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# Korea: Overview

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## Antitrust Policy of the Administration in Economic Downturn

As the global economic crisis worsened throughout 2008, stimulus became the over-riding agenda of President Lee Myung-Bak's new government. In the same context, the Korea Fair Trade Commission (KFTC), Korea's antitrust enforcement agency, attempted to minimise the fallout from the economic slowdown through corporate deregulation and consumer protection. The KFTC's annual report to the president outlined its policy goals for 2009 as follows.

- Prevention of unfair trade practices to protect small and medium-sized enterprises (SMEs) and to protect consumers' rights and interests:
  - the KFTC will monitor unfair subcontracting practices, such as unfair reduction in the supply price, theft or unlawful acquisition of technology and payment in kind, and impose stricter sanctions on repeat violators;
  - the KFTC will focus its efforts on investigating and remedying unfair trade practices by monopolistic or oligopolistic public enterprises; and
  - the KFTC will continue to examine large discrepancies between the domestic and overseas prices of key products.
- Monitoring and prevention of unfair trade practices targeting ordinary consumers:
  - the KFTC is concerned about unfair trade practices that have a direct bearing on the daily lives of ordinary consumers. In this light, the KFTC plans to designate medical devices, mobile communication, private education, petroleum products and certain other industries that are likely to affect the public as 'industries subject to closer monitoring,' and investigate price-fixing, tying, unfair labelling and advertisements in these industries. The KFTC will also keep watch on industries where harm to ordinary consumers is expected to increase, such as illegal multi-level marketing, electronic commerce, funeral arrangement services and private loan business.
- Flexible approach to collaboration in response to downturn:
  - the KFTC will review the anti-competitiveness of business combinations in light of the broader competitive environment and global market dynamics. If the KFTC finds it is unavoidable for companies to jointly decrease production or jointly downsize their production facilities in order to cope with the economic crisis, the KFTC will adopt a reasonable and flexible approach to reduce the companies' burden, including temporarily permitting such collaborative action.
- Stronger enforcement against international cartels and abuse of intellectual property rights:
  - recognising that economic recession often breeds more international cartels, the KFTC plans to boost the size and expertise of its cartel enforcement staff and to strengthen the network of cooperation with competition authorities of other countries;
  - the KFTC will enforce antitrust law more strictly against abuse of intellectual property rights by multinational corporations, especially in the IT and pharmaceutical sectors.

## Korean competition law

The Monopoly Regulation and Fair Trade Law (MRFTL), enacted in 1980, is the primary source of competition law in the Republic of Korea. At the time of its adoption, the MRFTL marked a considerable step forward from a rigid government-controlled economy, focusing on the stabilisation of prices, towards a market economy based on private initiative and competition. Taking account of the extensive concentration in most Korean industries, competition policy was essentially a tool used by the government to implement policies relating to the big conglomerates known as *chaebol*. Since then the scope of enforcement has broadened and the law has been revised to conform generally to global standard practices.

The KFTC is a ministerial-level central administrative organisation with four main mandates: promote competition, strengthen consumers' rights, create a competitive environment for SMEs and restrain concentration of economic power.

To protect competition and detect anti-competitive behaviour, the KFTC has comprehensive investigative powers, including summoning respondents and witnesses and inspection and seizure of relevant evidence. To obtain evidence, the KFTC often proceeds with dawn raids; technically, the KFTC has no right to enter the premises when refused entrance by the party under investigation, but the adverse consequences, formal and informal, of non-cooperation lead most parties to admit the investigative team when it comes.

The KFTC has been an enthusiastic participant in the OECD and International Competition Network, and has not hesitated to use its investigative powers on international issues touching the Korean market. To enhance cooperation with other jurisdictions, particularly the United States, Japan and the European Union, and to foster extraterritorial application of Korean competition law, in 2008 the KFTC created a new department whose only task is to investigate and prosecute international antitrust violations.

## Mergers & acquisitions

Business combinations that meet certain thresholds are subject to merger notification requirements. The types of combinations that may require a merger notification include:

- the acquisition or lease of all or an important portion of the business of another company;
- the acquisition of all or an important portion of fixed assets for business;
- the acquisition of 20 per cent (15 per cent if a listed company) or more of the voting shares of an existing company;
- the acquisition of 20 per cent or more of the voting shares in a newly incorporated company, other than a wholly owned subsidiary;
- the additional acquisition of shares resulting in the acquirer's becoming the largest shareholder of another company; and
- the interlocking directorate with a 'large-scale company' (a company with total assets or revenues on a consolidated basis exceeding 5 trillion Korean won<sup>1</sup>).

Turnover thresholds also apply: the above combinations require filing only when:

- the total amount of assets or sales of either one of the parties is 200 billion won or more; and
- that of the other party is 20 billion won or more. For overseas mergers (foreign-to-foreign transactions), the threshold regarding total sales of the acquirer and the acquired on the Korean market (as determined by total affiliated companies' sales in Korea, not limited to the company at issue) is 20 billion won or more for each of the parties.

