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I. INTRODUCTION

In recent years, antitrust enforcement agencies around the globe have enjoyed more efficient and effective cartel enforcement in no small part thanks to the burgeoning use of leniency programs by cartel members who fear that other cartel members will confess their violations faster in return for leniency. In addition, since the global crackdown of cartel activities and attendant publicity surrounding astronomical fines, and even substantial jail terms, companies and individuals have certainly become more sensitive to the issue. Perversely, at least in some cases, they have also become more sophisticated in entering into and implementing alleged cartel agreements. As a result, these days one would be hard pressed to find an explicit cartel agreement, let alone a written cartel agreement, that neatly sets forth the terms of the agreement complete with signatures.

Against this backdrop, antitrust agencies have pushed the boundaries of the definition of a cartel agreement. In a sense, that is not new. The U.S. antitrust enforcement agencies and private plaintiffs have long fought against accused cartelists regarding such issues as "conscious parallelism" and so-called "facilitating practices." However, in the United States, the enforcement agencies now tend to pursue these less than clear cut cartel cases as "civil" enforcement cases rather than "criminal" cases that, by definition, require a higher evidentiary standard. This rather well-established "criminal v. civil" treatment in the United States has led to a somewhat more predictable treatment of those concerted practices that fall short of price-fixing or market allocation cartels.[2]

In the European Union, however, where there are no community-wide criminal sanctions for cartels, the European Commission and some member countries have expanded the definition of the prohibited concerted conduct to include certain practices that have not yet universally come to be condemned as cartels. In those cases, the European Commission and national

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[2] For example, in April 2013, the U.S. Federal Trade Commission ("FTC") and Bosley, Inc., a hair replacement company, entered into a consent agreement to settle the FTC's charges that Bosley engaged in improper information exchanges with competitors in violation of the "unfair methods of competition" prong of Section 5 of the FTC Act. Under the consent agreement, Bosley agreed to take certain corrective measures without admitting any wrongdoing.

competition agencies have claimed that certain information exchanges amounted to improper concerted conduct by "object."[3]

Similarly, in Korea, the Korea Fair Trade Commission ("KFTC") has endeavored to broaden the reach of the Monopoly Regulation and Fair Trade Act ("MRFTA"), the South Korean antitrust statute. The KFTC is the primary competition enforcement agency in Korea that imposes corrective measures and administrative fines on violators of the MRFTA. Although it does not conduct "criminal" probes of alleged cartels, based on its administrative investigations the KFTC refers matters to the Prosecutor's Office for criminal proceedings. Therefore, any KFTC's determination based on its expanded definition of cartels will likely have a material effect on the criminal enforcement of cartels in Korea. As such, the KFTC's treatment of information exchange and other facilitating practices and the Korean judiciary's responses warrant careful review.

In this paper, we will discuss a recent Seoul High Court decision in the case of 16 life insurance companies' information exchanges. First, we will examine the KFTC's decision that found the requisite cartel agreement. Then we will discuss the Seoul High Court's opinion that overruled the KFTC decision. We will then discuss what this may mean to the practice of information exchanges in Korea.

II. KFTC DECISION IN THE *SIXTEEN LIFE INSURANCE COMPANY CARTEL CASE*

On December 15, 2011, the KFTC issued a formal written decision finding that 16 life insurance companies engaged in improper concerted conduct in violation of Article 19 of the MRFTA.[4] Specifically, the KFTC held that from 1998 to 2006 various combinations of 16 life insurance companies: (1) "agreed" to fix the discount rate for fixed-rate individual insurance products and the reference rate for variable rate individual life insurance products; and (2) "exchanged non-public information" on future discount rates and reference rates and then used such information to decide their own respective rates.

