

# Subjective Requirement of Competition Law Violations

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## Abstract

*The Korean Supreme Court has held in the case of POSCO (2007) that subjective requirements such as anti-competitive intent or purpose must necessarily be considered before there can be any finding of abuse of market dominant position or of competition restraints effects in antitrust cases. However, this holding is not properly supported by legal theory or competition policy.*

*When considering regulations governing the abuse of market dominant position pursuant to Article 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU), the concept of abuse has an objective standard. Subjective requirements, such as anti-competitive intention, are not considered independently. The objective characteristics of the behavior in the relevant market are crucial in determining whether there is the abuse or not. Likewise, Section 2 of the Sherman Antitrust Act prohibits both monopolies and attempts to monopolize, but while the subjective requirements of the alleged monopolistic behavior might be considered, this approach must be understood in terms of the different legal systems regulating the monopoly itself.*

*These issues are relevant to any determination of the illegality of a cartel in the aftermath of the POSCO decision. Article 101 in the TFEU refers explicitly to the purpose of competition restraints as a requirement for the regulations of cartels. However, the purpose in this article could be proved by nature, and where the effect of the competition restriction exists, the purpose of competition restraints could not be understood as an essential requirement. If the subjective requirements are essential to decide the illegality of a claim for abuse of market dominance under the POSCO rules, these requirements may pose a problem in establishing abuse.*

KEY WORDS: Abuse of Market dominant Position, POSCO Case, Subjective Requirement, Cartel Regulation, Criminal Law

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## I. Introduction

Recently, questions have been raised regarding whether subjective requirements are required in deciding whether an alleged abuse of market dominant position is illegal under the Monopoly Regulations and Fair Trade Act (hereinafter **MRFTA**) and, if so, what meanings these requirements may have from the point of view of competition policy and legal theory. Such discussion has been stimulated by the 2007 *POSCO* holding<sup>1)</sup> of the Korean Supreme Court. The *POSCO* holding has received considerable attention from various legal scholars,<sup>2)</sup> primarily directed at the Court's somewhat controversial views indicating that the subjective requirement is essential to the establishment of certain MRFTA violations.

Specifically, the holding posits a subjective requirement such as economic intent or objective as a separate and independent element necessary to establish a refusal to deal as an illegal abuse of dominant market position. The holding also presents factors that could create a presumption that such subjective factors exist. The significance of this decision is undeniable, as it represents the first time the Court has addressed the legal significance of these subjective requirements in detail. However, the Court's holding did not resolve all of the issues pertaining to such subjective requirements. There were many critical comments made about the holding, and it is unclear whether the *POSCO* ruling will continue to serve as precedent in the future, let alone expand to the other types of offenses in the MRFTA.

Hereinafter, these subjective requirements will be discussed with respect to the violations of the MRFTA. First, the content and meanings of the *POSCO* case will be analyzed (II), and then, the case's significance and legal validity will be critically examined (III). Next, the subjective requirements posited by the Court will be reviewed from the perspective of competition policy, and the need for both a review of this judgment and a reasonable approach towards the subjective requirement will be demonstrated (IV). Then, the question of whether such an analysis should

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1) Supreme Court [S. Ct.], 2002Du8626, Nov. 11, 2007 (S. Kor.) [hereinafter *Posco Case*]

2) See KWON OHSEUNG, GYEONGJEBEOP [ECONOMIC LAW] 168-171 (Beobmunsa, 2015).

be expanded to other types of antitrust offenses such as concerted conduct (i.e. cartel conduct) will be discussed beyond the unilateral conduct (abuse of market dominant power and unfair trade practice) contemplated by the MRFTA. The question of how possible meanings might affect criminal antitrust law will also be discussed (V). Finally, this paper will conduct a comparative review of Article 2 of the Sherman Antitrust Act and Article 1 of the Treaty on the Functioning of the European Union (hereafter TFEU) with regard to both unilateral conduct and concerted conduct. These provisions may take the legislative structure causing the discussion about the subjective requirements, so they will provide meaningful implications, even as discussing the subjective requirements of violations in MRFTA.

