Regulation of Undue Internal Dealings under the Monopoly Regulation and Fair Trade Act

*Ho Young Lee**

Abstract

The prohibition of undue internal dealings under the Monopoly Regulation and Fair Trade Act ('the MRFTA') is controversial from the perspectives of practitioners and academics as well. Many issues have recently been discussed and resolved by courts on undue internal dealing cases. This article presents a brief overview of the prohibition of undue internal dealings under the MRFTA by focusing upon the legislative intent and requirements for finding an internal dealing in violation of the Act articulated by relevant court interpretations.

To be sure, the prohibition of undue internal dealings under the MRFTA mainly aims at concentration of economic power by large business groups commonly known as 'Chaebol.' The actual legislation, however, is not consistent with the intents of the legislators, which creates unnecessary confusion in enforcing the prohibition of undue internal dealings and sometimes misleads the court in ruling on each case.

To cure those problems and secure a clear standard in enforcing the prohibition of undue internal dealings, legislative improvement is called for. Among others, it should be positively considered to provide for the prohibition of undue internal dealings as a measure to repress concentration of economic power under the Chapter 3 of the MRFTA. This will ensure the consistency between the legislative intent and the statutory regulation of undue internal dealings, and thereby enable the enforcers with the competition authority and practitioners to avoid unnecessary confusion on the prohibition of undue internal dealings.

* Associate Professor of Law, College of Law, Hanyang University, Member of the New York Bar Association; Former Litigation Officer, KFTC; LL.B. and LL.M., Seoul National University; Ph.D. Seoul National University; J.D. Univ. of Missouri-Columbia.

I. Introduction

The Monopoly Regulation and Fair Trade Act (1980, hereafter 'the MRFTA'), the main Korean antitrust law prohibits 'undue internal dealings.'[1] The Article 23 Paragraph (1) of the Act provides, as a type of unfair trade practice, for an "act assisting a person with a special interest or other companies by providing advanced payment, loans, manpower, immovable assets, stocks and bonds, or intellectual properties thereto, or by transacting under substantially favorable terms therewith."[2] In turn, the Enforcement Decree of the Act lists, as subtypes of undue internal dealings, undue financial support, undue asset support and undue manpower support.[3]

The National Assembly enacted the prohibition of undue internal dealings by the 1996 amendment to the MRFTA. The prohibition of undue internal dealings is understood as a competition policy measure designed to prevent large business groups, so called 'Chaebol' from maintaining or strengthening their concentrated economic power by illegitimate methods and/or from giving their affiliated companies unfair competitive advantages over their competitors in each relevant market. Just as the 'Chaebol' phenomenon in Korea is unique in nature, the prohibition of undue internal dealings is considered so unique that its equivalent can not be found in any antitrust laws of developed countries. For some reason or other, it has been an object of continuing debate among antitrust practitioners and policy makers as well as academics in Korea. Some academics have argued that the MRFTA over-regulates internal dealings inside business groups by prohibiting even benevolent ones which tend to promote efficiencies. Academics on the other side and officials in the Fair Trade Commission, the Korean competition authority have continuously given firm support to the idea underlying the prohibition of undue internal dealings pointing to the fact that the Chaebols keep trying to maintain their economic power through internal dealings unduly advantageous to their affiliates or

1) Internal dealings are defined here as dealings between affiliated companies of a business group or between an affiliated company of a business group and persons who have a special interest with the business group.

2) The Monopoly Regulation and Fair Trade Act, Article 23 Paragraph (1) Subparagraph 7.

3) The Enforcement Decree of the Monopoly Regulation and Fair Trade Act, Appendix 1 related to Article 36 Paragraph 1, Section 10.

persons with a special interest.

The Fair Trade Commission actively enforced the prohibition of undue internal dealings during the period of 1998 ~ 2002 when the Korean economy suffered from a currency crisis and had to rely upon the International Monetary Fund (hereafter 'IMF') for massive loans to overcome the crisis. During the period, the Chaebols also experienced unprecedented hardships and made much use of internal dealings to maintain their economic power by preventing their affiliated companies from going bankrupt one after another. On the other hand, the Korean economic policy makers and officials with the Fair Trade Commission heavily affected by the policy perspectives deemed undue internal dealings to be one of the greatest evils that weakened the competitiveness of the Korean corporations and thus caused the IMF crisis as well. The Fair Trade Commission focused its enforcement efforts upon undue internal dealings committed by the five to six leading business groups. It made twelve rounds of massive investigations into undue internal dealings by business groups and, as a result, issued hundreds of corrective orders and levied surcharge of about \ 327.2 billion ($ 272.6 million) during the period of 1998 ~ 2002.[4)]

The prohibition of undue internal dealings has a short history of the government enforcement and judiciary reviews as well as scholarly discussions. There have been a lot of issues left unresolved as to requirements for finding an undue internal dealing in violation of the Act. Recently, however, the issues have been being discussed and settled, at least for practitioners, one after another through court holdings and reasoning. This article presents a brief overview of the prohibition of undue internal dealings under the Act focusing upon the legislative intent and requirements for finding an internal dealing in violation of the Act, articulated by relevant court interpretations.

