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Juridical Nature and Achievements of Korean Economic Law

SUMMARY: I. Introduction II.Development and Characteristics of Korean Economic Law III.The Monopoly Regulation and Fair Trade Act IV. Regulatory Agency and Enforcement Procedures V. Conclusion VI. References

I. INTRODUCTION

Economic law can be generally defined as a series of laws and regulations to implement economic policies of a country. The emergence of economic law worldwide began with industrialization and its negative effects. The economic growth in various countries was largely driven by manufacturing-oriented industrial production. With this growth, enterprises could achieve economies of scale by increasing productivity with lower costs. In doing so, firms possessing market power such as monopolies and oligopolies were created, and these firms prevented free trade, caused a market distortion, and limited competition in the market.

To counter this, the government of many countries started to intervene in the national economy by establishing economic law to regulate and prevent these anti-competitive practices by dominant firms, thereby promoting fair trade, overcoming the contradictions and conflicts that have occurred in the free market economy, and benefiting a national economy as a whole in the end.

With this same background as other countries, Korean economic law was enacted to cure these market failures, based on the economic order promoted by the Korean Constitution.[2] Korean economic law also has dealt directly and

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2 Article 119 of Korean Constitution: (1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs. (2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of

indirectly with the relationship between the market and the government according to the process of economic development and has covered a wide range of business, regulatory and consumer issues which are unique to Korea.

Current Korean economic law can be categorized into three segments. The first segment consists of the competition laws to regulate the abuses of economic power by dominant firms, to protect fair competition, and to suppress the concentration of economic power. The second group would be the consumer-related laws to protect economically vulnerable market participants like consumers or small and medium-sized enterprises. The third segment includes the individual laws regulating the related industries to revise the problems occurring in market failures.[3] The competition law in the first segment is embodied in the Monopoly Regulation and Fair Trade Act and the scope of the Act covers a variety of topics, such as cartels, mergers, the restraint of economic power concentration, etc. The consumer-related laws of the second part include the Framework Act on Consumers, the Act on the Consumer Protection in Electronic Commerce, etc., the Fair Transactions in Subcontracting Act, the Framework Act on Small and Medium Enterprises, etc. The third part deals with laws regulated by the related industry sectors. For example, there are the Banking Act, the Financial Investment Services and Capital Markets Act, etc. in the financial sector, or the Broadcasting Act, the Telecommunications Business Act, etc. in the broadcasting communications sector.

This paper will cover only the first part, the Monopoly Regulation and Fair Trade Act (hereinafter, "MRFTA" or "the Act"), and before proceeding to the discussion about the Act in Chapter III, the development and characteristics of Korean economic law will be briefly reviewed in Chapter II. The Act and the decisions by the Supreme Court of Korea cited in this paper can be found at the website of Korea Legislation Research Institute[4] and Supreme Court Library of Korea.[5]

II. DEVELOPMENT AND CHARACTERISTICS OF KOREAN ECONOMIC LAW

Proceeding through the liberation in 1945 from Japanese Colonization and the Korean War in 1950-1953, Korea did not have any established systemic legal infrastructure. The new government in 1960 which was established

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the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

3 Youngsu Shin, *Economic Law: Focusing on the Monopoly Regulation and Fair Trade Act*, INTRODUCTION TO KOREAN LAW-Korean Legislation Research Institute, Springer (2013), at 216.

4 https://elaw.klri.re.kr/eng_service/main.do

5 https://library.scourt.go.kr/base/eng/main.jsp

by the military coup d'etat prioritized the achievement of economic growth which was necessarily followed by the government's active role in market economies. For this reason, Korea achieved drastic industrialization and economic growth in 1960s and 1970s. In the process of this industrial development, however, the government provided integrated investments and support in a few certain companies, which led to the formation of conglomerates, commonly known as *Chaebol*[6] This type of highly capitalized company can rarely be seen in other OECD countries. This government-driven economic growth led to the result that *Chaebol* was embedded in the Korean economy since the 1960s and subsequently, unfair competition practices by firms with dominant market power were rampant. Thus, the economic laws in Korea have been developed with a focus on *Chaebol* reform.

The competition policy issues in Korea started to surface when the Korean oil crisis occurred in 1974. The market mechanism was severely distorted and imported raw material prices increased drastically, causing high inflation and an imbalance of supply and demand.[7] During the period, the necessity of enacting the anti-competition laws was largely supported by academia, government agencies and customers, but the industries led by large group enterprise like *Chaebols* strongly opposed this. In the end, the government legislated the Act Concerning Price Stabilization and Fair Trade in 1975 to control prices by targeting numerous monopolistic and oligopolistic products, and enforced price regulation until 1979.[8] This Act, however, only focused on short-term price stabilization, which was limited to price regulation against a monopoly, and left behind the causes of monopoly, such as the business combinations or the concentration of ownership. Eventually, the Monopoly Regulation and Fair Trade Act(the MRFTA) was enacted in 1980, and the government's efforts to strengthen the market forces, prohibit abuse of market power by dominant firms and suppress the concentration of economic power came to fruition in the end. This is the first competition law of Korea regulating extensively anti-competitive practices. Since then, numerous amendments have been made even as recently as 2020.

In order to better understand Korean competition policies, consideration should also be given to the Korean Fair Trade Commission (KFTC), which has broader powers than other competition authorities across the world.[9] The KFTC is a ministerial-level administrative organization under

6 Chaebol is not a legal term, but a vernacular one. It is formed from Korean words CHAE, meaning "wealth," and BOL, meaning "faction."

