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2013 Modularization of Korea's Development Experience:

Korea's Developmental Experiences in Operating Competition Policies for Lasting Economic Development

2014

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Korea's Developmental Experiences in Operating Competition Policies for Lasting Economic Development

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Preface

The study of Korea's economic and social transformation offers a unique window of opportunity to better understand the factors that drive development. Within one generation, Korea had transformed itself from a poor agrarian society to a modern industrial nation, a feat never seen before. What makes Korea's experience unique is that its rapid economic development was relatively broad-based, meaning that the fruits of Korea's rapid growth were shared by many. The challenge of course is unlocking the secrets behind Korea's rapid and broad-based development, which can offer invaluable insights, lessons and knowledge that can be shared with the rest of the international community.

Recognizing this, the Korean Ministry of Strategy and Finance (MOSF) and the Korea Development Institute (KDI) launched the Knowledge Sharing Program (KSP) in 2004 to share Korea's development experience and to assist its developing country partners. The body of work presented in this volume is part of a greater initiative launched in 2007 to systematically research and document Korea's development experience and to deliver standardized content as case studies. The goal of this undertaking is to offer a deeper and wider understanding of Korea's development experience in hopes that Korea's past can offer lessons for developing countries in search of sustainable and broad-based development. In furtherance of the plan to modularize 100 cases by 2012, this year's effort builds on the 20 case studies completed in 2010, 40 cases in 2011, and 41 cases in 2012. Building on the past three year's endeavor that saw publication of 101 reports, here we present 18 new studies that explore various development-oriented themes such as industrialization, energy, human capital development, government administration, Information and Communication Technology (ICT), agricultural development, and land development and environment.

In presenting these new studies, I would like to express my gratitude to all those involved in this great undertaking. It was their hard work and commitment that made this possible. Foremost, I would like to thank the Ministry of Strategy and Finance for their encouragement and full support of this project. I especially would like to thank KSP Executive Committee, composed of related ministries/departments, and the various Korean research institutes, for their involvement and the invaluable role they played in bringing this project together. I would also like to thank all the former public officials and senior practitioners for lending their time and keen insights and expertise in preparation of the case studies.

Indeed, the successful completion of the case studies was made possible by the dedicated efforts of the researchers from the public sector and academia involved in conducting the studies, which I believe will go a long way in advancing knowledge on not only Korea's own development but also development in general. Lastly, I would like to express my gratitude to Professors Kye Woo Lee, Jinsoo Lee, Taejong Kim and Changyong Choi for their stewardship of this enterprise, and to the Development Research Team for their hard work and dedication in successfully managing and completing this project.

As always, the views and opinions expressed by the authors in the body of work presented here do not necessary represent those of the KDI School of Public Policy and Management.

April 2014

Joon-Kyung Kim

President

KDI School of Public Policy and Management

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Summary

This report discusses the introduction and development of Korean competition policies to provide policy-makers of developing countries information and insight on implementing their own competition policies. Korean competition policies have contributed to the successful achievement of the country's policy goals. They have been customized in terms of direction and level of enforcement in coordination with the different stages of Korea's economic development, including the stage of: price stabilization; consumer protection; vitalization of market competition; and economic growth. This report will first discuss the achievements of competition policies that have contributed to the Korean economy, and then describe the process of formation and development of competition policies against the backdrop of overall economic circumstances and policies. This will lead into explanations and evaluations of the current enforcement system and major aspects of Korean competition policies. The final section will discuss the implications that can be extracted from the Korean experience.

The organization of the report is in the following order: The Introduction of Competition Policies in Korea: Objectives and Achievements (Chapter 1); The Introduction of Korean Competition Policies: Background and Necessity (Chapter 2); The History of the Development of Korean Competition Policies (Chapter 3); The System of Korean Competition Enforcement (Chapter 4); Main Issues of Korean Competition Law (Chapter 5); The Effects of Competition Law Enforcement (Chapter 6); and The Implications for Developing Countries (Chapter 7).

In Chapter 1: The Introduction of Competition Policies in Korea, this chapter discusses the objectives of the introduction and achievements of policy enforcement in Korean competition policies. Korea utilized competition policies to overcome the inconsistencies and limits of government-led economic development, and the adoption of competition

policies led to transforming social awareness and vitalizing market competition, ultimately contributing to economic development. More specifically, competition policies have implemented various measures of improving monopolistic/oligopolistic market structures and regulating anti-competitive and unfair trade practices among enterprises in pursuit of vitalizing market competition. It has also contributed to solving issues of excessive economic concentration in uniquely-Korean forms of large conglomerates. Separate laws have been enacting to protect small and medium-sized enterprises ("SME"s) and establish fair trade practices, as in the case of the Fair Transaction in Subcontracting Act. Further, it has protected consumer rights and interests through appropriate consumer policies in harmony with economic growth, as seen in the enforcement of the Adhesion Contract Act.

In Chapter 2: The Introduction of Korean Competition Policies: Background and Necessity, this chapter describes the process and historical circumstances of Korea's economic development, along with the major process of the introduction of competition policies. This section also discusses how a developing country may set the objectives and level of enforcement for competition laws in the process of economic development. In the case of Korea, the objectives and levels of competition policy enforcement were appropriately adjusted to the changes in economic policies. In order for competition policies to be effective, it may turn out to be important for a developing country to accurately diagnose its circumstances, and then establish and continuously adjust to an appropriate level of competition enforcement in a comprehensive framework.

In Chapter 3: The History of the Development of Korean Competition Policies, this chapter describes how competition policies have changed in line with the economic and political circumstances of each age, and what its contributions were. Korean competition policies were initially focused on price stabilization, and protection of SMEs and consumers, but after the 1997 financial crisis, transitioned into concentrating on improving market structure and vitalizing market competition, in response to demands calling for fundamental change in economic policies. Currently, these principles are well-established as the core principles of competition policies.

In Chapter 4: The System of Korean Competition Enforcement, this chapter discusses the organization, case procedures and restrictive measures of the Korea Fair Trade Commission (the "KFTC"), the principal agency responsible for competition policies, along with other related agencies. The KFTC deals exclusively in issues of competition law enforcement, and has led the development of competition policies. Today, the policies and procedures are further developing through contribution from external sources, such as the courts, various related governmental entities and private entities. In addition, as damage actions (the classic example of private enforcement) gradually increase, their role in directly compensating for damages and indirectly deterring further violations is expanding.

In Chapter 5: The Main Issues of Korean Competition Law, this chapter discusses the major issues of competition policy, that include prohibitions against abuse of market-dominating positions, restrictions on mergers with anti-competitive effects, prohibitions of cartels, prohibitions of unfair trade practices, restraint of excessive economic concentration, competition policies for large conglomerate-SME relationships, and protection of consumers, along with relevant improvement measures and enforcement records. The KFTC has developed the legal standards for the conduct regulated by each major category, and has also continuously improved the analytical methods for critical determinations of the economic effect. The legal scheme of abuse of market-dominating positions is developing in the direction of concentrating on anti-competitive effects. The legal scheme of restrictions on mergers with anti-competitive effects has adopted and developed intricate methods of economic analysis to analyze anti-competitive effects. The legal scheme of prohibitions of cartels has become highly sophisticated due to strong enforcement and systematic improvement measures like leniency programs. The legal scheme of prohibitions of unfair trade practices has reorganized its previously all-encompassing scope while expanding the reach of competition policies to incorporate protection of fair trade. It also contributes to dealing with issues of economic polarization. In the case of the legal scheme of excessive economic concentration, in the past, this issue was mainly focused on regulating the uncontrolled corporate expansion of large conglomerates through restrictions on total investments, loan guarantees, cross-shareholding and holding companies. But currently, it is transitioning into a focus on enhancing competitiveness. On a lesser note, it is also involved with improving measures for the protection of parties-of-inferior-economic-status like SMEs and consumers.

In Chapter 6: The Effect of Competition Law Enforcement, this chapter describes and evaluates the effects of enforcement for each major category of competition policies. Regarding abuse of market-dominating position, the KFTC has continuously pursued measures to improve monopolistic/oligopolistic market structures to considerable success but problems persist. Experts argue that as substantial time will be required to resolve issues of monopolistic/oligopolistic market structures, systematic improvement measures and bold regulatory measures that eliminate the anti-competitive effects of monopolistic acts should be pursued for long-term benefit. Regarding mergers, in contrast to the sophistication of KFTC merger reviews being at par with the highest international standards, there are not many regulatory cases and there is a need for more structural corrective measures. Regarding cartels, although the KFTC has pursued this issue to considerable results from its very start, cartels persist, leading to a need for a heightened level of sanctions and more private damage actions for compensation and deterrence. Regarding unfair trade practices, this legal scheme contributed to regulating the conduct of anti-competitive enterprisers at a time that the organization and manpower of the KFTC were not sufficient. But now, the

KFTC needs to refrain from intervening in disputes that are primarily private in nature and concentrate on enhancing market competition and fair trade practices. As for excessive economic concentration, the KFTC has been able to reduce economic concentration, but there are many tasks remaining, as exemplified in current issues of economic polarization. Apart from these efforts, through international cooperation of competition policies, the KFTC is strengthening its enforcement capacities, and through competition advocacy, the KFTC is improving anti-competitive laws and spreading a culture of voluntary legal compliance. On the other hand, systematic measures have been implemented to protect fairness and rights-to-defend in line with court procedures. But for stronger justification of competition policy enforcement, many experts argue that advanced enforcement procedures like expanding guarantees of the right-to-defend for respondents are necessary.

In Chapter 7: The Implications for Developing Countries, this chapter discusses the implications that can be extracted from the Korean experience of enforcing competition policies, as the importance of competition policies grows in the economic development of developing countries. In the process of fast economic development, Korean competition policies have experienced various changes in policy systems. Although there were many mistakes made in this process, Korea was able to properly adjust to each stage, and construct the current form of competition policy enforcement fit for its economic scale. There are seven general implications to be found in Korean competition policies. Firstly, Korean competition policies played an important role in serving as a source of economic development in the process of fast and successful economic development. Secondly, Korean competition policies were the product of a long history of discussion and experience. Thirdly, it is very important to develop the direction and level of competition law enforcement flexibly and in line with economic development. Fourthly, considerable efforts to solve issues of economic concentration in chaebols have been meaningful. Fifthly, when considering that issues of excessive economic concentration (deepened by external shocks) persist despite active competition policies, there is a serious need to prepare for external shocks. Sixthly, vitalizing increasingly-internationalized competition policies and strengthening international cooperation is meaningful. Lastly, enforcing consumer policies in conjunction with competition policies may be put into serious consideration.

The specific implications that can be extracted from Korean competition policy enforcement can be categorized into issues of institution-building and issues of enforcement strategies. Regarding institution-building, the following points can serve as a reference. Firstly, the effectiveness of competition policies was in some part due to the origins of the KFTC's organization. The KFTC was initiated as a department of the Economic Planning Board that was in full charge of economic development policies at the time. Secondly, the substantial status and authorities granted to the KFTC are significant. Thirdly, continuous

efforts to change and develop the KFTC's organization are significant. Fourthly, consistent efforts to obtain and raise high-quality staff are significant. Even after its establishment, the KFTC continuously heightened its expertise and formed its framework (distinctly different from industrial policies) by obtaining and raising high-quality staff. Fifthly, since competition policies have substantially developed in the 2000s, there has been a serious rise in the participation of other governmental entities, law firms and private institutions for policy enforcement, and this has led to another opportunity for Korean competition policies to grow. Sixthly, as competition policy enforcement has been expanded to regulatory agencies other than the KFTC, including the KCC and Financial Services Commission/ Financial Supervisory Service, a need to clearly define the overlapping scope between these agencies has emerged.

Regarding enforcement strategies, when selecting priorities for major categories of enforcement, the KFTC initially focused on actions that would be immediately and easily perceivable to the general public, which brought substantial social and media support. Secondly, the competition advocacy functions (such as review of anti-competitive laws) have contributed to raising the sophistication of Korean economic policies and establishing a market economy. Thirdly, raising the level of sanctions (such as expanding surcharges) may help reinforce the importance of competition policies and stimulate corporate compliance efforts. Fourthly, private enforcements may contribute to diversifying and expanding the scope of competition enforcement, and as a result, the total capacities of competition policies may be strengthened. Fifthly, legal review of KFTC measures by the courts, and the increase in private damage actions may help to raise the level of legality and reasonableness with respect to competition policies.

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Chapter 1

The Introduction of Competition Policies in Korea: Objectives and Achievements

The Introduction of Competition Policies in Korea: Objectives and Achievements

1. Background and Objectives

In a narrow sense, competition policies in Korea mean the legal system of investigative, corrective and restrictive measures imposed on acts of violation of the Monopoly Regulation and Fair Trade Act (the "MRFTA"). In a broader sense, it encompasses enforcements of other competition-related laws, including the Adhesion Contract Act and Fair Transactions in Subcontracting Act. Interpretations of competition policies can also include the planning and execution of economic policies associated with fair competition. It can further represent consumer protection policies based on the Consumer Protection Act. Although competition policies are typically discussed in the context of enforcing the MRFTA, and while this report will mainly discuss such MRFTA-related enforcement, it will also cover MRFTA-related laws and consumer policies.

Korean competition policies were enacted in December 1980 and took effect in April 1981. At the time, only 10 developed nations in the world, including Germany, Japan and the US, had competition policies in effect within their respective legal systems. Hence, it is a rare and unique choice that Korea adopted competition policies at a time it was still a struggling developing country, whereas a majority of developing countries overlooked competition policies in the interest of spurring economic development. Yet, Korea actively sought to supplement and overcome the limits of typical developmental strategies and apply a new paradigm in economic development. Hence, it pursued an application of competition policies based on market tools. Korea's introduction and operation of competition policies is significant in that it enhanced industrial dynamism while also forming a foundation for lasting economic development. Cases such as Korea's, where organic integration of economic development policies and competition policies yielded considerable results are

rare. In comparison to most other Asian countries who implemented competition policies in the late 1990s by external demand or solely for the purpose of enlisting in the WTO, Korea's unique process and experiences in self-introducing competition policies has special significance.

It is hard to say that the principal objective of Korean competition policies was in establishing market competition or enhancing consumer welfare. The direct purpose was more likely to establish fair trade and correct the side effects of economic concentration in large conglomerates (which were initially formed through government-led efforts to maximize return on investment by concentrating the country's scarce resources at the time). Yet, this led to the need to protect consumers as exemplified in the 1960s Three-Powder monopoly case. More directly, skyrocketing inflation following the oil crisis in the 1970s became the main driver for the establishment of competition policies. In other words, in the early stages, securing the fairness of transactions in the market was the primary objective for Korea's competition policies.

As competition policies began to serve their legislative intent, social support began to grow. With such support, competition policies began to expand beyond maintenance of fair trade in the markets to fulfill its more standard objective of promoting economic efficiency and consumer welfare. Especially following the 1997 financial crisis, competition policies moved to the forefront as the only solution to harmonize the internal changes caused by market liberalization and the external changes caused by global trends of open trade.

Currently, two major directions coexist in the objectives and enforcement of competition policies in Korea: a focus on traditional efficiency concerns of competition law and a focus on fairness concerns for small-to-medium-sized enterprises (the "SMEs") and consumers.

2. Contribution of Competition Policies to the Development of Korea's Market Economy

Korean Competition Policies contributed to economic development by raising social awareness for the necessity of market competition and vitalizing market competition.

The implementation of competition policies based on the MRFTA played an important role in breaking away from government-led economic development of the 1960s and 1970s (in which fostering monopolization was considered a valid measure). This also led Korea to officially adopt market competition as a fundamental principle in its economy. For the

following 30 years, Korea's competition policies have been essential in establishing and proliferating competition principles.

Overall, Korea's competition policies contributed to economic development by raising social awareness for the necessity of market competition and vitalizing market competition.

2.1. Change in Perception of the Paradigm of Economic Development

Competition policies have acted as a basic foundation of the Korean free market economy and have raised awareness on the importance of innovation and market competition. In the past, the Korean government had supported imbalanced growth (which entailed promoting large conglomerate-led accelerated growth in key industries), intending such growth to lead to general economic development. The concentration of human and capital resources in a select number of enterprises was considered an effective measure given the social and economic circumstances at the time. And such "trickle-down effect" is generally accepted to have had a positive impact in the early stages of economic development.

However, as the economy grew in scale and quality, the government's planned allocations of resources and the compressed growth-focused model reached its limits. Against the backdrop of international calls for change in Korea's economic development in the 1980s, led by WTO free trade pressures, Korea needed to adopt a fundamental change. Moreover, Korea underwent major political changes in the 1980s when a dictatorial government collapsed and political democratization was achieved. Hence, a consensus that individuals and corporations, rather than the government, should lead economic development began to form.

The competition policies administered in these changing times helped address the inconsistencies of traditional economic policies. These policies further helped earn the trust of the general public during the late 1990s financial crisis when regulatory reform and liberalization policies were rapidly implemented. As a result, Korea was able to continue its economic growth into the 21st century.

2.2. Vitalization of Market Competition and Economic Development[1]

Through the implementation of competition policies, Korea was able to consistently monitor and correct the formation of monopolies, abuse of market-dominating positions, and any anti-competitive or unfair acts, while countering the side-effects of a large

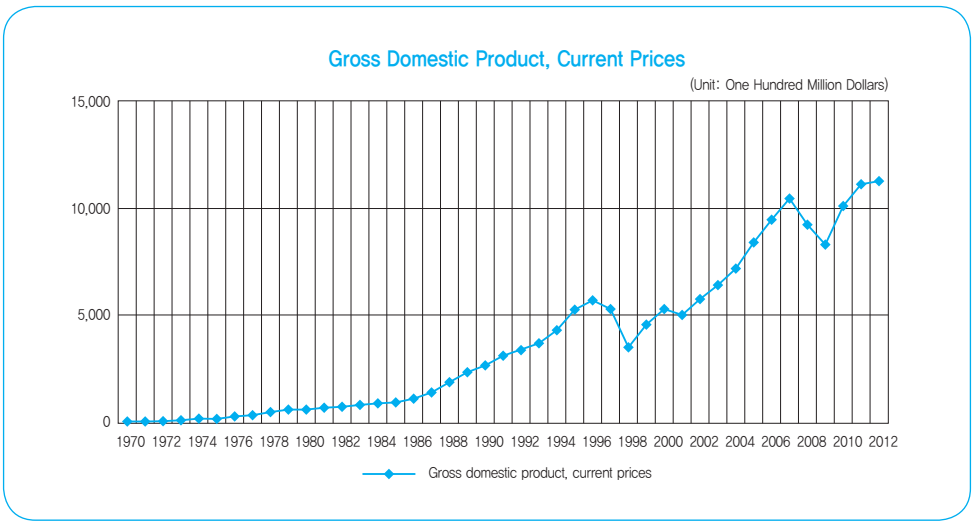
1. Joseph Seon Hur, *The Evolution of Competition Policy and Its Impact on Economic Development in Korea*, in COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES (UNCTAD, 2004); Joseph Seon Hur, *The Effects of Competition on Economic Development*, Ordo-economics Journal, Vol.5 No.1 (2002).

conglomerate-focused economy. As competition policies went through various stages of development, the problem of violations became well-known and consequently, social awareness of the seriousness of unfair trade practices (such as cartels and price-fixing) grew. Moreover, competition policies have also served to either reduce or reform unnecessary or excessively-restrictive regulations. As a result, the general economy has garnered benefits in the form of a fair market with vitalized competition.

There are not many tangible records readily available to show the positive effect of competition policies on economic development. Still, the general consensus is that vitalization of market competition significantly contributed to Korea's economic growth. The presumption is that competition policies correct the underlying reasons for market failures, and thus, increase economic efficiency. Market competition is generally comprehended to contribute to social welfare, while also having a positive effect on a variety of other factors, including economic growth, distribution of income and technological innovation. Market competition further enhances corporate efficiency and productivity by lowering the cost of production and retail prices, leading to a growth in international competitiveness for not only corporations and industries but the whole country in general. In Korea, this whole effect became manifest after the official adoption of market liberalization following the financial crisis of late 1997.

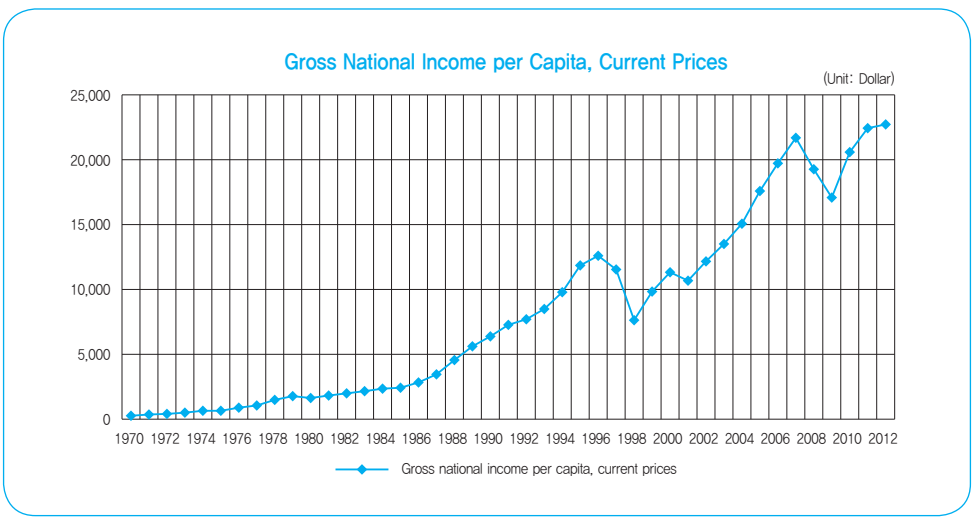
The description above is clearly seen in the process of Korea's economic development. The graph below shows that at the stage of rapid political changes in Korea (1980), the rate of economic growth that had been fluctuating at around 10% suddenly spiraling down into negative growth. After an aggressive recovery of the economic growth rate, the rate became negative again in 1998 during the financial crisis. This was quickly recovered, and subsequently, the growth rate remains around a 5% annual growth rate (excluding the period in and around the 2008 financial crisis) but with a gradual trend of decline. Hence, Korea's economic development and survival through economic crises can be explained in association with the implementation of competition policies.

Figure 1-1 | Gross Domestic Product, Current Prices



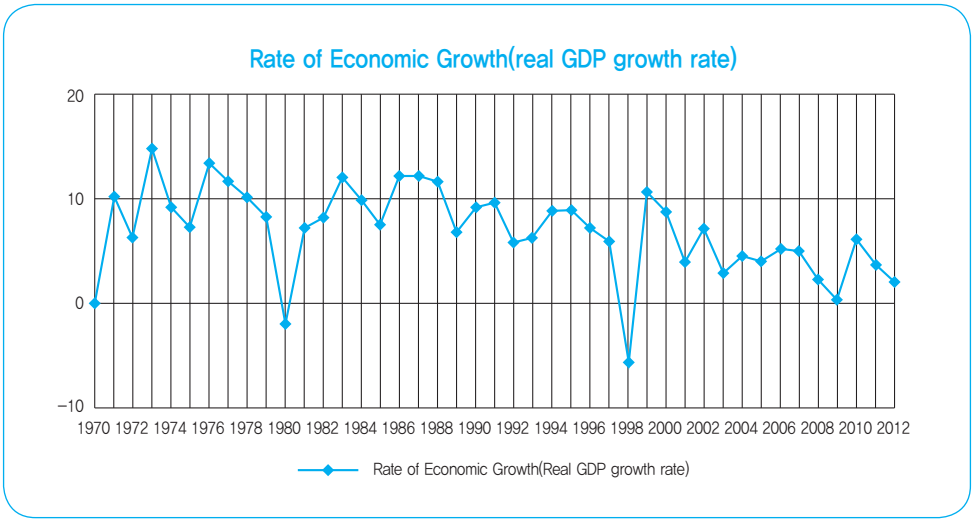
Source: Bank of Korea 「National Income」, 2013.

Figure 1-2 | Gross National Income per Capita, Current Prices



Source: Bank of Korea 「National Income」, 2013.

Figure 1-3 | Rate of Economic Growth (real GDP growth rate)



Source: Bank of Korea 「National Income」, 2013.

Foremost, it is true that Korea has accomplished amazing growth under a government-led economic development policy since the 1960s. There is a general consensus that the political shock in the 1980s was not a simple political change but an explosion of the discrepancies of prior economic development policies. In other words, many view that, at that point, there was an internal crisis due to the heavy and chemical manufacturing industry-focused economic development policies meeting resistance in the form of stagnant productivity and limitation in government capabilities. In addition, there was significant pressure from the US and other developed countries to open the economy.

We have described earlier how the MRFTA had been established in late 1980 as a tool to cope with unprecedented difficulties and how it became successful in such efforts. As political democratization continued to progress, governmental economic policies became much more tolerant of corporate freedom. Between the 1980s and late 1990s, the Korean economy produced great outcomes in collaboration with economic policies focused on exports within a WTO free trade system, and was further assisted by the stabilization of international oil prices and a general boom in the global economy. With the help of high foreign exchange rates, inflation remained in the single digits, and as Korea maintained its pace of high growth, it achieved its first current account surplus for the first time in its history. Up to the early 1990s the average GDP growth rate was 8.7%.