II. Legislative Intent to Prohibit Undue Internal Dealings

The Fair Trade Commission proposed and the National Assembly enacted the bill

4) Fair Trade Commission, Result of Investigations of Undue Internal Dealings, 2004 (unpublished document).

prohibiting undue internal dealings with the purpose of addressing problems associated with excessive concentration of economic power by Chaebols. The term 'Chaebol' is used in Korea to describe a huge business group, controlled by a small number of close family members, that has tens of affiliated companies operating mostly in unrelated markets. The family members have control of the whole business group typically by holding a very small percentage of stocks of the major affiliated companies supported by a complex cross-shareholding system among the affiliated companies.[5)] They are also more interested in maintaining their management and the overall viability of the business group as a whole than profitability of each affiliated company.

It is well recognized that Chaebols have made a great contribution to the rapid growth of the Korean economy since the 1960s. They have built modernized plants on a large scale necessary for massive exports which is the core of the economic growth policy driven by the Korean government and generated by the vast majority of employment opportunities for skilled workers and educated young men and women since early the 1960s. They have also played a key role, however, in creating the dark side of the Korean economy. They have commonly over-diversified into tens of unrelated business areas, which is called 'fleet-style management.' Tens of affiliated companies of a 'Chaebol' compete with their competitors in each market using their total management resources, i.e. experienced management, highly skilled workers, financing capability based not on their individual assets but on total assets of the entire business group as if they were a single company. As a matter of course, they enjoy substantial unfair competitive advantages over competitors unaffiliated with any large business group and usually win the competition. The results are not only highly concentrated markets, for almost all the major products in Korea and significantly high entry barriers to those markets[6)] but also concentration of wealth in

5) Leaders-in-fact('same person' under the MRFTA) and their family members of the 13 largest business groups only hold 1.5% and 2.6% of total stock of the affiliated companies belonging to the business groups respectively. See Fair Trade Commission, The Analysis on the Stock Ownership of the Large Business Groups Subject to the Restrictions on the Total Amount of Shareholdings, Aug. 2004.

6) CR3(Concentration Ratio for the top three companies) was beyond 95% for 1,148 manufacturing items(34.5% of the manufacturing industry) and average CR3 of all the manufacturing items was 78.6% in 1998. See Korean Development Institute, Research Report funded by the FTC, Dec. 1999.

the hands of a few persons who have a special relationship, typically family relationship, which lays ready foundations for collusive ties between politicians and businesses.

This situation created significant concerns among the public in general, which induced the legislators to introduce a series of policy measures to repress the economic power concentration into the MRFTA. Those measures include Limitation on Establishment of a Holding Company(Art. 8-2), Prohibition of Cross Shareholding(Art. 9), and Restrictions on Total Amount of Shareholding of Other Companies(Art. 10) in the 1986 amendment to the MRFTA and Prohibition of Debt Guarantees for Affiliated Company(Art. 10-2) later in 1992 amendment to the Act. As they had originally aimed at limiting enlargement of business groups by means of shareholding and borrowing from financial institutions, they came to prove ineffective in preventing the groups from driving competitors of their affiliated companies out of each market by unfairly enhancing the competitive position of the affiliated companies and thereby maintaining concentrated economic power through various undue internal dealings. To fill the gap in regulating the excessive concentration of economic power, some measures against internal dealings among affiliated companies of a large business group that have an effect of rendering undue competitive advantage to the affiliated companies over their competitors were called for.

