



## **BACK TO OFFICE REPORT**

### **2023 KOREA FAIR TRADE COMMISSION (KFTC) INTERNSHIP PROGRAM**

**COMPETITION AUTHORITY OF KENYA WAS REPRESENTED BY;**

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## INTRODUCTION

1. The Korea Fair Trade Commission (KFTC) hosted their annual internship programme for case handlers, in South Korea from 23<sup>rd</sup> November, 2023 – 3<sup>rd</sup> November, 2023. The internship programme was aimed at building the capacity of case handlers who investigate anti- competitive business practices and undertake merger assessment on a day- to- day basis to enhance their abilities in investigations techniques and learn from KFTC case handling procedures.
2. Specifically, the sessions covered KFTC regulation of abuse of market dominance, cartel regulation and merger and Acquisition regulation. The programme format involved lecture sessions on theory followed by interactive sessions where case handlers were required to share their personal experiences from their respective agencies.

## PARTICIPANTS

3. The Internship by KFTC was the 2<sup>nd</sup> edition of the 2023 programmes which attracted participants from:
  - i. Competition Commission of Pakistan (CCP)
  - ii. Mongolian Authority for Fair Competition and Consumer Protection (AFCCP)
  - iii. Vietnam Competition and Consumer Authority (VCC)
  - iv. Competition Authority of Kenya (CAK)

The other agencies had only one representative except for CAK which was represented by two participants.

## SUMMARY OF AREAS COVERED DURING THE INTERNSHIP

### a) ABUSE OF MARKET DOMINANCE KFTC REGULATION

4. The abuse of market dominance is prohibited under article 3-2 of the Monopoly Regulation and Fair Trade Act of Korea (MRFTA). The MRFTA enumerates five different types of conduct of dominant enterprises that would constitute abuses of market dominance. These 'abusive acts' are:
  - i. unreasonably determining, maintaining, or changing the price of products or services;
  - ii. unreasonably controlling the sale of products or provision of services;
  - iii. unreasonably interfering with the business activities of other enterprises;

- iv. unreasonably impeding the entry of new competitors; and
  - v. unreasonably excluding competitors, or seriously impairing the interests of consumers
5. The MRFTA has a regulatory framework setting out the conditions for an abuse of dominance case to be found illegal. This being: *A market Dominant position need to be established, abusive conduct and the anticompetitive effect.*
  6. A market-dominating enterprise is considered to be any enterpriser who can determine, maintain, or change the prices, quantity or quality of commodities or services or other terms and conditions of business as a supplier or customer in a particular business area individually or jointly with other enterprisers. (MRFTA Art. 2(3)). The Market share of one enterpriser to be considered as dominant is 50% or more and the total market share of not more than 3 enterprisers is 75% or more.
  7. The types of abusive conducts under the MRFTA Art. 5 are classified into two:
    - a. **Exploitative Conducts** such as: Price abuse (unfair pricing), Output control and Conduct that significantly harms consumer benefits; and
    - b. **Exclusionary Conducts** such as: Interfering with the business activities this includes: -refusal to deal, discriminatory pricing, coercing disadvantage, improper use of legal proceedings, impeding market entry (exclusive dealing, loyalty rebate, etc), and excluding competitors (predatory pricing, margin squeeze among others).
  8. Factors considered by KFTC for examining whether a firm holds a dominant position: Market shares; existence or level of entry barriers; relative size or strength of competitors; vulnerability to collusion (cartels); existence of similar products or adjacent markets; existence of big buyers; consumers' ability to switch.
  9. Regarding anticompetitive effect and in order to find illegality, KFTC is required to demonstrated that the dominant company had the intent<sup>1</sup> of impeding competition, and that the concerned act/ conduct actually damaged, or is likely to damage, competition to a considerable degree. **Examples of anti-competitive effect considered** are increase in price; decrease in output; reduction in diversity; impediment to innovation; reduced number of competitors or entrants; rise in competitors' costs, etc