## II. Analysis of the POSCO Case

### 1. Facts and Processes

POSCO was a business entity which participated in the production of steel throughout Korea. POSCO's share of the direct production of cold-rolled steel plate was estimated at 58.4% in the Korean market. Its share of the Korean market for production of the hot-rolled coil (which is required to produce cold-rolled steel plate) was 79.8%. Three other business entities were significantly involved in these markets. Hisco produced only cold-rolled steel plate and held about 11.1% of that market. Dongbu, and Yeonhap respectively held a 13.7% and 7.9% market share in the hot-rolled coil market in 2000. Since 1997, Hisco, a subsidiary of Hyundai Motor Company, had requested several times for a supply of hot-rolled coil from POSCO. However, POSCO never supplied the hot-rolled coil to Hisco.

The issue before the Court was whether POSCO's refusal to supply the hot-rolled coil to Hisco represented an abuse of market dominant power. The Korea Fair Trade Commission (hereinafter KFTC) held that POSCO abused its market dominance in the hot-rolled coil market based on Article 3-2, Clause 1 in the MRFTA because POSCO's refusal to supply had hindered Hisco's business.<sup>3)</sup> POSCO appealed to the Seoul High Court,

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3) KFTC Decision, 2001-068, Apr. 12, 2001 (S. Kor.).

seeking a revocation of the KFTC's decision, but that court affirmed the KFTC's ruling.<sup>4)</sup> POSCO objected appealed to the Korean Supreme Court.

## 2. Judgment of the Supreme Court

The Korean Supreme Court agreed that POSCO's refusal to deal with Hisco represented an abuse of market dominant power. Nevertheless, the Court overturned the lower court's ruling and held that the effects of competition restraints arising solely from a refusal to deal are not sufficient to establish the illegality of the conduct. It is meaningful to adopt the analysis of the effects of competition restraints in this judgment,<sup>5)</sup> and it is also worth noting the Court's comments on the subjective requirements. The Court said the following as part of its decision rejecting the illegality of refusal to deal:

It is insufficient to acknowledge illegality of refusal to deal, in all cases market dominant undertakings refused to deal with an unreasonable intent or object to the other party or only by the facts that the other party suffered a disadvantage, such as to have the difficulties or be likely to be faced with the difficulties due to the refusal to deal. In particular, when the party who refuses to deal will have intents or objects to maintain or strengthen monopoly in market, namely to influence artificially market orders by restraining the free competition in the market, and objectively he will give a refusal to deal with characteristics evaluated as action raising a concern that the effects of competition restraints will appear, the illegality of the actions could be recognized.<sup>6)</sup>

In other words, the Court found it necessary to consider independently both subjective and objective factors before finding an illegal refusal to deal.

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4) Seoul High Court [Seoul High Ct.], 2001Nu5370, Aug. 27, 2002.

5) See Lee Minho & Joo Hyunung, *Sijangjibaejeog Jiji Namjonghaengwiui Budangseonge Gwanhan Yeongu* [Unreasonableness in the Abuse of Market Dominance], 22 SABEOB [PRIVATE LAW] 104-105 (2012).

6) Posco Case, 2002Du8626, Nov. 11, 2007.

The *POSCO* opinion also stated that:

The defendant claiming that the refusal to deal of an undertaking in market dominant position falls under abuse of such position must prove that this action could bring about the effects of competition restraints, such as price rise, output reduction, inhibition of innovation, decrease of the number of viable competitors, decline of diversity and the subject of this action had the intent or object of such effects. If it is proved that the effects above mentioned appeared practically, it will be presumed in fact that there were concerns about the competition restraints from the undertaking's conducts and an intent or object to restrict competition. If not, it must be decided whether this refusal to deal was a conduct that could cause the effects of competition restraints and the subject of the conduct had the intent or object of the effects, comprehensively considering the motive of refusal to deal, the way of the refusal, the characteristics of the relevant market, the degree of disadvantage that the counterparty has suffered due to the refusal, the changes in prices and output in the relevant market and inhibition of innovation and diversity.<sup>7)</sup>

Ultimately, the Court held that for an abuse of a dominant market position to rise to the level of illegality, it must be shown in a concrete way that the purpose of the restriction of competition was subjectively as well as objectively in violation of the law.