It is hard to say that competition policies were the main focal point of economic policies in the process of economic growth after the 1980s. Yet, it can be noted that the efforts to

establish fair transactions made considerable contributions by cultivating social consensus and determining the direction for economic policies. Many experts also find significance in that the Korea Fair Trade Commission (the "KFTC"), the entity in charge of the MRFTA, was initially part of the Economic Planning Board responsible for economic policies.

Yet, as GDP per capita reached the USD 10,000 mark in the late 1990s, the Korean economy began to experience another crisis. As the economy grew to a larger scale and became more intricate, prior large conglomerate-focused and compressed-growth policies became clearly outdated, and the government began to push the national economy towards an open market while pursuing wide-scale policies of deregulation and liberalization. Unfortunately such policies were already too late and Korea lost its chance to enter the competitive global market at the proper point, and the financial crisis unexpectedly hit Korea in late 1997 along with many other Asian countries.

In the process of overcoming the financial crisis, contrary to the past, competition policies became the focal point of economic policies. Government-led efforts, along with support from the IMF and international community, focused on overcoming its past failures and continuing economic growth by making market competition a core economic principle. Accordingly, the government implemented intensive restructuring and bold regulatory reform in corporations, financial industry, labor force and public services. As a result of such efforts, the Korean economy was able to overcome this economic crisis within a remarkably short period of time. Above all, such achievements were possible due to regulatory reform, a consensus that anti-competitive elements (such as cartels) hurt economic growth, and strong corrective and restrictive measures being taken.

Since 2004, the Korean economy has maintained a stabilized growth rate in pace with the recovery and growth of the global economy. Despite the 2008 global economic crisis, Korea has overcome its difficulties and maintained economic policies aiming to sustain market competition.

At this point in 2014, Korea's GDP growth rate remains at a 3~4% natural growth rate and the GNI per capita is stagnant at USD 20,000. Hence, the current priority is to overcome an economic slowdown. The central issues that are brought up in these efforts include economic de-concentration policies (due to the 2008 global economic crisis, economic concentration in chaebols, Korea-specific family-owned industrial conglomerates, has become serious), SME promotion policies, and strengthening corporate competitiveness in the international market. The popular view is that the best way to address such issues is to vitalize the economy by promoting corporate innovation and strengthening Korea's competitive edge in the international market.

2.3. Conclusion

Korean competition policies have played an increasingly-central role in overcoming the economic difficulties that surfaced with each stage of economic development, and in shifting to new developmental paradigms. Currently, Korean competition policies have settled as a core principle for Korean economic development which is focused on the market and corporations.

Internationally, it is significant that a self-introduced competition law makes tangible contributions to economic development in a short term of 30 years and then continues to maintain its position as a regulator of basic economic order. Such history may provide some reference for countries that are in the process of similar economic development.

3. Achievements of Korean Competition Policies by Category[2]

In Korea, competition policies are classified into 4 major categories: prohibition against abuse of market-dominating positions, restriction on anti-competitive business combinations, prohibition against unjust concerted practices and restrictions of unfair trade practices. The common focus is regulation of concentration of economic power and ensuing issues of unfair transactions brought about by imbalance between corporate powers. The KFTC has vigorously regulated violations of the MRFTA while various government efforts have been made to improve monopolistic/oligopolistic market structures.

Korean competition law further deals with uniquely-Korean issues of chaebol regulation and concentration of economic power. Moreover, competition-related laws such as the Adhesion Contract Act and the Fair Transactions in Subcontracting Act have been enacted to secure fair transactional order and to protect SMEs. Finally, issues of consumer protection have also been rising in importance.

While this report will deal with the specific aspects of Korean competition policies in later sections, in this part it will discuss the achievements of Korean competition policies according to each category of competition law.

2. This section has been adapted and supplemented based on the relevant sections concerning systems and achievements of the KFTC in the following sources: Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 20 years* (2001); Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 30 years* (2011).

3.1. Competition Policies

3.1.1. Improvement of Monopolistic/Oligopolistic Market Structures

The KFTC has achieved results in promoting market competition by establishing and executing measures to correct monopolies/oligopolies, undertaking market structure studies and launching comprehensive market improvement measures.

In Korea there is serious controversy over monopolistic/oligopolistic market structures and concentration of economic powers in the hands of a small number of chaebols (caused by a long history of government-led and conglomerate-focused economic policies). Hence, the Korean government has made continuous efforts to correct such discrepancies and improve its market structure to enhance competition.

In the late 1996 revision of the MRFTA, the KFTC was granted the duties and powers to improve monopolistic/oligopolistic market structures through establishment and enforcement of customized policies. For example, the KFTC was granted the right to advocate its opinion to other governmental entities if it considered such advocacy necessary to enhance market competition or improve market structures. Accordingly, 26 product markets, including the automobile and steel markets, were selected as 'Priority Improvement Markets' (among product markets that had been consistently identified as being monopolistic for the past ten years). From 1996 to 1999, the KFTC pursued policies to improve conditions in such product markets with considerable results.

Between 1999 and 2010, the KFTC conducted seven market structure surveys (made possible by new provisions in the MRFTA) and announced its findings. Through such efforts, the KFTC raised awareness of the monopolistic/oligopolistic conditions in the market and laid out the ways to improve such conditions for the public and government officials.

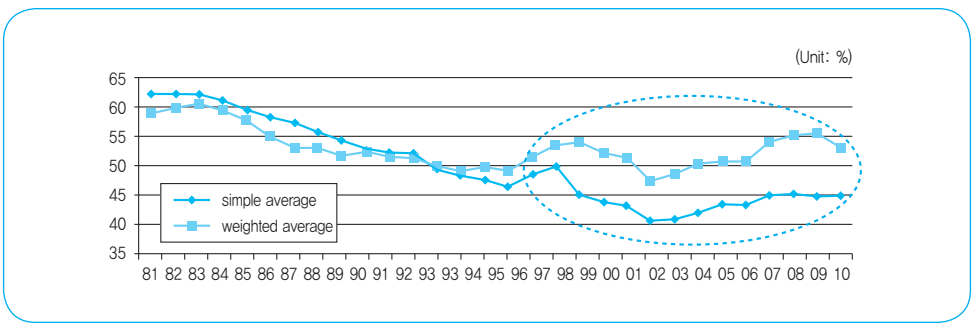
In 2001, the KFTC's efforts to improve monopolistic/oligopolistic market structures were expanded and developed into a new comprehensive policy called the Clean Market Project (CMP). This comprehensive policy went beyond case-by-case enforcements of MRFTA violations and extended to the KFTC's efforts to research specific industries and markets, devise improvement schemes and develop a systematic approach to correct violations. Accordingly, from 2001 to 2005, measures for 39 different industries were put in place with considerable results in improving the overall market.

From 2008 to 2013, the KFTC conducted market studies to spot, analyze and provide countermeasures for monopolistic/oligopolistic markets where market distortion was perceived to be persistent. Through such market analysis, the KFTC aimed to find the fundamental reasons for restricted competition and market distortion in specific markets, devise countermeasures and find the most appropriate enforcement method for enhancing market competition and protecting consumers.

Yet, despite such continuous efforts, it is hard to say that Korean competition policies have produced sufficient results in the resolution of monopolistic/oligopolistic market conditions. This is not only because Korean competition policies have reached their limits (despite considerable results), but also due to the unavoidable side effects derived from the financial crisis of the late 1990s and the global financial crisis of 2008.

The figure below shows that concentration in certain industries decreased with the enactment of the MRFTA in the 1980s but rebounded with the financial crisis in the late 1990s and once again in the early 2000s.

Figure 1-4 | Long-term Trends of Industrial Concentration



Source: KFTC, 「10-year Market Structure Study」, 2013.

Yet, it is worth noting that the circumstances surrounding recent increases of industrial concentration is different from that of previous monopolies in the domestic market. As the market share of export-oriented corporations (especially IT or automobile companies) steadily grows into the top global class, it is inevitable that their weight in the total economy also increases, partially accounting for the increase of industrial concentration. Thus, while industrial concentration has increased, this can be understood as not only due to the lack of market improvement efforts, but also as the result of Korean corporations increasing their global market share. Nevertheless, issues of economic concentration continue to be a major focus of the Korean economy and competition policies.

3.1.2. Prohibition against Abuse of Market-dominating Positions

The KFTC achieved significant effects in promoting market competition by remedying abuse of market dominating positions in many large cases, including cases involving multi-national IT firms like Microsoft, Intel, and Qualcomm. Some of these cases led to global recognition.

Korean competition law prohibits an enterprise with a market-dominating position from undertaking anti-competitive acts (such as excluding or interfering with a competitor) while also restricting any acts that harm consumer welfare. This is a quintessential objective of competition law which most other countries with competition laws pursue.

Yet, contrary to other countries, in its earlier stages, investigations and corrective measures for abuse of market-dominating positions were undertaken based on the principles of prohibition of unfair trade practices, and not the principles of prohibition of abuse of market-dominating positions. There were many reasons for this but primarily: firstly, huge opposition from large conglomerates restricted the enforcement of such provisions since enforcement was prone to give the impression of directly regulating market-dominating enterprises; and secondly, and more likely, the KFTC deliberately pursued the more convenient line of action to enhance the efficiency of competition law enforcement. Particularly, to prove illegality under abuse of market-dominating positions, the KFTC needed the will and expertise to conduct complicated analyses that proved market-domination (by showing market-definition and high-possibility of derivative anti-competitive effects). Such a process entails highly sophisticated legal and economic analyses which require expert staff and considerable capital resources. Against this backdrop, one may be able to understand why the KFTC avoided invoking this complicated process in favor of a more efficient resolution in an already highly-monopolistic market. As a result, many acts of abuse of market-dominating positions were regulated under the principles of prohibition of unfair trade practices. It is interesting to note that there is a similar history in Japan.

Yet 2006, the landmark Microsoft case changed this practice. In accordance with market competition moving to the forefront, the standard of regulation became to be based on determinations of anti-competitive effects (an effect-based approach). Since then, general practice in the Korean competition community is to regulate abuse of market-dominating positions based on determinations of anti-competitive effects rather than relying on principles of unfairness.

A significant number of cases were dealt with after the Microsoft case. Especially the investigations and remedies concerning multi-national IT firms, including the cases of Intel and Qualcomm, produced considerable effects in promoting market competition in the IT industries (that play a pivotal role in the Korean economy).

Despite such developments, it is still hard to say that enforcements against abuse of market-dominating positions are actively being pursued at the same level of the US or EU enforcements. This is primarily due to Korea-specific economic circumstances in which market concentration is widely found. Yet, on the whole, it is true that Korean enforcement has made a wide turn to US-style enforcement in which abuse of market-dominating positions is commonly regulated by corresponding legal measures. This is hoped to enhance market competition while establishing a market economy in line with other developed countries.

3.1.3. Restrictions on Anti-competitive Business Combinations (Mergers)

The KFTC has succeeded in utilizing and developing analytical methods for merger reviews, and this has contributed to preventing the formation of monopolistic/oligopolistic markets.

The MRFTA prohibits business combinations or mergers that cause or reinforce a monopolistic/oligopolistic market. From a positive perspective, mergers are artificial expansions of a corporation that enhance the efficiency of resource allocation and contribute to economic development. But anti-competitive mergers may also remove competitors from the market and cause price increases through reduced production. The MRFTA has regulated mergers from the early stages of its enactment.

There were not many cases of regulatory action taken for the restriction of mergers. There were only two such cases in the 1980s. This was primarily due to two causes. Firstly, mergers had been historically rare in Korea. On the other hand, many large-scale mergers were often the product of government-led industrial policies, and thus, were not considered a proper subject for KFTC intervention. At the same time, many mergers were the product of mid-sized companies seeking to create new synergistic effects through a merger and thus, were more likely to create more rather than inhibit competition. Secondly, the regulatory efficiency and technical expertise in enforcing the MRFTA was another issue. Regulation of anti-competitive mergers requires highly advanced economic and legal analyses on par with what is required for regulation of abuse of market-dominating positions.

But with the occurrence of the 1997 financial crisis, many corporations were forced out of the market and the number of mergers increased. Many large conglomerates fell apart and were acquired by other large conglomerates, intensifying an already monopolistic/oligopolistic market structure. Under such circumstances, the KFTC reinforced its resolve regarding active review of anti-competitive mergers. However, efforts to regulate anti-competitive mergers were not initially successful and often limited to lukewarm corrective measures. In the case of the late 1997 SK Telecom-Shinsegi Mobile Communication Company merger, the merger was permitted on conditions of light behavioral corrective measures, which ultimately paved the way for the intensified monopolistic market structure in the mobile communication market we currently see. Since then, a consensus on the importance of restricting anti-competitive mergers has grown, leading to the Samik-Youngchang Musical Instruments Company merger case. In this case, the KFTC took the unprecedented structural measure of ordering Samik Musical Instruments to sell all of its shares of Youngchang Musical Instruments after its merger review. Currently, the KFTC is able to review mergers utilizing advanced analytical methods that help sustain competition in the market. Accordingly, behavioral and structural regulations of mergers have considerably increased. The KFTC has also carried out extraterritorial applications in cases where mergers abroad have been perceived to have anti-competitive effects in the Korean market.

In Korea, such restriction of anti-competitive mergers by competition law and policies are considered to have significantly contributed to preventing the formation of monopolistic/oligopolistic markets. In addition, this category of enforcement has emerged as a major practice area of the MRFTA and the subjects and standards of review have been globalized along with the globalization of the Korean economy.

3.1.4. Prohibitions against Unjust Concerted Practices (Cartels)

The KFTC pinpointed cartels as "public enemy no. 1" immediately following the financial crisis of late 1997, and has pursued active regulation ever since. International cartels that affect the Korean economy are also the subject of enforcement with considerable results.

The inherent characteristics of the Korean economy inbred from years of government-led compressed growth policies and cultural traditions that emphasize cooperation had facilitated the widespread formation of cartels in Korea. Although there are certain advantages to such a culture, it may also restrict free competition among enterprisers and interfere with economic

development. Based on such a perception, Korea has pinpointed unjust concerted practices or cartels as "public enemy no. 1" and has aggressively enforced against them.

Although the KFTC recognized the harmful effects of cartels early on, it was not aggressive in detecting and correcting cartels from the start. This was because the Korean government sometimes facilitated the formation of cartels in the name of efficient economic development while not fully realizing its negative effects. In general, there was a lack of understanding among enterprisers that certain practices of administrative guidance by governmental agencies or cooperation among enterprisers could constitute a formation of a cartel and thus be in violation of the MRFTA.

Perceptions of cartels began to improve as the market economy developed. In 1996, as the KFTC separated from the Korean Economic Planning Board as an independent administrative body, it became possible for the KFTC to pursue its own line of policies independent of government-led economic policies, and as a result, KFTC enforcements against cartels became more active and showed a large increase.

The financial crisis of the late 1990s became the turning point for active cartel regulation. In a backlash derived from the economic crisis, the government and economic circles reached a general consensus that Korea needed to break free from previous paradigms of economic development and secure a new developmental drive through a new paradigm focused on a market economy. Such consensus led to a policy aiming to eradicate cartels. Accordingly, cartels were pinpointed as "public enemy no. 1" and the KFTC spent a considerable amount of its human and capital resources on this endeavor. Hence, social awareness of the harmful effects of cartels was renewed and the legitimacy of the large surcharges ordered for cartel cases became largely accepted by the public.

Between 1988 and 2012, 18.8% of the cases (338 cases) in which KFTC surcharges were imposed on violations of the MRFTA were cartel cases, consisting of 72.5% of the total surcharges collected (amounting to nearly KRW 3 trillion). The table below shows that there has been a great increase in the number of cases and amount of surcharges ordered in cartel enforcements. Since 2005, there has been a continuous flow of surcharges ordered in the range of hundreds of billions (KRW) every year. The leniency program has substantially contributed to such achievements.

Table 1-1 | Status of Surcharges Imposed on Unjust Concerted Practices

(Unit: Number, Million KRW)

Year	88~92	93~97	98	99	00	01	02	03	04
Cases	2	28	19	15	12	7	14	9	12
Amount	2,367	17,684	31,991	36,158	198,812	27,704	53,109	109,838	29,184
Year	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	21	27	24	43	21	26	34	24	338
Amount	249,329	110,544	307,042	205,746	52,903	585,822	571,006	398,944	2,988,183

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

On the other hand, as the Korean economy continued to grow, along with the increase in international trade and imports from foreign enterprisers, the KFTC began to take interest in international cartels. Since the 2000s, the KFTC has concentrated on the extraterritorial application of the MRFTA and dealt with cases of international cartels independently and in collaboration with competition authorities of other countries to considerable success.

One of its most significant achievements is the 2010 Air Freight Rate International Cartel case. In this case, the KFTC ordered corrective measures and KRW 119.5 billion in surcharges on 26 international air freight operators for collectively fixing air freight rates for inbound-to and outbound-from Korea routes. This case was the largest international cartel case in KFTC history in terms of the number of cartel participants, relevant turnover involved, and surcharges ordered. It was particularly significant for being the first case that the KFTC cooperated with US and EU authorities to perform simultaneous worldwide ex-officio investigations. Such strong enforcement against international cartels publicized the capacities of the KFTC to the international community while also raising the level of KFTC enforcement to the next level.

Accordingly, social perception regarding the harm of cartels has changed and corporate efforts for compliance have grown, leading to a vitalization of market competition. Such improvement is considered to be one of the greatest achievements of competition policies in Korea. This is comparable to US authorities pointing to the almost-total eradication of cartels as one of its greatest achievements in its 200-year history of enforcing antitrust laws.

3.1.5. Prohibitions against Unfair Trade Practices

The KFTC widely regulates unfair trade practices while contributing to protecting SMEs and enhancing consumer welfare.

Competition policies broadly defining acts that interfere with fair transactional order as unfair trade practices follow in the footsteps of Japan. It is also commonly found in some developing countries in Asia like Taiwan. Separate regulation based on unfairness standards is a unique aspect of Korean competition policies rarely found in major developed countries.

When considering the circumstances and developmental background of the Korean economy, regulations of unfair acts have played an important role in competition policies. Until recently, anti-competitive acts in the market were simply perceived to be unfair and the distinction between anti-competitive acts and unfair acts had been blurry. Under such circumstances, in cases of anti-competitive acts of market-dominating enterprises, it was easier to bypass any complicated economic analyses of anti-competitive effects and enforce based on a determination of unfairness. This was acceptable because in the earlier stages, anti-competitive acts in the market were numerous, limiting the possibility of error. Also, this line of policy could enhance the efficiency of necessary enforcements. Further, although severe imbalance existed in the market between large conglomerates-SMEs and corporations-consumers, even if a loss occurred due to abuse of a superior position, only limited legal means were available for a party to seek relief through civil action. Under such conditions, the KFTC had to fill this gap and provide the necessary relief though efficient allocation of its enforcement powers. It may also be added that a deeply Confucian society was more willing to embrace notions of fairness in transactions aside from recognizing the economic benefits to be incurred from the limitation of anti-competitive acts.

Presently, the KFTC has successfully enforced thousands of cases of unfair trade practices. Such enforcement has been credited for deterring the exploitation of large conglomerates against SMEs or corporations against consumers, and leveling the playing ground for SMEs to compete against large conglomerates. Hence, it is generally accepted that, against a backdrop of a developing economy lacking the system and resources to effectively enforce competition laws, such a legal scheme made significant contributions in correcting anti-competitive and unfair acts in the market, ultimately boosting and expanding market competition.[3]

3. Many argue that a fully-functioning market, corporations and judicial systems are required for normal enforcement of competition laws. For example, refer to the following: Abel M. Mateus, *Competition and Development: What Competition Law Regime?* (2010).Available at http://ssrn.com/abstract=1699643.

Recently, efforts to apply the principles of abuse by market-dominating positions to acts that have anti-competitive effects have grown so that fundamental issues can be determined and addressed. Hence, the applicability of unfair trade practices has become limited to a complementary role when evaluating acts with anti-competitive effects. Another trend that has emerged is the KFTC minimizing its intervention so that private disputes (primarily caused by conflict of economic interests among private parties) can be resolved through the courts or mediation procedures. Accordingly, the domain of unfair trade practices has been considerably reduced compared to the past.

On the other hand, however, with regard to the issues of excessive concentration of economic powers and social inequity that have emerged since the 2008 financial crisis, the principles of unfair trade practices have sprung to a renewed status due to its pliability to deal with consumer rights and serve as a viable source for various legal schemes.

From such a perspective, the legal scheme of prohibition of unfair trade practices has significantly contributed to resolving the various economic problems unique to the Korean economy and society and will continue to play a flexible role in solving current and upcoming issues.

3.1.6. International Cooperation on Competition Policies

The KFTC continues to actively participate in international discussions of competition policies in the circles of the OECD, ICN, WTO, UNCTAD and APEC. This leads to a better understanding of international trends, better enforcement and heightened reputation of Korea's competition policies.

Competition policies have played a significant role in an age of an open and integrated international market based on free global trade. Korea is a country where imbalanced economic growth policies in international trade have produced considerable results, internationally renowned corporations have emerged, and multinational corporations and capital have actively entered the market.

As a result, anti-competitive acts that affect the Korean market may occur domestically and abroad. Cooperation with foreign competition authorities has become crucial in a globalized Korean economy. At the same time, the need to prevent conflicts with other countries by taking a uniform approach to identical acts has become important, along with protecting corporate trust in the KFTC's authority and reducing regulatory uncertainty in performing corporate activities.

The KFTC has strengthened its international collaboration since the 1990s as part of its economic policies. This had much to do with the fact that eliminating the obstacles of market entry in a globalized market (especially obstacles in investing and sales) had become a critical issue for international trade. This was a particularly important matter for Korea with its ambitions for an open trade economy. Global trends of trade liberalization and competition meant that competition policies could no longer remain solely applicable to domestic markets nor remain isolated from competition policies of other countries.

The KFTC's international cooperation can be categorized into multilateral cooperation and unilateral cooperation. Multilateral international cooperation is conducted through international entities such as the OECD, ICN, WTO, UNCTAD, and APEC. Through such cooperation, trends of competition policies and the handling of specific cases are exchanged among major developed countries and other countries in the area while relationships are formed for further mutual collaboration. Unilateral cooperation mostly occurs through the Competition Chapter of FTA treaties enacted with other countries such as the US and EU. Once FTA treaties with China and Japan reach a settlement, unilateral cooperation should become even more active.

These efforts for international cooperation have significantly improved Korea's policies and system by providing a source for reference within the long history of competition law enforcement of other developed countries. In addition, through international cooperation, enterprises have been able to lower the costs of trade with other countries by being able to evaluate the stability and predictability of the competition laws of such countries.

Internationally, Korean competition policies are viewed to be of high standing due to systematic improvements, active enforcement and strong international cooperation carried out by the KFTC. Namely, the GCR (Global Competition Review), which evaluates the competition authorities of each country on an annual basis, consistently gives high marks to the KFTC's performance.[4]

International cooperation today extends to global academic and practical collaboration, in the areas of laws and economics and among scholars and large law firms, especially in the region of Northeast Asia.

4. In 2013, the KFTC received a 'good' rating in evaluation of 37 competition authorities in the world. Global Competition Review, *Rating Enforcement 2013*(2013), http://globalcompetitionreview.com/surveys/survey/828/rating-enforcement-2013. While this is a slight fall from being ranked in the top 7 of 38 global competition authorities in 2010, it is still a high-rank position.

3.1.7. Competition Advocacy

The KFTC has collaborated with other governmental entities to improve anti-competitive laws and spread the reach of its compliance programs. This has led to systematic improvement and a culture of legal compliance.

The responsibility of the KFTC is not limited to correcting anti-competitive acts but extends to gaining public support of competition and working in collaboration with other governmental entities to create a pro-competition environment.

Korea has understood that the key task for lasting economic development is to maximize awareness of market competition principles. Hence, the KFTC has been granted active and extensive roles and authorities in competition advocacy with considerable results. This is a unique aspect of Korean competition policies in comparison to other countries.

The KFTC pursues the following major functions in competition advocacy: improvement of anti-competitive laws, deregulation, and spreading the reach of its corporate leniency programs. We will discuss the leniency program in later sections of this report.

Foremost, the MRFTA has granted the KFTC the authority to put forth its opinions to improve anti-competitive laws of other governmental entities and also actively provide its opinion on various laws in the process of legislation. To ensure maximum effectiveness, all government entities must notify and consult with the KFTC when enacting or revising anti-competitive laws. As a result, out of a total of 330 enactments or revisions of laws in 2009, in 35 cases the KFTC requested that the law be improved or suggested more market-friendly alternatives based on reasons of anti-competitiveness. Starting in 2010, the KFTC has worked in collaboration with local governments (that had agreed to cooperate with the KFTC) and the Ministry of Public Administration and Safety, leading to the improvement of 643 anti-competitive laws and rules (out of a total of 976). These efforts have helped to improve anti-competitive systems in Korea.

