



# Korean Competition Policy: Accomplishments and Challenges Ahead

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1075324](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075324)

# 1. Overview of Korean competition law enforcement

- Korean Competition Law (Monopoly Regulation and Fair Trade Act) enacted in 1980 under a new military government after the assassination of President Park in 1979.
- Early attempts in the 1960's and 70's had failed. Took two decades to overcome opposition from powerful business lobby and “growth-first” policy makers.
- An adaptation of the US law, modified by Japan. However, Japanese influence has faded over time; instead heavy influence of both U.S. and EC case laws.

# 1. Overview of Korean competition law enforcement

- Korea Fair Trade Commission (KFTC) established in 1981 as the principal enforcer of MRFTA.
- Humble beginning as an arm of Economic Planning Board, but has grown as a powerful agency that regulates *chaebol*, big Korean conglomerates controlled by founding families.

# 1. Overview of Korean competition law enforcement

- After the economic crisis in 1998, however, has increasingly asserted its role as the traditional competition law enforcer.
- Significant achievements in cartel enforcement & competition advocacy (repeal of regulations that restrict competition).
- Connor (2008): In Asia, 80% of total surcharges on cartels levied by KFTC.

# 1. Overview of Korean competition law enforcement

- In Asia, the first to introduce extraterritorial application (Graphite Electrodes, 2002 & Vitamin cartels, 2003)
- Highly effective leniency program.
- In contrast, mergers & abuse of dominance enforcement has been anemic.
- However, in recent years, ambitious forays into abuse of dominance, both by domestic firms & multinationals.

# 1. Overview of Korean competition law enforcement

- First significant case: *Posco refusal to deal* (2001).
  - When Hyundai Motor Group built its own cold coil plant at its affiliate in 1998 and demanded Posco, the only integrated steel mill in Korea at that time, to supply hot coils instead of cold coils as it used to, Posco refused.
  - Reversed by the Korean Supreme Court (2007) for lack of anticompetitive effects (import easy from Japan).

# 1. Overview of Korean competition law enforcement

- Aggressive pursuit of dominant multinationals
- *Microsoft* tying (2006)
  - KFTC the first competition authority to rule against the inclusion of messengers in Windows & media servers in Windows Server OS.
  - Fine: KRW 324 M (US\$ 28 M).
- *Intel* loyalty rebates (2008)
  - KFTC ruled *before* the EC did.
  - Fine: KRW 260 M (US\$ 23 M).
  - Cf.* JFTC (2006) only issued “recommendations”.



# 1. Overview of Korean competition law enforcement

- *Qualcomm* discriminatory licensing, loyalty rebates, monopolization of the chipset market (2009) and technological integration/tying (pending)

The *first* competition authority to take action.

Fine: KRW 2.6 B (US\$ 230 M); the largest on a single company

# 1. Overview of Korean competition law enforcement

- In addition to discriminatory licensing and loyalty rebates which the KFTC condemned in August 2009, it is deliberating on the issue of technological integration of multimedia processor to baseband chips.
- Competing multimedia processor vendors in Korea demanding that Qualcomm release “interface information” so that their own processors run “natively” on Qualcomm chips.

# 1. Overview of Korean competition law enforcement

- Qualcomm denies that such “interface information” exists. (Highly technical, so hard to judge for an economist.)
- Will set an important precedent in Korea (and in the world) on technological innovation.

# 1. Overview of Korean competition law enforcement

- Continued enforcement against domestic firms:
- *SKT Melon* DRM (2007).  
An online music site which refused to license its DRM to competitors (similar to Apple's iTunes policy)  
Reversed by Seoul High Court (2007) for lack of anticompetitive effects after the Supreme Court's *Posco* (2007) decision.

# 1. Overview of Korean competition law enforcement

- Minimal merger enforcement until only a few years ago

Hyundai Motor's acquisition of Kia Motors (1999) unchallenged. (# 1 with 39% share taking over then bankrupt #3 with 17% share in 4-to-3 merger, raising HHI to 4,500 with delta = 1,290)

# 1. Overview of Korean competition law enforcement

- Minimal merger enforcement until only a few years ago

SK Telecom's acquisition of Shinsegi (1999) approved with restrictions on market share (# 1 mobile telephone service provider with 43% share taking over #3 with 14% share in a 5-to-4 merger, raising HHI to 3,886 with  $\Delta = 1,192$ )

SKT ordered to reduce its market share below 50% within a year, but with no follow-up restrictions

# 1. Overview of Korean competition law enforcement

- However, quite aggressive after the economic crisis of 1998 was over

Samik Piano's acquisition of Youngchang Piano (2004) blocked (#2 piano manufacturer with 39% share taking over then near-bankrupt #1 with 50% share in a 4-to-3 merger, raising HHI to 7,998 with  $\Delta = 3,893$ )

DCC's acquisition of CCK (2006) blocked (#1 carbon black manufacturer with 40% share taking over #3 with 24% share in a 3-to-2 merger, raising HHI to 5,347 with  $\Delta = 1,932$ )

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- On the merger front, viewed from the conventional perspective with emphasis on concentration and static competition, the KFTC moving in the right direction.
- From the dynamic competition perspective, my assessment is, “yes and no”.



## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- What's my criterion?
- With *dynamic* competition in mind, expand the “competitive arena” beyond the conventional “relevant (geographical) markets” under the hypothetical monopolist test.

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- For many products/services, import competition does not meaningfully constrain domestic firms in Korea.
- Hence, traditional SSNIP test would define Korea as a *separate* geographical market in most cases.
- True for the 4 merger cases (Hyundai Motors 1999, SK Telecom 1999, Samik Piano 2004, and DC Chemical 2006).

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- SK Telecom and Samik Piano both largely cater to *domestic* customers.
- For both, actual competition is all there is to it. Little threat of potential competition.
- For mobile telephony (SK Telecom), 3G licenses already given out. 4G competition distant in future and expected to be carried out by current players.

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- SK Telecom's attempts to move out to foreign markets are limited and unsuccessful so far (Helio MNVO service in the US a failure).
- KFTC's decision to allow SKT's acquisition of Shinsegi in 1999 was probably wrong and the remedy imposed (temporary reduction of market share to below 50%) is hard to justify.

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- For pianos too, largely a domestic market.
- KFTC's decision to block Samik Piano's acquisition of Youngchang probably a right decision.

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- Foreign competition in Korean automobile market minimal (around 1% in 1999 and still around 5% in 2009).
- A conventional “concentration” analysis would have blocked the merger.
- In allowing Hyundai Motor’s acquisition of Kia Motors in 1999, the KFTC recognized that Hyundai competes with global firms in the *foreign* markets (1/2 ~ 2/3 of Hyundai cars exported).

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- Due to the competitive threats in the *foreign* markets, Hyundai Motors continued to innovate.
- In the mid 1980's Hyundai cars were synonymous with cheap but poor quality cars in the US.
- After a decade of endeavors, recently achieved high ratings in consumer satisfaction & quality surveys.
- Record high market shares in the US (in August 2009, combined 8%, ahead of Chrysler).

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- Success of Hyundai Motors an enigma.
  - Militant labor union
  - Poor corporate governance (Chairman Chung recently ordered by a court to retribute Hyundai Motors KRW 700 M (US\$ 60 M) for inappropriate usage of company funds)
  - Inadequate domestic/import competition
- My perspective: illustrates the importance of *actual* competition in *foreign* markets. (Actual or potential import competition in *domestic* market may not be adequate.)



## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- The loss of domestic competition surely resulted in consumer welfare loss in the *short term*.
- However, Hyundai/Kia merger probably allowed the combined firm to achieve economies of scale by sharing underlying “platforms,” thereby allowing it to better compete with foreign firms.
- From a *dynamic* perspective, Korean consumers probably have gained from the introduction of new and improved cars (although at any point of time, they pay higher prices than foreigners do for the same cars at any point of time)

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- Even if not, Hyundai/Kia's gains (profits/cost savings) in foreign markets certainly a social surplus for Korea.
- Such gains should be taken into account by competition authorities.
- (Of course, I do not mean to be nationalistic. Hyundai/Kia's gains in the U.S. were accompanied by increases in U.S. consumer surplus. Therefore, increased *global* surplus.)

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- DCC claimed that its acquisition of CCC, which is a parent company of CCK, was done with *global* markets in mind, not Korea.
- The KFTC defined Korea as a separate geographical market (justifiable under the traditional SSNIP test) and ordered DCC to either abandon the entire transaction or divest CCK's Korean plant (or DCC's own Korean plant).
- DCC claimed that combined operation of the two Korean plants were essential for achieving synergy effects *globally*.

## 2. Analysis of KFTC Decisions from the perspective of dynamic competition

- Unlike in its 1999 approval of Hyundai/Kia merger, the KFTC only looked at the effects in *Korea*.
- The KFTC could have been right. Korean consumers could have suffered in the *short term*.
- However, along the lines of Hyundai/Kia, possible that DCC's gains in the foreign markets (and potential long-term consumer gains in Korea) could outweigh short term losses .

### 3. My proposal

- Bottomline: when there are several geographical/product markets, I advocate “summing” the gains/losses across all markets in examining the effects of mergers, when remedies tailored to specific markets are not at hand.
- I believe that my approach could be potentially fruitful for *export-oriented* economies/industries.
- Short term consumer losses in the domestic market can be outweighed by the merging firms’ gains in the foreign markets.

