

## 3. Korea

**Jaemin Lee**

---

### 1. INTRODUCTION

Competition law is one of the most rapidly developing areas of law in Korea, and has seen dramatic developments over the past decade. The most recent change came in 2002, when the Korea Fair Trade Commission (KFTC) undertook to achieve its goal of enhancing economic efficiency and consumer welfare by promoting and eliminating certain behaviors that hinder competition in the market.<sup>1</sup> The KFTC is a ministerial-level central administrative organization under the authority of the prime minister and also functions as a quasi-judiciary body.<sup>2</sup> The idea of ensuring fair trade in the Korean market has become one of the major tasks of the Korean government and the KFTC has been the vehicle to implement this objective.

Over the years, the KFTC has conducted investigations into various sectors of the economy. The active engagement of the KFTC has indeed helped to establish a 'fair trade' environment in Korea. As a result, consumers have become more willing to come forward when they encounter anti-competitive activities and the KFTC has been quick to respond to public concern.<sup>3</sup> As a consequence, the importance of protecting consumer rights has taken root in Korea. The Korean government has viewed the competition regime as an important policy tool to sustain the market economy, which in turn supports the competitiveness of the Korean economy.

Korea's efforts have apparently succeeded since economic performance

---

<sup>1</sup> See OECD Report (2002), 'Competition Law and Policy in Korea'. Retrieved from <http://www.oecd.org/dataoecd/21/8/34834187.pdf> (last accessed 2 February 2013) at para. 1.

<sup>2</sup> Fair Trade Commission of Korea (KFTC), available at <http://eng.ftc.go.kr/about/overview.jsp?pageId=0102>.

<sup>3</sup> See Kim, Tong-hyung (2011), 'Government out of Options on Inflation', Korea Times, July 26. Retrieved from [http://www.koreatimes.co.kr/www/news/biz/2011/07/123\\_91658.html](http://www.koreatimes.co.kr/www/news/biz/2011/07/123_91658.html) (last accessed 2 February 2013).

has been strong for most of the last decade, and the country has recovered quite quickly from the 2008 economic recession. This strong performance has been widely recognized. For instance, Korea came in first in comprehensive competitiveness rankings of Asian countries conducted by the Research Institute of Boao Forum, a Chinese economic think-tank, where Korea was listed as the country with the highest level of competitiveness out of a total of 35 Asian countries.<sup>4</sup> This strong performance has been made possible by many factors, but one of them is the enhancement of the competitive environment in the market.

At the same time, the active participation and engagement of the KFTC in many sectors of business has also led to inevitable criticism. Concerns have been raised regarding the active (sometimes overactive) application of competition rules. These criticisms have been based on allegations that certain investigations were motivated by political reasons: that is, to target a particular industry or a particular corporation in the course of implementing general governmental economic policies.

This chapter first provides an overview of the Korean political system and economic system in order to offer an assessment of the current situation of Korea. The chapter then discusses the competition regime in Korea more specifically.

## 2. BRIEF HISTORY OF MODERN KOREA

It is probably the case that the last 100 years represent the most dramatic century in Korea's history. It started with Japan's annexation of Korea in 1910, followed by 36 years of colonial rule by Japan. Korea's liberation from colonial rule in 1945 came with the division of the peninsula between South Korea and North Korea, which ultimately led to the tremendously destructive Korean War in 1950. Suffering from the annihilation of the Korean War, Korea finally initiated its economic development in 1961. Ever since, Korea has successfully implemented its economic development agenda, largely based on its focus on the expansion of exports. In early December 2011, Korea had become the ninth largest economy in the world with a trade volume of US\$1 trillion. Korea's fast economic development in such a short time frame has also posed new social problems

---

<sup>4</sup> See 'Korea Tops Asian Competitiveness Ranking' (April 2011), newsletter of the Embassy of the Republic of Korea in the USA, retrieved from [http://www.dynamic-korea.com/news/view\\_news.php?main=KTD&sub=ECO&uid=201100337220&keyword=](http://www.dynamic-korea.com/news/view_news.php?main=KTD&sub=ECO&uid=201100337220&keyword=) (last accessed 2 February 2013).

such as deepening polarization between the rich and the poor and the dominance of big conglomerates in the economic apparatus. Calls for social justice and fairness have increased since early 2000. How to ensure social justice and fairness while maintaining the pace of economic development has become the most important national question for Korea. As of 2011, Korea is now standing on the threshold of a new paradigm, both economically and socially.

## **2.1 Japanese Colonial Period (1910–1945)**

The Chosun Dynasty, established in 1392, came to an end when Korea was annexed by the then imperial Japanese government with the Annexation Treaty of 1910. Colonial rule continued until the defeat of imperial Japan by the Allied Powers in 1945, and left a deep mental scar on the psyche of the Korean people, a scar which still presents itself in many different forms in Korean society. The colonial period was also the time when a modern legal system was first introduced in Korea, affected largely by the Japanese legal system and its jurisprudence. The lawyers trained during colonial rule formed the first batch of lawyers when Korea was finally liberated from Japanese rule in 1945.

## **2.2 Establishment of a New Republic (1945–1950)**

The defeat of Japan in 1945 in World War II caused an instant collapse of colonial rule in the Korean peninsula. With the departure of the Japanese government and its forces across the Korean peninsula, the United States and the Soviet Union divided the peninsula across the middle and occupied their respective halves. In the South, under the auspices of the United States and the United Nations, the Republic of Korea was established in 1948. As the North also formed its own communist government, the two Koreas began to proceed in a completely different direction, raising tension in the peninsula. In South Korea, this is the time when US influence started to take root in all sectors of society, including the legal sector, although the traditional Korean legal system, with its Japanese remnants, still remained largely intact.

## **2.3 Korean War and Aftershocks (1950–1961)**

Then came the most tragic incident in Korean history. The communist North invaded the South in June 1950. The war continued until July 1953 when the two Koreas signed an armistice agreement. The three-year war devastated the entire country. After the war, South Korea (hereinafter Korea) was one of the poorest countries in the world, with a gross national

product (GNP) per capita of around US\$200. Economic hardship continued throughout the decade and Korea's economy was only maintained by outside aid, mainly from the United States. Domestic politics in Korea were also in turmoil at this time.

#### **2.4 Economic Development (1961–1987)**

The social and political chaos invited a military coup in May 1961 under the leadership of General Park Chung-Hee. The new administration of President Park adopted national economic development plans and started to pursue an export-driven economy. Korea managed to secure low-interest long-term loans from other countries, which provided the financial resources to finance the export-producing manufacturing industries. The export items at this time were mainly cheap, labor-intensive manufacturing articles. Korea expanded its export items to include petrochemical products and heavy machinery in the 1970s. President Park was succeeded by President Chun Doo-Hwan in 1981, another leader with a military background. Korea's economy continued to develop under President Chun's administration. This time Korea turned its attention to new export items: shipbuilding, semiconductors and automobiles. Throughout the 1980s, opposition to the military leadership and demand for a democratic regime dominated Korean society.

#### **2.5 Democratization and Diversification (1988–2011)**

The presidential election in December 1987 finally brought a democratic regime to Korea. A new constitution was adopted which mainly mirrored the constitutions of western countries. Still remembering the military rule, the new constitution limited the presidential term to a single five-year term with no re-election. Presidents Roh Tae-Woo (1988–93), Kim Young-Sam (1993–8), Kim Dae-Jung (1998–2003), Roh Moo-Hyun (2003–08), and Lee Myung-Bak (2008 to the present) have held office during this period. In the meantime, Korea continued its economic achievements, showcased in its hosting of the Olympic Games in 1988 and joining the Organisation for Economic Development and Co-operation (OECD) in 1995. Korea, however, was severely hit by the Asian financial crisis in 1997. It was the first major failure on the economic front, and the country had to borrow rescue funds from the International Monetary Fund (IMF). The IMF demanded that Korea undergo a significant reformation of its economic sectors as a condition for the provision of funding. As a result, during 1997 to 2000, Korea adopted a wide range of reform measures in economic areas. New legislation and regulations were adopted at that time. Due to

this effort, Korea was able to overcome the financial crisis more quickly than expected and its economy was back on track by the middle of 2000. Its economy has registered steady growth throughout the first decade of the 21st century. It has become a major player in the global markets of shipbuilding, automobile, IT and steel products.

The successful export efforts have made Korea the ninth country to reach the milestone of a US\$1 trillion trade volume as of December 2011. It took Korea 23 years to leap from the US\$100 billion mark to the US\$1 trillion point, which represents the fastest growth rate when compared to its eight predecessors in the US\$1 trillion club.

The economic achievement, however, also makes Korea pause to appreciate the treacherous road ahead of it. As noted in the Doha stalemate and the surge of Free Trade Agreements (FTAs), a new paradigm of global trade is in the offing, and it is not yet clear how Korea would fare in this new paradigm. Korea has gotten an advantage from its early start, but whether it will be able to hold onto its lead is an open question. Besides, the export performance has been made possible by largely focusing on key export items such as commercial vessels, automobiles, semiconductors, IT products, and the like. If one or two items somehow falter in the future, overall export performance will be directly affected. This would also mean that Korea's domestic economy might stumble, as it is heavily dependent on exports. In fact, some of these key export items are already within the sights of competing countries: a couple of bad years might easily change Korea's fortunes.

It is also unfortunately true that general export performance is not always translated into a comparable improvement in the economic situation of individual households. While Korea as a nation may have registered a remarkable achievement, a widening gap between those financially privileged and those who are not can be observed. Unless the deepening polarization is adequately addressed before it is too late, the true economic advancement of Korea will remain elusive. As of December 2011, Korea is indeed standing on the threshold of a new paradigm, both economically and socially. How Korea adapts itself to this new paradigm will decide Korea's future.