### **III. Subjective Requirement of Single Conduct**

#### *1. The significance of POSCO*

*POSCO* addressed whether “refusal to deal” was an abuse of market dominant position in the absence of other factors. Although *POSCO*

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<sup>7)</sup> Posco Case, 2002Du8626, Nov. 11, 2007.

established the necessity of demonstrating that the subjective requirements in a “refusal to deal” case are met, it remains unclear whether such requirements must be met in other types of cases, including all “refusal to deal” cases, all exclusive abuses, all abuses including exploitative abuses, or all MRFTA violations in the widest scope. Because the content of the subjective requirements resulted in the restriction of competition under *POSCO*, the structures of illegality suggested by the ruling might be expected to encompass other MRFTA violations, particularly unfair trade practices which impose competition-restrictive effects that must be considered as potential abuses of dominant market position.<sup>8)</sup>

It is worth noting that the *POSCO* decision delineated the proof needed to establish the subjective requirements. For example, while the Court placed the burden of proving the subjective requirement on the regulatory agency, the *POSCO* opinion presented different burdens of proof for different groups divided by whether the factual presumption from the effects of competition restraints is possible or not. This division does not seem to have a practical sense. There should be no fundamental difference between cases in which the subjective requirements are presumed in fact from the effects of competition restraints and the cases in which the existence of the subjective requirements must be decided by the comprehensive considerations of conduct and market. This is because it is doubtful that there are differences between the analysis of the effects of competition restraints and the comprehensive considerations of conduct and market.<sup>9)</sup>

One must also consider the fact that the *POSCO* standard shifts the

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8) See JEONG HOYEOL, *GYEONGJEBEOP [ECONOMIC LAW]* 200 (Bagyeongosa, 2012) (discussing view that *POSCO* should be understood within confines of “refusal to deal” as abuse of dominant market position). But compare Lee & Joo, *supra* note 5, at 105-106 (*POSCO* judgment can be applied to exclusive abuse, not to exploitative abuse) with Hong Daesik, *Sabeobjeog Gwanjeomeseo Bon Gongjeonggeolaebob [Fair Trade Law from the Perspective of Private Law]*, 29(2) *SANGSABOEYONGU [COMMERCIAL LAW REVIEW]* 363 (2008) (arguing that *POSCO* must be applied to all types of abuses of market dominant position and that Korean Supreme Court has shown that *POSCO* ruling could be expanded to exclusive abuses).

9) Jeong Yeongjin, *Daebobwonui Sijanggyeongjee Daehan Cheolhagjeog Gonoe [Korean Supreme Court’s Philosophical Torment about Market Economy]*, *BEOLYULSINMUN [LAW DAILY]*, Dec. 13, 2007 at 12 (Korean Supreme Court has taken effect-based approach based on *POSCO* requirement of proof of concerns of competition restraints).

normal burden of proving subjective requirements from the regulated to the regulator. Specifically, the responsibility for proving the non-existence of the subjective requirement of competition restraints may be placed on the regulator through this switching of the burden of proof. Naturally, it is more difficult to prove the absence of subjective requirement than its existence, and such a legal proof structure itself may be a path that the regulated can use to avoid the responsibility despite not meeting the subjective requirement.

## 2. Legal Validity

The *POSCO* decision has impacted the judgment of the lower courts as a precedent relevant to illegal abuse of a dominant market position.<sup>10)</sup> These lower courts have held that subjective requirements must be satisfied in other types of alleged antitrust abuse besides “refusal to deal,” including claims pertaining to exclusive conduct<sup>11)</sup> and to conduct that harms the consumer’s interest<sup>12)</sup> which arise under Article 3-2, Clause 1, No. 5 of the MRFTA.

There has been much criticism of *POSCO*.<sup>13)</sup> One counter-argument is that, while it is appropriate to understand the intentions or objectives of competition restraints as material facts in deciding illegality, it is not a positive subjective requirement that must be established to prove illegality.<sup>14)</sup> Another criticism argues that the *POSCO* Court’s application of the doctrine of factual presumption was flawed due to the difficulty of recognizing the empirical or theoretical relationship between objectives and

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10) Supreme Court [S. Ct.], 2008Du17707, Apr. 8, 2010 (S. Kor.); Supreme Court [S. Ct.], 2008Du1832, Oct. 13, 2011 (S. Kor.).

11) Supreme Court [S. Ct.], 2007Du22078, July 9, 2009 (S. Kor.).

12) Supreme Court [S. Ct.], 2009Du1983, May 27, 2010 (S. Kor.).

13) *But see* Lee Hwang, *Posco Panyeol Ihu Sijangjibaejeog Jiwi Namyonghaengwi Panlyeeseo Budangseong Pandanui Gyeonghyanggwawa Jeonmang* [Tendency and prospect of illegality decision in the abuse of market dominant position cases since *POSCO* judgment] in FIFTH ANNIVERSARY OF THE *POSCO* JUDGMENT 41 (ICR Center, Korea University School of Law, 2013) (noting that there are different degrees of criticism towards *POSCO* and presenting analysis that the request of subjective requirements has not been influenced negatively on regulations in practice).