### 3. My proposal

- Under the conventional approach which looks at effects in separate markets in isolation, competition authorities likely to block mergers that results in short-term consumer losses in the domestic market.
- Particularly important when innovations are undertaken with *all* markets in mind (or even strongly, with foreign markets in mind, where the merging firms face strong competitive pressure which is absent in the domestic market).

### 3. My proposal

- My approach is different from the proposal to examine *potential* competition more seriously, because foreign competition—a major source of potential competition for many developing markets and small-sized developed markets—may not materialize in the domestic market even in the relatively long term (the case in car market in Korea).
- *Actual* foreign competition in *foreign* markets serves as a stimulant for dominant domestic firms (which compete in foreign markets) to undertake innovative activities that ultimately benefits domestic consumers (although they suffer short-term losses at any point of time).

### 3. My proposal

- In sum, I welcome the KFTC's more aggressive merger enforcement in markets where firms mostly cater to domestic demand (with little foreign competition present).
- In markets where domestic firms compete with foreign firms in foreign markets, I believe that the KFTC's narrow look at the effects in Korea only are misguided and a step backwards.



## 4. Other Challenges Ahead

- (1) The KFTC should let go of its “monopoly” over the enforcement of competition law and take affirmative measures to encourage private enforcement.
  - Currently, private parties can only complain to the KFTC or file *damages* suit in the court, but cannot file an *injunction* suit to “cease and desist” potentially anti-competitive conduct.
  - Meaningful discovery impossible. Hence, only after the KFTC establishes liability, damages litigation becomes realistic.
  - No punitive damages and no class action.

## 4. Other Challenges Ahead

- (1) The KFTC should let go of its “monopoly” over the enforcement of competition law and take affirmative measures to encourage private enforcement.
  - I advocate modifying the MRFTA so that
  - private injunction suits are allowed;
  - discovery expanded; and
  - punitive (e.g., treble) damages and class action for hard-core cartels (but not for unilateral conduct).

## 4. Other Challenges Ahead

- (2) The KFTC should establish a “Chinese wall” between its investigative arm and its adjudicative arm
- In theory, they are separate; however, long-standing personnel policy does not maintain a separation between employees of the Secretary General’s Office and those in the Office of the General Counsel.
  - KFTC aware of this problem and contemplating establishment an independent professional adjudicator’s office (similar to the office of Administrative Law Judge in the U.S. or the Hearing Officer in Japan). I strongly urge the KFTC to quickly implement its plan.

## 4. Other Challenges Ahead

- (3) The KFTC should double its efforts to guarantee proper procedural rights to both complainants and respondents
- *Microsoft* (2006) a watershed event in the KFTC's attempts to develop into a respectable quasi-judicial body.
  - Investigation over 5 years;
  - 3 to 4 months given to Microsoft to rebut the Examiners' Report;
  - a total of 7 hearings over 4 months;
  - complainants (a Korean portal site with messenger service; 2 Korean makers of media server software; and Real Networks) and Microsoft exchanged economic analysis reports and underlying data

## 4. Other Challenges Ahead

- (3) The KFTC should double its efforts to guarantee proper procedural rights to both complainants and respondents
- I hoped that these attempts would continue and be institutionalized.
  - Unfortunately, in both *Intel* (2008) and *Qualcomm* (2009), the KFTC has not followed through its early efforts.
  - For example, the KFTC should require submission of redacted versions of complaints, Examiners' Reports or respondents' briefs, accompanying economic/technical reports to be shared with interested parties.

## 4. Other Challenges Ahead

(4) The KFTC should resume its efforts to establish a well-staffed economic analysis unit

- Following the *Microsoft* (2006) case, the KFTC tried to establish a sizeable economics units, but so far failed due to budgetary limitations.
- There are many economics Ph.d's at the KFTC, but most have received degrees in *macroeconomics* back in the days of the Economic Planning Board.
- Need to convince both the President and National Assembly of the importance of economic staff.

## 5. Concluding remarks

- For a relatively young agency with only a quarter-century history, the KFTC has achieved some remarkable success in cartel enforcement and competition advocacy.
- However, its track record in merger control leaves much to be desired. Need to break out of the traditional market definition mold and focus more on competitive effects analysis. I emphasize a *dynamic* perspective.

## 5. Concluding remarks

- In order to achieve its aspiration to be recognized as a global force in antitrust—for which it has already made significant progress—the KFTC should take measures to
  - encourage private suits,
  - strengthen its economic analysis unit,
  - fundamentally overhaul *chaebol* (large Korean conglomerates) regulation,
  - establish a “Chinese wall” between its investigative and adjudicative offices and personnel, and
  - reinforce its efforts to guarantee proper procedural rights to defendants.