One of the most notable achievements in this respect is the enactment of the Omnibus Cartel Repeal Act in 1997 by which legally acknowledged cartels were eradicated in one big sweep. Through this measure, 18 of 20 legally-acknowledged cartels were abolished. As a result, the fee standards of 9 categories of specialized practitioners (including attorneys and CPAs) were uniformly abolished, leading to price competition among such practitioners and significant consumer benefits achieved through lower fees.

Another example would be the 2001 repeal of regulations which had restricted the manufacturers of Korean rice wine to supply the rice wine only to retailers in the same city or province. This forced previously-monopolistic manufacturers to compete on a nationwide basis. The result was an increase of new product development, an increase of efforts to lower prices, and a larger selection of different brands and high-quality rice wine available for consumers at closer retail stores. Consequently, this led to increased export of Korean rice wine to other Asian counties, aided by the growing popularity of Korean pop culture in those countries.

The KFTC's contributions to the progress of relaxing regulations are also noteworthy. In order to create pro-competition market conditions, the KFTC has been continuously making efforts to correct unreasonable or excessive governmental regulations. This has led to the strengthening of corporate competitiveness through enhanced competition, more efficient resource allocation, increased consumer benefits, more efficient governmental functions and less corruption. As a classic example, starting with deregulation efforts for 10 industries in 1988 (which included the liquor, oil, pharmaceutical products and the finance industries), up to late 1990, the KFTC detected and improved anti-competitive regulation in major industries so that such industries would be able to incorporate competition and overcome the limits of previous government-led industrial structures.

It is also significant to note how active research by non-governmental research institutes contributed to competition advocacy. Prior policy research by government-run research bodies became diversified through the active participation of university or university-related research bodies, leading to enhanced diversity and creativity.

3.2. Policies for Excessive Economic Concentration

The KFTC has pursued continuous and strenuous policies with regard to excessive economic concentration. It contributed to improving the governance and business practices of large conglomerates.

Excessive concentration in Korea was created and intensified through the 30-year history of economic development since the 1960s. Although substantial growth by large conglomerates partially account for such a phenomenon, a steady push of anti-competitive economic policies (that intended to spur high growth with the limited resources available) are generally more responsible, including measures of selective support and protection of particular industries and corporations from international competitors.

Excessive economic concentration in chaebols has become a hot issue in Korea and the KFTC has been appointed to address such issues. Hence, the KFTC has launched continuous and intensive measures to deal with excessive economic concentration, including restrictions on cross-shareholding, limitations on total investment and prohibitions against debt guarantees among affiliated companies. The 1986 MRFTA revisions first introduced such provisions to Korean competition law. And thanks to these efforts, there have been considerable improvements in the external structure and business practices of large conglomerates.

Following such strong enforcement efforts in the early stages, the importance of policies regarding large conglomerates began to earn public favor after the financial crisis of the late 1990s. Demands to correct unreasonable business practices, including debt guarantees among group companies and insider trading, intensified. Moreover, the government considered excessive economic concentration and ensuing moral hazard the primary culprits for the financial crisis. Hence, at this stage, it focused on economic concentration policies that aimed to correct unreasonable business practices and corporate governance structures that centered on the head of chaebol corporations. With these measures, individual companies would be able to grow the competitive edge necessary for the global market. Further, measures to restrict illegal subsidizing among group companies were implemented with considerable results.

Since the 2008 financial crisis, the KFTC has significantly relaxed its ex-ante measures and moved onto promoting ex-post monitoring of the market through measures that require disclosure of group company status and other information.

Still, despite such success, it is hard to say that the market structure of Korea is sufficiently competitive, and further improvement of excessive economic concentration remains a major task. Yet, one cannot underestimate the role that competition policies played in countering the issues of excessive economic concentration.

3.3. Competition Policies for Large Conglomerate-SME Relationships

The KFTC has promoted the growth of SMEs and protected their rights against abuse by large conglomerates through various policies regulating large conglomerate-SME transactions.

Another distinct aspect of Korean competition policies is the measures aiming to protect economically-disadvantaged parties from abuse by large conglomerates. SMEs, distribution

industries and consumers have been disadvantaged by economic policies favoring large conglomerates, manufacturing corporations, and corporations. The market has often been distorted and SME advancement limited. Hence, competition policies have been involved in protecting the fair rights of such parties to significant results.

3.3.1. Establishing Fairness in Subcontracting Transactions

As the Korean economy grew on a base of large conglomerates, subcontracting became a general trend in industries. Despite the beneficial effects of subcontracting whereby both parties can enjoy collaborative benefits and growth, there always lies the potential of a large conglomerate exploiting a subcontractor by abusing its superior position.

To address such issues, the Fair Transactions in Subcontracting Act was enacted in 1984. Although this law initially focused on addressing the issues of exploitation of subcontractors by large conglomerates, further efforts have been concentrated on not only resolving issues of monetary disadvantages, but also normalizing unfair practices among large conglomerates and SMEs. Hence, the KFTC has pursued ex-post correction, restriction of unfair subcontracting practices, and ex-ante deterrence of such practices, while also promoting various measures to induce voluntary change in the transactional culture. For example, starting in 1990, the KFTC carried out documentary status investigations to guarantee the anonymity of subcontractors in detecting violations, which ultimately led to multiple ex-officio investigations.

Since 2007, the KFTC has been pursuing large conglomerates and SMEs to execute collaborative growth agreements. A year after a collaborative growth agreement is executed, the KFTC undertakes compliance evaluations and provides incentives like exemption from ex-officio investigations to corporations with excellent performance.

Besides regulations against unfair subcontracting practices, a dispute resolution system for subcontracting disputes has been introduced so that such disputes can be resolved by the relevant industry in a quick and self-regulated manner. This system has been well-received and has lessened the burden of the KFTC while promoting cooperation among companies.

3.3.2. Improving Unfair Trade Practices of the Large-scale Retail Industry

Conflicts between large conglomerates and SMEs are blatantly manifest in the large-scale retail industry. The KFTC has undertaken various measures to improve unfair trade practices in this industry, and currently these issues are regulated by the newly enacted Large-Scale Retail Fair Trade Practices Act.

The large-scale retail industry has grown to become a complicated and substandard industry unresponsive to efforts of improvements, compared to the growth of the manufacturing industry. Within the industry, SME manufacturers and suppliers are in a worse situation compared to large-scale retailers. This issue has recently intensified as a small number of large discount retailers dominate the retail distribution network.

The KFTC has carried out measures to improve the industrial structure of distribution and also undertaken documentary status investigations to counter issues of reporting evasion while building a system of continuous monitoring.

Laws and government releases concerned with issues of unfair trade practices by large-scale retail enterprises are seen to have eased issues of abuse of superior position and assisted in promoting fair trade in the this industry.

3.3.3. Establishing Fair Transactions in the Franchise Industry

In line with general economic growth, the franchise industry has been continuously growing, assisted by its increasing popularity. Accordingly, the Fair Franchise Transactions Act has protected fair trade between franchisors and franchisees (who are generally found to be in an inferior position) by regulating unfair trade practices by franchisors.

Specifically, the KFTC has undertaken documentary status investigations regarding franchise transactions since 2006, and launched various measures to correct structural unfair trade practices that are inherent when a franchisor holds a superior trade position against a franchisee. Also, in order to prevent victimization and encourage fair contracts, the KFTC has introduced registration of franchise prospectuses and conducted regular education and promotional programs for franchisors/franchisees so that the Fair Franchise Transactions Act would be well-understood and properly utilized by its users.

On the other hand, when a dispute arises between a franchisor and franchisee, there is a dispute resolution process available for quick resolution. More than 60% of all such disputes are resolved through this venue.

All these various measures have contributed to the advancement of the franchise industry and protection of franchisees.

3.4. Consumer Policies

The KFTC has contributed to protecting consumer rights, as exemplified in its operation of the Adhesion Contract Act. The KFTC provides a uniform platform for consumer policies to be pursued in harmony with competition policies. This line of policy has been implemented to protect appropriate consumer interests as the economy grows.

The KFTC is dedicated to establishing consumer rights and power to enhance market competition by adopting and operating consumer protection programs, an aspect of the economy that had been overlooked in previous supplier-focused growth periods.

The KFTC's most significant contribution in this area has been the Adhesion Contract Act that corrects and deters the inclusion of unfair terms in contracts fixed and offered by corporations. Since 2008, the KFTC has inspected approximately 700 adhesion contracts in the fields of bakeries, restaurants, residential rentals and college application fees and other daily items, to find and correct 606 cases of unfair terms of contract. In addition, the KFTC has introduced and widely publicized a series of Standard Terms of Adhesion Contracts since 1995 to prevent consumer victimization due to unfair terms in adhesion contracts.

In 1999, the KFTC upgraded a provision in the MRFTA to a separate law, the Fair Labeling and Advertising Act, to help consumers make informed and rational choices based on accurate information. This Act requires certain information deemed important to be mandatorily included when advertising.

Consumer policies were originally regulated by the Financial Planning Board but the KFTC has taken full charge since 2007 to enhance the effectiveness of consumer policies in combined synergy with competition policies. Accordingly, the KFTC intervenes in all issues of consumer protection and also supervises the Korea Consumer Agency, an independent body in charge of consumer protection. These measures have laid the groundwork for a comprehensive system that pursues the realization of consumer rights.

2013 Modularization of Korea's Development Experience
Korea's Developmental Experiences in Operating
Competition Policies for Lasting Economic Development

Chapter 2

The Introduction of Korean Competition Policies: Background and Necessity

1. The Process and Background of Korea's Economic Development
2. Major Process of the Introduction of Competition Policies
3. Standards of Economic Development and Enforcement of Competition Policies

The Introduction of Korean Competition Policies: Background and Necessity

1. The Process and Background of Korea's Economic Development[5]

Even from the very beginning of the modern Korean government in 1948, the nation claimed to support capitalism. However, Korea was lacking the basic capital necessary to start a capitalist market economy. Hence, from its start, Korea allocated major industries to state-owned enterprises, but then the Korean War (1950~1953) destroyed whatever industrial base it had managed to construct. As a result, the government chose to cultivate an economic system managed by heavy state intervention.

From the early 1960s, the government chose to reconstruct the underdeveloped economy by applying high-growth and export-focused economic growth strategies. The Five-year Economic Development Plan initiated in 1962 pursued an imbalanced-growth strategy through intensive support of a small group of enterprises that would eventually grow into large conglomerates. This line of policy was successful and led to rapid economic growth in Korea.

However, as a result of such imbalanced-growth strategies, and as the economy grew, monopolistic market structures and excessive economic concentration became intensified and serious imbalance between industries and social classes became apparent. In the early stages of Korea's economic development, large conglomerates were able to solidify

5. This section has been adapted and supplemented based on the relevant sections concerning the introduction and process of Korea's economic development in the following sources: Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 20 years* (2001); Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 30 years* (2011).

their positions due to various factors, including: firstly, selective governmental support of particular manufacturing industries (such as machinery, chemistry, oil and steel) in the process of the Five-year Economic Development Plan leading to formation of a new group of large conglomerates; secondly, successful enterprises accelerating growth by acquiring the assets, international loans and governmental support of failing enterprises; and thirdly, boom in land development and increase of real estate prices leading to the emergence of large construction and cement conglomerates.

From a competition policy standpoint, large conglomerates were able to monopolize their respective markets through such process, starting in the early stages of development. And in order to reproduce their monopolistic profits, large conglomerates began to dominate distribution networks and form trade associations to control the market (through measures like manipulating resale prices). In addition, they attempted to block new SME competition from entering the market and did not hesitate to price-fix.

Amidst rising criticism regarding such issues of monopoly materializing in the process of high economic growth, the 1963 3-Powder case[6] emerged, leading to calls for the introduction of competition policies in Korea. However, this initial attempt was foiled by opposition from enterprises and governmental policies prioritizing economic growth.

In the 1970s, strong industrial policies were launched, based on promotional policies for the heavy and chemical manufacturing industry. In this process, various preferential investment incentives, such as long-term financial funding and tax incentives, were mostly provided to large conglomerates that already had a capital base. As the capital growth of certain conglomerates accelerated, they quickly diversified into different types of industries and the number of their affiliated companies increased. Consequently, the number and scale of complex large conglomerates increased and their reach began to extend to almost every major industry including, manufacturing, distribution, construction and financial industries. In the 1970s, there were only 126 affiliated companies to 30 large conglomerates but this quickly increased. Due to heavy and chemical manufacturing industry promotion policies, the portion controlled by the 100 largest conglomerates rose from 29% in 1970 to 46% in 1980. By 1980, the added value that the 46 largest conglomerates controlled of total GDP reached 20%, a twofold increase from 1973.

On the other hand, while the Korean economy experienced the first oil crisis in the early 1970s (caused by the Middle East War), the international monetary order was shaken by turbulence in the international economy and instability of the US dollar (caused by US

6. This case involved a small number of large conglomerates that manufactured daily items (such as cement, flour and sugar, etc.) forming monopolistic markets and collectively fixing prices to exploit consumers and harm the market.

governmental efforts to fund the Vietnam War). Furthermore, countries with valuable natural resources formed cartels and controlled the supply and prices of such natural resources on an arbitrary basis. Accordingly, Korea faced instability in prices and a weakening of its international balance. To counter such economic difficulties, fundamental solutions for inflation and an increase of economic efficiency moved to the forefront. Hence, free competition among corporations was emphasized and led to public support for the enactment of competition laws. The political democratization efforts at the time also provided an advantageous platform for such purposes.

2. Major Process of the Introduction of Competition Policies

2.1. Discussions and Mistakes in the Early Stages of Introduction

In 1961, right before major economic development policies were launched, the Korean government enacted the 'Temporary Act for Price Control' which attempted to control the prices of daily items (such as rice, barley, coal and fertilizers) that were in serious shortfall.

As the 3-Powder case emerged in the early stages of economic development, persistent price instability, unfair practices by large conglomerates and excessive economic concentration in chaebols became a major social issue. Hence, the Economic Planning Board produced a first draft for a competition law in 1964 that focused on regulating unreasonable prices, terms of transactions, and restricting cartels, in pursuit of price stabilization. From then to the early 1970s, the enactment of competition policies was attempted each time similar issues emerged. However, these initial efforts were primarily alternatives adopted to promote price stabilization and were somewhat distant from the original intent of competition laws (which are generally perceived to be to establish economic order in the markets and enhance competition). These efforts are significant in that they were the roots of Korean competition policies that were required during that stage of economic development. At this point, the government's willingness to enact competition policies was not strong, generally reflecting the notion that Korea's economic conditions were too premature for an enactment of competition laws. Concern over potential decline in investment incentives with the enactment of a new competition law, along with the general acceptance of monopolies as a necessary evil for economic growth, usurped repeated attempts to legislate competition laws.

With the oil crisis in the 1970s causing economic difficulties in the Korean economy, discussion of the harmful effects of monopolies and relevant countermeasures became serious. A key criticism addressed the issue of constant price increases by monopolistic/

oligopolistic enterprises (supposedly based on elements of non-price related competition) at the expense of rising inflation.

Accordingly, in March 1973, the government enacted the 'Price Stability Act' and attempted to address the issue by controlling the prices of products and other services, such as real estate rental rates. Later, when the limitations of such superficial measures emerged, the government incorporated certain elements of competition policies into the 'Price Stability Act'. Thus, the 'Price Stability and Fair Trade Act' was enacted in 1975, in replacement of the 'Price Stability Act'. According to this revised law, price control could be controlled in a flexible manner, while anti-competitive acts and unfair trade practices were to be specifically regulated so that market functions could work to stabilize prices. Hence, competition policy-related provisions for mandated price reports by monopolistic enterprises, restrictions on cartels and prohibitions against unfair trade practices (like intentional control of supply) were incorporated into the new legislation.

Still, the revised Price Stability Act was operated with a greater focus on stabilizing prices rather than promoting competition policies. Rather than restricting the formation of monopolies, it concentrated on case-by-case restrictions of issues that had surfaced in the context of price instability. Despite providing for regulation of cartels, actual efforts for detection and correction were not strong enough and cartels formed through trade associations were not even covered by the revised law.

2.2. Political Change and the Enactment of the MRFTA

While the harmful effects of monopolies persisted, the second oil crisis occurred in 1979 leading to even greater price instability. In addition, Korea experienced drastic political change starting in late 1979, partially in response to demands of democratization, while social perceptions regarding economic development policies and solutions for price stabilization sharply changed. The limitations of governmental capacities to control prices became obvious and the harm of non-apparent anti-competitive acts such as cartels and governmental-intervention were deemed to be causing many of the present issues. Many believed that the new order of political democratization should be reflected in a new economic order.

The new government that came to power in 1980 took such public opinion into serious consideration and strived to gain public support by offering a blueprint for reform. Accordingly, the government announced a new direction for economic policies with the

revision of the Constitution[7] in 1980. The new Constitution established that "economic order respects the economic freedom and creativity of individuals" as a basic principle, and then went on that the state may "regulate and control economic affairs as deemed necessary" to "realize social justice and develop a balanced national economy". Specifically, it was added that the government would "regulate and control the harmful effects of monopolies".

Based on such constitutional support, the government limited the scope of the 'Price Stability and Fair Trade Act' to regulation of public utility charges, and then separately enacted the MRFTA in December 1980.

Thus, the enactment and implementation of the MRFTA was the product of a long history of discussion and mistakes in pursuit of resolving issues of economic difficulties. More than anything, political resolve supported by public consensus, against the backdrop of major political democratization, was the primary driver. As a result, the KFTC was able to receive strong governmental support by being installed within the Economic Planning Board that was in comprehensive charge of economic development policies. This led to substantial results in enforcement and advancement.

2.3. Supplemental Legislation including the Fair Transactions in Subcontracting Act and Adhesion Contract Act

The Fair Transactions in Subcontracting Act, which works in conjunction with the MRFTA to protect SMEs against abuse from large conglomerates, was established around the same time. In an economy where growth is concentrated in large-conglomerates, the portion that subcontractors represent in the manufacturing system is quite large. In 1976, the number of SME manufacturing companies engaged in subcontract transactions consisted of 19.7% of the total number of SME manufacturing companies, but increased to 34.7% in 1981. Proportionally, the volume of SME turnover generated by subcontracting transactions also rose to 28.8% in 1981 compared to 20.4% in 1976.

The rise in the weight of subcontracting transactions showed that SME dependence on large conglomerates had increased. It also meant that policies promoting collaborative growth based on mutual cooperation were needed in the context of subcontracting transactions.

7. CONSTITUTION OF THE REPUBLIC OF KOREA Article 120 (basics of economic order, regulation of monopolies and oligopoly).
(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creativity of individuals in economic affairs.
(2) The state may regulate and control economic affairs as deemed necessary, for realization of social justice and balanced development of the national economy that will fulfill the basic needs of all its citizens.
(3) The state may regulate and control the harmful effects of the practices of monopoly and oligopoly. (8th revision, October 27, 1980).

From this perspective, restricting unfair subcontracting transactions and establishing fair transactional order for subcontracting became a critical issue in enhancing the competitive edge of SMEs and promoting balanced development of the economy. As a result of such concerns, the Fair Transactions in Subcontracting Act was enacted in 1984. This can be understood as interest in competition policies extending into protection in subcontracting transactions.

Interest in competition policies also extended into protection of consumers against abuse by large-conglomerates. Foremost, it was pointed out that regular citizens (that lacked legal knowledge and to whom protection of normal judicial processes were not readily available) were being exploited by adhesion contracts unilaterally provided to consumers by large conglomerates. Consequently, the Adhesion Contract Act was enacted in 1986 by which the KFTC gained the authority to uniformly correct unfair adhesion contracts.

Through the enactment of the MRFTA, Fair Transactions in Subcontracting Act and Adhesion Contract Act, the basic system and legal framework for Korean competition policies were completed.

3. Standards of Economic Development and Enforcement of Competition Policies[8]

3.1. Goals and Levels of Competition Law Enforcement in Developing Countries

Competition laws can be categorized into the following categories of style: US-style, European-style or developing country-style (Asian-style). US anti-monopoly laws almost solely focus on economic efficiency and enhancing consumer welfare. On the other hand, European competition laws emphasize competition as a process in conjunction with issues of economic efficiency, internal market integration, protection of SMEs and various other aims. However, EU competition laws have become significantly more similar to the US model (focused on economic-efficiency) after its modernization efforts in 2004.

8. Refer to the following: Hwang Lee, *Globalization and Development of Korean Competition Laws*, in Competition Policy in Korea, Hyeongseol Publishing Company (Chang Ho Yoon, Ji Sang Chang &Jong Min Kim eds., 2011), pp. 387~428.

Although not considered a major international force in competition enforcement, the approach to competition laws by increasingly-influential Asian developing countries is different from those of the US and EU.[9] While essentially enforcing against acts that affect market competition and consumer welfare (pursuing traditional measures of prohibiting abuse of market-dominating positions, and restricting anti-competitive mergers and cartels), the level of sanctions have been considerably low. Also in scope, enforcement efforts have often been concentrated on regulation of unfair trade practices which are judged based on abstract determinations of unfairness. Further, it is general practice to pursue non-economic goals such as economic welfare, SME protection and fairness of transactional order in the context of competition policies.[10] According to the ICN (International Competition Network) the goals of competition laws reach 10 different variations in the international community.[11]

From the vantage point of Western traditional competition laws where consumer welfare is prioritized, such competition policies could lead to a pursuit of superficial justice becoming the major focus instead of promotion of market competition in the economy.

However, when economic efforts are concentrated on macroscopic development, the microscopic effects of vitalizing market competition cannot always be clearly seen. The problems that the competition policies of developing economies need to address are also different from those of developed economies. Namely, the competition policies of developed countries pursue stabilized operation of the economy, enhancement of consumer welfare and creation of jobs. In comparison, developing countries tend to focus more on fast economic growth. Additionally, in developing countries that lack technology and capital, competition policies and free competition being guaranteed to enterprises in superior positions may undercut the autonomous development of the national economy.

It is further pointed out that the lack of human, capital and systematic foundations necessary to enforce competition laws, in combination with the inefficiency of examining countless violations with such scarce resources, create distinct circumstances for developing

9. Many Asian developing countries, including Malaysia, Singapore, India, Indonesia, Vietnam and Thailand, have adopted and are in operation of competition laws. The remaining countries who are ASEAN members, such as Cambodia, Laos and the Philippines, are aiming to adopt competition laws by 2015.

10. Refer to the research by the American Bar Association that categorizes the policy objectives for competition law in different countries into three categories. American Bar Association, *Reports on Antitrust Policy Objective* (2003), pp. 11~19, available at http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf.

11. International Competition Network, *Report on the Objectives of Unilateral Conduct Laws*, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, Presented at the 6th Annual Conference of the ICN(2007), pp. 5~38, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

countries. Apart from this, many of these developing countries are in dire need of democratization and social unification. As a result, some criticize the idea of implementing competition laws solely in pursuit of short-term economic efficiency.

On the other hand, others argue that, in contrast to Korea's experience since the 1970s and unlike the past, globalization and the international economy of the 21st century have made the implementation of competition laws and policies at the earlier stages of economic development more advantageous for the long term. Different from the past when open trade was non-existent, in the current environment of WTO trade liberalization and internal market integration, government-led imbalanced growth or export-focused economic development cannot achieve its intended effects. Therefore, it is argued that developing countries need to establish market systems in line with developed countries along with a system of competition policy that can control it. With the successful operation of such systems, developing countries can draw foreign investment, compensate for its lack of resources, and build a capital base.

3.2. Korea's Experience: Economic Development and Competition Policy

The role and the level of contribution of competition laws in a developing country's economic development is a considerably controversial issue. With many developing countries preferring Korea's line of strong industrial policies, a full-scale adoption of competition laws is a rather difficult challenge, especially when lacking confidence in the results that may be produced. This is all the more true for developing countries that lack normal functioning markets. The international circumstances that developing countries face today are clearly different from that of the 20th century, and now economic development needs to concentrate more on quality rather than quantity.

In the case of Korea, export-focused and imbalanced-growth economic development policies were initially implemented through government-led initiatives. In this process, many discrepancies and problems emerged, and competition policies were constantly checked and utilized as a means to overcome such problems through enactment of, change in the direction of, or change in the level of enforcement of competition laws. As a result, competition policies have played an important role in complementing macroscopic economic policies to the point of competition policies currently being a major force in Korean economic policy. However, many argue that the developmental experiences of export-oriented economies like Korea and Japan cannot be directly applied to developing countries.[12]

12. Refer to Kenneth M. Davidson, *ECONOMIC DEVELOPMENT, COMPETITION, AND COMPETITION LAW, AAI Commentary* (2011), http://www.antitrustinstitute.org/sites/default/files/Davidson%20Economic%20Development.pdf.

In summary, Korean competition policies were born and developed in the role of correcting and complementing economic development policies, based on the success of industrial/economic development policies customized to Korea's circumstances. Eventually, this led to competition policies providing an alternative in overcoming economic difficulties.

