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Analysis of the Korean Supreme Court decision concerning “unreasonableness” in the abuse of a market dominant position case involving Posco

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On November 22, 2007, the Supreme Court of Korea rendered a landmark decision in the history of the enforcement of the Monopoly Regulation and Fair Trade Act of Korea (MRFTA). The decision presents a new standard of illegality in an unreasonable refusal to deal among the prohibited activities as an abuse of a market dominant position.¹ The Supreme Court held that, in order to find illegality of an abuse of a market dominant position, it is insufficient to prove only that the concerned act has damaged the other enterprise to a considerable degree, but that it should be demonstrated that the concerned act had been conducted with the intention and purpose of impeding competition and had actually damaged, or had potential to damage, competition to a considerable degree.² This decision has heightened the bar in determination of “unreasonableness” in an abuse of a market dominant position, from the previous standard of proof of considerable damage to the other parties without consideration of the

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¹ Supreme Court of Korea decision No. 2002Du8626 (decided Nov. 22, 2007) (Claim for cancellation of corrective order imposed by the Korea Fair Trade Commission on Posco) [hereinafter *Posco*].

² *Id.*

effects on market competition, to a new standard of proof of considerable effects on market competition. This new decision has significance at this point when the Korea Fair Trade Commission (KFTC) is focusing on investigation of abuse of a market dominant position against major foreign companies such as Intel and Qualcomm.

This paper reviews the trends in the KFTC's latest regulations and policies on abuse of a market dominant position, and analyzes the statutes, regulations, KFTC Guidelines, and court standards regarding determination of abuse of a market dominant position in light of latest global trends. Then, it summarizes the major points of the *Posco* decision, and presents the impacts of the *Posco* decision on KFTC's enforcement activities and the implications on major companies conducting business in Korea.

I. Latest Trends in the KFTC's Regulation of Abuse of a Market Dominant Position and Its Policy

Since its establishment in 1980, the KFTC has focused on the regulation of conglomerates, or so-called "chaebols", and the regulation of other ordinary unfair trade practices. In other words, the KFTC has been working on mitigating the economic and social harms caused by economic concentration on large enterprise groups, and on ensuring "fairness" in transactions among enterprises in the market.³

Following the Korean economic crisis of 1997, the Korean government's chaebol regulations became even stronger and traditional competition law issues were not taken seriously. However, the enforcement officers in the KFTC have been continuously improving their capabilities with a passion for regulating cartels and business

³ For more on the performance of the KFTC, see Joseph Seon Hur, *Evolution of Competition Policy and its Impact on Economic Development in Korea*, Remarks at the Seoul Competition Forum co-hosted by KFTC, OECD and UNCTAD (Nov. 9, 2002).

combinations. In 2004, the KFTC made remarkable achievements by improving the Leniency Program and by concentrating its capabilities on regulating cartels and by boldly applying Korean competition law extraterritorially to graphite electrode international cartels.⁴ The KFTC also strengthened its economic analysis function by creating Economic Analysis Team within the field of business combination. In 2005, the KFTC established a separate organization called the Cartel Investigation Bureau which focuses on the investigation of cartels. In 2006, the KFTC reorganized its Market Surveillance Bureau by dividing it into groups, each responsible for a separate industry, and assigned each group to work on business combinations, abuse of market dominant positions, ordinary unfair trade practices, and so forth, within its assigned industry. However, concerns have been raised about whether execution powers have been weakened as a result of the separation of such functions into several teams, while a high degree of economic and legal analysis is required to regulate business combinations and abuse of a market dominant position.