### 3. THE POLITICAL SYSTEM OF KOREA

#### 3.1 Overview

At its creation in 1948, the Republic of Korea adopted a presidential system, in which the president possesses strong authority in all aspects of national policy. Korea briefly experienced a parliamentary system between

1960 and 1961, but strong presidents have led the country at all other times. One of the reasons why Koreans have preferred a strong presidential system is the division of the Korean peninsula at the end of World War II, and the ensuing confrontation between the South and the North. North Korea invaded the South in 1950 and the tragic three-year war left an indelible scar on the national psyche and economy. It may be the case that Korea's economic development drive since 1960 was mainly attributable to its continued effort to overcome the tragic consequences of the war. Presidential elections are held every five years and the next is due in December 2012.

Governmental authority is shared by three branches of the government: the legislature, the judiciary and the executive. The legislative branch is called the National Assembly whose members are elected every four years. The unicameral National Assembly at the moment has 299 members. The executive branch is composed of ministries and agencies, led by the Prime Minister. The judiciary branch is composed of career judges who are appointed from among young attorneys upon their graduation from the National Judicial Research and Training Institute or from career practitioners. All three branches operate under a strict principle of separation of powers.

### **3.2 The Constitution of Korea**

The Constitution of Korea was first promulgated on July 17, 1948. Since then, it has been amended nine times, with the October 27, 1987 amendment being the most recent. The amendments so far have generally focused on the scope of presidential power and the method of presidential and congressional elections. To a lesser extent, they have also addressed the structure of the legislative body. Boosted by the democratization movement in 1987, the last amendment in 1987 significantly increased the level of protection for human rights to meet international standards. The Korean Constitution, therefore, has incorporated almost all human rights protections that appear in international human rights conventions, including the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights. What mainly distinguishes Korea before 1987 and after 1987 is increased awareness of democracy and human rights.

As noted above, strong authority is accorded to the president under the Korean Constitution. According to the constitution, the president is the head of state and represents the state on foreign matters.<sup>5</sup> The president is

---

<sup>5</sup> See Article 66 of the Korean Constitution.

also the head of the executive branch<sup>6</sup> and the commander-in-chief of the Korean armed forces.<sup>7</sup> The president assumes responsibility for and the duty of safeguarding the independence, territorial integrity and continuity of Korea and its constitution.<sup>8</sup> Furthermore, reflecting the unique situation of Korea as a divided country, the president also has a duty to pursue peaceful unification with North Korea.<sup>9</sup> One of the unique aspects of the Korean Constitution is that it prohibits re-election of the sitting president: thus, each president has only a five-year term. This is another institutional safeguard to deter the establishment of an authoritarian regime. Reflecting the changed reality of Korea, however, a suggestion to amend the Constitution is being floated, mainly with respect to the general election system for members of the National Assembly to allow the re-election of the president. But it is still too early to predict whether these changes will eventuate.

### 3.3 Political Parties

The Korean Constitution stipulates freedom of establishment and activities of political parties.<sup>10</sup> The constitution also guarantees a pluralistic party system.<sup>11</sup> At the same time, political parties are not forced to be dissolved except in a situation where the Constitutional Court determines with a judgment that the objectives or the activities of a political party are against the basic democratic order of the country. The government also provides logistical support to political parties by offering funds for their operation and election campaigns. The Political Party Act constitutes implementing legislation for the basic provisions of the Constitution, and provides more detailed provisions concerning all aspects of the activities of political parties from their establishment to their dissolution.

There are 19 political parties at present and eight of them hold more than one seat in the National Assembly. The ruling party is the Grand National Party, and the major opposition party is the Democratic Party. The number of seats occupied by the various parties in the Korean National Assembly is set out in Table 3.1.

---

<sup>6</sup> Id., Article 66.

<sup>7</sup> Id., Article 74.

<sup>8</sup> Id., Article 66.

<sup>9</sup> Id., Article 66.

<sup>10</sup> Id., Article 8.

<sup>11</sup> Id., Article 8.

*Table 3.1 Parties in the 18th National Assembly of South Korea (as of October 18, 2010)*

Negotiation Group	Electoral District	Proportional Representation	Total	
Grand National Party	149	22	171	57.38%
Democratic Party	72	15	87	29.19%
Non-negotiation				
Liberty Forward Party	12	4	16	5.37%
Future Hope Alliance	0	8	8	2.68%
Democratic Labor Party	2	3	5	1.68%
Creative Korea Party	0	2	2	0.67%
Solidarity for New Progressive Party	1	0	1	0.34%
People First Party	1	0	1	0.34%
Members with No Political Party Affiliation	7	0	7	2.35%
<b>Total</b>	<b>244</b>	<b>54</b>	<b>298</b>	<b>100%</b>

*Note:* The numbers in the table fluctuate as the members of the National Assembly sometimes change their affiliation or resign.

*Source:* Retrieved from the Korea National Election Commission website, available at <http://www.nec.go.kr/engvote/political/definition.jsp> (last accessed 2 February 2013).

### 3.4 Structure and Effectiveness of the Executive Branch

The organization of the government, including the structure of the executive, is provided for in the Government Organization Act. The purpose of this Act is to establish the basic principles for the establishment, organization and functional scope of ministries and administrative agencies for the systematic and efficient performance of national administrative affairs.<sup>12</sup> According to the Act, the executive branch of Korea consists of the president, the prime minister and 15 executive ministries. The executive ministries are: the Ministry of Strategy and Finance, the Ministry of Education, Science and Technology, the Ministry of Foreign Affairs and Trade, the Ministry of Unification, the Ministry of Justice, the Ministry of National Defense, the Ministry of Public Administration and Security,

<sup>12</sup> See Article 1 of the Government Organization Act.

the Ministry of Culture, Sports and Tourism, the Ministry for Food, Agriculture, Forestry and Fisheries, the Ministry of Knowledge Economy, the Ministry of Health and Welfare, the Ministry of the Environment, the Ministry of Employment and Labor, the Ministry of Gender Equality and Family, and the Ministry of Land, Transport and Maritime Affairs.<sup>13</sup> There are also ministerial-level commissions under the Office of the Prime Minister including the KFTC and the Financial Supervisory Commission, a financial watchdog. The National Board of Audit and Inspection is an independent agency which monitors governmental budget spending and the administration of national businesses.

### 3.5 Independence and Effectiveness of the Judicial System

Article 101 of the Korean Constitution stipulates that judicial power is vested in the courts, consisting of judges who are obligated to promote the rule of law. Article 27 of the Constitution further states that all citizens possess the right to a fair and prompt trial in accordance with legitimate legal procedures.<sup>14</sup> Article 103 of the Constitution stipulates that judges should follow the Constitution and its law and regulations in rendering judgment in any particular case.<sup>15</sup>

The judiciary is composed of six different categories of courts: they are the Supreme Court, High Court, District Court, Patent Court, Family Court and Administrative Court. The Korean judicial system is based on a three-level adjudication system, composed of trials by District Courts, appellate review by the High Courts, and final appellate review by the Supreme Court. The District Courts, High Courts and the Supreme Court are courts with general jurisdiction. The other three courts, on the other hand, are specialized courts with limited jurisdiction: the Patent Court has jurisdiction over patent disputes; the Family Court has jurisdiction over familial issues; and the Administrative Court has jurisdiction over disputes arising from the governmental agencies' measures. The Patent Court is positioned on the same level as the High Courts, while the Family Court and the Administrative Court are on the same footing as the District Courts.<sup>16</sup> Figure 3.1 provides an overview of the Korean judicial system.<sup>17</sup>

---

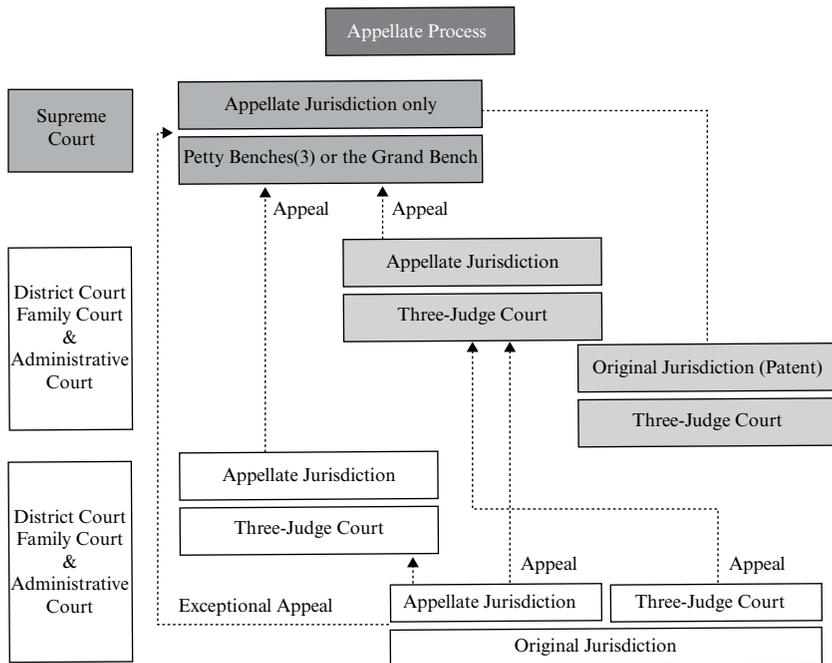
<sup>13</sup> *Id.*, Article 22.

