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## Korea's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries

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# Korea's Competition Law And Policies In Perspective

*Youngjin Jung\* & Seung Wha Chang\*\**

## I. INTRODUCTION

Korea's legal and regulatory landscape is one that has experienced monumental changes over the past several decades. The country has dealt with a series of political and socio-economic challenges, and is moving rapidly closer to the level of economic development of a developed country. Following the economic crisis in 1997 that shook the Asian region, and recognizing the need to restructure its economy into one based on market competition, Korea has been working towards eliminating governmental intervention, entry barriers, and other anti-competitive elements from its markets and reforming costly and inefficient economic structures, thus hastening the transformation of its previously government-led economy into a more market-based one. At the heart of this audacious restructuring endeavor has been Korea's competition law and policy. Korea's competition law has strong regulatory legal instruments to curb the economic concentration of Korea's business conglomerates, or *chaebol*. A unique feature of Korea's competition policy has been to overhaul their corporate governance. Korea has also significantly augmented its enforcement activities in all of the major areas of competition law—cartel investigation, merger review, and regulation of the abuse of market

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dominance. As a prime example of such increased enforcement activities, on December 7, 2005, Korea's Fair Trade Commission ("KFTC") found Microsoft Corporation guilty of abuse of market dominance and levied a fine of approximately \$30 million and a corrective measure that is more stringent on Microsoft than that of the European Commission.<sup>1</sup> Additionally, in response to increased globalization, the KFTC has expanded its jurisdictional reach overseas to cope with the anti-competitive behaviors of foreign nations or corporations that threaten the welfare of Korean consumers.

The aim of this article is to provide an overview of competition law and competition policy in Korea and to analyze their relationship with other important national economic policies. Section II provides a historical survey of the country's competition law and policy. Section III examines the major components of the law and evaluates how the antitrust authority has actually enforced its provisions in practice. It also highlights elements of the law that have been tailored to Korea's unique economic circumstances. Section IV focuses on the relationship between competition policy and related economic policies—in particular, industrial policy and trade and investment policy—and gives some case studies. Section V discusses Korea's recent expansion of its antitrust jurisdiction beyond its own territory. Section VI offers some policy suggestions for other developing Asian countries based on the Korean experience with competition policy.

## II. THE EVOLUTION OF COMPETITION POLICY IN KOREA

### A. The 1960's and 1970's: The Early History of Competition Policy

In the early 1960's, after serious political turbulence ending in a military coup, Korea's new government launched its first five-year economic development plan.<sup>2</sup> To promote the growth of selected labor-intensive, export-oriented industries, the government provided strong financial and tax incentives for companies engaged in export businesses, while enforcing tight control on imports. By the time the second five-year economic development plan came to an end in 1971, the economy was recording annual economic growth of approximately 10%.<sup>3</sup>

In the late 1960's, concerned about growing protectionism among

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<sup>1</sup> Press Release, Korea Fair Trade Commission, The Findings of the Microsoft Case (Dec. 7, 2005), at [http://www.ftc.go.kr/data/hwp/microsoft\\_case.pdf](http://www.ftc.go.kr/data/hwp/microsoft_case.pdf) [hereinafter KFTC Press Release].

<sup>2</sup> South Korea – Economic Plans, <http://www.country-data.com/cgi-bin/query/r-12300.html>.

<sup>3</sup> KFTC, HISTORY OF THE DEVELOPMENT OF A MARKET ORIENTED ECONOMY 12 (2001); BON HO KOO, A HISTORICAL PERSPECTIVE OF THE KOREA ECONOMY 184 (1991).

major trading partners, such as the United States, and the international competitiveness of Korea's labor-intensive light manufacturing industries, which were under threat from other emerging economies, the government enacted legislation to shift the focus to heavy manufacturing industries. The Industrial Machinery Promotion Act of 1967, the Shipbuilding Promotion Act of 1967, the Electrical Industry Promotion Act of 1969, the Steel Industry Promotion Act of 1970, and the Petrochemical Industry Promotion Act of 1970 demonstrated the government's commitment to developing the heavy manufacturing sector by providing preferential treatment to the industries covered by these laws. The heavy and chemical industry ("HCI") drive was formally launched in 1973 and continued well into the late 1970's.<sup>4</sup> The government directed significant financial resources and tax incentives toward these industries, marginalizing labor-intensive, light manufacturing industries in the process.<sup>5</sup> It encouraged a handful of companies that had performed well under the first two five-year economic development plans to enter major HCIs selected by the government.<sup>6</sup>

Korea recorded annual growth of 9.6% throughout the 1970's, but this high rate of economic growth coincided with deepening macroeconomic imbalances and microeconomic inefficiencies.<sup>7</sup> The first and second oil shocks took a heavy toll on the economy, which was reliant on foreign raw materials.<sup>8</sup> Excessive investment in equipment and facilities during the HCI drive, a construction boom in the Middle East that increased the money supply in Korea as workers repatriated their earnings, and the government's price support policy for rice led to high levels of inflation that worsened the currency account balance.<sup>9</sup> Excessive investment and persistent government policy throughout the 1960's and 1970's of setting high entry and exit barriers for strategic industrial sectors solidified monopolistic and oligopolistic market structures and caused an inefficient allocation of resources.<sup>10</sup> The selective economic strategy pursued in this era also propelled the formation of the *chaebol*—Korea's family-owned industrial conglomerates, including global giants like Samsung, Hyundai, LG, and SK—further accelerating the concentration of economic power. The share of the ten largest *chaebol* rose from 5.1% of GDP at the beginning of the

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<sup>4</sup> *Id.* at 12–13.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.*

<sup>7</sup> JUNG-HO YOO, THE INDUSTRIAL POLICY OF THE 1970S AND THE EVOLUTION OF THE MANUFACTURING SECTOR 37–39, 44 (1990).

<sup>8</sup> KFTC, *supra* note 3, at 33; KOO, *supra* note 3, at 220–24; Kwang Shik Shin & Seung Wha Chang, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 30 (1998), <http://www.cid.harvard.edu/hiid/661.pdf>.

<sup>9</sup> KFTC, *supra* note 3, at 33–34 (2001); KOO, *supra* note 3, at 215–18.

<sup>10</sup> *Id.*

HCI drive to over 10% by the end.<sup>11</sup>

Against this backdrop, the government believed that to maintain economic growth in an expanding market, it needed to create a more competitive industrial environment. Its initial attempts to diffuse criticism of the country's monopolistic and oligopolistic markets were formulated during the course of rapid economic development in the 1960's.<sup>12</sup> In 1963, the *Sambun* case stirred a public outcry, leading to a public consensus on the need to contain monopolistic and oligopolistic behavior.<sup>13</sup> This case involved several large producers of wheat flour, sugar, and cement for the domestic market who were able to charge three to four times the listed price for goods by sustaining chronic shortages of supply.<sup>14</sup> Not only were they earning excessive profits, they were also practicing widespread tax evasion.<sup>15</sup>

To deal with problems of this type, in 1964 the government released a draft of a new competition law made up of 29 articles.<sup>16</sup> The law proposed the establishment of a competition watchdog to regulate prices and contract terms.<sup>17</sup> The Economic and Planning Board—the powerful bureaucratic agency in charge of economic development throughout the 1960's and 1970's—was to be in charge of the new agency.<sup>18</sup> Due to strong objections from the business sector, however, this bill failed to be placed on the cabinet agenda, a necessary step before it could be referred to the National Assembly.<sup>19</sup> In 1966, the government submitted a new bill in which the competition watchdog would play only an advisory role.<sup>20</sup> As significant a setback as this was, the bill was not even considered by the National Assembly and was automatically discarded when the session ended in June 1967.<sup>21</sup> The government reintroduced the bill in August 1967, but once again it failed in the face of fierce lobbying from business.<sup>22</sup>

In 1968, a National Assembly investigation into the misuse of foreign capital focused public attention on another case of consumer exploitation and excessive profits.<sup>23</sup> Sinjin, a monopolistic automobile manufacturer that had obtained a commercial loan from a foreign entity, was accused of

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<sup>11</sup> IL SAKONG, KOREA IN THE WORLD ECONOMY 247 (1993).

<sup>12</sup> KFTC, *supra* note 3, at 4–6.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4, n.1.

<sup>15</sup> *Id.*

<sup>16</sup> KFTC, *supra* note 3, at 14.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.*

<sup>22</sup> KFTC, *supra* note 3, at 16.

<sup>23</sup> *Id.* at 5.

selling its Korona cars in the domestic market at approximately four times the international price.<sup>24</sup> The government seized the opportunity to submit another competition law bill, but this was automatically discarded when the session ended in June 1971.<sup>25</sup> This time, business successfully argued that a competition law would be premature at a time when the goal of the Korean economy was to accumulate industrial capital and facilitate the free flow of products to the market.<sup>26</sup>

The early 1970's witnessed widespread inflation caused by a worldwide oversupply of the dollar, the first oil shock, and rampant cartelization around the globe.<sup>27</sup> The government tried hard to stabilize domestic prices by raising exchange rates and domestic oil prices, but this only aggravated price instability.<sup>28</sup> As part of its price stabilization plan, the government once again submitted a bill to the National Assembly proposing a competition watchdog under the Economic and Planning Board, composed of representatives from both government and the private sector.<sup>29</sup> This bill failed when the president dissolved the National Assembly using his emergency powers in late 1972.<sup>30</sup>

In late 1975, to address the issue of continuing inflation caused in part by the previous increases in exchange rates, the government enacted the Price Stabilization and Fair Trade Act. Although the act aimed to stabilize prices and ensure fair trade, in practice most resources were expended in the former area. Nevertheless it failed to accomplish its putative goals of reining in prices and creating fair markets. In late 1979, a series of unprecedented political events took place in Korea, including the assassination of the incumbent president.<sup>31</sup> After the military coup, the ruling elites who formed the new government wanted to project a new vision for Korean society. Bearing in mind the problems caused by the growth-first strategy of the 1960's and 1970's, the government undertook numerous social and economic reforms. These included, notably, the enactment of the Monopoly Regulations and Fair Trade Act ("MRFTA") in 1980, which took effect in 1981.<sup>32</sup> This was a significant achievement

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<sup>24</sup> At the time, government approval was required to obtain a loan from a foreign entity. What enraged the public in this instance was that Sinjin was not only granted the privilege of having its request for a foreign loan approved but the company was also reaping excessive profits on domestic sales of its cars.

<sup>25</sup> KFTC, *supra* note 3, at 18.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 24-25.

<sup>31</sup> EDWARD M. GRAHAM, REFORMING KOREA'S INDUSTRIAL CONGLOMERATES 38 (2003).

<sup>32</sup> Monopoly Regulations and Fair Trade Act, No. 4198 (1990) (S. Korea) [hereinafter MRFTA].

considering the fierce lobbying it faced from businesses and the objections raised by other government agencies also charged with industrial policy. The passage of the MRFTA heralded a new phrase in the regulation of monopolistic and oligopolistic behavior and represented a major step on the path to a more balanced and equitable society. The MRFTA garnered overwhelming support from the media and consumer organizations, if not from businesses.

