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I. INTRODUCTION

The Korea Fair Trade Commission ("KFTC") has been at the forefront of public enforcement of Korean competition law. Delegated by the Monopoly Regulation and Fair Trade Act[2] ("MRFTA") with the independent authority to investigate and remedy competitive harm, the KFTC is uniquely situated to pursue the mission to protect the marketplace from abuse of dominant market power and unfair trade practices.

As the IT sector constitutes the critical mass of the Korean economy, the KFTC's considerable interest in guarding the IT sector free from competitive injury is warranted. For example, in the 1990s when competition law enforcers in the United States and the European Union were investigating Microsoft's business practices that had allegedly driven new competitors out of the markets, the KFTC concluded that Microsoft violated the MRFTA by abusing its dominant position, ordered structural changes in Windows, and levied a 32.5 billion won fine (approximately $33.5 million at the time). One literature called the KFTC's remedial approach in the Microsoft investigation "creative," commenting that the remedy was praiseworthy for its potentials not only to effectively restore competition, but also to re-empower consumers.[3]

Viewed in this light, the KFTC's enforcement action against Qualcomm should create little surprise. All the more so, because Korea was the first country that successfully commercialized Qualcomm's CDMA (Code Division Multiple Access) technology in the 1990s, leading to Qualcomm's dominant position in the IT sector. Unable to compete in the Korean market despite the capability to produce CDMA chips, Texas Instrument and Broadcom petitioned the KFTC in 2006 to investigate Qualcomm's licensing practices. The KFTC's investigation was concluded in 2009 with the finding that Qualcomm had abused its dominant position in the CDMA markets. On appeal, the Seoul High Court in 2013 affirmed the KFTC's determinations and remedial orders for the most part. The case is currently pending before the Korea Supreme Court.

This paper walks through the KFTC's enforcement action against Qualcomm and reviews why the KFTC and the court concluded that Qualcomm violated the MRFTA by abusing its

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[2] An English translation of the Monopoly Regulation and Fair Trade Act is *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=62&pageId=0401.

[3] ANDREW I. GAVIL & HARRY FIRST, THE MICROSOFT ANTITRUST CASES 230-31, 306 (2014).

dominant position in the CDMA markets, focusing on how they interpreted Qualcomm's FRAND commitments. Part II looks into the KFTC's findings of fact and conclusions of law in the administrative proceeding. Part III examines the Seoul High Court's reasoning that the KFTC's action was justified.

II. THE ADMINISTRATIVE PROCEEDING BEFORE THE KFTC

After a lengthy investigation and administrative adjudication lasting for more than three years, the KFTC concluded that Qualcomm had abused its dominant position in the CDMA markets in three ways: (i) discriminatory patent licensing, (ii) conditional rebating, and (iii) demanding post-patent term royalty payments.[4] This paper focuses on the charge of discriminatory patent licensing because implications of Qualcomm's standard-essential patents ("SEPs") and fair, reasonable, and non-discriminatory ("FRAND") commitments were explored therein.[5]

In licensing CDMA technology to Korean mobile phone makers, Qualcomm was found to have charged "discriminatorily" higher royalty rates to the domestic firms who purchased CDMA chips from its competitors and to have offered a rebate (for example, 3 percent) to firms on the condition that they fill most of their chip demand from Qualcomm. Qualcomm's chips read on its SEPs, and after the Korean government in 1993 adopted CDMA technology as the national standard, Qualcomm promised to license SEPs on FRAND terms.

Underlying the KFTC's finding of liability were three patent licensing practices that Qualcomm was charged as having engaged in:[6]

1. A royalty discount program discriminating against export-model mobile phones using non-Qualcomm chips—where Qualcomm charged a 5.75 percent royalty rate for these users while offering a discount of up to 5.0 percent royalty rate for Qualcomm chip users.
2. A royalty cap program imposing a $30 cap on non-Qualcomm chip users while imposing a $20 cap on Qualcomm chip users.
3. A price-netting program discriminating against domestic-model mobile phones using non-Qualcomm chips by providing for Qualcomm chip users only a deduction of the chip value from a phone price when accounting the royalty.

The KFTC held that such licensing practices violated Article 3-2(1)(iii) of the MRFTA, which prohibits "unjustly hindering the business undertaking of others," and further violated Article 23(1)(i) which prohibits "unjustly treating a trading party in a discriminatory manner." The KFTC also held that Qualcomm's conditional rebating and post-patent term licensing practices violated the MRFTA. With an eye shifted toward remedying competitive harms arising from the violations as found, the KFTC ordered Qualcomm to cease and desist all of such

[4] KFTC Decision and Order No. 2009-281, 2009JiSik0329, Dec. 30, 2009 (S. Kor.).