Ultimately, from the standpoint of a developing country pursuing economic development, the most important issue is to evaluate its circumstances and implement appropriate economic development strategies. If such strategies do not incorporate free market principles in line with developed countries, competition policies (as the essence of a market economy) can help correct and complement the problems that inevitably arise. Constant examination of the problems and research of the alternatives available should highlight the importance of competition policies. Korea's experience of competition policies shows economic crises arising when competition policies fail to fulfill their role to complement and substitute and then eventual prevail over such crises through implementation of competition policies. This is true for the economic crises of the late 1970s and late 1997. A similar process contributed to overcoming economic difficulties surrounding the 2008 global financial crisis.

Furthermore, the importance of national champions (that may be able to spread a positive effect on the domestic economy) and international competitiveness have been emphasized in this age of global competition in many Asian countries, including Korea. While such theories have valid aspects, from a competition policy perspective, they can be dangerous. If domestic consumer welfare is sacrificed in pursuit of such industrial policies, the benefits and disadvantages must be closely evaluated and compared. In Korea, recent studies show that the trickle-down effect of large conglomerates has drastically decreased and that the benefit of such growth largely remains with large conglomerates. Hence, the effects of industrial policies differ in each stage of economic development, and the countermeasures need to change along with them. The importance of competition policies can be further explained as providing an analytical framework to carefully and accurately deal with economic circumstances.[13] In the end, it is critical to understand and utilize the mutual complementary effects between economic development policies (or industrial policies) and competition policies.

13. A successful case of industrial policies in the analytical framework of competition policies is the case of Airbus Project and EU governmental support. As part of collaborative R&D policies (carried out since 1984), the EU implemented promotion strategies for a national champion in the aviation industry. This case gathered interest as there was a remarkable contribution of competitive analysis in designing and pursuing this successful project. For specific discussion, refer to Kab Soo Lee, *The 3 Case Studies: The Theory and Practice of EU R&D Policies*, The Journal of Contemporary European Studies, Vol.25 No.2 (2007).

Chapter 3

The History of the Development of Korean Competition Policies

The History of the Development of Korean Competition Policies[14]

1. The Dawn of Korean Competition Policies

Please refer to the initial development, related issues and legislative history of the MRFTA discussed in Chapter Two of this report.

2. The Launch of the Korean Competition Policies (1981~1986)

When dividing the history of Korean competition policies into different phases, the first phase refers to the period between 1981 to 1986 in which the MRFTA was first enacted and implemented. This period was devoted to building the enforcement system and it was too early for competition policies to produce significant results.

Unlike prior regimes, however, at least on its surface, the new MRFTA did not list price control as an immediate objective. The legislative purpose is listed as "to promote fair and free competition, to encourage thereby creative enterprising activities, to protect consumers and to strive for balanced development of the national economy, by preventing any abuse of market-dominating positions by entrepreneurs and any excessive concentration of economic power, and by regulating undue collaborative acts and unfair trade practices". Hence, this period can be understood as a preparatory stage for full-blown transition into the pursuit of such goals.

14. This section has been adapted and supplemented based on the relevant sections in the following sources: Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 20 years*(2001); Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 30 years* (2011).

3. Rise of Korean Competition Policies (1987~1994)

Despite the enactment of the MRFTA, it took considerable time before serious enforcement started to take place. Up till the early 1990s, amidst a lack of belief in market competition and weak enforcement, serious competition law enforcement was rare. Instead, enforcement mainly focused on regulation of unfair acts, misleading advertisements and unfair subcontracts, intending to actualize fair trade through protection of SMEs and consumers. A significant achievement of this period was raising the awareness of the need to prohibit cartels.

At this phase, it was important that there was a growing consensus that the harmful effects of large conglomerates were intensifying and needed to be corrected. Under previous government-led economic development, large conglomerates were the driving force of the economy and their growth was intensely supported by the government. As the economy grew in scale and the economic system transitioned into a market-based system, the negative aspects of chaebols (including interference with market principles and social equity) started to attract more attention. To counter such issues, the government introduced various provisions regarding excessive economic concentration (which included measures to remedy the harmful effects of chaebols) in 1987. This is understood to be a major aspect of Korean competition law ever since.

From a historical standpoint, 1987 was the year when a long history of political authoritarianism (that started in the early 1960s) ended in two stages: first, with the termination of a dictatorial government in late 1979; and subsequently followed by the termination of a transitional authoritarian government. With new democratic political order at hand, the harms of excessive concentration became apparent and new measures that would bring about free and fair economic order were actively sought. In 1987, the Constitution of 1980 was fully amended into its current form and the old Article 120 was replaced by the present Article 119[15] that is now named "the Article for Economic Democracy". This Article provides a constitutional foundation for current competition policies. Accordingly, public consensus agreed that the freedom and creativity of individuals should be respected, and that deregulation would be necessary as the economy grew in scale. Against this backdrop, the new role and function of the KFTC became significant. Furthermore, as the Korean

15. Article 119
(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.
(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power, and to democratize the economy through harmony among the economic agents. (9th revision, October 29, 1987).

society opened and became globalized, Korea began to actively participate in international discussions of competition policies.

4. Advancement of Korean Competition Policies (1995 ~1997)

Although the Korean economy continued to grow, by the mid-1990s it became apparent that previous government-led economic development strategies had reached its limits. With such consensus at hand, the new administration that came into power in 1993 expanded political democratization, and launched other socio-economic changes, like introduction of self-government by local entities, deregulation and open trade. In this process, competition policies were expected to play an important role in supplementing previous industrial-focused economic policies.

In line with such change, in 1995, the KFTC separated from the Economic Planning Board and became a central independent agency as part of a comprehensive government restructuring. Moreover, in 1996 its status rose to an agency attached to the Prime Minister's office and its Chairman became a member of the cabinet who could offer his opinion on any issue of economic policy at cabinet meetings. In addition, its role was extended to consumer protection and regulatory reform.

As the status and authority of the KFTC was strengthened, procedural measures securing KFTC intervention on issues of anti-competition were installed, including advance consultation being required of other administrative bodies with respect to their anti-competitive legislation and prior notice being required for any anti-competitive rules or announcements. The previous exemption of the finance and insurance industries from the MRFTA was also repealed.

With such a rise in status, the KFTC could wield stronger powers to monitor and sanction unfair trade practices. In particular, the KFTC newly installed an investigatory unit to exclusively deal with various unfair trade practices (including unreasonable subsidizing of affiliated companies within chaebol corporate groups), strengthening its investigatory functions. The KFTC also reinforced its quasi-judicial functions by installing a legal director general who would enhance the legality of KFTC decisions through expert legal review, and by implementing a system for legal procedures.

Although the KFTC was monitoring unfair trade practices and becoming a quasi-judicial body, at the time, the primary focus of competition law enforcement remained in control and correction of the excessive economic concentration prevalent in the market.

Overall, the heightened status of the KFTC and reinforcement of its functions signified the conversion of governmental economic policies from protection, support and regulation of industries to promotion of freedom and competition. Yet, this transition was not sufficient for the needs of the Korean economy at the time, as competition policies were hesitant to move to the forefront. Unfortunately, this weak transition became an underlying cause of the late 1997 financial crisis.

5. The Financial Crisis and the Settlement of a Market Economy (1998~2007)

The financial crisis of late 1997 holds great significance for the progress of Korean competition policies. Against the backdrop of this major economic crisis, a new liberal administration took power, eager to adopt new policies distinct from past administrations. Such circumstances obviously affected competition policies. Hence, there was a total overturn of previous government-led growth policies. The new focus was on enhancing market freedom and democratization, and the MRFTA rose to the center of such new economic policies. Competition policies at this stage concentrated on regulation of large conglomerate groups and enforcement of competition policies focused on efficiency.

The new administration started amidst a major economic crisis and pointed to the longtime practices of elusive business management and excessive expansion driven by loans, as the main culprits of the financial crisis. Hence, it proceeded to launch measures for the whole large conglomerate industry. These measures were put on center stage and strongly enforced as a means to overcome the financial crisis. Externally, this was further necessary because the IMF and foreign investors demanded change in corporate government structures, improvement of financial management, and incorporation of other various free market measures as a condition to financial support.

The government and corporations agreed on five principles to overcome the crisis at hand. They were: improvement of financial management, focus on core business, strengthening management responsibility, restrictions of cross-guarantees, and enhancement of transparent business practices.

Due to such efforts, Korea quickly rose to global standards and changed its economic policies to reflect free market principles. Also, as Korea started to participate in constant international policy exchange with international bodies such as the OECD or WTO, the demand for enforcement based on the original intent of competition law (focused on efficiency and consumer welfare) grew, as opposed to previous competition enforcement (more focused on fairness in transactions). Yet it was still too early to say that any fundamental change had occurred.

Up to the mid-2000s, the KFTC made efforts to limit its intervention in cases of private disputes, and concentrated its limited resources on efforts that would produce the greatest outcomes. In this process, interest grew on the development of legal enforcement based on economic analyses and advanced legal theories. It was only natural that judicial review of KFTC enforcements grew stronger. As the number and scale of KFTC enforcements increased, the interest of attorneys at large law firms also increased. Accordingly, such external bodies and experts acted as a balance and check for KFTC enforcements. Hence, active judicial review of KFTC enforcements has contributed to raising the level of competition policies.

6. The Spread of Freedom for Market Participants (2008~)

Since the occurrence of the global financial crisis, the KFTC has been focused on maturing the market economy and promoting balanced growth by enhancing the freedom of market participants, including corporations and consumers. Hence, previous measures regulating large conglomerates have weakened. On the other hand, measures aiming to establish democratic shareholder-centered corporate governance by tweaking corporate law have become a much-discussed alternative. Restrictions on total amount of investments for large conglomerates have been repealed and the number of large conglomerates subject to regulation has been reduced. Restrictions on holding companies have also been relaxed and restraints of excessive economic concentrations have lost much of its significance. Recently there is renewed interest in regulating unreasonable subsidizing of affiliated companies within large conglomerate groups in a backlash against the side effects of such deregulation.

The KFTC has shown special interest in dealing with unfair practices between large conglomerates and SMEs to promote a healthy companionship among the parties and to deal with issues of economic polarization. It also aggressively pursues policies of collaborative growth for large conglomerates and SMEs.

In addition, with respect to consumer policies, the KFTC has taken up a proactive role in strengthening consumer rights rather than remaining at protecting such rights, with the intention of enabling consumers to grow the power to defend their own rights.

2013 Modularization of Korea's Development Experience
Korea's Developmental Experiences in Operating
Competition Policies for Lasting Economic Development

Chapter 4

The System of Korean Competition Enforcement

The System of Korean Competition Enforcement

1. Overview[16]

The KFTC is the principal government agency in charge of enforcing competition policies. Although the Korea Communications Commission and the Financial Services Commission have enforced certain aspects of competition policies in their respective industries, they lack the expertise to carry out serious competition enforcement.

Although the prosecutor's office may file criminal charges against offenders of competition law apart from the KFTC, such criminal prosecution is not active. On the other hand, private enforcement through individual legal actions filed by corporations or individuals is also very important. Yet, such private actions are not active due to high attorney fees and difficulty in showing proof.

Hence, it is safe to say that Korean competition policies are primarily enforced by the KFTC while the courts and other governmental bodies have recently started to contribute to the vitalization of private enforcement.

16. This section has been adapted and supplemented based on the relevant sections concerning enforcement systems in the following sources: Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 20 years* (2001); Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 30 years* (2011).

2. The Korea Fair Trade Commission

2.1. Legal Characteristics, Authorities and Procedures

The KFTC is a central governmental agency that operates under the umbrella of the Prime Minister's Office to ensure its independence. As an independent regulatory commission, the KFTC may enforce the MRFTA and related laws while also functioning as a quasi-legislative (the KFTC may establish various legal standards) and quasi-judicial body (the KFTC may make decisions that include initial corrective measures to be taken). This is similar to the case of the Federal Trade Commission of the US or Japan Fair Trade Commission but in contrast to EU competition authorities.

As a rule, the MRFTA can be applied to any industry excluding the exceptions specified in its provisions. While past provisions excluded the finance and insurance industries from application of the MRFTA, such exemptions were repealed in 1999.

Distinct from other administration actions, administrative proceedings under the MRFTA are guaranteed a system of due process from investigation to final administrative decisions, in line with judicial procedures. Deliberations are based on quasi-judicial principles for fair judgment, right-to-defend and protection of all parties involved.

When a violation is reported or detected, an examiner of the relevant department in the Secretariat investigates the case, and if a violation is found, an examination report is submitted to the Commission of the KFTC. Before any decisions are made, KFTC proceedings provide the content of the examination report to the respondents and also give them the opportunity to voice their opinions. Further when the case reaches the stage of decision, the KFTC strives to maintain fairness of its administrative proceedings to meet the standards of adversarial legal proceedings, in aspects of its legal process and interpretation of relevant laws. If a party disagrees with a decision, it may file an appeal with the KFTC or in court. The courts have assigned a special division for competition law cases in the Seoul High Court for expert judgments on such cases of appeal.

2.2. Authority

The MRFTA specifies that the KFTC holds authority on the following matters: 1. matters related to prohibiting the abuse of market-dominating positions; 2. matters related to restricting mergers and preventing the concentration of excessive economic power; 3. matters related to prohibiting unjust concerted acts and anti-competitive practices of trade associations; 4. matters related to prohibiting unfair trade practices and resale price maintenance; 5. matters related to prohibiting unjust international contracts; 6. matters

of competition advocacy, including the consultation and adjustment of any legislation, regulation, or administrative measure with an anti-competitive effect; and 7. matters conferred to the Commission by other legislations. The KFTC also holds authority over laws related to SME protection including the Fair Transactions in Subcontracting Act, Fair Franchise Transactions Act, Large-Scale Retail Fair Trade Practices Act and Omnibus Cartel Repeal Act.

The KFTC is also a primary authority on various consumer policies and laws, including the Consumer Protection Act, Adhesion Contract Act, Fair Labeling and Advertising Act, Installment Transactions Act, Door-to-Door Sales Act, Consumer Protection in Electronic Commerce Act and Product Liability Act.

2.3. Organization

The KFTC consists of a Committee, the decision-making body, and a Secretariat, the working body.

2.3.1. The Committee

The committee has nine members, including one chairman and one vice-chairman, and four commissioners who serve as non-standing commissioners. The committee chairman and vice-chairman are recommended by the prime minister and appointed by the president to serve a term of three years. Standing commissioners are appointed as high-level government officials. The chairman represents the KFTC and if the chairman is unable to perform his duties, the vice-chairman acts on his behalf. When both chairman and vice chairman are both unable to perform their duties due to unforeseen events, the standing commissioners shall act on their behalf according to seniority of appointment.

Commission meetings may be either Full-Commission meetings or Sub-Commission meetings. Full Commission meetings consist of all commissioners and have authority over the following matters: 1. Enforcement of Legislations, Presidential Decrees, Regulations, By-Laws, and Guidelines that fall under the jurisdiction of the Commission; 2. Petitions; 3. matters that are not decided by a Sub-commission Meeting, or those that are sent to the Full-commission Meeting by a Sub-commission Meeting; 4. Issuance or amendment of Regulations or Guidelines; 5. Matters that have significant effect on the economy, or those that are deemed necessary to be dealt by a Full-commission Meeting. The proceedings of a Full-commission Meeting are presided over by the chairman, and resolutions are based on a majority vote of the current members.

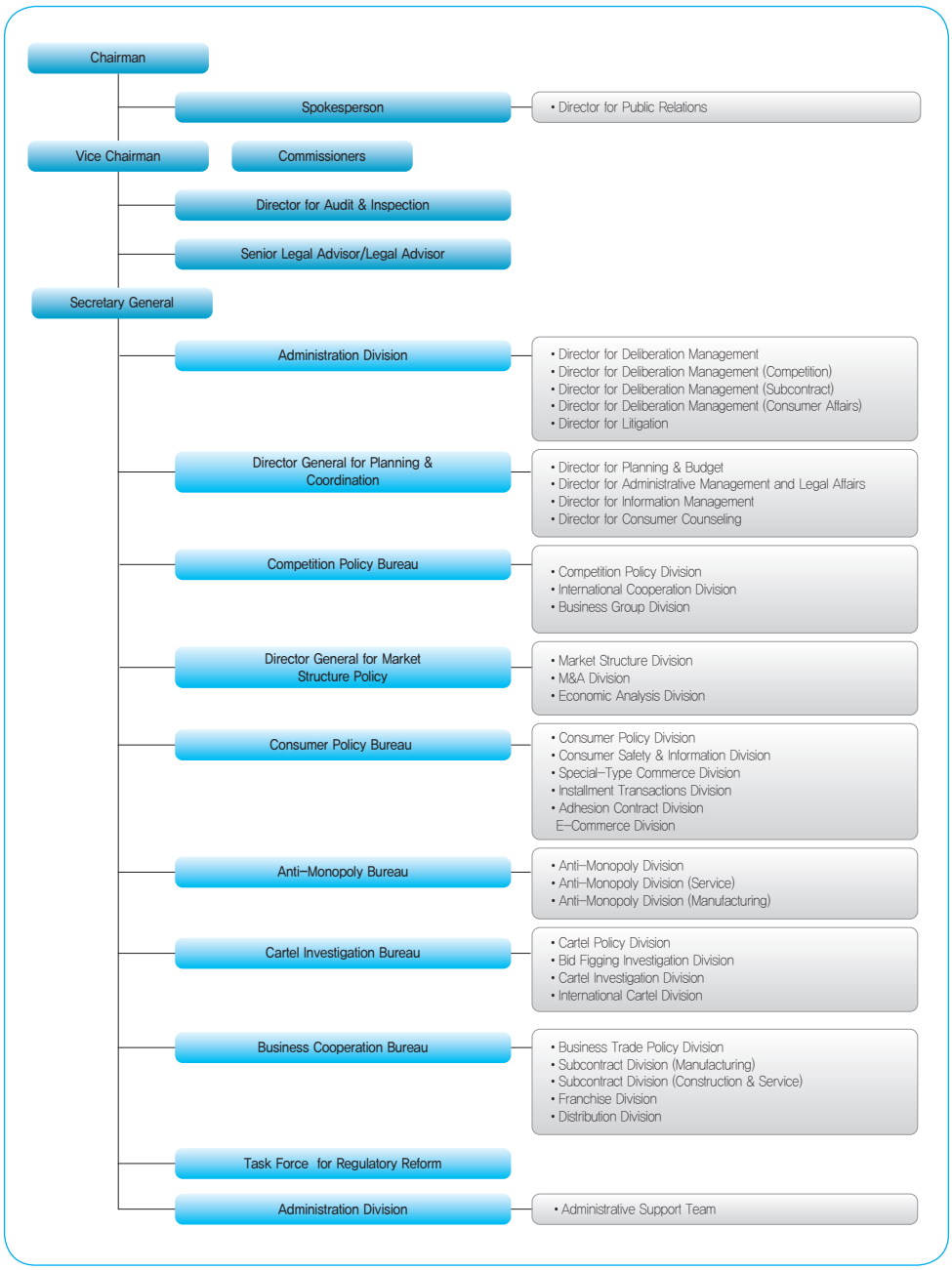
A Sub-Commission meeting consists of three commissioners, including one standing commissioner. There can be up to five Sub-Commissions at the KFTC. The chairman

has the authority to designate or change the relatively minor matters to be decided and deliberated at Sub-commission Meetings (and not dealt by Full-commission Meetings). The proceedings of a Sub-commission Meeting are presided over by a standing commissioner and resolutions are based on a unanimous vote of all constituting members.

2.3.2. The Secretariat

The Secretariat is the working body of the KFTC. It has five divisions, three officers, one spokesperson, 21 departments and 11 officers (one Team), five regional offices (Seoul, Busan, Kwangju, Daegu and Daejun), and a total staff of approximately 500 (based on 2013 figures). Under the Secretariat, there are the following offices: Administrative Division, Competition Policy Bureau, Consumer Policy Bureau, Anti-Monopoly Bureau, Cartel Investigation Bureau and the Corporate Trade Policy Bureau. The spokesperson is under the direct authority of the chairman, and there is a Director for Audit and Inspection and a Director of Trial Administration under the direct authority of the vice-chairman. There is also a deputy director under the authority of the secretary general. The secretary general deals with all matters relating to the operation of the KFTC by order of the chairman.

Figure 4-1 | Organizational Structure of the KFTC (as of End of 2013)



Source: KFTC Homepage (www.ftc.go.kr).

2.3.3. History and Change of the KFTC's Organizational Structure

The KFTC was originally established under the Economic Planning Board that was in charge of all economic policies, first in the form of a department in April 1981 and then in the form of an independent body in May 1981. The Vice-Minister of the Economic Planning Board was also co-appointed as the Chairman of the KFTC. The humble body consisted of two standing commissioners, two non-standing commissioners and four employees.

Later in 1981, the chairman became a political appointee at the vice ministerial-level and total staff increased to ten.

Later, the head of the Competition Department was assisted by one Director General and two examiners who were put in charge of investigation and pre-examination of violations of the MRFTA. Five departments were installed including the Comprehensive Fair Trade Department (17 staff members), two Corporate Departments (20 staff members, collectively), Group Department (12 staff members) and Transactions Department (12 staff members). The total number of staff was 65.

In 1990, the organization and function of the KFTC was substantially expanded. The Competition Department was abolished and incorporated into the Secretariat. Total staff increased to 221 (including 57 in regional offices) and three regional offices were newly established. Even when governmental restructuring efforts for a 'small but effective government' were pushed, the KFTC was the only administrative agency to expand by separating from the Economic Planning Board as an independent body. The current framework of the KFTC was established at this time.

2.4. Case Proceedings

At the start, the KFTC was merely a review and decision body under the Economic Planning Board, and the Minister of Economic Planning held all final authority over all its decisions. Also, while the KFTC did hear and put into consideration a respondent's arguments in making determinations on cases, it had not fully adopted an adversarial legal system. Hence, a respondent's right-to-defend was not entirely protected. Subsequently, as the KFTC's powers and sanctions increased, it started to incorporate elements of an adversarial system, and guaranteed and systemized a respondent's right to defend.

In 1996, the KFTC enacted procedural rules for cases and newly established sub-committees of three commissioners (separate from the full commission) to improve the deliberation process.

In hopes of promoting a strong adversarial legal framework, the KFTC also installed a separate Office of Trial Administration to assist commissioners in the deliberation process and be responsible for the administrative procedures of a decision.

In 2002, the KFTC adopted a compliance program that gave enterprises with a good record of compliance the benefit of a reduced level of sanctions, if violations were later found. In 2006, various measures of due process were installed to enable in-depth examination of complex cases and enhance the appropriateness and fairness of decisions. Many other measures aimed to protect a respondent's right to defend including the right to review and reproduce examination reports. Accordingly, the case process at the KFTC is currently assessed to be on par with the judicial process which guarantees the right-to-defend based upon a sophisticated adversarial system. This was possible due to the KFTC's efforts to balance administrative efficiency and quasi-judicial fairness in dealing with countless cases. Yet, it is a constant struggle to keep its procedures at a level maintained by the courts, especially when considering its material limitations and its priorities in pursuing efficiency. Hence, balancing such fairness and efficiencies remains one of the KFTC's most critical tasks.

Cases at the KFTC proceed in the stages of examination, deliberation and resolution. Under the MRFTA, anyone can report illegal conduct to the KFTC, as is the case for the majority of cases. However, many cases of great significance are brought directly by the KFTC.

When a possible violation of law is suspected, reported or alleged, the Secretary General will order the case to open, and an examiner will launch an investigation of facts and pre-examination into the issue before full examination begins. If the examiner finds the need for a formal examination, a decision to formally open the case is made. Once an examiner decides that legal measures are required, he will produce an examination report and present it to the Committee. The report is also sent to the respondent who is given an opportunity to submit any objections or comments on the report.

In the subsequent deliberation process, commissioners review the report and any opinions put forth by the respondent. If a violation is duly recognized, the KFTC will impose corrective measures such as surcharges or a cease and desist order and may refer cases to the Prosecutor's Office for criminal prosecution.

2.5. Corrective Orders and Sanctions

To enforce compliance of corrective measures, the KFTC utilizes various legal schemes, including prohibition orders (such as prohibition orders for certain acts), corrective measures (including measures to correct the circumstances, restore competition and prevent recurrence), announcements of violation of law, monetary sanctions by administrative agencies (such as surcharges), criminal penalties (such as criminal fines or filing of criminal complaints) and filing of civil damage lawsuits.

2.5.1. Corrective Measures

Corrective measures are used to correct violations of law and deter repeat violations. When a violation of the MRFTA occurs, free and fair trade in the market can be distorted or destroyed, leading to the need to restrict such violations and restore competition in the market to normal levels.

The KFTC utilizes various forms of corrective measures. When there is an obvious violation but there is not enough time to take the violation through a full process, or when any delay would increase the damage to consumers, if the violator acknowledges its violations and clearly expresses its will to correct such conduct, the KFTC can provide a recommendation for correction to such enterprises or trade associations, as a non-binding measure.

Consent orders were introduced in 2012. Under this system, a respondent may offer to comply with a corrective measure without any acknowledgement of the illegality of its conduct to the KFTC. Such corrective measures must be assessed to be effective in restoring competition and providing victim relief. Hence, the KFTC will review, consult with other related agencies, and determine the appropriateness of the measures offered. When deemed proper, the case can be quickly closed without any determinations of illegality of the conduct at issue.