## 10. The sanctions and Remedies for dominance abuse

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<sup>1</sup> The 'intent' may be presumed when it is proved that the market competition is actually harmed

- a) **Remedies** Cease-and-Desist order, any other remedial measures necessary to correct abusive conducts
  - b) **Administrative Fines** up to 6% of the relevant sales (relevant turnover during the infringement period)
  - c) **Criminal penalty** imprisonment of up to 3 years, fines of up to 200 million won (Prosecution is not possible without KFTC's filing complaint to the prosecutor's office.)
11. To better understand KFTC case handling procedure with regards to abuse of dominance, the lecture highlighted on a number of cases:

**Case 1: Exclusive Dealing by Google (2023)**

12. Korean local App store called One store was launched in Jan 2016 to compete with Google Play.
13. Google, as an overwhelmingly dominant player in the Android app store market, blocked game developers from releasing their apps on One store to maintain and increase Google play's dominance. Google required game companies to exclusively release their games on Google Play in order for their apps to get featured on Google play front page.
14. KFTC assessed the conduct engaged by Google and found that as a result of its conduct Google had blocked the release of new games on One store. As a result, one store faced difficulties attracting new games, and it led to a decrease in One store's value as a platform as well as a direct hit to revenues, while Google was able to further entrench its dominance in the Android app market.
15. KFTC decided to impose a remedy and administrative fine of 42.1 Billion Won on Google, as the company prevented mobile game developers from publishing games via its competing app market (One Store) and undermine fair competition in the market.

**Case 2: Output Control by Korea Vaccine (2019)**

16. Korea Vaccine Co. (KV) that imports the tuberculosis vaccine for infants produced by JBL in Japan and monopolized domestic TB vaccine market since 2016. In 2017, KV stopped importing intradermal (injection-type) BCG vaccine that was much cheaper than the percutaneous (stamp-type) BCG vaccine. As the volume of intradermal vaccine dropped, sales of percutaneous vaccine drastically increased

17. KFTC on assessment established that Korea Vaccine had been de facto monopolist in domestic BCG vaccine market since Sep. 2015 when Denmark's SSI halted supplying BCG vaccine.
18. KV exploited its dominant power by stopping its import of JBL's intradermal vaccine in order to maximize profits. As a result of this parents were forced to choose more expensive percutaneous vaccine.
19. Based on its finding KFTC imposed administrative fine of 1 Billion won, and referred 2 executives to prosecution.

### **Case 3: Tying by Microsoft (2006)**

20. MS which had 99% market share in domestic PC OS market, offered its Windows Media Player (WMP) and its Messenger bundled to its Windows PC operating system beginning from 1999.
21. On investigation KFTC found that WMP and Messenger are separate products distinct from the Windows PC OS, and that MS coerced consumers to purchase WMP and Messenger by its tying practice.
22. KFTC further noted that MS intended to 'leverage' its dominance in the PC OS market to obtain competitive edge and exclude competitors in the media player and messenger markets.
23. As a remedial measure, Microsoft was ordered to separate version such that MS should unbundle WMP and Messenger from Windows PC OS. KFTC also imposed administrative fine of 33 billion won (US\$ 30 million).

### **b) CARTEL REGULATION**

24. Article 40 of the MRFTA prohibits forming an agreement to engage in certain conduct that would unreasonably restrain competition.
25. The types of conduct listed in the provision include: price-fixing; setting terms and conditions, the price or payment terms for trade of goods or services; restricting production, shipment or transportation of goods, or trade of services; restricting territory or customers; interfering with or restricting the establishment or expansion of facilities or installation of equipment necessary to manufacture products or provide services; restricting the type or specification of the product or service being produced or provided; jointly conducting or managing, or establishing a corporation to conduct or manage, a key part of the business;

deciding the successful bidder, successful auctioneer, bidding price, highest price or contract price.

