

# So-called Vertical Dimension in the Cartel Case: Long way toward Establishing the Clear Distinction between Concerted and Unilateral Conduct under the Korean Antitrust Law Regime\*

Ho-Young Lee\*\*

## Abstract

*The Korea Fair Trade Commission have long stuck to law enforcement policy that Article 19 of the Monopoly Regulation and Fair Trade Act which prohibits anticompetitive concerted practices applies to horizontal agreements only, while most anti-competitive vertical agreements have been judged by 'the likelihood to impede fair trade' standard under Article 23. This does not, however, have any statutory ground or antitrust policy justification. Such law enforcement approach to vertical restraints may make prohibition on unreasonable concerted practices under the MRFTA insufficient and cause unnecessary confusion in regulating unilateral conduct under the Act.*

*Fortunately, the KFTC and courts which reviewed the KFTC's decisions recently showed signs of changes where a non-horizontal agreement was in issue. However, this does not seem enough to change antitrust rules governing vertical restraints under the MRFTA in near future.*

*A consistent and systematic approach is requested for establishing the clear distinction between concerted and unilateral conduct under the Korean antitrust law regime by restoring law enforcement against anti-competitive vertical agreements as an unreasonable concerted practice. In process of such development, of course, a due respect should be paid to predictability on the side of business communities.*

KEY WORDS: Vertical agreement, Horizontal agreement, Vertical restraint, Unreasonable concerted practice, Unilateral conduct, Unfair trade practice, Resale price maintenance, Mutual restraint, Unreasonable restraint of trade

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\*\* Professor of Law, Hanyang University. LL.B., M.A., and Ph. D., Seoul National University; J.D., University of Missouri-Columbia.

## I. Introduction

A unique characteristic of the Korean antitrust law enforcement is heavy reliance upon prohibition on unfair trade practices under Article 23 of the Monopoly Regulation and Fair Trade Act (hereinafter 'MRFTA'). The other side of the same coin is practically no antitrust law enforcement against vertical restraints as concerted conduct. No statutory basis for such enforcement policy can be found on the MRFTA or any other legislation as will be discussed later (II). However, the Korean competition authority, the Korea Fair Trade Commission (hereinafter **KFTC**) have long stuck to law enforcement policy that Article 19 of the MRFTA which prohibits anticompetitive concerted practices applies to horizontal agreements only, not vertical agreements.

The agency has never officially publicized its view on applicability of Article 19 of the MRFTA to a vertical agreement and no other official explanation has been given for this long-lasting law enforcement practice. The widely accepted and plausible speculation is that such KFTC's law enforcement policy was affected by law enforcement practice of its Japanese counterpart, the Japan Fair Trade Commission, which in turn affected by an early Tokyo High Court decision rendered in 1953.

The main ground for the Japanese court's ruling was a unique requirement of so-called 'mutual restraint' for being held unreasonable restraint of trade (anticompetitive agreements) under the Japanese Antimonopoly and Fair Trade Act. Nonetheless, the court decision has been widely criticized among Japanese antitrust law scholars and law enforcers within the Japan Fair Trade Commission.

The lack of law enforcement against vertical restraints as concerted conduct may create substantial loopholes in the Korean antitrust law regime regarding anticompetitive concerted practices. The loopholes have been filled up in part by means of prohibition on unfair trade practices under Article 23 and other related clauses of the MRFTA. It seems that some anticompetitive vertical restraints which are supposed to be held an illegal concerted practice under other leading antitrust law regimes have been judged as an unfair trade practice under Article 23 or resale price maintenance under Article 29 if the MRFTA. Hence, the prohibition on

unfair trade practices under Article 23 of the MRFTA has born too heavy burden.

A more serious problem is that the 'unfairness' criteria under the unfair trade practice provision of the MRFTA has not been clearly defined either through the KFTC's enforcement practices or reviewing courts' judicial precedents yet. herefore, an argument can be persuasively made that the current Korean antitrust law regime has not made clear distinction between concerted and unilateral conduct, and substantial number of anticompetitive concerted conduct cases have been judged by the vague 'unfairness' concept which appears on the unfair trade practice clause (Article 23 of the MRFTA).