#### B. The Early 1980's to 1997: Regulation of Economic Concentration

Despite the enactment of the MRFTA, which had been intended to control mergers and regulate market-dominating behavior, the economic concentration of the *chaebol* did not abate.<sup>33</sup> Rather, the market share in terms of turnover of the thirty largest *chaebol* in the mining and manufacturing sector increased from 34.1% in 1977 to 40.8% in 1985, as seen in Table 1.<sup>34</sup> The cross-shareholdings and cross-debt guarantees of the *chaebol* continued to expand "like the tentacles of an octopus." By the early 1980's, the public's opinion of the *chaebol* was souring noticeably.<sup>35</sup> The strong, growth-first strategy of the previous two decades had greatly alleviated poverty, and the general public was beginning to take more of an interest in wealth distribution and equity issues. A cross-section of society, from workers to intellectuals, now held the view that the *chaebol* had made their fortunes by virtue of cozy relations with politics and by exploiting the Korean people.<sup>36</sup>

The then-ruling Democratic Justice Party also shared in this negative view of conglomerates.<sup>37</sup> The expansion of the *chaebol* into all areas of business was hampering the sound growth of small- and medium-sized enterprises ("SMEs"), the bedrock of the Korean economy. The over-concentration of the *chaebol* and their practice of transmitting wealth through inheritance raised questions about their legitimacy and created distrust in the economic system and in politics.<sup>38</sup> Thus, the issue of the *chaebol* was not confined to the economic sphere, but had political and social dimensions as well.<sup>39</sup>

In the mid-1980's the Korean economy was faring well with the help

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<sup>33</sup> KFTC, *supra* note 3, at 35–37.

<sup>34</sup> DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, KOREA REBUILDS: FROM CRISIS TO OPPORTUNITY 199 (1999), available at [www.dfat.gov.au/publications/korea\\_rebuilds/korea.pdf](http://www.dfat.gov.au/publications/korea_rebuilds/korea.pdf).

<sup>35</sup> SO MEE SUNG & KWANGSHIK SHIN, TWENTY YEARS OF COMPETITION POLICY 5 (2001).

<sup>36</sup> *Id.* at 5–6.

<sup>37</sup> See GRAHAM, *supra* note 31, at 74–76.

<sup>38</sup> K.U. Lee, *Economic Development and Competition Policy in Korea*, 1 WASH U. GLOBAL STUD. L. REV. 67, 67–68 (2002).

<sup>39</sup> *Id.* at 68.

of the “three lows”: low interest rates, low oil prices, and a low dollar.<sup>40</sup> In this benign environment, the government, plagued by questions about its legitimacy, took the bold step of instituting a new legal system to regulate the *chaebol*. Chapter 3 of the MRFTA, created in 1986, was entitled “Regulation of Economic Concentration” and contained a series of provisions to regulate “large-scale companies.”<sup>41</sup> These included a limit on holding companies, a ban on (direct) cross-shareholdings, and a ceiling on the total amount of investment that could be carried out by *chaebol*.<sup>42</sup> Because the latter provision greatly restricted the *chaebol*’s entry into new areas of business, the *chaebol* has made unrelenting efforts to have the limit eased or lifted ever since.

These sweeping legislative changes did not alleviate economic concentration.<sup>43</sup> In 1989, the number of *chaebol* with assets of more than Korean won 400 billion was 43, 11 more than in 1987.<sup>44</sup> Over the same two-year period, the number of *chaebol*-affiliated companies increased from 509 to 673.<sup>45</sup> The total amount of mutual investment among affiliates surged from Korean won 3.3 trillion to Korean won 16.97 trillion, to account for 28.1% of the net asset value of the forty-three *chaebol*.<sup>46</sup> The share of total turnover of the thirty largest *chaebol* in the mining and manufacturing sector was 39.6% in 1994, again revealing no sign of a slowdown in economic concentration.<sup>47</sup>

Until the financial crisis of 1997–98, the government continued to tighten its regulations on *chaebol* to address the problem of unrelenting economic concentration. In 1992, a provision tightening the restrictions on debt guarantees among *chaebol* affiliates was promulgated to prevent them from excessive debt financing that might undermine their financial structure.<sup>48</sup> In 1996, a new provision was added to the MRFTA to curb inside transactions among affiliated companies that were not based on arm’s-length valuations.<sup>49</sup> None of these attempts to stem the tide of economic concentration met with much success, however.

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<sup>40</sup> SUNG & SHIN, *supra* note 35, at 38.

<sup>41</sup> KFTC, *supra* note 3, at 85; SUNG & SHIN, *supra* note 35, at 7–8.

<sup>42</sup> KFTC, *supra* note 3, at 78–83; SUNG & SHIN, *supra* note 35, at 8.

<sup>43</sup> KFTC, *supra* note 3, at 89.

<sup>44</sup> HWANG & SEO, CHAEBOL GOVERNANCE AND REFORM IN KOREA 365 (2000).

<sup>45</sup> *Id.* at 364.

<sup>46</sup> Hee-young Song, *Chaebol, Widening Octopus Expansion*, CHOSUN DAILY, Jun. 6 1989.

<sup>47</sup> KFTC, *supra* note 3, at 95.

<sup>48</sup> Lee, *supra* note 38, at 70.

<sup>49</sup> KFTC, *supra* note 3, at 130–33.

### C. 1997 to the Present: Economic Restructuring and Competition Policy

In the face of the intense turmoil brought about by the financial crisis of 1997–98 and under pressure from the IMF, the government amended the MRFTA to facilitate economic and corporate restructuring.<sup>50</sup> It abolished (but later reinstated) the limit on the total amount of investment, flatly prohibited debt guarantees among affiliated companies, and lifted the restriction on holding companies, though with strict conditions.<sup>51</sup>

There is a strongly held view that the *chaebol* were the main cause of the financial crisis in Korea, leading to IMF supervision. The economy has rebounded nicely since 1999, but the question of how to view and deal with the *chaebol* is still clouded in controversy and awaits further research.<sup>52</sup> Whether or not they were the main culprit in the crisis, the *chaebol* remain at the heart of the Korean economy. The top thirty *chaebol* are engaged in businesses spread across twenty or so major industries and have more than 600 affiliates.<sup>53</sup> Their total assets comprise over 45% of all corporate assets in Korea.

The government now appears to take the view that economic concentration is closely related to issues of corporate governance, and that regulation of economic concentration under the MRFTA should therefore give way to regulation under general commercial law in the future when the corporate governance of *chaebol* is sufficiently improved. In early 2004 it announced an ambitious ‘roadmap for market reform’ under which it would lift most of the restrictions relating to economic concentration once certain conditions, such as transparency in corporate governance, were met.<sup>54</sup>

## III. AN OVERVIEW OF KOREA’S COMPETITION LAW

### A. Objectives

Article 1 of the MRFTA defines its purpose as being:

to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers, and to strive for balanced development of the national economy by preventing the abuse of market-dominating positions by enterprises and the excessive concentration of economic power, and by regulating undue collaborative acts and unfair trade practices.

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<sup>50</sup> KFTC, *supra* note 3, at 169–70.

<sup>51</sup> *Id.*

<sup>52</sup> See GRAHAM, *supra* note 31, at 126–127.

<sup>53</sup> See KFTC, *supra* note 3, at 360, Table 2.

<sup>54</sup> KOREA FAIR TRADE COMMISSION, 2005 FAIR TRADE WHITE PAPER 3 (2005) [hereinafter KFTC WHITE PAPER].

Therefore, Korean competition law can be said to pursue multiple objectives in addition to the promotion of economic efficiency, which is arguably the sole concern of U.S. antitrust law.<sup>55</sup>

Certain provisions in the MRFTA can sensibly be explained only when one assumes that the act pursues diverse social goals. For instance, the KFTC—the government agency established under the MRFTA to enforce its provisions—has dealt with unfair trade practices in a way that protects economically weaker enterprises, indicating that maximizing economic efficiency is not its sole objective. An examination of the guidelines it has promulgated on specific issue areas, such as large retail stores and newspapers, confirms this view. The diverse values the MRFTA embraces are also apparent in the act's exceptions and exemptions from antitrust disciplines. A clause in the cartel regulations, for example, exempts collaborative behavior designed to enhance the competitiveness of SMEs.<sup>56</sup>

The most glaring example of the MRFTA's non-efficiency-oriented goals is the set of provisions on the concentration of economic power in Chapter 3 of the act. The chapter addresses the pathologies supposedly emanating from the *chaebol*, such as cross-share holding, debt guarantees, and equity investment among affiliates.<sup>57</sup> The act also contains a provision to ensure arm's-length transactions among the affiliates of large business groups. In short, it can be argued that the MRFTA has broad objectives that go beyond its putative goals of promoting economic efficiency and maximizing consumer welfare.

Nevertheless, in terms of priority, increasingly such socio-political objectives appear to play a minimal role in the process of the KFTC's enforcement except for regulation of economic concentration and certain regulations on unfair trade practices. In other words, in traditional areas of antitrust enforcement, such as merger review, cartel investigation, and abuse of market dominance, socio-political considerations rarely come to the fore in the KFTC's enforcement, making them only secondary to the goal of promoting economic efficiency and consumer welfare.<sup>58</sup>

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<sup>55</sup> Phillip Areeda and Herbert Hovenkamp argue as follows:

Today it seems clear that the general goal of the antitrust law is to promote 'competition' as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of ever available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.

PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 100a (2d ed. 2000) (1978).

<sup>56</sup> MRFTA, *supra* note 32, at art. 19 (2)(6).

<sup>57</sup> *Id.*

<sup>58</sup> SUNG & SHIN, *supra* note 35, at 56–57.

## B. Major Legislation

The MRFTA is the central legislation in place designed exclusively to deal with competition law and policy. The MRFTA encompasses all of the traditional aspects of competition policy that are the subject of competition law in other countries, such as anti-competitive mergers, cartels, monopolization, resale price maintenance, and exclusive dealing arrangements.<sup>59</sup> In addition, it addresses certain aspects of economic concentration in the Korean economy by regulating undue subsidies, debt guarantees, and equity investment among *chaebol* affiliates.<sup>60</sup>

Additionally, many other laws make up Korean competition law in a broader sense. For instance, both the Telecommunications Business Act and the Act on the Structural Improvement of the Financial Industry contain provisions to regulate merger and acquisition ("M&A") activity in the telecommunications and financial industries. The Unfair Competition Prevention Act of 1961 regulates competition in the area of intellectual property, especially trademarks.<sup>61</sup> And the Consumer Protection Act of 1979 provides for a Consumer Protection Agency to enforce its provisions. These laws are primarily enforced by other government agencies. Yet, in regards to consumer protection, the KFTC has exhibited its strong commitment to aggressively protect consumer interests, which is expected to become one of the central pillars of the KFTC's enforcement activities in the near future.

Importantly, the KFTC administers several companion statutes governing specific areas of antitrust concern. The KFTC devotes significant resources to administering these laws, so it is worth looking more closely at how they are enforced.

### 1. Companion Statutes

First, the Fair Subcontract Transactions Act aims to establish fair subcontracting practices and create a competitive environment for small and medium-sized subcontractors. It prohibits large companies from unduly reducing payments to subcontractors, bans them from refusing to accept returned goods, and requires them to pay their subcontractors within 60 days, with interest to be paid after this set period.<sup>62</sup> The act also contains other regulations to protect subcontractors from unfair actions by large companies during the transaction process. In recognition of the growing

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<sup>59</sup> *Id.* at 68–70; KFTC; *supra* note 3, at 39–40.

<sup>60</sup> *Id.* at 78–83.

<sup>61</sup> The act has been revised several times. It was renamed the Unfair Competition Prevention and Trade Secret Protection Act in 1998.