The KFTC further decided that the discount and reference rates amounted to the price of the relevant products—individual life insurance products in this case.[5] As such, the KFTC held

[3] For example, in March 2013, the EU General Court affirmed the EC's findings in the so-called "bananas cartel" case that bilateral pre-pricing information exchanges amounted to a concerted practice with the object of restraining competition in violation of Article 101 of the TFEU. Previously, in the *T-Mobile* case, the European Court of Justice confirmed the EC's decision that one single exchange of sensitive information might amount to a violation of Article 101 by object. In the United Kingdom, as shown in the *RBS/Barclays* case, even a unilateral one-way disclosure of sensitive information might be illegal. In Germany, among other enforcement actions, the Bundeskartellamt recently fined confectionery good producers for exchanging sensitive information. While this is certainly a worthy topic, it is outside the scope of this paper. Instead, this paper focuses on the state of information exchange and its antitrust enforcement implications in Korea.

[4] KFTC Decision No. 2011-284 (December 15, 2011).

[5] The "discount rate" is the expected rate of return on the investment of the insurance policy premiums. More technically, it is the rate used to calculate and match the net present value of the expected sum of insurance premiums received from policyholders and return on investment on one hand, and the net present value of the expected insurance proceeds to pay out to policyholders for fixed rate life insurance products on the other hand. The lower the discount rate, the higher the insurance policy premiums that individual policyholders will have to pay. The "reference rate" serves a similar function for variable rate life insurance products. It is the rate to calculate the

that the information exchange in this matter itself constituted an improper agreement in violation of the MRFTA. The KFTC imposed administrative fines and corrective measures requiring that the insurance companies refrain from exchanging sensitive non-public information with competitors.[6]

The alleged cartel involved two distinctive time periods and concerted practices. From 1998 to early 2001, the KFTC alleged that the insurance companies actually agreed to directly fix the discount rates and reference rates. On the other hand, from early 2001 to 2006, they exchanged non-public, pre-market disclosure information on future discount rates and reference rates and then used such information to set their own respective rates. However, the KFTC decided that, for purposes of Article 19 of the MRFTA, the two practices and periods constituted one continuing improper concerted act.

Regarding the information exchange component of the alleged cartel, the KFTC determined that regular, frequent, and comprehensive exchanges of sensitive future rate information increased the transparency in the marketplace in a negative way. Rather than making potentially relevant information available to consumers to help make informed decisions on various life insurance products, the practice facilitated the life insurance companies to monitor and react to one another's strategy and, as a result, facilitated the formation of a cartel or helped implement such a cartel arrangement.

In arriving at this determination, the KFTC examined: (1) the nature of the market and the concentration level; (2) the nature, type, and specificity of the information exchanged; (3) the timing and frequency of exchanges; and (4) the secrecy of the exchange, *i.e.*, that it was shared among competitors only and not disclosed to the public.

The KFTC did not allege that the insurance companies agreed to directly fix the rates in the period from 2001 to 2006 but rather that they exchanged sensitive information and then, reflecting one another's information, decided their own respective rates. In other words, according to the KFTC, the agreement after 2000 was not one of directly and jointly fixing the rates. Rather there was an agreement to indirectly, but still jointly, fix the price by exchanging sensitive information on the future rates that determined to the price of the relevant products and thereby eliminated the risk of each company independently deciding rates. As such, the

amount of proceeds to pay out to policyholders. The higher the reference rate, the higher the amount of proceeds that policyholders will receive upon maturity.

[6] However, the KFTC acknowledged that until early 2000 there might have been special circumstances. Specifically, from the early 1990's to March 2000, under both the Product Information Bank System pursuant to the relevant insurance regulations and prevailing industry practices, insurance companies were allowed to use other companies' discount rates, risk rates, expense ratio, and all other factors in developing and selling new products. Moreover, only in June 2000 did the KFTC inform the insurance industry that the KFTC would enforce and apply the prohibition on cartels under Article 19 of the MRFTA. In the late 1990's and early 2000's, Korea suffered from the well-publicized Asian financial crisis and was just coming out of the crisis. During the crisis, there were special rules for reference rates. Therefore, while alleging that price-fixing meetings and agreements also occurred in 1998 to 2000; for purposes of fine calculations, the KFTC decided that the beginning date of the relevant cartel at issue was sometime in June 2001 or thereafter.