Corrective measures take different forms according to the violation at issue. Cease and desist orders are a core element in any case in conjunction with various other forms of corrective measures.

Violations against prohibitions of abuse of market-dominating positions may be subject to orders to reduce prices, discontinue the violation, announce its receipt of a corrective order to the public, or any other necessary corrective measure.

Violations against restrictions on business combinations, restrictions on holding companies, prohibitions of cross-shareholding and prohibitions of debt guarantees for affiliated companies may be subject to the following correcting orders: 1. Discontinuance of the practice concerned; 2. Disposition of all or part of the stocks; 3.Resignation of officers; 4. Transfer of business; 5. Cancellation of debt guarantees; 6. Public announcement of receipt of a corrective order; 7. Restrictions on the business method or business scope to prevent the negative effects of restricted competition pursuant to the combination of enterprises; 8. Other necessary measures to correct such violation.

Violations against prohibitions of unjust concerted practices, trade association restrictions and prohibitions of resale price maintenance may be subject to cease and desist orders, orders to announce its receipt of a corrective order to the public, or any other necessary

corrective measure. In addition to the above, violations against prohibition of unfair trade practices may be subject to an order to delete the provision at issue from the contract.

2.5.2. Surcharges

a. Overview

Surcharges are also considered an integral part of KFTC actions for the purpose of confiscating any illegal profits incurred by violations of competition law and deterring recurrence. The MRFTA first allowed the KFTC to impose surcharges for violations of prohibitions on abuse of market-dominating positions, and since then, surcharges have been expanded to all violations of the MRFTA, excluding violations of restrictions of mergers. Following the example of successful implementation in the MRFTA, surcharges have also been incorporated into many other administrative laws.[17]

Surcharges are usually imposed based on a fixed rate of sales turnover that is deemed to be affected directly or indirectly by the acts of violation at issue. When it is difficult to measure the related sale turnover, the KFTC may impose an amount of surcharge that it deems appropriate. The MRFTA sets the maximum limit for the amount of surcharge that may be imposed according to the category of violation. Within each category of violation of the MRFTA, there are three levels of surcharge rates that may be imposed depending on the seriousness and gravity of the violation at hand, but then a final decision is made reflecting the facts, degree, term, frequency of the violation at hand, along with the amount of illegal profits incurred by the violation. The KFTC may impose a surcharge not exceeding 2% of sales turnover for violations of unfair trade practices, 3% of sales turnover for abuse of market-dominating positions, and 10% of sales turnover for unjust concerted practices.

b. Trends of Surcharge Impositions according to Major Categories of Violations

Imposition of surcharges was rare until such imposition became possible for violations of unfair trade practices in 1993. Since then, the number of cases in which surcharges have been imposed has largely increased. As the KFTC revamped its enforcement efforts as a countermeasure to overcome the financial crisis in 1998, the number of cases and amount of surcharge impositions increased sharply. Efforts to curb cartels especially contributed to the amount of surcharges collected. Although the amount of surcharges collected from each individual violation of unfair trade practices is typically not large, the sheer number of cases makes the total amount of surcharges come to a considerable amount.

17. Coercive charges can be imposed on anti-competitive mergers, in place of surcharges.

Table 4-1 | Status of Surcharge Impositions for Violations of the MRFTA

(Unit: Number, Million KRW)

Year	88~92	93~97	98	99	00	01	02	03	04
Cases	11	173	62	79	45	81	82	31	89
Amount	5,743	26,023	136,113	141,704	225,465	161,654	82,798	149,619	35,839
Year	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	264	146	316	100	61	56	142	59	1,797
Amount	258,926	155,940	420,712	254,628	366,170	607,114	597,439	495,872	4,121,759

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

There have not been many surcharge impositions on cases of abuse of market-dominating positions. In those rare cases, the importance and size of the case is usually large, and hence, the ensuing surcharges are relatively high for an individual case. In the history of KFTC, the Qualcomm abuse of market-dominating position case has yielded the largest amount in surcharges for an individual case, approximately KRW 270 billion.

Table 4-2 | Status of Surcharge Impositions for Abuse of Market-dominating Positions

(Unit: Number, Million KRW)

Year	88~92	93~97	98	99	00	01	02	03	04
Cases	0	1	3	1	0	2	0	0	0
Amount	0	1,014	1,308	962	0	5,663	0	0	0
Year	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	0	1	25	0	2	4	0	1	41
Amount	0	32,490	24,176	26,616	288,225	11,104	0	424	391,982

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

The investigation, detection and level of sanctions for unjust concerted practices have increased since 1998 and hence, the number of cases and amount of surcharges have sharply increased. Currently, the amount of surcharges imposed on unjust concerted practices greatly surpasses any other category of violation.

Table 4-3 | Status of Surcharge Impositions for Unjust Concerted Practices

(Unit: Number, Million KRW)

Year	88~92	93~97	98	99	00	01	02	03	04
Cases	2	28	19	15	12	7	14	9	12
Amount	2,367	17,684	31,991	36,158	198,812	27,704	53,109	109,838	29,184
Year	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	21	27	24	43	21	26	34	24	338
Amount	249,329	110,544	307,042	205,746	52,903	585,822	571,006	398,944	2,988,183

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

Violations against prohibited activities of trade associations also fall under the category of unjust concerted practices.

Table 4-4 | Status of Surcharge Impositions for Prohibited Activities for Trade Associations

(Unit: Number, Million KRW)

Year	88~92	93~97	98	99	00	01	02	03	04
Cases	0	0	4	18	7	25	19	10	14
Amount	0	0	908	223	102	6,384	276	1,028	330
Year	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	10	5	7	16	9	7	27	6	184
Amount	947	806	273	709	492	177	242	836	13,733

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

Since surcharge imposition became possible for unfair trade practices in 1993, the number of such cases account for a large part of total surcharge impositions.

Table 4-5 | Status of Surcharge Impositions for Unfair Trade Practices

(Unit: Number, Million KRW)

Year	88~92	93~97	98	99	00	01	02	03	04
Cases	0	138	28	40	21	45	35	8	62
Amount	0	2,900	97,716	103,369	25,861	121,601	20,507	37,141	5,586
Year	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	229	111	260	40	27	18	77	27	1,166
Amount	4,979	11,548	89,221	21,557	24,247	9,721	20,291	95,665	691,910

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

2.5.3. Criminal Punishment and Damages

This report will deal with this topic in detail in later sections.

3. Organizations Related to the KFTC

The scope of the KFTC's operations is quite large compared to that of competition authorities of major developed countries. As competition enforcement has grown stronger, the demand for expert staff and organization has also largely increased. Yet, the KFTC is still operated on a limited basis due to rigid governmental control of any expansions of administrative organizations. To counter such issues, external agencies that share or supplement the KFTC's operations have been created. There is an advantage in that these entities can utilize their non-governmental status to provide a more flexible and demand-focused form of policy enforcement.

3.1. Korea Fair Trade Mediation Agency (KOFAIR)

3.1.1. Overview

The KOFAIR was established as a nonprofit foundation under the KFTC, along with the adoption of a dispute mediation system for unfair trade practices and franchise disputes in 2007. There were a total of 35 members of staff in March 2013. The KOFAIR attempts to deal with the issue of damage relief caused by unfair trade practices, by facilitating voluntary settlement between parties-at-dispute, for disputes that are considered to be primarily private. This is hoped to lead to more effective and efficient MRFTA enforcement. The KOFAIR carries out mediation for five categories of disputes through the Unfair Trading Dispute Mediation Council and other entities.

On the other hand, the KOFAIR also supports the KFTC by providing various analyses on the market/industries and corporate practices as part of its continuing research on competition policies. Since 2010, the KOFAIR also overtook the role of evaluating corporate compliance programs, which was previously undertaken by the Korean Fair Competition Association.

3.1.2. The Dispute Mediation System for Fair Trade

Disputes regarding unfair trading practices and unfair franchise practices are often primarily cases of private monetary dispute between enterprisers and not directly related to public transactional order. Additionally, even in cases of SME abuse by large conglomerates, the KFTC's corrective measures will not directly lead to damage relief of an injured party. A separate judicial damage action is necessary for direct compensation. Therefore, in many cases, it is more appropriate to resolve the dispute through voluntary settlement between the parties-at-dispute apart from any corrective measures or restrictions by the KFTC. This is thought to result in better effectiveness and victim relief. Hence, the dispute mediation system operated by the Korea Fair Trade Mediation Agency was initially installed in 2007 for disputes relating to franchise transactions and has gradually expanded to five different categories of dispute.

Currently, the Unfair Trading Dispute Mediation Council consists of seven experts in the field of competition, mostly professors and judicial officers appointed by the chairman of the KFTC according to provisions in the MRFTA. The chairman of KOFAIR also holds the position of chairman for such council. Once settlement is reached through the mediation process, it is has the same legal effects as a civil settlement according to civil law. If a respondent performs the terms of settlement, it shall be exempted from any corrective measures or recommendations for correction, according to the MRFTA.

At the same time, a mediation system for franchise industry disputes was introduced along with the enactment of the Fair Franchise Transactions Act. Such mediations are undertaken by the Franchise Dispute Mediation Council that has been installed within KOFAIR. The council consists of three representative members of public interest, three representative members of franchisors, and three representative members of franchisees, for a total of nine members. The chairman of the council is appointed by a chairman of the KFTC among the representative members of public interest. The procedures and effects of the settlements reached are similar to those of unfair trade disputes.

In 2011, the Subcontract Dispute Mediation Council was established along with the Fair Transactions in Subcontracting Act. In 2012, the Large-Scale Retail Transactions Dispute Council was established along with the revision of the Large-Scale Retail Fair Trade Practice Act. Finally, in 2012, the Adhesion Contract Mediation Council was established along with the revision of the Adhesion Contract Act.

Currently, while many cases are processed through such a dispute mediation system, it receives high marks in satisfaction from the parties-at-dispute. In addition, the KFTC benefits from the reduced caseload that, in turn, enables it to focus on other important issues of fair trade and consumer welfare. Supported by such positive feedback, the number and scope of cases to be resolved through such mediation is expected to substantially increase and expand in the future.

3.2. Korea Consumer Agency (KCA)

3.2.1. Overview

The KCA is the governmental organization in comprehensive control of policies enhancing consumer rights. There were a total of 312 members of staff in late 2013. Although the Consumer Protection Act was established in January 1980 (slightly before the enactment of the MRFTA), it has been criticized for its lukewarm enforcement efforts. In response, the Consumer Protection Act was revised in late 1986 and the KCA was established in 1987. Since consumer protection policies were under the authority of the Economic Planning Board, similar to competition policies, the KCA was initially established under the Ministry of Strategy and Finance (the successor of the Economic Planning Board). But in 2007, according to change in the market environments, consumer policies and the KCA have been transferred to be under the authority of the KFTC.

The KCA takes charge of the critical daily tasks of consumer protection (including relief of damages to consumers) and connects the government with other non-governmental consumer groups. This transfer of the KCA and the establishment of a uniform platform to pursue consumer policies in effective conjunction with competition policies are considered significant.

3.2.2. Assigned Functions

The KCA carries out the following important functions.

Firstly, the KCA handles consumer complaints and damage relief. To improve its expertise in consumer relief, it continuously consults with outside experts and performs inspections. If an act is found illegal in a case proceeding, the KCA will report such findings to relevant governmental bodies, such as the Prosecutor's Office and local governments, in order to prevent similar further damage, according to the Framework Act on Consumers. The KCA also provides consumer alerts through the media and internet relating to major cases or to prevent the spread of consumer damage.

Secondly, the KCA settles consumer disputes through the establishment of the Consumer Dispute Mediation Council within the KCA. Once settlement is reached between the parties-at-dispute through the mediation process, it is considered to have the same effects as settlements in court.

Thirdly, the KCA undertakes policy research regarding revisions of consumer laws, improvements of consumer protection systems, and modernization of consumer policies, for effective enforcement of consumer policies.

Fourthly, the KCA is responsible for managing information related to consumer risk, which includes the collection and analysis of such information and the designation and operation of agencies appointed to report such information.

Fifthly, the KCA is in charge of educating consumers and providing them with better information. The KCA has developed and spread various consumer education publications and programs for schools and the general public while also operating various training programs that aim to enhance consumer rights and provide useful consumer information.

3.3. Other Related Private Organizations

3.3.1. Korean Fair Competition Federation (KFCF)

The KFCF is a trade association established in 1994 to spread competition principles, strengthen corporate fair trade capacities and act as a bridge between the government and industries. The Korea Chamber of Commerce and Industry, trade associations (including the Federation of Korean Industries, the Korea Trade Association and the Korea Federation of Small Businesses) and representatives of the big-five large conglomerates play a major part in this organization.

The KFCF contributes by providing education for competition laws, spreading and evaluating compliance programs, and mediating disputes in subcontract transactions. Especially before the establishment of KOFAIR, and in the early stages of the compliance program, the KFCF supported and significantly contributed to the spread of the compliance program. The KFCF has also been operating the Subcontract Dispute Mediation Council since 1999 which allows the industry to quickly and voluntarily settle cases of subcontracting disputes.

3.3.2. Various Mutual Aid Associations

According to growth of the distribution industry, new and various sales tactics have emerged in the forms of door-to-door sales, multilevel marketing, prepaid mutual aid companies, among others. Hence, the credit ratings of such business operators have become

an important consumer concern as new corporations conduct large-scale business with multiple consumers. In fact, various cases of consumer damage have frequently appeared, including refusals to cancel a contract or refusals to accept a return of product.

In order to deal with such issues, the KFTC has revised relevant laws (including the Door-to-Door Sales Act) to provide grounds for compensation insurance and mutual aid businesses. Accordingly, four mutual aid associations were established in the door-to-door sales and mutual aid industries.

Within the door-to-door sale industry, the Direct Sales Mutual Aid Association and the Korean Special Sales Mutual Aid Association were established in late 2002. These two associations carry out the function of insurance by providing relief for consumer damage incurred by multilevel marketing. They have also strengthened their efforts to prevent consumer damage and disputes caused by multilevel marketing. They further provide support so that new sales schemes like multilevel marketing can settle in a healthy manner.

In the prepaid mutual aid industry, according to a revision in the Fair Transactions in Subcontracting Act, the Korean Mutual Aid Association, and Mutual Aid Guarantee Association have been established and perform the functions of providing consumer relief and protecting consumer rights.

4. Governmental Agencies Related to the KFTC

4.1. The Courts

The Courts play an important role in reviewing the legality of KFTC measures (private enforcements will be discussed in later sections). If dissatisfied with a KFTC decision, a respondent may file an appeal to reconsider the case at the Full Commission of the KFTC, while simultaneously or separately filing an appeal to cancel the KFTC decision in the courts. As the number and scale of KFTC corrective measures and restrictions increase, such cancellation lawsuits are sharply increasing. Court review has utmost importance in competition policies in that they act as a check and balance of the KFTC's enforcements, make final interpretations of the MRFTA, and set standards of judgment.

Cancellation lawsuits can be brought at the Seoul High Court which has exclusive jurisdiction over all KFTC-related appeals. Such a two-level review is distinct from other administrative actions and is in recognition of the expertise and quasi-judicial status of the KFTC. The Seoul High Court has installed three panels in the court that exclusively handle KFTC cases as competition cases have increased and expert review has become necessary.

There were 1087 cancellation lawsuits filed in appeal of a KFTC decision between 1981 and 2012. More than 50% of those appeals were brought after 2005. There were less than ten appeals filed in 1995 but the number gradually and continuously increased from 1997, until in 2012, there were 121 appeals filed at the court. As seen earlier, this increase corresponds to the period that the KFTC concentrated enforcement efforts on cartels while increasing the imposition of surcharges. Since then, the number of competition cases has continuously increased.

Table 4-6 | Number of Cancellation Lawsuits by Year

(Unit: Number)

Year	81~90	91	92	93	94	95	96	97	98	99	00	01
Cases	9	4	3	4	6	9	7	22	31	65	40	67
Year	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
Cases	62	46	56	46	46	81	115	81	70	96	121	1,087

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

In a majority of such cancellation lawsuits, the KFTC has prevailed, showing general trust in the legality of KFTC decisions. There were 862 lawsuits finalized between 1981 and 2012. Among them, the KFTC won 600 cases on all grounds, partially won 140 cases and lost 122 cases. Hence, the total number of cases won (including cases partially won) consists of 85.8% of all such cases. The KFTC's average rate of victory in court (on all grounds) is 72.3% and considerably higher than the approximately 50% average rate for all administrative agencies. This has more significance when one puts into consideration the fact that in a majority of the cases partially won, the error was found in the calculation of surcharges and not in any legal error related to a material issue (such as determination of illegality or validity of an imposition of corrective order). This indicates the high level of regard for the competence of the KFTC.

Nevertheless, some critics view that further efforts are necessary to reduce the loss rate considering the fact that KFTC decisions go through a sophisticated fairness-driven adversarial process (unlike any other administrative agency) and the fact that the KFTC's decisions constitute a judgment of a court-of-first-instance.

Table 4-7 | Results of Cancellation Lawsuits by Year

(Unit: Number)

Year	81~90	91	92	93	94	95	96	97	98	99	00	01
KFTC Wins	9	4	1	4	5	5	6	16	13	42	20	40
KFTC Partially Wins	0	0	0	0	0	3	0	3	12	13	10	10
Counterparty Wins	0	0	2	0	1	1	1	3	6	10	10	17
Total	9	4	3	4	6	9	7	22	31	65	40	67
Year	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**Total**
KFTC Wins	37	31	42	37	39	56	72	55	24	28	14	600
KFTC Partially Wins	13	7	12	5	3	8	28	4	4	3	2	140
Counterparty Wins	12	8	2	4	4	14	12	8	6	1	0	122
Total	52	46	56	46	46	78	112	67	34	32	16	862

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

While the courts have played a crucial role in the balance and check of the legality of KFTC decisions, the judges in charge of such legal review are criticized for their lack of expertise and understanding of core economic theories underlying competition law. To address such issues, the court has installed exclusive panels for KFTC-related appeals, and has been appointing judges that have expertise in the field of competition law. The Supreme Court has also appointed Supreme Court Research Fellows who exclusively research issues of competition law. As a result, the sophistication of the legal review of Korean courts has reached significantly high levels and is considered to lead the improvement and modernization of competition policies in certain cases.

4.2. Prosecutors

4.2.1. Overview

Most violations of the MRFTA can be subject to criminal sanctions. Such broad applicability of criminal measures is a rare case internationally. Even in the US, where criminal enforcement against monopolies is emphasized, the scope of criminal enforcement

is limited to violations of cartels in the Sherman Act.[18] Japanese competition laws have provisions allowing criminal sanctions to be imposed for violations of competition law but not in relation to unfair trade practices.

In principle, the KFTC initially imposes administrative sanctions for violations of the MRFTA and this is similar to the case of EU. In cases where administrative sanctions are not sufficient or criminal sanctions are deemed necessary, the KFTC refers the case to the Prosecutor's Office and criminal action may be brought in the courts.

Table 4-8 | Status of Availability of Criminal Sanctions for Members of the OECD

No Provisions (15 countries)	Provisions included in Competition Laws (13 countries)	Provisions included in Bid-Rigging Regulations (6 countries)
Poland, Czechoslovakia, Mexico, Australia, New Zealand, Finland, Sweden, Spain, Swiss, Netherlands, Portugal, Luxembourg, Slovenia, Estonia	①(5 countries): Australia, Denmark, Iceland, Canada, UK ①+②(2 countries): France, Ireland ①+②+③(4 countries): US, Greece, Norway, Israel ①+②+③+⑤(1 country): Japan ①+②+③+④+⑤(1 country): Korea	Germany, Italy, Turkey, Hungary, Slovakia, Belgium

① cartels; ② abuse of market-dominating positions; ③ mergers; ④ unfair trade practices; ⑤ others.

Still there are not many cases of actual criminal sanctions being imposed. From 1981 to 2012, there were 191 cases of referral to the Prosecutor's Office, consisting of 1.52% of all cases in which sanctions were imposed by the KFTC. This extremely low rate of referral may show that the KFTC is reluctant to initiate criminal sanctions.

18. In the US, according to the Sherman Act, anti-competitive act or acts of monopoly can be punished as a felony with a criminal sentence of less than 5 years. But, the Clayton Act does not allow criminal sanctions for anti-competitive mergers prohibited under its Article 7 or for unfair methods of competition prohibited under Article 5 of the FTC Act.

Table 4-9 | Results of Sanctions Imposed on Violations of Competition Law by the KFTC (1981~2012)

(Unit: Number)

	Referral to Prosecution	Surcharges	Corrective Orders	Request to Correct	Recommendation to Correct	Warning and Others	Self-correcting	Total
MRFTA	191	1,796	5,553	0	891	5,549	382	12,566
Consumer Protection Act	80	100	2,667	47	1,665	3,940	1,799	10,097
The Fair Transactions in Subcontracting Act, The Fair Franchise Transactions Act etc.	302	85	1,829	0	95	18,408	2,845	23,479
Sub-total	573	1,981	10,049	47	2,651	27,897	5,026	46,142
Rate	1.24	4.29	21.78	0.10	5.75	60.46	10.89	100

Source: 「2012 Annual Statistics Report」, KFTC.

Table 4-10 | Records of Sanctions Imposed on Violations of Competition Law by the KFTC

(Unit: Number)

Year	Referral to Prosecution		Corrective Orders		Recommendation to Correct	Request to Correct	Fine	Warnings	Self-correcting	Settlement	Others	Total	
		Surcharges		Surcharges									Surcharges
81~91	33	0	854	2	380	0	0	608	-	0	43	1,918	1
1992	8	0	145	9	31	0	0	304	-	28	92	608	9
1993	7	0	220	23	59	3	0	341	-	90	189	909	23
1994	13	0	207	68	110	5	0	307	-	87	200	929	68
1995	33	2	199	49	119	3	0	414	-	118	229	1,115	51
1996	16	1	250	21	179	4	0	454	-	152	481	1,536	22
1997	35	0	221	9	330	9	0	600	-	133	825	2,153	9
1998	37	5	535	61	57	5	1	465	-	183	836	2,119	66
1999	11	0	621	102	149	4	4	356	-	126	867	2,138	102
2000	22	3	441	46	35	0	43	356	-	121	652	1,670	49
2001	23	9	347	72	84	4	52	3,352	-	71	735	4,668	81
2002	11	1	497	90	110	5	107	1,858	-	48	711	3,347	91

Year	Referral to Prosecution		Corrective Orders		Recommendation to Correct	Request to Correct	Fine	Warnings	Self-correcting	Settlement	Others	Total	
		Surcharges		Surcharges									Surcharges
2003	18	4	449	33	102	2	91	2,011	-	30	835	3,538	37
2004	22	2	478	89	100	1	159	2,191	-	38	957	3,946	91
2005	12	2	756	272	163	0	81	2,306	-	32	949	4,299	274
2006	47	3	644	154	178	1	70	2,411	-	35	1,052	4,438	157
2007	48	11	928	315	124	0	78	1,938	-	108	1,256	4,480	326
2008	33	9	737	132	76	1	146	559	1,395	236	1,364	4,547	141
2009	43	8	486	70	85	0	53	869	1,356	311	1,461	4,664	78
2010	19	3	277	63	66	0	42	784	634	302	1,514	3,638	66
2011	38	22	370	134	62	0	78	644	830	290	1,567	3,505	156
2012	44	7	387	75	51	0	53	898	703	382	2,798	5,316	82
Total	573	92	10,049	1,889	2,650	47	1,058	24,026	4,918	2,921	19,613	65,481	1,980
Portion	0.9%	4.6%	15.3%	95.4%	4.0%	0.1%	1.6%	36.7%	6.0%	4.5%	30.0%	100%	100%

Source: 「2012 Annual Statistics Report」, KFTC.

Out of the 573 cases referred to the Prosecutor's Office, criminal charges were eventually filed in 402 cases. While imprisonment is possible for competition law violations under the MRFTA, such an occurrence is very rare. It is interesting to note that a majority of such criminal cases are closed with the imposition of monetary fines.

4.2.2. The Exclusive Accusation System

In the general Korean legal system, for a criminal sanction to be imposed, a prosecutor must file a criminal complaint, and the courts will proceed to make judgments on the issue. But under the MRFTA, a criminal prosecution can only be initiated upon the filing of a criminal complaint by the KFTC. This system is called the Exclusive Accusation system. This is a policy maintained to restrain imprudent criminal sanctions that may dampen market activity, on the presumption that the KFTC is best-suited to undertake the expert and complex analyses necessary to make initial determinations on whether a particular violation of the MRFTA should be subject to criminal sanctions.

Yet, some critics have long argued that as the KFTC is reluctant to exercise such powers, criminal punishment of unfair trade practices has largely failed to have any material effect. On the other hand, the prosecutor's office has repeatedly expressed its will to play a larger and more proactive role in imposing criminal sanctions on violations of competition law.