<sup>62</sup> KOREA FAIR TRADE COMMISSION, HISTORY OF THE DEVELOPMENT OF A MARKET ORIENTED ECONOMY 46–52 (2001).

importance of the service sector in subcontracts between large companies and small-and-medium sized subcontractors, the KFTC recently amended the law to encompass service subcontractors.<sup>63</sup>

Second, the Adhesion Contract Act aims to eliminate biased contracts, written and circulated by businesses, which preclude the consumer's right to choose the terms of a transaction. It requires businesses to issue formal contracts and explain their terms to consumers, and invalidates clauses that unduly infringe on consumers' rights.<sup>64</sup>

Third, the Fair Labeling and Advertising Act aims to ensure that consumers are given accurate information that enables them to make informed choices. It requires firms to withdraw and correct false representations and misleading advertising and to disclose all information that could be considered relevant to consumer decision-making. In addition, firms may be ordered to hand over evidentiary material.<sup>65</sup>

Fourth, the Door-to-Door Sales Act aims to protect consumers and secure a smooth flow of goods and services in the trouble-prone area of door-to-door sales and pyramid selling schemes.<sup>66</sup> It requires pyramid businesses to purchase consumer compensation insurance or subscribe to a cooperative, to educate their sales force on illegal sales activities, and to allow buyers of their products to withdraw unconditionally from contracts within fourteen days of purchase.<sup>67</sup>

Fifth, the Installment Transactions Act recognizes the consumer's right to withdraw from a contract within seven days of purchasing a product on an installment plan. It requires businesses to give consumers advance notice of fourteen days or more when a contract is being terminated due to consumer default. It also invalidates contract clauses that unfairly disadvantage consumers.<sup>68</sup>

Sixth, the Fair Franchise Transactions Act aims to establish a fair trade system for franchise businesses and ensure the mutually beneficial and balanced development of franchisers and franchisees. The law bans various kinds of unfair transactions in franchise operations and defines the basic rules governing the relationship between franchiser and franchisee. It requires franchisers to provide up-to-date and correct information to their franchisees, bans the use of false or exaggerated information, obligates the parties to a franchise to return franchise fees under certain conditions, and sets rules for the issuance of franchise contracts.<sup>69</sup>

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<sup>63</sup> Fair Subcontract Transactions Act, No. 3799 (1984) (S. Korea).

<sup>64</sup> Adhesion Contract Act, No. 3922 (1986) (S. Korea).

<sup>65</sup> Fair Labeling and Advertising Act, No. 5814 (1999) (S. Korea).

<sup>66</sup> Door-to-Door Sales, Etc. Act, No. 5086 (1995) (S. Korea).

<sup>67</sup> *Id.*

<sup>68</sup> Installment Transactions Act, No. 4480 (1991) (S. Korea).

<sup>69</sup> Fair Franchise Transactions Act, No. 6704 (2002) (S. Korea).

Finally, the Consumer Protection in Electronic Commerce Act aims to protect vulnerable consumers in electronic commerce due to its very nature: with no face-to-face transactions, it is often difficult to locate the seller as well as to physically examine the product before purchase. This law protects consumer interests and enhances market reliability in this sector. To this end, it establishes safety measures or mechanisms for the following: preventing consumer error while using electronic devices, protection of consumer information from possible abuse, adoption of an unconditional seven day contract withdrawal period, and the mandatory purchase of a consumer compensation insurance policy by e-money issuers.<sup>70</sup>

## 2. *The Omnibus Cartel Repeal Act*

In February 1999, the KFTC promulgated a special law to deal with pervasive cartel behaviors permitted, or in some instances encouraged, by statutes administered by other government agencies. This law, the *Omnibus Cartel Repeal Act* ("Cartel Act"),<sup>71</sup> was drawn up to conform to the Organisation of Economic Cooperation and Development's ("OECD") 1998 recommendations on hard-core cartels.<sup>72</sup> It abolished the formation of cartels by eight categories of certified professionals, including lawyers, accountants, customs officers, patent lawyers, architects, and veterinarians. Moreover, the Cartel Act revised the collective optional contract system for SME products, which previously allowed collusive behavior by SMEs in government purchasing programs. In all, the Cartel Act revised around twenty regulations that, until that time, impeded market competition. The passage of this legislation indicated that the KFTC formally began to exercise its competition advocacy role in Korea.<sup>73</sup>

A KFTC study shows that professional fees and commissions have remained the same or decreased since the implementation of the Cartel Act.<sup>74</sup> After abrogation of the prevailing compensation standard, price competition started to take effect and, in time, the professions reached a new, more appropriate price level. The Consumer Protection Agency has tried to ensure that consumers have access to the information they need to determine appropriate fee levels for professional services and select the services that best meet their needs.<sup>75</sup>

In addition, the differential between professional fees for similar tasks

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<sup>70</sup> KFTC, *supra* note 3, at 466–69.

<sup>71</sup> Omnibus Cartel Repeal Act, No. 5815 (1999).

<sup>72</sup> OECD 1998 Recommendation on Hard-Core Cartels, <http://usinfo.state.gov/journals/ites/0299/ijee/oecd.htm> (last visited April 15, 2006).

<sup>73</sup> KFTC Press Release, *supra* note 1.

<sup>74</sup> Press Release, KFTC, Investigation Results on Fees of 8 Licensed Professionals (Feb. 7, 2005) (on file with author).

<sup>75</sup> *Id.* at 8–18.

has lessened, with a tendency for fees to level out at the lower end of the spectrum.<sup>76</sup> Nevertheless, this differential can still be very large, ranging from 3.3 to 50 times the highest price charged to the lowest price charged.<sup>77</sup> Not only has increasing price competition resulted in an overall decrease in fees, but fees have tended to converge at the average price due to increases in the lowest fees and decreases in the highest, as illustrated in Table 2. Attorneys' fees are the exception, where prices for the most expensive services have gone up, increasing the gap between the lowest and highest fees charged for similar tasks: the highest fees were between 14.5 and 30 times greater than the lowest fees charged in 2001.<sup>78</sup>

As one might expect, professional fees for similar services differ according to location. This indicates that prices are formed naturally through supply and demand. The Seoul region, where demand for professional services is greatest, records the highest prices. This is also where the most highly paid professionals are found. Moreover, the difference between the highest and lowest fees charged for similar tasks is greatest in Seoul.

### C. Monopoly Regulations and Fair Trade Act

#### *1. Curbing Concentration of Economic Power*

##### a. Limitation on Total Investment

One of the means employed by the MRFTA to curb undue concentration of economic power is the so-called limitation on total investment amounts. The threshold for applying the limitation on total investment amount is six trillion Korean won in assets, calculated by adding up all of the assets of companies belonging to any business group.<sup>79</sup>

Therefore, a company belonging to a business group with combined assets of at least six trillion Korean won and thus subject to the limitation on total investment amount, may not acquire or hold stock of other domestic companies in excess of 25% of the company's net asset amount.<sup>80</sup> Stock of overseas companies and treasury stock do not count toward the total investment amount.<sup>81</sup>

The net asset amount of a company, for the purposes of this limitation, is equal to the larger of (1) the capital, or (2) the equity (or paid-in) capital,

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<sup>76</sup> *Id.* at 10.

<sup>77</sup> *Id.* at 13–14.

<sup>78</sup> *Id.* at 4, 14.

<sup>79</sup> KFTC WHITE PAPER, *supra* note 54, at 238.

<sup>80</sup> KFTC, *supra* note 3, at 311.

<sup>81</sup> MRFTA, *supra* note 32, at art. 10 (1), (6).

less the amount of any equity investment in that company held by its affiliates (valued at par).<sup>82</sup> The stock of other domestic companies held by a company subject to the limitation is valued at acquisition cost. However, the limitation does not apply to some categories of companies. Most notably, it does not apply to a "holding company." Additionally, the limitation does not apply to (1) a financial or insurance company, (2) a company under insolvency, restructuring, or similar proceedings, or (3) a company belonging to any business group whose debt-to-equity ratio (i.e., the ratio of debt to total assets less liabilities) is less than 100% as shown on the consolidated financial statement.<sup>83</sup>

Where a company is subject to the limitation, certain of its investments do not count toward the total investment limit. These include those investments in (1) another company in the same industrial or business sector or whose business operations are closely related to those of the investing company, (2) a qualified "social overhead capital" company, (3) a company in which any governmental unit holds at least 30% of the stock, or (4) a government-held company being privatized.<sup>84</sup> In addition, certain transactions that would otherwise be prohibited by the limitation are permitted for a limited duration within which any violation of the limitation must be cured.

#### b. Restrictions on the Exercise of Voting Rights by Financial or Insurance Companies

In general, a financial or insurance company belonging to a business group with at least two trillion Korean won in assets may not exercise voting powers based on any shares of stock it holds in a domestic affiliate or another domestic company belonging to the same business group.<sup>85</sup> However, certain exceptions do apply. The fundamental policy behind this provision is that financial capital should be separated from industrial capital.

A financial or insurance company may exercise voting rights based on the shares it holds for the purpose of carrying on the financial or insurance business. An insurance company may exercise voting rights based on the shares it holds for the purpose of the efficient operation and management of the insurance assets and with approval under the Insurance Business Act or other laws. Also, a financial or insurance company may exercise voting rights based on the shares it holds in a listed or registered domestic affiliate (i.e., an affiliate listed with the Korea Stock Exchange or registered with

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<sup>82</sup> KFTC, *supra* note 3, at 309, n.16.

<sup>83</sup> *Id.* at 176–77, 309; MRFTA, *supra* note 32, at art. 10 (7).

<sup>84</sup> KFTC, *supra* note 3, at 177, 309; MRFTA, *supra* note 32, at art. 10 (6).

<sup>85</sup> KFTC, *supra* note 3, at 347–48.

Kosdaq) if the agenda is the appointment or dismissal of a director or officer, an amendment of the articles of incorporation, or a merger or transfer of the whole or a substantial part of the business. However, if the sum of such shares and the shares in the same affiliate held by that affiliate's specially related party exceed 15% of all the issued and outstanding shares of that affiliate, the financial or insurance company may not exercise voting rights based on shares equal in number to such excess (however, according to interim measures, this may progressively exceed 30% by March 31, 2006, 25% by March 31, 2007, 20% by March 31, 2008, and 15% from April 1, 2008).<sup>86</sup> As a note, some of Samsung's financial affiliates filed a suit with Korea's Constitutional Court to invalidate this provision on the grounds that the gradual reduction of the shares until 2008 abridges their property rights and equal treatment bestowed by Korea's Constitution.

### c. Holding Companies

To be a "holding company," a company must satisfy two conditions: (1) have at least one hundred billion Korean won in assets, and (2) the value of the shares it holds in its subsidiaries must account for at least 50% of the value of its assets.<sup>87</sup>

The establishment of a holding company, or the conversion of a pre-existing company into a holding company, must be reported to KFTC within certain prescribed time limits: thirty days after establishment or conversion as a result of a merger or spin-off; and four months after the end of the fiscal year in which a company became a holding company as a result of acquisition of shares in other companies or other increases or decreases in assets.<sup>88</sup>

Although a holding company may hold shares in its subsidiaries beyond the limitation on gross investment amount (as described above), it is subject to certain other restrictions. A holding company may not have a debt-to-equity ratio exceeding 100%.<sup>89</sup> However, if a company becomes a holding company as a result of an in-kind contribution, or becomes a holding company or is newly created as such as a result of a merger or spin-off (hereinafter, "the event of a conversion or new establishment"), then there is a cure period of two years.<sup>90</sup>

Moreover, a holding company may not hold less than a certain minimum equity interest in a subsidiary (30% of the total issued and

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<sup>86</sup> KFTC WHITE PAPER, *supra* note 54, at 261–63.

<sup>87</sup> MRFTA, *supra* note 32, at art. 2(1)–(2).

<sup>88</sup> KFTC WHITE PAPER, *supra* note 54, at 267.

<sup>89</sup> *Id.* at 268.