In 1996, the legislators chose to adopt the prohibition of undue internal dealings into the prohibition of unfair trade practices under Art. 23 of the MRFTA. The legislative intentions publicly announced were to provide proper measures for preventing various harms likely to be caused by undue internal dealings among affiliated companies within a large business group. The harms that can be caused by undue internal dealings may be summarized as these.[7)]

First, undue internal dealings have an anticompetitive effect on each market where an affiliated company financially supported through the internal dealings is operating. The affiliated company acquires competitive advantages over its competitors not on the basis of merits, i.e. technical superiority, better management

7) See for the details of harms caused by undue internal dealings Young Soo Woo, "The Necessity of Regulating Undue Internal Dealings and Policy Goals for the FTC", *Monthly Fair Trade*, Apr. 1999; Fair Trade Commission, *Footprints of Creating a Market Economy - Twenty-year History of the FTC* (2001), pp. 330-331.

capabilities, or efficient distribution networks, but on the basis of financial assistance from its affiliated companies. As a result, the affiliated company which might not have survived without undue internal dealings can survive and even win the competition over more efficient competitors. A worse case is that, after more efficient competitors are driven out of the market, the surviving affiliated company now in a monopolistic position exploits consumers by fixing monopoly prices. What makes the situation worse is the fact that there would be a substantial barrier to entry into the market where an affiliated company is being financially supported by tens of its affiliated companies through undue internal dealings. A potential new entrant should take into consideration not only the management assets of the existing participants in the target market but also the overall management assets of the whole business group that the participants belong to.

Second, undue internal dealings can make the affiliated companies formerly in good financial condition caught in trouble, as well as the entire business group in the long run. Undue internal dealings may inherently transfer assets without proper compensations from a company to its affiliated companies, and the transfers are usually from companies in better financial condition to their affiliates in worse condition. Recurring undue internal dealings on a large scale may even destroy the financial soundness of affiliated companies formerly in sound financial condition by pumping out their 'core competence', which may drive affiliated companies within the business group into insolvency one after another. Considering the relative socioeconomic magnitude of a large business group in the Korean economy, a failure of any large business group proved to be a disaster for the whole national economy and society during the period of the IMF exchange shortage crisis.

Undue internal dealings also have a negative effect on wealth distribution. Undue internal dealings are commonly made under the direction of the leaders-in-fact, so called "same person" under the MRFTA,[8)] for maintaining their control of the business group or keeping viability of the entire business group. This means that undue internal dealings aim to serve the leaders-in-fact and their family instead of the stockholders or creditors in general. More often than not, in reality undue internal dealings harm the interests of the minority stockholders or creditors of the

8) The "same person" is a person or company who substantially controls a business group. See the MRFTA Article 2 Subparagraph 2.

assisting companies[9] for the sake of the leaders-in-fact or their family. The negative effect on the wealth distribution can be cured by effective taxation and sufficient protective measures for minority shareholders and creditors. Unfortunately, however, taxation and protective measures for minority shareholders against undue internal dealings within a business group have proved to be ineffective so far. Thus, the MRFTA should play a role in this respect as well.

Third, undue internal dealings create disparities and inefficiencies in the national economy. The undue internal dealing is a commonly used device for a large business group to enter a new market by establishing an affiliated company and letting the company take root firmly in the market within a short period of time. The Chaebols have typically used undue internal dealings for entering new markets, like octopuses stretching out their suckers. In addition, they have secured investment resources from financial institutions which are limited in amount with their superior leveraging power based upon their huge volume of transactions and magnitude of businesses with the institutions. Even with much more promising investment opportunities, companies unaffiliated with any large business group could not get sufficient investment resources from financial institutions or only at a lot more disadvantageous terms, which could create a great loss to the society in general as well as each individual company.

In addition to economic harms, the undue internal dealings may contribute to social and political instability by aggravating the disparity between the large and the small and medium businesses. Increasingly growing, the large business groups have gained capabilities to affect main government policies in their favor. This creates concerns that relate to fundamental values attached to our democratic government system.

After summarizing the harms the legislators tried to cure by prohibiting undue internal dealings, it should be noted that they created troublesome issues, as elaborated below, in interpreting the provision prohibiting undue internal dealings by inserting it into Article 23 (Prohibition of Unfair Trade Practices) of the MRFTA. If the prohibition of undue internal dealings is a measure to cure the harms created from concentration of economic power, it is logical to provide for it as a kind of

9) The assisting company here refers to a company which gives support to an affiliated company (assisted company) through undue internal dealings.

measure to repress excessive concentration of economic power under Chapter 3 (Restriction on the Combination of Enterprises and Repression of the Economic Power Concentration) of the MRFTA. The legislators decided, however, to prohibit undue internal dealings as unfair trade practices because undue internal dealings may be made not only among affiliated companies within a large business group but also among companies or persons that have a relationship, other than affiliation within a large business group, with one another.