<sup>14</sup> See Supreme Court of Korea website at <http://eng.scourt.go.kr/eng/judiciary/introduction.jsp> (last accessed 2 February 2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> The total number of judges in Korea is around 2500. It has been argued that the number of judges should be increased to meet the demand of legal disputes



Source: Website of the Korean Supreme Court. Retrieved from <http://eng.scourt.go.kr/eng/judiciary> (last accessed 2 February 2013).

Figure 3.1 Overview of the Korean Courts

### 3.6 Professionalism and Sophistication of the Legal Profession

The legal profession in Korea has been undergoing drastic change since 2007. The changes have mainly been caused by two incidents: the introduction of a new legal education system and the surge in FTAs. Amid national controversies, Korea introduced a new law school system in 2007.

in Korean society. In particular, the insufficiency of the number of justices at the Supreme Court, currently set at 14, has been a constant item on the agenda for national discussion since the highest court has been swamped by a surge of cases for the past decade. See Yonhap News (2011), 'Confirmation Hearing of the New Chief Justice' (the press report of the confirmation hearing of Seung-Tae Yang, candidate for the Chief Justice of the Korean Supreme Court), September 6. Retrieved from <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=001&aid=0005252450> (last accessed 2 February 2013).

Originally, legal education in Korea had been confined to undergraduate programs and only those graduates who wanted to become attorneys took national bar exams. Having realized that this system had inherent limitations in producing attorneys with a diverse background who could compete in the global market, the Korean government decided to introduce a US-style law school system in the summer of 2007. This is a graduate program and only students with a bachelor's degree are eligible to apply. Twenty-five law schools have been approved by the government and they admit 2000 students each year. Almost all graduates of the law schools will become attorneys once they pass the national bar exam, where the pass rate is set at around 75 percent, resulting in a significant increase in the number of attorneys in Korea. Before the law school system was introduced, approximately 1000 attorneys joined the market each year. Under the new law school system, 1500 new attorneys will be added to the legal market annually.

At the same time, the surge in FTAs that Korea has concluded has also led to the opening of the services market, including the legal services sector. Most notably, the Korea–EU FTA and the imminent Korea–US FTA require Korea to open its legal services market to the law firms of Europe and the United States, albeit in several stages. The penetration of foreign attorneys into the Korean legal market will increase competition in the market and allow for diversification of the legal services available in Korea. Thus, the changes in legal education and the increasing presence of foreign attorneys in Korea will ensure that the Korean legal profession will experience significant changes and reform in the near future. Most probably, the level of sophistication and professionalism will increase in Korea.

## 4. THE ECONOMIC SYSTEM OF KOREA

### 4.1 Overview

Having been among the world's poorest countries before the 1960s, Korea has subsequently achieved and sustained rapid economic growth over a long period of time. The rise in Korea's economic status is best demonstrated by its accession to the OECD in 1996 and the hosting of the G20 Summit in 2010.<sup>18</sup> Gross National Income (GNI) soared from a

---

<sup>18</sup> The Bank of Korea (2010), *The Korean Economy*, Korea: Korea Economic Institute and the Korea Institute for International Policy, p. 3.

mere US\$82 in 1961 to exceed US\$20,000 in 2007<sup>19</sup> and Korea became the world's 13th largest economy in 2009.

However, in 1997 Korea faced an unprecedented financial crisis. In order to overcome the crisis, Korea had to turn to the IMF to obtain relief funds from international organizations.<sup>20</sup> The Korean government agreed with the IMF that it would pursue macroeconomic stabilization and structural reform in the financial and corporate sectors, the labor market and accelerate trade and capital account liberalization.<sup>21</sup> On the basis of its agreement with the IMF, Korea pressed ahead with massive reforms in the corporate and financial sectors, while pursuing macroeconomic stabilization.<sup>22</sup> As a result of these drastic reform measures, the Korean economy was able to pull itself out of the crisis by 2000.<sup>23</sup>

In the course of boosting domestic demand to overcome the financial crisis, however, the Korean government took measures to encourage credit card transactions and stimulate the real estate market. These stimulus measures brought with them side-effects: a rise in credit card delinquency, growth in household indebtedness and an increase in housing prices. These side-effects turned out to sap economic vitality and stability.<sup>24</sup> The government and the Bank of Korea made strenuous efforts to contain the liquidity crisis from spreading throughout the entire financial system, and by 2003 Korea managed to overcome its liquidity and solvency problems.<sup>25</sup>

Korea faced another financial crisis when the global financial system was threatened by the bankruptcy of Lehman Brothers on September 15, 2008 and by the subsequent crisis.<sup>26</sup> However, Korea again recovered quickly from the recession. The prompt rebound was mainly attributable to the buoyant export growth boosted by the Korean Won's depreciation and an increase in demand from China, coupled with an effective policy response from the Korean government.<sup>27</sup> The bitter experience of 1997

---

<sup>19</sup> Id., p. 3.

<sup>20</sup> Id., p. 12.

<sup>21</sup> Id., p. 14.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id., p. 16.

<sup>25</sup> Id.

<sup>26</sup> Pyo, Hak-kil (2009), 'Global Financial Crisis and the Korean Economy: Issues and Perspectives', in *Korea's Economy 2009*, Korea: Korea Economic Institute, Korea: Korea Economic Institute and the Korea Institute for International Policy, pp. 8–15.

<sup>27</sup> OECD Report (2010), 'Economic Survey of Korea 2010', p. 1. Retrieved from [http://www.oecd.org/document/24/0,3343,en\\_2649\\_34111\\_45393816\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,3343,en_2649_34111_45393816_1_1_1_1,00.html) (last accessed 2 February 2013).

turned out to be an invaluable lesson for Korea at the time of the second economic crisis. As with any other country, Korea adopted a comprehensive stimulus package to ride out the storm.<sup>28</sup> Indeed, Korea became the ninth largest exporter in the world in 2009, up from 12th in 2008, and its current account surplus rose to 5 percent of gross domestic product (GDP) in 2009.<sup>29</sup> According to statistics for the Korean economy from the WTO 'Trade Profiles 2010', Korean GDP reached US\$832.5 billion in 2009 and GDP per capita increased to US\$17,074.<sup>30</sup>

## 4.2 Overall Assessment of the Korean Economy

The World Economic Forum (WEF) provides reliable economic statistical data and recently released its global competitiveness report for the period 2010–11. This report examined various key economic factors enabling national economies to achieve sustained economic growth and long-term prosperity.<sup>31</sup> According to this report, Korea is ranked 22nd out of 139 countries overall in its Global Competitiveness Index, while Switzerland is ranked first. The report provides a positive overview of the Korean economy in general.<sup>32</sup> More specifically, it states that Korea possesses world-class transport infrastructure (ranked 12th), a healthy macro-economic environment at a time when many industrialized countries are struggling in this area (ranked sixth), excellent higher education (ranked 15th), with the highest rate of tertiary education enrollment in the world. This report also notes the weak spots of the Korean economy: it ranked Korea at 124th place with respect to labor market flexibility.<sup>33</sup> Korea's fast adaptation to the 'digital age' has also grabbed attention from outside. For some time, Korea has been known to be the most wired country in the world. The OECD has been following the status of the broadband internet connection in its 34 member countries, and Korea has been steadily ranked first, with 97 percent of households hooked up. The average for all 34 countries stands at just 62 percent. The October 2011 statistics released

---

<sup>28</sup> Id.

<sup>29</sup> Id., p. 3.

<sup>30</sup> World Trade Organization (WTO) (2010), 'WTO Trade Profiles 2010'. Retrieved from [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles10\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles10_e.pdf) (last accessed 2 February 2013), p. 93.

<sup>31</sup> See WEF (2011), 'The Global Competitiveness Report 2010-2011'. Retrieved from [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2010-11.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf) (last accessed 2 February 2013) p. 3.

<sup>32</sup> Id., p. 28.

<sup>33</sup> Id.

by the Korea Communications Commission, a government agency in charge of the telecommunications sector, describe the virtual explosion of smartphone subscriptions in Korea. As of October 2011, the total number of smartphone users in Korea exceeded 20 million, which means that four out of ten Koreans and eight out of ten economically active people in Korea are currently using smartphones. This is the fastest growth rate in the world at the moment.<sup>34</sup> All these efforts and achievements have allowed Korea to reach the status of an influential trading partner: its total trade volume exceeded US\$1 trillion in December 2011.

Although Korea has registered a remarkable record in economic development, there are still many areas of the economy that require improvement. According to the statistics released by Transparency International in December 2012, an NGO (non-governmental organization) reporting the corruption status of governments of various countries, Korea was ranked 43rd out of 183 countries, and 27th among the 34 OECD members. This is largely a reflection of continuing political scandals and bribery investigations in Korea. This gloomy statistic indicates that there is still a long way to go before Korea attains the true advancement of its society. Another social problem is deepening polarization. While Korea as a nation may have registered a remarkable achievement, a widening gap between those who are financially privileged and those who are not has been a chronic social problem for a long time. Unless the deepening polarization is adequately addressed, the true advancement of Korea will remain elusive despite the increasing trade volume it registers.

### **4.3 New Policies and Trend in the Korean Manufacturing Sector**

Over the years, Korea's manufacturing sector has maintained steady growth despite the global economic downturn. In particular, growth in IT, shipbuilding, automobiles, household appliances, machinery and steel industries has been quite robust. The Ministry of Knowledge Economy (MKE; formerly the Ministry of Commerce, Industry and Energy) is the governmental agency in charge of the development plan for the Korean manufacturing sector.<sup>35</sup> The traditional focus on the manufacturing

---

<sup>34</sup> In February 2011, the *Wall Street Journal* reported the smartphone frenzy in Korea, reporting that smartphone subscribers in Korea had passed 10 million. The number has doubled in eight months.