In discussing the issue raised above, this paper will first show statutory frameworks for regulating anticompetitive concerted conduct (Article 19 of the MRFTA) and unfair trade practices (Article 23 of the MRFTA and others) on the MRFTA (II), and then review law enforcement activities performed by the KFTC so far against vertical restraints either as a concerted practice or a unfair trade practice (III). It will also review recent court decisions in non-horizontal cartel cases, which suggested applicability of Article 19 to anticompetitive agreements entered into among parties who are located on different level of distribution chain (IV). Finally, it will discuss the prospects for changes to law enforcement against vertical restraints under the Korean antitrust law regime and make some suggestions on the issue (V), and conclude (VI).

## **II. Statutory Frameworks for Regulating Cartel Behaviors and Unfair Trade Practices**

The main antitrust legislation in the Korean legal system is the Monopoly Regulation and Fair Trade Act which was enacted in 1980. The Act was originally modeled after the Japanese Antimonopoly and Fair Trade Act which was enacted in 1947 and amended in large part in 1953. The MRFTA has four main pillars, namely prohibition on abuse of market dominance (Article 3-2), restriction on mergers and acquisitions (Article 7), prohibition on unreasonable concerted practices (Article 19), and prohibition on unfair trade practices (Article 23). It is generally accepted

that Article 3-2 and Article 23 aim at unilateral conduct by an undertaking with a market dominant or at least relatively powerful market position, whereas Article 19 aims at anticompetitive agreements among two or more undertakings.

In addition, Article 26 of the Act prohibits anticompetitive or other restrictive practices by trade associations and Article 29 restricts resale price maintenance. Resale price maintenance is defined in Article 2(6) and considered a type of unilateral conduct in shape, not concerted conduct under the MRFTA.

Hence, regulation of unilateral conduct on the MRFTA consists of prohibition on abuse of a market dominant position under Article 3-2, and prohibition on unfair trade practices under Article 23, and lastly, restriction on resale price maintenance under Article 29. This multilateral scheme of regulating unilateral conduct on the MRFTA creates a great deal of debate in constructing the statutory provisions and designing enforcement policy on unilateral conduct under the Korean antitrust law regime.

As compared with multilateral nature of regulating scheme of unilateral conduct, prohibition on anticompetitive concerted practices on the MRFTA is quite straightforward and relatively simple. Article 19(1) of the Act prohibits agreements among undertakings which unreasonably restrain competition. It says, "No undertaking shall enter into an agreement, by contract, arrangement, decision or any other means, to engage in any of the following acts which, in concert with other undertakings, unreasonably restrict competition or cause other undertakings to enter into such an agreement." This does not require 'mutual restraint' of business activities of participants as required under Article 2(6) of the Japanese Antimonopoly and Fair Trade Act.

From the language of Article 19(1) seen above, prohibition on unreasonable concerted practices on the MRFTA may be said to be quite similar to that under Section 2 of Sherman Act as well as Article 101 of the Treaty of the Functioning of the European Union in large part. In particular, no ground for requirement of mutual rivalry relationship among participants in the concerted practice is found on the concerted practice provision of any of those three antitrust law regimes.

The two main provisions aimed at unilateral conduct on the MRFTA are prohibition on abuse of a market dominant position under Article 3-2 and

prohibition on unfair trade practices under Article 23 of the Act. The former obviously applies only to undertakings with a market dominant position. Also, criteria for judging its violation have been relatively clearly established since the Supreme Court in *POSCO*<sup>1)</sup> held that the ‘unreasonableness’ requirement for finding abuse of market dominance means ant-competitiveness in essence.

On the other hand, there is much less clarity with regard to the latter, which provides for prohibition on various types of unfair trade practices. Article 23(1) says, “No undertaking shall engage in any of the following acts which are likely to impede fair trade or cause other undertakings to engage in such an act” and lists seven types of unfair trade practices. Also, the Presidential Decree implementing the MRFTA lists detailed types of unfair trade practices corresponding to each type of unfair trade practice provided for by Article 23(1). The unfair trade practice clause on the MRFTA seems modeled after Article 2(9) of the Japanese Antimonopoly and Fair Trade Act as was before the latter was amended in 2009.

The prohibition on unfair trade practices under Article 23 is applicable also to an undertaking without a market dominant position, but still many types of the unfair trade practices are understood applicable only to an undertaking having a powerful market position or superior bargaining position. In turn, apparently there is an issue on how much powerful or superior the undertaking should be for the prohibition to apply.