III. Are There 'Supportive' Internal Dealings?

The first step for finding an internal dealing in violation of the MRFTA is to answer the question, "Are there supportive internal dealings?" Supportive internal dealings are classified under the Enforcement Decree of the MRFTA as three categories; financially supportive dealings, asset supportive dealings and manpower supportive dealings. A financially supportive dealing is present when a company "assist[s] a person with a special interest or other companies through the provision of excessive economic benefit by providing them with funds, such as temporary payment, loan, etc., at substantially low prices or by providing them with such funds in substantial amounts."[10] An asset supportive dealing is present when a company "assist[s] a person with a special interest or other companies through the provision of excessive economic benefit by providing them with assets, such as real estate, securities intangible property rights, etc., at substantially high or low costs or by providing them with such assets in substantial amounts."[11] Lastly, a manpower supportive dealing is present when a company "assist[s] a person with a special interest or other companies through the provision of excessive economic benefit by providing them with manpower at substantially high or low costs or by providing such manpower in substantial amounts.[12]

The Unfair Internal Dealing Guidelines (hereafter 'the Guidelines') issued by the

10) The Enforcement Decree of the Monopoly Regulation and Fair Trade Act, Appendix related to Article 36 Paragraph 1, Section 10 (1).

11) *Id*. Section 10 (2).

12) *Id*. Section 10 (3).

Fair Trade Commission also provide that "a supportive dealing is present when the fair price of the economic benefit which the assisting party delivers, directly or indirectly, to the assisted party is higher than that of the economic benefit which the assisting party receives from the assisted party in return."[13] Therefore, an undue internal dealing can be made through indirect and circumventive transaction as well if its effect is to transfer economic benefits from the assisting party to the assisted party. The Supreme Court also found an undue internal dealing in violation of the MRFTA, in SKCNC Ltd. v. Fair Trade Commission,[14] when SKCNC Ltd. bought corporate papers issued by a financial institution at a price substantially higher than the market price and had the institution buy corporate papers issued by its former affiliated company also at price substantially higher than the market price. In addition, the Supreme Court made a clear, in Daewoo Ltd. et al. v. Fair Trade Commission,[15] that there was a supportive dealing even without any transaction, direct or indirect, between the assisting and the assisted party when the company financed the purchases of automobiles by its employees from its affiliated company with no commission.

An omission may also constitute an undue internal dealing. For example, the Supreme Court found an internal dealing in Korea National Housing Corp. v. Fair Trade Commission[16] when the Corporation made advance payments to and failed to settle accounts with its subsidiary, also a contractor for the Corporation by granting a one month grace period and, thus, enabled the subsidiary to capitalize upon the amount of money to be adjusted. The Court pointed out that the omission to settle the accounts was equivalent to paying the subsidiary the amount equal to the proceeds from the amount of money to be adjusted.

Another critical issue in finding a supportive dealing is whether the given transaction was made on substantially favorable terms. The Supreme Court has repeatedly held that the court should decide, on the facts of each case, whether the transaction was made on substantially favorable terms by examining the difference between the benefit rendered by the assisting party and the benefit in return rendered

13) The Unfair Internal Dealing Guidelines, Art. II. Section 4.

14) Supreme Court Decision, March 12, 2004 (2001 du 7220).

15) Supreme Court Decision, October 14, 2004 (2001du 2935).

16) Supreme Court Decision, September 5, 2003 (2001 du 7411).

by the assisted party, the volume of the transaction, the economic benefit provided through the transaction, the length of period, the number of times and the occasion of the transaction, and the financial situation of the assisted party at the time of the transaction, etc.[17]

One of the most important works in finding a supportive dealing is calculating a 'fair price' of the object of the transaction in question to be compared with the price actually paid. The Guidelines provide that the fair price is the price that the parties without any special interest with each other in similar conditions in terms of time, kind, volume, period, and financial standing would have fixed for the same benefit as the object of the transaction.[18] Similarly, the Supreme Court has held that the fair price in a financial supportive dealing case is the interest rate which the assisted party and an independent party, usually a financial institution without any special interest with the party would have reached in the same or similar conditions in terms of time, kind, volume, period, financial standing, etc.[19]

Nonetheless, the circumstances and objects of transaction in reality are so different from case to case that it is extremely hard to find comparable transactions between parties without any special interest with each other in similar conditions and calculate the fair price. Therefore, the Guidelines provide that so called 'general fair interest rate', the deposit money banks' weighted average of interest rates on loans which the Bank of Korea publishes every month can be used as a surrogate for the fair interest rate calculated on the facts of each case, i.e. so called 'individualized fair interest rate' in case the Fair Trade Commission is unable to find a comparable transaction.[20] The Supreme Court is, however, cautious about using the general fair interest rate instead of an individualized fair interest rate. In Hyundai Motor Co. et al. v. Fair Trade Commission, the Court held that since the commercial bank's weighted average of interest rates on loans, which was calculated on the basis of short-term loans on checking accounts, was generally higher than interest rates of

17) Supreme Court Decision, April 9, 2004 (2001 due 6197, 6203); Supreme Court Decision, October 14, 2004 (2001 du 2935), etc.