Generally a post-closing notification is required to be made within 30 days after the closing of the transaction. However, if the transaction involves a share acquisition, business transfer, merger or establishment of a joint venture company that constitutes a large-scale company (as defined above), a merger notification report must be filed before the execution of the business combination (within 30 days after the signing of the share acquisition agreement, business transfer agreement, merger agreement, or board of directors meeting that approves the establishment of a joint venture). If the parties close the transaction without the KFTC's clearance, the KFTC may impose an administrative fine of up to 100 million won and/or imprisonment up to two years or criminal fines up to 150 million won.

The statutory review period for a pre-closing business combination report is 30 days from the filing, but the KFTC has the discretion to extend the period for an additional 90 days. If the KFTC makes a request for additional information or material, the review period is tolled until the requested information or material is submitted to the KFTC. The MRFTL does not specify a review period for post-closing filings.

In order to decrease the administrative burden for companies involved in business combinations not likely to cause any anticompetitive impact, the KFTC has introduced a simplified review procedure. If a business combination falls into a 'safe harbour', among others, based on its Herfindahl-Hirschmann Index value, the KFTC is required to notify the applicant of the outcome of its review within 15 days after the filing.

After completing the review of a business combination report, the KFTC issues its decision, which can be either a clearance decision or divestiture order, or can contain measures such as a corrective order. Failure to comply with the remedies may result in fines calculated based on the length of the default period and the size of the business combination in violation. Once the KFTC issues its decision, only the filer of the report (not any other affected party) may appeal to the KFTC or the court, or both.

In recent cases involving mergers in the domestic distribution industry, there has been a notable trend toward flexibility. In a landmark case on 3 September 2008, the Seoul High Court vacated an order of the KFTC requiring Shinsegae, a large discount store chain, to sell a number of Wal-Mart Korea stores that it acquired in 2006. As the first court decision on mergers among distribution businesses, the decision is expected to have a seismic effect on related business combination cases in the future. Then on 17 September, the KFTC approved the combination of Samsung Tesco and E-Land Retail, and again a week later endorsed eBay's acquisition of GMarket, Korea's largest open-market operator. These decisions in favour of business combinations mark a notable shift in the KFTC's policy, which had been considered as formalistic and legalistic in the past. Shifting from its earlier practice relying heavily on the total market share of combined businesses, now the KFTC seems willing to give greater consideration to entry barriers and market dynamics when evaluating business combinations.

Continuing this trend, the KFTC reached another notable decision on 28 January 2009, when it found that the acquisition of Korea Information Service by National Information and Credit Evaluation did not raise anti-competitive concerns and approved the acquisition despite a finding of high combined market shares in a number of relevant markets. According to the KFTC, even if a transaction will result in a significant increase in the market share of one party, it may be approved when appropriate conditions exist (eg, presence of another strong competitor in the market, autonomy of consumers, ease of entry, etc).

### Cartels & leniency

With intensifying international cooperation, the KFTC has become an active partner in the fight against global cartels, leading to increasing imposition of fines and several thorough industry investigations. In recent years the KFTC has been aggressively enforcing the Korean competition law on an extraterritorial basis, with well-known actions against worldwide cartels involving air cargo, carbon paper, CRT, marine hose and cable.

As noted above, the KFTC is stepping up its cooperation with other jurisdictions, notably the United States, Japan and the European Union (the KFTC recently raided cable manufacturers simultaneously with the competition authorities in those jurisdictions). The KFTC expects that the global economic crisis will lead to proliferation of international cartels and is reinforcing its personnel and resources accordingly. It is expected that transactions involving foreign companies will receive closer scrutiny in the near future.

The MRFTL prohibits entities from engaging in certain concerted acts and collaborative behaviours that substantially restrain competition in a particular field of trade. The law further specifies that entities may not agree by contract or any other means to jointly engage in any acts that substantially restrain competition in a relevant area of trade, such as price-fixing, territorial or customer allocation, or restriction of other companies' business activities.

If as result of its investigation the KFTC concludes that a company has or is engaged in collaborative behaviour in violation of the MRFTL, it may:

- issue a cease-and-desist order;
- order the company to issue a public announcement of the finding of violation;
- impose an administrative surcharge up to 10 per cent of the company's revenue during the relevant period; or
- in case of grave infringement, file a criminal complaint with the Prosecutor's Office.

Korea was one of the first countries in Asia to establish a leniency programme. The programme provides for full leniency for the first applicant (immunity) and partial exemption for the second applicant (reduction of fine). There is also another kind of 'amnesty-plus' leniency whereby an entity that is being investigated for one type of violation of the MRFTL provides the KFTC with valuable information on another type of violation.