7 Kyu Uck Lee, *Economic Development and Competition Policy in Korea,* 1 Wash. U. Global Stud. L. Rev. 67 (2002), at 67.

8 *Id.*, at 68.

9 Whie-kap Cho, *Korea's Economic Crisis: The Role of Competition Policy,* International Business Lawyer (December 1999), at 496.

the authority of the Prime Minister and enforces the Monopoly Regulation and Fair Trade Act and other competition-related laws and regulations. The KFTC's chairperson has played a vital role in establishing and reforming the nation's competition policies by attending and speaking at Cabinet meetings. The KFTC has authorization to render cease and desist orders or other corrective measures, to impose penalty surcharges or other monetary sanctions and to file civil lawsuits for damages. In this regard, the KFTC is categorized as a quasi-judicial body. Especially for criminal sanctions, the KFTC has a right to file a complaint at its discretion with the Prosecutor General.[10]

The KFTC has an exclusive right to accuse, meaning that the Prosecutor General shall indict the offender only when the KFTC files a complaint. This is because, in order to prosecute serious offenses such as the abuse of a market-dominant position, etc., economic analysis by experts is required.[11] Accordingly, the prosecution could not proceed unless the KFTC filed the charges even if it had alleged the violations of the MRFTA. However, the KFTC's exclusive right to accuse was partly amended in 2013 in which even if the KFTC concludes that a case does not fall under the requirement for filing a complaint, the Chairperson of the Board of Audit and Inspection, the Administrator of the Supply Administration, or the Administrator of Small and Medium Business Administration may request the KFTC to file a complaint for other reason, such as the ripple effect on the society, influence on the national finance, and the degree of the damage caused to small and medium enterprises. And upon receiving such request, the chairperson of the KFTC is obliged to file the complaint with the Prosecutor General.

Lastly, Korean competition laws have more provisions as to criminal penalties compared to other countries. Many countries, such as Germany, Spain, New Zealand, and others, have no criminal penalties for violating competition laws. The UK, Canada, and Australia regulate only cartels, but there are rarely punished. The U.S. only enforces criminal penalties for hardcore cartels. On the other hand, Korea has extensive criminal penalties, not only for the violations of the MRFTA, but also for violations of laws derived from the MRFTA, such as the Subcontract Act, the Fair Transactions in Franchise Business Act, the Fair Agency Transaction Act, etc. Apart from these penalties, fines are also imposed.[12]

The MRFTA regulating extensively anti-competitive practices of Korea

10 That is why the KFTC is frequently called 'the economic prosecutor' in Korea.

11 Jun-seon Choi, *KFTC's Waiver of its Exclusive Right was too Hasty,* Korea Economic Daily, September 6, 2018, available at https://www.hankyung.com/opinion/article/2018090401971 (accessed on May 25, 2020).

12 *Id.*

will be reviewed in depth in the next chapter by focusing on regulations which are important parts in Korean current competition policies.

III. THE MONOPOLY REGULATION AND FAIR TRADE ACT

The purpose of the Monopoly Regulation and Fair Trade Act (the Act) is to enhance fair and free competition, thereby encouraging creative enterprising activities and protecting consumers. For this purpose, the Act prevents the abusive acts by firms with market-dominant positions and the concentration of economic power and regulates improper concerted actions and unfair business practices (Article 1). The Act comprises 14 Chapters and Addenda. General provisions and substantive provisions are set forth until chapter 7 and an enforcement agency, investigation procedures, the imposition of penalty surcharges, etc. are stipulated in the remaining Chapters.

The substantive provisions can be divided into, for better understanding, the improvement of market structure and the improvement of transactional practice. [13] The improvement of market structure includes the restriction on combination of enterprises and the restraint of the concentration of economic power. These are laid down in subchapter 2 and 3, respectively. The improvement of transactional practice includes the prohibition of abuse of market-dominant position, the restrictions on cartels, the prohibition of unfair trade practice, the regulation of enterprisers' organization and the restrictions on resale price maintenance. These are elaborated in subchapter 1, 4, 5, 6 and 7, respectively.

1 PROHIBITION OF ABUSE OF MARKET-DOMINANT POSITION

1.1 MARKET-DOMINANT POSITION

There are two methods to regulate enterprisers in monopolistic or oligopolistic positions. One is to prohibit monopoly or oligopoly status itself and the other is to allow monopoly or oligopoly status, but to control only the abusive behaviors by using those status. The U.S. and Japan take the former method, and Korea and the EU take the latter one.[14]

A market-dominant enterpriser is defined as being one with market power. Having market power means that someone is in a position to hinder effective competition in the market by freely influencing the price or supply of goods or services, or other trading conditions. Because of this risk, it is necessary to regulate market-dominant enterprisers.

The Act defines a market-dominant enterpriser as a business entity in a position to determine, maintain, or change the prices, quantity or quality of commodities or services, or other terms and conditions of business as a supplier

13 Ki-Su Lee and Jin-Hee Ryu, ECONOMIC LAW (9nd Edition), Saechang (2012), at 22

14 *Id*, at 52.

or customer in a particular business area, individually or jointly with other enterprisers (subparagraph 7 of Article 2). A market-dominant position is presumed to exist where market share of one enterpriser is 50% or more; or the aggregate of market shares of not more than three enterprisers is 75% or more: Provided, the enterpriser whose market share is less than 10% is excluded. The enterpriser whose annual amount of sales or purchase in a particular business area is less than 4 billion KRW is excluded from this presumption (Article 4).

