UNIVERSITY OF CHICAGO THE COASE-SANDOR INSTITUTE OF LAW AND ECONOMICS
COLLOQUIA: NEW TOOLS IN LAW AND ECONOMICS
16-17 JULY 2013

Current Issues on the Use of Economics in Korean Antitrust

[Preliminary]

Jinyul JU
Pusan National University School of Law, Korea
jinyul_ju@pusan.ac.kr

[Keywords] Korean antitrust law, abuse of dominant position, rule of reason, effect-based approach, monopolistic leveraging, resale price maintenance, price fixing, cartel damages, empirical evidence, Daubert rule

[Contents]

I. Introduction

The Monopoly Regulation and Fair Trade Act (MRA),[1] Korean antitrust law, prohibits: abuse of dominant position (article 3-2), anticompetitive mergers (article 7), unreasonable concerted conducts (article 19), unfair trade practices (article 23), and resale price maintenance (article 29). Though the MRA was entered into force in 1981, it was the late 1990 when the Korean Fair Trade Commission (KFTC) started to actively enforce the act.

[1] Enacted by Law No3320, 31 Decemeber1980.

For a long time, commentators and the KFTC believed that the MRA is a self-contained system, isolated from economic analysis. There was a widespread belief that the MRA reflects form-based approach. Since 2007, however, the Supreme Court has dramatically changed the landscape of antitrust law and policy form form-based to effect-based approach through a number of cases. This paper purports to briefly introduce: (i) Korean Supreme Court's decisions concerning the abuse of dominant position, minimum resale price maintenance, price fixing in the intra-brand market, and cartel damages; and (ii) current issues facing Korean courts on the use of economics in antitrust cases.

II. Effect-Based Approach in Supreme Court Decisions

A. Abuse of Market Dominant Position

Article 3-2 (1) of the MRA prohibits abuse of dominant position. Logically, an undertaking without dominant position cannot breach article 3-2 (1).

'Dominant position'

The meaning of 'dominant position' is defined in article 2 (1) (vii) of the MRA. According to this, dominant position means that 'market position' with which an undertaking may either individually or jointly with other undertakings determines price, output, and other trading conditions in a certain trade (that is, relevant market). In order to avoid complexity of determining dominate position, the MRA authorizes the KFTC to use 'market share' as a proxy for dominant position. Article 4 (1) of the MRA states that one undertaking with 50% or more market share can be presumed to have dominant position. In addition, article 4 (2) stipulates that two or three undertakings with 75% or more combined market share can be presumed to have dominant position. But one undertaking with 10% or less market share is not presumed to have dominant position. For example, according to article 4 (2), if one undertaking has 11% market share and the other undertaking has 64 %, the undertaking with only 11% market share can be presumed to have dominant position. However, it is hard to imagine a situation in which the

undertaking with 11% market share may individually determine price, output, and other trading conditions in a relevant market. It would be better to understand that article 4 (2) is purported to prohibit abuse of *collective* dominant position, that is, conscious parallelism in oligopolistic market.

'Abuse'

Dominant position itself is not condemned under the MRA. It is 'abuse' of dominant position that is prohibited by article 3-2 (1). Without any definition of abuse, article 3-2 (1) provides a non-exhaustive list of categories of abuse of dominant position: (i) unreasonable pricing, (ii) unreasonable restriction of production or selling of goods or services, (iii) unreasonable hindrance to other undertaking's business, (iv) unreasonable hindrance to market entrance of new competitors, (v) unreasonable dealing to exclude competitors, and (vii) unreasonable and substantial impairment of the interest of consumers. While the types of abuse of dominant position are different, they share a common element of unreasonableness in the conducts.

Is Article 3-2 (1) a self-contained system?