The KFTC, since inauguration of Mr. Kwon, Oh-Seung as the Chairman, has made its priority the regulation of abuse of a market dominant position. Such policy has significance in alleviating direct regulations on chaebols, while resolving the harms on competition caused by abusive acts of chaebols through principles of competition law. This also reflects that the regulation on the abuse of a market dominant position was relatively weak, whereas cartel investigations, among various competition law areas, generated a considerable achievement. The KFTC, prior to the inauguration of Mr. Kwon

⁴ Joseph Seon Hur, *Extraterritorial Application of Korean Competition Law*, REGENT J. INT'L L. (forthcoming 2008).

as the Chairman, was relatively passive in regulating abuse of a market dominant position. Between 2000 and 2005, there were only five cases involving abuse of a market dominant position. Since, the number has dramatically increased—to two cases in 2006 alone and to over 19 cases in 2007. The most remarkable case was the bundling case brought against Microsoft.⁵ As of the time of this writing, the most significant case in which the court has issued a decision is the *Posco* case involving refusal to deal, and the subject of this paper.⁶

II. Legal Principles of Regulating Abuse of a Market Dominant Position under the MRFTA and Ambiguities Thereof

The MRFTA regulates abuse of a market dominant position, as well as cartels and business combinations. Unlike competition laws of other countries, the MRFTA has tools that directly regulate corporate governance of large business groups and capital transactions between subsidiaries of chaebols. It also regulates unfair trade practices of enterprises without market dominant power in dealing with other enterprises or consumers. Such cases make up over 50 percent of the total cases handled by the KFTC. The KFTC also enforces laws and regulations other than MRFTA, such as laws related to consumer protection, Fair Transactions in Subcontracting Act regulating unfairness in subcontracts made by large corporations, Act on Fair Indication and Advertisement regulating deceptive advertisements, Act on the Consumer Protection in the Electronic

⁵ See KFTC Resolution No. 2006-042 (Feb. 24, 2006). See also Joseph Seon Hur, *Analysis of the Korea Fair Trade Commission decision on Microsoft's tie-in sales of Applications programs with Window Operating System*, 3(2) COMPETITION L. INT'L (Oct. 2007).

⁶ The KFTC is also currently investigating Intel's conducts concerning rebates and Qualcomm's conducts for alleged abuse of a market dominant position. The KFTC's rulings in the foregoing investigation are expected some time this year (2008).

Commerce Transactions regulating transactions by internet businesses, Door-to-Door Sales Act, and Regulation of Standardized Contracts Act.

As Korea adopted the civil law legal system, restriction on abuse of a market dominant position is specifically prescribed in detail in the MRFTA and subordinate regulations. The KFTC rulings and court decisions are dependent upon reasonable interpretation of the provisions in the MRFTA. Article 3-2 of the MRFTA provides that “(1) No market-dominant enterprise shall commit acts falling under any of the following subparagraphs (the ‘abusive acts’)” and specifies five types of conducts which are:

- (i) an act of determining, maintaining, or changing unreasonably the price of commodities or services (the “price”);
- (ii) an act of unreasonably controlling the sale of commodities or provision of services;
- (iii) an act of unreasonably interfering with the business activities of other enterprises;
- (iv) an act of unreasonably impeding the entry of new competitors; and
- (v) an act of unfairly excluding competitive enterprisers, or of doing considerable harm to the interests of consumers.

The MRFTA further provides the types and criteria of such abusive conduct, by presidential decree. In addition, the KFTC Guidelines provide more detailed definitions regarding types and criteria that are determined by the presidential decree.

The provision of the MRFTA quoted in *Posco* is that “a market dominant enterprise shall not commit any act of unreasonably interfering with the business

activities of other enterprise.”⁷ The Enforcement Decree of the MRFTA further prescribes such act of unreasonable interference in detail:⁸

- (i) the act of obstructing the purchase of raw materials by other enterprises for their production activities without any justifiable reasons;
- (ii) the act of employing workers essential for other enterprises to carry out their business activities, promising the workers economic interests that are deemed abnormally higher in the light of normal practices;
- (iii) the act of denying, interrupting, or limiting access to the use of elements essential for other enterprises to produce, supply, and market their goods and services without any justifiable reasons; and
- (iv) the act of making it difficult for other enterprises to carry out their business activities in unfair ways other than those referred to in subparagraphs (i) through (iii), which is put on public notice by the KFTC.

