

**Global Antitrust Institute,
George Mason University School of Law
A Conversation with former Federal Trade Commissioner Joshua
D. Wright and Korea Fair Trade Commission Vice-
Chairman Kim Hack-hyun
April 8, 2016**

1. Competitive Effects Analysis.

As an economist and antitrust scholar, I'm pleased with the KFTC's Comment to using an effects-based approach to determine liability under Korea's Monopoly Regulation and Fair Trade Act (MRFTA). What types of economic analysis does the KFTC use to determine competition effects? In particular, how is harm to competition determined, how are efficiencies determined, and how are they balanced? For example, how would the KFTC analyze an alleged refusal to license? How do you define foreclosure? Who bears the ultimate burden?

As you are well aware, competition law regulates agreements or M&As whose anti-competitive effect outweighs their efficiency enhancing effect and also conducts that unfairly forms, maintains and strengthens monopoly power.

Therefore, analyzing and comparing the anti-competitive effects and efficiency enhancing effects is very crucial in guaranteeing the justification of regulations, especially in cases of anti-competitive agreements or M&As.

It would be good if we were able to reach a quantitative conclusion through economic analysis tools that are unquestionable, but in reality there are many restricting factors such as disagreements on analysis tools and presumptions used, limitation on data, and restraints on the time and resources.

Facing these difficulties, The KFTC takes various methods to make sure that its law

enforcements do not make errors, the errors that consider things that are not illegal as illegal

<Comparison methods of anti-competitiveness and efficiencies>

First, we limit our enforcement as much as possible to types of agreements or conducts whose anti-competitive effects, mostly exclusionary effects, are well established by the previous cases.

Of course, this is not an effects-based approach, but I think that limiting our enforcement to the types, whose anti-competitive effects have been deemed to outweigh their efficiency enhancing effect by the cases of the countries such as the US and the EU, is an effective way to reduce regulation error.

Second, we are increasingly demanding stricter criteria for determining monopoly power and market power of enterprise.

Now, I think I need to briefly explain the characteristics of Korean Competition Law. Under Korean Competition Law, conducts such as exclusive dealing, tying and RPM are regulated only as unilateral conducts, unlike the U.S. and EU in which they are usually regulated as vertical agreements.

Moreover, we regulate those activities and unilateral conducts in a narrow sense such as refusal to deal or predatory pricing through two provisions: the one that prohibits the abuse of market dominance and the one that bans unfair business practices. Also, the Korean law allows the presumption of market dominance when one company has a market share of 50% or more, or when three companies has a combined market share of 75% or more.

So, in the past, when it comes to abuse cases, only 30 to 40% of market shares could be subject to our regulations and as for unfair business practices, 10 to 20 %.

However, we now think that such criteria of determining the market power or monopoly power are not in line with the global standard and have a danger of going too far. So, we amended the unfair business practices guidelines last year, raising market share thresholds to more than 20~30% depending on the degree of concentration of the market at issue. Accordingly, it can be thought that the market share thresholds for the prohibition on abuse of market dominance have increased to as much as 40 to 50%.

The third point is how to analyze anti-competitive effects. Theoretically anti-competitive effect means that the slope of the demand curve becomes steeper. However, measuring how much the demand curve has changed is not an easy task.

There are two things that the KFTC usually do. One is to see whether the conduct at issue has increased the market share through its exclusionary effects. The other is to analyze based on economic data whether the conduct at issue has increased the price.

<Regulation on unilateral conduct in the narrow sense, such as refusal to deal>

When it comes to unilateral conducts, such as refusal to deal or predatory pricing, which are regulated in the U.S. and the EU only as a monopolization or abuse of market dominance as those conducts do not involve an agreement, Korea's criteria for determining the illegality of such conducts is not much different from those of the U.S. and the EU.

The requirements of illegality of those conducts are (a) monopoly power and (b) an unfair foreclosure.

As for the former requirement, even though we have the provision that allows presumption of law, which I mentioned earlier, we now enforce our laws mainly to the market leader with a market share of more than 40 to 50%.

With regard to the latter requirement, the decision is made based on whether the conduct is competition on the merits or not. We also rely on the test developed in the U.S. such as ‘no economic sense test’ or ‘equally efficient competitor test’ on a case by case basis. This is a very controversial issue in Korea, too, and is the area where the KFTC loses the most at court.

As I mentioned earlier, our law allows us to regulate the conducts such as refusal to deal or predatory pricing not only as an abuse of market dominance case but also as an unfair business practice case.