26. Three main ways adopted by KFTC to maximize cartel detection these are:
  - i. Leniency Program - Incentive for self-reporting cartels.
  - ii. Ex Officio Detection - Bid-rigging Indicator Analysis System (BRIAS) and Digital Forensic Investigation.
  - iii. Informant Rewarding- Rewarding system for providing information about cartels.

### **Leniency Program**

27. In 2021, about 65.4% (34 out of 52) cartel cases investigated by KFTC and which were subject to administrative fines were cases detected through leniency program. It was notably the most effective and efficient tool adopted by KFTC in cartel detection as it enables easy collection of evidence, effective in breaking up existing cartel structure and deterring cartels from forming in the future.
28. In the leniency program only 1<sup>st</sup> and 2<sup>nd</sup> applicants are eligible for leniency under the MRFTA. The first applicant gets immunity from corrective order, administrative fine 100% and immunity against any criminal charge. The second applicant gets reduced immunity for corrective order, 50% reduction in administrative fines and immunity against any criminal charges.
29. In return the applicants are required to provide necessary evidence proving a cartel they participated, providing evidence when KFTC has no information about an alleged cartel, or evidence is insufficient to prove its illegality, ensure full cooperation throughout the investigation process, cease cartel conducts immediately and they should not be a coercer or recidivist

### **Bid-rigging Indicator Analysis System (BRIAS)**

30. There are indications frequently observed when a bid-rigging occurs, such as a high Bid-to-Expected ratio—a ratio dividing the winning price by the expected price—and low number of bidders, making it possible to create indicators for bid-rigging. BRIAS is an online system that receives bid data from public sector authorities and detects signs of bid-rigging by analyzing the collected raw data for such indicators. The analysis is later utilized in competition investigations.

### **Informant rewarding system**

31. Involves giving financial rewards to those who reported unlawful behaviors and submitted the evidence.
32. The workshop also highlighted cartel investigation method adopted by KFTC:

- a. Preliminary investigation
33. This involves Analyzing of information obtained from reports leniency/informant, research through BRIAS or on the web and work out the investigation plan.
- b. Dawn raid
34. This involves enter of premises of the suspect without prior notice and gathering documents or electronic files
- c. Order to report (a.k.a. RFI; Request for Information)
35. Order the suspect to report on its business behavior or other necessary information or documents
- d. Summon for interview
36. Summon relevant parties and witnesses and elicit their interview
- e. Sanctions:
37. Sanctions under the MRFTA include warning when degrees of violation are immaterial, Corrective Order (To discontinue the violation and to publicly announce the fact of receiving corrective order), administrative fine up to 20% of the affected turnover, Criminal charge (File to Prosecutor's Office) Jail term up to 3 years and or a fine up to 200 million KRW

### **Case 1: Car Carrier Cartel**

38. Car manufacturers periodically hold global bids to select car carriers to transport their products. The international car transportation market was occupied by a few major car carriers, and they were in close relationship with one another since they were members of Shipping Conferences.
39. As a result of high fixed cost and low variable cost in the shipping industry, price wars would erupt among the carriers. Due to increase price wars these car carriers agreed to respect each other's trade area and do not trespass it. Specifically, carriers allocated market by not making a bid ("no service") or purposely bid at a high price ("high ball") in the other carriers' trade area. They also agreed that If anyone breaks the rule, there was a claim and compensation process among the carriers.
40. Upon investigation it was found that by limiting the area in which a transaction arises or the transaction counterpart was a violation of MRFTA through Market Segmentation. The case was resolved through imposition of corrective Measures and a Fine of 43 billion KRW



41. Some carriers filed a lawsuit against KFTC's decision, arguing that imported cars' freight charge was paid at foreign port, so it did not affect Korea market – thus, revenue from imported cars should be excluded from the Relevant Sales Revenue ▪ However, Court rejected carriers' argument and ruled that regardless of the place of payment, agreement on freight charge did affect car price in Korea market as well