<sup>35</sup> See Samsung Economic Research Institute (2005), 'Korea's Manufacturing Sector to Maintain Steady Growth', January. Retrieved from <http://www.seriworld.org/06/wldNewsV.html?mn=D&mncd=0406&key=20050110220002&sectno=> (last accessed 2 February 2013).

industry continues, but the Korean government is currently paying attention to two new projects for future development: the New Growth Engine project and the Green Growth Policy.

#### 4.3.1 New growth engine project

This policy has been initiated by and formulated in close consultation with the private sector. In 2008, the MKE set a new orientation for the entire national economy for the future by identifying industries that would support the Korean economy for coming generations. The focus of the project is to suggest ways to transform Korea's key industries into high value-added industries, to facilitate the development of the technological capabilities of those industries, and to support the service industries in their efforts to become more competitive globally. The following elements are contemplated by the Korean government in exploring the New Growth Engine project:

- Korea's main industries are under growing pressure to restructure due to global oversupply and are at increasing risk of losing competitiveness because of production systems (which are heavily dependent on simple processing/assembly) that will soon be caught up with by developing countries.
- It is crucial to explore new growth engines through a combination of new technologies such as IT·BT·NT<sup>36</sup> and through differentiation and sophistication of products.
- Next-generation growth engines should be explored primarily in the industries where a synergy effect can be guaranteed through a combination of new technologies based on current competitiveness and product differentiation.
- Due to high oil prices and the global economic crises, securing energy sources and key resources and ensuring a prompt response to climate change will be important for a country's future competitiveness.
- Developed countries are also actively responding to the changed market reality with green technology strategies to achieve economic growth.

Under this framework, the MKE has finally selected 17 industries for the actual implementation of this general policy. They are grouped into three categories: green technology, high value-added industry and IT

---

<sup>36</sup> Information technology, biotechnology and nanotechnology.

convergence systems. The green technology field includes six industries such as new renewable energies, low-carbon energies, LED (light-emitting diode) applications, and green transportation systems. The IT convergence system includes six industries such as IT fusion systems, robot applications, and biomedicines, and the high valued-added industries include global healthcare, global education services, green financing, MICE (meetings, incentives, conventions, and events) and the tourism industry.

#### **4.3.2 Green growth policy**

At the same time, Korea is also pursuing a Green Growth Policy in the form of new guidelines for the future development of the Korean manufacturing sector. Following the enactment of the Basic Act on Low Carbon Green Growth in April 2010, the GOK has pursued a Green Growth Policy in keeping with the demands of the international community. Green Growth is a new national development paradigm which aims to minimize environmental pollution and greenhouse gas (GHG) emissions, while simultaneously achieving economic growth. Through this policy, and by increasing green technology R&D expenditures, Korea focuses on developing green energy technologies such as solar and wind power, coal-to-liquid (CTL), green vehicles, LED lights, and others. In order to systematically support its Green Growth Policy, Korea established the Presidential Committee on Green Growth in January 2009, and adopted the Basic Act on Low Carbon Green Growth in 2010.

As noted, the Green Growth Policy aims to achieve two fundamental objectives: reducing the utilization of fossil energy sources to the lowest feasible extent, and expanding the utilization of renewable and clean energy sources as much as possible. More specifically, under the policy, Korea aims to achieve the following tasks:

- Improving national energy efficiency by 46 percent compared to the current level by the year 2030 in order to reduce the utilization of fossil energy sources.
- Banning low-efficient incandescent bulbs by 2013, setting fuel-efficiency standards for hybrid cars and providing incentives for high-efficiency hybrid cars.
- Expanding nuclear energy and new renewable energy which are clean and derived from self-supporting energy sources.

Finally, as the core of the Green Growth Policy, the green energy industry will be further promoted. The green energy industry is largely divided into three areas: (i) the new renewable energy area where various

alternative energy sources such as wind and solar power are developed, (ii) the clean coal energy research area where technologies relating to CTL (coal-to-liquid), GTL (gas-to-liquid) and CCS (carbon capture and storage) are developed in order to ensure cleaner utilization of fossil fuels and (iii) the energy efficiency improvement area where LED, smart grid and energy storage, etc. are implicated in order to enhance energy utilization efficiency. These new industrial policies are changing the general orientation of governmental policies relating to the Korean manufacturing industries that have been in place since 2008.

#### **4.4 Addressing the Conglomerates Issue**

Korea's recent economic achievements have further solidified the dominance of the big conglomerates in Korea. Although the big conglomerates have been the powerhouse of Korea's economic success through their strong performance in export competition, their increasing dominance has caused continuing domestic concern. As a result, the Korean government has introduced a series of measures to monitor the furtherance of economic dominance by big conglomerates. For its part, since 2009 the Korea Fair Trade Commission (KFTC) has imposed an obligation on big corporations to report their affiliation and ownership structure to the government agency. The reporting requirements are imposed by the introduction of Paragraph 1 of Article 13 of the Monopoly Regulation and Fair Trade Act, and Paragraph 1 of Article 17 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (i.e. 'Business Groups subject to the limitations on cross-shareholding'). Thus, big corporations are required to submit ownership-related information to the KFTC by April 1 of each year. Once the information is collected, the KFTC posts this information on its website ([groupopni.ftc.go.kr](http://groupopni.ftc.go.kr)).

At the same time, in 2009 the Korean government, with the sponsorship of the Ministry of Knowledge Economy (MKE), introduced a system where big corporations and small and medium enterprises (SMEs) are matched together to establish respective partnerships. The partnerships are administered with financial resources funded by the participating big corporations and the MKE. The purpose of the partnership is to provide the SMEs with the knowledge and expertise of the large corporations in company management and R&D activities. This is also an effort of the Korean government to address increasing concern over the dominance of big corporations and the deepening social polarization in Korean society.

## 5. COMPETITION LAW OF KOREA

As noted above, the KFTC is an agency charged with competition regulation in Korea. The KFTC was first established in 1981 within the Economic Planning Board (currently the Ministry of Strategy and Finance) with the enactment of an enabling Act, the Monopoly Regulation and Fair Trade Act (MRFTA).<sup>37</sup> The KFTC became an independent agency in 1994 as a vice ministerial-level, central administrative agency under the direct supervision of the Prime Minister.<sup>38</sup> The status of the agency was elevated again in 1996 to the current ministerial level, with its chairman holding the position of a minister eligible to attend cabinet meetings. As reflected in the changing status of the KFTC, the role of the KFTC has increased over the years. This adjustment in status was in tandem with the growing national awareness of the importance of ensuring fair competition in the market to bring Korea to the next level of economic development.

The role of the KFTC received further attention when Korea underwent substantial economic reform as a result of the 1997 financial crisis. The IMF demanded further deregulation and liberalization of all sectors of the Korean economy in exchange for the provision of the relief fund. The massive economic reform required an active KFTC as a watchdog of market competition.<sup>39</sup> This turning point of the Korean economy in the late 1990s provided a platform upon which the KFTC was able to increase its operations in the last decade.

### 5.1 The Enhancement of the Status of the KFTC

The KFTC basically consists of a committee, which is a decision-making body, and a secretariat, which is in charge of the daily operations of the agency. The committee consists of nine commissioners, who deliberate and make decisions on competition and consumer protection issues.<sup>40</sup> The KFTC is committed to four main mandates: promoting competition,

---

<sup>37</sup> Law No. 3320 (December 31, 1980).

<sup>38</sup> See the KFTC website available at <http://eng.ftc.go.kr/about/history.jsp?pageId=0104> (last accessed 2 February 2013).

<sup>39</sup> The Chairman of the KFTC at the time summarized the lessons of the financial crisis for the KFTC as follows: 'developed economy and balanced growth can only be achieved when all the players – the government, the private sector and consumers – become competition minded', Lee, Nam-Kee (2002). *Toward a Mature Market Economy: Competition Law and Policy in Korea*, Korea: Korea Fair Trade Commission, at p. 139.

<sup>40</sup> See the KFTC website, available at <http://eng.ftc.go.kr/about/overview.jsp?pageId=0102> (last accessed 2 February 2013).

strengthening consumers' right, creating a competitive environment for SMEs and restraining concentration of economic power. To that end, the Commission enforces 12 laws, including the MRFTA.<sup>41</sup> The MRFTA stipulates three types of remedies an injured party may seek under the Statute. Specifically, the available remedies are administrative, criminal, and civil. What distinguishes an administrative remedy from the other two is that, as their names suggest, administrative remedies are rendered by a regulatory agency (i.e. the KFTC) while the other two are rendered by the court.

In a speech on the 30th anniversary of the KFTC in April 2011, the KFTC Chairman stated that 'the remarkable economic growth of Korea was attributable in part to the introduction of competition law which helped create the pro-competitive culture in society from an early stage of its national economic development'.<sup>42</sup> In fact, the general consensus is that KFTC's active role in fighting business practices that impede market competition has contributed to Korea's fast recovery from the global financial crisis.<sup>43</sup>

Since the KFTC is an administrative body under the influence of the political leadership, industry-promoting policy was a priority of the political leadership in the 1980s and the early 1990s. This policy adversely affected enforcement of competition law by the KFTC.<sup>44</sup> The change in general orientation of business policy occurred after the 1997 financial crisis. That crisis confirmed the importance of eliminating anti-competitive elements in the market. A particular feature of Korea's

---

<sup>41</sup> These 12 laws are Monopoly Regulation and Fair Trade Act, Framework Act on Consumers, Product Liability Act, Consumer's Cooperative Union Act, Fair Labeling and Advertising Act, Act on Consumer Protection in Electronic Commerce, Act on Door-to-Door Sales, Installment Transactions Act, Regulation of Adhesion Contract Act, Fair Franchise Transactions Act, Fair Subcontract Transactions Act, and Omnibus Cartel Repeal Act. Bearing in mind the problems caused by the growth-first strategy of the 1960s and 1970s, the government undertook numerous social and economic reforms. These included, notably, the enactment of the Monopoly Regulations and Fair Trade Act (MRFTA) in 1980, which took effect in 1981; See the KFTC website (n 40).