As with other MRFTL infringements, the KFTC exercises extraterritorial jurisdiction on the basis that cartel activity outside Korea (with no ties to Korea other than sales in the Korean market) may adversely impact competition in Korea. In this regard, the international cartels that were targeted by the KFTC in the past specifically included the domestic market in the scope of their cartels and their agreement was implemented in the domestic market.

### Vertical restraints

Although the concept of vertical restraints itself is not separately defined, the MRFTL and specific KFTC Guidelines do mention several categories of vertical restraints, eg, exclusive dealing, customer or territorial restraint, refusal to deal, discrimination, tying or transaction with condition, abuse of superior bargaining position, interference with management, and resale price maintenance.

Korean antitrust law is unique in regulating a type of vertical restraint known as 'abuse of superior bargaining position', stemming from the Korean business context of traditional conglomerates dealing in an arbitrary manner with smaller business partners (most often SMEs). The scope of this type of vertical restraint is very comprehensive in that if a company deemed to have a superior bargaining position forces its transaction counterparty to accept any 'unfair' condition, it may be deemed illegal. No finding of market power or dominance is required to establish an abuse of superior position.

The KFTC's approach in assessing vertical restraints varies with the type of vertical restraint under investigation. Safe harbour exceptions for companies with market shares not exceeding 10 per cent are applied to refusal to deal, discriminative transaction terms (excluding price discrimination), exclusive dealing and territorial or customer restraint. Minimum resale price maintenance is deemed illegal per se, but other types of vertical restraint will generally be assessed under the rule of reason.

As with cartels, if a vertical restraint has an impact on the Korean market, even though the restraint is imposed by a foreign company with no branch or business presence in Korea, the Korean antitrust regulations may apply on an extraterritorial basis if the company has sales or other connections in Korea.

### Abuse of dominant market position

The MRFTL prohibits abuse of a dominant market position. A company is presumed to be market-dominant when it has a market share of 50 per cent or more in the relevant market, or when it is one of the top three companies with a combined market share of 75 per cent

or more. Companies with annual turnover of less than 1 billion won or a market share of less than 10 per cent are conclusively presumed not to be market-dominant.

Six types of behaviours are specified as abuses of market dominance: price abuse, output control, obstruction of competitors' business activities, blocking market entry, exclusion of competitors and damaging consumer interest.

Once the KFTC decides that an abuse of market dominance has occurred, it may impose an administrative surcharge of up to 3 per cent of the annual sales turnover or, in a rather rare case, if it is difficult to compute turnover, up to 1 billion won. The KFTC may also issue a corrective order against the dominating firm to reduce prices, to discontinue the infringement, to announce the fact of the corrective order to the public, and to take other measures necessary to correct the abuse.

### Unfair subcontracting

One of the KFTC's ongoing objectives is to establish a fair subcontracting order and crack down on unfair transaction practices. The Fair Subcontract Transactions Act (FCTA) protects small subcontractors against larger contractors with bargaining leverage. The typical targets of enforcement of the FCTA are undue price reduction, unreasonable return, retaliation by refusing to deal with a reporting subcontractor, failure to provide a prior written agreement, and forced purchase of goods. Violators may be subject to corrective measures (eg, cease-and-desist order or order to pay the subcontract price), a surcharge of up to double the subcontract price, and in severe cases a criminal fine of the same magnitude.

In 2008, the KFTC imposed a record surcharge for violation of subcontracting regulations on a domestic electronics company in the amount of 11.6 billion won, as well as personal fines on the executive officers of the violating company for interference with the KFTC's investigation. It is expected that strict enforcement of the regulations will continue in the future, especially in relation to unilateral reduction of subcontracting prices by large-sized companies. -

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**Criminal penalties**

In Korea, the KFTC is empowered to pursue criminal sanctions for violations of the MRFTL. If the KFTC determines that any given violation warrants criminal sanction, it will file a criminal complaint with the Prosecutors' Office to seek an indictment. Since criminal proceedings for a violation of the MRFTL can be commenced only if the KFTC files the complaint, there is no private right of action on the criminal side. Recently, in a criminal action brought against price-fixing practices, the court held that under the MRFTL prosecutors may indict only those against whom the KFTC has filed a criminal complaint. This decision, which was appealed by the Prosecutors' Office, clarified the roles of the Prosecutors' Office and the KFTC in criminal cases and affirmed the authority and expertise of the KFTC in antitrust matters.

The maximum possible criminal penalty which may be imposed on an offending company is 200 million won. The responsible officer may also be sentenced to up to three years in imprisonment and/or a criminal fine of up to 200 million won.

**Notes**

- 1 This and certain other reporting thresholds were raised in 2008 in line with President Lee's more business-friendly approach to competition law. At the time of writing, 1,000 Korean won = approximately US\$0.67 or €0.52.