### **Case 2: Shipping liners Cargo Cartel**

42. There are 2 types of shipping companies according to operation method: Liners and Tramps. Unlike tramps, Korean Act allows liners' conference (including price fixing, space sharing, etc) under certain conditions for policy reasons - prevent excessive competition, protect domestic liners from global liner.
43. Accused liners operate on various Asia routes and have dominant position in the near-sea container shipping market. These liners colluded on container freight rates, surcharges and engaged in bid-rigging for more than 17 years. If shippers (freight owners) refused to accept the price increase, the liners boycott the complaining shippers' request until they give in. Additionally, the liners made internal rules such as penalty, kicking-off from liner conference to prevent the breach of the agreement.
44. The accused liners argued that their collective actions legally had no problem according to the block exemption rule.
45. In its investigation, KFTC argued that the alleged liners' cartel cannot be exempted from the Fair Trade Act as the Liners failed to comply the procedural requirements in the relevant law, which is devised to protect shippers' rights and that Liners unreasonably restricted competition by forcing the agreement to both shippers and themselves.
46. Based on this the liners were found to be in violation of the Act through price fixing. Corrective Measures and a fine of 176.2 billion KRW was imposed.

### **c) M&A Regulations and procedures of KFTC**

47. The lecture highlighted the various types of mergers regulated under the MRFTA. These include:

#### **a. Acquisition of shares**

48. Gaining ownership of shares by purchase. Acquisition or ownership of 20% or more of the shares of another company (or 15% for companies listed on the Korea Exchange). Acquisition of shares means gaining ownership of shares by purchase or transfer of ownership from a former owner of the shares. or Acquisitions of additional shares in a company where the acquiring party already holds 20% or more of the shares in the company

(15% for companies listed on the Korea Exchange) and the acquisition results in the acquiring party becoming the largest shareholder.

**b. Interlocking directorates**

49. Interlocking directorate of a large company that has worldwide assets or annual turnover of KRW2 trillion or more (where an officer or employee holds an officer's position in another company)

**c. Mergers**

50. Merger with other companies which means the absorption of one company that ceases to exist, into another that retains its own name and identity and acquires the assets and liabilities of the former with the statutory formalities under the Korean Commercial Code.

**d. Acquisition of business**

51. Acquisition of a business (or sometimes substantial assets) which means gaining ownership of a specific business including assets (liabilities and employees) by purchase or transfer of ownership from a former owner of the business.

**e. Joint Venture**

52. The MRFTA treats joint ventures as business combinations that are subject to merger control. A party in the process of becoming the largest investor of a newly established company (or joint venture) must file a merger notification to the KFTC.

53. However, some joint ventures formed between competitors can be considered unlawful restrictive agreements or practices if the parties intend to carry out the main part of their business by establishing a joint venture.

**Thresholds**

54. The general thresholds for notification are as follows:

- One party to the transaction has worldwide assets or annual turnover of KRW300 billion or more.
- The other party has worldwide assets or annual turnover of KRW30 billion or more.

55. In addition to these general thresholds, local thresholds are applied to overseas mergers/cross border mergers, including transactions where either a:

- Foreign company acquires another foreign company.
- Korean company acquires a foreign company.

56. If each of these merging parties has annual local sales revenues of KRW30 billion or more, notification of the merger is mandatory.
57. Worldwide assets and annual turnover are calculated on a group-wide bases, meaning that the total assets or total turnover of all affiliate companies worldwide, both before and after the transaction, are relevant. Whether a company would fall within a "group" is determined according to share ownership or control. A company would generally be deemed a member company of a group if a related party owns share of 30% or more, or where a related party can exercise a controlling influence over the undertaking's board composition, appointment of its executives, and major decision-making in relation to the operation and management of the business.

