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**Prospects of Korean Antitrust Enforcement  
Policy  
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Joseph Seon Hur & Paul S. Rhee

Yoon Yang Kim Shin & Yu

## **Prospects of Korean Antitrust Enforcement Policy During an Economic Crisis**

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### **I. INTRODUCTION**

The financial crisis that originated in the United States is spreading throughout the world and is now causing an economic crisis by infiltrating the real economy. This crisis is of a magnitude that has rarely been witnessed in the past.

This is also the case in Korea. Korea has a small but open economic system. It has heavily relied on exports and foreign investments for growth and jobs, and foreign investors have been active players in the Korean stock and investment markets.

Accordingly, the current real economic crisis stemming from the global financial crisis is directly affecting the Korean economy. Stock prices have been cut in half compared to their highest point and the value of the Korean currency has plummeted by about 60 percent compared to a year ago. Interest rates in the market are still going up despite interest rate cuts by the Korean central bank. Banks are luring deposits with high interest rates in order to increase capital, but their credit ratings are not getting better. As unemployment increases with the economic downturn, some pessimistic institutions in

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\*Joseph Seon Hur is a Senior Consultant at Yoon Yang Kim Shin & Yu in Seoul, Korea and a former Secretary General of the Korea Fair Trade Commission. He can be reached by email at josehur@yoonyang.com. Paul S. Rhee is the Senior Foreign Counsel/Partner in the Antitrust Practice Group of Yoon Yang Kim Shin & Yu in Seoul, Korea. He can be reached by email at psrhee@yoonyang.com.

the private sector are starting to announce negative growth projections for next year. Companies are conducting layoffs and taking production cuts for granted and more companies are becoming insolvent. Korean industries are standing in the middle of an economic crisis.

The current economic crisis clearly shows that the market economy has failed in the real world. How should competition laws and policies that are based on the market economy, the key factor of which is competition, respond to this crisis? As in other countries, a new trend is emerging in Korea that looks to the government instead of the market for coordination and control by contending that the current crisis has been caused by a lack of regulation and supervision over the financial markets.

The new administration of Korea, which has been steering the economy into deregulation towards a smaller government by relying on the market instead of the government, and on the creativity of entrepreneurs instead of public officials, is now faced with a backlash due to this global financial crisis.

In this brief article, we will discuss how the Korean competition authority faced with an economic crisis might change their enforcement policies or whether they will resist any change. We will first examine the systematic devices available under the Monopoly Regulation and Fair Trade Act of Korea (“MRFTA”) that may be used to incorporate industrial policy needs in times of an economic crisis. Since Korea already experienced a similar financial crisis in 1997, we will then review how the Korea Fair Trade Commission (“KFTC”) changed its enforcement policies during that financial

crisis. In addition, we will try to predict how and to which direction the KFTC policies would change by analyzing the KFTC's recent official positions, partial forecasts by some domestic experts, the level of the KFTC's independence in the Korean government, and the political and economic power of competition policies.

## **II. ANALYSIS OF THE MRFTA PROVISIONS INCORPORATING INDUSTRIAL POLICY NEEDS**

The MRFTA recognizes the needs of industrial policies and the national economy to a certain degree.

- According to Article 1 of the MRFTA, although one of the important objectives of the MRFTA is to promote fair and free competition, the purpose of the MRFTA is to seek a balanced development of the national economy as a result. Although there are some court precedents that refer to this objective as a standard for interpreting individual provisions of the MRFTA, our belief is that this is a confusing, outdated, and misleading provision, which makes the enforcement standards for competition laws vague.
- In addition, similar to other countries, Article 7(2) of the MRFTA specifies a failing company defense as a defense against regulation of business combinations. Depending on its interpretation, this provision may be interpreted as a device to give the competition authority a broader discretion regarding corporate combinations during an economic crisis. Furthermore, given that this provision also recognizes an efficiency defense, the KFTC's business combination

- guidelines based on this provision provide that efficiency for the entire national economy, including, *inter alia*, job creation, development of local economies, contribution to related industries, substantial contribution to stable energy supply, and improvement of environmental pollution, should be considered as well as the efficiency which is specific to the merger. Such a provision on the efficiency of the entire national economy is an outdated provision distorting competition policies.
- The MRFTA also provides that cartel activities may avoid regulation if the involved companies target overcoming recession, restructuring the industry, reorganizing trade conditions, and/or improving the competitiveness of small and medium sized businesses and obtain the KFTC's prior approval based on some additional conditions. In other words, the KFTC is legally authorized to approve cartel activities if targeted to achieve such industrial policy objectives as the foregoing. This is an outdated provision in itself. Fortunately, however, the KFTC has maintained a sound implementation record and has not allowed such approval of cartel activities except for only one or two cases, which is understandable in competition policy, during the last 10 years. Finally, the MRFTA allows fines to be paid in installments when the relevant company is faced with a material crisis due to deteriorated business conditions or a significant cash crunch. In addition, the MRFTA allows fines to be reduced up to 50 percent if debtor rehabilitation or bankruptcy proceedings commence against the examinee.