[5] For the same reason, this paper discusses the charge of conditional rebating only to the extent related to the charge of discriminatory patent licensing and does not discuss the charge of post-patent term royalty demands.

[6] Il Kang & Hee-Eun Kim, *Enforcement of Competition Law in Standardization and Abuse of Intellectual Property Rights in Korea and Europe*, 161 J. OF COMPETITION 68, 78 n.31 (2012).

practices and levied a fine of 273 billion won (approximately $208 million at the time), creating a record-high fine level against a single firm.

Because Article 3-2(1) prohibits "abuse of dominant market position," the KFTC first had to define the relevant market and resolve whether Qualcomm was in a dominant position in that market. The KFTC defined the market as the "CDMA technology market" and found that Qualcomm had "complete" monopoly power therein. The CDMA technology market was characterized as encompassing all patented technologies owned by Qualcomm and incorporated into the national CDMA standard. In this market definition, the KFTC reasoned that standard implementers could not switch to viable alternatives in response to a significant royalty increase for a non-transitory period, because no other technologies could enter the CDMA technology market due to their inability to realize the CDMA standard.

Next, the KFTC determined—pursuant to its Guidelines for the Abuse of Market Dominant Position—that Qualcomm's licensing program had "unjustly discriminated a price or condition against a trading party"[7] in violation of Article 3-2(1)(iii). The KFTC reasoned that Qualcomm owned the standardized CDMA technologies and that Qualcomm was a "vertically integrated" firm engaged in both manufacturing CDMA chips and licensing CDMA technologies. It concluded that, with its dominant market power in the CDMA technology licensing market, Qualcomm had restricted competition in the CDMA chip market by charging "unjustly discriminatory" royalty rates to non-Qualcomm chip users. In this narrative, Qualcomm was perceived as extending or "leveraging" its market power in the licensing market to demand higher royalties from non-Qualcomm chip users, in an attempt to interfere with the business of chip market competitors.

The KFTC further held that Qualcomm's conduct had "unjustly" hindered the business undertaking of others. The three licensing practices in combination, the KFTC found, were "intended" to restrain competition in the CDMA chip market with the "objective probability" of success. The KFTC inferred the "intent" to restrain competition from the following facts:

1. Qualcomm had been charging discriminatory royalties since 2004, when the license at issue was entered into, coinciding with the timing of when the market share of non-Qualcomm chips was growing.
2. Qualcomm incorporated into the 2004 license a termination clause under which Qualcomm could terminate the license should a licensee fail to purchase from Qualcomm a certain proportion of the chips it needed.
3. At the time of standardization, Qualcomm voluntarily promised to abide by FRAND commitments to license all of its SEPs.
4. Qualcomm's internal documents revealed that the licensing program was geared towards driving competitors out of the CDMA chip market.

[7] Korea Fair Trade Comm'n, Guidelines for the Abuse of Market Dominant Position, Part IV.3.D(2). An English translation of the KFTC Guidelines is *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=62&pageId=0401.

Turning to the "objective probability" of anticompetitive effect, the KFTC again provided a list of facts in support of its conclusion. The list included:

1. that Qualcomm reneged on its FRAND commitments by imposing discriminatory royalty rates,
2. that the discriminatory licensing practice would likely hinder entry to the chip market as Qualcomm is a vertically integrated firm dominant in both chip and licensing markets,
3. a degree of royalty discrimination,
4. that Qualcomm's licensing program was in effect for more than five years,
5. competitive conditions of the mobile phone market, and
6. the effects from coupling royalty discounts with conditional rebates.

Significantly, Qualcomm's failure to abide by FRAND conditions appears to have weighed more heavily than other facts. Articulating about the importance of implementing FRAND commitments, the KFTC highlighted that "the conduct of SEP owners reneging on FRAND commitments may *per se* raise competitive concerns" and that "the FRAND commitment is a critical measure to prevent the abuse of monopoly power gained by virtue of standardization." However, the KFTC also appears not to have precisely interpreted the boundary of Qualcomm's FRAND obligation, nor it did provide clear guidance as to how Qualcomm's royalty scheme was a FRAND violation.