A much more debated issue is by what criteria to judge ‘the likelihood to impede fair trade’ as required for an act listed to be held an unfair trade practice under Article 23(1). The majority of scholars have opined that the concept of likelihood to impede fair trade on Article 23(1) is broad enough to include unfairness of competition measures and unfairness of transaction terms and conditions as well as anti-competitiveness. Nevertheless, there are a lot of issues yet to be resolved with regard to the concept of likelihood to impede fair trade on Article 23(1).<sup>2)</sup>

For example, how different the anti-competitiveness required to be an

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1) Supreme Court [S. Ct.], 2002Du8626, Nov. 22, 2007 (S. Kor.).

2) See LEE HO YOUNG, *DOGJEOMGYUJEBEOB* [MONOPOLY REGULATION ACT] 278-282 (Hongmoonsa 5th ed. 2015), for theories and court decisions on the meaning and judging criteria of likelihood to impede fair trade under Article 23(1).

unfair trade practice from that required to be held abuse of a market dominant position or an unreasonable concerted practice? It is also unclear from law enforcement practices of the KFTC and court precedents which types of unfair trade practices should be judged by the anti-competitiveness criteria, which types should be by the unfairness of competition means criteria, and which types, if any, should be by the both. A more challenging issue is how to distinguish the 'unfairness of transaction terms' type unfair trade practices which become the target of law enforcement by the competition authority from pure civil disputes which are properly to be resolved through civil dispute resolution means, typically a civil lawsuit filed by the aggrieved party. Although courts as well as law enforcement officials in the KFTC have long struggled with those issues, lots of them are yet to be more fully discussed and resolved.

### **III. Law Enforcement Activities by the KFTC against Vertical Restraints**

The competition authority of Korea had limited its law enforcement activities against anticompetitive concerted practices under Article 19 of the MRFTA only to cases where an anticompetitive agreement was entered into among undertakings which were competing against one another (horizontal agreement cases) until quite recently from very early period in implementing the MRFTA. As already explained, such law enforcement policy is believed to come from that of the Japan Fair Trade Commission.

The MRFTA which was enacted in 1980 was modeled after the Japanese Antimonopoly and Fair Trade Act as amended in 1953 in substantial part. Naturally, the early enforcement of the MRFTA was heavily affected by the law enforcement practice of the Japanese competition authority. The law enforcement activities against cartel behaviors by the KFTC were no exception.

Initially, the Japanese competition authority had applied Article 2(6) which provides for unreasonable restraint of trade to an agreement among undertakings located on different levels in the chain of distribution (vertical agreement) as well as one among undertakings competing against each

other on the same level (horizontal agreement).<sup>3)</sup> However, an early Tokyo High Court decision brought a drastic change to such enforcement policy. The decision was about an anticompetitive distribution agreement between a newspaper publisher and newspaper distributors. The court held that the unreasonable restraint of trade under the Japanese Antimonopoly and Fair Trade Act was capable of being committed only by undertakings in relationship of mutual rivalry, because the essence of unreasonable restraint of trade was setting up of mutual restraint on their business activities among the participating undertakings.<sup>4)</sup> It added that a vertical agreement among undertakings located on different distribution levels could not constitute unreasonable restraint of trade because it lacked ‘mutual restraint’ as required on the language of Article 2(6) of the Japanese Antimonopoly and Fair Trade Act.<sup>5)</sup>

As seen above, the main ground for the Japanese court’s ruling was a unique requirement of so-called ‘mutual restraint’ which appears on the unreasonable restraint of trade (equivalent to anticompetitive agreements under other antitrust regimes) clause of the Japanese Antimonopoly and Fair Trade Act. In fact, Article 2(6) of the Japanese Antimonopoly and Fair Trade Act defines unreasonable restraint of trade as “business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, **mutually restrict or conduct their business activities** in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

The court’s ruling, although not explicitly overruled, has been widely criticized among many Japanese scholars and law enforcers within the Japanese competition authority on various policy grounds from early on. In particular, the Guidelines Concerning Distribution Systems and Business

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3) See JOUJI ATSUYA (厚谷襄兒) ET AL., ANNOTATED ANTI-MONOPOLY ACT (條解獨占禁止法) 57-59 (Hongmoondang, 1997) (Japan), for the early enforcement practice against unreasonable restraint of trade and its change of the Japanese Fair Trade Commission.

4) Tokyo Koto Saibansho [Tokyo High Ct.] Mar. 9, 1953, 4 KOSEI TORIHIKI IINKAI SHINKETSUSHU 145 (新聞販路協定事件 判決) (Japan).