Through the 1996 revision of the MRFTA, the Exclusive Accusation system has changed. The KFTC was mandated to file a criminal complaint with the prosecutor's office in cases

where the violation was deemed to be objectively gross and considerable, and substantially anti-competitive. The Prosecutor General could notify the KFTC of the existence of a case that would require the filing of a KFTC complaint, and request that the KFTC cooperate in filing a complaint with the prosecutor's office. Despite such efforts, criticism still persisted.

Accordingly in 2013, the MRFTA was revised and the Exclusive Accusation system was substantially reformed. Now, the authority to request a criminal complaint has been extended beyond the Prosecutor General to other specific entities. And now, even if the KFTC determined that a case did not meet the standard for a criminal complaint, the Chairman of the Board of Audit and Inspection, Head of the Public Procurement Service and the Head of the Small and Medium Business Association can request that the KFTC file a complaint with the prosecutor's office, in consideration of the social importance and effects on national finances and SMEs. In such cases, the KFTC is mandated to file a criminal complaint.

4.3. Specialized Regulatory Agencies by Industrial Category

In Korea, there are specialized regulatory agencies in certain fields, such as the finance and broadcast/communications industries. In terms of competition enforcement, the KFTC focuses on enhancing economic efficiencies and consumer welfare through market competition while other socio-political goals are largely not put into consideration. In contrast, specialized regulatory agencies usually prioritize other policy goals like industrial development along with economic efficiency. On the other hand, specialized regulatory agencies play a significant part in enforcing relevant competition policies.

As such, similarities and differences in the regulatory purpose and directions are generally found between the KFTC and specialized regulatory agencies. Although these organizations should collaborate, there is often conflict in their regulations and authorities.

Therefore, it is necessary to establish a proper relationship and promote cooperation between the KFTC and such specialized regulatory agencies in order to correctly implement competition policies.

4.3.1. Korea Communications Commission (KCC)

The KCC has been established as a presidential council body to pursue balanced development and enhance the international competitiveness in the broadcast/communications industry. The regulatory purpose of the KCC lists the realization of consumer welfare and general services in the communications market, development of broadcasting and communications technologies, establishment of fair competition, and provision of measures to enhance its contribution to public interest. Hence, the purpose

and scope of KCC regulations overlaps with certain authorities of the KFTC, especially as it covers the formation of a fair competition environment in the broadcast/communications industry.

KCC regulations are somewhat different from competition regulations that prioritize economic efficiency. KCC regulations incorporate competition regulations to reach its public goals of providing general service in the broadcast/communications market, while also directly promoting consumer protection. Thus, in certain cases, the regulatory perspective and approach of these two agencies creates conflict and they fight over priority in authority to enforce regulations, or the directions or methods of regulatory acts.

Despite such conflict, they are similar governmental agencies in that they pursue the goals of enhancing consumer welfare and bringing further economic development. Accordingly, they make efforts to attain maximum regulatory results through proper cooperation.

4.3.2. Financial Services Commission and the Financial Supervisory Service

The Financial Services Commission has been established as a presidential council body to modernize the financial industry, stabilize the financial markets, establish a healthy credit system and fair business practices, and protect financial consumers. It was established in 1999, and has regulatory authority over the financial industry, under the supervision of the Financial Supervisory Service and Securities and Futures Commission.

The financial industry is considered to be a key industry that greatly affects the national economy and consumers, and to this end, the government has undertaken various regulations through these agencies. Despite general trends of deregulation, the financial industry still remains under strong regulation. Although there were certain measures of deregulation taken in the past, in the aftermath of the 2008 financial crisis, various financial regulations have been tightened to oversee the soundness of the industry and protect consumers.

Since the financial industry exemption in the MRFTA has been repealed, there has been conflict between the financial regulatory agencies (which focus on regulation) and the KFTC (which focuses on market functions). The KFTC has recently taken interest in and has ordered corrective measures on cartels of insurance companies and banks. This sort of effort has led to more conflict between the KFTC and financial regulatory agencies.

Nevertheless, from the perspective that the KFTC and financial regulatory agencies both pursue the goals of economic development and consumer protection, they are continuously making efforts to cooperate.

4.4. Local Governments

Local governments are often involved with the actual implementation of both competition and consumer policies by delegation of authorities by the KFTC or in terms of providing the necessary cooperation for enforcement. Local governments are important in this process, as they are the most familiar and most qualified to execute such policies customized to a specific geographical area. This is considered particularly important for consumer policies.

In relation to competition policy, local governments are required to cooperate with KFTC investigations, in cases of unjust concerted practices in the context of project bidding for national/local governments or state-owned enterprises, by providing relevant documents or any other cooperation requested.

In relation to consumer policy, local governments have various responsibilities in protecting consumer safety or providing for victim relief according to consumer protection laws. This is to complement the relatively poor conditions of consumer protection in local markets. On the other hand, local governments may independently investigate and order corrective measures on violations of consumer protection-related laws. Yet in such cases, the local government must notify the KFTC of such action in order to avoid duplicate investigations and measures.

5. Private Enforcement of Competition Law: Damage Actions

Traditionally in Korea, in relation to violations of the MRFTA, administrative sanctions and corrective measures have been the main body of enforcement while private enforcement has remained a supplemental element. However, it has been pointed out that administrative sanctions by the KFTC do not directly compensate a victim's loss. Also the KFTC only has limited resources in its staff and organization, private enforcements of the MRFTA can help generate an appropriate level of deterrent. In the US, more than 90% of antitrust cases are private enforcements lawsuits, and in the EU, there has been much discussion on the issue recently.

On other hand, improvements in judicial procedures (such as enhanced rights for the parties, simpler procedures and lower costs) have made it more convenient to bring a private action to court. Also, with the introduction of a US-style law school system, the number of legal practitioners has largely increased. As a result, it has become easier for victims whose loss has been incurred by violations of the MRFTA to obtain monetary relief through judicial procedures without intervention by the KFTC. Accordingly, the number of legal actions for damages has been sharply increasing, especially in relation to cartel cases, and there is active discussion on ways to promote such trends.

5.1. Damage Actions[19]

5.1.1. Overview

Damage actions brought by a plaintiff directly compensate for a plaintiff's loss incurred by a violation of law, while indirectly deterring further violations, and ultimately reinforcing the effectiveness of competition law in the market. In Korea, as in many other civil law countries, the plaintiff must show many complicated elements to be able to file a damage action in the courts that include, the illegality of the alleged conduct, the intent or negligence of the defendant and factual proof of the actual damages incurred by alleged conduct. Yet, it is hard for an individual plaintiff to collect the evidence and show these elements for complicated cases related to violations of the MRFTA against a corporate defendant. In addition, attorneys' fees are high and due to principles compensating only for actual damage, the monetary amount involved is not large. Thus, damage actions by private parties have been scarce in the history of Korean competition law.

The element most difficult to prove by a private party is the element of illegality of alleged conduct. Hence, most damage actions have been follow-up litigations brought after the KFTC confirms such illegality through a corrective measure.

In 2004, the KFTC installed various measures to promote relief for plaintiffs and enhance deterrent effects against violations. Accordingly, the burden to show no intent or no negligence in alleged conduct has shifted to the defendant in contrast to the principles of general civil actions. Proving the existence and amount of loss incurred by alleged conduct is also very difficult. To address this issue, the MRFTA allows the courts to recognize considerable amounts of loss based on the purpose of the damage action and results of factual investigation, even when specific loss has not been sufficiently proven. Further, the KFTC has made efforts to provide the documentary evidence (produced through its examination and decision process) to plaintiffs for use in follow-up litigations in order to actively promote such follow-up litigations.

Until recently, most damage actions related to violations of the MRFTA concerned issues of unfair trade practices and the monetary amounts involved were not large. But since the 2000s, enforcements against unjust concerted practices have grown in number and amount of surcharges, and related damage actions have increased accordingly.

19. For review of the KFTC's explanation and visions for private actions in relation to the MRFTA, refer to the following: Hwang Lee & Byung eon Lee, *Korea*, in *The International Handbook on Private Enforcement of Competition Law*, Edward Elgar (Albert A. Foer & Jonathan W. Cuneo eds.,2010), pp. 542~552.

5.1.2. Cases

The number of damage actions has been historically low in Korea. Even when looking at the most important cases of cartels, between 1981 and 2012, there have been 603 cases of price-fixing and only 10 cases of ensuing damage actions.

Yet, recently, a number of significant damage actions have been brought to the court. The case with the largest amount of damages involved concerned the bid-rigging of military fuel supplies by five oil refining companies. The KFTC imposed a KRW 100 billion surcharge on this oil company cartel in 2000, and subsequently, private parties filed a follow-up damages lawsuit against the cartel participants in 2001. After a long litigation, the plaintiffs accepted a court-induced settlement of KRW 135.5 billion in damages. In another significant case in 2006, the KFTC imposed surcharges of KRW 43.4 billion against eight companies involved in a flour cartel. Bakery companies filed a follow-up damages lawsuit against the participants of the flour cartel to seek compensation for the losses they incurred by the high flour prices maintained by the illegal cartel. The Supreme Court of Korea ordered two of the flour companies to pay damages of KRW 1.4 billion.

As public awareness on the harms of cartels rises, and a number of successful cases of private litigation in relation to cartels have surfaced (by which plaintiffs have succeeded to obtain considerable compensation), public interest in private enforcement continues to grow.

5.2. Current Discussions of System Improvement

5.2.1. Class Actions Lawsuits

Class actions lawsuits are lawsuits filed by a group of plaintiffs that have the same interests in order to represent and realize the individual rights of its members.

For a long time, Korean law did not allow class action lawsuits due to legal principles which stipulate that lawsuits must be brought directly by a party-of-interest. In 2002, class action lawsuits became available for securities-related lawsuits to promote effective and efficient relief for large groups of plaintiffs whose individual losses are not large. Since then, class actions lawsuits have also been allowed for product liability lawsuits. However, due to the many restrictions, class action lawsuits have not been active.

Currently, there are active discussions regarding the incorporation of class action lawsuits into Korean competition law, and especially in cases related to cartels.

5.2.2. Punitive Damages

Punitive damages are awarded to punish malicious or intentional conduct in violation of law (in addition to specific damages) and to provide a strong deterrence of such conduct by any other parties in the future. It is considered to be separate from compensatory damages. Korea, like other countries with a civil law system, generally only recognizes specific and actual damages. But there has been much criticism that punitive damages are necessary to promote more private litigation and deter further violations of law.

The concept of punitive damages was first introduced into the Fair Transactions in Subcontracting Act in 2011. At this time, punitive damages could be awarded in cases of misappropriation of technical documents, up to a maximum penalty of treble damages. In 2013, the Fair Transactions in Subcontracting Act was revised and punitive damages were extended to unfair reduction of supply prices, unfair order cancellations, and unfair return of supplied goods.

Currently, there are active discussions regarding the incorporation of punitive damages and/or treble damages into Korean competition law.

5.2.3. Discovery

One of the most difficult aspects a plaintiff faces in a civil action in Korea is the difficulty of collecting necessary evidence. Especially, in cases of violation of the MRFTA which require a showing of complicated elements, it is extremely hard to gather documentary evidence. This is all the more true because, in many cases, the plaintiffs are SMEs or ordinary consumers, while the defendants are large conglomerates. To deal with such issues, for cases the KFTC has dealt with, courts may ask the KFTC to transfer documents in its possession and/or the KFTC may provide the documentary evidence that it has obtained in its examination process to plaintiffs. But these measures are still not sufficient.

Accordingly, there are discussions regarding the introduction of a system of discovery similar to US civil procedures by which a party must provide documentary evidence that an adverse party requests.

5.2.4. Requests for Injunctions by Private Parties (Private Injunctions)

Private injunctions can be filed directly by a party-of-interest for violations of the MRFTA in a civil court, regardless of whether the KFTC has initiated an examination process. This is a measure widely allowed in the legislation and cases of many countries and functions in mutual complement with private damage actions.

Korean competition laws do not include any provisions referring to private injunctions and hence, most authorities view this measure to be prohibited under the current laws.

Accordingly, there is active discussion regarding the introduction of private injunctions into Korean competition law.

2013 Modularization of Korea's Development Experience
Korea's Developmental Experiences in Operating
Competition Policies for Lasting Economic Development

Chapter 5

The Main Issues of Korean Competition Law

1. Prohibitions against Abuse of Market-dominating Positions
2. Restrictions on Business Combinations (Mergers) with Anti-competitive Effects
3. Prohibitions of Unjust Concerted Practices (Cartels)
4. Prohibitions of Unfair Trade Practices
5. Restraint of Excessive Economic Concentration
6. Competition Policies for Large Conglomerate - SME Relationships - The Fair Transactions in Subcontracting Act, etc.
7. Protection and Reinforcement of Consumer Rights and Interests

The Main Issues of Korean Competition Law[20]

1. Prohibitions against Abuse of Market-dominating Positions

1.1. Overview

In Korea, due to a history of economic policies concentrated on development and in the process of surviving multiple economic crises, a monopolistic/oligopolistic structure has become fixed in many markets. Hence, improving such monopolistic market conditions and deterring abuse of market-dominating positions has become a critical task for Korean competition policies.

Article 3-2 of the MRFTA lists the 5 following categories of conduct as abuse of a market-dominating position:

- unreasonably fix, maintain, or alter the price of a good or service fees;
- unreasonably control the sale of goods or the rendering of services;
- unreasonably interfere in the business activities of other enterprises;
- unreasonably interfere in the entry of new competitors;
- engage in unreasonable transaction to eliminate competitors or harm the interest of consumers.

20. This section has been adapted and supplemented based on the relevant sections concerning the major categories and content of enforcement in the following sources: Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 20 years*(2001); Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 30 years* (2011).

One of the most complex issues in regulating abuse of market-dominating positions involves the determination of whether the enterprise-at-issue has market-dominating power. Market dominance may be proven by direct evidence, but in many cases, it is shown through advanced economic analyses on a case-by-case basis. In consideration of such difficulties in analysis, when an enterpriser holds 50% or more of the market share or when the top three enterprises hold a total of 75% or more of the market share, such enterprisers are presumed to have market dominance.

Another key issue of abuse of market-dominating positions relates to showing the crucial 'unreasonableness' element. In the 2007 landmark case of POSCO's abuse of market-dominating position, the Supreme Court of Korea set an important standard for unreasonableness. In this case, the Supreme Court ruled that with respect to cases of abuse of market-dominating position, the alleged conduct must have an anti-competitive effect on the market to be deemed unreasonable.

Prior to this case, most competition enforcement of unilateral conduct relied on the legal scheme of restricting unfair conduct. This was partially due to the fact that unfairness was a concept easier to wield, but also because it was well accepted by social standards. But if competition enforcement continued to rely on standards of unfairness, it would never achieve its fundamental purpose, which is to understand the anti-competitive effects of market activities and utilize such understanding to promote consumer welfare. Hence, since the 2004 Microsoft bundling case, whenever anti-competitive conduct is an issue, the KFTC has been making efforts to enforce based on the principles of abuse of market-dominating position.

There have been relatively few cases of enforcement in relation to abuse of market-dominating positions. However, since the 2004 Microsoft case, the KFTC has been taking action in large cases with international significance.

Table 5-1 | Corrective Measures Taken for Abuse of Market-dominating Positions

(Standard: Above Warnings, Unit: Number)

Year	81~86	87~97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	Total
Cases	4	17	5	2	0	4	0	1	0	0	2	38	5	2	7	0	1	88

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

1.2. Major Cases

In 2001, when POSCO (Korea's only integrated steel mill) refused to provide a supply of hot coil (a raw material necessary to produce steel sheets) to new market competitor Hyundai Hysco, the KFTC imposed a corrective order and surcharges for unreasonably interfering with the business activities of another enterprise. But in 2008, the Supreme Court ruled that to satisfy a claim of refusal to deal by a market-dominating enterprise, the KFTC must show both the objective anti-competitive effects in the market and the subjective intent to maintain a monopoly by the enterprise. This ruling has great significance in that it narrowed the definition of unreasonableness, in contrast to the KFTC's previous reasoning that incorporated unfairness into the standards of unreasonableness for cases of abuse of market-dominating positions.

Another significant case is the 2006 Microsoft abuse of market-dominating positions case. In this case, the KFTC imposed corrective orders and surcharges on Microsoft, ruling that its practices of bundling Internet Messenger and Windows Media Player with its Windows PC operating software constituted the illegal act of 'unreasonably interfering in the business activities of other enterprises'. This case was investigated over an unprecedented long term of 50 months and was deliberated over seven sessions. An entity to supervise compliance with the corrective measures ordered was also installed for this case. The KFTC became the third country in the world (following the cases of enforcement in the US and EU) to participate in global efforts to curtail Microsoft's abusive conduct. With the success of this case, the KFTC became aggressive in enforcing against cases of abuse of market-dominating positions while also gaining confidence in enforcing against foreign companies. Hence, this subsequently led to enforcements against other foreign companies, including the Intel and Qualcomm cases discussed below.

In the 2008 Intel abuse of market-dominating position case, the KFTC imposed corrective measures on Intel, ruling that its practices of providing rebates to companies on the condition that they do not purchase CPUs from Intel's competitor, AMD, constituted the illegal act of 'unreasonably excluding a competing enterprise'. In the 2009 Qualcomm abuse of market-dominating position case, the KFTC imposed a corrective order and surcharges totaling KRW 260 billion on Qualcomm, ruling that its practices of providing discriminatory rebates to mobile phone manufacturing companies (including Samsung) on the condition that they do not use a competitor's modem chips also constituted the illegal act of 'unreasonably excluding a competing enterprise'. This case became symbolic by producing the largest amount of surcharges in the history of Korean competition law at the time.

2. Restrictions on Business Combinations (Mergers) with Anti-competitive Effects

2.1. Overview

In principle, parties can engage in mergers by free will. But under the MRFTA, in cases where one party to the merger has worldwide assets or turnover exceeding KRW 200 billion and the other party has worldwide assets or turnover exceeding KRW 20 billion, such mergers must be reported to the KFTC within 30 days from the date of merger. In addition, as such ex-post determination of anti-competitiveness may be insufficient to deal with large-scale mergers, the MRFTA requires mergers involving a company with worldwide assets of turnover exceeding KRW 2 trillion to report such mergers to the KFTC in advance. Once a report is filed, the merger process cannot be completed for 30 days while the KFTC reviews the anti-competitive effects of the merger at issue.

If an anti-competitive effect is found, the merger will either be prohibited or a corrective order that cures the anti-competitive effect will be incorporated into the merger as a condition. To determine the anti-competitive effects of a merger, the KFTC generally, first, defines the relevant market, and then, evaluates market concentration based on analyses of market share and other factors, usually using the HHI index.

In 1996, a statutory presumption of anti-competitiveness was created, if a merger would create a combined company that would satisfy certain thresholds for a statutory presumption of a market-dominating enterprise. Parties to the merger may rebut such statutory presumption based on other factors. Specific determinations of anti-competitive effect are based on economic analyses of various factors. For example, in cases of vertical mergers, the KFTC evaluates various factors, such as unilateral effect, coordinated effect and increase of buying power to determine whether such merger would limit free competition in the market. In cases of horizontal mergers, the KFTC evaluates whether the merger has any market foreclosure effect or coordinated effect. Finally, in cases of conglomerate mergers, the KFTC evaluates anti-competitive effect, exclusion of competitors, and higher entry barriers.

While surcharges were available for merger restrictions in the past, they have since been repealed based on criticism that imposing surcharges on acts that have not occurred cannot be justified. Instead, coercive fines were introduced in 1999. Coercive fines mandated a company in non-compliance of a corrective measure imposed in relation to a merger to be subject to a surcharge assessed at a maximum 0.03% of the total value of the merger for each day in non-compliance.

For a long time in Korea, regulation of mergers was not active. This is because mergers were quite rare in Korea while many cases of anti-competitive mergers of large scale were the product of government-led economic efforts and thus, not a proper subject for KFTC enforcement. In addition, many mergers were the product of mid-sized companies seeking new synergistic effects through a merger and thus, were more likely to create more competition. As a result of these factors, there were only two cases of corrective measures being ordered for a merger in the 1980s.

Following the financial crisis, as many corporations failed or fell apart, multiple cases of large-scale mergers and acquisitions emerged. This eventually led to intensification of monopolistic/oligopolistic market structures. On the other hand, many corporations started to utilize mergers as a means to reorganize their business structures and expand their corporate capacities, leading to an increase in the number of mergers. Accordingly, the KFTC began to initiate merger reviews over concerns of their anti-competitive effects and corrective measures were ordered in certain cases. Hence, it can be said that a review of mergers actually only began to be seriously implemented from this point on.

While merger review in Korea has significantly developed in terms of its methods, it is hard to say that it fulfills the role of actively curing anti-competitive effects and securing market competition. A classic example of its limitations can be found in the generous permission of multiple mergers in the name of overcoming a crisis during the 1997 financial crisis.

Table 5-2 | Corrective Measures Incurred by Violations of Restrictions of Business Combinations

(Standard: Above Warnings, Unit: Number)

Year	81~86	87~97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	Total
Cases	2	1	3	2	4	1	2	7	6	1	7	3	4	3	2	1	3	52

Source: 「2012 Annual Statistics Report」, KFTC, 2013. Excludes cases of violation of merger reporting procedures.

2.2. Major Cases

Since the financial crisis, the 1999 Hyundai and Kia Motor Company merger case and 2000 SK Telecom and Shinsegi Communications Company case are among the most significant cases in merger regulation. Both cases involved a merger between large conglomerates who were experiencing troubles in the aftermath of the financial crisis. In both cases, there were clear anti-competitive effects to be incurred by such a merger in the domestic markets. Yet, both mergers were approved on the condition of some relatively weak corrective measures

being satisfied, based on policy considerations that were focused on surviving an extreme economic crisis. The KFTC has been widely held responsible for the current monopolies in the relevant industries. This is deemed to have been caused by the KFTC's underestimation of the anti-competitive effects and weak imposition of corrective measures.

In the 2004 Samik-Youngchang musical instruments company merger case, the KFTC ordered strong structural corrective measures based on the large anti-competitive effect that a monopoly by the combined company would create. Hence, the KFTC ordered Samik to sell all of its shares of Youngchang and also ordered the restoration of all the factories that had already been acquired. The economic benefits consumers garnered from this action have been estimated at KRW 10.29 billion.[21] This case is considered a representative case of merger review under the MRFTA, by which the formation of a monopolistic enterprise was prohibited. Through this case, the KFTC was able to show its visions and prove its willingness to regulate mergers.

The 2006 Hite-Jinro merger case heightened the level of sophistication for merger reviews in Korea. This case involved a merger of Hite, the no. 1 enterprise in the beer market, and Jinro, the no. 1 enterprise in the Soju market. In this case, the KFTC performed a critical loss analysis (a specified version of the SSNIP test) for the first time in order to define the relevant market with regards to the beer and soju market. As a result, it found that the merger would constitute a conglomerate merger with little anti-competitive effects.

On the other hand, in order to protect the domestic market, the KFTC has applied the effects doctrine to and ordered corrective measures for mergers between foreign companies when they are deemed to create anti-competitive effects in the domestic market, even if the merger itself occurs abroad.

The US Owens Corning Company and French Saint-Gobain Vetrotex merger case is a classic example in which the KFTC deemed the merger to have anti-competitive effects in the domestic market and ordered that certain shares and basic equipment be sold to third parties. This case is significant in that it is the first case that the KFTC restricted a merger between foreign companies.

Subsequently in 2010, when the number two iron ore producer in the world, the Australian company BHP Billiton, and the number three producer Rio Tinto attempted a merger, the KFTC performed a sophisticated review that resulted in a finding of anti-competitive effect created by such merger. The KFTC was known to be closely cooperating with the competition authorities of China and Japan in the process of examining and ordering corrective measures for this case. The economic benefits consumers garnered from

21. Dae Wook Kim and Jong Ho Kim, *Economic Analysis on the Enforcement Effect of Competition Law*, Korea Fair Trade Commission (2012).

the prohibition of this merger have been estimated at KRW 251.2 billion.[22] This case also has international implications in that the KFTC merger review process actually functioned as a prohibitive measure, since following such a review, the two companies voluntarily withdrew their merger applications.

3. Prohibitions of Unjust Concerted Practices (Cartels)

3.1. Overview

3.1.1. Prohibitions of Cartels

The MRFTA strictly prohibits unjust concerted practices. Unjust concerted practices are defined as any collaborative act unreasonably restricting competition, such as agreeing with another enterprise to fix or increase prices.

In Korea, major industries grew upon a base of oligopolistic control by large conglomerates, and there was administrative guidance by governmental agencies in many industries. Almost every industry established a trade association in cooperation with or by recommendation of the government, inadvertently forming a base for cartels. In addition, in the process of bidding for public construction, bid-rigging persisted. Apart from these factors, deep-rooted traditions of Confucianism and remnants of an agrarian society that valued cooperation may have blurred distinctions between constructive cooperation among competitors and illegal cartels. Despite such circumstances favoring cartels, the KFTC started to strongly enforce against cartels after the late 1997 financial crisis.

