

Prohibition of Abuse of Market-Dominant Undertakings under the Monopoly Regulation and Fair Trade Act

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Abstract

This article discusses the basic issues in the prohibition of abuse of market dominant undertakings in Korea with emphasis on the dogmatic definition and systematics of abuse. In the process of rapid development of the Korean economy, the concentration of large scale industries has been increased. Through recent changes in market opening and deregulation, the pressure of market competition is becoming fierce. Simultaneously, the risk that market dominant undertakings try to hinder, foreclose or exclude actual or potential competitors grows. However, the Monopoly Regulation and Fair Trade Act has not effectively responded to various types of abuse committed by market dominant undertakings. The main cause of this situation appears to be that the Korea Fair Trade Commission and commentators have failed to provide sufficient explanations about the nature of abuse. This article tries to make clear how to understand, interpret and apply the abuse concept that has evolved in the social and political context of Korea. This approach is expected to reveal some interpretative characteristics of abuse.

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I. Introduction

A free market economy requires free and open competition, which in turn enables private autonomy to operate. And private autonomy contains in its essence freedom of contract, i.e. freedom to choose with whom to trade, decide whether or not to trade and what the terms would be. Therefore free market economy denies a system coordinated by mandatory obligation.¹⁾ However, free contract and free competition, if not restrained, have a risk to destroy themselves. From long ago, most of the modern jurisprudence had responded to such danger in *laissez faire* by means of setting limits to the exercise of significant economic power. As a typical limitation of private autonomy there have been legal restraints due to the lack of equality between contract parties, so the competition law aims to prevent anti-competitive conducts in the sense that it also tries to guarantee substantial freedom of contract by means of limiting private autonomy and constraining market power.²⁾

Most industrialized countries treat the concentration of economic power by individual firms as a harm and, therefore, apply legal controls to the conduct of a firm having such power. U.S. antitrust law utilizes the concept of monopolization to define the limits of permissible conduct for dominant firms, but virtually all other competition law systems, including the Korean legal system, put the concept of abuse of that power into practice to fulfill the same function. Article 3-2 of the Monopoly Regulation and Fair Trade Act (hereafter “the Act”) is a provision that places particular obligation on undertakings holding market dominant position.

Conceptually, several methods of regulation are available to public authorities to prevent or remedy the potential anti-competitive conduct by dominant firms harming free contact and consumer welfare. One is public ownership or ex ante regulation, which aims to protect public interests through the direct regulation of prices, output, and other trade terms. The other is to prohibit certain types of conduct by these firms ex post, only when such prohibitions are infringed. The latter is the approach of competition law, which is taken by the Act. In this context, the Act tries to guarantee

1) Bong-Eui Lee, “Illegality of Unfair Trade Practices from the Viewpoint of Contract Order”, *Fair Trade and Rule of Law* (November 2004), pp. 658~659.

2) Rittner, *Vertragsfreiheit und Wettbewerbspolitik*, *Festschrift Solter* (1982), pp. 27, 30; Fikentscher, *Vertrag und wirtschaftliche Macht*, *Recht und wirtschaftliche Freiheit* (1992), pp. 30.

room for free enterprise activities by constraining unsound use of power in a economic society and one of the main instruments for it is the prevention of abuse practiced by market dominant undertakings.

The two legal approaches mentioned above are, notwithstanding some common objectives, fundamentally different.³⁾ They have evolved from different conceptual and theoretical backgrounds; they are embedded in different legal traditions, especially in relation to the role of government in economic activities; they are shaped by different social and political pressures; and their enforcement is based on different legal systems.⁴⁾ Consequently, lawyers well acquainted with the U.S. antitrust law frequently misunderstand the concept of abuse in its legal context and its interpretation for individual cases. This lack of understanding the abuse concept impairs, above all, the ability of Korean lawyers and competition authorities to effectively respond to complicated business operations. Moreover, not only the market dominant undertakings themselves, but those undertakings who would either deal or compete with such undertakings are confused in pre-evaluating their conduct, which would result in problems of compliance and wasteful disputes. This article, therefore, responds to this lack of understanding by analysing the legal concept of abuse of a market dominant position. The focus of this article is on analysing what meaning is ascribed to the vague notion of abuse and how to systematize it. In analysing Korean approach to abusive conducts, the article also makes clear characteristics of the decisions of the Korea Fair Trade Commission (hereafter “KFTC”) and the courts.

II. Market Dominance

The concept of abuse of a market dominant position has two components; the concept of abuse and the concept of market dominance. The former provides conduct standards, the latter identifies undertakings whose conduct is subject to

3) It is much the same for the comparison between U.S. and European competition law approach to the possession of significant economic power. Gerber, “Law and the Abuse of Economic Power in Europe”, 62 *Tulane Law Review* 57 (1987).