However, regulating these conducts with regard to business entities that do not have monopoly power has weak economics grounds and may excessively restrict the freedom of contract. Therefore, the KFTC now refrains from regulating these conducts based upon the unfair business practice regulation as much as possible.

Furthermore, even in cases where the abuse of market dominance provision is applied, the KFTC is very prudent in enforcing its law, sufficiently considering the POSCO case ruled by the Korean Supreme Court in 2007.

POSCO was an exclusive producer of hot rolled steel sheets and also a producer of cold rolled steel sheets, which is made by hot rolled steel sheets. POSCO refused to supply hot rolled steel sheets to the company that was newly entering the market of cold rolled steel sheets. The KFTC regarded the conduct as an abuse of market dominance, but the Supreme Court ruled against the KFTC. This POSCO case is somewhat in line with the Verizon v. Trinko decision.

Lastly, as for the burden of proof, the KFTC has the burden of proving the market power or monopoly power, as well as anti-competitive effect and unfairness. The respondent bears the burden of proving the efficiency enhancing effect.

2. Procedural Fairness.

How is procedural fairness expressed at the KFTC? Is the KFTC process for disclosure aligned with the OECD's or ICN's recommendations?

Procedural fairness is critical in securing fair and correct decision and it also builds trust on the competition authority.

The KFTC has procedures that resemble judicial proceedings to secure procedural fairness. It operates a system such as evidence-based hearing and secures the right to rebut based on adversarial system.

Reflecting such quasi-judiciary characteristics, Korean Competition Law recognizes the KFTC's function as a first instance court, and the Seoul High Court has exclusive jurisdiction on the appeals regarding the KFTC's ruling.

In Korea, rules related to procedural fairness are stipulated in the Korean Competition Law, Case Procedure Rules, Investigation Procedure Rules, etc. I will briefly walk you through the KFTC's case handling procedures including information disclosure, step by step.

First of all, on the investigation stage, the public official in charge of on-site investigation submits in advance a written notice with the purpose, duration and location of the investigation, and, after the investigation, delivers to the investigated the list of materials collected during the on-site investigation or submitted.

Next, when the investigation suspects that there is a violation of law, the public official in charge should draft an examination report, hand in the case to the Commission and send the examination report to the respondent.

The examination report should include factual findings, judgment on illegality, applicable legal provisions, and the opinions of the examiner on countermeasures. All

the attachments to Examination Report should be sent as a matter of principle, to give a sufficient opportunity for the respondent to defend.

Also, the KFTC guarantees the interested parties the right to access or copy the relevant documents. Such access and copy may partially be limited when confidential business information and privacy need protection, when it is related to leniency, or when such a non-disclosure is ordered by laws.

The respondent may submit opinions regarding the examination report within a certain period of time. Basically, the respondent should submit opinions within three weeks from the receiving of the examination report. However, the period may be extended upon the respondent's request when the case is so complicated that it needs more time for additional review.

During the deliberation stage at the KFTC court attended by commissioners, the adversarial system is strictly guaranteed, and the respondent has the right to express opinions, counter-argue against the examiner's argument, present evidence, request for witnesses and cross-examine the examiner's witnesses.

Lastly, after the deliberation process, the final decision is made by commissioners, and the statement of resolution is sent to the respondents and is officially open to the public on the KFTC web site.

We are trying our best to enhance transparency and procedural fairness through open deliberation where not only interested parties but also third parties are allowed to watch and monitor the whole process. Also, the statement of resolution is made public.

In conclusion, KFTC's process of investigation, deliberation and information disclosure is totally aligned with the OECD's or ICN's recommendations.

3. Matters involving IPRs and the KFTC's IP Guidelines.

The KFTC's draft revised IP Guidelines introduce provisions on SEPs and NPEs. The provisions on SEPs provide, among other things, that conduct such as tying, bundling, seeking injunctions, refusals to license, discriminatory licensing, and "imposing an unreasonable" royalty are "likely" to violate the MRFTA. Am I correct to read the guidelines as including presumptions that certain conduct is likely to harm competition, or is this still an effects-based approach?

Korean competition law exempts intellectual property rights' just or proper exercise from the application of the law. The conducts illustrated in the IP guidelines are just the list of conducts that may face the application of Korean competition law as it is hard to regard them as a just or proper exercise of patent rights.

Therefore, the conduct concerned should meet the general requirements for illegality, such as anti-competitiveness or unfairness, to be established as illegal.