<sup>90</sup> *Id.*

outstanding shares of a subsidiary if a listed or registered company, 20% if the subsidiary is a so-called venture company, and 50% in all other cases).<sup>91</sup> However, a cure period of two years applies in the event of a conversion or new establishment.<sup>92</sup>

A holding company may have as subsidiaries *only* financial or insurance companies or *only* companies that are not financial or insurance companies.<sup>93</sup> In other words, a holding company may not have both kinds of subsidiaries. This represents Korea's strict separation of industrial and financial capital. In addition, a holding company may not have a second-tier subsidiary.<sup>94</sup> In other words, a subsidiary of a holding company may not itself have a subsidiary. However, a second-tier subsidiary is permitted if a close relationship exists between the first-tier subsidiary and the second-tier subsidiary, such as that of a parts or service provider.

d. "Roadmap" and Proposed Amendments to the MRFTA

On December 30, 2003, the KFTC announced The Three Year Market Reform Roadmap.<sup>95</sup> This reform aimed at improving the internal and external monitoring system of companies and business groups by enhancing transparency, fairness and competition in market transactions.<sup>96</sup>

The measures that the government introduced towards this end can be divided into three categories: (1) measures to strengthen transparency and accountable business management, (2) measures to improve corporate ownership and governance structure of large business conglomerates, and (3) measures to enhance market competition.

First, the program to strengthen transparency and accountable business management included new legislation introducing securities related class action law suits in Korea (passed in 2003), amending audit-related laws (passed in 2003), permitting electronic voting at shareholders meeting, and further separating industrial and financial capital. For example, the legislation further limited the exercise of voting power by a financial or insurance company belonging to a business group with at least two trillion Korean won in assets (as described above).<sup>97</sup>

Next, the program to improve the corporate ownership and governance structure of large business conglomerates included an expansion of disclosure requirements applicable to such conglomerates, a fine-tuning of the limitation on the total investment amount by which certain companies

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<sup>91</sup> KFTC, *supra* note 3, at 181.

<sup>92</sup> *Id.*

<sup>93</sup> KFTC WHITE PAPER, *supra* note 54, at 279.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 251.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 251–56, 261–64.

may be exempted from such limitations, and encouragement for business groups to adopt a holding company structure. According to the MRFTA as amended on Dec. 31, 2004, companies falling under one of four categories were exempt from the regulations governing the total investment amount: (1) companies with good corporate governance programs and armed with effective internal monitoring systems, such as a cumulative voting system and vote-by-mail system, as well an internal transaction review committee consisting only of outside directors; (2) companies that adopt a holding company structure; (3) companies engaged in relatively uncomplicated cross-shareholdings with fewer than five affiliates; and (4) companies with a relatively small gap between the voting rights and cash flow rights of the controlling shareholder.<sup>98</sup> As part of efforts to further separate industrial from financial capital, the 30% threshold described above is scheduled to be gradually reduced by 5% per year and ultimately to 15% by 2008.<sup>99</sup>

Finally, as part of the program to enhance market competition, the KFTC intends to streamline and improve the anti-competitive regulation regime, anti-cartel measures, and the KFTC's M&A review system, as well as introduce more self-regulatory mechanisms.

## *2. Business Combinations*

### *a. Overview*

The MRFTA prohibits a business combination that substantially restricts competition in its relevant market and grants the KFTC authority to issue a corrective order to an enterprise in violation of, or likely to violate, such regulation.<sup>100</sup> In order to secure effective administration, the MRFTA requires a report to be filed with the KFTC when a business combination meets certain requirements.<sup>101</sup> Because transnational M&A activities are increasingly affecting the domestic market, the KFTC also introduced (in 2003) a notification threshold for M&As between foreign companies.<sup>102</sup>

Recently, the KFTC attempted to strengthen its investigative powers with regards to business combinations, which became an issue of interest to enterprises in Korea. As a representative case, in September 2004 the KFTC prevented SAMICK Musical Instrument Co., Ltd. ("SAMICK"), an enterprise holding approximately a 35% share of the Korean piano market,

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<sup>98</sup> *Id.* at 253–54.

<sup>99</sup> *Id.* at 261–63.

<sup>100</sup> KFTC, *supra* note 3, at 175.

<sup>101</sup> *Id.*

<sup>102</sup> Yong Seok Ahn & Youngjin Jung, *Merger Control in Korea*, ASIA PAC. ANTITRUST REV. 62, 64(2004), available at [http://www.lawleeko.com/pdf/Article\\_YSA\\_1.pdf](http://www.lawleeko.com/pdf/Article_YSA_1.pdf). In fact, one foreign company has already reportedly been fined for failing to make such a notification to the KFTC. *Id.*

from purchasing Young Chang Co., Ltd. ("Young Chang"), an enterprise holding an approximately 60% share of the Korean piano market.<sup>103</sup> The KFTC reasoned that since the market share of the combined companies would reach up to 92% and result in a *de facto* monopoly, it was likely that there would be an abuse of market power and subsequent damage to consumer interests.<sup>104</sup> Some commentators hurled criticism against this decision, arguing that under the current market conditions for piano makers, taking into consideration that competition in the world market is competitive, permitting the business combination of two companies, each of which have weak competition powers as compared to foreign companies, cannot be deemed to restrict competition.<sup>105</sup> Moreover, should the business combination of the two companies not be approved, the companies would find it difficult to survive since they would not be able to secure competitive power. The case went to court and its outcome is currently pending.

The first case in which the KFTC determined that conglomerate integration would restrict competition involved the acquisition of Jinro Co., Ltd, a soju (Korean wine) manufacturer, by Hite Co., Ltd., a beer manufacturer.<sup>106</sup> The main issues in the case were: (i) whether soju and beer were substitutable products; and (ii) whether there would be an anti-competitive effect due to the fact that the two products utilized the same distribution channel (i.e., liquor wholesalers). On the first issue, the KFTC found that soju and beer were not in the same product market. However, on the issue of the anti-competitive effect of the contemplated transaction, the KFTC concluded that the combination of the two dominant companies would greatly restrict potential competition because the conglomerate companies may abuse their dominant power in downstream sales to consumers as well as in upstream wholesale markets. While approving the transaction, the KFTC adopted the following corrective measures to address the potential anti-competitive effect which, among others, included (i) an order barring Hite from raising the retail price of soju and beer beyond the consumer price inflation rate over the next five years, and instructing Hite to consult with the KFTC in advance should it wish to raise their prices, and (ii) an order to separately manage the two companies' sales divisions for the next five years.<sup>107</sup>

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<sup>103</sup> KFTC WHITE PAPER, *supra* note 54, at 130–32.

<sup>104</sup> *Id.*

<sup>105</sup> OECD, *Barriers to Entry* 154 (paper prepared by the Directorate for Financial and Enterprise Affairs Competition Committee), available at <http://www.oecd.org/dataoecd/43/9/36344429.pdf>.

<sup>106</sup> Press Release, Korea Fair Trade Commission, Hite-Jinro Merger Gets Behavioral Remedy from the KFTC (Sept. 5, 2005), available at <http://www.ftc.go.kr/eng/>.

<sup>107</sup> *Id.*

Until now, there have only been a few cases wherein the KFTC had conducted economic analyses in the course of its proceedings relating to business combination investigations. However, increasingly economic analysis has been conducted in important business combinations. In the case of Jinro, a very sophisticated economic analysis used previously in the Microsoft case was used to analyze the relationship between the soju and beer markets. The latest KFTC reorganization established a Division for Economic Analysis within the existing KFTC structure.<sup>108</sup>

#### b. Reporting Requirements

Under the MRFTA, if a company has aggregate assets or turnover (including the assets or turnover of all of its affiliated companies and related persons worldwide) of one hundred billion Korean won (approximately US \$90 million) or more, then the company should file a business combination report with the KFTC.<sup>109</sup>

Unlike in the United States and the European Union, the MRFTA specifies five types of business combinations subject to merger filing. The first type is an acquisition of shares by a company (either directly or through an affiliate or other party with which it has a special relationship) of 20% or more of the total issued and outstanding shares of another company whose stock is not listed with the Korea Stock Exchange (it must have 15% or more if the stock is listed with the Korea Stock Exchange). The second is a merger between two companies. The third type is a business transfer in the form of acquisition by a company (whether by transfer, lease, or the entrustment of the management) of the whole or a substantial portion of the business undertaking of another company. Fourth, the combination creates an interlocking directorate (the concurrent holding of a director or officer's position in another company by a director or employee of a company, with the term "officer," as defined in MRFTA, embracing representative directors (the Korean equivalent of a CEO), directors, statutory auditors, unlimited liability partners, and certain high-level managers). The last type is a subscription by a company for at least 20% of the total issued shares of a new company.<sup>110</sup>

#### c. Timing of Reporting Requirements

Normally, a reporting company should file its Report with the KFTC within thirty days of the date of the consummation of the pertinent transaction. Thus, in these cases, the KFTC will review the Business

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<sup>108</sup> Republic of Korea Fair Trade Commission, *KFTC News* (2005), available at [http://ftc.go.kr/data/hwp/kftc\\_news\(2005\\_december\).doc](http://ftc.go.kr/data/hwp/kftc_news(2005_december).doc).

<sup>109</sup> Ahn & Jung, *supra* note 102.

<sup>110</sup> *Id.*

Combination after its occurrence (“post-merger filing”).

However, if the company has aggregate assets or turnover (including the assets or turnovers of all affiliated companies and related persons worldwide) of 2 trillion Korean won (approximately US \$1.8 billion) or more (a “Large Company”), then it should file its Report before the completion of the transaction in all types of Business Combinations except in cases of an interlocking directorate.<sup>111</sup> The KFTC, at its discretion, may extend the thirty day standstill period by a maximum of ninety days or, conversely, may shorten the standstill period.<sup>112</sup> During this period, the KFTC should examine the contemplated transaction to ascertain whether such a transaction would contravene the MRFTA.

#### d. Standards of Review

Following the filing of a Report, the KFTC will then examine the report, along with other pertinent information, to determine whether the Business Combination in question would substantially impair competition in the relevant market. If the KFTC finds that the Business Combination would substantially restrain competition, then the transaction would be prohibited under the MRFTA unless such anti-competitive Business Combination falls within one of two exceptions: (i) the enhancement of efficiency related to such Business Combination outweighs the anticompetitive effect, or (ii) such Business Combination is necessary for the revitalization of a financially distressed company. The former exception is the Korean law equivalent of the concept of “merger-specific efficiency” and the latter exception is comparable to the concept of the “failing company doctrine” found in the antitrust laws of the United States.

According to the KFTC’s horizontal merger section in its Business Combinations Examination Guidelines, a Business Combination may be regarded as having anticompetitive effects if (i) the aggregate market share of the combining companies in the relevant market is 50% or greater, or (ii) the aggregate market share of the top three companies, including the combining companies, in the relevant market is 70% or greater.<sup>113</sup>

### 3. Cartels

#### a. Overview

The MRFTA prevents, as an undue or unfair concerted act, an enterprise from agreeing to restrict, among other things, the price of goods or services, transaction volume, or transaction conditions, together with

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<sup>111</sup> *Id.*

<sup>112</sup> KFTC WHITE PAPER, *supra* note 54, at 18.

<sup>113</sup> Ahn & Jung, *supra* note 102.

other enterprises by way of contract, agreement, resolution, etc. Since cartels hinder fair competition and harm consumers, the KFTC conducts efforts to efficiently regulate cartels. However, proving that there is an agreement to create a cartel is difficult because most cartels generally conduct their activities in secret.