In this light, perhaps an equally pivotal fact was that Qualcomm was a dominant firm in the CDMA licensing market who was also practicing its own technologies in chip manufacture, thereby vertically integrating the licensing market with the chip market. The KFTC repeatedly took the position that Qualcomm's discriminatory licensing program, combined with conditional rebating, was intended to suppress new competition from "low-end" chip markets in which Qualcomm was known to be less competitive.

In assessing competitive concerns arising out of Qualcomm's vertical integration, the KFTC started by noting that both phone makers and chip makers would need to acquire patent licenses from Qualcomm, because Qualcomm owned the standardized CDMA technologies. The KFTC also observed that when new chip makers typically focus, as they should, on making market entry through the "low-end" chip market, they would likely regard price competitiveness as the critical factor. Under Qualcomm's licensing program, however, those new chip makers were forced to have a lower profit margin because they would have to add the royalty they paid to Qualcomm to the royalty discount offered to phone makers using Qualcomm chips. As a result, the KFTC concluded, Qualcomm's licensing program in practice served as an entry barrier deterring new or nascent competitive threats to Qualcomm.

Finally, the KFTC found anticompetitive effects generated from Qualcomm's licensing program. First, the program was found to have excluded competitors from the market. The KFTC noted that, for the duration of the licensing program, the record showed that the share of non-Qualcomm chips used by two phone makers experienced a sharp decline in 2004 (the year when the license came into effect). Moreover, the record showed initially successful, but ultimately failed, entry into the CDMA chip market by some competitors, such as Samsung

Electronics, EoNex, VIA Telecom, and Texas Instrument (who took a sharp increase in CDMA chip demand beginning 2003 as a market entry opportunity). However, based on statistics showing that Qualcomm had maintained a nearly 100 percent market share in the CDMA chip market from 2002 to 2006, the KFTC concluded that Qualcomm had engaged in discriminatory royalty discounts to meet the increased demand, thereby maintaining its market position and excluding new rivalry from the chip market.

Second, the licensing program was found to have harmed consumers by causing product-variety losses and limiting price competition. Taking as evidence that a price drop of CDMA chips was lower than that of GSM chips in the years following 2004, the KFTC predicted that had Qualcomm's royalty rate not been discriminatory against non-Qualcomm chips, new chip makers would have emerged as stronger competitors capable of lowering prices to the benefit of consumers.

Qualcomm countered that the record showed no causal connection between Qualcomm's discriminatory royalty rates and the decreased chip sales by its competitors. Qualcomm instead posited as a more probable cause that a superior quality of Qualcomm chips accounted for the sales decrease of non-Qualcomm chips. However, the KFTC noted data concerning one phone maker that showed a pattern of increasing sales by Qualcomm's competitors after Qualcomm's licensing program ceased to discriminate against the maker's export-model phones using non-Qualcomm chips. Also, the record showed that Qualcomm itself was aware of its lack of competitiveness in the low-end chip market. The record further contained a Qualcomm executive's remark to the effect that a VIA chip was of a superior quality to one model of Qualcomm chips. Taken together, the KFTC concluded that at least some chip makers could have been viable competitive threats to Qualcomm in terms of price and quality in the low-end chip market.

Further, the KFTC went on to hold that Qualcomm also violated Article 23(1) of the MRFTA which prohibits unfair trade practices, including the conduct of "unjustly treating a trading party in a discriminatory manner." Article 23(1) entails a similar analysis to Article 3-2(1) except that the KFTC need not find that the accused firm is in a dominant market position. Citing the same records as used to establish the violation of Article 3-2(1), the KFTC concluded that Qualcomm's licensing program constituted unfair price discrimination intended to secure competitive advantages in the CDMA chip market by using its dominant position in the CDMA technology licensing market.

III. THE SEOUL HIGH COURT'S AFFIRMANCE OF THE KFTC'S FINDINGS AND ORDERS

In June 2013, the Seoul High Court held that the KFTC was justified in issuing remedial orders against Qualcomm.[8] In doing so, the court affirmed the KFTC's finding of facts almost in their entirety and looked to a similar set of evidence (described below) in support of its legal opinion. However, the court canceled part of KFTC's imposed order as in excess of Qualcomm's unlawful conduct, but this may amount to an inconsequential amount in the KFTC's fine

[8] Seoul High Court [Seoul High Ct.], 2010Nu3932, June 19, 2013 (S. Kor.).

calculation. Both parties have appealed their respective adverse rulings to the Korea Supreme Court.[9]

Specifically, the Seoul High Court held that Qualcomm's discriminatory licensing program violated Article 3-2(1)(iii) (abuse of dominant market position), although it did not pass judgment on the violation of Article 23(1) (unfair trade practice). It is unclear why the court chose to remain silent on Article 23(1), but the reason may well be judicial efficiency because affirming the Article 3-2(1)(iii) violation suffices to uphold the KFTC's determination. The three licensing practices (discriminatory royalty discount, royalty cap, and price netting) were all under scrutiny before the court.