Article 19 of the MRFTA generally prohibits a wide range of agreements between competitors that unreasonably restrain competition, disregarding the name or form of conduct. These include: fixing or changing prices; fixing or changing terms of trade; restriction production or distribution; limiting geographic areas or customers; restricting establishment of facilities or equipment; restricting the types of traded goods or services; jointly performing the main parts of a business, or jointly establishing a company for identical purposes; bid-rigging; and any other act that substantially restricts or interferes with competition in a particular market.

Proving an agreement between cartel participants is the most important issue in a KFTC investigation. But as the harms of cartels and the KFTC's strong sanctions have become widely publicized, obtaining material that proves such agreement has become extremely hard. This is even more so because KFTC investigations are to be conducted on the basis

22. Dae Wook Kim and Jong Ho Kim, *Economic Analysis on the Enforcement Effect of Competition Law*, Korea Fair Trade Commission (2012).

of voluntary consent and cannot be forced. Accordingly, the MRFTA allows a presumption that such an agreement exists based on circumstantial evidence making such an agreement highly likely. On the other hand, a pre-approval program is available for unjust concerted acts but it has never been put to use due to very limited operation.

There are an abundant number of cases of KFTC enforcement against unjust concerted acts in every industry. Among them, the industries of oil refining, communications, construction, ready-mixed concrete and insurance are found to have the most violations. This is assessed to be the case because these industries have adamant monopolistic structures and deep-rooted cartel tendencies due to a history of strong governmental interventions.

In any case, regulation of unjust concerted practices has been possible due to heightened awareness of the harms of cartels that led to public support, along with the KFTC's strong will to enforce for improvement of economic structure. In addition, the KFTC has continuously established and improved measures that would support its investigations, such as introduction of a presumption in proving cartels, leniency programs and reward programs. Among them, the reward program for cartel reporters is only available in Korea and UK, but has been substantially operated only in Korea.[23]

Table 5-3 | Corrective Measures Imposed for Unjust Concerted Practices

(Standard: Above Warnings, Unit: Number)

Year	81~86	87~97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	Total
Cases	19	177	37	34	48	43	47	23	35	46	45	44	65	62	62	71	41	899

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

3.1.2. Leniency Program for Voluntary Reporters

Enforcement against unjust concerted practices have been substantial because of the strong will to enforce on the part of the KFTC, assisted by an effective leniency program for voluntary reporters.

The MRFTA provides for a program of granting automatic immunity from all or part of corrective measures or surcharges if a party of a cartel voluntarily comes forward and fully cooperates with the KFTC investigation. The first party is eligible for full immunity and the second party is eligible for a 50% reduction of corrective measures. This leniency program is complemented by an Amnesty Plus program in which a party under investigation for

23. Daniel Sokol, Andreas Stephan, *Prioritizing Cartel Enforcement in Developing World Competition Agencies* in Competition Law and Development (D. Sokol, Thomas Cheng and Ioannis Lianos eds.,2013), pp. 146-148.

one cartel can report another cartel (unrelated to the initial cartel) to become eligible for additional reductions in surcharges otherwise applicable to the first investigation.

The leniency program was first incorporated into the law in 1997. At the time, strict criteria had to be met to become eligible for a reduction in surcharges, full immunity was not available and it was unclear whether such reductions would actually materialize. There were further doubts of whether this program would be effective in a Confucian society that values cooperation. Hence, early on in its enactment, the program was not actively utilized.

Yet, full immunity became available for first-in-line leniency applicants while KFTC made consistent efforts to raise awareness, voluntary reporters sharply increased. In addition, the KFTC's strong efforts in detecting cartels and imposing massive surcharges made the benefits of the leniency program much more attractive.

Today in Korea, a majority of the cartel cases have the cooperation of a leniency applicant. Thus, in many cases, the KFTC does not have a problem with proving agreement and the main issue of most cancellation lawsuits in courts is the amount of surcharges.

3.1.3. International Cartels and Extraterritorial Applications

Along with the growth of the Korean economy and increase in international trade, imports by foreign companies increased and concerns over the negative effects of international cartels emerged. Accordingly, the KFTC has reinforced its efforts for extraterritorial application of the MRFTA on international cartels in order to protect consumer welfare in the domestic market.

The 2002 international graphite electrode cartel case is the first case in which extraterritorial application of the MRFTA occurred. Following this case of a cartel collectively determining export prices, explicit provisions providing for extraterritorial application (based on effect theories) were incorporated into the MRFTA. Additionally, in the 2003 international vitamin manufacturer price-cartel case, the KFTC ordered corrective measures in line with competition authorities of other countries. The 2009 international copy paper manufacturer/seller cartel case is significant because it is the first international cartel that the KFTC independently detected and sanctioned.

Recently, as shown in the 2010 international air freight rate cartel case, in cases of extraterritorial application, the KFTC has reinforced its efforts to cooperate with competition authorities of major countries and has been eager to participate in competition enforcement on a global level.

3.1.4. Prohibited Activities of Trade Associations

Trade associations have traditionally played a strong role in Korea due to a history of developmental economic policies and a culture of community spirit. Despite such merits, trade associations often limit the business activities of its member enterprises or sponsor collusions between them. To address such issues, from its start, the KFTC has strongly enforced against such practices of trade associations with great progress.

Table 5-4 | Corrective Measures Imposed on Anti-competitive Acts of Trade Associations

(Standard: Above Warnings, Unit: Number)

Year	81~91	87~97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	Total
Cases	37	182	46	71	69	53	59	55	37	48	46	41	79	60	36	86	66	1071

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

3.2. Major Cases

The 1988 oil refining company cartel case is the first case that the KFTC ordered surcharges on a cartel. In this case, six oil refining companies pre-allocated the market share for each cartel participant in the domestic market, and limited sales volume accordingly. The KFTC proved the existence of an agreement and ordered surcharges for the first time in a cartel case.

This was followed by the 2000 case of bid-rigging of military fuel supplies by five oil refining companies. Through investigation, the KFTC found that the five domestic oil companies participated and gained illegal profits in the bid-rigging of military fuel supplies for the Ministry of National Defense over a three-year period starting in March 1988. This case was initiated through a report by the Ministry of National Defense to the KFTC. The KFTC ordered KRW 190 billion in surcharges on the three occasions of collusion, the largest in history at the time. After such corrective measures were ordered, the Korean government filed a follow-up civil lawsuit in 2013, and KRW 135.5 billion in damages were awarded. This case became a pioneering case for damage actions in relation to violations of the MRFTA.

Another classic cartel enforcement case is the 1993 case in which 32 major banks were found to have raised and installed bank fees in collaboration and ordered to corrective orders and KRW 450 million in surcharges (1% of bank fees collected). This was the first time the KFTC had ordered corrective measures on a finance-related cartel.

In 2005, the KFTC ordered surcharges in relation to KT (the dominant landline operator of the domestic market) and Hanaro Telecom (new market entrant) colluding to raise local, long distance and international call rates and internet line rates. The amount of surcharges assessed on the collusion of local call rates was KRW 115.1 billion, the largest amount of surcharges imposed on a single case at the time. Also, the KRW 113 billion in surcharges assessed on KT was the largest amount of surcharges to be imposed on a single enterprise. In this case, these telecommunication companies argued that their collusion was in compliance with administrative guidance, but the KFTC investigation found that such guidance was merely a recommendation and was not directly related to the collusive acts.

In 2009, the KFTC imposed KRW 668.9 billion on six LPG gas companies for a cartel operated between 2003 and 2008 to maintain the sales prices for propane and butane gas. This is the largest amount of surcharges imposed on a single case to date. The economic benefits consumers garnered from this action have been estimated at KRW 1.27 trillion.[24]

In 2010, the KFTC uncovered a soju (the most popular alcoholic drink in Korea) company cartel. In this case, 11 soju manufacturing/sales companies colluded on raising prices and limiting sales activities (such as prize awards), and KRW 27.2 billion was ordered in surcharges. In the subsequent cancellation lawsuit, the courts accepted that this was the result of aggressive control by the National Tax Service (the supervising entity of soju sales), and considerably reduced the amount of surcharges while still recognizing the illegality of the acts.

4. Prohibitions of Unfair Trade Practices

4.1. Overview

The MRFTA defines any act likely to restrain the fairness of transactions in the market as an unfair trade practice and lists seven specific categories. This includes: unreasonable refusals to transact with or discriminations against certain parties; unreasonable exclusion of competitors; unreasonably luring or coercing customers away from competitors; unreasonable abuse of a superior bargaining position; unreasonable restriction or imposition of terms favorable to a party; unreasonable support for affiliate corporations; and any other acts that may interfere with a fair transaction. Resale price maintenance is also regulated as an unfair trade practice. In addition, most other standard violations of competition law have been incorporated into the definition of unfair trade practices, along with unfair trade practices imposed by large conglomerates on SMEs and unfair trade practices imposed by corporations on consumers.

24. Dae Wook Kim and Jong Ho Kim, *Economic Analysis on the Enforcement Effect of Competition Law*, Korea Fair Trade Commission (2012).

In addition, if the KFTC deems necessary, it may stipulate specific standards to apply to particular conduct in a particular market. Currently, such special standards have been announced for restrictions of unreasonable awards of prizes, unfair trade practices in large-scale retail stores, and unfair trade practices related to newspapers.

As the KFTC has made strong efforts to regulate unfair trade practices from its very start, the KFTC has an abundant record of enforcement in this category against a variety of industries and companies.

Table 5-5 | Corrective Measures Imposed on Unfair Trade Practices

(Standard: Above Warnings, Unit: Number)

Year	81~86	87~97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	Total
Cases	586	3,518	408	172	121	169	210	123	298	481	370	715	602	539	498	279	248	9,337

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

As shown in the table below, cases related to unreasonable luring of customers and unreasonable abuse of a superior bargaining position are the most frequent. In relation to unreasonable luring of customers, most of the cases concern unreasonable offering of prizes to consumers or fraudulent sales practices by corporations. In relation to unreasonable abuse of a superior bargaining position, most of the cases concern a large conglomerate/manufacturer/large-scale distributor abusing its superior bargaining position to force disadvantages on a SME/distributor/retail store, respectively.

On the other hand, the sub-category of unfair subsidizing is a particular case. Unfair subsidizing encompasses a corporation providing a free subsidy of goods, services, funds, assets or employees and/or providing highly advantageous terms in a transaction to a person of special relation or any other company. The prohibition of unfair subsidizing prevents the joint-degeneration of affiliated companies (of large conglomerates) with their parent companies and unreasonable transfer of wealth within a chaebol family. While such measures should be considered a measure to prevent excessive economic concentration, in the complicated process of political lawmaking, they were specified as a sub-category of unfair trade practices and remains so today. Yet, many experts agree that, conceptually, unfair assistance should be understood to be part of policies restraining excessive economic concentration.

Table 5-6 | Corrective Measures Imposed on Unfair Trade Practices by Category

(Standard: Above Warnings, Unit: Number)

Categories	1981~1986	1987~1997	1998~2007	2008~2012	Total
Unreasonable Refusal of Transaction	4	116	136	36	292
Discriminatory Treatment	2	107	67	4	180
Exclusion of Competing Enterprises	2	13	16	0	31
Unreasonable Luring of Customers	16	606	1,675	1,412	3,709
Forcing Transactions	3	96	85	25	209
Abuse of Superior Position in a Transaction	25	566	570	576	1,737
Conditional Transactions	11	106	62	29	208
Interference with Business	0	6	37	25	68
Unreasonable Support	0	7	128	18	153
Other Unfair Trade Practices	17	307	1	0	318
Maintenance of Resale Prices	27	71	104	41	243
Unreasonable Labeling and Advertising	102	1,090	186	-	1,378
Sub-Total	209	3,084	3,067	2,166	8,526

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

4.2. Major Cases

A typical case in this category involves an act that a standard violation of competition law being regulated as a violation of unfair trade practices. For example, in the 1970~80s, in a shortage of wedding halls, certain wedding hall operators would force its users to purchase wedding dresses or photography services from them. Along the same lines, funeral hall operators would force its users to purchase funeral products (such as coffins) from them. These cases became big social issues. The KFTC determined that such acts constitute bundling and has been consistently ordering corrective measures ever since. The KFTC's stance was validated by the courts in the 2001 Korea Land Corporation bundling case. In this case, the Korea Land Corporation was found to be providing priority rights to purchase housing sites in popular areas to construction companies that would first purchase housing sites in non-popular areas.

A typical case in the high-frequency sub-category of 'abuse of a superior position in a transaction' involves the relationship between large retail stores and suppliers. For example, these issues arise when a large discount store asks a sales employee of a supplier to sell other products or unreasonably transfers advertising costs to a supplier. In another example, these issues arose when certain loss insurance companies took advantage of consumer ignorance and did not compensate for expenses they were required to pay by the insurance terms, such as replacement car rental costs or costs of decreased value of the car. In this 2008 case, the KFTC ordered corrective measures for the loss insurance companies that abused their superior positions and caused considerable disadvantage to consumers.

In the 2009 Seven-Pharmaceutical Company case, the KFTC ordered corrective measures and surcharges for seven pharmaceutical companies including GlaxoSmithKline. In this case, the KFTC found that these companies (who manufacture and sell pharmaceutical products) committed acts of 'unreasonable luring by providing unreasonable benefits' when they repeatedly provided illegal economic benefits utilizing various methods (such as products, cash, and various expense supports) in return for product sales.

5. Restraint of Excessive Economic Concentration

Policies restraining excessive economic concentration pertain to chaebols or large conglomerate business groups, and have been in enactment since 1987. Since then, various ex-ante regulations were vigorously enforced including, limitations of total investments, limitations of debt guarantees and cross-shareholdings for affiliated corporations and limitations of holding companies. Many of these measures were focused on restricting reckless expansion by large conglomerates.

Since the 2008 financial crisis, the KFTC has been shifting from a focus on the harms of excessive economic concentration in domestic markets to a focus on strengthening efforts to enhance international competitiveness. In line with such change, regulatory action has started to shift from a concentration on ex-ante regulation to reinforcing market disclosure and ex-post monitoring. Specifically, the previously all-important measure of limitations of total investments has been repealed and replaced by disclosure requirements for status of corporate groups and other enhanced disclosure requirements. Starting in late 2013, new cross-shareholdings have been prohibited and the scope of regulation has been expanded for corporations in which the owner family's shares exceed 30% of total shares. This shows a trend of restraining excessive economic concentrations making somewhat of a comeback.

On the other hand, restrictions have been implemented on exercise of voting rights by financial or insurance companies (affiliated with large conglomerate groups) in order to prevent a corporation expanding its control through such voting.

Table 5-7 | Corrective Measures Imposed on Violations of Restraint of Excessive Economic Concentration

(Standard: Above Warnings, Unit: Number)

Year	81~86	87~97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	Total
Cases	-	90	12	27	19	16	80	29	149	108	24	44	116	41	36	77	31	899

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

Previously, holding companies were prohibited under the MRFTA. In the aftermath of the financial crisis and in the process of corporate restructuring, the merits of holding companies were brought to light, i.e., holding companies tend to clarify the ownership structure of corporations and make shareholder structures simpler and more transparent. Accordingly, holding companies were permitted on the condition of restricting stock ownership of affiliated companies in the mother company.

6. Competition Policies for Large Conglomerate - SME Relationships - The Fair Transactions in Subcontracting Act, etc.

Systems intended to protect the economically weak are unique and are rarely found in other countries.

6.1. The Fair Transactions in Subcontracting Act

A subcontract transaction occurs when one enterprise (the main contractor) assigns a part of its production obligations to another enterprise (the subcontractor), and the subcontractor produces and delivers the assigned goods in turn. Issues arise when main contractors (mainly large conglomerates) take advantage of their superior position and cause disadvantages for subcontractors (mainly SME suppliers). To correct this issue, in 1982, unfair acts in subcontracting were incorporated as one of sub-categories of unfair trade practices under the MRFTA. Subsequently, in 1984, the Fair Transactions in Subcontracting Act was enacted for even stronger protection.

The Fair Transactions in Subcontracting Act is applied to large conglomerates or SMEs that are larger than their subcontractors. The Act covers cases of production or repair of products, construction, or assignment of service.

Under the Fair Transactions in Subcontracting Act, main contractors are required to put their agreement with subcontractors in written terms, and also required to pay their

subcontractors within 60 days of delivery. In addition, the Act prohibits the main contractor from setting the subcontracting fee unreasonably lower than market rates, cancelling the subcontract without reason, or unduly reducing payments.

When a violation of the Fair Transactions in Subcontracting Act occurs, a corrective measure ordering the payment of the subcontracting fees to be paid or surcharges up to a maximum of twice the subcontracting fees can be imposed.

Apart from KFTC enforcements, to encourage voluntary settlements of disputes and to provide relief for damages, the Subcontract Dispute Settlement Council has been implemented in 13 entities that include the Korean Fair Competition Federation, Korea Federation of Small and Medium Businesses, and the Construction Association of Korea.

Table 5-8 | Corrective Measures Imposed on Unfair Subcontracting Transactions

(Standard: Above Warnings, Unit: Number)

Categories	1987~1997	1998~2007	2008~2012	Total
Non-payment of Fees	1,308	1,315	1,906	4,529
Delayed Payment of Fees	228	37	64	329
Non-payment of Bond Discount Fees	946	9,593	1,294	11,833
No Contract	354	101	399	854
Unreasonable Reduced Payments	32	114	70	216
Non-payment of Deposits	77	363	72	512
Refusal to Accept/Receive	35	31	45	111
Non-payment of Interest for Delayed Payments	0	2,130	821	2,951
Others	311	814	836	1,961
Sub-Total	3,291	14,498	5,507	23,296

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

In conjunction with ex-post corrections of unfair subcontracting acts, the KFTC also operates various policies to deter such acts ex-ante and induce a culture of voluntary compliance in the subcontracting market.

Since 1999, the KFTC has expanded its documentary status investigations (in which the anonymity of the subcontract is guaranteed) and connected the findings to ex-officio investigations. Also, since 2007, the KFTC has been encouraging the execution of collaborative growth agreements between large conglomerates and SMEs by which enterprises with a good record of compliance are given certain benefits, such as exemption from ex-officio investigations.

6.2. The Large-scale Retail Fair Trade Practices Act

Even in the large-scale retail industry, there are many cases of a large-scale retailer abusing its superior position to commit unfair acts against small and medium retail members or consumers.

This act originates from the regulation of unfair trade practices by large-scale retailers (such as large discount stores) and focuses on protecting the fair profits of a supplier from abuse by a large-scale retailer.

Under this Act, large-scale retailers are required to put their agreement with suppliers in written terms. In addition, the Act prohibits large-scale retailers from taking undue advantage in forms of unreasonably reducing payments for goods, unreasonably delaying payments for goods, unreasonably refusing to accept goods, unreasonably returning goods, unreasonably transferring promotional costs, forcing exclusive transactions and demanding the disclosure of business information.

In 2005, the KFTC introduced a reward program to encourage suppliers or employees to report unfair trade practices by large-scale retailers. And similar to the Fair Transactions in Subcontracting Act, the KFTC has undertaken documentary status investigations in the industry.

Table 5-9 | Corrective Measures for Violations of Large Retail Regulatory Announcements

(Standard: Above Warnings, Unit: Number)

Year	00	01	02	03	04	05	06	07	08	09	10	Total
Cases	18	11	17	5	8	18	10	34	33	20	18	192

Source: 「2012 Annual Statistics Report」, KFTC, 2013. This table reflects statistics showing the number of sanctions for violation of regulatory announcements in relation to large-scale retailers.

6.3. The Fair Franchise Transactions Act

In 2012, the KFTC enacted the Fair Franchise Transactions Act in order to regulate unfair trade practices in the franchise industry and ensure mutually beneficial and balanced development of franchisors and franchisees.

Under this Act, franchisors are required to provide prospectuses and franchise agreements to franchisees. The Act also specifies types of unfair trade practices that includes unreasonable termination of supplies by franchisor and abuse of superior position in a transaction. In order to protect franchisees from arbitrary termination by the franchisor,

the Act stipulates the duty to notify franchisees of the termination of a franchise agreement and also provides for restrictions in terminating a franchise agreement.

In addition, the Franchise Dispute Settlement Council has been installed in the Korea Fair Trade Mediation Agency to resolve disputes in franchise transactions through settlement. If a settlement fails to be reached, the case can be transferred to the KFTC and processed according to regular case procedures.

Table 5-10 | Corrective Measures for Violations of the Fair Franchise Act

(Standard: Above Warnings, Unit: Number)

Year	03	04	05	06	07	08	09	10	11	12	Total
Cases	1	20	34	30	46	95	366	165	111	102	970

Source: 「2012 Annual Statistics Report」, KFTC, 2013.

7. Protection and Reinforcement of Consumer Rights and Interests

The KFTC implements consumer policies in connection with competition policies in order to maximize consumer welfare. The KFTC utilizes the Framework Act on Consumers as a basis along with other related laws including, the Adhesion Contract Act, the Door-to-Door Sales Act, the Installment Transactions Act, and the Electronic Commercial Act to protect consumers. The KFTC has also devised the Basic Plan for Consumer Policies which lists six goals for consumer policies, including, reinforcement of consumer safety, fairness in transactions between enterprises and consumers, promotion of consumer education and disclosures, facilitation of consumer damage relief, efficiency in the system of implementing consumer policy and customization of consumer policies.

2013 Modularization of Korea's Development Experience
Korea's Developmental Experiences in Operating
Competition Policies for Lasting Economic Development

Chapter 6

The Effects of Competition Law Enforcement

The Effects of Competition Law Enforcement

1. Overview

Korean competition policies have played a large role in the economic development of Korea from its enactment to the present. Earlier on competition policies complemented the negative side effects of a government-led economic development but rose to become a central principle that leads the development of Korea's market economy.

In its initial stages, enforcement of competition policies was focused on regulating the unreasonable conduct of large conglomerates and protecting SMEs, leading to some criticism that it actually interfered with innovation and market functions. Considering the high demand for external economic growth and the general lack of understanding of a market economy in the early stages of economic development, this may have been an unavoidable.

The greatest contribution of competition policies lies in the correction and restriction of enterprises that interfere with free and fair market order on a microeconomic and practical level. This ultimately led to successful economic development. However, as economic growth has reached considerable levels in the 21st century, a general consensus has been formed that competition policies should focus on vitalizing market competition and enhancing economic efficiencies in line with standard notions of competition policies.

In the following sections, this report will review and evaluate the effects of competition law enforcement by each major category.

2. Effects and Evaluation by Major Category[25]

2.1. Promotion of Competition in Monopolistic/Oligopolistic Markets & Prohibition of Abuse of Market-dominating Positions

Up to 2012, the KFTC imposed corrective measures on 21,392 cases. Among those, only 89 cases concern issues of abuse of market-dominating positions. This may reflect a certain lack of efforts to promote free market competition, the primary objective of competition policies.

One must consider the fact that, from its inception, Korean competition policies have been primarily focused on ex-ante prevention of excessive economic concentration in large conglomerates. Also, governmental policies in pursuit of enhancing market competition historically relied on industrial policies of industrial restructuring or regulation rather than imposing corrective measures for cases of abuse of market-dominating positions. Hence, the scope of MRFTA enforcement was not wide.

There were some cases of enforcement. However, due to particular reasons, the KFTC tended to rely on the legal scheme of unfair trade practices for enforcement. This report has discussed the background and reasons for this in terms of efficiency in enforcement in its previous sections.

Even when considering its circumstances, the Korean economy continues to show aspects of a structurally monopolistic/oligopolistic market. While the concentration of industries did gradually regress over time, it spiked again when the external impact of the 1997 financial crisis and the 2008 global financial crisis hit Korea. As surviving enterprises absorbed failing competitors with each financial turmoil, economic concentration was intensified and recently, the ensuing economic polarization has become a serious social issue in Korea. However, Korea is not a unique case, and international trends of trade liberalization and accelerated capital movements in the flow of neoliberalism are also accountable in this respect.

The KFTC has continued to promote measures to improve monopolistic/oligopolistic markets and correct abusive acts of market-dominating enterprises. Yet, it is hard to expect material results as of yet and additional time may be required. It is also true that for the time

25. This section has been adapted and supplemented based on the relevant sections concerning effects and evaluation by major category in the following sources: Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 20 years* (2001); Korea Fair Trade Commission, *Trace of Market Economy Development: Korea Fair Trade Commission, History of 30 years* (2011).

being, experts expect unequal distribution of wealth and polarization to continue between export-focused large conglomerates and domestic market-focused SMEs, as domestic demand is in a slump. Hence, it can be said that, considering the circumstances, more aggressive improvement measures for monopolistic/oligopolistic markets are necessary today.

Competition experts and academics opine that the KFTC needs to undertake more fundamental and aggressive measures to fix monopolistic/oligopolistic market structures and correct its harms. Many point to the KFTC's historical focus on behavioral regulation (rather than structural regulation) for limiting its capacities.

From a perspective of efficiency and international competitiveness in this global age, Korean corporations need to compete freely in the domestic market to acquire the strong competitiveness necessary for survival in the global market. Therefore, by strengthening policies related to improving monopolistic market structures, the KFTC can break from the remnants of government-led economic policies and establish a market in which newly-formed corporations can freely compete.

