Competition Law in Korea

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Chapter I. Legislative Framework

1. Overview of the Legal System of Korea

The legal system of Korea is based on the civil law model of Germany and Japan. The relevant laws at the national level, in order of importance, are comprised of the relevant statutory code, enforcement acts (Presidential Orders), enforcement regulations (Ministerial Orders), and notifications. There are a few municipal regulations at the local level. Although case law precedent is not considered binding on the court, prior court rulings (particularly those of the Supreme Court) significantly influence judaical decision making.

A law suit (whether civil or criminal) in Korea begins in the District Court; the first level of the three-level Korean court system. The District Court usually renders its verdict approximately six to ten months after commencement of the action. An appeal may be taken by either party to the High Court within two weeks of the date on which the District Court judgment is served on the party.

The High Court usually reaches a decision in approximately six to ten months. A party may appeal to the Supreme Court within two weeks of receipt of the decision of the High Court. Grounds for appeal to the Supreme Court are limited to assertions that the decision of the High Court was in violation of the Korean Constitution, or of a valid law, order or regulation of Korea. The Supreme Court either renders a final judgment or returns the case to the High Court for reconsideration. If the case is decided by the Supreme Court, its decision is final and binding. However, if the case is returned to the high court, it may take another six to ten months for the High Court to reconsider its original decision.

If either party is dissatisfied with the High Court's reconsideration of its decision, that party may re-appeal to the Supreme Court.

If a favorable judgment is rendered by the District Court in a civil suit, the Court may in its discretion allow the successful claimant to execute the judgment and satisfy his claim out of the assets (if any) of the judgment debtor. If no appeal is launched by

the defendant, the claimant may execute the judgment as a matter of course.

There is no pre-trial "discovery" in Korea. Although compulsory production of documents during trial is possible, requests for production of documents must be specific, not general. Testimony and/or production of documents by non-parties can also be compelled during trial, but only upon a showing of good cause. Therefore, the plaintiff should endeavour to obtain and produce all the evidence required to establish its case. Class actions are not permissible under Korean legal system.

2. Competition Laws and Regulations

The Korean Constitutional Law effective as of October 27, 1980, first adopted the concept of regulation and control of anti-competitive practices in Article 120, Paragraph 3 thereof. Based upon the principle enunciated in the Constitutional Law, the Monopoly Regulation and Fair Trade Act ("MRFTA") was enacted on December 23, 1980 and came into force on April 1, 1981. The MRFTA is the basic competition law in Korea and has been amended three times; December 1986, January 1990 and December 1992. Other legislation in the area of competition law includes the Fair Sub-contract Transaction Act, the Unfair Competition Prevention Act, and the Price Stabilization and Fair Trade Act. Various regulations and notifications have been promulgated under the above Acts.

Although the Korean government has attempted for more than a decade to regulate both anti-competitive structures and activities, such efforts to enforce the MRFTA and related legislation have not in practice been substantial or efficient.

Chapter II. Implementation of Competition Law

1. Enforcement Agencies

The Fair Trade Commission ("FTC") is an independent government agency established under the auspices of the Economic Planning Board. the FTC is primarily responsible for the enforcement of competition law. The FTC consists of seven members, including some part-time members. The FTC has its own staff and four regional offices to co-ordinate anti-competition policy and to regulate anti-competitive activities.

2. Administrative Actions

The FTC is vested with the authority to issue Corrective Actions and to impose Administrative Surcharges in the nature of fines. Also, certain types of transactions must be reported to, and accepted by, the FTC in order to be effective and enforceable.

2.1 Corrective Actions

The FTC may issue a Corrective Order which may include (i) an order suspending or cancelling unlawful activities, transactions or agreements, (ii) an order to publicize the violation in the media, and (iii) any other actions necessary to correct the violation. A Corrective Order can only be issued by resolution of the FTC after an administrative hearing. The alleged violator thus has sufficient opportunity to present its defense before the FTC. An appeal of a Corrective Order can be made to the High Court and, in turn, after the judgement of the High Court, to the Supreme Court.

The FTC may recommend corrective actions without the formal FTC hearing procedure in the case of minor violations.

2.2 Administrative Surcharge

The FTC may impose administrative surcharges in the nature of fines upon a violator of certain type of anti-competitive activities including abuse of dominant market position, conspiracy and mergers or acquisitions in violation of the Act.