On the other hand, article 5 of the Presidential Decree of the MRA provides a definition of each of categories in article 3-2 (1). According to this, if an undertaking with dominant position committed any conduct in article 3-2 (1) of MRA *without justifiable reasons*, the undertaking is condemned under article 3-2 (1). For this reason most commentators believed that the MRA took the *form-based approach* to abuse of dominant position. Indeed some commentators took the view that article 3-2 (1) is a self-contained system, isolated from economics. The KFTC accepted commentators' opinion on abuse of dominant position, and thus paid little attention to economic analysis in enforcing article 3-2 (1).

Effect-based approach and the rule of reason

In *POSCO v. KFTC* (2007),[2] the Supreme Court destroyed the long and deep-rooted belief that

[2] Supreme Court (en bank) 2002Du8626 (November 22, 2007).

the MRA is a self-contained system. The *POSCO* Court established the rule of reason and effect-based approach by which the KFTC and the lower courts determine the abuse of dominant position cases under article 3-2 (1) of the MRA.

In 2002, the KFTC decided that *POSCO*'s refusal to supply its hot rolled steel coil product to *HYSCO* unreasonably hindered the latter's business and thus breached article 3-2 (1) (iii) of the MRA. This decision was affirmed by Seoul High Court in 2002.[3] But the Supreme Court reversed and remanded it in 2007. In *POSCO*, the Court determined that the *rule of reason* must be applied to abuse of dominant position case. The *POSCO* Court opined that the words 'abuse' and 'unreasonableness' in article 3-2 (1) of the MRA means *anticompetitive effect* caused by a conduct in question on a relevant market, and provided a list of anticompetitive effect: increase of price, decrease of production, retarded innovation, decrease of a number of competitors, and decrease of diversity of goods and services. The Court concluded that the KFTC bears the burden of proof under article 3-2 (1), and it failed to prove anticompetitive effect of *POSCO*'s refusal to deal.

Dominant Position leveraging

In the middle 2000, the KFTC tried to apply the monopoly leveraging theory in two-sided markets. But this attempt was blocked by the Supreme Court in *Tbroad v. KFTC* (2008)[4] and *SK Telelcom v. KFTC* (2011).[5]

In 2004, the KFTC decided that *T-broad* leveraged and abused its dominant position from the cable TV broadcasting market (first market) to the cable TV advertising market (second market). In 2005, the KFTC again decided that *SK Telecom* leveraged and abused its dominant position form the wireless telecommunication market (first market) to the online music download service market (second market). However, citing the *POSCO* (2007), the Supreme Court determined that the leveraging theory does not make a sense. The Court ruled that the KFTC failed to prove that the conducts in the first market caused anticompetitive effects in the second

[3] Seoul High Court 2001Nu5370 (August 27, 2002).
[4] Supreme Court 2007Du25183 (December 11, 2008).
[5] Supreme Court 2008Du1832 (October 13, 2011).

market. It can be said that the Chicago antitrust approach was first recognized by the Court in dealing with the matter of monopolistic leveraging.

The two-sided market theory and market definition

After *POSCO* (2007), instead of using the monopoly leveraging theory, the KFTC tried to apply the two-sided market theory in order to define the relevant market itself narrowly. In 2008, the KFTC, employing the two-sided market theory, decided that *NHN (Naver)* abuses its dominant positions in the web portal service market. *NHN (Naver)* argued that its conduct in question occurred in the online free video search service market in which it did not have dominant position. In *NHN v. KFTC* (2009),[6] noting the Supreme Court's decision in *POSCO* (2007), the Seoul High Court rejected the two-sided market theory of the KFTC, and concluded that the KFTC erred in defining the relevant market. The KFTC appealed to the Supreme Court. As of June 2013, the Supreme Court is still considering the KFTC's appeal.