18) The Unfair Internal Dealing Guidelines, Art. II. Section 5.

19 Supreme Court Decision, April 9, 2004 (2001 du 6197, 6203); Supreme Court Decision, October 14, 2004 (2001 du 2935) , etc.

20) The Unfair Internal Dealing Guidelines, Art. III. Section 1-da.

ordinary loans such as loans on issuing commercial papers, the general fair interest rate could not be used as a surrogate for the individualized fair interest rate simply because it was hard to calculate a fair interest rate on the basis of the facts of each case.[21] The Court rather suggested that the general fair interest rate could be used as a surrogate for an individualized fair interest rate only when the circumstances clearly showed that the individualized fair interest rate was not lower than the general fair interest rate.[22]

Regarding a supportive dealings, a series of controversial decisions by a lower court emerged in 2003. The Seoul High Court shocked the officials with the Fair Trade Commission who had stuck to the enforcement policy of prohibiting undue internal dealings regardless of the forms of transactions used to assist affiliated companies in Chosun Daily Newspaper v. Fair Trade Commission.[23] The Court decided that the clause in the MRFTA prohibiting undue internal dealings is 'not' applicable to transactions of commodities and services. The reason was that Art. 23 of the MRFTA and the relevant clause of the Enforcement Decree of the MRFTA provide for prohibiting undue financial support, undue asset support and undue manpower support only, not undue support through transactions of commodities or services.[24] Shocked by the decision, the Fair Trade Commission appealed to the Supreme Court by arguing that the clause should be applicable regardless of the forms of the transaction in question if the net effect of the transaction was to transfer undue economic benefits from the assisting to the assisted company.

The Supreme Court agreed with the Fair Trade Commission in Daewoo Corp. Ltd. et al. v. Fair trade Commission.[25] In this case, upon issuing a great deal of unsecured corporate bonds, a plaintiff indirectly hired its affiliated securities company as the underwriter in violation of the Securities Underwriting Regulation

21) Supreme Court Decision, April 9, 2004 (2001 du 6197, 6203).

22) *Id*.

23) Seoul High Court Decision, September 23, 2003 (2002 nu 1047). For other decisions that held the same, see Seoul High Court Decision, October 21, 2003 (2002 nu 12252), Seoul High Court Decision, December 9, 2003 (2001 nu 3329); Seoul High Court Decision, February 3, 2004 (2001 nu 15865), and Seoul High Court Decision, February 14, 2005 (2001 nu 16288), etc.

24) *Id*.

25) Supreme Court Decision, October 14, 2004 (2001 du 2935).

and paid a substantially higher rate of underwriting fees to the affiliated company than the fair market price. The Seoul High Court would have found that the prohibition of undue internal dealings under the MRFTA would not apply because the object of the transaction in question was underwriting 'services', not any financial instruments, assets or manpower. The Supreme Court, however, reasoned that the legislative intent of prohibiting undue internal dealings was to secure fair trade in markets and repress concentration of economic power and thus, Article 23 of the MRFTA provides inclusively against various forms of undue internal dealings without excluding transactions of commodities or services even though it is not explicitly mentioned in the list of the exemplary forms of internal dealings prohibited.[26] As a result, the Court, focusing upon the contents and effects, not the forms of transactions in question, decided that the prohibition of undue internal dealings under the MRFTA was applicable to transactions of commodities or services as well if they satisfied other requirements under the Act.[27] The decision should be highly evaluated in that it focused on the actual business effects of transactions involved instead of sticking to the letter of the statute.

IV. When Are Internal Dealings 'Unduly' Supportive?

The other step, more controversial from the perspectives of both antitrust practitioners and scholars in Korea, in finding an internal dealing in violation of the MRFTA is to answer the question, "When are the internal dealings 'unduly supportive'?" It would be extremely difficult, almost impossible, to set an objective quantitative criterion for deciding whether an internal dealing is unduly supportive or not. The Guidelines provide that the elements that should be considered in deciding whether a supportive dealing is 'undue' or not include the market conditions for the assisted party, the changes in competitive capabilities of and circumstances faced by small and medium companies and other competitors, the magnitude of the support, the period of the support, the shift of market share of the assisted party before and after the support is made, and the degree of market

26) *Id*.