<sup>42</sup> See KFTC (2011b), 'The KFTC Holds its 30<sup>th</sup> Anniversary Ceremony', April 1. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=52&pageId=0201](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201) (last accessed 2 February 2013).

<sup>43</sup> See KFTC (2009), *2009 Annual Report*, Korea: Fair Trade Commission of Republic of Korea. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013), p. 7.

<sup>44</sup> See Lee, Sanghyun (2007), 'Using Action in Damages to Improve Criminal Penalties against Cartel: Comparative Analysis of Competition Law of United States and South Korea', *International Trade Law Journal* 55, p. 59.

competition law is a focus on curbing the economic concentration of Korea's business conglomerates, or *chaebols*.<sup>45</sup> In 2002, the KFTC further clarified its objective to preserve competition in the market as a protector of consumers.<sup>46</sup> This effort culminated on December 7, 2005 when the KFTC found the Microsoft Corporation had committed abuse of market dominance and levied a fine of approximately US\$30 million, imposing corrective measures that were more stringent than those imposed by the European Commission.<sup>47</sup> Korea's investigation of the Microsoft Corporation expanded the horizon of the Korean competition authorities. Many people were wary when the KFTC initiated the investigation, but the overall assessment seems to be that it managed to complete the investigations successfully. This has enhanced confidence in the agency and expanded the scope of the work of the KFTC.

The expansive role of the KFTC is further evidenced by a provision of the MRFTA in which other Korean governmental agencies are required to notify the KFTC of proposed laws or regulations that might restrain competition, and the KFTC is authorized to provide its views on such proposed legislation to the relevant government agency.<sup>48</sup> In other words, the KFTC can take a preemptive action in order to minimize any adverse competitive effects. The KFTC, therefore, possesses the authority to regulate competition-related governmental actions throughout the entire economic spectrum. This provision is somewhat unique in Korean legislation, and reflects the increased authority and status of the KFTC in the Korean government. The current organizational structure of the KFTC is shown in Figure 3.2.

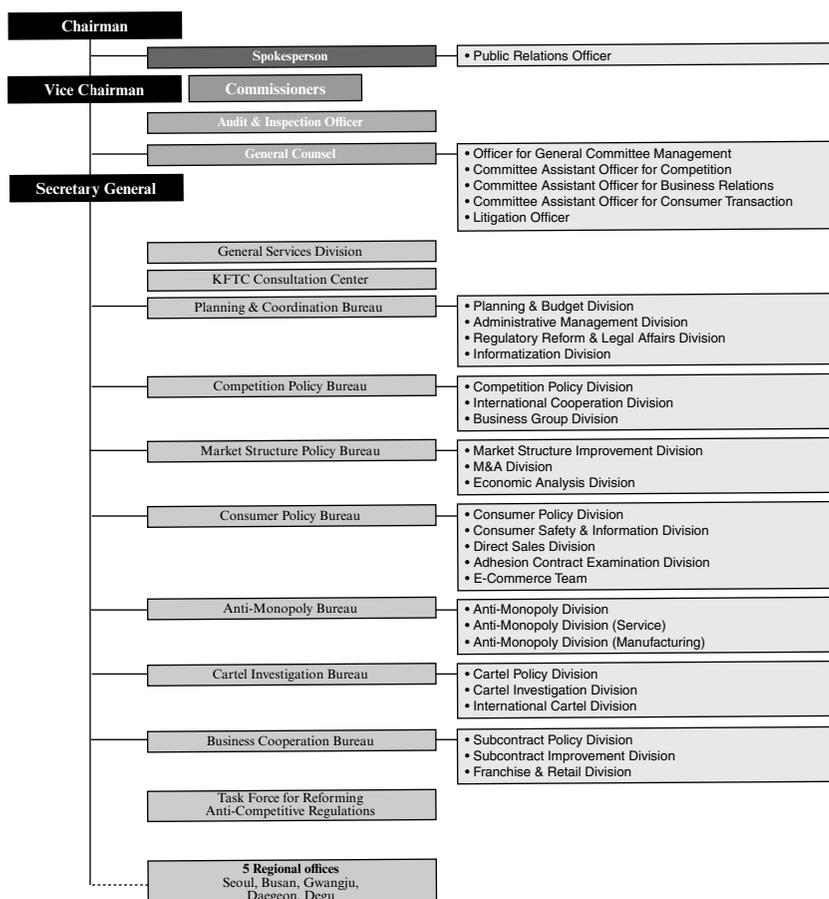
---

<sup>45</sup> See Jung, Youngjin and Chang, Seungwha (2006), 'Korea's Competition Law and Policies in Perspective', 26 *Northwestern Journal of International Law and Business* 687, p. 687.

<sup>46</sup> See KFTC (2002), *2002 Annual Report*, Korea: Fair Trade Commission of Republic of Korea. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013); also, be advised that in 2002, the Act on Consumer Protection in Electronic Commerce was enacted as an institutional basis for protecting consumer interests in the rapidly expanding field of electronic commerce. For this information, see the KFTC website available at <http://eng.ftc.go.kr/about/history.jsp?pageId=0104>.

<sup>47</sup> See KFTC (2005) 'The Findings of the Microsoft Case', December 7. Retrieved from [http://www.ftc.go.kr/data/hwp/microsoft\\_case.pdf](http://www.ftc.go.kr/data/hwp/microsoft_case.pdf) (last accessed 2 February 2013).

<sup>48</sup> See Shanahan, Deirdre (2005), 'International Competition Law: Real World Issues and Strategies for Success', paper presented at conference on 'The Development of Antitrust in China, Korea and Japan', held in Montreal, Canada, June 16–17, 2005), p. 5.



Source: KFTC website. Retrieved from <http://eng.ftc.go.kr/about/organization.jsp?pageId=0103> (last accessed 2 February 2013).

Figure 3.2 Organizational structure of the KFTC

## 5.2 Major Recent Developments Relating to KFTC Activities

Recent developments in the activities of the KFTC and the administration of the competition law can be summarized as follows. Although the KFTC's position or role in specific instances or cases may vary depending upon the circumstances involved, a general direction seems to emerge as set forth below.

### **5.2.1 Consideration of national economic policy**

As discussed above, since its inception in the 1980s, the KFTC has steadily expanded its authority and scope of operation. The agency has now become one of the most important agencies of the Korean government, which aims to achieve key governmental policy objectives. For instance, in 2008, the KFTC amended the MRFTA and its Enforcement Decree primarily to decrease regulation on companies, adopt a regulatory mechanism to increase the market's self-monitoring function, and implement the consent order system. Through this amendment, the KFTC aimed to offer incentives to lure domestic and foreign investment and to stimulate the economy in general. More specifically, the amendment included: (i) repealing the restriction on the amount of investment that an affiliate company within a designated conglomerate group may own in the form of stock ownership of other domestic companies; (ii) raising the threshold for designation of certain conglomerate groups for which cross-shareholding among affiliates is prohibited; and (iii) decreasing regulations on holding companies. In addition, the KFTC aimed to increase the market's self-monitoring function by requiring public disclosures of information on the shareholding structure of designated large corporate groups.<sup>49</sup> These objectives are all related to the attainment of the general economic policy set out by the Korean government. These changes reflected the new administration which came into office in February 2008 on a platform of business-friendly policies.

The 2011 Plan of the KFTC sets out the KFTC's objectives as (i) to foster stability in the day-to-day lives of average consumers by focusing on price stabilization and (ii) to promote the development of SMEs. Thus, the KFTC has become heavily involved in national price stabilization policy, which is one of the major governmental objectives of the current administration.<sup>50</sup> The KFTC is also involved in the governmental policy of

---

<sup>49</sup> Corporations falling under the category described in Paragraph 1 of Article 17 of the Enforcement Decree of the MRFTA (i.e. 'Business Groups subject to the limitations on cross-shareholding') are required to submit ownership-related information to the KFTC in accordance with Paragraph 1 of Article 13 of the MRFTA. Once the information is collected, the KFTC posts this information on its website at [groupopni.ftc.go.kr](http://groupopni.ftc.go.kr) (last accessed 2 February 2013).

<sup>50</sup> On January 13, 2011, nine ministries of the Korean government, including the Ministry of Strategy and Finance, the Ministry of Agriculture, Forestry and Fisheries, the Ministry of Knowledge and Economy and the KFTC, jointly announced comprehensive measures for price stabilization. The measures set out the following significant areas of focus for the KFTC:

- regular monitoring of the prices of 103 identified products with a disparity between domestic Korean and overseas prices, including goods or services

protecting and enhancing SME activities. One of the specific ways to assist SME activities is to monitor abuse of market dominant positions by large corporations, such as abuse of intellectual property rights (IPR), unfair trade practices by large scale retailers, and unfair subcontracting practices.<sup>51</sup> The KFTC also issued Guidelines on the Exercise of Intellectual Property Rights so as to ensure that IPRs are not abused to the detriment of SMEs.<sup>52</sup> The KFTC has become an important mechanism for pressing ahead with national economic policies.