5) *Id.*

Practices Under the Antimonopoly Act issued by the Japan Fair Trade Commission in 1991 provides, with regard to the requirement of mutual restraint which appears on Article 2(6), that the content of restrictions of business activities in this context does not have to be identical in all firms (for example, distributors and manufacturers), but is sufficient if the conduct restricts the business activities of each firm and is for the purpose of achieving a common purpose, such as the exclusion of any specific firm.

More importantly, the language of Article 19 of the MRFTA does not include the same or similar requirement as seen above. In fact, the requirement of mutual restraint which appears on Article 2(6) of the Japanese Antimonopoly and Fair Trade Act is very unique and cannot be found in any other major antitrust law regimes against anti-competitive concerted practices including the Korean. From the competition policy perspective, it is hard to justify requiring mutual restraint for holding a concerted practice among undertakings anticompetitive and hence, a violation of antitrust law.

Therefore, neither statutory nor policy ground exists for limiting prohibition on unreasonable concerted practices under Article 19 of the MRFTA only to horizontal agreement cases. Nevertheless, the KFTC probably affected by law enforcement practices of the Japan Fair Trade Commission had applied Article 19 only to horizontal agreements until recently. To anticompetitive restraints of trade among undertakings located on different levels of distribution such as a manufacturer and dealers, the KFTC had instead applied Article 23 of the MRFTA dealing them as a type of unfair trade practice or Article 29 which prohibits resale price maintenance.

Vertical restrictive trade practices including resale price maintenance, tying arrangements, exclusive dealings, and market divisions, have been judged by the likelihood to impede fair trade standard under Article 23(1) or similar standard under Article 29(1), rather than unreasonable anti-competitiveness standard under Article 19(1). Since the likelihood to impede fair trade standard is less clear and inclusive of different policy goals as already discussed, the law enforcement against those types of restrictive trade practices has not been necessarily consistent in terms of judging criteria.

Also, the distinction between concerted conduct and unilateral conduct

in antitrust law enforcement has been ignored as to those vertical restraints. Undertakings only on the one level of distribution chain (usually, the upstream market level) have been subject to law enforcement by the KFTC even when undertakings on both levels of distribution chain actively participated in the illegal anticompetitive practice.

Since early 2000's, the KFTC has showed signs of change in cartel cases where undertakings located on more than one levels of distribution chain are involved. Although it has never explicitly announced that a vertical agreement may also constitute unreasonable concerted conduct under Article 19 of the MRFTA, it has dealt undertakings located on the different level of distribution chain as cartel participants in a cartel case. The examples include School Uniform Cartel case,<sup>6)</sup> Trunked Radio System Device Bid-rigging case,<sup>7)</sup> and Film Distribution Cartel case.<sup>8)</sup>

More recently, the KFTC became more willing to apply Article 19(1) to a vertical agreement in a series of cartel cases. In Digital Music Source Cartel case, it decided that an agreement on the price and other terms of the digital music source product among contents providers (CP) and on-line service providers (OSP) which were in vertical relationship on the distribution chain of digital music source constituted unreasonable concerted conduct under Article 19(1).<sup>9)</sup> Also in Cable TV System Operators' Cartel case, it held that five major cable TV system operators who agreed to implement so-called 'Cable Only policy' on TV program providers violated Article 19(1) even though they were not competing against one another since their franchises (broadcasting coverage areas) were defined by government permission and had no overlaps with one another's.<sup>10)</sup>

Finally, in Antiemetic Cartel case, where a global pharmaceutical company holding drug patents entered into a so-called reverse payment agreement with a domestic generic drug manufacturer which alleged the

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6) KFTC Decision, 2001-82, May 31, 2001 (S. Kor.); KFTC Decision, 2001-83, June 7, 2001 (S. Kor.).

7) KFTC Decision, 2008-137, May 2, 2008 (S. Kor.).

8) KFTC Decision, 2008-168, June 10, 2008 (S. Kor.).

9) KFTC Decision, 2011-85, June 29, 2001 (S. Kor.).

10) KFTC Decision, 2011-153, Aug. 24, 2011 (S. Kor.). It should be noted that the cartel members in this case were neither in horizontal nor in vertical relationship with each other.

patents were invalid, the KFTC first explicitly held that Article 19 applies to agreements among undertakings which are not in mutual rivalry relationship.<sup>11)</sup>

#### IV. Recent Court Decisions in Non-Horizontal Cartel Cases

The courts which reviewed decisions by the KFTC in cartel cases had had no opportunities to render a ruling on the issue of applicability of Article 19 to non-horizontal agreements until quite recently because the KFTC had long applied Article 19 only to horizontal agreements as seen above. The situation has changed since the KFTC came to apply Article 19 to agreements among undertakings which were not necessarily in mutual rivalry.