14) YANG MYEONGJO, GYEONGJEBEOBGANGUI [ECONOMIC LAW LECTURE] 108 (Sinjosa, 2011).

effects of the competition restraints.<sup>15)</sup> Other critics point out that the POSCO holding's views on the subjective requirements were improperly based on a distorted comparative law understanding of US antitrust law and EU competition law.<sup>16)</sup>

It is rare for a competition legal system to demand subjective requirements prior to determining the illegality of an action arising from abuse of market dominant power. There are different ways to respond legally to the rise of a monopoly, as Article 2 in U.S. Sherman Antitrust Act shows. Those Article 2 provisions are intended to address and regulate the formation of monopolies. Furthermore, the regulations on attempting to monopolize assume a previous stage. In order to exclude a legitimate act such as a natural monopoly from an illegal act, it would be necessary to consider such subjective requirements, particularly where regulation might be necessary to prevent further monopolization. One such feature of U. S. antitrust law is that regulations calling for subjective requirements are still being maintained through U.S. antitrust law cases, if only passively by asking a direct demonstration of the subjective requirements. This characteristic could not be shared with the MRFTA in Korea with its regulatory framework which differs from the Sherman Act in important ways. Likewise, in Article 102 of the TFEU, which has a regulatory framework similar to the MRFTA, the abuse of a dominant market position is understood as an objective concept, and so subjective elements can be used only as a basis to judge it.

## IV. Subjective Requirement and Competition Policy

### 1. Issues of Competition Policy

It will also be difficult to accommodate the Korean Supreme Court's

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15) Lee Bongui, *Leading Cases of Abuse Control in Korea*, in THE SECOND SNU COMPETITION FORUM 104 (SNU Center for Competition Law, 2010).

16) SIN DONGGWON, DOGJEOMGYUJEBEOB [ANTITRUST LAW] 180-182 (Bagyeongsa, 2011). See also Lee Hoyeong, *Gongjeonggeolaebeobsang Sijangjibaejeogjiwiui Namyong Haengwiui Jaengjeomgwa Gwaje* [The Issues and Tasks of the Regulations on the Undertakings with Market Dominant Power in Fair Trade Act], 104 JUSTICE 95 (2008).

interpretation from a perspective of competition policy. Among other things, if the subjective factors are a part of the essential requirements in determining the illegality of the abuse, the predictability and clarity of the regulations will be reduced because of the difficulty of proving the subjective elements. In other words, the essential subjective requirements will likely increase the possibility that regulations may deviate from the appropriate regulatory level when considering the abuse of dominant market power. Also, the Korean Supreme Court's holding denied the illegality of the abuse of market dominant power due to a lack of the subjective requirements. This shows that the problem of a false negative, rather than a false positive, has been raised.<sup>17)</sup> If the subjective requirements are required to prove illegality, the regulation range will be inevitably reduced.<sup>18)</sup> It may be questionable whether the reduced scope of such regulation is desirable.<sup>19)</sup>

On the other hand, if the regulators intervene excessively in determining whether the subjective requirements are met, such a requirement may result in an overextended regulatory scope.<sup>20)</sup> Based on the Court's view that the subjective requirements could be proven only through the concerns about competition restraints without proving any effects of them, this possibility could be realized. Finally, the inclusion of the subjective requirements in the determination of any illegality may lead to enlargement or reduction in the scope of the regulation. In either case, it might be difficult to avoid a negative impact on the illegality judgment of the abuse of market dominant position.

Furthermore, because many types of unfair trade practices require competition restraints to prevent illegality, these characteristics may

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17) A false negative occurs where a competition authority incorrectly concludes that anti-competitive behavior is not illegal. A false positive occurs where a competition authority incorrectly concludes that pro-competitive behavior is abusive. ROBERT WHISH & DAVID BAILEY, *COMPETITION LAW* 193 (Oxford Univ. Press, 2012).

18) See SIN, *supra* note 16, at 182; *GWB KOMMENTAR* 667 (Ulrich Immenga & Ernst-Joachim Mestmäcker ed., C. H. Beck, 2001).

19) See Lee, *supra* note 13, at 41 (noting that that *POSCO* does not appear to have caused any reduction in regulations on abuse of market dominant position since opinion was handed down).