### **Responsibility for Notification**

58. The acquiring companies must notify, as follows:
- Acquisition or ownership of another company's shares. The party that acquires or owns at least 20% of another company (or at least 15% for companies listed on the Korea Exchange) must notify the merger.
  - Establishment of a new joint venture. The largest investor must notify.
  - An interlocking directorate. The company that makes its officer or director hold a directorship or an officer position of another company is required to notify.
  - Acquisition of a business. The acquiring company is required to notify.
  - Merger. The surviving entity is required to notify for "absorption merger" and the newly created entity is required to notify for "new entity creation merger", provided, however, if one of the parties to a new entity creation merger has assets or annual turnover of KRW2 trillion or more, the parties are required to jointly notify the merger.
59. The KFTC Merger Review Guidelines classify merger review procedures into two categories:
- Simplified merger review- simplified review mergers are presumed not to be anti-competitive
  - Regular merger review- These mergers include all mergers other than simplified review mergers. In such cases, the KFTC reviews the cases more thoroughly
60. The MRFTA prohibits a merger which substantially restricts competition in a particular market. A substantial restriction of competition refers to a situation where a certain company or business group influences with a certain degree of freedom (this has an imprecise meaning; it can also be interpreted as "with a considerable degree of freedom")

one or more of the following within a particular market Price, output, terms of trade among others.

61. In assessing whether a horizontal merger substantially restricts competition in a particular market, the KFTC considers multiple factors such as the:

- Market concentration before and after the business combination.
- Possibility that competitors can sufficiently and timely supply replacement products if the parties to a horizontal merger were to engage in competition restricting activities (for example, price increase).
- Possibility of collusion between competing businesses.
- Degree of import competition and the international competition situation.
- Degree of expanded purchasing power in the upstream market.
- Possibility of new entrants.
- Existence of similar goods and adjacent markets.
- Existence of a powerful purchaser.

62. In assessing whether a vertical merger substantially restricts competition in a particular market, the KFTC considers multiple factors such as whether:

- Parties to a merger can foreclose their competitors from purchasing or sales activities or prevent new entrants into the market.
- A possibility of coordination among competitors increases as a result of the merger.

63. In assessing whether a conglomerate merger substantially restricts competition in a particular market, the KFTC considers multiple factors such as the following:

- Deterioration of potential competition.
- Exclusion of competitors.
- Strengthening of entry barriers.

64. A merger is presumed to substantially restrict competition in a particular market if the combined market shares of the merging company:

- Meets the requirements for a market dominant company (that is, the market share of a single company is above 50%, or the sum of the market share for no more than three companies is above 75% in a particular market).
- Is the largest in the relevant market.
- Exceeds the market share of the second-ranking company in the market by more than 25%.

65. **Cross-border M&A- There are a number of types of cross border mergers that are regulated under the MRFTA these are:**

- a. **Foreign-to-Korean mergers-** these mergers are subject to notification if it meets the notification threshold of total assets or turnover of KRW 300B, 30B or more
  - b. **Korean-to-Foreign mergers**
  - c. **Foreign-to-foreign mergers-** In addition to the general jurisdictional thresholds, a 'local nexus requirement' must also be satisfied: a foreign-to-foreign merger is deemed to satisfy the local nexus requirement if each party has annual turnover in Korea of KRW 30B or more. However, in the case of an 'establishment of a joint venture' in Korea, the local nexus requirement does not apply, even if the participating companies are foreign firms
  - d. **Korean-to-Korean mergers-** Also could be defined as 'Cross-border M&A' if they have to be notified other countries
66. KFTC co-operates with a number of foreign competition authorities including:
- Through co-operation agreements (for example, with Australian, EU, Chinese, Indonesian, Russian, Canadian and Mexican authorities).
  - Without formal agreements (for example, with the US and Japanese authorities).

