

Co-published feature

Enforcement gets stronger

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In 2012, the Korea Fair Trade Commission (KFTC) continued to play a critical role in enforcing the nation's antitrust laws and shaping the antitrust policy as part of a broader national economic policy. Unlike the US Justice Department, the KFTC does not have the power to prosecute criminal cartel cases and obtain large criminal fines. Yet in 2012, the KFTC reportedly managed to impose administrative fines well in excess of KRW1 trillion (close to \$1 billion), which certainly compares well even against the US Justice Department's record-breaking \$1.13 billion in criminal fines in 2012.

Regulating conglomerates

In Korea, one of the most important and unique features of its antitrust and consumer protection regime is the special regulation of large conglomerates whose total assets exceed KRW5 trillion. Despite their contributions to Korea's phenomenal economic growth, large conglomerates have also raised antitrust issues, especially with respect to their vertical relationships with small and medium sized businesses. In particular, their allegedly less-than-arms' length dealings with affiliates and discriminatory practices against non-affiliates have become not just an antitrust issue but also an acute social and political hot potato.

In 2012, true to its Annual Plan for 2012, the KFTC made a big effort to monitor and regulate the activities of large conglomerate groups. The most oft-cited abuse has been the practice of unfair affiliate subsidisation or unfair inter-affiliate trading. The KFTC vigorously regulated this practice in several ways. It included efforts to amend the guidelines for unfair subsidisation by interpreting the so-called "remarkability" requirement to mean not just a remarkable degree of a favourable unit price difference but also a remarkable size of the total contract or business given to an affiliate, thereby making it easier for the KFTC to satisfy the requirement. It also recommended that a conglomerate group adopt a transparent decision making process by establishing an independent "affiliate transaction review committee," at least two thirds of whose membership must be outside directors.

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The KFTC aggressively disciplined unfair internal trading practices. For example, in the *SKC&C* case, seven SK affiliates have entered into long-term, private IT outsourcing contracts with SKC&C regarding IT management. After finding that the terms and conditions of these contracts were extremely favourable to SKC&C, the KFTC determined that those contracts had been executed to guarantee SKC&C's profits and this unfair internal trading practice harmed competition.

Similarly, in the *Lotte PSNET* case, the KFTC imposed a corrective order and administrative fine on the Lotte PSNET for placing an affiliate in the middle of a transaction between an ATM manufacturer and Lotte PSNET so that the affiliate placed in the middle of the transaction could generate an easy profit although it did not have any relevant business experience nor added any real value to the transaction. The KFTC found no mitigating factors for this unfairness.

Merger Control

Lotte/Hi-mart Merger

Lotte Shopping (first and third largest company, in terms of market share, in the department store and major supermarket sector, respectively) acquired Hi-mart (number one retailer of consumer electronics and home appliances in Korea). Market definition and competitive effect were the main issues. Considering the characteristics of each distribution channel and results of an economic analysis based on a consumer questionnaire survey, the KFTC determined the home appliance distribution market as the relevant product market, which included large retail home appliance stores, direct branch retail stores of appliance manufacturers, speciality home appliance shopping mall, and home appliance sections in major supermarkets. The KFTC defined the geographical market as the area within a five mile radius of each store based on the present state of businesses and customers, status of competition, and result of a consumer questionnaire survey. Upon reviewing 38 separate geographic markets, the KFTC concluded that the proposed merger was not anticompetitive.

Amendment to the Guidelines

The KFTC amended the Guidelines for Notification on Combination of Enterprises and simplified merger notification forms to ease the burden on merging parties. It also clarified certain ambiguities regarding the merger control rules. For instance, it clarified that: only the final acquirer of stocks needs to notify upon continual acquisition of shares; when multiple combinations of enterprises arise from one contract, only the major part of the combination is subject to merger notification; and when computing domestic sales of a foreign company, the sales between the affiliates are excluded to prevent double counting.

Cooperation with China

As the number of foreign-to-foreign mergers that should be notified to both the KFTC and other foreign jurisdictions has increased, in May 2012 the KFTC executed MOUs with China's Ministry

The MOUs also recognise the need for a cooperative framework for international investigations

of Commerce (MOFCOM), National Development and Reform Commission (NDRC) and State Administration for Industry and Commerce (SAIC). These MOUs are a recognition that as the economic exchange between Korea and China has increased the regulatory uncertainty faced by companies in both countries has also increased. The MOUs also recognise that the need for a cooperative framework for international investigations based on mutual assistance has increased. Specifically regarding merger control, the MOUs envision strengthening mutual assistance between the KFTC and MOFCOM by means of certain information exchange regarding proposed mergers and consultation on consistent corrective measures.

Cartel enforcement

The KFTC's cartel enforcement in 2012 also focused on the industries closely related to public welfare, including consumer electronics and home appliances such as washing machines, flat screen TVs, and laptop PCs; instant noodles (price-fixing among four Korean ramen companies); and airlines (collusive agreement between Korean Airlines and Mongolian Airlines to exert undue influence on the Mongolian government to prevent competitors from flying the Incheon–Ulan Bator route). Especially, the KFTC's sanction against securities companies that fixed earnings rate regarding bonds denominated in small amounts (issued by state or local governments that are necessary for house or vehicle purchases) potentially represents a sea change. Previously, the KFTC's probe of the financial industry was largely limited to collusion involving insurance products or bank charges. Now, it is gradually but surely broadening its antitrust probe into more complex and specialised financial product markets.