KFTC held that the exchange of sensitive information itself constituted an improper price-fixing agreement in violation of Article 19(1) of the MRFTA.[7]

III. SEOUL HIGH COURT DECISION

On July 17, 2013, the 6th Administrative Department of the Seoul High Court reversed the KFTC's decision and nullified the administrative fine imposed on Hanhwa Life Insurance.[8] The Court held that the information exchange at issue, in and of itself, did not constitute an illegal concerted agreement in violation of Article 19(1) of the MRFTA.

Although the KFTC alleged one single conduct continuing from 1998 to 2006, the Court looked at two distinctive alleged cartel periods with two different types of conduct: (1) the first period from 1998 to 2000 where the companies allegedly agreed to directly fix the discount and reference rates; and (2) the second period from 2001 to 2006 where the companies exchanged non-public information on future rates and then, reflecting such exchanged information, decided their own respective rates.[9]

Regarding the relationship between information exchange and improper concerted conduct, the Court noted that Article 19(1) of the MRFTA requires not just an exchange of price information but an "agreement" to fix, maintain, or change prices. While an agreement could be an implicit one; at a minimum, there must be an agreement or a meeting of the minds as to the idea that the competitors will jointly decide prices. Therefore, for the second period (from 2001 to 2006), as long as there was no explicit or even implicit price-fixing agreement among the life insurance companies, the mere proof of price information exchanges did not establish a violation of Article 19 of the MRFTA.

The Court further noted that there was no genuine dispute as to the fact that the life insurance companies used not just the exchanged information on future rates to determine their own discount rate, but also comprehensively used numerous other critically relevant factors—such as the prime rate, going rates in the marketplace, their own return on assets ratio, level of customer recognition of each brand, their own competitive position, and the like. Similarly, the Court also determined that there was no genuine dispute as to the absence of uniformity or matching patterns in the competitors' actual discount rates.[10]

The Court apparently felt that it was inherently inconsistent and irreconcilable for the KFTC to acknowledge that the insurance companies "individually decided their own rates"—

[7] Prior to the *Sixteen Life Insurance Company Cartel* case, in addition to holding that information exchanges strongly supported the presumption of a cartel agreement, the KFTC intimated that certain information exchanges in and of themselves might constitute illegal cartel agreements. *See* KFTC Opinion No. 2011-67 (June 9, 2011) (Three Soy Milk Company Cartel case); KFTC Opinion No. 2011-143 (August 9, 2011) (Five Cheese Company Cartel Case); KFTC Decision No. 2012-107 (Four Ramen Noodle Company Cartel case).

[8] *Hanhwa Life Insurance v. KFTC*, 2012Nu2346 (Seoul High Court, July 17, 2013).

[9] After a lengthy discussion on the legality of information exchange and noting that whatever conduct took place in the first period (from 1998 to 2000) it must be deemed to have stopped because of the changed nature and type of conduct in the second period, the Court summarily dismissed the first period simply as falling outside the statute of limitations.

[10] While the Court characterized the facts of the case this way, the KFTC's decision does not actually concede that there was no genuine factual dispute. One way to read the Court's findings may be that the Court, on its own review of the facts, decided that there was no genuine dispute on these points.

albeit after exchanging certain sensitive information with others—but also allege at the same time that they had "jointly decided" the rates. Therefore, the Court held that the mere fact that insurance companies exchanged information and then individually decided their own rates did not prove that there was the requisite "agreement" under the MRFTA. Moreover, the Court noted, there was no other sufficient evidence to satisfy the "agreement" requirement.

IV. LESSONS LEARNED AND YET-TO-BE LEARNED

The Seoul High Court clearly held that an information exchange in and of itself does not constitute an improper agreement to fix prices. This case may represent an example of the judicial check and balance on the KFTC's aggressive (or at least zealous) enforcement initiatives. If the KFTC had direct, or even other circumstantial, evidence of a direct price-fixing agreement, it surely would have brought a different kind of case. Furthermore, it may very well be that the unique and complex nature of the insurance and other financial products made this case less than a perfect choice for the KFTC to bring "an exchange of information itself as a cartel" case.