In addition to the criteria based on market share, a market-dominant enterpriser can be also determined by comprehensively taking into consideration its market share, whether and to what extent a barrier to its entry into the market exists, the relative scale of competitors, the possibility of collaborations among competitors, the presence of similar products and adjacent market, etc.[15]

1.2 TYPES OF ABUSIVE PRACTICES

The Act prescribes six types of abusive practices that no market-dominant enterprisers shall commit. It includes (1) determining, maintaining, or changing unreasonably the price of commodities or services; (2) unreasonably controlling with the sale of commodities or provision of services; (3) unreasonably interfering with the business activities of other enterprisers; (4) unreasonably impeding the participation of new competitors; (5) unfairly excluding competitive enterprisers; or (6) doing considerable harm to the interests of consumers.[16] The detailed types or standards for abusive practices may be determined by Presidential Decree.[17]

The above abusive practices can be reorganized as exploitative abuse and exclusionary abuse. Exploitative abuse refers to the act by which a market-dominant enterpriser utilizes its market dominant position to impede the interests of consumers who are direct counterparties. Exclusionary abuse refers to the act by which a market-dominant enterprise utilizes its market-dominated position to exclude or possibly exclude his competitors from related markets. The number (1), (2) and (6) in the above fall into the exploitative abuse, and the number (3), (4) and (5) in the above belong to the exclusionary abuse. Korea prohibits both exploitative abuse and exclusionary abuse, as does the EU, but the U.S. prohibits only exclusionary abuse.[18]

Meanwhile, when determining "unfairness or unreasonableness" as an element for constituting the abuse by a market-dominant status under Article

15 Article III of the Criterial for Judging the Abuse of Market-Dominant Position.

16 Subparagraph 1 to 5 of Article 3-2 (1) of the MRFTA.

17 Presidential Decrees are administrative legislation for effectively enforcing the Acts.

18 Ki-Su Lee and Jin-Hee Ryu, *supra note* 12, at 64.

3-2 (1) of the Act, the Supreme Court of Korea has interpreted and applied it differently than the unfair business practices in Article 23 of the Act that will be discussed later. In the case of POSCO'S Refusal to Supply Hot Rolled Steel Coils to Hyundai Hysco, the Supreme Court of Korea decided in 2007 as follows: the "unfairness" in a refusal of transaction as an act of abusing market-dominant position under subparagraph 3 of Article 3-2 (1) of the Act, is different from the unfairness of a refusal as an act of unfair business practices under subparagraph 1 of Article 23 (1) of the Act; "unfairness" in a transaction refusal by a market dominating enterprise should be recognized only where a transaction refusal can be deemed perpetrated with an intent or objective of maintaining or reinforcing monopolistic status in the market, and the act of refusal can be objectively evaluated as an act that might have the effect of suppressing competition; thus, the defendant who had alleged that a transaction refusal of a market dominating enterprise constitutes an abuse of a market dominance status, must prove that the transaction refusal has the intent and objective as an act likely to effect a suppression of competition, such as a price increase of goods, decrease in output, harm to innovation, decrease in the number of capable competitors, decrease in diversity, etc.[19] In sum, the Supreme Court of Korea has demanded rigorous requirements: an intent to maintain and strengthen market-dominant position as a subjective requirement, and a potential anti-competitive effect as an objective requirement. This POSCO case has important implications in relation to the criteria for judging unfairness in abuse of market-dominant position.

2 RESTRICTION ON COMBINATION OF ENTERPRISES

2.1 COMBINATION OF ENTERPRISES

Combination of enterprises means that two or more enterprises are integrated into one governance regime, which is commonly known as mergers and acquisitions (M&A). It has numerous merits to reduce costs and strengthen the ability of capital procurement based on the scale of economy, and to mitigate or disperse investment risks by way of the diversification in business. However, combination of enterprises creates or deepens market power, which often limits free competition in the market.[20] Therefore, the Act categorizes the types of combination into five groups and bans conducts of practically suppressing competition in a particular business area with any of these five types of combination.

The categories of combination of enterprises under Article 7 (1) of the Act are as follows: the acquisition or ownership of stocks of other companies;

19 Supreme Court en banc Decision 2002Du8626 Delivered on November 22, 2007, available at https://library.scourt.go.kr/kor/judgment/eng_judg.jsp for more detail.

20 Ki-Su Lee and Jin-Hee Ryu, *supra note* 12, at 76.

the concurrent holding of an executive's position in another company by an executive or employee (referring to a person who continues to be engaged in the affairs of the company, but is not an executive); a merger with other companies; an acquisition by transfer, lease or acceptance by mandate of the whole or main part of a business of another company, or the acquisition by transfer of the whole or main part of fixed assets used for the business of another company; and participation in the establishment of a new company.

2.2 PRESUMPTION OF SUPPRESSING COMPETITION

It is difficult to recognize whether the combination of enterprises practically suppresses competition. For relieving the burden of proof on the side of the KFTC and enhancing the effectiveness of restriction on combination of enterprises, the Act established this rule in the 1996 amendment that a combination of enterprises falling under any of the following cases is presumed that competition is practically suppressed, thereby making it presumptively illegal: (1) in cases where the total market share of a company taking part in the combination of enterprises (i) satisfies the presumptive requirements for a market dominating enterprise, (ii) is the largest in the business area concerned, and (iii) exceeds the market share of a company with the second largest share (referring to a company with the largest market share besides the company concerned) by not less than 25% of the aggregate of the market share; (2) in cases where a large company, directly or through a person with a special interest, combines enterprises (i) in a particular business area where small or medium enterprises under the Framework Act on Small and Medium occupy not less than two-thirds of the whole market share, and (ii) through which the combined company will have 5% or more of the market share (Article 7 (4)).