4) See generally Joliet, *Monopolization and Abuse of Dominant Position: A Comparative Study of the American*

those standards.⁵⁾

Abuse is to be challenged, only when the conducting firm has a market dominant position. The Act defines the term “market-dominant undertaking” any one holding market position who can determine, maintain, or change the prices, quantity or quality of commodities or services or other terms and conditions of business as a supplier or customer in a particular business area, individually or jointly with other undertakings.⁶⁾ The Article 2 No. 7 further addresses that a dominant position can exist individually or jointly with other undertakings and it can be inferred that the Act recognizes, although implicitly, so called the “collective market dominance”.⁷⁾ However, the concept has never been put into use by the KFTC and the courts, and under what circumstances the existence of a collective dominance can be inferred, is still unclear.

The wording of Article 3-2 of the Act refers to market dominant undertakings, not monopoly or oligopoly. Under this usage, a market dominant undertaking is a firm that holds a prevailing or exclusive position in a market as measured by structural indicia, such as market share and barriers to entry, etc. Such an understanding of dominance naively coincides with the concept of monopolization under Section 2 of the Sherman Act.⁸⁾

A. Definition of relevant market

In determining the existence of a dominant position, it is first necessary to identify the relevant markets. “Particular business area” in terms of the Act means an area in which any competitive relation exists or may exist, by the product, stage of trade, or geographical area of such trade.⁹⁾ Relevant product refers to the aggregate of

and *European Approaches to the Control of Economic Power* (1970); Edwards, “American and German Policy Toward Conduct by Powerful Enterprises: A Comparison”, 23 *Antitrust Bull.* 83 (1978); Schmidt, *US-amerikanische und deutsche Wettbewerbspolitik gegenüber Marktmacht* (1973).

5) Gerber, *supra* note 3.

6) Article 2 No. 7 of the Act.

7) The concept “collective market dominance” had been developed in German and European competition law, so far rarely applied. See generally, Faull/Nikpay, *The EC Law of Competition* (1999), pp. 138~140.

8) Sullivan/Grimes, *The Law of Antitrust: An Integrated Handbook* (2000), pp. 75~76.

9) Article 2 No. 3 of the Act.

products to which major buyers of a specific product can switch, in response to a significant and non-transitory increase in the price of such product or service in transaction. Geographic market is similarly defined. The basic and common criterion is inter-changeability from the customers' view.¹⁰⁾ The KFTC applies the same definition of market without distinguishing abuse, cartel, and anti-competitive business concentration, which is likely to cause some analytical problems in a specific case.

B. Dominance

Generally, market dominance has been defined as a position of considerable economic power. It should not, however, be regarded as an absolute concept. It is rather a relative one as a matter of degree. The existence of a dominant position in a particular case is normally referred from a number of factors, through which the competition authority, the KFTC, considers at the outset from its own concept of competition policy.

In determining whether an undertaking is market dominant, the KFTC would therefore comprehensively take into account its market share, whether and to what extent any barriers to entry exist, and the relative size of competitive firms, etc. These factors, prescribed in Section III of the KFTC Guidelines of Reviewing Abusive Conduct of Market Dominant Position¹¹⁾ (hereafter "the Guidelines) relate to the structure of the relevant market, the primary indicator of dominance is among others the market share of the challenged undertaking.

However, it is very complicated for the KFTC to identify market dominance and therefore market participants can not often predict whether and under what conditions they could be challenged because of unfairness of their conduct. One way to overcome such legally uncertain situations and to alleviate KFTC's burden of proof is to presume market dominance depending on market share.¹²⁾ Under Article 4 of the Act an undertaking whose market share in a particular market falls under any

10) See in detail, Sai-Ree Yoon, "Regulation of Business Combination under the Antimonopoly and Fair Trade Act with Emphasis on the Case Law", *Journal of Korean Law*, Vol. 2 No.1 (2002), pp. 1, 10~18.

11) KFTC Notification No. 2002-6 (2002.5.16).

12) Oh-Seung Kwon, *Economic Law*, 4thed., (Seoul, Beopmunsa, 2002), p. 159.

of the following shall be presumed to be market dominant:

- a. market share of one undertaking is 50% or more; or
- b. the total market share of not less than three undertakings is 75% or more; provided that those whose market share is less than 10% shall be excluded.

"Market share" of the Act means the ratio of the price of goods or services that the concerned company has supplied or purchased domestically to the total price of goods or services supplied or purchased domestically during the year immediately before the year that includes the date in which the activity suspected of violating the Act's Article 3-2 by the company ended. Provided, however, that it is difficult to compute the market share based on price, the market share may be computed based on quantity or production capacity.