At the same time, another appeal by other life insurance companies from the same KFTC case is pending before the 7th Administrative Department of the Seoul High Court. It is not clear at all how this particular Department of the Seoul High Court will decide that appeal.[11] Furthermore, the Seoul High Court's *Hanhwa Life Insurance* decision itself is on appeal before the Supreme Court. Thus, while the Seoul High Court's decision certainly counts as a setback to the KFTC, until the Supreme Court speaks on the issue, it is premature to rejoice or despair.

There are a few other observations:

First, even if an exchange of sensitive information in and of itself does not constitute an illegal price-fixing agreement, it still is relevant and likely powerful circumstantial evidence in proving an implicit agreement. Of course, as the Seoul High Court noted, there probably needs to be some additional evidence to satisfy the agreement requirement, especially if the requirement under Article 19(1) of the MRFTA is not just any agreement but an agreement to fix prices.[12]

Second, the Seoul High Court found that the life insurance companies relied on numerous factors other than just the exchanged information on non-public future rates to determine their own independent discount and reference rates. This may be construed to mean that the exchanged information did not materially affect each life insurance company's pricing decision. While the court did not explicitly state so, another way to construe this determination is

[11] Even though all appeals of KFTC decisions have to be filed with the Seoul High Court, almost invariably different departments within the Seoul High Court are assigned to separate cases and sometimes issue potentially conflicting opinions. Thus, while technically it is not a circuit split in the U.S. sense; in reality, these are often akin to circuit splits in the United States. What is even more confusing is that when Seoul High Court decisions are appealed to the Korean Supreme Court, they may be also assigned to different departments within the Supreme Court. As a result, it is not uncommon for different departments within the Supreme Court to issue seemingly conflicting decisions rather than resolving department splits within the Seoul High Court.

[12] Although the Seoul High Court did not say it this way, the Court's observation may be viewed as consistent with the teaching of the *Monsanto* case that "there must be evidence that tends to exclude the possibility of independent action by the parties." *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Alternatively, it may be viewed as consistent with the *Container Corp. of America* case's focus on the "effects" of the information exchange on prices. *See United States v. Container Corp. of America*, 393 U.S. 333 (1969).

that the Court implicitly rejected the KFTC's contention that the exchanged information (*i.e.*, non-public future discount rates and reference rates) amounted to the price of the relevant products. One could even posit that if the discount rate is not really the price of the relevant product, then exchanging information on this measure, or even agreeing to a certain discount rate, may not be by itself a price-fixing agreement. Of course, the Court did not expressly address this theoretical possibility and it just remains an alternative interpretation.

Perhaps the most important lesson of this case is this: Antitrust enforcement agencies by their very own nature do, and indeed need to, push the boundaries of the law where appropriate and necessary. However, there also must be an independent judiciary that will critically assess the enforcement agencies' agenda and keep them in check in an effort to strike a fine balance. Until the Supreme Court renders a decisive opinion on this issue, or another Department within the Seoul High Court issues a conflicting opinion, at least for now an exchange of information—even if it is about sensitive, non-public information that may affect or influence one's pricing decision—is not by itself sufficient to constitute a "price-fixing agreement" for purposes of Article 19 of the MRFTA.[13]

[13] Even if an information exchange were an agreement for purposes of Article 19 of the MRFTA, that would not be the end of the inquiry. Under the Supreme Court's recent decisions in the *BMW Dealers* case, *Kolon Glotech et al. v. KFTC* (Supreme Court judgment no. 2010Du18703 delivered on April 26, 2012), and the *Lexus Dealers* case, *D & T Motors et al. v. KFTC* (Supreme Court judgment no. 2010Du11757 delivered on April 26, 2012), there is no *per se* illegal concerted conduct category in Korea. The KFTC would still need to define a proper relevant market and an anticompetitive effect in the properly defined relevant antitrust market. *See* Cecil Saehoon Chung & Sung Bom Park, *Recent Korean Supreme Court Decisions on Per Se Illegality and Noerr-Pennington in Korea,* ABA Section of Antitrust Law, Cartel & Criminal Practice Committee Newsletter (Fall 2012).