The first court decision ever found which dealt with this issue was Seoul High court's decision rendered in Film Distribution Cartel case. Seoul High Court held that an undertaking which is not in horizontal relationship with other participants is also capable of engaging in an unreasonable concerted practice in violation of Article 19 of the MRFTA with other undertakings which are in horizontal relationship with one another.<sup>12)</sup> Also, in Digital Music Source Cartel case, Seoul High Court held that an agreement among undertakings in vertical relationship as well as in horizontal relationship can constitute an unreasonable concerted practice in the light of the language of Article 19(1) of the MRFTA.<sup>13)</sup>

The long-awaited ruling of the Supreme Court of Korea on this issue was finally rendered in Cable TV System Operators' Cartel case in the spring of year 2015. In this case, the Cable TV System Operators argued that they were not capable of engaging in an unreasonable concerted practice as a matter of law because their broadcasting coverage areas were not overlapped, and hence, they were not in horizontal rivalry relationship

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11) KFTC Decision, 2011-300, Dec. 23, 2011 (S. Kor.).

12) Seoul High Court [Seoul High Ct.], 2009Nu2483, Oct.7, 2009 (S. Kor.).

13) Seoul High Court [Seoul High Ct.], 2011Nu25717, July 11, 2012 (S. Kor.). *See also* Seoul High Court [Seoul High Ct.], 2012Nu3028, Oct.11, 2012 (S. Kor.); Seoul High Court [Seoul High Ct.], 2011Nu32470, Sept.19, 2012 (S. Kor.).

with one another. The Supreme Court of Korea, rejecting this argument, explicitly ruled that mutual rivalry relationship among cartel participants is not a requirement for finding an unreasonable concerted practice under Article 19(1) of the MRFTA.

However, the Court did not elaborate upon the grounds for such ruling. In addition, it could be possibly argued that the Court did not specifically mention a 'vertical' agreement in the decision and it is still unclear if the Court meant to apply Article 19 of the MRFTA to a pure vertical agreement among undertakings on different levels of distribution chain such as a manufacturer and a dealer, where no plural undertakings on the same level of distribution chain are involved.

## **V. Prospect for Changes to Antitrust Rules governing Vertical Restraints in Korea**

What will be the prospects for changes to law enforcement against vertical restraints under the Korean antitrust law regime? It would be unrealistic to expect a drastic change in near future. Most importantly, the law enforcers within the KFTC, as many government officials do, tend to follow the precedents and are reluctant to change their law enforcement practices. They have treated almost all of the vertical restraints such as refusals to deal, tying arrangements, exclusive dealings, and resale price fixing arrangements as unfair trade practices prohibited under Article 23 or Article 29, not as an unreasonable concerted practice under Article 19 for more than thirty years since the MRFTA came into effect in 1981.

Those non-horizontal agreement cases to which the KFTC applied Article 19 could be regarded as rare exceptions to this general rule and some unique characteristics of the cases led the KFTC to make such exceptions in choosing the applicable prohibition provision on the MRFTA. For example, the participants did not have only vertical relationship with one another, but also horizontal rivalry relationship on each level of distribution in School Uniform Cartel case,<sup>14)</sup> Film Distribution Cartel

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14) KFTC Decision, 2001-82, May 31, 2001 (S. Kor.); KFTC Decision, 2001-83, June 7, 2001 (S. Kor.).

case,<sup>15)</sup> and Digital Music Source Cartel case.<sup>16)</sup> In other words, plural undertakings which mutually competed participated in the cartel both on the upstream and on the downstream market.

Also in Cable TV System Operators' Cartel case,<sup>17)</sup> the participants seemed to be in fact potential competitors to one another, even though they were not in actual rivalry relationship. The five major Cable TV System Operators were active in merging or acquiring minor Cable TV Systems for enlarging their broadcasting coverage areas and may confront with one another on the nationwide multi-channel Pay-TV market in near future. Lastly, the parties to the reverse payment agreement in Antiemetic Cartel case<sup>18)</sup> were in actual rivalry relationship on the main Antiemetic product market with each other and additionally, they were in vertical relationship on the distribution chain of other pharmaceutical products.