It should be noted that in applying the presumption and prohibition clauses, an undertaking and affiliated corporations thereof shall be regarded as a single entity. For example, Hyundai Motor Company and its affiliated Kia Motor Company have more about 70% market share in a domestic automobile markets, so they are regarded as a single undertaking and therefore presumed market dominant irrespective of the other competitors' market share.¹³⁾

III. Abuse

A. Typology

Article 3-2 itself does not provide any definition of what and under what circumstances an abuse of market dominant position exists. There has been some uncertainty regarding the nature of the abuse concept during the past 24 years of the enforcement of the Act. It is partly due to the fact that the decisions of the KFTC and the judgments of the courts are too few to allow some clear guidance to be derived from them.¹⁴⁾ Another reason is that there has been some conceptual uncertainty,

13) KFTC Decision, No. 99-130 "Hyundai Motor/Kia Motor" (1999.9.3). The KFTC acknowledged that their aggregate market share for bus and truck would amount to respectively 74.2%, 94.6%.

14) To date, the number of cases where the KFTC ordered corrective measures regarding an abuse, amounts to about 30.

because commentators influenced by U.S. antitrust law approach tried to interpret an abuse according to the legal principles of Sec. 2 of the Sherman Act without explaining differences between the concepts of monopolization and abuse of market dominant position.

Article 3-2 provides exhaustively five different conducts of abuse as following:

1. an act determining, maintaining, or changing unreasonably the price of commodities or services;
2. an act unreasonably controlling the sale of commodities or provision of services;
3. an act unreasonably interfering with the business activities of other enterprisers;
4. an act unreasonably impeding the entry of new competitors; and
5. an act unfairly excluding competitive enterprisers, or which might considerably harm the interests of consumers.

Categories or standards for abusive conducts are further determined by Presidential Decree and the Guidelines. The revised Presidential Decree of 2001 introduced a somewhat troublesome type of abuse, as a subcategory of unreasonable interference and entry impediment in No. 3 and 4, namely refusal to access to essential factors.¹⁵⁾ Under this concept, the Presidential Decree prohibits conduct by a dominant firm refusing, discontinuing, or limiting, without any justifiable reason, the use of or the access to essential factors for manufacturing, providing, or selling the products or services of other firms or new entrants.¹⁶⁾ There has not been a single case of abuse, against which the KFTC decided explicitly based on this so called “essential facilities doctrine”,¹⁷⁾ remains therefore much to be cleared.

15) This category of abuse seems to have modelled after Article 19 I No. 4 of the Act against Restraints of Competition of Germany (Gesetz gegen Wettbewerbsbeschränkungen; GWB), the origin of that article is in turn to trace to the precedents of European and U.S. competition law. See generally Cheol Han, “The Essential Facilities Doctrine under the Antitrust Law”, *Journal of Business Administration & Law*, Vol. 13, No. 2 (2003), pp. 423; Beckmerhagen, *Die essential facilities doctrine im US-amerikanischen und europäischen Kartellrecht, Nomos* (2002).

16) Presidential Decree Article 5 No. 3 and 4.

17) In a case of a collective refusal by 7 leading banks to allow access of another bank to jointly owned CD (Cash Dispenser) network which could be qualified an essential factor to compete in virtual account service market,

Under this system, it is now widely acknowledged that abuses within the meaning of Article 3-2 are conceptually divided into two categories, exploitative and exclusionary or hindering practices. Exploitative abuses are those practices by a dominant undertaking, while not directly harming competitors in the market, to exploit the opportunities provided by market forces and to reduce the consumer welfare. This reduction of consumer welfare or exploitative effects may take various forms, such as excessive pricing, insufficient quantity of products, stifling innovation (Article 3-2 I No. 1, 2, and 5). In contrast to exploitative abuses, exclusionary or hindering ones are those practices, not based on normal business performance, which are likely to harm the competitive position of the dominant firm’s competitors, to foreclose or exclude them from the market altogether (Article 3-2 I No. 3, 4, and 5). Exclusionary abuses have in general as their object or effect the maintenance or strengthening of the dominant firm, which is in turn likely to result in long-term harm to their customers or end consumers. For that reason, exploitative abuses are sometimes said to follow exclusionary ones.