20) See HERBERT HOVENKAMP, *FEDERAL ANTI-TRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 284 (Thomson/West, 2005).

represent a basis for the essentiality of subjective requirements in deciding the illegality of conduct as an abuse of market dominant power. However, as we saw earlier, the addition of these requirements will not be desirable from the point of view of competition policy or even from a demand of logical necessity. Therefore, courts must be cautious in extending *POSCO*'s holdings to unfair trade practices beyond mere abuse of market dominant power.

## 2. Objectification or Non-Essentiality

In light of the foregoing, the *POSCO* Court's views on the subjective requirement will be difficult to be apply both judicially and in the context of competition policy. The major questions arising from *POSCO* are not about simply considering the subjective requirement, but whether such a requirement is essential. There are insufficient grounds to justify the essentiality of the subjective requirement in deciding illegality, and such a legal theory is undesirable from a perspective of competition policy.

Accordingly, legal theories about the subjective requirement arising from *POSCO* should be modified, and judges and legal theorists must decide in which direction such modifications will move. One possible approach might be the objectification of the subjective requirement. That is, it may be possible that the subjective factors can be confirmed *through* the objective factors. This approach does not evade the position adopted by the Korean courts that requires proof of subjective factors and is not be contrary to the *POSCO* ruling, which is why it may not be a viable solution. There may also be a limit on the feasible methods for the objectification of subjective requirement. The Korean Supreme Court said:

Because it would be difficult to obtain the direct evidences of the agreement of cartel due to the nature of conduct, the court could not help taking the method proving the conduct by showing the indirect facts or circumstance facts.<sup>21)</sup>

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21) Supreme Court [S. Ct.], 2006Du6625, May 29, 2008 (S. Kor.).

This view is consistent with *POSCO*'s holding that the objective factors would be substituted for the subjective factors. Above all, because objectification of the subjective requirement would be based on the same methodology as the *POSCO* requirement of proving the subjective factors, it would be difficult to consider the other method while suggesting more concrete objective factors that function as a mechanism of objectification capable of relaxing the essentiality of subjective requirement.<sup>22)</sup> It seems unlikely that these factors could be proven in court, so it is doubtful whether objectification can compensate for the problems presented by the *POSCO* holding. Also, the relaxation of essentiality could not be a meaningful alternative so long as the decision structure of illegality is maintained.

Consequently, a reasonable approach is to deny the essentiality of the subjective requirement.

Even if courts adhere to the principle that legal liability can be imputed to certain conduct consisting of both subjective and objective factors, as has been a legal dogma of long standing affected by principles of responsibility,<sup>23)</sup> such conduct must be evaluated objectively in accordance with the negative effect on competition mechanisms as the regulations on abuse in EU competition law. Subjective factors can be integrated into the process of objective evaluation of conduct.

Of course, a court could be required to consider the subjective requirement in a manner comparable to litigation abuse.<sup>24)</sup> However, in such cases, the essentiality of the subjective requirement will emerge from exceptional circumstances, where it may not be satisfactory to understand the meanings of such conduct, only by the objective evaluation of it.

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22) See Lee & Joo, *supra* note 5, at 106-107 (discussing the view that Korean Supreme Court has responded to negative aspects arising from essentiality of subjective requirement in this way).

23) See OECD, *TRADE AND COMPETITION: FROM DOHA TO CANCUN 19-20 (2003)* (pointing out that courts have not imposed strict sanctions on cartels, because they have been bound by the traditional principle of responsibility).

24) See Case T-111/96, *ITT Promedia NV v. Commission*, 1998 ECR II-207 (EU competition law); see also *Professional Real Estate Investors, Inc. v. Columbia Pictures Industry, Inc.*, 508 U.S. 49 (1993) (U. S. antitrust law) (holding that intent of competition restraints must be proven in litigation abuse cases).

Therefore, the subjective requirements must be treated as discretionary considerations in competition law in principle.

## V. Further Debate on the Subjective Requirement

### 1. Cartel Regulation and the Subjective Requirement

#### 1) Cartel Regulation by TFEU Article 101

EU competition law, which explicitly stipulates the objective of competition restraints as the requirement for the cartel, provides helpful implications. “All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market” pursuant to Article 101, Clause 1 (TFEU), which is the basis for the cartel regulation in EU competition law. In light of the prescribed methods of such provisions, the objective and effect of the restriction of competition constitutes an unlawful requirement in mutual alternative meaning.<sup>25)</sup> In other words, the objective and effect of competition restraints in this provision are not parallel requirements<sup>26)</sup> Therefore, proving the objective and effect must be premised on understanding about the mutual alternative relationship between both sides, and the need and level of analysis will be established from this understanding.