In addition, a KFTC guideline⁹ which was put on public notice further specifies the above subparagraph (iv) in Article 5(3) of the Enforcement Decree to the MRFTA, as “the act of unreasonably refusing to deal with a particular enterprise or considerably restricting quantity or contents of good or services that are traded (i.e., refusal to deal).”

The aforementioned provisions are summarized as following: The refusal to deal as an abusive act by a market dominant enterprise is an act (1) that is committed by a

⁷ See *Posco*, *supra* note 1.

⁸ See Enforcement Decree of the MRFTA, at art. 5(3)(i)-(iv).

⁹ KFTC Public Notice No. 2000-6, Guideline on Examination of Abusive Acts of Market Dominant Position (Sep. 8, 2000) [hereinafter *MDP Guideline*], at art. IV, para. 3C(1).

market dominant enterprise, (2) in an unreasonably way, (3) by refusing to deal with a particular enterprise, and (4) making it difficult for such enterprise to carry out its business activities. Such standard of interpretation by specific element of violation is already established or still being established by the KFTC rulings and decisions by Seoul High Court and the Supreme Court.

Among the elements of illegality of refusal to deal as an abusive act of a market dominant position, the most controversial and crucial elements are “in an unreasonable way” and “making it difficult for other enterprise to carry out its business activities”. With respect to the unreasonableness, interpreting which circumstances are “unreasonable” is a very important standard in determining illegality, because not every refusal to deal is illegal but only unreasonable refusal to deal is illegal. It is also important to determine how difficult business activities should become, in examining the acts which make it difficult for other enterprise to carry out its business activities.

Two considerations with regard to the standard of illegality:

1. The words in the MRFTA provide that a refusal to deal is illegal when such refusal is “unreasonable”. Such standard is different from and much broader than the standard in the United States and the European Community which provides that an abusive act is illegal when such act restricts market competition. The KFTC was able to claim illegality only by demonstrating the facts of conduct, because it was not required to prove anticompetitiveness. This is virtually the same as determining restriction of abusive act by per se

illegal standard, not by a rule of reason. In consequence, restriction on abusive act is not strict, and much easier than in western countries. Or, enterprises' scope of rebuttal is far narrower. This, in turn, results in excessive restriction and false positives which restrict pro-competitive conduct by enterprises that do not impose negative effects on consumers and competition in oligopolistic markets.

2. Such interpretation of illegality also obscures the distinction from ordinary unfair trade practices, which is set forth in a separate provision, Article 23 of the MRFTA. The enforcement officers at the KFTC have brought about distortion, such as excessive enforcement of ordinary unfair trade practices and sub-optimal restriction on abusive act, by excessively enforcing ordinary unfair trade practices which are also applicable to ordinary enterprises without market dominant position. Thus, the KFTC did not perform its main mission responsibilities in protecting and promoting competition in the market.

The provisions in the MRFTA concerning ordinary unfair trade practices provide a standard of “unreasonableness” which is interpreted and enforced in a very expansive way. In other words, every marketing activity is unreasonable unless it is a competition on the merit based on quality or price, or if it deviates from normal trade practices.

III. Details of the *Posco* Case

Posco is a Korean comprehensive steel company and the third largest steel company in the world. It produces and sells hot-rolled coils and cold-rolled coils, as well as other diverse steel products. In the Korean market, Posco is the provider of hot-rolled

coils. Exports from Japanese steel companies make up about 20 percent Korean market for hot-rolled coils. There are four Korean companies, including Posco, which produce cold-rolled coils. In Korea, one of the largest purchasers of cold-rolled coils market is an automotive company that owns Hyundai and Kia and uses cold-rolled coils for automobiles. It purchased cold-rolled coils from Posco until 1999 when Hyundai established a steel company, Hyundai Hysco, to produce cold-rolled coils for Hyundai and Kia automobiles, at which point Posco and Hyundai Hysco became competitors.