B. Interpretative Issues

1. Teleological Interpretation of abuse

The Act seeks primarily to promote fair and free competition, thereby to encourage innovative entrepreneurship, to protect consumers, and to strive for balanced development of the national economy.¹⁸⁾ In general, competition facilitates consumer welfare and development of national economy, but if it conflicts with other non-competition interests, the KFTC is able to consider exceptionally, so long as the elements for an exemption clause, such as Article 7 II (Exemption of Anti-competitive Concentrations) or Article 19 II (Exemption of Anti-competitive cartel),

the KFTC had applied only Article 23 I (prohibition of unfair trade practices). See KFTC Decision, No. 2002-001 (2002.1.8). The doctrine, however, plays recently an important role in the liberalization process of regulated industries, such as telecommunications, electricity etc. See Dong-Kwon Shin, “Telecommunication law and the Essential Facilities Doctrine in Europe and Germany”, *Competition Law Journal*, Vol 10, 2004, pp. 223; Hohmann, *Die essential facilities doctrine im Recht der Wettbewerbsbeschränkungen, Nomos* (2001).

18) Article 1 of the Act.

are cumulatively satisfied.¹⁹⁾ It doesn't mean, however, that the Act is to protect the interests of competitors before competition itself or to protect consumer interests to the detriment of competition order. This is because the goal of the Act is to protect competition as a fundamental economic order, not merely the means to safeguard the private interests of competitors or consumers. This so called monistic approach is compatible with the somewhat dogmatic approach, represented by the famous German scholar in economic law, Prof. Emeritus Fritz Rittner, that competition has a two-fold function, one is the constitutional guarantee, the other is the protection of private rights.²⁰⁾

In this regard there has been a large critic against the prohibition of monopolistic abuse that has contributed only to protecting inefficient competitors. It may be the case, only if the KFTC is, without its own analytical approach, ready to severely intervene private autonomy of a market dominant undertaking. But in a market where effective competition does not prevail, the maintenance or strengthening of existing market power, unless it has not been the result of competition on the merits, may restrain the remaining competition unfairly. Here the protection of the remaining competition can be achieved through safeguarding other competitors from unreasonable interference of dominant firms.

Market dominant undertakings are said to have a "special responsibility"²¹⁾ not to allow their conduct to impair remaining competition. Indeed, in markets where an undertaking holds a dominant position, any further concentration of the market structure could strengthen the market power of this undertaking, and conduct tending to exacerbate market concentration could be considered as a monopolistic abuse. In some cases, the weakening of one competitor or the exclusion of a single competitor, which is the very result of unilaterally exercised abusive conduct by a dominant

19) For detail, Bong-Eui Lee, "Goals of the Korean Antimonopoly Act and illegality of anticompetitive conducts", *Case study on Economic Law* (2004), pp. 1~16.

20) Rittner, *Das Kartellgesetz als die magna charta des Unternehmens?*, *Festschrift Raisch* (1995), pp. 483.

21) ECJ, Case No. 322/81 "Michelin" (1983.11.9). "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market." Imposition of such stricter obligation on a market dominant firm is not explicitly found in the KFTC decisions, Special treatment of such dominant firms is, however, underlying Article 3-2 of the Act.

firm, could be sufficient for the KFTC to consider that the conduct with such effect is abusive. In this case the prohibition of such abuses may seem ostensibly to protect a particular competitor, it aims, however, to protect the remaining competition from further concentration of the markets, and the competitors are indirectly benefited in their continuance.

2. Acceptance of Rule of Reason?

The prohibition of abuse practiced by market dominant undertakings has as its counterpart the illegality of monopolization or any attempt to monopolize under Section 2 of the Sherman Act. Meanwhile, some Korean commentators made use of the American approach of rule of reason developed by U.S. precedents for differentiating illegal or normal restraints of trade under Section 1 of the Sherman Act.²²⁾ According to this approach, a conduct practiced by market dominant undertakings should be sanctioned for an abuse, only if it can be established by the competition authority, the KFTC, that such an anti-competitive conduct is not likely to accompany any redeeming efficiencies or to enhance consumer welfare.²³⁾

Abuse in terms of the Act, however, cannot be interpreted under the rule of reason concept for the following reasons. First, like European or German jurisprudence, the Act does not prevent any attempt to monopolize or monopolization, but only abusive conduct of market dominant undertaking. Here the concept of abuse contains special responsibility not to follow exploitative or exclusionary practices, and whether any breach of such special obligation exists, cannot be evaluated persuasively, only if based on purely economic analysis.²⁴⁾ On the other hand, it is no doubt that the abuse concept leaves no room for application of per-se prohibition. Under the abuse concept, it can be inferred that the illegality of conduct by market dominant undertakings is likely to be accepted more widely than

22) See Sang-Seung Yi/Seung-Wha Chang, "Regulation Tying Computer Software under the Fair Trade Act - An Analysis of the Competitive Effects of Incorporating Windows Messenger into Windows XP", *Seoul Law Journal*, Vol. 43, No. 3 (2002), pp. 301, 372, 380; more generally, Nam-Ki Lee/Seung-Woo Lee, *Economic Law* 3, ed., (2001), pp. 227~228; Ki-Soo Lee/Jin-Hee Ryu, *Economic Law*, 6. ed., (2004), pp. 213~214.