With such exceptions, the KFTC is more likely than not to stick to the past decision practices by applying Article 23 or Article 29 to most vertical restraints rather than Article 19 of the MRFTA regardless of the recent development of court decisions discussed above. Without changes to law enforcement policy of the KFTC, the role of courts in developing antitrust rules is very limited under the Korean antitrust law regime.

The Korean courts have made a contribution to development of antitrust rules mainly through the appellate jurisdiction to review the law enforcing administrative decisions rendered by the KFTC. Although any victims allegedly injured by a violation of a prohibition provision on the MRFTA may file a law suit for damages with a civil court under Article 56 of the Act as well as under Article 750 of the CIVIL CODE, only tens of civil damages suits have been filed so far. Moreover, almost all of those damages suits are so-called 'follow-on suits', which means that they were filed after the KFTC decision of finding a violation had been finalized.

Therefore, changes to law enforcement policy of the KFTC is a prerequisite for establishing the clear distinction between concerted and

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15) KFTC Decision, 2008-168, June 10, 2008 (S. Kor.).

16) KFTC Decision, 2011-85, June 29, 2001 (S. Kor.).

17) KFTC Decision, 2011-153, Aug. 24, 2011 (S. Kor.). It should be noted that the cartel members in this case were neither in horizontal nor in vertical relationship with each other.

18) KFTC Decision, 2011-300, Dec. 23, 2011 (S. Kor.).

unilateral conduct under the Korean antitrust law regime by restoring law enforcement against anti-competitive vertical agreements as an unreasonable concerted practice under Article 19 of the MRFTA. The task of making changes to law enforcement policy is not easy in general. Moreover, changing the long-lasting law enforcement policy of competition authority which has long been relied upon by related business communities could be harder than amending the relevant antitrust statute itself.

In the process of making changes to law enforcement practices against vertical restraints by the KFTC, a due respect should be paid to predictability on the side of business communities even though no amendment to the MRFTA is needed. The first step should be pre-announcement of changes to law enforcement policy against vertical restraints. The next step could be revision of the 'Guidelines for concerted practice review' issued by the KFTC to include detailed reviewing criteria for vertical concerted practices. The current Guidelines for concerted practice review keeps silent as to applicability of Article 19 to vertical agreements.

Lastly and most importantly, the KFTC should be clear and consistent in distinguishing concerted conduct from unilateral conduct in enforcing the MRFTA against vertical restraints. Also, the KFTC should stick to the anti-competitiveness standard in reviewing vertical concerted practices under Article 19 as compared to vertical unilateral conduct either as an unfair trade practice under Article 23 or resale price maintenance under Article 29.

## VI. Conclusion

The problem of ignoring the distinction between concerted conduct and unilateral conduct has been pointed out with regard to the Korean antitrust law enforcement. So far, the KFTC has applied Article 19 of the MRFTA mainly to horizontal agreements, whereas most anticompetitive vertical agreements were judged by the likelihood to impede fair trade standard under Article 23. Such law enforcement policy was presumably affected by law enforcement practices against unreasonable restraints of trade under the Japanese Antimonopoly and Fair Trade Act by the Japan Fair Trade Commission.

This does not, however, have any statutory ground under the MRFTA nor antitrust policy justifications in general. Such law enforcement approach to vertical restraints may blur the fundamental distinction between concerted conduct and unilateral conduct, and thereby cause serious problems in antitrust law regulatory system under the MRFTA. It may make prohibition on unreasonable concerted practices insufficient and cause unnecessary confusion in regulating unilateral conduct under the MRFTA.

This issue is also interwound with the multilateral regulatory scheme of unilateral conduct under the MRFTA. In particular, the unique nature of prohibition on unfair trade practices under Article 23 contributed to such skewed law enforcement practices.

Fortunately, the KFTC and courts which reviewed its decisions recently showed signs of changes in cases where a non-horizontal agreement was in issue. Courts including the Supreme Court of Korea as well as the KFTC approved the applicability of Article 19 to agreements the parties to which are not in mutual rivalry relationship. However, this does not seem enough to change antitrust rules governing vertical restraints under the MRFTA in near future.

A consistent and systematic approach is requested for establishing the clear distinction between concerted and unilateral conduct under the Korean antitrust law regime by restoring law enforcement against anticompetitive vertical agreements as an unreasonable concerted practice under Article 19 of the MRFTA. In process of such development, a due respect should be paid to predictability on the side of business communities.