A firm stance

John H Choi and Daeyong Baek of Shin & Kim examine antitrust enforcement practices in South Korea

Korea's antitrust laws comprise primarily of the Monopoly Regulation and Fair Trade Act (MRFTA), the Enforcement Decree promulgated under the MRFTA, and the notifications that the Korea Fair Trade Commission (KFTC) issues pursuant to the relevant enabling clauses in the Enforcement Decree. Similar to many other jurisdictions, the Korean antitrust regime regulates all the traditional fields of antitrust law such as abuses of dominance, cartels and anticompetitive business combinations, with the KFTC acting as the sole enforcement agency as well as the court of first instance. On the other hand, features more unique to Korean antitrust regime than other jurisdictions include its special regulation on the concentration of economic powers (regulation of *chaebols*, mega-scale conglomerates that were the beneficiaries during the time of Korea's government-directed economic growth), along with regulations on consumer protection, labelling and advertising, and subcontracting. In a sense, the KFTC is more than just an ordinary antitrust agency as seen in many jurisdictions around the world.

More than anything, however, the KFTC is known for its active enforcement stance among the antitrust authorities in the Asia-Pacific region. Consistent with the KFTC's tradition of active law enforcement, the period of 2010 and the earlier part of 2011 has witnessed the same degree of activism on the part of the KFTC on the traditional topics of antitrust regulations that include abuses of dominance, cartels, and anticompetitive business combinations. There were several notable developments and legal revisions in the latter part of 2009 through to the earlier part of 2011 on cartels and anticompetitive business combinations, as well as collaborative efforts seen in the earlier part of 2011 between the KFTC and the antitrust authorities of other jurisdictions on international cooperation in matters of an international dimension.

Cartels

Enforcement trends

Cartels have always been one of the KFTC's keen regulatory targets. Not surprisingly, such level of activism often translates into huge fines and frequent case referrals for criminal prosecution. In addition to the traditional form of cartels that are perpetrated having their bases on some form of collusive agreements, explicit or implicit, the KFTC's regulatory interest has more recently spilled over into the sphere of data exchanges.

In 2010 alone, there were a total of 103 cartel cases filed with the KFTC. Of such 103 cases, 62 cases ended in condemnation. The total aggregate of all fines imposed on them amounted to W586 billion ($516.3 million), which represented a record amount of aggregate fines for any given year. This regulatory determination continues to be seen in 2011. For example, in a case involving an alleged collusion among four domestic oil refineries to restrict competition for gas stations, the KFTC issued a condemnation decision (May 30 2011) in which the aggregate fines were W434.8 billion.

The same degree of activism is seen towards cartels of international dimensions that negatively impact the Korean market. Having extensive enforcement experience in regulating international cartels, the KFTC has been imposing heavy sanctions on international cartels, including its condemnation decisions in the graphite electrodes cartel case (April 2002), the vitamin cartel (April 2003), the photocopying paper cartel (December 2008) and the marine hose cartel (May 2009). More recently, in May 2010, the KFTC issued a condemnation decision in an international air cargo rates cartel case in which 21 companies headquartered in 16 countries faced fines to an aggregate amount of W119.5 billion. Given the increasing degree of global business activities that cross national boundaries, the growing trend towards coordinated antitrust enforcement on international cartels, and the KFTC's accumulated expertise in regulating international cartels, the expectation is that the KFTC will take

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an increasingly active stance on regulating international cartels.

Leniency

The leniency programme is a very effective measure of detecting cartels and as such is widely used in many jurisdictions. The KFTC also runs a leniency programme that has helped it so far to catch 50% or more of the cartels that it condemns. In short, the leniency programme in Korea provides that a participant in a cartel that is the first to report it to the KFTC will enjoy a full immunity from fines and the criminal prosecution, and the second party to report the cartel will still enjoy a 50% reduction of the fine and a full immunity from criminal prosecution. Also, under the so-called amnesty-plus system, a party that reports its involvement in a second cartel may receive additional reduction on the first cartel, with the degree of such additional reduction depending on the scale of the second reported cartel.

The KFTC's Notification on Implementation of Cartel Leniency Program lays out the procedural aspects and the substantive elements of a leniency filing and the benefits of leniency, among other related matters. So far, there have been two revisions to this Notification (in May 2009 and July 2011), the most notable changes being the following:

(i) First revision (May 2009)

This revision allowed multiple participants in a cartel to jointly file for leniency if they are either (a) affiliates that are practically in a relationship of control with respect to one another (that is, one exerts control over the other either because of 100% stock ownership or by other means of control); or (b) the companies were parties to a corporate split-off or business transfer (and, for this criteria only, such companies must not have participated in the cartel together).