23) Yi/Chang, *Ibid.* pp. 374, 379.

24) Lee, *supra* note 1, pp. 672~673.

in a monopolization approach in the USA.

Moreover, it should be noted that per-se and rule of reason concept in U.S. antitrust law had been developed in the process of allocating the burden of proof, not identifying material requirements based on statutory provisions. If application of the prohibitions provided in the Act is concerned, then the burden of proof is derived from statutory provisions themselves. This follows that under Section 2 of the Sherman Act the plaintiff, the DOJ or the FTC should prove any appreciable efficiency and net effect of the suspected practices, whereas in Korea, once the KFTC proves the existence of an abusive conduct enumerated in Article 3-2 I of the Act, thereafter the challenged firm shall take a burden of proof for any justifiable intent or effects for its conduct, and finally the KFTC decides the case on the grounds of all the feasible information.

Thus, the monopolization concept under the U.S. antitrust law coincides to a certain extent with its Korean counterpart, but not to the full extent. The concept of abuse under the Act takes more strict view on the unilateral unsound practices of market dominant undertakings. Since the criteria are not exclusively based on economic principles, but in greater part relying upon balancing some conflicting values, it cannot be denied that firms would have much difficulty predicting when and under what circumstances their conduct could be challenged or not.²⁵⁾

3. Objective justification as an exemption?

As mentioned above, the Act knows neither the per se, nor the rule of reason concept. Instead a practice by dominant firms will not constitute an abuse if it can be justified on objective grounds. The KFTC does not challenge any internal growth of a dominant firm as such, but only one resulting from unfair methods of competition.

It should be distinguished between objective justification and exemption. The latter could be granted by the KFTC, once the prohibitive requirements are fulfilled, whereas the former could be considered as a defence within the full discretion of the KFTC in deciding the illegality of that conduct challenged. The Supreme Court of Korea went further that in case of a conduct not justifiable, the burden of proof that

25) Supreme Court Decision, September 8, 1998 (96 nu 9003); Supreme Court Decision, December 11, 2001 (2000 du 933).

the conduct has as its object or effect no meaningful anti-competitive effect shall be shifted to the challenged undertaking.²⁶⁾ It means that a conduct of market dominant firms, which is likely to foreclose, exclude, even disadvantage other undertakings in actual or potential competition or to (in)directly harm consumer interests, may not be sanctioned, when the firm challenged successfully proved its innocence or outweighing benefits.²⁷⁾

C. Systematic issues

1. Abusive versus unfair conduct

Over decades after the enforcement of the Act it has not been sufficiently discussed regarding availability of abuse in literature or in case law. One of the reasons is that in practice the KFTC has only in a small number of cases applied Article 3-2 to abusive practices of a market dominant position, although many of such practices should have been subject to a stricter prohibition of abuse in light of the firm's market power. Rather, the KFTC preferred the application of ban on unfair trade practices which appears to have wider range of application in personal and behavioral scope than the surveillance of abuse.²⁸⁾

Meanwhile, it is widely accepted that the prohibition of abusive behaviors should be regarded as *lex specialis* (special law) in relation to banning unfair trade practices.²⁹⁾ Here in differentiating the protective interests of these two norms, it could be explained why a conduct of market dominant undertakings should be subject primarily to the prohibition clause of abuse rather than to that of unfair trade practices.³⁰⁾ The former aims firstly to protect fair and free competition, especially

26) Supreme Court Decision, December 11, 2001 (2000 du 833).

27) Seoul High Court Decision, August 27, 2002 (2001 nu 5370) "Posco"

28) Article 23 of the Act. Article 23 applies to all the undertakings regardless of their scale or market share and condemns almost all the undesirable conducts in light of unfairness, anti-competitiveness and even economic concentration.

29) Kwon, *supra* note 11, p. 309~310; Lee/Ryu, *supra* note 21, p. 210.