2.3 EXCEPTION TO ANTI-COMPETITIVE COMBINATION OF ENTERPRISES

On the other hand, the Act exceptionally permits the combination of enterprise if the national economic benefits arising from the efficiency increase resulting from the combination of enterprise, exceed the negative effect of limiting competition, or if a company that is a party to a combination of enterprise is a failing company. The requirements for these exceptions are: where the effect of efficiency promotion attainable through the combination of enterprises is more than the negative effect produced by the restricted competition, or where such combination is made with an inviable company, falling under the requirements determined by Presidential Decree, such as the company whose total capital in a balance sheet is less than its paid-in capital for a reasonable period. The parties concerned have the burden of proof as to whether it meets any of the above exceptions (Article 7(2)). [21]

21 The detailed criteria for judging the efficiency increase effect and the impossibility of companies' regen-

3 REPRESSION OF ECONOMIC POWER CONCENTRATION

3.1 BACKGROUND

Economic power in the business climate of Korea is especially concentrated in a few conglomerate groups, *Chaebols*. As discussed in the above, this is caused by the fact that the Korean government promoted economic development which was centered on large enterprises rather than small and medium-sized enterprises (SMEs) for the rapid economic growth. *Chaebols* are mostly held and controlled by individuals and their family members. It is true that during the process of industrial development, *Chaebols* made a significant contribution to the Korea economy through economies of scale or challenging entrepreneurship, etc. However, *Chaebols* hindered free and fair competition by strengthening market power, distorted resource allocation and income allocation by indiscriminately expanding affiliates through excessive borrowing or circular equity investment.

With that in mind, the Act introduced the concept of an enterprise group, referring to a *Chaebol* and established provisions to curb the concentration of economic power in 1986. The provisions concerning the repression of economic power concentration by large enterprise groups have been revised numerous times, even as recently as this year and the current notable legislative policies against *Chaebol* can be found in the regulations relating to a holding company and a large enterprise group.

3.2 REGULATION OF HOLDING COMPANY

The term 'holding company' means a company which controls any domestic company's business through the ownership of stocks as its main business and whose total assets are above the amount determined by Presidential Decree. Establishing holding companies was prohibited in the 1986 amendment, but came to be permitted in 1999 in order to promote corporate restructuring and to attract foreign capital as a result of the 1997-98 Korean Financial Crisis, However, in order to prevent holding companies from expanding subsidiaries, resulting in the concentration of economic power, the condition for establishing holding companies is strictly restricted.

Through several amendments made in the 2000s, the regulations pertaining to holding companies have been promoted in the direction of enhancing the transparency of the holding company system, while curbing the expansion of controlling power by taking advantage of a holding company. The Act stipulates that where a person has established a holding company or has converted a company into a holding company, he or she is obliged to make a report to the KFTC, as prescribed by Presidential Decree (Article 8). Furthermore, the Act forbids holding companies from engaging in certain activities.

eration is specified in the Criteria for Combination of Enterprises.

Namely, a holding company is neither allowed to hold liabilities in excess of twice the total capital amount, nor allowed to hold stocks of a domestic company that is not an affiliated company, in excess of 5% of the total number of stocks issued by the relevant domestic company or holding stocks of any domestic affiliate, other than its subsidiary. It is also prohibited for a holding company to own less than 40% of the total number of stocks issued by the subsidiary (subparagraph 1, 2 and 3 of Article 8-2 (2)).

In addition, a financial holding company which holds stocks of its subsidiary conducting financial business or insurance business, is not allowed to hold stocks of a domestic company, other than companies conducting financial business or insurance business. Similarly, a general holding company which is not a financial holding company is not allowed to hold stocks of a domestic company conducting financial business or insurance business (subparagraph 4 and 5 of Article 8-2 (2)). Stated in another way, a financial holding company and a general holding company are not allowed to own financial subsidiaries and non-financial subsidiaries, simultaneously. This is because where a general holding company holds stocks of a financial company, etc., such financial institution is more likely to be degraded into the bank that *Chaebols* use at their discretion; in the opposite case, where a financial holding company holds stocks of a non-financial company in an industrial sector, it is more likely to impute the risk of the industrial sector to the financial sector.[22]

Also, the Act prohibits any subsidiary of a general holding company from engaging in certain activities, namely: holding less than 40% of the total number of outstanding stocks of its sub-subsidiary; holding stocks of any domestic affiliates, other than its sub-subsidiary; or controlling a company conducting financial or insurance business as a sub-subsidiary (Article 8-2 (3)). Every sub-subsidiary of a general holding company is prohibited from holding stocks of any domestic affiliate (Article 8-2 (4)). This is to ensure transparency in the holding company system by securing a simple vertical relationship from a holding company to its subsidiaries, and again to sub-subsidiaries.