2.3 Notification Requirements

In the case of certain types of mergers and acquisitions, and international agreements, the parties must report the contemplated transaction to and, obtain the approval of, the FTC. The FTC reviews whether the contemplated transaction complies with applicable competition law.

3. Criminal Sanctions

Violations of competition law may be subject to criminal sanctions if the FTC refers the matter to the police or prosecutors office for further investigation. In practice, however, the FTC usually issues a Corrective Order before it refers the violator to the police or prosecutor. If the violator complies with the Corrective Order, the FTC rarely seeks criminal sanctions. Criminal sanctions may include both imprisonment and fines.

4. Civil Actions

Unlike the United States, Korean government agencies including

the FTC never use civil actions to enforce competition law. Rather, the FTC relies upon its own administrative tribunal apparatus. Although private claims for damages arising out of anti-competitive activities may be brought before the court, treble damage claims is not permissible. Further, a civil action under the MRFTA cannot be initiated until all administrative proceedings and appeals in connection with a given Corrective Action order have been exhausted and the order has thus become final and conclusive. A civil action can be initiated based upon general tort theory before the Corrective Action order becomes final. Practically, however, it is difficult to establish the tort since the plaintiff must prove the violation of competition law and that such violation was due to the negligence of the defendant. Accordingly, there are few judicial decisions concerning civil claims for damages due to a violation of competition law.

Chapter III. Anti-Competitive Behavior

1. Undue Collaborative Behavior

Chapter 4 of the MRFTA deals with undue collaborative activities as one of the anti-competitive acts.

The collaborative activities listed below which substantially restrict competition in any particular field of trade are prohibited in principle:

(i) Fixing, maintaining, or altering prices;
(ii) Restricting the terms and conditions for the sale of commodities or for rendering services, or the terms and conditions for the payment of prices and compensation thereof;
(iii) Restricting production, shipment, transportation, sales of commodities or rendering of services;
(iv) Restricting the sales territory of trade or customers;
(v) Restricting or interrupting new establishment or expansion of facilities, inducement of equipment for production of commodities or rendering of services;
(vi) Restricting the kinds or sizes of commodities at the time of production or sale thereof;
(vii) Establishing a corporation to implement or manage the main part of its business in a collaborative fashion;
(viii) Restricting or interrupting the nature of a business or activities of another entrepreneur.

It is difficult to prove collaboration. Thus, if two or more parties commit any of the above prohibited activities which

substantially lessen competition in a particular market, collaboration is presumed.

2. Monopolization

Except for the above undue collaborative acts and subject to the merger controls discussed below, monopolization or an attempt to monopolize itself is not prohibited by the MRFTA. However, the business activities of a company having a monopoly are more tightly regulated than those of companies in competition.

3. Abuse of a Dominant Market Position

Specific types of abusive trade practices by market-dominating entrepreneurs of a certain size are prohibited under Article 3 of the MRFTA.

The term "market-dominating entrepreneur" provided for by the MRFTA includes entrepreneurs whose market share fall under one of the following categories. In each case, the total supply of the commodity or service in the subject market must exceed 30 billion Won:

(i) One entrepreneur's market share is 50% or more; or
(ii) The aggregated market share of two or three entrepreneurs is 75% or more, provided, however, that an entrepreneur whose market share is less than 10% is excluded.

The market-dominating entrepreneur is prohibited from engaging in the following abusive acts:

(i) Unreasonable determination, maintenance, or alteration of the price of a commodity or service;
(ii) Unreasonable control of the sales of commodities or the provision of services;
(iii) Unreasonable interference with the business activities of other entrepreneurs;
(iv) Unreasonable hinderance of the entry of new competitive entrepreneurs; or
(v) An activity substantially restricting competition or damaging significantly the interest of consumers.

4. Resale Price Maintenance

Article 2, Item 6 of the MRFTA defines resale price maintenance as an act by which an entrepreneur who produces or sells a commodity, fixes in advance the price or other restrictive terms and conditions for each stage in the chain of distribution and requires resellers

to comply. In principle, such resale price maintenance is not permissible except for those goods designated by the FTC which meet the following requirements:

(i) customers can easily recognize the quality of the products as being equal;
(ii) the products are used frequently in the daily life of customers; and
(iii) the market for the products is competitive.

The MRFTA also permits resale price maintenance for copyrighted works.