After the establishment of Hyundai Hysco, despite making five formal requests for supply, Posco refused to supply the raw materials (hot-rolled coils) necessary to produce cold-rolled coils, for diverse reasons. In response, Hyundai Hysco imported hot-rolled coils from the Japanese steel producers and went on to record considerable profits by engaging in normal business activities.

On April 12, 2001, the KFTC determined that Posco's refusal to deal was a refusal to deal that fell under the abusive act of a market dominant position, and imposed US\$1.6 million in fines along with corrective orders. The KFTC determined that Posco's conduct was illegal because it, as a dominant enterprise in the market for hot-rolled coils, unreasonably refused to supply hot-rolled coils (i.e., an essential material needed in producing cold-rolled coils) to an enterprise which is in competing relation with it in the market for cold-rolled coils and thereby interfered with the business activities of the competing enterprise. On April 19, 2001, Posco brought the aforementioned ruling before the Court of Appeal, which dismissed the case on August 27, 2002. On August 30, 2002, Posco appealed to the Supreme Court, which reversed the original court decision and

remanded to the Seoul High Court. The main cause for the reversal was concerning the interpretation of “unreasonableness”, one of the standards in determining illegality.

Prior to the *Posco* case, the Supreme Court has never dealt with the standard of illegality concerning abuse of a market dominant position. The *Posco* decision was made en banc in which all fourteen Supreme Court justices participated—for only the second time in the history of the Supreme Court when dealing with a competition case. Internal controversy was so fierce that three Justices addressed dissenting opinions. Considering that the decision was made en banc, one would expect that the decision will not be overruled easily.

In *Posco*, the Supreme Court presented a clear-cut opinion as to interpretation of “unreasonableness” which is one of the important standards in determining illegality. In other words, the Supreme Court is saying that anticompetitiveness in the market or any concern thereof should be demonstrated, in order to establish any conduct by a market dominant enterprise as an illegal abusive act. The Supreme Court addressed that:

[A]ny act by a market dominant enterprise will be found illegal when a refusal to deal has a characteristics of an act that can be appreciated as an act having concerns of creating anti-competitiveness from an objective point of view and having intent or purpose to maintain or enhance such enterprise’s monopoly in the relevant market (i.e., intent or purpose of artificially influencing market order, by restricting free competition in the market).¹⁰

The Supreme Court further addressed that:

[T]he KFTC will have to demonstrate that such refusal to deal is an act that has a concern of creating anti-competitiveness such as increase of the product price, reduction in production, impediment to innovation, reduction in number of meaningful competitors, decrease in diversity, etc. and that there has been an intent and purpose to such effects ... [and] ... in the event that the existence of the

¹⁰ See *Posco*, *supra* note 1.

said effects is demonstrated, it can be presumed that there was a concern of anti-competitiveness at the time of such conduct and the intent and purpose to such effects [...] but, under all other circumstances, the totality of the circumstances (e.g., the cause and motive of the refusal to deal, quantity of the refusal to deal, characteristics of the relevant market, the degree of disadvantage that the transacting partner experience as a result of the said refusal to deal, changes in the prices and production in the relevant market, impediment to innovation, reduction in diversity, etc.) should be taken into account and it should be determined whether such refusal to deal contained any intent or purpose as an act having a concern of creating the aforementioned anti-competitive effect.¹¹

The Supreme Court presents two grounds of its decision that “unreasonableness” should be found in the anticompetitiveness in the market.

