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In the history of Korean competition law enforcement, the decision of the Korean Supreme Court in the refusal to deal case, *POSCO*¹, is a milestone in market dominance abuse cases (a concept similar to monopolization under U.S. antitrust law). On November 22, 2007, the Supreme Court held that evidence of specific intent, or purpose, and anticompetitive effects must be proven for there to be a violation of abuse of market dominance. The Court further held that the intent or purpose of maintaining or enhancing dominant position in the relevant market could be presumed in the event that anticompetitive effects are proven.

About the POSCO Case

Since August 1997, Hyundai Hysco has made several requests of POSCO to supply hot-rolled coils, which are necessary for producing cold-steel plates. POSCO has refused to deal with Hyundai Hysco, who supplies cold-steel plates for Hyundai and Kia Motors, and thus also competes with POSCO in the market for cold-steel plates. On April 12, 2001, the Korea Fair Trade Commission issued a corrective order and imposed

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¹ Posco is a Korean comprehensive steel maker and the third largest steel company of its kind. It produces and sells hot-rolled coils, cold-steel plates, and other related steel products. For the decision, see Supreme Court of Korea decision No. 2002Du8626 (decided Nov. 22, 2007) [hereinafter *POSCO*].

administrative fines of US\$1.6 million on POSCO, accounting for 79.8 percent of the hot-rolled coils market and 58.4 percent of the cold-steel plates market, for the violation of abuse of market dominance.

In response to the Commission's decision, POSCO filed an appeal on April 19, 2001 and the Seoul Appeal Court ruled in favor of the Commission on August 27, 2002. POSCO appealed to the Supreme Court immediately after and, on November 22, 2007, the Supreme Court ruled that POSCO's refusal to deal did not meet the requirements for unreasonableness of abuse of market dominance and remanded the case to the Seoul Appeal Court.

Implications and Issues

Pursuant to the ruling of the Supreme Court, intent is a separate requirement of an abuse of market dominance claim and thus, the defendant must prove that the plaintiff has the intent to restrain competition in the relevant market. Further, the intent could be presumed if anticompetitive effects such as an increase in price, reduced consumer choice, impediment to innovation, or significant decrease in market participants can be proven. In short, anticompetitive effect is a separate requirement and unless proven, any exclusionary practice does not constitute an abuse of market dominance.

The *POSCO* ruling has a historical place in Korean competition law enforcement in that the Supreme Court held that two requirements must be proven separately for illegality of abuse of market dominance, and specified that detailed anticompetitive effects must be proven. Nevertheless, the decision leaves something to be desired and its pros and cons are debated among economists, practitioners, and government officials.

In particular, if the intent can be inferred from the anticompetitive effects, then why is intent required as a separate element of the abuse of market dominance? For instance, there is no violation of abuse of market dominance in cases where anticompetitive effects are not proven. Then intent has no meaning at all as one of the two requirements. And, when anticompetitive effects are proven, intent has no meaning at all either since intent could still be presumed in fact.

A more debatable issue is whether intent should be a separate requirement in determining the illegality of abuse of market dominance. Criminal cases require intent as an essential element and this legal rule is reflected in monopolization cases under Section 2 of the U.S. Sherman Act. But even in the United States, except in the case of the attempt to monopolize, there is no established rule that intent must be a separate requirement. Since intent to exclude is consistent with both efficient practices and inefficient ones, the intent, subjective intent in particular, should not be a separate requirement for determining the illegality of monopolization. On the other hand, objective evidence of intent can be inferred from the concerned conduct. That is why most economists and lawyers insist that intent should not be a separate requirement but could be a plus factor substantiating ambiguous conduct.

Given that abuse of market dominance through anticompetitive conducts in Korea is not a criminal case, and that objective intent could be inferred from the anticompetitive effects and subjective intent is not decisive evidence in distinguishing a legitimate claim from an illegitimate one, then why should intent be an essential separate requirement?

In the meantime, the ruling does not specify what conduct is a separate

requirement for the abuse of market dominance. There are good and bad business practices which result in the same anticompetitive effects, such as decrease in production and increase in prices, and which are specified in the ruling. In order to charge a company with abuse of market dominance, distinguishing permissible conducts such as exclusionary practices from impermissible ones is an essential element. Section 3-2 of the Korean competition law forbids not the intentional pursuit of market dominance, but the employment of unjustifiable means to maintain or enhance that position. Market dominance achieved through superior skills and business acumen is no less intentional than that achieved by anticompetitive means.

As stated in this article, the *POSCO* decision is a watershed decision in abuse of dominant cases in Korean competition law enforcement even though it has pros and cons. But as the history of antitrust law enforcement shows, decisions of the Supreme Court are subject to change. In this regard, I hope that the *POSCO* ruling will evolve to reflect the reality of business more and satisfy many more people.