Likewise, the mergers and acquisition (M&A) review for national security purposes presents even more potential for possible controversy. As is well known, Korea is aggressively expanding its FTA and BIT (Bilateral Investment Treaty) networks these days to invite more foreign investment into the Korean market. The prevalence and expansion of foreign investment in Korea have also highlighted an important policy consideration, which is whether and when the Korean government can restrict foreign investment if it is targeted at the national security-related area or other vital national interest-related areas. The concern is that foreign investment

---

directly linked to the everyday life of the average consumer (Consumer Goods);

- identification, and immediate investigation into the prices, of certain Consumer Goods, particularly those processed food products the prices of which have recently increased or are expected to increase;
- assessing and removing bottlenecks in distribution channels (particularly in the TV home-shopping and petroleum industries) or barriers to market entry (particularly in the health care, broadcasting and telecommunication, education and energy industries) that may eventually contribute to price increases; and
- increasing the number of Consumer Goods in respect of which companies must provide pricing information, together with comparative investigations into the domestic and overseas prices of 50 (food and beverage and other industrial) products.

See Alderman, Karen, Jun, K.T., Shin, Luke (2011), 'Korea: Overview', *The Asia-Pacific Antitrust Review* 2011. Retrieved from <http://www.globalconpetitionreview.com/reviews/33/sections/118/chapters/1221/korea-overview> (last accessed 2 February 2013).

<sup>51</sup> Id.

<sup>52</sup> The Guidelines came into effect on 7 April 2010 and provide guidance on when enforcement of IPR may constitute a violation of the MRFTA. The Guidelines apply not only to agreements made by domestic business entities but also to agreements made by foreign business entities within or outside Korea, if such agreements affect the Korean market. Although the Guidelines focus on patent rights, they will be applied by analogy with the exercise of other IPRs, such as utility models, designs, trademarks and copyrights. See Alderman et al. (n 51).

in these areas, if unbridled, has the potential to undermine the Korean government's authority to preserve and exercise its sovereignty.

In this respect, Korea recently amended the Enforcement Decree of the Foreign Investment Promotion Act. Article 5 of the Enforcement Decree provides more elaborated provisions regarding the government's authority to restrict foreign investment because of national security concerns, but its exact scope and coverage still remain uncertain. Depending upon how this provision is interpreted, therefore, the exact scope of the national security-related restriction on foreign investment would vary. What is particularly unclear, and thus controversial, is whether the national security-related restriction on foreign investment could also cover the situation where the national vital *economic* interest is being threatened. This idea has been floated for some time since the Korea–US FTA negotiations triggered this debate. The traditional concept of national security has been understood to mean military security. Nonetheless, it also appears that there are situations where the whole economic structure is in danger, as seen in the 1998 and 2008 financial crises, and that such situations may warrant the application of the national security review clause. It is simply not clear yet at this point. If such national policy considerations are reflected in the administration of competition laws involving foreign-invested corporations in Korea, disputes may inevitably ensue.

The fact that the KFTC adjusts or establishes its policy direction based on general national economic policy considerations has sometimes made the role of the KFTC more complex and its enforcement action controversial. Foreign countries and companies sometimes tend to view the enforcement action of the KFTC as a reflection of general economic policy rather than of competition policy *per se*.<sup>53</sup> One of the general economic policies, as alleged by some, is to support domestic corporations in their exports and in competition in the domestic market. It is true that many countries take into consideration government's objectives of maintaining general economic policy,<sup>54</sup> but the situation in Korea seems to raise the

---

<sup>53</sup> For further discussion, see KFTC (2011a), '2011 Annual Report'. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013), p. 158.

<sup>54</sup> For more than two decades, China has been pursuing what it calls a 'socialist market economy'. This concept is rooted in an ideological framework that generally minimizes the intrinsic value of competition. In this view, competition is valued solely for its consequences – specifically, its effectiveness in promoting economic development. For many, 'competition' also has negative associations, because prior to 1979 it had long been considered antithetical to the goals of Chinese communism. 'Competition' as a value is thus not only burdened with some negative associations, but even its positive valuations tend to be solely

suspicion that Korea has governmental apparatus in place for the benefit of domestic corporations.

One of the unique aspects of the KFTC's recent work is its focus on the regulation of large business conglomerates or *chaebols*. This effort is also a reflection of the KFTC's constant concern as a government agency that establishes justice and fairness in the private market. While the contribution of the large conglomerates as the main vehicle of Korean economic development is undeniable, their dominance in various sectors also continues to give cause for concern in terms of ensuring fair competition in the market. More particularly, the KFTC's main focus was to ensure fairness in inter-affiliate transactions and to avoid internal cross-subsidization. By way of example, Paragraph 1 of Article 13 of the MRFTA imposes a reporting obligation on large corporations to submit documents and information regarding their ownership structure to the KFTC. Large corporations are those falling under the category described in Paragraph 1 of Article 17 of the Enforcement Decree of the MRFTA (i.e. 'Business Groups subject to the limitations on cross-shareholding').

### 5.2.2 Increase of international cooperation

The KFTC has increased its effort to expand the network of cooperation with other agencies in the world. Such international cooperation takes place in three contexts. One is the FTAs, where competition has been a constant component.<sup>55</sup> The second is bilateral agreements that the KFTC has signed with counterpart agencies.<sup>56</sup> The third is the increase in technical assistance for foreign agencies: for instance, since 2002, the KFTC has joined hands with the Korea International Cooperation Agency (KOICA) to run Competition Law and Market Economy Growth courses to share

---

instrumental. As a consequence, this rhetorical scheme does not easily value a law that seeks to protect the process of competition other than for purely instrumental reasons. To the extent that this purely instrumental view of the value of competition law predominates, competition has no independent status, and it can thus easily be subordinated to other policy initiatives that may be considered more important for economic development at a particular time. For further discussion, see Gerber, David J. (2008), 'Economics, Law & Institutions: The Shaping of Chinese Competition Law', 26 *Washington University Journal of Law & Policy* 271, p. 291.

<sup>55</sup> Free Trade Agreement between the Republic of Korea, of the One Part, and the European Union and its Member States, of the Other Part (provisionally entered into effect on July 1, 2011).

<sup>56</sup> Agreement between the European Community and the Government of the Republic of Korea Concerning Cooperation on Anti-Competitive Activities (signed on May 23, 2009).

the experience of Korea in competition law enforcement.<sup>57</sup> The target audience is senior working-level officials from developing countries, and KFTC officials at director-general or director level and university professors are invited to give lectures on key competition policy issues and share the KFTC experiences.<sup>58</sup> In the first half of 2009, the KFTC provided courses for 20 working-level officials from 13 countries (from 31 March to 15 April) and, in the second half of the year, for 17 officials from the Ministry of Economy and Justice of Afghanistan (from 15 to 30 October).<sup>59</sup>

### 5.2.3 Protection of ordinary consumers' livelihood

At the same time, the focus of the KFTC's enforcement has been to protect ordinary people's lives.<sup>60</sup> Recent enforcement by the KFTC has targeted *chaebol* corporations for their alleged anti-competitive activities.<sup>61</sup> This is in stark comparison with the past close relationship between government and conglomerates.<sup>62</sup> This has caused friction and tension with the big corporations.<sup>63</sup> For instance, the Federation of Korean Industries (FKI), an association of large corporations in Korea, has lodged complaints against the KFTC for their overarching enforcement efforts against the *chaebol*.<sup>64</sup>

<sup>57</sup> See KFTC (2010), *2010 Annual Report*, Korea: Fair Trade Commission of Republic of Korea. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013) at p. 46.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *Id.*, p. 5. (Recognizing this, the KFTC beefed up its supervision over sectors that are closely related to ordinary people's lives in particular. Moreover, the KFTC designated automobile, aviation & transportation, energy, broadcasting & communications, healthcare & pharmaceutical industries for focused monitoring, strengthening its monitoring over dominant firms' abuse of their status and unfair trade practices.)

<sup>61</sup> Recently, the Korea Fair Trade Commission imposed a total surcharge of KRW194,077 million on 10 Thin Film Crystal Transistor Liquid Display manufacturers including Samsung Corporation and LG Corporation for violating Article 19 of the Monopoly Regulation and Fair Trade Act. See KFTC (2011c), 'KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD International Cartel', October 28. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=52&pageId=0201](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201) (last accessed 2 February 2013).

<sup>62</sup> See KFTC (2011d), 'The Number of Conglomerate-Affiliated Corporations Concluding "Common Growth Arrangements" with SMEs Has Exceeded 100', December 21. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=52&pageId=0201](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201) (last accessed 2 February 2013) pp. 3–4.

<sup>63</sup> *Id.*

<sup>64</sup> See Seo, Jee-yeon (2004), 'FKI Lodges Complaint on Fair Trade Revision', Korea Times, November 29. Retrieved from <http://news.naver.com/main/read>.

### 5.2.4 Enhancement of procedural fairness

Meanwhile, with a view to securing procedural fairness in its law enforcement, the KFTC has tried to enhance the impartiality of its decision making and transparency in its handling of business. Rules on the operation of KFTC meetings and case-handling procedure evidenced this new approach in March 2009. The revisions led to increased opportunities for respondents to present opinions, strengthened the protection of respondents' business secrets and empowered complainants' status. Through these revisions, the KFTC expects that respondents that are directly affected by its decisions will have their procedural rights well protected and that complaints filed will be handled with more care, all of which should lead to enhanced confidence in the KFTC's case-handling capabilities.<sup>65</sup>

Also, in this spirit, the KFTC has endeavored to ensure opportunities for respondents to present their opinions so as to prepare an effective defense. In March 2009, the KFTC amended its regulations to expand the rights of respondents by allowing respondents to request a resumption of hearings in order to submit new evidentiary material or, where the complexity of the case warrants them additional hearings. Furthermore, the examiner's recommended sanction (including details of the surcharge calculation) is now provided in most cases to the respondent along with the examiner's report. The KFTC also amended regulations to increase its operational transparency, requiring examiners to inform claimants promptly of its conclusions and the grounds for those conclusions. To increase transparency for respondents, in February 2007, the KFTC began to provide respondents with an official notice of investigation. These notices provide the respondent with detailed information on the purpose, scope and length of the investigation and entitle the respondent to refuse any aspects of the investigation it believes going beyond the notified scope of the examination and to report any misconduct on the part of examiners.<sup>66</sup>

### 5.2.5 Jurisdictional expansion

Korea has been expanding the jurisdictional reach of the competition law utilizing the effect doctrine. On April 4, 2002, the KFTC took the unprecedented step of extraterritorially applying Korean antitrust law to

---

nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=0000017245 (last accessed 2 February 2013).