The first ground is the provisions in the Constitutional Law. That is, the ground of illegality of the refusal to deal should be found in the constitutional principles of freedom of contract and private autonomy. The Supreme Court reasoned that:

in Korea where market economy order is established based on the principle of private autonomy and private property, enterprises are in principle allowed a freedom of contract which contains decision whether to execute a contract, selection of transacting partners, contents of contract, etc., but in cases in which there is a concern of market dominance and abuse of economic power such freedom of contract can be limited.¹²

The Court further stressed the limited involvement of the government, by addressing that such restriction on freedom of contract:

is a revision of the civil law principle of the freedom of contract, but not a negation of the civil law principle itself ... [and that] ... it is equally important to ensure that the regulations under the MRFTA be enforced to nourish the competitive advantage in the global market based on enterprises’ creativeness and ultimately to achieve promotion of consumers’ welfare and economic development, [...] but such restriction should not be unreasonable or excessive.¹³

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

In short, the Supreme Court presented a specific measure of avoiding unreasonable or excessive restriction, and stressed that abuse of a market dominant position should be held illegal only when a competition in the market is hindered.

Another ground that the Supreme Court presented is the necessity to distinguish from provisions restricting unfair trade practices. The MRFTA contains provisions that prohibit ordinary unfair trade practices, as well as those which regulate abuse of a market dominant position. The former governs the incidents in which an act of enterprise that does not have a market dominant position unfairly interferes with fair competition. The corporate conducts which are subject to both types of provisions are in general duplicated, but the scope of unfair trade practice is rather large. The Supreme Court in *Posco* addressed that the abuse of a market dominant enterprise is found illegal only when there is harm to the market competition, and that ordinary unfair trade practices are found illegal when there is a concern of impeding fair transaction in the relationship with a concerned transacting partner, regardless of the effect on market competition. That is, the standard of unfairness is whether a particular enterprise experienced a disadvantage by the concerned transaction.

The Supreme Court in *Posco* specifically provides anticompetitiveness in the market as a standard of illegality of abuse of a market dominant position, and further elaborates elements thereof. The unreasonableness can be recognized when there has been an act of refusal to deal which can be considered as an act which is likely to create an anticompetitive effect from an objective point of view, and is accompanied by intent or purpose of maintaining or enhancing monopoly in the market, such as intent or

purpose of artificially influencing market order by restricting free competition in the market. The Supreme Court further provides examples of anticompetitive effect, such as “increase in price, reduction in production, impediment to innovation, reduction in the number of efficient competitors, decrease in diversity, etc.” In case it is not shown that the said effects have actually occurred as a result of the act of refusing to deal, it should be determined whether the act of refusing to deal was an act which was likely to create an anticompetitive effect and whether there has been any intent or purpose to such effect, taking into account the totality of the circumstances such as background and motive of refusal to deal, detailed facts of the refusal, characteristics of relevant market, degree of disadvantages occurred to the transacting partner as a result of the refusal, any change in price or production in the relevant market, impediment to innovation, decrease in diversity, and so forth. With respect to *Posco* case, the Supreme Court addressed that, as long as Hyundai Hysco only specifies the fact that it was experiencing considerable difficulties such as additional burden of costs associated with import from Japan and instability of transaction as a result of Posco’s refusal to deal and fails to demonstrate the anticompetitiveness in the market, concern thereof, intent and purpose to such effects, then it is not sufficient to determine such refusal to deal as an illegal act, because such effect is nothing but specific disadvantages that enterprises may experience. In addition, in light of the fact that Hyundai Hysco was purchasing necessary materials through import from Japan, that it was engaged in the normal business activities, that it was making profits, and that it failed to demonstrate reduction in production or increase of price, the Supreme Court did not find the anticompetitiveness.

IV. Effects and Significance of the *Posco* Case

The Supreme Court in *Posco* presented that, in order to claim illegality of an abuse of a market dominant position, existence or concern of anticompetitiveness, and intent and purpose of the committing enterprise should be demonstrated. Such position is a convergence toward the global standard. It is true that the competition authorities in the United States, European Community, and other developed countries have different standards in determining unilateral conduct, but it is also true that such standards are converging. Active discussions on such convergence toward a global standard are taking place at international organizations such as International Competition Network and Organization for Economic Co-operation and Development, etc. Major countries such as the United States and EU member states employ an approach based on rule of reason and effect-based analysis in the determining illegality of abuse of a market dominant position. In most cases, economic analysis is indispensable. The Supreme Court's decision in *Posco* has significance in that the outlived trend of applying per se illegal standard and form-based analysis and neglecting economic analysis was overruled overnight. To that extent, the *Posco* case is the most important landmark decision in the history of competition law in Korea.