3.3 REGULATION OF ENTERPRISE GROUPS (*CHAEBOLS*)

In general, an enterprise group refers to a group of two or more companies that are combined by economic common interests while maintaining legal independence. A typical type of such an enterprise is a *Chaebol*. The Act regulates only large enterprise groups with assets above a certain scale determined by Presidential Decree, and requires the KFTC to designate annually large enterprise groups subject to the limitations on mutual investment, and enterprise groups subject to the limitations on debt guarantees, etc. as

22 Ki-Su Lee and Jin-Hee Ryu, *supra note* 12, at 118.

prescribed by Presidential Decree, and to give notice of such designation to companies belonging to the enterprise group (Article 14 (1)).[23]

There are several provisions dealing with a large enterprise group. The first is the prohibition of mutual investment. The mutual investment between companies falling under an enterprise group subject to the limitations on mutual investment, is forbidden in principle, but is exceptionally permitted in the case of a merger of companies or the acquisition of a whole business, and in the case of an exercise of security right or the receipt of payment in substitutes (Article 9 (1)). In addition, no company belonging to an enterprise group subject to the limitations on mutual investment shall make any affiliated investment that forms any circular equity investment in principle (Article 9-2 (2)).

The second is the prohibition, in principle, of mutual debt guarantees between companies belonging to an enterprise group subject to the limitations on debt guarantees. However, this case also has exceptions when a guarantee was made in connection with any obligation of a company, which is taken over according to the criteria for rationalization under the Restriction of Special Taxation Act, or a guarantee on debts is deemed necessary to enhance the international competitiveness of enterprises or is set forth in Presidential Decree (Article 10-2 (1)).

The third is the limitation on voting rights of finance companies or insurance companies. This provision came to be introduced in 1986 to prevent a large enterprise group from expanding its control by using the customer assets of financial institutions which belong to the large enterprise group itself. That is, any finance or insurance company belonging to an enterprise group subject to the limitations on mutual investment, cannot exercise, in principle, its voting rights in stocks of any domestic affiliated company, under its acquisition or ownership (Article 11).

Beside these restrictions, in order to prevent unfair support acts in confidence among companies belonging to an enterprise group, the 1999 amendment introduced the system that requires the resolutions of a board of directors and its publication in the case of large scale internal trading (Article 11-2). Moreover, to enhance the transparency of ownership structure and management behavior of the unlisted companies belonging to a large enterprise group subject to the limitations on mutual investment, these unlisted companies are obliged to publish information on their general status, status of stockholding, etc. (Article 11-4 (1)).

23 According to the Press Release published by the KFTC on May 1, 2020, the KFTC designates 64 conglomerates (*Chaebols*) whose total assets over 5 trillion KRW subject to disclosure, and among these, designates 34 conglomerates whose total assets over 10 trillion KRW subject to the limitations on mutual investment.

4. RESTRICTIONS ON UNFAIR COLLABORATIVE ACTS (CARTELS)

Unfair collaborative acts, which are also referred to as cartels or horizontal agreements in other countries, mean that an enterpriser agrees with other enterprisers by contract, agreement, resolution, or any other means, to jointly engage in an act, such as fixing or raising prices, dividing markets, or controlling production output, etc., and as a result, that agreement unfairly restricts competition (Article 19). Cartels are the same as an anti-competitive combination of enterprises, which is discussed in the above subchapter 2, in that they both aim at restricting anti-competitive behaviors. However, cartels differ from combination of enterprises in that each company maintains economic independence and adjusts market elements, such as price or trade conditions, while combination of enterprises is to integrate two or more enterprises into one governance regime and adjusts the market structure itself. [24]

Cartel behaviors are prohibited because they limit competition and are a serious threat to freedom to conduct a business of enterprises that are not involved in such behaviors. Moreover, cartels lead to consumers buying low quality products at higher prices and hinder the improvement of production capacity, thereby adversely affecting the national economy.[25]

The Act prescribes that no enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means, to jointly engage in an act falling under nine types of acts enumerated in Article 19 (1), which unfairly restricts competition, or allow any other enterpriser to perform such unfair collaborative acts. An agreement here is a key element for constituting unfair collaborative acts and refers to "a meeting of the minds" to restrict competition between two or more enterprisers. Therefore, an unfair collaborative act is established even with the meeting of the minds between enterprisers and does not require that the action according to such agreement is realistically performed.[26]

The listed nine types of unfair cartels in the Act can be classified as hardcore cartels and softcore cartels. The former ones include the acts of horizontal price fixing, bid ridding, restricting the production of goods or services, determining terms and conditions for the transaction of goods or services, and limiting the transaction counterpart or the area where a trade arises. The latter ones include the acts of preventing or restricting the establishment or extension of facilities or installation of equipment, restricting the kinds or specifications of commodities, jointly carrying out and managing the main parts of business, and interfering or restricting the activities of other enterprisers' business (Article 19 (1)).

24 Ki-Su Lee and Jin-Hee Ryu, *supra note* 12, at 149.

25 http://www.ftc.go.kr/eng/contents.do?key=502 (accessed on May 31, 2020)

26 Supreme Court Decision 98Du15849 Delivered on February 23, 1999.

It is not easy for a regulatory agency to distinguish whether an enterpriser's conduct was jointly engaged with any other enterpriser. Therefore, the 2007 amendment introduced the provision that where two or more enterprisers conduct any act set forth in the above, it shall be assumed that the enterprisers have agreed to conduct the act in association when it is highly probable to reckon that they did the act in association in light of given circumstances, such as the characteristic that the relevant transaction or good or services have, the economic reasons and ripple effects that the relevant activities have, or the number of contract and its mode between the enterprisers. (Article 19 (5)).

Meanwhile, cartels are exceptionally permitted if they are conducted for certain purposes, such as industry rationalization, research and technology development, overcoming economic depression, industrial restructuring, rationalization of trade terms and conditions, improvement of competitiveness of small and medium-sized enterprises(SMEs). These exceptions are subject to prior approval from the KFTC (Article 19 (2)).