Until 1993, the MRFTA required that a concerted act be performed in order to support the finding of cartel activity.<sup>114</sup> However, since then the MRFTA has been amended to the effect that even absent the performance of a concerted act, but with an agreement thereon, such actions may violate the MRFTA. Moreover, the MRFTA has a unique provision that would facilitate cartel investigation. Article 19:5 of the MRFTA provides for the presumption that although a direct agreement is not found, if parallel behaviors are ascertained in the market, the existence of such agreements may be presumed.<sup>115</sup> A great deal of controversy has arisen over this provision, in particular concerning whether it obviates the need to investigate “plus factors” in cases of “conscious parallelism,”<sup>116</sup> that is, the synchronous action that is the product of a rational, independent calculus by each member of the oligopoly, as opposed to collusion.<sup>117</sup> Recently the Korean Supreme Court confirmed that it is not necessary to show a “plus factor” in interpreting the presumption provision on collusive behavior. This could be viewed as at least a technical victory for the KFTC in cartel enforcement.<sup>118</sup>

Recently, the KFTC has expended greater resources on the regulation of international cartels. For the first time, in 2002 the KFTC applied the MRFTA extraterritorially. It imposed a \$9.2 million surcharge on an international cartel in graphite electrodes, a decision that was later upheld by the Seoul High Court. Thereafter, in 2003, the KFTC imposed a \$3.3 million surcharge on foreign companies involved in an international vitamin cartel.<sup>119</sup> These cases are discussed in more detail in Section IV below.

As the KFTC strengthens its investigation of cartels, the KFTC's relationship with other governmental authorities and legal systems has

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<sup>114</sup> KFTC, *supra* note 3, at 89–90.

<sup>115</sup> “Where two or more enterprises are committing any act listed in subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed unfair collaborative act despite the absence of an explicit agreement to engage in such acts.” MRFTA, *supra* note 32, at art. 19(5).

<sup>116</sup> ANDREW I. GAVIL, ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 255–56 (2002).

<sup>117</sup> *Williamson Oil Co. vs Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003).

<sup>118</sup> *In re Dongsuh Food Co.*, 99Du6514, 99Du6521 (Consolidated), available at [http://www.scourt.go.kr/scourt\\_en/crt\\_dcsns/crt\\_dcsns2/1173896\\_1190.html](http://www.scourt.go.kr/scourt_en/crt_dcsns/crt_dcsns2/1173896_1190.html).

<sup>119</sup> Korea Fair Trade Commission, *The Relationship Between Growth-centered Industrial Policy and Competition Policy* (June 7, 2001), available at <http://www.ftc.go.kr/data/hwp/wto200103.htm>. [hereinafter KFTC Relationship Paper].

become a concern. Although many regulations have been abolished as compared to in the past, Korea still maintains special regulations in connection with pricing and supply which are applicable to particular industries, such as telecommunications and energy. That is, the policies of the administrative departments that supervise the relevant industrial areas have a direct or indirect influence on the management activities of the enterprises doing business in the relevant industry. Many enterprises that have been investigated for cartel activity by the KFTC have argued that their acts were conducted in accordance with the regulations imposed by their relevant industries or the guidelines of the relevant administrative departments. However, the KFTC has adhered to its position that such excuses cannot justify cartel activity.

For instance, in 2005 the KFTC strengthened its enforcement activities over regulated sectors such as telecommunications and financial industries—notably in the Korea Telecom (“KT”) investigation.<sup>120</sup> The case involved certain agreements reached on telephone service subscription rates between KT, which traditionally monopolized the local Korean telecommunications market, and Hanarotelecom, a relative newcomer to the market.<sup>121</sup> Specifically, just prior to the launching of the “local phone number transferability service” in 2003, KT and Hanarotelecom reached an agreement to reduce the difference in the two companies’ service subscription rates. As a result of the price collusion charges, the KFTC imposed administrative fines on both KT and Hanarotelecom. Hanarotelecom sought refuge under the KFTC’s Leniency Program and obtained a 49% reduction in the amount of the administrative fine originally imposed upon it.<sup>122</sup>

#### b. Leniency

The amended MRFTA (effective as of April 1, 2005), and the enforcement decree promulgated thereunder, introduced major changes to the leniency program that applied to collusive behavior. The enforcement decree under the amended act provides for an “automatic” leniency policy for the first individual to report a cartel to the KFTC.<sup>123</sup> The informant will be subject to neither an administrative fine nor any corrective measures usually imposed by the KFTC if (i) the informant is the first and sole provider of evidence necessary to prove the existence of the cartel, (ii) the

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<sup>120</sup> Press Release, Korea Fair Trade Commission, Corrective Orders & Surcharges Imposed on Telecom Operations in Fixing Prices, (Oct. 28, 2005), *available at* <http://www.ftc.go.kr/eng/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Enforcement Decree of the Monopoly Regulation and Fair Trade Act (No.17564), art. 35, *as amended by* Presidential Decree No.18768, March 31, 2005.

KFTC has received no previous information or proof regarding the cartel, (iii) the informant provides a full report and cooperates fully with the KFTC throughout its investigation, and (iv) the informant has ended its involvement in the illegal activity.<sup>124</sup> Therefore, the first-in informant receives complete amnesty from administrative penalty and probable amnesty from criminal penalty, similar to the U.S. leniency program.

Unlike the U.S. leniency program and more in line with the EU leniency program, a second individual who reports to the KFTC before its investigation has commenced will also receive a reduction in fines and more lenient corrective measures. This informant must be the second sole provider of evidence necessary to prove the existence of a cartel and must meet the two latter requirements mentioned above.

The amended decree abolishes the requirement that an informant must not be the ringleader or originator of the activity in question, and must not have coerced another party into participating in the activity (a situation for which verification was considered difficult under the previous decree). "Amnesty plus" is a new feature under the amended decree, whereby an entity that cooperates in a cartel investigation reveals a company's involvement in a second cartel in a different product/service market; in so doing, such informant becomes eligible for additional reductions in (or exemption from) fines otherwise applicable with respect to the first investigation.<sup>125</sup>

## D. Competition Policy in Practice

### *1. The Functions of the KFTC*

The KFTC is the principal governmental agency in charge of enforcing the MRFTA. It operates at a ministerial level under the umbrella of the Prime Minister and functions as a quasi-judicial body. The KFTC consists of a committee made up of nine members (the decision-making body) and a secretariat (the working body). It has more than 400 employees and a budget of over 250 million Korean Won, as shown in Table 3. The role of the courts in enforcing competition law in Korea is relatively limited because the system of private lawsuits does not allow for treble damages, class actions, and effective pre-trial discovery processes, as in the United States. Administrative proceedings conducted by the KFTC therefore play a central role in the enforcement of the act.

About 80–90% of the tasks performed by the KFTC are traditional cartel regulation, business combination reviews, regulation of abuse of

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<sup>124</sup> *Id.*

<sup>125</sup> See KFTC, *supra* note 3, at 52–57.

market dominance, and monitoring of unfair trade practices.<sup>126</sup> In addition, as mentioned earlier, the KFTC pursues policies dealing with economic concentration. The regulations set out in Chapter 3 of the MRFTA differ from traditional competition law in that they apply without regard to the concept of a relevant market—the cardinal element of competition policy in most jurisdictions. The philosophy that financial capital must be kept separate from industrial capital in order to prevent the *chaebol* from dominating the national economy is also reflected in the provisions of the MRFTA.<sup>127</sup>

Apart from its unique authority to deal with general concentration of ownership, the KFTC is endowed with the capability to conduct competition advocacy among other government agencies.<sup>128</sup> As a competition advocate, it seeks to prevent laws and regulations that would restrict competition from being enacted and to remove existing regulations that impede competition. It does this by consulting with other government agencies to identify anti-competitive regulations and suggesting possible remedies to the Regulatory Reform Committee in the Prime Minister's Office.<sup>129</sup> In 2000, the KFTC considered 481 cases of legislation brought to it for prior consultation.<sup>130</sup> The agency is also consulted on matters relating to the privatization of state-owned enterprises, where its job is to design measures to facilitate competition during the privatization process, so that public monopolies are not simply transformed into private monopolies.<sup>131</sup>

In light of the foregoing discussion, it is apparent that concerns may legitimately be raised about the conflict between the KFTC's extensive powers—over the *chaebol* in particular—and its traditional antitrust mandate, which would normally require it to pursue an efficiency maximization policy. Although there is a need to restrain the *chaebol* from abusing market-dominant positions in certain markets, it is difficult to justify a strict anti-*chaebol* policy, which might decrease consumer welfare. This is a more important consideration in light of the present global economy, where the *chaebol* themselves face strong competition from foreign companies that are not bound by the same disciplines.

## 2. Enforcement of Competition Law

As mentioned, private lawsuits based on MRFTA provisions are rare because aggrieved individuals could only file a suit in court after the corrective measures imposed by the KFTC have been finalized. Individuals

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<sup>126</sup> SUNG & SHIN, *supra* note 35, at 6.

<sup>127</sup> Lee, *supra* note 38, at 69–70.

<sup>128</sup> *Id.* at 72.

<sup>129</sup> KFTC WHITE PAPER, *supra* note 54, at 496.

<sup>130</sup> *Id.*

<sup>131</sup> KFTC, *supra* note 3, at 187–90.

could conceivably lodge a tort claim under the Civil Code, but due to the difficulty of gathering evidence, this would be a rare occurrence. The prosecutor's office also plays a very limited role in enforcing the MRFTA because, in most cases, it can prosecute offenders only if the KFTC has referred the matter to it. It is therefore safe to say that the KFTC plays the dominant role in enforcing the MRFTA. In this sense, Korea's competition regime is closer to the European system than to the American system: Europe administrative agencies play a central role in enforcement whereas in the United States, multiple actors are involved in the enforcement of antitrust law. Moreover, the courts have a much greater role to play in the United States than in Korea.

To enhance the role of individuals in the enforcement of the antitrust law, a new legislative bill was introduced early this year to allow aggrieved individuals to file damages claims with the courts without waiting for the KFTC's corrective measure to be finalized. The government expects this and some other, yet to be announced, improvements to the system to spur the number of private lawsuits in Korea. While it is too soon to tell whether such legislative changes will bring a dramatic increase in private lawsuits in Korea, the record of private lawsuits as of now is not encouraging. On the other hand, an increasing number of enterprises have been challenging the corrective measures imposed on them by bringing administrative suits before the Seoul High Court, which exercises exclusive jurisdiction over administrative antitrust suits. About forty such cases have been filed annually over the past several years.

A study of the KFTC's enforcement history reveals that it has tended to emphasize behavioral over structural regulation. In particular, it has expended a great deal of resources on regulating unfair trade practices to correct imbalances in markets where the parties have an unequal position. This interest of the KFTC can be attributed in part to the strong legacy of the industrial policies of the 1980's.<sup>132</sup> During the period of 1981 to 2000, the KFTC issued a total of 5,521 corrective notices in connection with unfair trade practices, including cases of resale price maintenance.<sup>133</sup> Most of these involved issues of vertical restraint arising from transactions between manufacturers, wholesale dealers, and retailers. Between 1981 and 1992, the KFTC issued only 94 corrective notices in connection with violations of cartel regulations. However, from 1993 to 2000 it markedly stepped up its level of enforcement, imposing as many as 238 corrective notices in connection with collusive behavior—a coveted record even compared with that of developed countries. With respect to merger controls, one of the premier structural instruments, the KFTC has only a meager record of enforcement. During the twenty years from 1981 to 2000,

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<sup>132</sup> SUNG & SHIN, *supra* note 35, at 3.

<sup>133</sup> *Id.* at 26.

it issued corrective measures in only twelve cases. Despite some positive signs in recent years, out of the 600 or so corporate combination filings recorded each year in 2001, 2002, and 2003, the KFTC has taken corrective action only in a very small number of cases.<sup>134</sup> Arguably, the primary legal instrument to deal with Korea's entrenched monopolistic and oligopolistic market conditions is a set of MRFTA provisions on abuse of market dominant positions. However, cases involving the aforementioned have been scarce.