27) *Id*.

opening, etc.[28)]

The Guidelines also continue to provide for examples which should be deemed undue internal dealings and those that should not. Examples of the former include cases where the internal dealing in question results in the assisted affiliated company reaching market share 5% or becoming the third largest in a market where small and medium companies have market share higher than 50%; cases where the assisted party fixes its prices below those of competitors for a substantial period of time using the economic benefit transferred through the internal dealing and, as a result, a competitor is put in danger of insolvency; cases where the assisted party gains competitive advantages over competitors such as superior financial capabilities, technologies, marketing abilities, and brand images resulting from the internal dealing; and where the internal dealing among affiliated companies belonging to a large business group has a discouraging effect upon the assisted affiliated company's going out of the relevant market or entry of potential competitors.[29)]

Courts also consider a long list of elements instead of applying a strict criterion in deciding whether a supportive internal dealing is undue or not. The Supreme Court repeatedly said that the issue should be resolved pursuant to whether the internal dealing in question created a danger of infringing upon the fairness of transactions by restraining competition in the assisted party's relevant market or causing a concentration of economic power in view of the relationship between the assisting and the assisted party, the purposes and intent of the parties in making the supportive dealing, the market conditions and characteristics for the assisted party, the magnitude of the support, the economic benefit transferred by the support, the period of the support, restraint on competition in the assisted party's market and effects on concentration of economic power caused by the support, the changes in competitive capabilities of and circumstances faced by small and medium companies and other competitors, the shift of market share of the assisted party before and after the support is made, and the degree of market opening, etc.[30)]

Still, the issue whether the internal dealing in question is 'unduly' supportive is

28) The Unfair Internal Dealing Guidelines, Art. IV.

29) *Id*.

30) Supreme Court Decision, March 12, 2004 (2001 du 7220); Supreme Court Decision, April 9, 2004 (2001 du 6197, 6203); Supreme Court Decision, April 23, 2004 (2001 du 6517).

often vulnerable to equally plausible arguments raised by both parties in litigation proceedings. Reviewing some court decisions on this issue is therefore necessary. In Korea National Housing Corp. v. Fair Trade Commission,[31)] discussed above, the Supreme Court held that making advance payments to a subsidiary, which was also a contractor for the parent company, and granting some grace period for the subsidiary in settling accounts with the Corporation was a prohibited undue internal dealing under the MRFTA. Noteworthy was the Court's reasoning that the internal dealing should be unduly supportive because the magnitude of the supportive dealing and the amount of economic benefit transferred by the support were substantial compared with the assisted party's revenue and net profit.[32)] Additionally, the Court emphasized that the supportive internal dealing in question had a high probability of creating an anticompetitive effect on the relevant market for the assisted party because the market, i.e. the building maintenance industry consisted mostly of small-scale businesspersons without sufficient financial resources to compete with the assisted subsidiary.[33)]

Another holding in this decision that has significant practical meaning is that the supportive dealings authorized by the government by a parent company intended to assist an insolvent subsidiary that the parent company took over under directions of the government as part of a government-oriented industry reorganization may not be deemed undue internal dealings.[34)] The Court emphasized that the supportive internal dealings had purposes of public interests and were necessary for preventing the assisting parent company itself from going bankrupt since it had already given a huge amount of debt guarantees and extended financial credit to the subsidiary.[35)]

From the judicial decisions made so far on undue internal dealing cases, one can reasonably sort out facts which courts typically consider highly relevant in deciding whether an internal dealing is unduly supportive or not. Those include the facts that the assisted party was in financial difficulty at the time of the internal dealing in question, that the assisted party avoided going bankrupt with the economic benefits

31) Supreme Court Decision, September 5, 2003 (2001 du 7411).

32) *Id*.

33) *Id*.

34) *Id*.

35) *Id*.

gained by the internal dealing in question, that a substantial amount of economic benefits was transferred through the internal dealing in question, that many affiliated companies systematically supported a designated affiliated company at the similar time,[36] and that the internal dealing in question was initiated by a request by the assisted affiliated company for purposes of supporting the affiliated company.[37]

A typical defense raised by the part allegedly committing undue internal dealings is that the internal dealing in question was motivated to meet business managerial necessities or to enhance reasonableness of transactions such as securing stable a supply of inputs by supporting the supplier financially. Since this defense, although seemingly plausible from the perspective of the businessperson, has a substantial danger of abuse in practice, the Fair Trade Commission has consistently rejected the defense in undue internal dealing cases. The Supreme Court agreed, in Hyundai Motor Co. et al. v. Fair Trade Commission,[38] with the Fair Trade Commission. The Court held that the issue whether an internal dealing was unduly supportive should be resolved only from the perspective of the fairness of transactions. Mere necessities for the business management or reasonableness of the transactions could not negate the undue nature of supportive internal dealings.[39] It should be noted, however, that the Court did not exclude the necessities for the business management or reasonableness of transactions out of the list of relevant elements by reasoning that purposes of public interest, effects on consumer welfare, and the necessities for the business management or reasonableness of transactions were also to be considered to the extent that they had an effect upon the fairness of transactions.[40]

V. Undue Transfer of Economic Benefits to a Person with a Special Interest

An interesting and heavily debated issue worth discussing separately is whether

36) Supreme Court Decision, April 9, 2004 (2001 du 6197, 6203); Supreme Court Decision, April 23, 2004 (2001 du 6517).