### **III. ANALYSIS OF KFTC'S ENFORCEMENT EXPERIENCES DURING PAST FINANCIAL CRISIS**

Amid the Asian financial crisis in 1997, Korea also went through one of the worst economic crises, subjecting Korea to a bailout by the International Monetary Fund. The Korean government is thought to have overcome the crisis faster than expected through swift and radical restructuring and decisive and fast enhancement of competition policies. During this crisis, the KFTC very leniently examined reported business combination cases in connection with companies in dire conditions, approving most of them. For example, in the case of the business combination of Hyundai Motor and Kia Motor, which were the number one and number two companies, respectively, in the domestic automobile industry, the KFTC approved their business combination although their market share after their business combination exceeded 90 percent. At that time, the KFTC used the failing company defense to justify such a business combination. The failing company defense is applicable only when there is no other company willing to acquire the failing company, but it has not been disclosed how extensively this defense was analyzed and proved in connection with the business combination of Hyundai Motor and Kia Motor.

Even after analyzing the statistics regarding the KFTC cases during the financial crisis from 1997 to 1999, it is difficult to detect any meaningful changes relating to the financial crisis. The statistics only show that the KFTC's enforcement was strengthened overall as a result of an epochal enhancement of competition policies by the Korean

government as a way to overcome the financial crisis.

#### **IV. KFTC'S OFFICIAL POSITION AND RECENT PREDICTIONS FROM KOREAN ANTITRUST COMMUNITY**

First, let us start with the KFTC's official position. Chairman Yong-Ho Baek of the KFTC recently declared that the KFTC's enforcement policy would not change despite the economic crisis. During his speech made at a seminar on November 19, 2008, Chairman Baek said that although other Korean governmental agencies such as the National Tax Service or Public Prosecutors' Office changed their policies to reduce such governmental interventions as investigations, the KFTC would consistently maintain its enforcement policy because the nature of the KFTC was different from that of other governmental agencies. Under his analysis, although it is true that the current chaos resulted from the failure of the market system under lax regulation in developed countries, the chaos in Korea resulted from the government's failure, which caused the market to malfunction due to governmental intervention, regulation, and interference. He affirmed, therefore, that the Korean government should continue to push for pro-market policies including tax reduction, deregulation, and a small government for market recovery. Regardless of whether its judgment is correct or not, we can infer the KFTC's official position from this statement. Other officials of the KFTC have also made several statements which conform to Chairman Baek's position.

It is not easy to summarize the predictions of experts of the antitrust community in Korea. However, we conducted a quick informal survey with about 20 lawyers,

scholars, businessmen, and KFTC officials. Although this survey may not have statistical meaning, it may be viewed as significant anecdotal data. According to this survey, most of these experts believed that the economic crisis would continue for one or two more years. They expected that, while possible antitrust cases would increase in connection with business combinations in particular, cartel investigations and accusations of abuse of market dominant positions would not increase. Many predicted that the KFTC would pass up investigating cartel cases or treat financially vulnerable companies more generously by reducing or exempting fines. As to business combination cases, more experts expected that the KFTC would apply its examination guidelines in a more lenient manner rather than remaining unchanged. Specifically, they thought that the KFTC would be more generous when applying its guidelines for examinations of business combinations or would be more agreeable in accepting the failing company defense. They expressed mixed opinions regarding abuses of market dominant positions. Overall, these predictions appear to be a natural phenomenon during an economic crisis and could be understood by considering the KFTC's past experience and the incorporation level of competition policies in Korean society.

## **V. THE NEED FOR CONSISTENT ENFORCEMENT OF COMPETITION LAWS AT TIMES OF CRISIS**

Competition laws must be observed even during an economic crisis. Indeed, competition laws need to be implemented more strictly in times of economic crisis. If anticompetitive business combinations are permitted during difficult situations of an



economic crisis, the oligopolistic market structure is likely to cause innovation to drop and consumers to lose the benefits of competition. In overcoming the economic crisis, if the government turns a blind eye to cartel activities such as bid-rigging, market allocation, and price-fixing, we are afraid that the competition rules which business people have been trained to follow will collapse in addition to directly harming consumers. Market-dominant companies should not be permitted to exclude their competitors during such economic confusion. How different will the markets of each country look after the current crisis passes? Will they turn into markets with large companies slumping around that are cost-inefficient, insensitive to consumer demands, and lazy in innovation? Or will they become markets full of efficient and innovative companies, regardless of their size, that are cost-efficient, equipped with new technology and strategies, sensitive to consumer demands, and accustomed to innovation? This all depends on whether each country enforces its competition laws consistently.