This understanding has been made manifest in the Guidelines on the Application of Article 81(3) of the Treaty (hereafter “the 81(3) Guidelines”) established by the EU Commission.<sup>27)</sup> Such guidelines clearly reveal that it is unnecessary to analyze the concrete effects of competition restraints if the

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25) ARIEL EZRACHI, *EU COMPETITION LAW* 46 (Oxford Univ. Press, 2010). European Court of Justice has taken a same position, paying attention to the expression ‘or’ in the provision. See Case 56/65, *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, 1966 ECR 235, 249.

26) EZRACHI, *supra* note 26, at 46-47.

27) Guidelines on the application of Article 81(3) of the Treaty, 2004 O.J. C101/97 [hereinafter 81(3) Guidelines]. This Guidelines are valid for the application of TFEU Article 101 too.

agreements demonstrate an objective of competition restraints.<sup>28)</sup> According to the 81(3) Guidelines, agreements with the objective of competition restraints have a high potential for restricting competition by their very nature. For example, price fixing or market division which results in reduction of output, price increase, and irrational allocation of sources may be a part of such the agreements.<sup>29)</sup> Whether or not the specific agreement has such an objective should be determined on the basis of a comprehensive analysis of the various elements. Through this analysis, the content of agreements and the objective intent pursued through such agreements should be considered by the court, as well as the context in which the agreements are applied and the actual behavior of the cartel participants. Although the agreements need not state explicitly the effects of competition restraints, the actual practical method of the agreements can help elucidate the substance of competition restraints by objective evidence as well. While the subjective intent of competition restraints could be the related evidence, it is not an essential requirement.<sup>30)</sup>

Furthermore, according to the 81(3) Guidelines, even if the agreements do not contemplate competition restraint “by object,” by the legal evaluation of the object of the conduct, any incidental effects of competition restraints should be analyzed and not merely presumed. Analysis of such effects should consider both actual and potential effects. If it turns out that there are negative impacts on price, output, innovation or the variety and quality of the goods in the relevant market on the basis of this analysis, the effects of competition restraints will be recognized to that extent.<sup>31)</sup>

The examples of the competition restraints recognized “by object” have been usually the types classified as a hardcore cartel. According to the 81(3) Guidelines, hardcore cartels constitute a restriction of competition “by object” through means such as price fixing, output restriction, horizontal market division, resale price maintenance, and vertical area restrictions.<sup>32)</sup>

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28) 81(3) Guidelines, para. 20.

29) 81(3) Guidelines, para. 21.

30) 81(3) Guidelines, para. 22.

31) 81(3) Guidelines, para. 24.

32) 81(3) Guidelines, para. 23.

Of course, because such a correspondence must not be absolute,<sup>33)</sup> an understanding of competition and competition restraints will be bound to vary according to the specific circumstances of the market and trading partners.<sup>34)</sup> In addition, the *Leegin* ruling<sup>35)</sup> changed the legal doctrine governing competition restraints from “per se illegal” to “rule of reason” with reference to the regulation on the resale price maintenance in the United States, a change that significantly impacted EU competition law.<sup>36)</sup> The types of cartels classified as rigid might be changed in accordance with the progress of the thinking on competition policy.

However, it is expected that the current methods of cartel regulation based on “by object” analysis and the effects of competition restraints in EU competition law will be maintained, so it is necessary to understand the meaning of this competition policy. First, so long as the acknowledgement of competition restraints “by object” excludes any analysis of the effects in principle, this legal approach may be basically similar to the “per se illegal” standard from US antitrust law. Price fixing, market division, boycott and tying which are all per se illegal under U.S. antitrust law correspond to hardcore cartels acknowledged “by object” in EU competition law. Therefore, it is possible to understand the method of cartel regulation “by object” in EU cases as the same approach of per se illegality in the United States.<sup>37)</sup> For example, in the *BAT CF* case, it was important to decide whether the agreements on trademark affect market division. The analysis of the effect of competition restraints was no longer necessary after the market division had been acknowledged.<sup>38)</sup> Such regulatory systematic

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33) EZRACHI, *supra* note 26, at 77.