The way market dominance is regulated in MRFTA is similar to that of Article 82 of the EC Treaty, which codifies abuses of market dominance. It is a general understanding that with respect to abuse of market dominance, Korea follows the European model rather than the American model since at least the statutory language set forth in Article 3-2 of the MRFTA does not regulate an enterprise with a dominant market power unless the enterprise abuses its dominance.<sup>135</sup> As showcased in the latest Microsoft case, the KFTC puts great emphasis on regulating abuse of a market dominant position, especially in "new economy" industries as opposed to smoke-stack industry.<sup>136</sup> In 1996 the KFTC was given a new enforcement power that allowed it to initiate actions to promote competition in markets in which monopolies or oligopolies have existed for an extended period of time.<sup>137</sup> This new initiative, which has the flavor of a "general" structural remedy, has fared well.<sup>138</sup> The KFTC has conducted a series of thorough investigations into areas where an egregious monopolistic or oligopolistic market had existed for a lengthy period of time—such as automobiles, tires, steel, and beer—and has taken the action necessary to remedy the situation.<sup>139</sup>

The KFTC has a unique set of tools to alleviate the evidentiary difficulties in enforcing the MRFTA. The three so-called "statutory presumption" provisions apply in the context of identifying market-dominant enterprises, determining substantial restraint of competition resulting from mergers, and identifying collusive behavior that restrains competition. Another of the extraordinary powers of the KFTC concerns

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<sup>134</sup> Ahn & Jung, *supra* note 102.

<sup>135</sup> In practice, even U.S. antitrust law does not condemn a monopoly *per se*. Despite the language of Section 2 of the Sherman Act, the judicial gloss on the section indicates that for there to be a violation of the said Section, a company must not only possess monopoly power, but should also commit a certain exclusionary act. See *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

<sup>136</sup> KFTC Press Release, *supra* note 1.

<sup>137</sup> KFTC, *supra* note 3, at 161.

<sup>138</sup> *Id.* at 9–10.

<sup>139</sup> OECD, *Annual Report on Competition Policy Developments in Korea* 12 (1999), available at <http://www.oecd.org/dataoecd/51/50/2405359.pdf>.

the collection of evidence from financial institutions.<sup>140</sup> To facilitate the investigation of internal transactions among *chaebol* affiliates with respect to funds, assets, and personnel, for a limited duration the KFTC has the power to ask their financial institutions to provide relevant financial information.<sup>141</sup>

Finally, it would be remiss not to stress the importance of administrative surcharges in ensuring compliance with the law. Surcharges are being imposed in an increasing number of cases of anti-competitive behavior, and the ceiling on these surcharges is rising.<sup>142</sup> Moreover, the KFTC is able to impose administrative surcharges without resorting to the courts.<sup>143</sup> This unique enforcement tool is considered very effective, mostly due to the size of the surcharges: from April 2005, companies taking part in cartels may be subject to surcharges amounting to as much as 10% their total sales volume.<sup>144</sup> Although strong and effective as an enforcement tool, the surcharge system also faces criticism because of the KFTC's overly wide discretion in setting the amount of the surcharges.

All countries maintain articles of law that partially or entirely exempt certain sectors from the application of competition law. Common examples are utility industries such as telecommunications and electricity, which are often government-owned or regulated in the belief that they have natural monopolistic aspects. In Korea, the range of such exemptions is gradually being reduced, as regulatory and technological developments in areas where corporations had previously enjoyed a monopoly position have increased the scope of competition.<sup>145</sup> Recently, the KFTC has attached special emphasis to combatting monopolistic and oligopolistic structures in markets where public enterprises are dominant.<sup>146</sup>

### 3. Market Concentration

In general, the liberalization policy undertaken since 1980 has not significantly improved Korea's market concentration ratios.<sup>147</sup> In the midst of the financial crisis of 1997–98, market concentration increased, but since 1999 the general, industrial, and market concentration ratios have again declined, as shown in Tables 4, 5, and 6. Despite the overall fall in concentration in the mining and manufacturing sectors, which together account for about 30 percent of GDP, concentration ratios in some other

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<sup>140</sup> MRFTA, *supra* note 32, at art. 50 (5).

<sup>141</sup> *Id.*

<sup>142</sup> KFTC, *supra* note 3, at 685–95.

<sup>143</sup> *Id.*

<sup>144</sup> KFTC WHITE PAPER, *supra* note 54, at 65–67.

<sup>145</sup> KFTC, *supra* note 3, at 282–99.

<sup>146</sup> *Id.*

<sup>147</sup> KFTC Relationship Paper, *supra* note 119.

leading industries and products remain very high—especially when compared with similar ratios in countries such as Japan and the United States, as seen in Table 7.

#### IV. COMPETITION POLICY AS IT AFFECTS OTHER ECONOMIC POLICIES

##### A. Competition Policy and Industrial Policy

Whether competition policy should prevail over industrial policy or vice versa has been a controversial question. Mainstream economic theory suggests that microeconomic industrial policies focusing on selected industries are largely ineffective; countries should therefore place more emphasis on maintaining macroeconomic stability, which will lead to “virtuous circles of high rates of accumulation, efficient allocation [of resources], and strong productivity growth.”<sup>148</sup> A more recent study by Marcus Noland and Howard Pack provides further evidence for this view.<sup>149</sup>

Mainstream economic theory exhorts developing countries not to engage in the artificial allocation of resources as they carry out selective industrial policies that are likely to impede competition in a given field. A series of empirical studies on Korea’s HCI drive of the 1970’s, for example, concludes that the HCI policy led to distortions in the allocation of economic resources, resulting in excess capacity in favored sectors and contributing to inflation and the accumulation of foreign debt.<sup>150</sup> The KFTC itself appears to hold the firm belief that competition principles should be put into operation from an early stage of economic development; it has averred that industrial policies that constrain competition will lead to inefficient operations characterized by excessive investment in facilities and to higher prices for consumers.<sup>151</sup>

Not all scholars agree with this view, however. Jean-Jacques Laffont, for instance, has argued that “it is not always the case that competition should be encouraged in developing countries.”<sup>152</sup> He reasons that:

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<sup>148</sup> WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 105 (1993).

<sup>149</sup> Marcus Noland & Howard Pack, *Industrial Policy in an Era of Globalization: Lessons from Asia* (2003).

<sup>150</sup> YOO, *supra* note 7, at 34–43; Ji Hong Kim, *Korean Industrial Policy in the 1970’s: The Heavy and Chemical Industry Drive* (Korea Development Institute, KDI Working Paper 9015, Seoul, 1990).

<sup>151</sup> KFTC Relationship Paper, *supra* note 119.

<sup>152</sup> Jean-Jacques Laffont, *Competition, Information, and Development* 6–7 (Paper prepared for Annual World Bank Conference on Development Economics, Washington, D.C., Apr 20–21, 1998), available at <http://www.worldbank.org/html/rad/abcde/laffont.pdf>.

[C]ompetition is an unambiguously good thing in the first-best world of economists. That world assumes large numbers of participants in all markets, no public goods, no externalities, no information asymmetries, no natural monopolies, complete markets, fully rational economic agents, a benevolent court system to enforce contracts, and a benevolent government providing lump sum transfers to achieve any desirable redistribution.<sup>153</sup>

In his view, since developing countries lack most of these conditions, they may legitimately turn to industrial policies as a second-best solution.

These “revisionist” scholars opine that “the more competition the better” is not always an optimal policy.<sup>154</sup> Ajit Singh, for example, argues that higher rates of investment bring about greater *dynamic efficiency* as opposed to *static efficiency*, leading to long-term gains in growth and productivity.<sup>155</sup> Governments, therefore, need to concentrate their efforts on creating a business environment that encourages investment.<sup>156</sup> In his view, restricting competition in the market to ensure a reasonable, as well as stable, rate of profits is one means of making sure that firms’ incentives to invest are not dampened.<sup>157</sup> Referring specifically to Korea and Japan, he argues that competition law should be subordinated to the requirements of industrial policy.<sup>158</sup>

Given the dearth of comprehensive empirical studies, it is difficult to determine which of these contrasting views is correct. Indeed, it may be absurd to make definitive judgments based on theory without looking at the specific circumstances facing individual economies.<sup>159</sup> Of course, nobody knows what actually would have happened in Korea if the government had taken a different track—for example, by adopting a strong and comprehensive competition policy at an early stage of economic development. Nonetheless, one lesson we can draw from the Korean experience is that governments that adopt industrial policy tools that serve to create monopolistic market structures in the domestic market—whether intentionally or unintentionally—will most likely pay the price later.

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<sup>153</sup> *Id.* at 1.

<sup>154</sup> LESTER G. TELSER, A THEORY OF EFFICIENT COOPERATION AND COMPETITION (1987); Alice H. Amsden & Ajit Singh, *Growth in Developing Countries: Lessons from East Asian Countries*, 38 EUR. ECON. REV. 941, 941–42 (1994).

<sup>155</sup> Ajit Singh, *Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals* 12–13 (Paper presented at the fifth session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 2–4, 2004), available at <http://www.networkideas.org/feathm/aug2003/MCP.pdf>.

<sup>156</sup> Amsden & Singh, *supra* note 154, at 949–50.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Singh, *supra* note 155, at 2–5.

Whether any countervailing benefits can be obtained is another question entirely, with the answer depending on many other economic variables.

Another important dimension for evaluating industrial policy in its relationship to competition policy is the surrounding environment. From the 1960's to the 1980's, when economic development in Korea was accelerating, no international disciplines existed to prevent trade or competition distortions resulting from the industrial policies of individual countries, in particular developing countries. The reality facing developing countries today is very different. The present WTO subsidy rules have major implications for internal economic policy-making and provide standards for judging the legality of certain governmental measures, in particular industrial policy tools. Accordingly, measures that have a distortionary effect on international trade and competition are simply illegal and may face legal challenges from other WTO members.<sup>160</sup> Industrial measures that distort the domestic market, such as subsidies, may, under certain circumstances, be contrary to WTO rules.<sup>161</sup> Given this change in the international legal environment, countries that adopted the Korean model for economic development would very likely violate international rules.

Nevertheless, industrial policies are not illegal *per se*. It is possible to develop a good and effective industrial policy in harmony with competition policy, and thereby promote the national economy, without facing the risk of violating international norms. In the age of the "new economy"—as opposed to a smoke-stack industrial economy—innovation and knowledge-based intellectual property issues come to the fore; concomitantly, there is an increasing need to develop a competition policy that takes greater account of the need for dynamic as well as static efficiency. This allows some room for industrial policy interventions.

At least one ministry in the Korean government appears to take such a view; the Ministry of Commerce, Industry, and Energy has sought to formulate industrial policies that are in harmony with competition policy. Cognizant of the limitations of the quantitative, selective industrial policies pursued during the period of rapid industrialization, the Ministry is now striving to put more emphasis on qualitative, R&D-focused industrial policies. First, as already stated, the advent of the WTO system has significantly reduced the room for industrial policy, and the provision of financial support for specific strategic industries is now very likely to violate WTO subsidy rules. Second, due to changes in the economic environment, investment-driven growth strategies are not as effective as they once were.

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<sup>160</sup> MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 260-263 (2003).

<sup>161</sup> *Id.*

Economic growth rates in Korea have been declining steadily—from 7.8% in the 1980's to 6.6% in the first half of the 1990's to 6.0% in the latter part of the decade.<sup>162</sup> In an attempt to halt this decline, the government has adopted a new strategy of innovation-driven growth. The goal is to increase total factor productivity in ten selected “new economy” industries that possess considerable potential for growth, including digital television and broadcasting, liquid crystal displays (“LCDs”), and artificial intelligence. To the extent that this new policy aims to build the general foundation for a competitive market environment by encouraging the R&D efforts of several industries chosen according to objective criteria, it would not necessarily conflict with competition policy or with the WTO's subsidy rules.