B. Resale Price Maintenance

Article 29 of the MRA prohibits "resale price maintenance." On the other hand, the article do not condemn *maximum* resale price maintenance when there are justifiable reasons. Commentators and the KFTC viewed that minimum resale price maintenance (min RPM) is illegal *per se* under article 29. However, in *Hanmi Pharmaceutical v. KFTC* (2010),[7] the Supreme Court determined that min RPM may promote *consumer welfare* and thus is not illegal *per se*, and the KFTC has to consider pro-competitive effects of min RPM. The KFTC and commentators criticized the *Hanmi* (2010) on the reason that the plain language in article 29 makes min RPM unlawful *per se*. But the decision in *Hanmi* (2010) was reaffirmed by the Court in *Callway Golf v. KFTC* (2011).[8]

[6] Seoul High Court 2008Nu27102 (October 8, 2009).
[7] Supreme Court 2009Du9543 (November 25, 2010).
[8] Supreme Court 2010Du9976 (March 21, 2011).

C. Price Fixing

Article 19 (1) of the MRA prohibits "concerted conducts that unreasonably restrict competition." The article also provides a list of nine categories of such conducts including price fixing. The 2002 KFTC's Guideline on Review of Concerted Conducts stated that horizontal price fixing is unlawful *per se*. Nonetheless, in practice, the KFTC defined the relevant market and tried to prove anticompetitive effect in horizontal price fixing cases on the reason that article 19 (1) condemns a concerted conduct only when it unreasonably restricts competition. Considering the KFTC's form-based approach to abuse of dominant position, some commentators hardly understood its effects-based approach to horizontal price fixing. Anyway, courts tended to affirm the KFTC's decisions in horizontal price fixing agreements.

In 2009, at last, the KFTC applied the *per se* rule to BMW luxury car dealers' agreement to fix retail prices without defining the relevant market. However, in *BMW dealers v. KFTC* (2011),[9] the dealers argued that their agreement does restrict competition in luxury car market because their total market share in the Korean luxury car market is very low. The KFTC argued that price fixing has only anticompetitive effect, and thus illegal *per se*. Noting that BMW dealers' price fixing occurred in *intrabrand* (BMW) market, the Supreme Court determined that the rule of reason should be applied to this case. As *BMW dealers* (2011) is about intrabrand, it is hard to say that the Supreme Court do not recognize the *per se* rule to horizontal price fixing in interbrand market.

D. Cartel Damages

In *Petroleum bid-rigging cartel damages case* (2011),[10] the Supreme Court recognized the role of econometrics in estimating cartel damage. The Court opined that 'sound' econometric method must be used to estimate the amount of cartel damages.

In 2001, the KFTC detected five petroleum companies' bid-riggings for the military fuels contracts from 1997 through 1999. In 2001, the Department of Justice (on behalf of the

[9] Supreme Court 2010Du18703 (April 26, 2012).
[10] Supreme Court 2910Da18850 (July 28, 2011).

Government of Korea) brought damages claim before the Seoul Central District Court. The plaintiff, using yardstic and cost analysis methods, argued that the estimated amount of damages is 165 billion Korean Won (KW). But the defendants, employing multiple regression model with ordinary least squares (OLS), argued that the amount of damages is 15 billion KW. On the other hand, the court-appointed expert, using multiple regression with weighted least squares (WLS), estimated damages as 112 billion KW. The defendants severely disputed the WLS model employed by the court-appointed expert. At last, the district court, employing multiple regression with OLS, concluded that the amount of damage is 80 billion KW. [11]

But the first instance' decision was reversed by the Seoul High Court in 2009. Noting that the results of econometric estimation are significantly divergent, the high court concluded that all regression models in this case are not reliable. Employing yardstic and cost analysis method, the high court concluded that the amount of damages is130 billion KW.[12]

However, the high court's decision was reversed by the Supreme Court in 2011. The Court opined that the amount of cartel damages should be estimated by "sound econometric method," and ordered the Seoul High Court to estimate the damages by a proper econometric method. But the Court did not clarify the meaning of "sound."