4. Excessive Pricing

What factors does the KFTC take into account when determining whether a particular price is “unreasonable”? For example, does the KFTC view charging for expired or invalid patents as charging “unreasonable” royalties? With respect to SEPs, will the KFTC consider additional factors, such as concerns about royalty stacking?

<Price abuse: Excessive pricing on royalties>

The provision that regulates unreasonable level of price (royalties) in the IP Guidelines is stipulated in line with the so-called “price abuse regulation” provision in Korean competition law.

This price abuse provision came from German competition law. But there are very few cases where we actually enforced this provision. As far as I remember, the last case that this provision was applied to was the case in 1992, the early stage of the competition law enforcement. It was a very rare case where the output was drastically reduced with prices unchanged.

I am very much aware of the fact that the price abuse regulation is not about regulating exclusive behaviors and it can lead to a price regulation. It can also undermine innovation as it was warned in the Trinko ruling.

I know there could be some disagreements with regard to the regulation, but please do understand that this provision has its grounds under the current law.

<Charging royalties on expired or invalid patents and royalty stacking>

Imposing royalties on expired or invalid patents also has no direct relevance to competition; therefore I think it cannot be subject to competition law enforcement as a matter of principle.

SEPs are no exception. However, as SEPs are an essential patent to implement the standard concerned and are FRAND encumbered, we should be cautious against the possibility of foreclosure.

For your information, there is a provision unique to Korea that regulates abuse of superior bargaining position. This is stipulated as one of the unfair business practices I mentioned earlier, and regarded to have relation not with competition but with fairness.

This provision reflects the problem that a business entity with a superior bargaining position may disrupt fair trade through a significantly unfair contract in a situation where a continuous transaction is inevitable for reasons such as the lock-in effect of specialized capital facilities or technologies.

For example, in the 2009 Qualcomm case, the KFTC held that charging royalties on expired patent is an abuse of superior bargaining position. This case is currently pending at the Supreme Court, and the illegality of the conduct will be determined when the ruling comes out.

I think that royalty stacking is more likely to harm consumer welfare, as the effect of excessive increase of production cost resulting from royalty stacking would outweigh the positive effect of freedom of charging royalties on innovation.

However, I also think that it is an easy problem to solve through competition law enforcement.

5. Extraterritoriality

What limits does the KFTC place on itself with respect to extraterritorial rulings?
What is the balance between the KFTC's desire to issue an effective ruling versus extending a ruling to raise extraterritorial implications?

Extraterritorial jurisdiction has many issues such as the problem of infringement of national sovereignty and the problem of securing a practical law enforcement authority.

However, in the area of competition law, governments mutually recognize each other's extraterritorial jurisdiction when its domestic market is affected and any harm is done on its domestic consumers or companies.

Just like most other countries, Korea also applies its competition law to the conduct that happens abroad but affects domestic market following the effect doctrine.

However, even in cases where extraterritorial jurisdiction is recognized, the KFTC takes as minimum measures as possible, according to the principle of proportionality and taking international comity into account, to an extent where the measures can properly and effectively resolve the anti-competitive effects in the domestic market.

6. NPEs and Extraterritoriality

My understanding is that there are not many NPEs or PAEs in Korea and that the draft revised IP Guidelines are intended to reach conduct by NPEs outside Korea against Korean companies. Is this accurate? If so, how will the KFTC reach such foreign conduct?

The KFTC is enforcing competition law without discriminating based on the nationality of the company concerned. Korean PAEs are subject to the KFTC's law enforcement as well as foreign PAEs in cases where their conduct has an impact on the Korean market.

Competition law enforcement against foreign PAEs will follow the principles of extraterritorial jurisdiction.

However, if the terms of a contract signed in and out of Korea between the Korean company and a foreign PAE is applied to the Korean company's subsidiaries located and doing business abroad, whether the KFTC has the jurisdiction over the subsidiaries or not could become a contentious issue.

7. De facto essential patents

In a prior version of its IP guidelines, the KFTC applied the same principles to de facto essential SEPs as to standard-setting organization SEPs. Why were those provisions deleted?

As for SEPs, they are patents to which the monopoly power was artificially granted on the condition of FRAND commitment in the standard setting process. Therefore, the competition authority may have a room for raising issues regarding the FRAND commitment.

However, as for de facto SEPs, they became essential patents as a result of market competition. Therefore, it is inappropriate to treat de facto SEPs the same as SEPs, and regulating de facto SEP the same as SEP can undermine innovation.

Taking these into account, we have amended our IP guidelines, and the amendment has been finalized at the end of last March.