The case study of the broadband internet market presented below shows how such a policy might work in practice. The phenomenal success of Korea's broadband internet market can be attributed to the government's skillful blend of industrial and competition policy. This case demonstrates that the two should not be viewed as being inherently in conflict—a good combination of policies can be effective in accomplishing policy goals for the national economy as a whole.

### *1. A Case Study of the Broadband Internet Market*

In July 1998 Thrunet, currently the third-largest internet service provider (“ISP”) in terms of number of subscribers, launched Korea's first broadband internet services. It was followed by Hanaro Telecom (the second-largest ISP) in April 1999 and by KT (the largest ISP and former state enterprise) in December 1999. The ISPs offer two types of broadband internet connection: digital subscriber line (“DSL”)—usually asynchronous digital subscriber line (“ADSL”)—and cable modem. ADSL uses existing copper telephone lines or optical fiber networks, while cable modems employ a dedicated hybrid fiber coaxial (“HFC”) network.

Initially ISPs relied on HFC networks to deliver broadband internet services, and thus the overwhelming majority of subscribers were connected through cable modems. However, since KT entered the market and began competing with Hanaro Telecom for the top spot in the broadband market, ADSL use has soared. By January 2001 there were more ADSL subscribers than cable modem subscribers. As of October 2001, 56.8% of users were connected through ADSL, 34.9% through cable modems, and 7.8% through local area networks (“LANs”), as shown in Table 8. This distinguishes Korea from other nations, where cable modems and HFC networks are more common.

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<sup>162</sup> Korean Development Institute, Economic Bulletin, *Potential Growth Rate of the Korean Economy for 2003-2012* 26 (May 2003), available at [http://epic.kdi.re.kr/common/download.jsp?url=/data/epic/web/eco\\_bul/200305/&filename=Issues.pdf](http://epic.kdi.re.kr/common/download.jsp?url=/data/epic/web/eco_bul/200305/&filename=Issues.pdf).

KT provides ADSL services over existing copper telephone lines and does not own an HFC network at all. Hanaro Telecom, on the other hand, provides ADSL services over an optical fiber network that it laid itself, and cable modem services mainly through an HFC network that it leases from Powercomm. Demand from users for each type of connection is roughly equal. Thrunet and the other ISPs mainly, or exclusively, rely on HFC networks and cable modems.

Although some ISPs own their own HFC networks, most lease them from Powercomm. It was a division of Korea Electric Power Corporation until January 2001, and originally built its HFC network for use by system operators and cable TV program providers. Approximately 60% of the internet services provided by Korean ISPs as of March 2002 were delivered over HFC networks leased from Powercomm, as seen in Table 9. Under its basic telecommunications services license, however, Powercomm itself is prevented from offering broadband internet services to end users. In addition to Powercomm, which owns about 48,000 kilometers of the country's HFC networks, another 100 or so local cable TV companies own smaller HFC networks that they sometimes lease out.

The high penetration of broadband in Korea owes much to the quality of infrastructure. The availability of HFC networks has allowed ISPs to provide broadband internet services without having to gain access to KT's telephone lines, with all the problems that would entail.

Even before the formation of a broadband internet market, the government encouraged the building of high-capacity, high-speed backbone and core networks, both within and between cities. To alleviate the cost burden, it made low-interest loans available from 1999 to 2001. It also provided R&D funding to companies intending to build the networks, implemented a certification scheme for broadband facilities installed in apartment blocks, and introduced an internet service quality evaluation system in an attempt to improve service quality and protect users. These industrial policy measures were supported by measures to foster competition among ISPs. The government classified broadband internet services as a value-added telecommunications service under the Telecommunication Business Act, thus allowing existing providers of basic telecommunications services to offer internet services without first having to obtain an additional permit or license. New market entrants, meanwhile, only had to file a simple report with the regulators. As a result of this relaxed policy, broadband internet access became available at the competitive price of about Korean won 30,000–43,000 (\$25–\$35) per month, encouraging dial-up users to switch to broadband.

The development strategy adopted by the government can be called

“facilities-based competition.”<sup>163</sup> Unlike most other nations, where local loop unbundling has preceded retail competition in the telecommunications market, Korea encouraged the early providers, Thrunet and Hanaro Telecom, to establish their own facilities, including their own local networks. In part this was possible because Thrunet and Hanaro Telecom were able to reinvest their profits in facilities and networks and establish a presence in the broadband market before the arrival of the telecommunications heavyweight, KT.

Although facilities-based competition initially stimulated broadband penetration, it also created problems. First, basic telecommunications service providers were denied access to KT's local networks; new entrants such as Dreamline, Onse Telecom, Dacom, and SK Telecom could not use Powercomm's HFC networks either. Second, ISPs have tended to concentrate their investments in highly populated areas. When more than one ISP has invested in the same area, this has led to an unnecessary dissipation of capital. Third, some basic telecommunications service providers have run into financial difficulties because of the heavy capital requirements of network building and marketing. Fourth, although it entered the market after Thrunet and Hanaro Telecom, KT soon occupied a dominant position in the market because it could use its existing network to provide broadband internet services. Its market share was approaching 50% by the time local loop unbundling was implemented, a level that threatened fair competition. Finally, users in non-metropolitan areas, including small- and medium-sized cities, have been disadvantaged by a lack of high-quality internet services because, under facilities-based competition, the cost to ISPs of providing such services has outweighed the benefits.

To alleviate these problems and create a fair competitive environment, the regulators introduced local loop unbundling in April 2002.<sup>164</sup> However, with KT dragging its heels on providing access to its copper telephone network, this has proceeded slowly. In fact, on February 27, 2003 the Korea Communications Commission, a sub-agency of the Ministry of Information and Communication, fined Korean won 2 billion for refusing to give Hanaro Telecom access to its local loop, as well as issuing a correction order against the company.

Korea has acquired world-class broadband internet services through a successful combination of industrial and competition policy. From the

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<sup>163</sup> Francisco J. Proenza, *The Road to Broadband Development in Developing Countries is Through Competition Drive by Wireless and VOIP* (prepared for the Wireless Communication and Development: A Global Perspective Workshop, Annenberg Research Network on International Communication, Oct. 7-8, 2005), available at [http://arnic.info/workshop05/Proenza\\_Wireless&VoIP\\_5Oct2005.pdf](http://arnic.info/workshop05/Proenza_Wireless&VoIP_5Oct2005.pdf).

<sup>164</sup> A new article on the joint utilization of subscriber lines, Article 33-6, was inserted into the Telecommunications Business Act in January 2001. In April 2002 the Ministry of Information and Communication finalized its local loop unbundling guidelines.

start, the Ministry of Information and Communication aggressively pursued industrial policy in the sector, but without stifling competition. It fostered competition in the market by lowering entry barriers and intervening to prevent KT from gaining too much of a competitive edge. It also adopted a local loop unbundling strategy to address concerns about unfair competition. The success of the government's broadband internet strategy is apparent in the penetration ratio: according to data provided by the Ministry of Information and Communication, in June 2001 Korea had 6.51 million broadband subscribers (13.9% of the entire population), rising to 7.26 million (15.3% of the population) by October 2001. What can we learn from this Korean example? At an early stage of development, the government recognized the need for fundamental infrastructure. As an industrial policy measure, it required market entrants to install their own facilities while helping to create the market conditions that would make this affordable. Later, after sufficient facilities had been set up throughout Korea, the government changed tack and began to enforce an "essential facilities" doctrine that rested on local loop unbundling. This enabled new entrants to secure a foothold in an established market on a competitive basis. This demonstrates that under certain circumstances industrial policy can function alongside competition policy to achieve an ultimate economic policy goal, without producing undesirable side effects from a competition policy perspective.

#### B. Maximizing the Benefits of Trade and FDI Reform

As an active participant in successive GATT/WTO negotiations on trade,

[T]he Korean Government has also made efforts to liberalize trade, especially since the 1980's. In the aftermath of the 1997-98 financial crisis, it redoubled its efforts. The simple average bound tariff rate was reduced from 24.4% in 1997 to 18.5% in 2000, the applied tariff rate fell from 13.4% to 8.8%. In the context of its post-crisis agreement with the International Monetary Network and its Uruguay Round commitments, the Government removed quantitative restrictions on the eight remaining items subject to balance-of-payments protection as of 1 January 2001. The import diversification system, implemented in 1978 to restrict imports from Japan (and criticized as constituting an unfair trade practice), was abolished in June 1999. Export subsidies and imprecise import-licensing and certification procedures that allegedly distorted international trade have also been discarded.<sup>165</sup>

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<sup>165</sup> Asian Development Outlook 2005, *Competition Policy in the Context of Regional and Global Integration* (2005), available at <http://www.adb.org/Documents/Books/ADO/2005/part030500.asp>.

Economic theory suggests that trade liberalization will increase national welfare in a competitive domestic market. However, there is less of a consensus on whether it will bring about an increase in national welfare when the domestic market is not competitive. In the Korean example,

where the domestic market is not always large enough to realize economies of scale, and where various trade protection measures have distorted the market and prevented domestic companies from operating in an efficient manner, trade liberalization is likely to have a "rationalization effect" by making inefficient firms exit.<sup>166</sup>

The remaining firms would then be more likely to benefit from economies of scale. Trade liberalization does not automatically lead to a more competitive domestic market, however, and the best outcomes are achieved when liberalization is accompanied by measures to increase competition in the domestic market.

As with trade, the government gradually liberalized investment in services in the 1980's and early 1990's and then instituted sweeping liberalization measures in the aftermath of the financial crisis. It eliminated ceilings on foreign equity ownership in the stock market, relaxed the rules on cross-border mergers and acquisitions, and fully liberalized foreign land ownership. Foreign direct investment ("FDI") increased by 69% between 1997 and 1998, and then more than doubled to over \$10 billion in 1999.<sup>167</sup> Inflows continued to increase in 2000 on a notifications basis, while decreasing slightly on an arrivals basis.<sup>168</sup>

The benefits of FDI are well established in the literature on trade liberalization.<sup>169</sup> Not only does FDI induce stable, long-term inflows of capital, it also leads to spillovers of technology and managerial know-how, employment creation, and regional development. According to Dunning, the presence of foreign multinationals has a positive impact on labor productivity, largely through increased competition.<sup>170</sup> However, FDI is not necessarily conducive to market competition; big players like the *chaebol* "might hamper the sound development of [a] competitive market economy by distorting or manipulating the course of liberalization, deregulation, or opening up."<sup>171</sup> This is yet another reason why it is important to develop a

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<sup>166</sup> *Id.*

<sup>167</sup> Mikyung Yun & Sungmi Lee, *Impact of FDI on Competition: The Korean Experience* 1-3 (Korea Institute for International Economic Policy, Working Paper No. 01-04, 2001), available at [http://www.eaber.org/intranet/documents/55/46/KIEP\\_Yun\\_01.pdf](http://www.eaber.org/intranet/documents/55/46/KIEP_Yun_01.pdf).

<sup>168</sup> *Id.* at 3.

<sup>169</sup> *Id.* at 7.

<sup>170</sup> JOHN H. DUNNING, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* 4 (1993).

<sup>171</sup> Keun Lee, *Business Groups as an Organizational Device for Economic Catch-up* 2

competitive market in tandem with market liberalization.

Economic liberalization, if carried out correctly, is supposed to establish a competitive market in which financial instruments, such as shares and corporate bonds, are transacted in an open, rules-based manner. But, in an economy where a few players dominate the market for corporate control such that they are able to influence transactions in corporate finance, the course that economic liberalization actually takes may differ from what its advocates had in mind.