## **VI. CONCLUSION: KFTC'S ENFORCEMENT POLICY ARE VULNERABLE TO CRISIS**

The KFTC is asserting that it will not change its enforcement policy despite the economic crisis, while experts expect it will ease its policy. However, we believe that we need another analysis to see how the KFTC's official position will be enforced in practice when an even more severe economic crisis becomes reality in one or two years. In other words, the official statement of principles could differ from actual enforcement practices. We would like to argue that we should wait and see whether the KFTC will refuse to be

as considerate for industrial policy needs in enforcing competition laws as it was in a peaceful era, or veer to accommodating industrial policy needs to some extent.

The Korean government is taking emergency measures in order to overcome the economic crisis like the United States and the European Union. For example, the Korean government is injecting capital into financial institutions, aiding the cash flow of construction companies, and announcing government support plans for major industries such as the shipbuilding industry and the petrochemical industry. According to the news media, the petrochemical industry even requested the government to lower the KFTC's merger examination guidelines. In this regard, supplying government funds to risky companies of a specific industry may have an anticompetitive effect of breaking the level playing field. Nevertheless, the KFTC remains silent. In order to understand this silence, one needs to assess the position that the KFTC takes in the Korean government and how powerful the competition policies would be against industrial policies in Korea.

Compared to other advanced countries, the KFTC holds a very high position in the governmental hierarchy as the Chairman of the KFTC is considered to be minister-level. The Chairman of the KFTC is treated just like ministers of other economic-related ministries and, although the KFTC Chairman is not an official member of the Presidential cabinet, he regularly attends and speaks at cabinet meetings. The KFTC Chairman also attends meetings of economy-related ministers as a regular member. Therefore, the KFTC Chairman is in a position to be, if determined, independent of industrial policy demands if not actually overcoming industrial policies. However, that the KFTC

Chairman has the right to attend various minister-level meetings also means he has an obligation to cooperate with policy adjustments in the government.

This status has served as a positive function to promote regulatory reforms until now, but it becomes a weakness in an era of national emergency such as when an economic crisis compels the KFTC to accommodate industrial policy demands. In addition, we can see the possibility that the current KFTC Chairman will position the KFTC and enforce KFTC policies in a larger framework of economic policies, rather than asserting the independence and superiority of competition policies. This thought is supported by the fact that the KFTC considers more dynamic market factors in merger review and policy-driven investigations of industries where there are large price gaps between domestic and foreign markets, which seem to come from a pricecontrol perspective of government. Another important factor concerns the devoted expertise of officials of the KFTC. The current challenge will reveal the truth about how much strength they have accumulated to abide by the principles of competition in times of an economic crisis. We are concerned that they may not yet have such strength.

Therefore, if the government leads the restructuring efforts in the construction and petrochemical industries and, in particular, financial industries through bankruptcy or the merger of large banks (as in the United States), we believe that the KFTC is likely to be more flexible in accepting the failing company defense as the experts predicted rather than applying the same current standards in its investigations. To be frank, we still have no idea as to how the competition authorities of the United States, Europe, France,

Germany, and United Kingdom will accept and justify a governmental support which is contradictory to existing competition policies for the banking and automobile industries.

It will be a challenge for the KFTC to apply the same strict yardstick they did before if companies slipping into distress apply for the KFTC's pre-approval of cartel activities aimed at overcoming an economic slowdown. We must wait and see whether they stand up to the challenge. Likewise, we must also wait and see whether the KFTC will actively try to find and aggressively investigate the cartel activities that will infest the market in an economic downturn, or turn a blind eye.

Cartel regulations will pose the same challenge to competition authorities of foreign countries. The antitrust policies of various countries are facing the biggest test in the history of antitrust. Once the current crisis passes, we will have another opportunity to confirm whether competition principles are indeed key policies in our market economy. As soon as the current crisis subsides, we will be able to see which countries' competition authorities and which leaders of such competition authorities were right and wrong. This test will confirm the accessibility of competition policies in a market economy and will offer a historical opportunity to open new visions and directions for competition policies.