5. General Unfair Trade Practices

Article 23, Paragraph 1 of the MRFTA broadly enumerates certain unfair trade practices and prohibits an entrepreneur from engaging in such activities which will impair fair competition. The illustrative list includes the following activities:

(i) Unreasonable refusal to trade with an entrepreneur or unreasonable discrimination against an entrepreneur;
(ii) Unreasonable transaction to eliminate a competitor;
(iii) Unreasonable inducement or coercion of the customers of a competitor;
(iv) Dealing with the opposite party in a manner taking unreasonable advantage of one's bargaining power;
(v) Dealing with the opposite party on terms and conditions which unreasonably restrict or interfere with the business activities of the opposite party; or
(vi) An advertisement (including use of tradename) or representation which is false, deceptive or misleading to customers with respect to an entrepreneur, commodity or service.

The FTC has promulgated more detailed lists of unfair trade practices in its Public Notices. These other regulated matters include refusal to deal, exclusive dealing, inequitable treatment, territorial or customer restrictions, tied selling, false, exaggerated or slanderous advertising.

6. Regulations Concerning International Agreements

Article 32, Paragraph 1 of the MRFTA prohibits an entrepreneur or an association of entrepreneurs from entering into international agreements which contain matters that are in violation of the MRFTA. Further, Article 33 of the MRFTA requires the following international agreements to be reported to the FTC before they take effect in

Korea: technology inducement agreements, copyright license agreements and import distributorship agreements. Public Notice No. 93-6 entitled "Scope and Criteria of Unfair Trade Practices in International Agreements" enumerates the prohibited unfair trade practices in international agreements. Each of the following events constitutes an unfair trade practice in technology inducement agreements and copyright license agreements:

(i) The raw materials, components, equipment, related products, etc. necessary for the manufacture of products (hereinafter the "Licensed Products") using the technology provided by the licensor (hereinafter the "Licensed Technology") are unreasonably required to be purchased from the licensor or a person designated by the licensor.

(ii) Sale/export of the Licensed Products is unreasonably restricted. Nevertheless such restrictions shall not be deemed unreasonable in regard to any territory wherein the licensor:

(a) has already registered the Licensed Technology,
(b) is engaging in ordinary sales activities with respect to the Licensed Products, or
(c) has given a third party an exclusive right of distribution.

(iii) The licensee's trade parties, sales quantity, sales methods, etc. are unreasonably restricted or sales prices and/or resale prices are unreasonably fixed.

(iv) Dealing with products or use of technology, either of which is in competition with or similar to the Licensed Products or the Licensed Technology, as the case may be, is unreasonably restricted for a considerable period of time after expiration or for the duration of the agreement.

(v) After "intellectual property rights" such as industrial property rights, or technical information (know-how) expire or are no longer subject to confidentiality, continuing use of Licensed Technology is unreasonably restricted, or royalties are unreasonably assessed with respect to use thereof.

(vi) Royalties are assessed, or certain technologies are unreasonably forced to be induced, with respect to products other than the Licensed Products manufactured or sold by the licensee using the Licensed Technology during the term of the agreement.

(vii) Improvements of the technology by the licensee are

unreasonably restricted or unilateral obligations to grant improvements made by licensee to licensor are imposed.

(viii) The licensee is obligated to pay an unreasonably large sum of money for sales promotion activities such as advertising for the Licensed Products.

(ix) The terms of the agreement concerning the method of calculating the royalty and changes thereto, termination of the agreement, arbitration of disputes and governing law are unreasonably prejudicial to either party.

(x) Raising objections to the effectiveness of alleged industrial property rights or the confidentiality of know-how is unreasonably prohibited, or licensor's liability for damages, losses and costs arising out of or relating to the use of Licensed Technology is unreasonably indemnified.

Also, each of the following events shall constitute an unfair trade practice in import distributorship agreements:

(i) Dealing with products which are in competition with and/or similar to the concerned products (hereinafter the "Agreement Products") is unreasonably restricted for a considerable period of time after expiration or for the duration of the agreement.

(ii) The components, etc. of the Agreement Products are unreasonably required to be purchased from the foreign business person who is a party to the import distributorship agreement or from a person designated by such foreign business person.

(iii) Any of the following restrictions are imposed with respect to the sale of the Agreement Products:

(a) Sale/export territories for the Agreement Products are unreasonably restricted. (Nevertheless, such restrictions on export to any territory wherein a distributor, branch or sales office of the foreign business person is already established are not deemed unreasonable.)