Other vertical restriction enforcement

In 2012, there were two notable resale price maintenance (RPM) cases involving foreign manufacturers. First, the KFTC found that Goldwin Korea, an importer and seller of North Face outdoor wears, illegally enforced a written resale price maintenance policy against retail stores by reducing supply to offending stores and even terminating them. Moreover, the KFTC found that Goldwin Korea's prohibition against resellers' online discounting also constituted a separate violation as an unfair restrictive trade practice.

Similarly, Philips Korea, a subsidiary of Royal Philips Electronics, set the minimum price of small appliances sold on internet open markets (where sellers register their products on the site and consumers choose what they like) in advance and prohibited retailers

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from selling the products below the minimum price by employing the same or similar coercive measures found in the Goldwin Korea case.

Furthermore, the KFTC undertook various initiatives to establish a level playing field in the distribution and franchise industries. For example, the KFTC established model fair trading standards for

various business categories such as bakeries, pizza parlours, coffee shops, and convenience stores, thereby clarifying its objectives of protecting franchisees from franchisors' unfair trade practices and also fostering franchise start-ups that were growing during the economic recession.

Supreme Court rules on cartels

On April 26 2012, the Supreme Court decided two related cases that clarified the proper analytical mode and sequence for concerted conduct. The Court ruled that the rule of reason applies to all concerted conduct cases in Korea, including even those commonly recognised as per se illegal horizontal price fixing cases in the US. In *Kolon Glotech et al v KFTC* (Supreme Court judgment no 2010Du18703 delivered on April 26 2012) (the *BMW* decision), the Court clarified that in determining the legality of concerted conduct, first and foremost, a relevant antitrust market must be defined based on a correct set of relevant factors before competitive effects can be ascertained. In *D & T Motors et al v KFTC* (Supreme Court judgment no 2010Du11757 delivered on April 26 2012) (the *Lexus* decision), the Court reconfirmed that concerted conduct offenses are not per se illegal but rule of reason offences and that the KFTC has the burden of proof in establishing a properly defined relevant antitrust market and anticompetitive effects within the properly defined market. At least partially in response to this opinion, in August 2012, in the course of its regularly scheduled updating of its internal Concerted Conduct Analysis Guidelines, the KFTC deleted references to the so-called "hardcore v softcore concerted conduct" distinction found in the 2007 version of the Guidelines.

No Passing-On Defence

On November 29 2012, the Supreme Court ruled on the so-called "passing-on defence." In *Samlip v Cheil Jedang et al* (Supreme Court judgment no 2010Da93790 delivered on November 29 2012), a bread manufacturer and direct purchaser of an input material brought a private damages action against the price-fixing flour manufacturers. The Court rejected the flour manufacturers' passing-on defence, i.e., the direct purchaser plaintiff passed on the alleged price-fixing overcharge to its own customers and thus did not suffer harm. The Court held that, because a direct purchaser considers various factors in raising the price of its own downstream product, a significant causal connection could not be presumed between the price increase of the input material (flour) by the upstream price-fixing agreement and the price increase of the downstream finished product (bread). Thus, the Court held that, without special circumstances such as a pre-existing agreement under which a price increase of the input material automatically or directly results in a corresponding price increase of the downstream product, the direct purchaser may recover damages even if it passed on all or part of the input material price increase to its own downstream customers. The Court further noted that the direct purchaser's increased downstream product price could make the downstream product less popular and lead to lower sales.

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Increasing reach

Consistent with the incoming administration's presidential campaign promises on "economic democratisation" and "shared growth between conglomerates and small/medium businesses," the KFTC's enforcement priority is likely to continue to be deterring conglomerates' abuse of their size and superior trading position, and providing as level a playing field as possible for small/medium-sized businesses to compete.

Aside from the conglomerate or *chaebol* regulation, there are several legislative initiatives and proposals to strengthen the reach and scope of the antitrust laws in Korea. First, there has been a steady and increasing call for weakening the KFTC's exclusive power to refer matters to the Prosecutors' Office for criminal prosecution based on

the perception that the KFTC has used its power too sparingly. It is not clear whether other government agencies will be vested with the direct or indirect criminal referral power or whether the KFTC's discretionary power will be curtailed, or even both.

Second, a class action system may be adopted to allow a few representative plaintiffs with small individual claims to pool their claims and bring private actions for the entire class. There is no indication as to whether the proponents of the proposal mean a full US-style class action system that has many complex procedural rules or whether they mean something else.

Third, punitive damages (whether it be treble damages or some other variations) may be adopted for certain types of antitrust violations, especially in the subcontracting law area that tends to affect small and medium-sized businesses more acutely. Fourth, there has been a discussion to adopt an injunctive relief system under which a private party may ask the court for an injunction to order an anti-trust violator to cease certain practices. These are certainly important initiatives that, if adopted, could fundamentally change the private antitrust enforcement landscape in Korea. It remains to be seen which of the proposals will become new laws, and if so, in what form or shape.