## V. CONCLUSION

Competition law does not operate in a vacuum. It is inextricably intertwined with the political, social, economic and cultural surroundings in which it operates. Korea's competition law is no exception. To break the vicious circle of economic failure that existed up until the early 1960's, the Korean government has aggressively pursued an intensive growth strategy throughout the 1960's and 1970's. In doing so, it has relied heavily on industrial policy while virtually disregarding the notion of competition policy. This strategy succeeded in recording phenomenal economic growth, but at significant political and social costs. The advent of competition law in 1981 was a manifestation of the Korean government's desire to address this problem in its economic policy-making by strengthening market competition.

Less developed countries desperate to achieve economic success may be tempted to follow the Korean model of placing industrial policy ahead of competition policy, at least at the initial stages of economic development. However, as the evolution of Korea's competition policy has suggested, to overemphasize industrial policy without regard to competition policy would lead to considerable political and social costs in the final analysis. It would be better for developing countries to adopt a well-planned mix of industrial and competition policy from an early stage of economic development, possibly using Korea's approach to the development of the broadband internet market as a model.

One of the most serious problems currently facing competition policy in Korea is arguably the "excessive" regulatory power of the KFTC. The KFTC exercises its authority to achieve multiple objectives in addition to promoting economic efficiency and consumer welfare. Regulating economic concentration—a practice that is unique to Korea (and possibly Japan)—may exemplify typical *ex ante* government interventions, which is hardly consonant with the dynamics of a global economy where the *chaebol* are confronted by unfettered international competition in world markets.

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(July 15, 2002) (unpublished paper, School of Economics, Seoul National University, Seoul) available at <http://dasan.snu.ac.kr/~ecores/activity/paper/52.pdf>.

The pursuit of broader social goals by the KFTC may lead to an inefficient allocation of resources, which would undermine the very purpose of competition policy. If Korea's economic circumstances and other considerations dictate a role for the KFTC in alleviating economic concentration, its mission in this area should be defined more clearly so as to minimize the negative effects of pursuing such a policy.

As globalization accelerates, economic interdependence among nations has deepened. The erosion of economic sovereignty is apparent. It is now difficult to envision a country pursuing competition policy without regard to international trade and investment. At present, it is commonplace for one country's competition policy to affect the welfare of consumers in other countries. To minimize dissonance among competition policies that have caused friction among trading partners, tremendous efforts have been exerted at international fora such as the ICN (International Competition Network), the WTO, and the OECD. In the onslaught of globalization, governments need to take full account of how their competition policies interact with international trade and investment policies.

Given its past stellar achievements as it relates to the Korean economy as a whole, Korea's competition law and policy will likely continue to be reinvented to account for new challenges and to take center stage in the development of Korea's economic infrastructure.

TABLE 1: KOREA—STATISTICS ON *CHAEBOL* IN THE MINING  
AND MANUFACTURING SECTOR, 1985<sup>172</sup>

<i>Chaebol</i> Grouping	Share of Turnover (%)	Share of Employment (%)	Share of Value Added (%)	Share of Fixed Immovable Assets (%)	Number of Affiliated Companies
Top 5	23.0	9.7	18.7	20.4	94
Top 10	30.2	11.7	24.2	27.9	147
Top 15	33.9	14.4	27.3	31.6	190
Top 20	36.4	15.5	29.5	34.4	218
Top 25	38.5	16.6	31.4	36.8	246
Top 30	40.8	17.6	33.1	39.6	270

TABLE 2: KOREA—FEES CHARGED BY CERTIFIED  
PROFESSIONALS BY TYPE OF CASE, 1999–2001 (W10,000)<sup>173</sup>

Type of Case		Fee Level (Average)				Direction since December 2000
		October 1999	June 2000	December 2000	2001	
Lawyers	Contract-related cases	447	429	391	387	Down
	Tort cases	518	485	458	405	Down
	Assault cases	462	404	387	391	Up
	Traffic incidents	445	485	448	378	Down
	Divorce cases	411	369	350	364	Up
CPA	Audits of individuals' financial statements	423	404	412	385	Down
	Accounting assessments and certifications	118	155	131	121	Down
	Cost calculations	210	264	220	157	Down

<sup>172</sup> Source: Korea Development Institute, *Analysis of Monopolistic and Oligopolistic Market Structures* (1999) (available in Korean).

<sup>173</sup> Source: Press Release, KFTC, Investigation Results on Fees of 8 Licensed Professionals Including Lawyers and Accountants (2001) (available in Korean).

**TABLE 3: KOREA—KFTC STAFFING AND BUDGET LEVELS, 1993–2003<sup>174</sup>**

	Staff (no. of people) <sup>a</sup>	Budget (W100 million)
1993	254	64
1994	279	80
1995	341	405
1996	381	146
1997	403	184
1998	410	160
1999	402	172
2000	401	193
2001	416	220
2002	416	252
2003	416	

a. Office Staff only.

**TABLE 4: KOREA—GENERAL CONCENTRATION RATIO, 1981–2001 (%<sup>a</sup>)<sup>175</sup>**

	1981	1990	1995	1996	1997	1998	1999	2000	2001
<b>Production</b>									
Top 50 companies	36.6	30.0	33.6	34.4	37.1	38.4	38.0	38.1	36.8
Top 100 companies	46.1	37.7	40.4	41.2	44.2	45.9	45.1	44.8	43.7
<b>Hiring</b>									
Top 50 companies	12.4	13.6	14.5	15.2	16.5	16.6	14.7	13.9	13.2
Top 100 companies	19.1	18.4	18.2	18.8	20.1	20.1	18.1	17.0	16.0

a. The general concentration ratio is defined as the share of the country's 50 and 100 largest mining and manufacturing companies as a proportion of the combined mining and manufacturing sectors, as measured by sales and employment levels.

<sup>174</sup> Source: KFTC, *White Paper on Fair Trade* (2003) (available in Korean).

<sup>175</sup> Source: KFTC, *Survey of Market Structure in 2001* (Dec. 9, 2003) (available in Korean).

TABLE 5: KOREA—THREE-FIRM INDUSTRIAL  
CONCENTRATION RATIO, 1980–2001 (%)<sup>176</sup>

		1980	1990	1995	1997	1998	1999	2000	2001
CR3	Simple average	62.4	52.8	47.8	48.6	50.0	45.4	44.0	43.4
	Weighted average	55.1	52.6	49.8	51.7	53.6	54.2	52.5	51.5
HHI*1,000	Simple average	263.8	221.3	173.4	179.4	190.5	158.6	152.5	153.1
	Weighted average	180.6	187.8	165.4	177.8	188.0	194.5	183.5	182.1

HHI = Herfindahl–Hirschman index.

a. Covers companies in the five-digit Standard Industry Classification. In 2001, there were 491 such companies.

Source: KFTC(2003b).

TABLE 6: KOREA—THREE-FIRM MARKET CONCENTRATION  
RATIO, 1980–2001 (%)<sup>177</sup>

	Year	1980	1990	1996	1998	1999	2000	2001
CR3	Simple Average	81.7	73.9	71.5	73.0	72.5	69.9	68.0
	Weighted Average	67.1	62.6	63.2	67.3	67.1	65.6	64.0
HHI*1,000	Simple Average	473	393	369.7	388	389	357	331
	Weighted Average	288	262	256.6	289	295	285	267

HHI = Herfindahl–Hirschman index.

a. Covers companies in the eight-digit Standard Industry Classification. In 2001, there were 3,056 such companies.

<sup>176</sup> Source: *Id.*

<sup>177</sup> Source: *Id.*

**TABLE 7: KOREA—COMPARISON WITH CONCENTRATION IN JAPAN AND THE UNITED STATES<sup>178</sup>**

Simple Average	Japan		Korea	
	1999	2000	1999	2000
CR3*100	71.6	72.0	72.5	69.9
HHI*1,000	264.6	269.3	389.0	357.0

Simple Average	United States (1997)	Korea (2001)
CR4*100	42.8	48.6
HHI*1,000	75.8	149.3

CR3 = concentration ratio of the top three firms; CR4 = concentration ratio of the top four firms; HHI = Herfindahl–Hirschman index.

**TABLE 8: KOREA—SIZE OF ISPS BY CONNECTION TYPE OFFERED, OCTOBER 2001 (NO. OF SUBSCRIBERS)<sup>179</sup>**

		ADSL	Cable modem	LAN	B-WILL	Satellite	Total
KT		3,068,511	-	487,956	11,532	1,018	3,569,017
Hanaro Telecom		946,871	927,487	6,435	-	28,010	1,908,803
Thrunet		1,558	1,215,349	-	-	-	1,216,907
Dream-line		102,244	77,912	-	-	-	180,156
Onse Telecom		-	201,490	-	-	-	201,490
Dacom		-	52,846	71,199	-	-	124,045
SK Telecom		-	57,757	-	-	-	57,757
Total	No.	4,119,184	2,532,841	565,590	11,532	29,028	7,258,175
	%	56.8	34.9	7.8	0.2	0.4	100.0

ADSL = asynchronous digital subscriber line; LAN = local area network; B-WILL = broadband wireless local loop; HFC networks are subsumed under ADSL or cable modem.

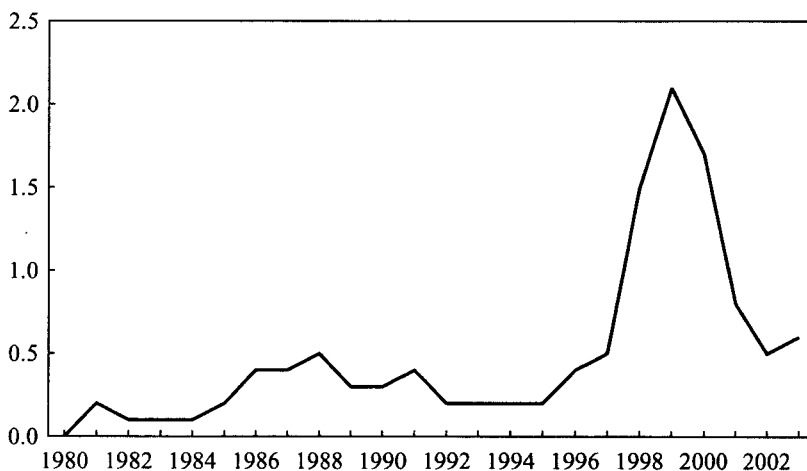
<sup>178</sup> Source: *Id.*

<sup>179</sup> Source: Ministry of Information and Communication.

TABLE 9: KOREA—ISPS' USE OF POWERCOMM'S HFC NETWORK,  
MARCH 2002<sup>180</sup>

	Thrunet	Hanaro Telecom	Onse Telecom	Other	Total
Total number of subscribers	1,407,333	1,392,413	294,717	147,090	3,241,553
Subscribers using Powercomm's HFC network (no.)	672,450	956,797	286,143	25,797	1,939,044
(%)	48.0	68.7	96.3	17.5	59.8

FIGURE 1: KOREA—FDI FLOWS AS A SHARE OF GDP,  
1980–2003 (%<sup>a</sup>)<sup>181</sup>



a. FDI is in US dollars. GDP is in Korean won converted to US dollars. The high ratio for 1999 reflects both an increase in FDI and a contraction in GDP in this year.

<sup>180</sup> Source: Ministry of Information and Communication.

<sup>181</sup> Source: United Nations Conference on Trade and Development, Foreign Direct Investment Database (2004), available at <http://stats.unctad.org/fdi/ReportFolders/ReportFolders.aspx>; International Monetary Fund, International Financial Statistics Online Database (2004), available at <http://ifs.apdi.net/imf/ifsbrowser.aspx?branch=ROOT>.