(b) The import distributor's sales territories or vendees in Korea are unreasonably restricted.

(c) The sales quantity is unreasonably restricted or a pre-determined unreasonably large sales quota is required to be attained.

(iv) With respect to resale of the Agreement Products, the sales

outlets are unreasonably restricted or the resale prices in the chain of distribution are pre-determined.

(v) The import distributor is obligated to pay an unreasonably large pre-determined amount for sales promotion activities such as advertisements.

(vi) The terms of the agreement concerning termination, arbitration of disputes and governing law are unreasonably prejudicial to one of the parties.

Any provision of an agreement in violation of the above unfair trade practices may be unenforceable and void.

Chapter IV. Structural Control

1. Merger Control

The MRTFA regulates mergers categorized based upon the method of combination as follows: acquisition of shares, inter-locking directorates, amalgamations, transfer of a business or of a substantial portion of its fixed assets, and establishment of a new company.

Mergers which substantially restrict competition in a particular field of trade by involving a company whose paid-in capital is five billion Won (approximately 6.25 million U.S. dollars) or more, or whose total assets are twenty billion Won or more, are prohibited. The term "particular field of trade" means a market in which competitive relationships exists.

Mergers which may otherwise be prohibited may be permitted if the Korean government deems it necessary to rationalize the industry concerned or to strengthen its international competitiveness.

As a means to monitor the legality of substantial proposed mergers, companies must report the contemplated transaction to the FTC in the following cases:

(i) Where an entrepreneur acquires or holds 20% or more of the total issued shares of another entrepreneur.

(ii) Where a holding company or other legal entity acquires or holds 20% or more of the total issued shares of two entrepreneurs respectively which are in competition with each other or are in a dependent relationship in terms of the procurement of raw materials.

(iii) Where an officer or an employee of an entrepreneur is

concurrently an officer of another entrepreneur in competition or in a dependent relationship in terms of the procurement of raw materials.

(iv) Where an entrepreneur merges with another entrepreneur.

(v) Where the whole or substantial part of a business of an entrepreneur is assigned, leased or managed by another entrepreneur.

(vi) Where an entrepreneur subscribes for twenty percent or more of the shares of a new company.

Although the guideline for mergers was published in 1980 by the FTC, it is not at all comprehensive. In any event, the FTC has issued Corrective Orders against proposed mergers only on two occasions since 1980.

2. Deterrence of Concentration of Economic Power

The adverse effects of economic concentration, especially by so-called "Chaebol" (conglomerates), have been a major social and economic issue in Korea for the past two decades.

In order to regulate such economic concentration, the MRFTA imposes the following restrictions: (i) Establishing a holding company is prohibited in principle. (ii) An entrepreneur ("acquiring entrepreneur") which belongs to one of the large conglomerates designated by the FTC is prohibited from acquiring shares of an affiliate entrepreneur which holds shares of the acquiring entrepreneur. (iii) The total amount of capital investment by a member company of a large conglomerate is limited to forty percent of the net assets of the investing company. (iv) The total amount of guarantee for borrowings of a member company of a large conglomerate by another member company of the conglomerate is limited to two hundred percent of the amount of the guaranty-providing company. (v) The voting rights of shares of a member company of a large conglomerate group held by a financing or insurance company which belongs to the same large conglomerate group are suspended.

Chapter V. Anti-trust Exemptions

The MRFTA does not apply to the legitimate activities of an entrepreneur or trade association conducted in accordance with other laws or decrees. As well, the MRFTA does not apply to the activities recognized as an exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act.

With respect to the financing and insurance industry, some

MRFTA restrictions are not applicable such as merger control, limitation of guarantee for affiliated entrepreneurs and resale price fixing.

Chapter VI. Conclusion

Before the introduction of the MRFTA fourteen years ago, the Korean government tended to encourage the formation of monopolies. It was thought that the development and growth of Korean industry as a competitive force in world markets could be most effectively accomplished given the nation's limited resources by allowing a small number of companies to benefit from the domination of markets domestically.

Therefore, since early 1960, all major industries have been controlled by only a few "chaebol". Recently, however, Korean government policy is changing to promote free competition in every field of business except for a few critical industries such as electricity, telecommunications, transportation, energy and financing industries. Due to the short history of anti-trust laws in Korea, many of the legal issues in this area have not yet been tested by the Korean courts. However, the FTC has been increasingly active in enforcing competition laws and the extent of this development in Korea still remains to be seen.