37) Supreme Court Decision, October 14, 2004 (2001 du 2935).

38) Supreme Court Decision, April 9, 2004 (2001 du 6197, 6203).

39) *Id*.

40) *Id*.

an internal dealing between an affiliated company belonging to a business group and its persons with a special interest may constitute an undue internal dealing prohibited under the MRFTA. Article 23 of the MRFTA provides for "a person with a special interest" in addition to a company as a possible assisted party to an undue internal dealing. Literally interpreted, therefore, the MRFTA seems to also prohibit undue transfers of economic benefits from affiliated companies belonging to a business group to non-corporate persons with a special interest, typically close family members of the leader-in-fact of the business group or chief executive level managers of the business group. The competition authority has also applied the prohibition of undue internal dealings under the MRFTA, on several occasions, to financial transactions transferring substantial economic benefits from affiliated companies of major large business groups to family members of the leaders-in-fact or chief executive officers of the business groups.

However, it has been fiercely argued by the plaintiff companies in the course of the related administrative suits filed against the Fair Trade Commission that the prohibition of undue internal dealings under the MRFTA is inapplicable to transactions with a person who is not running any business in a market. One of the reasons commonly given was that undue internal dealings are treated as a type of unfair trade practice provided for by Article 23 of the MRFTA and the prohibition of unfair trade practices under Article 23 is applicable only to transactions between undertakings, whether a corporation or non-corporate person, running a business in a market since it requires restraints upon competition in a market.

In Samsung SDS Co. Ltd. v. Fair Trade Commission,[41] a widely broadcasted case because it was associated with a person known as the inheritor of Samsung Business Group, the largest business group in Korea, the Seoul High Court stood against the Fair Trade Commission on the issue. The company, an affiliated company of Samsung business group, the largest business group in Korea, which has not listed its shares, issued a substantial amount of bonds with warrant through a series of stealthy and regulation-evading transactions to its persons with a special interest, i.e. sons and daughters of the leader-in-fact and top level managers of other affiliated companies at a price much lower than the fair market price. The Fair Trade

41) Seoul High Court Decision, July 3, 2001 (2000 nu 4790).

Commission applied the prohibition of undue internal dealings under the MRFTA to the transactions and levied a large amount of surcharge upon the company.[42] In the decision, the competition authority pointed out that the transfer of a substantial amount of economic benefits to the persons with a special interest through an evasive transaction of evading nature of financial instruments was likely to lay a foundation for maintaining a concentration of economic power in the hands of a few family members and so called fleet-style management.[43]

In the administrative litigation, however, the Seoul High Court overruled the decision by the Fair Trade Commission by holding that an internal dealing could be deemed 'undue' only when it had an anticompetitive effect upon the market in which the assisted party was operating and thus, a transfer of economic benefits to a person who was not running a business in a market could not constitute a prohibited undue internal dealing even if it had a negative effect upon the concentration of economic power.[44] The Seoul High Court decision created hot debates on the legislative intents and proper interpretations of the prohibition of undue internal dealings under the MRFTA. A powerful criticism, mostly from the Fair Trade Commission, was that at least part of the legislative intent was clearly to repress the concentration of economic power by large business groups controlled by a few family members and the interpretation taken by the court frustrated the legislative intent.

On appeal, the Supreme Court maintained the lower court opinion on ground which is slightly different from that of the lower court but seems to make no differences in practice. The Court first vacated an aspect of the lower court decision that an internal dealing with a person who is not running a business in a market may not constitute a prohibited internal dealing under the MRFTA. The Court held the assisted part was not required to be an undertaking participating in a market given the legislative intents in prohibiting undue internal dealings- partly to repress the concentration of economic power by large business groups.[45] Nevertheless, the Court continued to hold that an internal dealing could not be deemed 'undue' merely

42) Fair Trade commission Decision No. 99-212 (Oct. 28, 1999).

43) *Id*.

44) Seoul High Court Decision, July 3, 2001 (2000 nu 4790).