30) For somewhat critical approach, Bong-Eui Lee, "A Refusal to Deal as an Abusive Interference of Market-Dominant Position", *Korean Lawyers Association Journal [beopjo]*, Vol. 565 (October 2003), pp. 119, 125~127.

the remaining competition, because in a market where any market dominant undertakings is acting, the effective competition lacks from the very existence of such a position. That is, the primary object of the abuse norm is to protect the structurally restrained competition from further concentration by means of an abnormal instrument leveraged by the market power. In contrast to the prohibition of abuse, the law of unfair trade practices pursues, varying case-by-case, the object to challenge unfair methods of competition (unfair luring of customers, coercive dealing, and interference in other firms' activities), anti-competitive practices (refusal to deal, discriminatory treatment, exclusion of competitors, restrictive transactions), fixing unfair trade terms (discrimination in favor of affiliated companies, abuse of superior position) and excessive concentration by business groups (unreasonable subsidization of other affiliated companies).³¹⁾

Thus, the category of stifling the remaining competition committed by market dominant firms concerns abuses; in a monopolized market it should be under Article 3-2 taken into account, whether the remaining competition would be weakened and/or other up- or downstream markets are likely to be leveraged by monopoly power. Where an effective competition prevails, it would be the case of Article 23, whether the challenged conduct is likely to harm the ground of fair and free competition and thereby to create any dominant position in related markets.

2. General clause implicit

As the Act illustrates types of abusive practices in an exhaustive way, the KFTC seems to have been ready to apply Article 23 to conduct which superficially does not fall under the prohibition of abuses. The drawbacks of this enumerative approach could be cured by relying on Article 3-2 I No. 5 that prohibits an act unfairly excluding competitors, or considerably harming the interests of consumer. Qualifying Article 3-2 I No. 5 an implicit general clause could be justified as following.³²⁾

31) See Bong-Eui Lee, "Study on Issuing Guidelines on Unfair Trade Practices under Article 23 of the Korean Fair Trade Act", *2003 KFTC Research Project Report* (2003.11), pp. 2, 5; in detail, see Ho-Yeol Jung, "Prohibition of Unfair Trade Practices", *Lecture on Fair Trade Law* (2002), pp. 388-395.

32) Lee, *supra* note. 1, pp. 662-664.

First, an abusive conduct of dominant firms has in general as its object or effect potential or actual harm to consumer interests. In case of excessive pricing or output restraint, it results directly in an increase of retail price to the detriment of consumer welfare. If any practice hindering or excluding competitors concerned, such conduct is indirectly likely to increase deadweight loss of consumer welfare through maintenance or enhancement of market power in the long run.

Second, the prohibition of conducts enumerated under Article 3-2 I could not effectively respond to complicated and newly arising abusive strategies in a technology-based economy. In some industries, such as software, telecommunications service, broadcasting, press, etc., there is a trend toward convergence. Convergence often raises a so called tying problem which is not likely to be resolved by the traditional dichotomy between abusive and unfair trade practices. Here Article 3-2 I No. 5 gives room for successful intervention of the KFTC in technological tying. It would be the case that recently Microsoft incorporated its Windows Messenger and Windows Media Player into Windows XP Operating System.³³⁾

Third, it should be noted that Article 3-2 I cannot effectively regulate various forms of exploitative abuse, e.g. if interpreted in a way that the Act forbids only excessive pricing, directly or indirectly. It is, however, necessary to prevent some conducts, which could not exactly be based on cost/price analysis, but have an exploitative nature as a whole, in order to protect consumer interest from monopolist misuse of its power. It means that No. 5 as *ultima ratio* under the enumerative system should be utilized to respond to anti-competitive abuses likely to severely harm consumer interests by restraining technological progress, innovative capacity of small and medium-sized enterprises. In this context it can be understood that the KFTC issued an injunctive order to an excessive pricing against which Article 3-2 I No. 1 is not simply applicable.³⁴⁾

Finally, abuses are further divided into two categories: abuses by unfair trade

33) See Bong-Eui Lee, "Tying as an Abuse of de facto Monopolist, Microsoft", *Korean Journal of Law & Society*, Vol. 27 (2004.12), pp. 331, 340-369.

34) *Supra* note 13 "Hyundai Motor/Kia Motor". In this case, the KFTC held that the increase of domestic prices of bus and truck by Hyundai Motor and Kia Motor was abusive, because among other things they increased only the price of bus and truck where effective competition did not function and increased only domestic prices, although export prices decreased or remained stable.

practices provided in Article 23 I, and those which are practiced by other instruments not fully satisfying the prerequisites of that clause. Article 23 I contains small but general clause in No. 8, which prohibits other unfair conduct not illustrated in from No. 1 to No. 7. If any market dominant firm proceeds to such unfair trade practices in a broader sense, it could be generally assumed that the illegality, namely the risk of hampering fair trade order, grows much seriously. And this legitimates the interpretation that all the unfair conducts prohibited under Article 23 I including the general clause of No. 8 practiced by market dominant firms would fall under illegal abuse of Article 3-2. More strict obligation and special responsibility imposed on dominant firms to abide by competition rules, the necessity to broaden the applicable scope of Article 3-2, and the status of *lex specialis* of Article 3-2 to Article 23 would provide sufficient legitimacy of this approach.