<sup>65</sup> See KFTC (n 43) at p. 5.

<sup>66</sup> See USTR (2011), '2011 National Trade Estimate Report on Foreign Trade Barriers'. Retrieved from <http://www.ustr.gov/about-us/press-office/reports-and-publications/2011-0> (last accessed 2 February 2013), at p. 231.

six foreign manufacturers of graphite electrodes, and imposed a fine of US\$9.2 million for price fixing.<sup>67</sup> On April 29, 2003, after carrying out a sweeping investigation into an alleged international cartel of six foreign vitamin manufacturers, the KFTC levied a fine of US\$3.3 million.<sup>68</sup> On July 1, 2003, the KFTC introduced a system that requires certain M&A transactions involving a foreign company to be notified to the KFTC, even with respect to foreign-to-foreign M&A. On August 26, 2003, the Seoul High Court, which has exclusive first instance jurisdiction over challenges to KFTC's measures, affirmed the KFTC's decision of April 4, 2002 to extraterritorially apply Korea's cartel regulations to graphite electrodes. The court basically held that when the foreign enterprises entered into an agreement to restrain competition, and the subject of the agreement included the Korean market, regardless of whether the collusive behavior took place inside or outside the territory of Korea, the Korean court has the jurisdiction to apply Korea's competition law to the extent that the agreement directly affected the Korean market.<sup>69</sup>

Against this international backdrop and in response to legal precedents, Korea has introduced an amendment to the MRFTA, which codified the extraterritorial application of the Korean competition law. The amendment took effect on April 1, 2005. The Korean government introduced three provisions through this amendment. As noted earlier, Article 2-2 has been recently added to the MRFTA and codifies the extraterritorial application of the Korean competition law.<sup>70</sup> Also, Article 53-3 has been newly inserted into the MRFTA and provides for service of process by which the documents can be delivered through listing in one or more of the following means: the Official Gazette, a public bulletin, a bulletin board, and a daily newspaper.<sup>71</sup> This provision overrides the relevant regulations set forth in the Administrative Procedure Act (APA), when a foreign enterpriser domiciled in a foreign country refuses to designate a domestic agent. These amendments should prevent situations in which the KFTC exercised jurisdiction in a manner that would arguably be unlawful in the absence of these amendments.<sup>72,73</sup>

---

<sup>67</sup> See Jung, Youngjin (2005), 'Korean Competition Law: First Step towards Globalization', 4(2) *Journal of Korean Law* 180, p. 180.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, p. 181.

<sup>70</sup> *Id.*, p. 198.

<sup>71</sup> *Id.*, pp. 198–9.

<sup>72</sup> *Id.*

<sup>73</sup> Article 53-3 of the MRFTA was, in part, amended as of August 3, 2007. The new Article 53-3 provides as follows:

This new trend in the KFTC's jurisdictional expansion indicates Korea's recognition that it is sometimes preposterous to stick with the traditional territoriality principle trap that has its roots in the nation states era of the 18th century, where borders and citizens were a fixed notion. Such a limited notion of jurisdiction is simply unrealistic in an ever-shrinking world.<sup>74</sup> Setting aside the problem of punishing foreign violators, the fundamental flaw of such restrictive jurisdictional interpretation becomes self-evident even with regard to Korean companies. It doesn't require any further explanation to see how easy it is these days for Korean companies to recruit or establish a foreign proxy to get around the enforcement of antitrust laws. A narrow construction of the MRFTA would have frustrated the very purpose of the Act by allowing American companies engaged in antitrust activities directed at Korean consumers to escape the Sherman Act's bite simply by moving their operations abroad, or by plotting the scheme outside the US.<sup>75</sup> This is exactly what the First Circuit of the United States mentioned in *Nippon Paper*: '... a ruling in defendant's favor would create perverse incentives for those who would use nefarious means to influence markets in the U.S., rewarding them for erecting as many firewalls as possible between cause and effect'.<sup>76</sup>

Another important point recognized by the court in this regard is the emerging trend of recognizing transnational corporations (TNCs) as subjects of international law just like any individual state.<sup>77</sup> Unlike in the 18th century, when only nation states were the subject of international law, these days many companies conduct their business on an international

---

#### Article 53-3 (Serving of Document)

- The serving of document in Article 14 or 16 of the Administrative Procedure Act shall apply mutatis mutandis. <Amended on August 3, 2007>
- Notwithstanding the provision of Clause 1, an enterpriser or an enterprisers' organization maintaining an overseas address (hereinafter referred to as 'address') shall appoint a domestic representative to whom it shall serve the document. <Amended on August 3, 2007>
- For a business that needs to appoint a domestic representative, or if the business group does not appoint a domestic representative, Clause 1 shall apply.

<sup>74</sup> See Peterson, Mark (1983), 'The Extraterritorial Effect of Federal Criminal Statutes: Offenses Directed at Members of Congress', *Hastings International and Comparative Law Review* 773, p. 775.

<sup>75</sup> See *United States of America v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990) at 1517.

<sup>76</sup> See *United States of America v. Nippon Paper Industries Co. Ltd*, 109, F.3d (1997) at 6.

<sup>77</sup> See, for example, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (concluded on March 18, 1965).

level. Thus, in some situations they are afforded the status of player in international law. This seems to be exactly what prompted the Korean court to change its direction.

### **5.2.6 Facilitation of engagement of corporations**

Another noteworthy trend of recent days is the KFTC's effort to facilitate the engagement of corporations in the course of administering competition laws and regulations. They include the consent order system, leniency program and advance ruling. This change of policy reflects the reality that an efficient and effective investigation is only made possible with the cooperation of and information from the companies operating in the market.

*Consent Order System* The 2008 amendment of the MRFTA introduced the consent order system.<sup>78</sup> This system allows the KFTC to consult with the target corporation to restore competition in the market and remedy harms to consumer welfare.<sup>79</sup> In exchange for cooperation, a finding of illegality will not be made.<sup>80</sup> In formulating the remedy, the KFTC also solicits the views of other interested parties over a 30-day period. If the target corporation subsequently fails to comply with the agreed consent order, the order will be revoked and per-diem damages (not to exceed 2 million Korean Won per day) will be imposed for the entire period of non-compliance.<sup>81</sup> The consent order system, however, is not applicable to all situations: it does not apply to any situation where 'clear and grave antitrust violation that substantially harms competition in the market' is identified.<sup>82</sup> The consent order system is the implementation of the relevant provision of the Korea–US FTA.<sup>83</sup> It is meant to ease the burden that target corporations may experience from KFTC investigations, to find an efficient remedy for the anti-competitive harms in the market, and to afford a meaningful remedy for consumers. This is to find a practical

---

<sup>78</sup> See Hwan, Jeong and Lin, Kim (2009), '[Antitrust] Proposed Amendments to the Monopoly Regulation and Fair Trade Act', Newsletter of Shin & Kim, January. Retrieved from [http://www.shinkim.com/newsletter/200812/eng\\_202.html](http://www.shinkim.com/newsletter/200812/eng_202.html) (last accessed 2 February 2013).

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> See Shin & Kim (2008), 'Notification of the Draft Bill to Amend the Monopoly Regulation and Fair Trade Act and its Enforcement Decree', Newsletter of Shin & Kim, April 30. Retrieved from [http://www.shinkim.com/upload\\_files/newsletter/antitrust\\_080430\\_eng\(1\).html](http://www.shinkim.com/upload_files/newsletter/antitrust_080430_eng(1).html) (last accessed 2 February 2013).

<sup>82</sup> Id.

<sup>83</sup> Id.

solution to the alleged problem. As this system has been in place for only two years, it is still too early to tell whether it will achieve its stated objective.<sup>84</sup>

*Leniency program* Korea was the first country to introduce a leniency program in Asia by amending the MRFTA in 1997. Nonetheless, the leniency program was not so widely utilized, partly because of uncertainty over receiving lenient treatment. The uncertainty was caused by the wide discretion of the KFTC in terms of granting leniency. This uncertainty was mostly dispelled in 2005 when the MRFTA was amended again to fine-tune the leniency program and make application of the program more predictable.

The leniency program was a major component of the December 2004 amendment of MRFTA which went into effect on January 1, 2005. The amendments doubled the maximum surcharge rate that the agency could levy on cartels from 5 percent of related sales to 10 percent and improved the KFTC's ability to enforce the laws and regulations against foreign companies engaged in anti-competitive activities such as international cartels. The amendments also enhanced the leniency program adopted in 1997 by creating more incentives to be the first informant.

The amended MRFTA and the enforcement decree of the Act introduced major changes to the leniency program that applied to collusive behavior. The enforcement decree under the amended Act provided for an 'automatic' leniency policy for the first individual to report a cartel to the KFTC.<sup>85</sup> Unlike the US leniency program and more in line with the EU leniency program, a second individual who reports to the KFTC before its investigation has commenced will also receive a reduction in fines and more lenient corrective measures.<sup>86</sup> This informant must be the second sole provider of evidence necessary to prove the existence of a cartel and must meet the two latter requirements mentioned above.