> "The Commission has been imposing heavy sanctions on international cartels"

The rationale for this revision was that, under certain circumstances, allowing joint filing of leniency will maximise the level of cooperation from the applicants. For example, if two or more companies are affiliates that are practically in a relationship of control with respect to one another, they often share not only the incriminating documents (some documents are with one company, while other documents are with another company, so the documents from just one of them are not enough) but even certain employees and officers, in which case the KFTC will need cooperation from all such companies. Also, if all such companies are only allowed to file separately for leniency, then the first and the second spots will become immediately exhausted and therefore further cooperation and incriminating evidence from other companies may be foreclosed. For those companies of global presence, allowing only separate filings will result in inequity in that only some affiliates will qualify for leniency benefits, which will make coordinated cooperation from all relevant affiliates around the globe a difficult task because the ones that did not qualify for leniency will have no incentive to cooperate. Also, in the case of a corporate split-off or business transfer, the parent company or the transferor may have participated in a cartel but ceased further participation in it with the consummation of the transac-

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tion and then conveyed all its incriminating evidences and/or perpetrating personnel to the newly-created subsidiary company or the transferee, whereupon the subsidiary or the transferee joins the cartel as a new party, with the parent company or the transferor dropping out of the cartel. The company that no longer has the incriminating evidences would then not be able to file for leniency even if it wants to, and the company that now has the evidence will not have the incentive to file for leniency on the act that it did not commit. It was for these reasons that the two exceptions needed to be carved out for joint filing.

The benefit of this revision could be extended to cases where the headquarters and its subsidiary both participated in a single cartel, because they are able to file jointly for leniency.

(ii) Second revision (July 2011)

There were four notable changes here.

First, even after an applicant qualifies for a spot, the Commission now can revoke it. Before the revision, the Secretary General's confirmation of an applicant's spot could not be revoked later by the Commission. This revision however granted the final authority to the Commission as to whether reductions will be granted at all on leniency applicants, and also empowered the Commission to revoke the confirmation given by the Secretary General on leniency applicants' spots.

Second, the revision broadened the scope of the evidentiary materials that could be submitted as part of a leniency application. Before this revision, the permitted evidentiary materials that an applicant could submit in support of its written confirmation or declaration were limited to documents, objects, electronic data and communication data, among other things. Criticisms were voiced, however, that it is unreasonable to limit the scope of evidentiary materials allowed to be submitted, especially considering the already limited availability of such evidentiary materials given the inherent secrecy of cartels. Thus, the KFTC added an extra category of evidentiary material described as "any other evidentiary materials equivalent to the foregoing that can evidence the unreasonable concerted act in question when viewed comprehensively in light of the relevant facts." To the extent there were companies that opted against leniency filings because of lack of evidentiary materials, this revision will create an incentive to file for leniency.

Third, the benefits of amnesty-plus have been reduced. Before this revision, a leniency applicant in one cartel which also reports its participation in another cartel enjoyed a 20% reduction on its surcharge on the first cartel. This benefit was available even if the second reported cartel was only small in scale. This revision now allows the KFTC to determine the rate of reduction (with the reduction not to exceed 20%) in light of the scale of the second reported cartel. Thus, if the second reported cartel is small in scale, the reduction will not likely be the full 20% that would have been available before the revision.

Finally, the revision now makes it possible for an applicant to submit supplements even after passage of 75 days since its filing of leniency application. This revision stemmed from the criticisms on the inadequacy of the 75-day period in the cases of international cartels in which the process of collecting and translating huge amounts of documents consumes a lengthy time period.

Responding to such criticism, the revision now allows for supplements even after 75 days have passed, in international cartels and other cases where the document submission is overly time-consuming.

Mergers and acquisitions

Cooperation among antitrust agencies

In a multinational M&A transaction that impacts markets around the world, the parties to that transaction must obtain clearance from the antitrust agency of each jurisdiction on which the transaction will have an impact. There is a growing mood among antitrust agencies for cooperation on such transactions.

A meeting was held on June 2 2011 between the KFTC and the representatives of the Canadian competition authority to discuss multinational M&A transactions, among many other topics. There was another meeting on July 14 between the KFTC and the representatives of the EU competition authority also to discuss the topic of multinational M&A transactions. In the July 14 meeting in particular, both authorities shared the need for cooperation on anticompetitive multinational M&A transactions, and to that end, agreed to engage in further dialogues to form a system of cooperation between the two authorities. In 2010, BHP Billiton and Rio Tinto's plans for a joint iron-ore venture were rejected by antitrust authorities in Australia, the EU, Japan, South Korea and Germany. The expectation is for a growing level of cooperative efforts among antitrust authorities around the globe on multinational M&A transactions and their potential impact on competition.

Guidelines for M&A remedies

On June 22 2011, the KFTC issued the Guidelines for M&A Remedies. These Guidelines stipulate a number of principles that should govern an imposition of remedial orders on anticompetitive M&A transactions.

Thus far, the KFTC's practice has been to give clearance on anticompetitive M&A transactions, but only by imposing certain behavioural remedies, such as prohibiting price increases, requiring market share to be maintained, or requiring the supply to be maintained. The Guidelines now require the principle that anticompetitive M&A transactions be either rejected or subjected to structural remedies (divestiture of certain assets, for example).

Also reflecting the recent discussions at the International Competition Network on merger remedies, the Guidelines provide that, when concentration of IP rights ownership leads to the lessening of competition, the KFTC may impose an order that mandates sale of such rights as a structural remedy, or issue an order mandating licensing of such rights.