5. PROHIBITION OF UNFAIR TRADE PRACTICES

5.1 UNFAIR TRADE PRACTICES[27]

The Act intends that the difference in economic power does not occur or is not intensified by curbing concentration of economic power. On the other hand, the Act seeks to restore fair competition by regulating unfair trade practices which take advantage of the differences in economic power that has already existed. The prohibition of unfair trade practices that this subchapter will discuss belongs to the latter one. Namely, the Act recognizes that differences in economic power can inevitably arise in a free market economic system due to individual abilities, etc., and hence, it imposes ex post regulations against abusive or unfair trade practices enacted by taking advantage of such a difference.[28]

Unfair trade practices are those in which an enterprise is likely to act alone to interfere with a fair transaction, or to have an affiliated company or other enterprises perform such an act. The Article 23 (1) of the Act lists the prohibited unfair trade practices and Article 36 (1) of the Enforcement Decree of the same Act enumerates the criteria for, and the types of, such unfair trade practices in more detail. These practice types are divided into general unfair trade practices that are common to all business sectors and behaviors, and particular unfair trade practices that are applied only to particular business sectors and behaviors. Particular unfair trade practices include:

27 According to Statistical Yearbook of 2019 which was published by the KFTC, unfair trade practices account for 65.4% of the complaints received by MRFTA violation that occurred from 1981 to 2019.

28 Ki-Su Lee and Jin-Hee Ryu, *supra note* 12, at 175.

particular unfair trade concerning provision of giveaways; particular unfair trade practices concerning large-scale retail businesses; and particular unfair trade practices concerning the newspaper industry. These are regulated under the Notification of the Categories of and Standards for Unfair Trade Practices relating to each business. This paper will cover only general unfair trade practices below.

5.2 TYPES OF UNFAIR TRADE PRACTICES[29]

REFUSAL OF TRANSACTION
An enterpriser refuses to commence a transaction, discontinues any ongoing transaction, or substantially restricts the quantity or contents of goods or services. The refusal of transaction can be committed jointly with other enterprisers or by the enterpriser alone.
DISCRIMINATORY TREATMENT
An enterpriser discriminates against a transaction party and thereby maintains and strengthens its position by weakening the position of the transaction party. This includes discrimination in price, discrimination in trade term and conditions, discrimination for its affiliates, and discrimination by groups.
EXCLUSION OF COMPETITORS
An enterpriser sells goods or services at an excessively lower price than their supply cost or purchases them at a price higher than a commonly charged price in order to exclude its competitors.
LURING OF CUSTOMERS
An enterpriser unfairly lures customers of its competitors to make a transaction with itself by offering excessive benefits or inducing non-compliance with the contract made with the competitor.
COERCION OF CUSTOMERS
An enterpriser unfairly coerces customers of its competitors to make a transaction with itself by bundling products or forcing its executives and employees to purchase and sell goods or services against their will.
ABUSE OF DOMINANT POSITION
An enterpriser in a superior bargaining position abuses such position to diminish free decision making of a transaction party. This includes the acts of forcing to purchase, forcing to provide profits, setting sales goals and forcing to achieve them, giving disadvantages in trade, and interfering with management activities.
TRADE UNDER UNFAIR RESTRAINT
An enterpriser trades under terms and conditions which unfairly limit business activities of a transaction party restricting trading area in, or parties with which it may transact.
INTERFERE WITH BUSINESS ACTIVITIES
An enterpriser unfairly interferes with business activities of other enterprisers by using technology belonging to them, hindering the transfer of customers, etc.
UNFAIR ASSISTANCE
An enterpriser assists a related party or other companies by unfairly providing funds, assets, manpower, etc., or transacting under substantially favorable conditions.

29 These types of unfair trade practices are stipulated on Appendix 1 No.2 <Categories and Standards of Unfair Trade Practices> of Enforcement Decree of the MRFTA in accordance with Article 23 (1) of the MRFTA, and can be found in http://www.ftc.go.kr/eng/contents.do?key=505 for detail.

5.3 CRITERIA FOR JUDGING THE ILLEGALITY OF UNFAIR TRADE PRACTICES

The practices listed in the above are considered to constitute unfair trade practices in accordance with the Act only when those are performed unfairly, thereby establishing the illegality of such practices. In interpreting and applying 'unfairness', the Act has two kinds of criteria, namely, "without just cause" and "unfairly". When any type of practice prohibited by the Act occurs, it can be a criterion that distinguishes whether the practice is presumed to have its illegality or requires consideration of other factors comprehensively in determining its illegality.

Unfair trade practices that require "without just cause" to constitute illegality are (i) a refusal of transaction that is committed jointly with other enterprisers, (ii) discriminatory treatment in favor of its affiliates, and (iii) an act of selling goods or services at a substantially lower price than their supply to exclude its competitors. The Supreme Court of Korea interpreted the legislative intent relating to "discriminatory treatment in favor of its affiliates" as follows: Enforcement Decree of the Act stipulates that "discriminatory treatment in favor of its affiliates" constitutes an unfair trade practice unless there is just cause; the legislative intent is that such a behavior may reduce the efficiency of economy and deepen the concentration of economic power by maintaining its affiliates which are not competitive in the market, thereby being more likely to worsen fair trade than other types of discriminatory treatments; thus, if a trade practice apparently falls under such a behavior, then the practice is presumed to have the potential to hinder fair trade, and the party conducting such a behavior has a burden of proof that there is no concern that the action would impede fair trade.[30]