45) Supreme Court Decision , September 24 , 2004 (2001 du 6364).

because it enabled the leader-in-fact to transmit the magnitude of wealth to the below generation and was likely to lay a foundation for maintaining a concentration of economic power by a small group of family members.[46] For finding an undue internal dealing, the Court held, a potential harm should be established that the persons with a special interest who received the economic benefits through the internal dealing could restrain fair trade in the relevant market.[47] Now, it is clear that mere massive transfer of economic benefits to a person with a special interest is not enough to constitute an undue internal dealing prohibited under the MRFTA. There is an issue yet to be resolved, however. That is what evidence would suffice to establish that an internal dealing transferring substantial economic benefits to a person who is not running a business can create a danger of restraining fair trade in the relevant market.

VI. Conclusion

The prohibition of undue internal dealings is one of the hottest topics on the MRFTA both in practice and in academic debates. One of the reasons, which is rather political, is that the Fair Trade Commission has enforced it rigorously mostly against the major large business groups that have more than sufficient legal resources to fight against the decisions by the agency. They also believe that the rigorous enforcement against undue internal dealings could be a significant huddle for them to maintain their concentrated economic power. Another political explanation is that it has been heavily affected by other government policies. It would be hard to find any issue on the MRFTA more policy-oriented than the prohibition of undue internal dealings. One can figure out manifold policy implications from being policy-oriented. I would point out that the enforcement efforts on undue internal dealings by the Fair Trade Commission have fluctuated in many respects pursuant to the general economic policy, sometimes lacking legal consistency.

46) *Id*.

47) *Id*.

One of other reasons, which is rather theoretical, is that the prohibition of undue internal dealing and its intended targets, i.e. Chaebols, are so unique that no comparable discussion from other jurisdictions, which has often been a useful tool for discussing issues on the MRFTA, is available. The most critical theoretical reason, however, that created hot debates on the prohibition of undue internal dealings should be legislative carelessness in providing for undue internal dealings as a type of unfair trade practice under Article 23 of the MRFTA. Since the prohibition of undue internal dealings has legislative intent quite different from other types of unfair trade practices prohibited by the Article 23, one cannot find a coherent standard for evaluating all types of unfair trade practices including undue internal dealings. The lack of coherency in interpreting prohibition of unfair trade practices has caused troublesome problems in applying the provision to undue internal dealings as well as to other types of unfair trade practices.

To cure those problems and secure a clear standard in enforcing the prohibition of undue internal dealings, legislative improvement is necessary. If the prohibition of undue internal dealings mainly targeting the concentration of economic power by large business groups keeps its viability as a competition policy goal, then, it should be positively considered to provide for it as a measure to repress concentration of economic power under Chapter 3 of the MRFTA. This will secure the consistency between the legislative intents and the statutory regulation of undue internal dealings and thereby enable the law enforcers in the competition authority and practitioners to avoid unnecessary confusion on the prohibition of undue internal dealings.

Merger Regulations under the Korean Competition Law - Based on M&A Review Guidelines and KFTC's Decisions -

Sai Ree Yun and Dae Sik Hong***

Abstract

*As a general rule, the Monopoly Regulation and Fair Trade Act prohibits mergers restricting competition in a given area of trade, mergers achieved through coercion or any other unfair methods, or those consummated by way of acts of evasion of law. Acting either on its own authority or a notification by a company involved in the merger, the Korea Fair Trade Commission examines in detail whether the merger in question falls under the proscribed categories above. The "**M&A Review Guidelines**," then, set a concrete standard to be used in assessing a merger.*

* Partner of WooYun Kang Jeong & Han(Seoul, Korea); LL.B. Seoul National University, 1976;LL.M. Seoul National University ,1980; LL.M. Harvard Law School,1982; J.D. Hastings College of the Law, University of California ,1986; Public Prosecutor at the Pusan Public Prosecutors Office, 1980-1982; Associate at Baker & Mckenzie (Chicago and New York),1986-1989; Outside Legal Advisor to the Korea Fair Trade Commission,1996-1998

** Partner of WooYun Kang Jeong & Han(Seoul, Korea); LL.B. Seoul National University, 1990; Judicial Research and Training Institute, the Supreme Court of Korea,1993; LL.M. Seoul National University, 1996; Seoul National University, Graduate School of Law, Ph.D. Candidate,2000; University College London in the United Kingdom (Visiting Scholar) 2002; Judge, Chuncheon District Court, Gangneung Branch of Chuncheon District Court, Suwon District Court, Seoul District Court 1993-2003.

Authors would like to give special thanks to Kyoung Yeon Kim, Min Ji Kim, Sung Moo Jung, and Tae Yong Kim for their invaluable assistance.