34) Case T-328/03 O2, GmbH & Co OHG v. Commission, 2006 ECR II-1231.

35) *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

36) See Guidelines on Vertical Restraints, 2010 O.J. C 130/01, para. 106-107 (discussing *Leegin*'s influence on the EU competition law; See also Mart Kneepkens, *Resale Price Maintenance: Economics Call for a More Balanced Approach*, 28 EUROPEAN COMPETITION LAW REVIEW 656, 664 (2007).

37) See William E. Kovacic, *Importance of the Effects-Based Approach and the Rule of Reason in Competition Law* 6 (June 12, 2012), [http://boyanov.com/BNV\\_resources/uploads/2012/06/Importance-of-the-effects-based-approach\\_Prof.-William-Kovacic.pdf](http://boyanov.com/BNV_resources/uploads/2012/06/Importance-of-the-effects-based-approach_Prof.-William-Kovacic.pdf) (placing both ‘object-based’ and ‘per se illegal’ in similar category under the perspective of competition policy).

38) Case 35/83, *BAT Cigaretten-Fabriken v. Commission*, 1985 ECR 363.

characteristics could be understood to be overly formal, comparing the form-based approach and effect-based approach, with the goal of trying to extend the latter.<sup>39)</sup>

Also, it is necessary to note that the objective of competition restraints in Article 101, Clause 1 in the TFEU could be proven regardless of the specific subjective intention. Of course, as the 81(3) guidelines point out, specific subjective intent will be a meaningful evidence in proving the object of competition restraints, but this demonstration must not be absolutely dependent on it.<sup>40)</sup> Rather, as shown in the *BIDS* case,<sup>41)</sup> even if it is clear that the subjective intentions emerge regardless of the competition restriction, the object of competition restraints may be admitted on the basis of the acknowledgment of subjective intent by the nature of the agreement. Finally, the objective of Article 101, Clause 1 in TFEU is not comprised of specific subjective intentions about the undertakings. Rather, it can be understood as the concept inferred from the nature of the agreement within the framework of competition policy.

## 2) Subjective Requirement of Cartel in MRFTA

Article 19 Clause 1 of the MRFTA stipulates that “no entrepreneur shall agree with other entrepreneurs by contract, agreement, resolution, or any other means, to jointly engage in an act falling under the following subparagraphs, which unreasonably restrict competition or allow any other entrepreneur to perform such act.” With this provision, a cartel shall only be established by agreement, and the agreement will be prohibited if it will restrict competition without a justifiable reason. Furthermore, it is universally agreed that restriction of competition renders a cartel illegal. Consequently, it is unnecessary to consider the subjective requirements

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39) See Luc Peepkorn & Katja Viertio, *Implementing an effects-based approach to Article 82, COMPETITION POLICY NEWSLETTER* 20 (Nov. 2009); Damien Gerard, *Effects-based enforcement of Article 101 TFEU: the object paradox* (Feb. 17, 2012), KLUWER COMPETITION LAW BLOG, <http://kluwercompetitionlawblog.com/2012/02/17/effects-based-enforcement-of-article-101-tfeu-the-object-paradox/> (discussing analysis that ‘effect-based’ approach has yielded increase in EU Competition Law).

40) 81(3) Guidelines, para. 22.

41) Case C-209/87, *Competition Authority v. Beef Industry Development Society*, 2008 ECR I-8637.

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KFTC's regulation practices have shown the same attitude. In particular, this attitude could be found in the overall structure of the illegality determination presented in "guidelines on the cartel judging" (hereafter cartel guidelines) established by KFTC. Examination of the illegality of a cartel under the cartel guidelines will be made through an analysis of characteristics of the cartel and its market (stage 1), analysis of the competition restriction effect (stage 2), analysis of the effectiveness enhancement effect (stage 3), and fair comparison between the competition restriction effect and effectiveness enhancement effect (stage 4). In particular, the characteristics of a cartel in stage 1 will be decided based on factors such as the purpose of the cartel, the field covered by the cartel, its competition relation, and the subjective intention of cartel. But the subjective intention identified in these provisions does not mean the subjective requirements of the establishment of the cartel, and it may be considered as one among various factors related to cartel.

However, it is not easy to predict whether *POSCO* will have any influence on cartel regulations. Both the abuse of a market dominant position and a cartel are subject to regulatory systems based on competition restraints as the foundation of illegality. This common basis may lead to extension of the reasoning of *POSCO* to cartels. However, the above discussion on the essential subjective requirement of single conduct will raise doubts about the extension of *POSCO*'s ruling. There still remain questions on whether the *POSCO* holding is legally valid and is appropriate in light of competition policy.