The court first agreed with the KFTC that Qualcomm was a monopolist in the domestic CDMA technology market, reasoning that under Article 4 of the MRFTA, market dominance is presumed on a showing that the market share of a single firm is "50% or more." The court dismissed Qualcomm's arguments that the relevant technology should be all mobile telecommunications technologies, including GSM and W-CDMA, and that the geographic market should be worldwide. It reasoned that mobile phone makers facing a significant royalty increase in CDMA technology would be unlikely to switch to manufacturing non-CDMA phones or replace Qualcomm with another foreign chip supplier.

Denying the conduct of "unjustly discriminating a price or condition against a trading party" under the KFTC Guidelines interpretive of Article 3-2(1)(iii),[10] Qualcomm argued that the licensing program could not be found to be discriminatory because the program applied the same conditions to all purchasers and did not differentiate royalties based on the purchaser. However, the court ruled that the provision was not limited to the situation where different prices are set among a group of firms, and that setting a different price to even a single firm pursuant to specific conditions may count as discrimination. Consequently, the court determined that differentiating the royalty upon whether a trading party used Qualcomm chips fell within the conduct of "discriminating a price against the party."

For such price discrimination to be "unjust" under Article 3-2(1)(iii), the Korea Supreme Court has required that the accused firm, for the purpose of restraining competition, must have engaged in conduct that, viewed objectively, has generated an anticompetitive effect or has a dangerous probability of doing so.[11] The Seoul High Court viewed that Qualcomm's conduct met both of the subjective and objective prongs.

Related to the purpose of restraining competition, the court first premised that the FRAND commitment is a safeguard to prevent abusive conduct like discriminatory licensing by a SEP owner who acquires market power by virtue of the standardization. The court then found the intent to restrain competition from the following facts:

1. Prior to making FRAND commitments in 1997, Qualcomm had deducted its own chip value in setting a royalty basis for domestic-model phones; it continued that practice without modification after the FRAND commitments were in place.

[9] Supreme Court [S. Ct.], 2013Du14726 (S. Kor.) (pending).

[10] *See supra* text accompanying note 7.

[11] Supreme Court [S. Ct.], 2008Du17707, Apr. 8, 2010 (S. Kor.).

2. Despite the FRAND commitments, Qualcomm's 2004 licenses: (i) differentiated royalty rates based on whether an export-model phone was using Qualcomm chips, (ii) lowered the royalty cap for "high-end" mobile phones using Qualcomm chips, and (iii) inserted the termination clause.

In finding the "objective probability" of anticompetitive effect, the court did not conclude solely on the basis of royalty discrimination in breach of FRAND commitments. The court evaluated independently anticompetitive effects in the market. Because as a SEP owner Qualcomm was a monopolist with a "100 percent" market share in the CDMA technology market, the court was concerned less about the anticompetitive probability in the CDMA technology market. Guided by Korea Supreme Court precedent, the court was more concerned about competitive harms in upstream and downstream markets to the CDMA technology market.[12] Similar to the KFTC, the court was more attentive to the fact that Qualcomm's royalty discrimination gave rise to anticompetitive effects in the "CDMA chip market" downstream from the CDMA technology licensing market. The court found that Qualcomm's competitors were excluded from the downstream chip market as a result of the royalty discrimination that occurred in concert with the conditional rebating.

IV. CONCLUSION

Although what it means to be "FRAND" is not entirely clear, the KFTC and the Seoul High Court may not have to wrestle with the defining boundaries of FRAND, because the record showed that Qualcomm was a monopolist in the CDMA technology market trying to leverage its market power to the downstream chip market. On the one hand, the KFTC and the court did not hesitate to find the "intent to restrain competition" from Qualcomm's conduct in violation of its FRAND commitment. On the other hand, taking a more holistic approach to dealing with the "objective probability of anticompetitive effect," the KFTC and the court required more than a FRAND violation and examined how Qualcomm's licensing practices as a whole caused competitive harms in the CDMA chip market downstream to the technology licensing market.

[12] Supreme Court [S. Ct.], 2007Hu2827, Sept. 24, 2009 (en banc) (S. Kor.).