The decision in *Posco* is expected to prevent any further excessive restriction at least in the field of abuse of a market dominant position. Although a market dominant enterprise is concerned, creative innovation and fierce competition in favor of consumers can be secured as long as such enterprise's acts which do not negatively affect competition are permitted and guaranteed. In addition, the KFTC's inconsiderate attitude

of enforcing the laws without foreseeing false positive should be amended.

It is expected that the roles will be divided between restriction of ordinary unfair trade practices and that of abuse of a market dominant position. In the past, the foregoing two types of restrictions were intertwined and duplicated, creating confusion in determining the priorities in enforcing the competition law. Such confusion should be eliminated. Restriction of abuse of a market dominant position should be established as a means of regulation in order to prevent impediment to innovation and reduction in consumers' welfare incurred by restriction of market competition. Restriction of ordinary unfair trade practices should redeem its original role as a means of remedy and prevention of specific harms to particular transacting partners or particular consumers, and in the long run, such role should be turned over to the courts.

The *Posco* decision has provided a policy function of the judiciary, in its efforts to supplement the loopholes in the MRFTA. In fact, the words of the provisions regulating the abuse of a market dominant position do not specify the "anti-competitiveness" as an element of illegality, but only provide ambiguous standard such as "unreasonable". The Supreme Court in *Posco*, however, made it clear that, although the words "unreasonable" appear in provisions concerning abuse of a market dominant position and other provisions concerning unfair trade practice as well, totally different standards should be applied in each case when the contents of each provision are examined in light of the context. Therefore, the *Posco* case resolved the unreasonableness of the relevant provisions in the MRFTA and underdeveloped nature of enforcement of Korean laws.

In the future, the MDP Guidelines and Guideline on Examination of Ordinary

Unfair Trade Practices (UTP Guideline)¹⁴ should be revised and operated pursuant to the principle and standard given in *Posco*. Currently, the UTP Guideline splits the unfair trade practices into two different types of acts, and distinguishes acts that need to be determined based on anticompetitiveness and acts that should be examined based on fairness. However, such provisions should be amended. Further, the MDP Guideline should, at least with respect to relevant provisions concerning abusive acts with exclusionary nature, accept the standard addressed in *Posco* and be amended accordingly.

Lastly, the *Posco* decision explicitly presented the basic statement that the objectives of the competition law should be protection of competition, not of competitors, in light of the legislative intent of the MRFTA which promotes competition. Such a statement is a remarkable achievement.

The next question is how the standard of anticompetitiveness will be tested in matters involving restriction of a market dominant position. Also, further examination is required as to how much restriction upon competition would constitute illegality, and how such illegality would be tested. The foregoing questions are expected to be resolved through specific cases. In addition, there is a question of how and on which standard an exploitive abuse should be determined. Now the time has come to ponder on whether an explosive abuse should be included in Article 23 of the MRFTA, or whether specific incidents of harm should remain a standard in determining illegality.

Pending the KFTC's announcement of the result of its investigation on abuse of a market dominant position by major multi-national corporations such as Intel and

¹⁴ See *MDP Guideline*, *supra* note 8 and KFTC Regulation No. 26, Guideline on Examination of Ordinary Unfair Trade Practices (May 11, 2005) [hereinafter *UTP Guideline*].

Qualcomm, the Supreme Court's decision in *Posco* deserves further attention because the KFTC now has to render its decision in accordance with the aforementioned standard provided in *Posco*.