The practices that require "unfairly" as an element to constitute their illegality are all unfair trade practices other than three practices requiring "without just cause" discussed in the above. The Supreme Court of Korea decided in the case dealing with unfair price-cutting that whether there exits "unfairness" should be determined after considering comprehensively all relevant factors under the given situation, such as the act's motive and purpose, the excessive degree of low price, the repeatability, the behavior's position in the relevant market, the degree of impact on its competitors, etc.[31]

6. REGULATION OF ENTERPRISERS' ORGANIZATION

Enterprisers' organization refers to an association or a federation organized by two or more enterprisers in order to increase their common interests. The common interests here are the economic interests accrued from the business activities. Therefore, the organization is likely to be used to impair

30 Supreme Court Decision 2000Du833 Delivered on December 11, 2001.

31 Supreme Court Decision 99Du4686 Delivered on December 11, 2001.

competition by methods such as the control of price or production or the exclusion of competitors, etc. Enterprisers' organization has been heavily involved in cartels in Korea in many cases.[32]

As for the provision, the Act specifies that no enterprisers' organization shall commit any of the following acts: unfairly restricting competition by an act pertaining to unfair collaborative act enumerated in Article 19 (1); restricting the number of current or future enterprisers in any business area; unfairly limiting the business contents or activities of an enterpriser which is a member of the enterprisers' organization; inducing an enterpriser to conduct unfair trade practices listed in Article 23 (1) or to conduct practices of resale price maintenance under Article 29, or assisting an enterpriser in committing such act (Article 26 (1)).

7. RESTRICTIONS ON RESALE PRICE MAINTENANCE

Resale price maintenance means an act by which an enterpriser coerces, in trading goods or services, a counterpart enterpriser or an enterpriser by next trading stage to sell or provide the goods or services at the price fixed in advance, or makes a transaction under any binding conditions thereon for such purpose. This is also referred to as vertical price fixing.

Practices of resale price maintenance are prohibited in principle, and the scope of resale price extends to maximum price, minimum price, and standard price, as well as the price fixed by the involved enterpriser. However, practices of resale price maintenance can be exceptionally permitted when there exist justifiable reasons in terms of the maximum price maintenance which forbids the transactions of goods or services in excess of specified prices (Article 29 (1)). While the Act mentions only the maximum price maintenance as an exception to such prohibition, the Supreme Court of Korea interpreted that even the case of minimum price maintenance should be considered as an exception when there exist justifiable reasons. That is, the Court made a decision in the so-called Hanmi Pharmaceutical Case that even a case where an act of minimum price maintenance seems to limit competition within the trademark, such an act should be exceptionally permitted when there exist justifiable reasons depending on the specific situation of the market, such as promoting competition among brands and consequently increasing consumer welfare.[33]

32 Youngsu Shin, *supra note* 2, at 227.

33 Supreme Court Decision 2009Du9543 Delivered on November 25, 2010.

IV. REGULATORY AGENCY AND ENFORCEMENT PROCEDURES

1. REGULATORY AGENCY: KOREA FAIR TRADE COMMISSION

The Korea Fair Trade Commission (KFTC) is established for the purpose of independently performing the objectives of the Monopoly Regulation and Fair Trade Act. The KFTC is a ministerial-level central administrative organization under the authority of the Prime Minister and functions as a quasi-judicial body.[34]

The KFTC consists of a committee as the decision-making body, and a secretariat as the working body. The committee is comprised of nine commissioners, including a chairman and a vice-chairman, and four commissioners of them are non-standing members of the KFTC (Article 37 (1)). Commissioners deliberate and make decisions on competition and consumer protection issues. The Chairperson and the Vice Chairperson are appointed by the President upon the recommendation of the Prime Minister, while other remaining commissioners are appointed by the President upon the recommendation of the Chairperson (Article 37(2)). Term of office is three years for the commissioners and may be renewed only once (Article 39).

Meeting of the Commission is categorized as a meeting comprised of all members which is called "plenary session", and a meeting comprised of three members including a standing commissioner which is called "chamber" (Article 37-2). The matters that plenary session deliberates and determines are: matters as to an interpretation or application of Acts and subordinate statues, regulations, and public announcement under the jurisdiction of the Commission; matters as to an appeal; matters on which resolutions have not been made in a chamber, or which a chamber has decided to refer them to the plenary session; matters necessary to make or reform regulations or public announcement; and matters having substantial economic impacts or those recognized as necessary for being dealt with by the plenary session itself. A chamber may deliberate or determine matters, other than the above matters (Article 37-3).

Meanwhile, the secretariat carries out the affair of the Commission and is directly involved in drafting and promoting fair competition policies in the market, investigating suspected antitrust issues, presenting them to the committee, and handling them according to the committee's decision. The Secretariat consists of a secretary general, six bureaus, and five regional offices.

34 The official website of the Korea Fair Trade Commission is http://www.ftc.go.kr, and encompasses all relevant laws, regulations, and guidelines. The cases involving anti-competition issues can be found in https://case.ftc.go.kr/ocp/co/ltfr.do

2. ENFORCEMENT PROCEDURES

2.1 INVESTIGATION PROCEDURES

When the KFTC deems that a suspected violation of the Act exists, or when anyone who recognizes the existence of a fact violating the Act reports it to the KFTC, the KFTC may conduct a necessary investigation (Article 49). The investigation process includes investigating relevant documents, taking statements from the concerned parties, etc., and if it is determined that legal measures are necessary, examiners report it to the committee. The report is sent to the examinee as well in order to give he/she an opportunity to submit any objections, etc. on the report.