III. Unsolved Problems in Using Economics for Courts

1. Which Economic Theory?

After *POSCO* (2007), courts well recognize that antitrust economics plays a key role in antitrust cases. Although it can be said that the Supreme Court in *T-broad* (2010) and *SK Telecom* (2011) actually accepted the Chicago school of antitrust economics to the matter of abuse of dominant position, judges still have difficulty in understanding the structure of economics. For example, when the KFTC makes arguments based on post-Chicago antitrust economics, there is a possibility that judges might think that the KFTC proved anticompetitive effect. Indeed, in 2011,

[11] Seoul Central District Court 2001GaHap10682 (January 23, 2007).
[12] Seoul High Court 2007Na25157 (December 30, 2009).

the KFTC's Guideline on Review of Abuse of Dominant Position newly introduced the post-Chicago theory: raising rivals' cost and foreclosure. According to the 2011 Guideline, most behaviors of a dominant undertaking can be abuse of dominant position. It seems that the KFTC has the intention of applying the post-Chicago theory to abuse of dominant position case in the near future.

2. Which empirical evidence?

Since *POSCO* (2007), all kinds of empirical evidences have been submitted before courts. When the KFTC argues cause and effect from empirical studies, it is not easy for judges to avoid the *post hoc* fallacy. Just because lay judges are not familiar with the structure of empirical economic evidence, they have a great difficulty in assessing reliability as well as weight of empirical economic evidence.

With respect to reliability of empirical economic evidence, Korean courts may use the *Daubert* rule.[13] But when competing evidences meet the *Daubert* factors, it is still hard for judges to weigh competing empirical evidence. Unfortunately, quarrels among economists who served expert witnesses at the lower courts of *Petroleum bid-rigging cartel damages* case (2011) gave judges an impression that empirical analysis can be, intentionally or unintentionally, misused in courtroom. To avoid this undesirable situation, judges need to use court-appointed expert witness and/or special expert commissioner under articles 164-2 and 335 of the Civil Procedure Act. Economic advices from court-appointed expert witness and/or special expert commissioner are likely to be more objective and clear, less confrontational, and hence, more helpful in resolving econometric dispute than the advice obtained from individual experts employed by either plaintiffs or defendants.

3. Problem of Judge Rotation System

In Korea, only a limited number of judges at the Seoul High Court's three special chambers and legal officers at the Supreme Court's division of legal officers for constitutional and

[13] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

administrative law (equivalent to Advocate General at European-style high courts) have opportunity to deal with antitrust cases. After *POSCO* (2007), judges and legal officers fully understand that economic analysis is a critical element in deciding whether a conduct in question is unlawful under the MRA. But, in practice, they have difficulty in assessing competing economic theories as well as reliability and weights of empirical evidence. This is a real problem facing judges and legal officials.

The judge rotation system makes the problem worse. In Korea, all judges rotate to different courts on the two- or three- year term. This kind of rotation system hinders judges and legal officials to build the professional capacity to deal with complex antitrust cases. During their term, they also have to deal with a large number of ordinary administrative law cases. Considering notorious heavy caseloads, it is not possible for them to have enough time to learn about the structure of antitrust law and economics. (To overcome this problem, during the period from 2007 to 2009, the Supreme Court provisionally appointed antitrust law experts (law professor and former KFTC' high rank officer) as a special legal officer for antitrust law. They played an important role in the Supreme Court's antitrust policy.)

V. CONCLUDING REMARKS

There is little doubt that the Supreme Court has pursued the consumer welfare and efficiency model rather than the protection of small businesses. Since last year 2012, however, the Congress and the President of Korea as well have strongly asked the KFTC to protect small businesses through the MRA. The KFTC can use article 23 (1) of the MRA that prohibits *unfair trade practices* to protect small businesses. Indeed, article 23 (1) do not require the KFTC to prove anticompetitive effect. With article 23 (1), the KFTC is able to prohibit efficient conducts that harm small businesses. In regard to article 23 (1), I argue that courts should adopt the efficiency model in order to purse consumer welfare and economic prosperity.