IV. Application of the Abuse Concept

For over two decades after enactment of the Act in 1980, Article 3-2 was little used.³⁵⁾ In part, this was due to the fact that during the 1970s and 1980s of economic growth strongly driven by the government, more than half of Korean industries experienced high degree of concentration. This caused at the outset the KFTC to refrain from applying the abuse concept aggressively in some monopolized industries, especially to publicly-owned undertakings. Instead, the KFTC utilized Article 23 I. Furthermore, the reluctance to apply the abuse concept was particularly due to the concept's vagueness. This unclear situation created a significant risk that courts would overturn corrective measures ordered by the KFTC and increased its reluctance to enforce the abuse concept. There seems to be no meaningful signal for change so far. Case law and legal scholarship have not yet provided a detailed explanation regarding certain basic contours of the abuse concept.

³⁵⁾ See *supra* note 14.

A. Exploitative abuses

The concept of exploitative abuse is based on the Ordo-Liberal notion of “as-if” competition, and it is primarily used to prevent dominant undertakings from exploiting customers dealing with them, where such undertakings raise prices beyond a level that a competitive market would allow, or from decreasing their outputs without justifiable reasons other than a competitive market would demand.

This form of abuse has been viewed in Korea primarily as a means of combating high consumer prices.³⁶⁾ In applying Article 3-2 I No. 1 and 2 to such cases, however, there seemed to be a conflict between economic freedom and effectiveness of corrective measures. If the KFTC could merely issue an injunctive order against a dominant firm for having charged a over-competitive price, its ability to prevent such excessive pricing might be quite limited. On the other hand, if the KFTC could order that firm not to raise prices above a certain competitive level, this might be viewed as economic dirigism. In that case the Act allows the KFTC to order a price reduction, but it has been disputed so far whether the KFTC could define accurately the degree of that price reduction.

Courts have had no chance to deal with direct exploitation, namely excessive pricing. The Korean Supreme Court has dealt with only two cases of indirect exploitation, where the restraints of output of powdered milk and soy bean oil respectively by dominant producers in that market during 1997 to 1998 of the IMF crisis were challenged by the KFTC.³⁷⁾ The cases were rejected because of analytical errors made by the KFTC and objective justifications. The KFTC faced this issue in 1992 in a series of excessive pricing in a disguised form.³⁸⁾ The case involved the sale of pan cakes at prices slightly above those which could have been charged in a competitive market. Here the undertakings increased prices in terms of weight

³⁶⁾ Before the enactment of the Act there has prevailed wide range of price control over monopolistic or oligopolistic industries in Korea. For detail explanations on the Price Stabilizing Act of 1975, see KFTC, *20 Year History of Fair Trade in Korea* (2001.7), pp. 19~25.

³⁷⁾ See Supreme Court Decision, December 24, 2001 (99 du 11141) ; Supreme Court Decision, May 24 ,2002 (2000 du 9991)

³⁸⁾ KFTC Decision, No. 92-1 “Haitai Bakery”; No.92-2 “Lotte Bakery”; No. 92-3 “Crown Bakery” (1992.1.15).

reduction of the cakes. The KFTC had found the weight reduction was another form of price increase, the rate of increased price was above that of increased cost. Based upon this analysis, the KFTC ordered the sellers either to reduce their prices or to increase the weight of pan cakes by a specific percentage. In order to apply Article 3-2 I No. 1 and 2 in exploitative cases, one must posit a hypothetical competitive price, the question of how to establish that standard is not yet fully answered. This is another reason why exploitative abuse has been rarely dealt with.

B. Exclusionary abuses

While the application of exploitative abuse has been shown to be of limited effectiveness, the focus of enforcement activities has been increasingly put toward exclusionary ones. The main objective here is to protect the process of free competition by preventing dominant firms from hindering, foreclosing or excluding actual or potential competitors by (through) using their monopoly power. But there is much controversy concerning the analysis and interpretation to be applied to exclusionary practices.

The central problem with this category of abuse is how to distinguish abusive from competitive conduct. Competitive market assumes, by definition, that undertakings, even dominant firms, attempt to cause economic harm to competitors to win the game. Therefore the criterion for abusive conduct can be found mainly in its characteristics or competitive effects.