#### **Case: Delivery Hero SE's purchase of Woowa Brothers**

67. In December 2020, the KFTC conditionally cleared the merger between food delivery platform operators (Delivery Hero SE's purchase of Woowa Brothers). Delivery Hero SE (DH), the parent company of Delivery Hero Korea (DHK) (and the second-ranked online app food delivery platform operator in Korea) signed an agreement to acquire 88% of the shares of Woowa Brothers (WB), the top-ranked online app food delivery platform operator in Korea, and filed a merger notification on 30 December 2019.
68. The KFTC defined the relevant market(s) as the following:
- The delivery app market.
  - The food delivery agent market.
  - The shared kitchen market.
69. The KFTC found that in the first relevant market above, a horizontal overlap would occur and anti-competitiveness could be presumed because the market shares of the parties based on the transaction amounted to 99.2%. The KFTC also reasoned that there was an insufficient number of competitors that could exert competitive pressure on the parties and there was a likelihood that benefits to the consumer benefits would decrease, with the amount of commission to be collected from restaurants likely to increase. They found that competition in the second and third relevant markets outline above would likely be

substantially restrained because, under the assumption of a conglomerate merger, competitors would likely be foreclosed and the barriers to enter the market would likely become higher. Accordingly, the KFTC approved the merger on the condition that DH would sell all of its shares in DHK to a third party within six months.

## KFTC REGULATORY VERSATILITY

70. In line with the changing regulatory environment, KFTC amended its law, the MRFTA in order to enhance due process in investigative and hearing procedures. Some of the amendments have been:

- i. These amendments covered many issues including the right to submit opinions and make a statement, access to data, specification of the limitation period, monitoring of compliance with the consent decision, etc.
- ii. New provisions governing a report for detaining voluntarily submitted materials and a return of them (paragraph 3 of the article 50 of the MRFTA).
- iii. Specifying the respondent’s right to submit written opinions and make a statement (paragraph 3 of article 52 of MRFTA).
- iv. Specifying the relevant parties’ right to request to view and copy data (article 52(2))
- v. Specifying the obligation to notify the outcomes of investigations (paragraph 3 o article 49), among others.

## RECOMMENDATIONS

Department	Key Lessons	Recommendations
<b>Enforcement &amp; Compliance, Buyer Power</b>	The adoption of BRIAS system as a bid-rigging detection system in public procurement has been beneficial in pin pointing possible bid rigging conduct within the public sector	There is need for the Authority to adopt such a system as it will facilitate in detection and investigation of possible bid rigging in Kenya
	Leniency programme by the KFTC has been the most effective and efficient tool adopted by the agency in cartel detection. This is evidenced in that in 2021 more than 60% of cartel cases	There is need for the Authority to work on its leniency programme. The Authority can review upwards it penalties with regards to cartel this will in turn deter possible cartel actives.

	<p>investigated by KFTC and which were subject to administrative fines were cases detected through leniency program.</p> <p>This can be mostly attributed to the hefty penalties (20% of the affected turnover) for non – cooperation.</p>	
	<p>Unfair Practices (Theories of Harm) in digital markets- gatekeepers can engage in unfair practices including; discriminatory access, self-preference, restriction, high switching costs and defaults, tying and bundling, and data bundling.</p>	<p>Need for surveillance of big players in the digital sector to determine if they exhibit characteristics of gatekeepers and if they are engaging in the identified unfair practices. This will inform:</p> <ul style="list-style-type: none"> <li>- Development of Guidelines for regulation of gatekeepers if required</li> <li>- Review of the Competition Act to cover unfair practices specific to digital markets if need be</li> </ul>
<p><b>Mergers &amp; Acquisitions</b></p>	<p>Cooperation with member states in assessment of cross border mergers- KFTC in its review of cross border mergers relies on co-operation agreements entered into with other states/ countries in assessing mergers affecting their jurisdictions.</p>	<p>Entry into such co-operation agreement with regional and other global agencies can aid in sharing of information regarding cross border mergers that may affect our jurisdiction.</p>

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14<sup>th</sup> November,2023