It is also important to pursue such policies with careful attention so that they do not interfere with the unique international competitiveness of Korea's large conglomerates while striving to find the proper balance.

In cases of abuse of market-dominating positions, following the 2007 POSCO judgment, the regulatory standard has been narrowed and the KFTC is leading the trend of mandating proof of anti-competitive effect in related cases. Although this is partially for the purpose of limiting excessive restriction of business activities based on notions of unfairness, it has resulted in raising the bar for the KFTC.

Considering the fixed monopolistic market structure and the stronghold that groups of large conglomerates wield in the Korean economy, one must emphasize the need to correct corporate practices in which enterprises abuse market-dominating powers to restrict competition. From this perspective, the KFTC needs to focus on the difficult task of strictly proving anti-competitive effect so that error in enforcement is minimized while strengthening regulation on abuse of market-dominating positions.

2.2. Review of Anti-competitive Mergers

Review of anti-competitive mergers became full-fledged as mergers sharply increased after the 1997 financial crisis. The KFTC's economic and legal review of mergers is considered to be at a high level of sophistication even by international standards. But compared to its level of enforcement, there are not many actual cases of enforcement.

One of the most important aspects of merger review is constructing reasonable corrective measures to properly remove the perceived anti-competitive effects when a merger is determined to be anti-competitive. In the past, the KFTC frequently imposed behavioral corrective measures (such as price regulation or sales volume regulation) rather than structural corrective measures (such as prohibition of merger or sale of shares). Regarding this practice, many experts note that the KFTC needs to actively utilize structural corrective measures in aiming to improve market structure. This is because the KFTC cannot continuously intervene in the business activities of corporations, lacks the funds necessary for such monitoring, and may find it hard to force proper compliance, not to mention the lower regulatory efficiency.

2.3. Prohibitions against Unjust Concerted Practices

Since the late 1990s, the KFTC has considered the eradication of unjust concerted practices its top priority and actively enforced against it. Especially since the mid-2000s, systematic improvements like the leniency program contributed to the increase of such enforcements. Currently, the effectiveness of Korean competition policies against unjust concerted practices is considered to be quite effective as social awareness of its harms and fear of detection and sanctioning has substantially increased.

More than anything, the success of such policies against unjust concerted practices is due to the heightened level of surcharges and sanctioning. Surcharges up to 10% of relevant turnover may be imposed on unjust concerted practices, regularly resulting in hundreds of billions in surcharges.

There is still room for improvement. Many point to the excessive dependence on the leniency program as a problem. The KFTC needs to further raise the possibility of detection and sanctioning through diversification of its investigatory methods and establishment of a strong legal discovery process. This is because an increased possibility of sanctions directly leads to the increase of leniency applicants.

Regarding leniency programs, better confidentiality protection for leniency applicants should help increase leniency applications. On the other hand, a recent issue relates to large conglomerates (that gain the most from such cartels) also monopolizing the benefits of the leniency program. This goes against any notions of fairness, forces disadvantages on small competitors, and interferes with market competition. Hence, Korean competition policies need to focus on achieving fairness as much as effectiveness in operating the leniency program.

Another aspect of unjust concerted practices is that they tend to be repeated and continued despite aggressive enforcement. To prevent this, there needs to be a better awareness of

legal compliance in business management, along with a heightened level of sanctions. In addition, it may be more effective to subject the enterprises and individuals participating in the cartel to criminal prosecution rather than monetary fines. Some experts further opine that ordering imprisonment rather than mere criminal fines (currently extremely rare occurrences for competition cases), could enhance the deterrent effect.

Other experts consider systematic improvements such as the stimulation of private damage class actions or the introduction of punitive damages crucially needed. The reasoning follows that unjust concerted practices take place to gain economic profit and that one of the most effective ways to retrieve such profit is to stimulate private damage suits in addition to imposing surcharges. Many regard systematic improvements for private damage suits as a critical task, recognizing that private damage suits are one of the most effective measures available for victim relief.

Moreover, many agree that systematic improvements are necessary to prevent the negative side-effects of Trade Associations (a major breeding ground for violations of unjust concerted practices), such as restrictions related to grounds for establishment, and scope and method of activities.

Overall, the KFTC competition policies have substantially contributed to the detection and sanctioning of unjust concerted practices but their roots still persist and there is still much work to be done.

2.4. Unfair Trade Practices

In Korea, the legal principles of unfair trade practices has substantially contributed to the regulation of anti-competitive enterprises at a time the KFTC lacked the infrastructure and manpower to carry out active enforcement. Yet, there has always been criticism regarding the KFTC's excessive reliance on unfair trade practices by academics and practitioners.

Thus, the KFTC now tries to lead reports of unfair trade practices that are primarily private disputes to either be voluntarily settled through the relevant dispute mediation councils or resolved by private action at the courts. Then, the KFTC would be able to focus its limited resources on large-scale cases that have significant effect on the market by enhancing competition.

On the other hand, unfair trade practices have recently been returned to the spotlight as concerns over economic polarization and SME protection have grown. Many agree that the KFTC needs to take proper measures based on the restrictions of unfair trade practices to protect SMEs in an already monopolistic/oligopolistic market in which SMEs are continuously being taken advantage of, while being careful to not step into the boundaries of private disputes. Accordingly, based on a different perspective from the past, many experts

argue that there is a need for protective measures aiming to enhance SME competitiveness and that the system of unfair trade practices may be able to contribute to this end.

2.5. Restrictions on Excessive Economic Control

In general, the issues of economic concentration are categorized into issues of general concentration, ownership concentration and market concentration. In Korea, this issue encompasses both issues of general concentration and ownership concentration, unlike developed countries where the issue has been narrowed down to market concentration. This reflects the structural characteristics of Korea's economy in which chaebols exercise a huge influence on the economy.

Excessive economic concentration in chaebols has become a hot social issue in that it allows an unhealthy alliance between the government and corporations, brings about a delay in economic and social democratization, and causes an inefficient use of resources. As a small number of chaebols led a fleet-like group of companies that dealt in a variety of unrelated businesses, monopolies were easier to form and maintain, and industrial restructuring was not timely implemented. Concentration of ownership within the company also led to distortion of corporate governance.

To address such issues of economic concentration, the KFTC has changed its focus as the times changed. Earlier on, it focused on resolving issues of general concentration; in the mid-1990s, it changed its focus to correcting excessive business diversification; and since the 2000s it has targeted improving corporate governance structures caused by ownership concentration. Despite considerable success of its efforts, the problem of excessive economic concentration still largely looms. Given the 1997 financial crisis and the 2008 global financial crisis, economic concentration seems to be intensifying and countermeasures are being discussed.

2.6. International Cooperation

The KFTC's proactive efforts to cooperate with international competition authorities through international organizations or unilateral collaborations (with US, EU, Japan or China competition authorities) have substantially contributed to raising the level of its own enforcement.

In the process of implementing its competition policies, Korea has been consistently committed to international cooperation. As a result, it was able to continuously monitor and learn from the enforcement experiences and systems of other countries and has been able to reflect such findings in its own policies. In addition, as the Korean economy opened trade and Korean companies started to expand into international markets, the globalization

of Korea's competition policies engendered by such international cooperation helped domestic companies to easily adjust when entering international markets. More than anything, globalization raised the level of understanding for domestic companies regarding international cartels or multi-national mergers.

Recently, as many developing countries have or are preparing to introduce competition laws, Korea needs to proactively support such efforts by providing the necessary technical support to enhance the capacities of those countries. Such support can also lead to collaborative economic growth, while providing an especially useful reference to Asian countries that have a common history and cultural background with Korea.

2.7. Competition Advocacy

Korean competition authorities have been much more aggressive in competition advocacy than other comparable countries. The KFTC has always been keen to offer its opinions on issues of deregulation or to make efforts to reflect market competition principles in policies of other fields. Such efforts have engendered significant results. This is all the more significant in a country where governmental policies and regulations wield large influence. The implementation of systematic devices for competition advocacy that are hard to find in other countries have also contributed in this regard.

As noted earlier in this report, competition advocacy can be categorized into three measures including: improvement of entry barriers; advance consultations for legislation with anti-competitive effects and anti-competitive effect evaluation; and other measures to promote a culture of legal compliance such as the voluntary compliance programs. Many agree that such compliance programs should be further extended to improve general business practices so that corporations may willingly adopt a culture of voluntary legal compliance according to their own needs and characteristics. This should lead to lowering the costs of enforcement and creating a long-lasting model of growth for corporations.

2.8. Competition Policies Relating to Large Conglomerate-SME Relationships

Ever since the 2008 global financial crisis, issues of economic polarization and SME growth have become controversial. Korean competition policies have a long history of trying to address this issue through regulation of unfair trade practices or anti-competitive acts and through enactment and operation of various legislations, including the Fair Transactions in Subcontracting Act, Large-Scale Retail Fair Trade Practices Act, and the Fair Franchise Transactions Act.

Despite such efforts, economic polarization continues to intensify and remains a serious issue that could cause a slowdown of Korea's economic growth. Hence, many economic experts agree that strategies promoting collaborative growth among large conglomerates and SMEs are necessary to sustain long-lasting growth and create high-quality jobs. Competition policies are expected to play an important role in such a pursuit.

2.9. Advancement of Competition Law Enforcement Procedures

While the KFTC has contributed to establishing free and fair practices in the market, its procedures are lacking compared to judicial procedures. Many experts point out that this may diminish the fairness element of competition policies.

To counter such issues, the KFTC needs to remain independent of political pressures while systematic improvements of its procedures, such as the right-to-defend, need to be vastly enhanced. Although the procedures of administrative actions by the KFTC contain protective measures that guarantee higher standards of fairness and rights-to-defend, compared to other administrative actions, the KFTC must strive for further systematic improvement considering that its decisions carry the same weight as judgments from courts-of-first-instance. However, this should be pursued in balance with other urgent matters, such as dealing with countless reports of unfair trade practices or satisfying policy demands (such as measures for SME collaborative growth).

2.10. Consumer Policies

Since 2007, consumer policies have been consolidated with competition policies to be enforced by the KFTC so that they may enhance comprehensive economic development in conjunction as the underlying principles. Due to such reorganization, interest in consumer policies has risen, and the KFTC has implemented various consumer protection measures, including information disclosures to consumers and consumer alerts to warn consumers of potential damage.

However, it is hard to determine if sufficient resources have been directed to consumer policies as of yet. Also, the current policies lack a focus on consumers (as opposed to suppliers) in implementation and enforcement. Moreover, many tasks loom in the future until the synergistic outcomes that were initially hoped for become realized.

2013 Modularization of Korea's Development Experience
Korea's Developmental Experiences in Operating
Competition Policies for Lasting Economic Development

Chapter 7

The Implications for Developing Countries

The Implications for Developing Countries

1. Overview

Competition laws and policies have been discussed mainly between the US and EU at an international level. In Asia, Japan was the first country to enact competition laws and has exercised considerable influence in the spread of competition laws in the Asia region, especially since the 1990s. Recently, the voices of China and Asian developing countries have substantially increased in the international competition community as economic power and numbers of countries with competition laws have grown in the region.

In countries with mature market economies, to address issues of monopoly and ensure market functions work properly, competition policies are the most reasonable and often the only economic measure that can be taken. In this regard, competition policies have substantial significance.

Internally, most developing countries aim to develop their industries, enhance consumer welfare, and generally advance their economies. Externally, they aim to overcome international competition and safely settle in the global economy. In these tasks, efficiency is an issue of priority and competition policies must be able to effectively serve such objectives.

The Korean history of competition policies can serve as a good reference for the economic development of developing countries. Korea has a unique history of evolving from a destitute developing country to an advanced industrial country within a short period of time solely based on its own efforts. Even in terms of institutional development in association with socio-cultural development, Korea is in an intermediary position between developed and developing countries. Hence, it has the potential to contribute to filling in the gaps of systems and economies (in relation to economic development) that exist due to different

histories and experiences between the two groups of countries. It is also one of the rare cases that a developing country designs and enforces competition policies in coordination with its economic development policies to considerable results.

As discussed earlier in this report, in an age of international economy distinctly different from the past, Korean competition policies that have a history of developing in coordination with Korea's export-focused economic growth may not always provide the right answer for other developing countries. Yet, it may be able to provide significant implications for developing countries that need to establish a model of competition policy fit to their distinct circumstances.

2. The Progress of Korean Competition Policies

The progress of Korean competition policies closely follows the Krugman[26] model by transitioning from a model of increased input of productive elements to a model of increased productivity.

In the early stages of economic development, Korea pursued an economic policy of export-focused high-growth development based on strong industrial promotion and trade protection in order to break away from its status of under-development. This policy yielded substantial results in the backdrop of an immature market. In such circumstances, there was no consensus on the role or necessity of a competition policy and it was mainly utilized as a price control measure.

Following the late 1970s, as the scale and quality of the Korean economy reached considerable levels, the fruits of such economic development began to show, and Korea needed to transition into a more advanced economic model of increased productivity. To overcome its limits and meet political and economic demands of the early 1980s, the MRFTA was enacted. In its early stages, the MRFTA was not enforced according to the original intent, and with the economic policies of this age of developmental economics still leading the way, only partial liberalization was implemented. At this point, competition policies concentrated on establishing fair trade practices and curing the side-effects of industrial policies.

Following the late 1980s, as the economy was experiencing a boom due to improvements of external conditions and trade liberalization, structural reforms of the economy were delayed. With the 1997 financial crisis, the limits of past models of economic development became obvious. The new developmental paradigm demanded efficiency and creativity generated by a free market, and competition policies surfaced as an alternative to satisfy

26. Paul Krugman, *The Myth of Asia' s Miracle*, Foreign Affairs, Nov/Dec (1994) pp.62~78.

such needs. As a result, Korean competition policies left its previously narrow field of operation to become a fundamental and core principle for multiple economic policies.

3. Implications

Generally, there are a variety of opinions regarding the amount of contribution and necessity of competition law and policies for economic development and a conclusion on the issue is yet to emerge. Even when contemplating the Korean case, it is hard to determine whether the introduction of competition law at an early stage of economic development is appropriate.

This is the same case for many developing countries. Many developing countries have doubts about the role and contribution of competition law and policies, more since most developing countries prefer strong industrial policies in line with the Korea's earlier experience. As seen in the Korean example, developing countries may need to carefully enforce a full-blown competition policy with careful consideration of their respective market economies.

Furthermore, when considering the manpower, resources and capital necessary to seriously enforce competition policies, and the inefficiency of trying to analyze numerous violations with relatively scarce resources, it may seem senseless to adopt competition policies solely for the purpose of achieving short-term economic efficiency.

Despite such limitations, some implications that can be extracted from the Korean experience and provide a reference for developing countries will be discussed in the following sections.

3.1. General Implications

Firstly, Korean competition policies have been a core element of the fast and successful economic development of Korea. Korea is a case in which government-led industrial policies in collaboration with the relentless efforts of corporations and citizens led to successful economic advancement. But as the economy grew and such a model of increased input met its limits, a need for a new paradigm emerged. Hence, a government-led planned economy needed to transition into a market-led free economy, and in the various stages of such transition, competition policies played an important role of controlling, complementing and substituting industrial policies. Currently, in Korea, as in most other developed countries, industrial policies have lost any real effectiveness.

Secondly, Korean competition policies are the product of a long history of discussion and experience. The MRFTA started to be discussed in the early stages of economic development

in the 1960s as a measure to counter various fixed side-effects of the market while initial drafts of legislation were circulated. In 1975, an experimental form of such legislation was enacted but primarily focused on price control. It was finally enacted in its current form in late 1980. Because it was enacted after so much consideration and trial-and-error, its effectiveness was quickly and successfully established after formal enactment.

Thirdly, efforts to develop the direction and level of enforcement of competition policies flexibly and in line with the speed of economic development are meaningful. In the early days of MRFTA enforcement in the 1980s, notwithstanding the negative side effects of economic concentration, economic growth policies were prioritized. At this stage, competition enforcement played a complementary part to economic growth policies by concentrating on enforcing against unfair trade practices and controlling excessive economic concentration in large conglomerates. But as corporations and markets advanced, the internal/external economic challenges they faced changed, and a qualitative transition to efficiency-oriented and market-focused competition enforcement more in line with its more standard purpose became necessary and possible. Thus, Korean competition policies and enforcement are recognized for adapting flexibly and effectively to counter the most immediate economic issues at each stage of development.

Fourthly, it is worthy to make note of the considerable efforts to solve issues of economic concentration in chaebols leading to substantial results. Korean competition policies have been useful in regulating the negative side-effects of large conglomerates while also acknowledging and encouraging their contribution to the economy. Economic policies have continuously changed and adapted to the ever-changing role and side-effects of large conglomerates. For example, when issues of market competition were the focus, large conglomerates were strictly regulated, but recently, as issues of international competitiveness rise, government policies have become relatively relaxed. Efforts to consistently restrict excessive economic concentration while maintaining its flexibility to adapt to the changes in economic development may serve as a good reference.

Fifthly, notwithstanding active competition policies, Korea is experiencing serious issues of socio-economic polarization. Accordingly, the need to prepare action plans to counter unexpected external shocks should be seriously considered. In Korea, economic polarization intensified with the external shocks implanted by the 1997 financial crisis and the 2008 global financial crisis. This was because when countering such economic turmoil, there was not enough long-term consideration put into sustaining a healthy and competitive economic structure. This shows that due to the unpredictable nature of external shock, sufficient research and countermeasures need to be prepared in advance.

Sixthly, vitalizing competition policies and strengthening international cooperation in an open and internationalized world of competition policies is meaningful. By conforming to international standards and promoting international cooperation, the sophistication of one's own competition policies may grow. It also becomes easier to overcome resistance from corporations or other parties that may be disadvantaged by such policies. In addition, in the world of international trade today, even domestic competition policies can be more effective when pursued in harmony with international standards. While this does not mean that the competition policies of a developing country must always follow a developed countries laws or comply with international standards, it does mean that sufficient review and consideration of such laws and standards are helpful. In this regard, the Korean experience of continuous international cooperation leading to advancement of its policies and international support provides a good reference. Furthermore, such international cooperation could also contribute to increasing foreign investments and may ultimately heighten the international status of the whole economy.

Seventhly, based on the Korean experience, enforcing consumer policies in conjunction with competition policies may be put into serious consideration. When competition authorities envelop consumer policies, considerable efficiency can be created by expanding the operational scope of the entity and providing a uniform platform for operation on a basis of enforcement capacities and trust. Such conjunction is a relatively new policy in Korea and it is a rarity internationally, except for limited operation in a few countries including the US and Australia. The KFTC's experiences in utilizing its accumulated capacities to protect consumers at a transactional stage may provide a good reference.

3.2. Specific Implications

In the KFTC's experience of enforcing competition policies, the key driver was found in securing a high-quality organization and staff to be put in charge of competition policies and implementing a good strategy of policy enforcement. This may provide some reference to competition authorities of countries that are in a similar developmental stage with their economies.

3.2.1. Institution Building for Competition Policies

It is obvious that the well-organized body and high-quality staff of the KFTC have substantially contributed to the advancement of competition policies in Korea. Following such considerable development, the need to continuously raise high-quality staff and expand the external capacities emerged.

Firstly, the history of the KFTC provides some insights. It is important to note that in the early days of MRFTA enactment, the KFTC was launched as a department of the Economic Planning Board. Hence, the Deputy Prime Minister of the Board, the de facto person in charge of economic policies in the Korean government, became responsible for competition policies while elite governmental staff experienced in developing and operating economic development policies were put on board. Also, as the Economic Planning Board held full authority over the governmental budget, the ex-Board staff was able to obtain aggressive support (in the forms of support for policy plans and budget allocation) from the Board in establishing its competition policies. Even after the KFTC separated from the Economic Planning Board as part of the 1994 governmental reorganization plan, such elite staff recruited from the Board remained the primary drive in competition policy advancement.

Secondly, the substantial status and powers granted to the KFTC have significance. Public and media support of the KFTC's enforcement of competition policies also provided a strong base for its actions. After gaining independence from the Economic Planning Board, its status was raised to a ministerial body in 1996 and the Chairman of the KFTC could exercise significant influence by participating in cabinet meetings. Further, KFTC decisions were granted the same status as a judgment from a court-of-first-instance from the very start of MRFTA enactment. Therefore, it can be said that political support contributed to successful institution-building and policy enforcement, and as a result, the KFTC maintains a high level of independence in implementing competition policies today.

Thirdly, continuous efforts to change and develop the organization of the KFTC are significant. Even after the substantial transition it accomplished in the 1990s (detailed in earlier sections of this report), it reached the limits of enforcement focused mainly on reports of unfair trade practices. In the mid-2000s, the KFTC reorganized its case processing system so that regional offices would deal with reported cases, while the central office would be focused on large-scale ex-officio cases including cartel investigations and merger reviews. Such reorganization helped case processing become more efficient and effective while also contributing to the fundamental objective of vitalizing market competition and raising the level of consumer welfare.

Fourthly, consistent efforts to obtain and raise high-quality staff are significant. This raised the level of its expertise and formed the framework for competition policies to compete with industrial policies. As the importance and influence of the KFTC became apparent, the top group of incoming elite governmental staff (appointed through a rigorous national exam and selection process) desired and applied to work at the KFTC. Since the 2000s, as judicial review has become critical for cartel enforcement and other investigations, many top-grade attorneys have been joining the KFTC staff. In many cases, after dedicated work at the KFTC, elite staff had the opportunity to study abroad in the US or EU on government

scholarships or job training programs, and then return refreshed and ready to contribute to systematic development.

Fifthly, since competition policies have become well-established and highly-activated in the 2000s, the KFTC's monopoly on competition policies has effectively ended and external checks-and-balances have expanded to provide a new opportunity for competition policy advancement. In this stage, there has been a great increase in cancellation lawsuits and judicial review of KFTC decisions, and legal advocacy carried out by large law firms has significantly contributed to the advancement of research and jurisprudence in the field. Recently, private damage actions have increased to the point of supplementing public enforcement. Such expansion of external participation from other governmental bodies and private parties has contributed to the advancement of competition policies and further serves to coerce corporations into compliance. There are many implications to be found in such a multifaceted approach leading to enhanced market competition.

Sixthly, as competition policies started to be enforced by regulatory agencies other than the KFTC in certain industries, including the broadcast/communications or financial industries, a need to clearly define the relationship between the KFTC and those agencies has emerged. From the mid-1990s, the scope and types of acts of an enterprise that are covered by competition policies has widely expanded with the intention of spreading competition structures to all areas of economic activity. This caused issues of overlap and conflict with other regulatory agencies in regulating enterprises under the authority of both agencies. In Korea, allocation of regulatory powers has not been properly adjusted and is causing persistent problems. Thus, countermeasures, like establishing an intermediary agency that can mediate issues of authorities and enforcement between regulatory agencies, need to be undertaken.

3.2.2. Enforcement Strategies of Competition Policies

Firstly, when initially prioritizing the category of enforcement actions it would take, the KFTC focused on actions that would be immediately and easily perceivable to the general public, and this brought substantial social and media support. In addition, it enacted various laws to relieve and prevent harm to consumers in their daily lives, including: the Fair Transactions in Subcontracting Act that aimed to protect SMEs from the abuse of large conglomerates; the Adhesion Contract Act that aimed to protect consumers from unfair contractual terms; and the Fair Labeling and Advertising Act to correct and deter fraudulent labeling or advertising. Foremost, the KFTC applied the legal scheme of unfair trade practices to a large range of conduct to relieve the difficulties of parties-of-inferior-economic-status. Thus, such early efforts of prioritizing and publicizing enforcement led to social support from the beginning. Also, such social support led to further support of efficiency-oriented

competition policies whose underlying concepts are often too complicated and difficult for the general public to immediately grasp. This had significance in a democratic society where social support leads to political support.

Secondly, active efforts in competition advocacy, including review of legislation with anti-competitive effects, may contribute to raising the level of sophistication for economic policies and market economies. Currently, in the current stage of considerable economic development, acknowledging that competition policies play an essential role in economic policies, the KFTC was able to transmit its essence into other categories of economic policy through competition advocacy. This may provide a significant reference point for Asian developing countries in which the government's role is still significant.

Thirdly, gradually raising the level of sanctions may enhance the importance of competition policies and stimulate corporate motivation to comply with the laws. In Korea's case, this line of policy was enhanced by efforts to transform the general economy into a competitive market structure, which included measures to improve corporate governance structures or legal compliance in business management.

Fourthly, actions brought to the court by corporations for legal review of KFTC decisions may substantially contribute to diversifying and expanding the scope of competition enforcement, and as a result, the total capacities of competition policies may be strengthened. Consistent efforts for legal reform, including measures to improve judicial procedures and expand counsel access, have provided underlying support in this regard.

Lastly, recently, a notable trend in Korea is the increase of private damage actions, especially for cartel cases, as interest in competition enforcement rises, the content of competition policies are well-publicized and foreign cases of private actions are introduced in Korea. Such diversification of competition enforcement and incorporation of different perspectives may ultimately lead to a more balanced and healthy pattern of growth for competition policies.

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