First, it could be argued that one can identify competitive unfairness as one of the categories of abuse. Here the notion of abuse is used to prevent dominant firms from using their economic power to achieve an unfair advantage in competition with other firms, such as through predatory pricing, unjustifiable refusal to deal, etc. Another criterion is to be said anti-competitive effect, especially restraint of the remaining competition and monopolization of other related markets.³⁹⁾ Intent to foreclose or exclude competitors is not a necessary condition for establishing an abuse, but is likely to be considered as circumstantial evidence.⁴⁰⁾

Both the KFTC and the courts have encountered, however, significant difficulties

38) Seoul High Court Decision, August 27, 2002 (2001 nu 5370), "Posco"

39) *Ibid.*

in conceptualizing competitive unfairness for the purpose of judicial review. Each has primarily turned to the intuitively appealing idea of competition on the merits in order to provide a fairness of conduct, and there are many who doubt its viability.⁴¹⁾ These doubts relate to whether the concept of "competition on the merits" has sufficient analytical power to make justifiable and judicially available distinctions among the various types of conduct.

A difficulty in applying Article 3-2 to allegations of predatory pricing is to distinguish legitimate, competitive conduct from anti-competitive strategy. A price below cost may be objectively justifiable on legitimate reasons such as, for example, the need to clear stocks or to meet a competitor's more attractive offer. A refusal to deal by a dominant firm will not be considered an abuse under Article 3-2, if it can be justified on business grounds other than the intention to hinder or exclude a competitor from the up- or downstream market. Such efficiency considerations have featured, however, only to a limited extent in the case law.

For instance, in Posco,⁴²⁾ the Appeals Court of Seoul condemned a refusal to supply an intermediate product "hot coil" by Posco, to Hysco, a new entrant in downstream end product market. In this case, the dominant undertaking in a market for hot coil, Posco was fully vertical-integrated and itself produced final products. The court gave no significant weight to the fact that the refused Hysco, a daughter company of Hyundai Motor was to provide most of its steel products with the Hyundai affiliates, and that Posco was expected to lose its biggest client if it would provide hot coil with Hysco. Here it could be partly argued that the court failed to comprehensively consider the point how to approach rivalry between vertically integrated conglomerate firms.

In the Yeong-II Chemical case,⁴³⁾ the KFTC decided whether Yeong-II, the challenged firm who imported and sold the farm drug (Methyle Bromide), had unreasonably foreclosed a new competitor wishing to enter the extermination service market of imported plants by refusing to provide MB without any justifiable reason.

41) Mainly in case of unfair trade practices, see Jung, *supra* note 30, pp. 388-389; in detail, Dai-Sik Hong, "The Illegality of Abuse of Superior Position", *Korean Competition Law Review* Vol.7 (2001.4), pp. 278-280, 291-298.

42) *Supra* note 27.

43) KFTC Decision, No. 2001-22 "Yeong-II Chemical" (2001.1.11).

The challenged firm provided that it had a long term contract with incumbent 11 out of 16 extermination service companies and took an obligation to have sufficient stock for stable supply of MB. The KFTC did not accept this defense and held such a refusal to be illegal.

V. Conclusions

More than two decades have passed since the enforcement of the Act. As shown above, however, many issues on the abuse concept remain still unresolved. Above all, in determining the illegality of any business conduct by market dominant firms, there seems to be disagreement to a large extent. Because of the concept's vagueness, there have been some fears that it would be interpreted so broadly as to create significant discretionary interference with business conduct, to the effect that not competition but inefficient competitors are unnecessarily protected. To the extent that experience in applying the abuse concept has not through judicial standards significantly limited the scope of application of abuse, such fears would come true.

Such an unclear situation is partly, but primarily due to the fact that, whereas most industrialized countries adopting antitrust law treat the exercise of significant economic power by individual firms as an abuse, many commentators and law practitioners represent themselves from the U.S. antitrust approach utilizing the concept of monopolization to define the limits of permissible conduct for dominant firms. But the Korean legal system, like virtually all other competition law systems, codified and developed the concept of abuse in its own social and political backgrounds characterizing the greater role of government intervention than elsewhere. The concept of abuse of a market dominant position is the primary legal tool for regulating the exercise of economic power and its interpretation and application are of great importance to understand free economic activities and their limits in Korea. Furthermore, unlike horizontal restraints such as cartel, a conduct of dominant firms as such does not hinder or exclude their competitors. Therefore a comprehensive approach that can best reflect market conditions and business practices at issue is all the more necessary.

Finally, as described above, the case law of the KFTC and the courts concerning abusive practices have not sufficiently delineated the permissible boundary of

activities of market dominant firms. In light of legal certainty and predictability of market participants, the KFTC and the courts should develop in the future more specific, consistent and legally sound criteria for distinguishing abusive practices from competitive ones.