## 2. Subjective Requirement in Criminal Law

It is possible to impose a penalty on an undertaking or actor who violates Articles 66-68 of the MRFTA, and those clauses which form the basis for the regulations also establish criminal penalties for violations of them. If it is a requirement to prove the existence of subjective requirements in order to determine the illegality of any abuse arising from a market dominant position under the *POSCO* rules, the meanings imposed by these requirements in establishing a crime could pose a problem for prosecutors.

Normally, a crime is established in a Korean criminal court when all the

requirements of facts, illegality, and responsibility (which will be examined in each stage) are met. In such a judicial structure, it will be important to determine at which stage the existence of subjective requirements implying the intent of competition restraints must be proven. The intention meaning acknowledgement or willingness of a criminal act will pursue the facts. The intentionally produced effects of restriction of competition will not be related to the facts but will be involved in the evaluation of the illegality. Consequently, the intent of competition restraints could not be understood as a content of the intention as the subjective requirement in the stage of facts. However, because the intent of competition restraints will be a question of fact necessary to prove illegality, it will be inevitable to understand the intent of competition restraints as a subjective requirement other than intention in Korean criminal law.

If the intent of competition restraints cannot be understood as a requirement for a judgment of illegality under the *POSCO* rules, it might still be considered so within the area of responsibility from the perspective of the establishment of crime. In such a case, the legal theory of a possibility of expectation of legal action as the responsibility principle will be applied to the decision of responsibility. Under this legal theory, if the party engaging in the conduct lacked the intent or objective of competition restraints and such a subjective requirement were an essential element of the alleged crime, the subject could be exempted from criminal responsibility.<sup>42)</sup>

## VI. Conclusion

The Korean Supreme Court ruled in the *POSCO* case that the intent or objective of competition restraints as an independent requirement must be considered when determining the illegality of a refusal to deal as an abuse

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42) Korean courts have had a strict attitude toward 'mistake of law' (Verbotsirrtum). It will be difficult to acknowledge the possibility of avoidance of 'mistake of law' in view of such an attitude of the courts. See the BGH (German supreme court)'s decision that cartel participants' proffered defense of 'mistake of law' might be cognizable as a legal principle but could not be accepted as a defense in that particular case. See 1966 BGHSt 21, 18, vom 27. 1 (Ger.). See also VOLKER EMMERICH, FÄLLE ZUM WETTBEWERBSRECHT 38-39 (C. H. Beck, 2000)

of market dominant position. Whether the *POSCO* ruling has legal validity and accords with the competition policy and whether this opinion will be applied to determining the illegality of the other MRFTA violations are important issues. In spite of a variety of criticisms of *POSCO*, the position taken by the Korean Supreme Court spelled out in the case has been maintained up to now. The exclusive types of abuse of dominant market position other than the refusal to deal may fall under the rule announced in *POSCO*, and as a result, further discussion of the subjective requirements of the violations of MRFTA is warranted.

The abuse of market dominant position has been understood as an objective concept under the TFEU, which is based on a regulatory system similar to Korea's MRFTA, and the subjective requirements such as intent of the restriction of competition are not considered to be independent. It is critical to examine the objective characteristic of the conduct to harm the competitive situation in the market when competition is already restrained due to the existence of dominant undertakings. Meanwhile, the subjective requirements in the regulation to monopolize or attempt to monopolize found in Article 2, Section 2 of the Sherman Antitrust Act are essentially considered, even if presumptions could be made regarding the other objective requirements. But those legal principles correspond to a differing regulatory system relating to monopoly power. Thus, there are limitations on how much the principles in U.S. antitrust law can be invoked when construing the MRFTA, at least in the area of regulating the abuse of dominant market position rather than dominant market position itself. Furthermore, it will be difficult to recognize the validity of considering essentially subjective requirements when determining the illegality of a cartel.

Even if the intent or objective of competition restraints might be an important consideration to take into account when assessing the illegality of such restraints, it is too formal to consider the subjective and objective requirements symmetrically and independently. It is important to clarify the objective meaning of the conduct in determining whether it may have an adverse influence on the competition in the market. Thus, the subjective requirement could contribute only towards understanding a conduct objectively in light of competition policy.