When the committee determines that a violation of the Act has occurred, the KFTC may simply make a recommendation for correcting the violation and advise compliance with it, give a voluntary correction order, or give a warning, etc. When necessary, the KFTC may impose corrective measures, such as to stop the relevant retaliatory measures, to publish the fact that the enterpriser is ordered to take corrective measures, or to lower prices, etc. after giving any interested parties an opportunity to present their objection or opinions. The KFTC can also refer some cases to the prosecution. Any party with objections concerning any measures taken by the KFTC may file an appeal suit in the Seoul Appellate Court (Article 54 and 55).

2.2 SANCTIONS AGAINST OFFENCES

The KFTC may impose penalty surcharges upon offenders of the Act. In imposing surcharges pursuant to the Act, the KFTC must consider the nature and degree of unlawful practices, the duration and frequency of unlawful practices, the amount of benefits, etc. accrued from unlawful practices (Article 55-3 (1)).

In addition to receiving a surcharge, any offender of the Act can be punished by imprisonment or a fine. The Act sets forth the provision that anyone who has violated the provisions under the Act by committing serious offences, such as the abuse of market-dominated position, anti-competitive collaborative acts, etc., is punished by imprisonment for not more than three years, or by a fine not exceeding 200 million KRW (Article 66). Also, anyone who has violated the provisions under the Act by committing unfair trade practices, resale price maintenance, or failure to comply with corrective measures rendered by the KFTC, and so on, is punished by imprisonment for not more than two years, or by a fine not exceeding 150 million KRW (Article 67), irrespective of whether the offender is a legal entity or individual (Article 70).

2.3 KFTC'S EXCLUSIVE RIGHT TO ACCUSE AND DUTY TO ACCUSE

Any offense as prescribed in Article 66 and 67 shall be prosecuted by a public action only after a complaint is filed by the KFTC (Article 71 (1)), which is called the KFTC's exclusive right to accuse. However, the 1996 amendment introduced the KFTC's duty to accuse and the Prosecutor General's right to request the KFTC to file a complaint with him/her, in order to prevent the KFTC from arbitrarily exercising its' exclusive right to accuse. Namely, the KFTC shall file with the Prosecutor General the complaints where it is deemed that the degree of violation, among offences pertaining to Article 66 and 67, is so obvious from an objective point of view and serious that it may substantially hamper competition in the market (Article 71 (2)). The Prosecutor General may notify the KFTC of the existence of facts falling under this prosecution requirement and may request the KFTC to file a complaint with him/her (Article 71 (3)).

The KFTC's exclusive right to accuse was again partly amended in 2013 where even if the KFTC concludes that a case does not fall under the requirement for filing a complaint, the Chairperson of the Board of Audit and Inspection, the Administrator of the Supply Administration, or the Administrator of Small and Medium Business Administration may request the KFTC to file a complaint for other reason, such as the ripple effect on the society, influence on the national finance, and the degree of the damage caused to small and medium-sized enterprises(SMEs) (Article 71 (4)). And upon receiving such request, the chairperson of the KFTC shall file the complaint with the Prosecutor General (Article 71 (5)). Meanwhile, the KFTC may not withdraw the filing of a complaint after the prosecution has commenced (Article 71 (6)).

2.4 LIABILITY FOR DAMAGES

A party who sustains any loss inflicted by a violation of the Act can file a civil claim with a court for damages. The Act prescribes that if an enterpriser or an enterprisers' organization violates the provisions of the Act, and thereby gives a person any damage, such enterpriser or organization shall be liable for compensation of such damages to the person. However, this is not applied when the enterpriser or the enterprisers' organization verifies that it violates the provisions of the Act without any deliberation or any negligence (Article 56 (1)).

V. CONCLUSION

The Monopoly Regulation and Fair Trade Act (the MRFTA) was enacted in 1980 as the first set of fundamental rules regulating extensively anti-competitive practice, and subsequently its enforcement and the establishment of the Korea Fair Trade Commission (the KFTC) as the principal agency enforcing the Act, were accomplished in 1981. At the time, there were only ten developed countries that had competition laws in effect, and hence, it was rare that Korea at its development stage adopted competition policies then.[35]

It will be 40 years next year since the Korean government has tried to transform the paradigm of economic operation from government-led to market and competition by enforcing the MRFTA and the KFTC. The competition policies have pushed for *Chaebol* reforms in the direction of curbing the concentration of economic power and converting the market structure centered on *Chaebols* into a competitive market. In this process, the Act and the competition-related regulations have been numerously revised to respond to rapidly changing economic environments and the legal loopholes revealed during the process of the *Chaebol* reform.

In spite of these efforts by the government, the five largest *Chaebols* in Korea currently account for half of Korean Stock Index and the top 10 *Chaebols* hold about 27% of all busines assets in Korea.[36] It is undeniable that *Chaebols* led Korea's rapid economic growth, but now ironically, it is not too much to say that this dominance is hindering the further development of the Korean economy. It is true that there are many criticisms from academic and SMEs, etc. that the Act and the related regulations do not seem to be successful enough to curb the concentration of economic power, promote competition in the marketplace, and enhance consumer welfare. However, it is worth appreciating that the KFTC has been making proactive efforts to consistently monitor and correct legal loopholes and has endeavored to mitigate anti-competitive or unfair practices.

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