Since the amendment, the Leniency Program has been actively utilized. In 2009, the Leniency Program was applied in as many as 17 cases out of 21 cartel cases in which surcharges were imposed. In addition, in 2009 the amount of surcharges imposed through leniency amounted to KRW 42,400 million (US\$35.3 million), which accounted for roughly 80% of the

---

<sup>84</sup> Id.

<sup>85</sup> See Article 35 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (No. 17564), as amended by Presidential Decree No. 18768, March 31, 2005.

<sup>86</sup> See Jung and Chang (n 45), at p. 709.

*Table 3.2 Recent changing trend regarding the leniency program (number of cases and million US\$)*

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007
Application	1	1	–	2	1	2	7	7	9
Surcharge	0.3	0.04	–	1.3	3.4	–	174	550	221

total surcharges of the year, KRW 52,903 million (US\$44 million).<sup>87</sup> This program exempts or decreases the penalty to a person or a company who, as a member of a cartel, reported the cartel activity to the KFTC.<sup>88</sup> This is a significant development compared with the traditional reluctance of the Korean judicial system concerning plea bargaining.<sup>89</sup> Table 3.2 indicates the recent changing trend regarding the leniency program.

The KFTC operates the following leniency program which provides complete immunity or a reduction from corrective measures and penalties for cartel members which report their illegal cartels or which cooperate with the KFTC's cartel investigations:

- (i) The first member of the cartel to report the illegal cartel before the KFTC commences its investigation will receive complete immunity from the KFTC's penalties and corrective measures.
- (ii) The first member of the cartel to cooperate with the KFTC after the commencement of the investigation will receive complete immunity from penalties and complete or partial immunity from corrective measures, if the cooperation is extended while the KFTC is unable to prove the cartel by itself.
- (iii) The second member of the cartel to report the illegal cartel or cooperate with the KFTC will receive a 50 percent reduction in penalties and may receive reduced corrective measures.
- (iv) If a cartel member under investigation for participating in an illegal cartel (Cartel One) is the first member to submit evidence relating to another illegal cartel (Cartel Two), such member will receive

<sup>87</sup> See KFTC (n 57), at p. 30.

<sup>88</sup> See Article 22-2 of the MRFTA.

<sup>89</sup> After long consideration, the Korean government has yet again decided to postpone the introduction of plea bargaining in criminal investigation and indictment. See Park, Si-soo (2011), 'Plea-Bargaining Plan Put on Hold', *Korea Times*, May 3. Retrieved from [http://www.koreatimes.co.kr/www/news/nation/2011/05/117\\_86372.html](http://www.koreatimes.co.kr/www/news/nation/2011/05/117_86372.html) (last accessed 2 February 2013).

complete immunity from the KFTC's corrective measures and penalties that would otherwise be imposed on the member for participating in Cartel Two and will also receive immunity or a reduction in penalties and may receive a reduction in corrective measure for participating in Cartel One (note: this is known as the Amnesty Plus System).

- (v) The leniency application must be made alone by a cartel member (although a joint application by more than one cartel member will be allowed starting on June 25, 2009 in certain situations such as when the joint applicants are affiliates). The leniency applicant ranking will be based on the order of receipt of the leniency application. The leniency application may be made orally or in writing.<sup>90</sup>

*Advance Ruling* In addition, the KFTC has a voluntary review system under which an enterprise may request the KFTC to review an act to be carried out by the enterprise and determine in advance whether it would constitute a violation of the MRFTA. Under this system, the KFTC will notify the enterprise of such determination within 30 days from the request date.<sup>91</sup> The advance ruling is to ensure the compliance of the MRFTA in advance so as to avoid subsequent investigations and an adverse finding.

The recent attempt to encourage the provision of information from a target company and facilitate its cooperation with a KFTC investigation apparently has assisted the KFTC in conducting its investigation in an efficient and effective manner.<sup>92</sup> Given limited resources, this has certainly helped the KFTC deal with an increasing caseload in recent days. At the same time, this new trend has also raised some concerns. For instance, the leniency program has been criticized as a vehicle for settling old scores with a competitor and sometimes for being used as a business tactic to put a competitor in a dire situation. It is also not so familiar in Korea for a guilty party to go unpunished or to receive significantly less punishment simply because it has stepped forward first. This kind of criticism is related to the criminal justice system in Korea where a plea bargaining system has not yet been adopted. How this system will fare in Korea in terms of the

---

<sup>90</sup> See 'The International Comparative Legal Guide to Enforcement of Competition Law 2009' (2009). Retrieved from <http://www.iclg.co.uk/khadmin/Publications/pdf/3005.pdf> (last accessed 2 February 2013), p. 90.

<sup>91</sup> *Id.*, p. 88.

<sup>92</sup> See OECD (2000–1), 'Annual Report on Competition Policy Developments of Korea', p. 6, retrieved from <http://www.oecd.org/dataoecd/52/34/39554122.pdf> (last accessed 2 February 2013).

competition law administration is certainly an issue that many people will monitor with a lot of interest.

### **5.3 Introduction of Investigations by the KFTC**

The basic structure of the KFTC's investigation is as follows. First, anyone can report a violation of the MRFTA to the KFTC in writing with supporting documentation. The KFTC can also initiate an investigation on its own when it detects a possible violation of the MRFTA. When the KFTC receives information from a person or detects a potential violation of relevant laws and regulations, it will assign the case to investigators who collect factual evidence and examine the evidence. The investigator's examination process involves investigating relevant documents, questioning the relevant parties, consulting experts and conducting legal reviews, etc. During this examination process, the investigator may request the presence of the relevant parties, interested parties or witnesses and may request submission of data from them. The investigator may also conduct an on-site investigation at the office or the place of business of the relevant companies.

Once basic information and materials are collected indicating the violation of the laws and regulations, a hearing will be held by the KFTC. The KFTC's decision process takes the form of adversarial proceedings in which the investigator and the target companies present oral arguments. After these proceedings, the KFTC determines whether the target companies have violated the laws and regulations.<sup>93</sup>

If it has been determined that a violation exists, the KFTC may issue corrective orders, impose a penalty, publicize the violation, or refer the case to the public prosecutors' office depending upon the nature of the violation.<sup>94</sup> The decision of the KFTC is prepared in the form of a written opinion and sent to the relevant parties. With respect to case handling procedure, the KFTC has published the Rules on the Management of the Korean Fair Trade Commission and Case Procedures.<sup>95</sup> When an adverse ruling is rendered, the target companies may request re-deliberation or it may also file an appeal to the Korean court. The court that has jurisdiction

---

<sup>93</sup> See 'Summary of the Administrative Procedures of the KFTC Investigation', available at <http://www.apeccp.org.tw/doc/Korea/Admin/a0403.html> (last accessed 2 February 2013).

<sup>94</sup> *Id.*

<sup>95</sup> See Ahn, Yong Seok, and Kim, Yujin (2007), 'Overview: Korea', in *The 2007 Handbook of Competition Enforcement Agencies* at 158. Retrieved from [http://www.lawleeko.com/pdf/Article\\_YSA\\_3.pdf](http://www.lawleeko.com/pdf/Article_YSA_3.pdf) (last accessed 2 February 2013)

for the judicial review in this instance is the Seoul High Court and, if a further appeal is sought, it then goes to the jurisdiction of the Korean Supreme Court. As for private suits, anyone who discovers a violation of the laws and regulations may report it to the KFTC. Instances of private suits regarding the enforcement of the laws and regulations, however, are not common.<sup>96</sup> Interested persons can initiate a private action in a civil court once the KFTC issues a final determination on the violation of the relevant laws and regulations by the target companies.

#### 5.4 Recent Cases

Cartels are grave offenses that undermine the backbone of a market's economic order. With this recognition, the KFTC is aggressively responding to cartels, putting the task of combating them at the top of its enforcement agenda. In 2009, out of 61 cases of MRFTA violations upon which the KFTC imposed surcharges, 21 cases or 34 percent were cartels and, by amount, out of surcharges of KRW366,170 million (US\$305.1 million) imposed by the KFTC, KRW52,903 million (US\$44 million) or about 14 percent was imposed on cartels.<sup>97</sup>

In addition to the increasing enforcement of competitions laws on domestic corporations, it is noteworthy that the KFTC is increasingly expanding its investigations against multinational corporations that operate their businesses in the Korean market. One of the most well-known examples was the investigation against Microsoft, as briefly discussed above. On December 7, 2005, the KFTC, after four years of investigation, decided that tying the practices of the Microsoft Corporation and Microsoft Korea is in violation of Korean competition law, i.e. the MRFTA, constituting abuse of a market dominant position and unfair trade practices. The KFTC imposed a surcharge of KRW33 billion (approximately US\$31 million) and various corrective orders.<sup>98</sup> This is the third sanction on Microsoft following the decision of the US court in July 2000 and that of the Commission of the European Communities in March 2004.

Likewise, in June 2008, the KFTC pursued another international IT giant, the Intel Corporation, for unfair trade practices and determined

---

<sup>96</sup> See 'Summary of the Administrative Procedures of the KFTC Investigation' (n 93).

<sup>97</sup> See KFTC (n 57), at p. 30.

<sup>98</sup> See KFTC (2008), '2008 Annual Report'. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013).

to impose a fine of KRW26 billion (US\$25.4 million).<sup>99</sup> According to the KFTC, Intel had been offering rebates to the nation's major personal computer makers, on the condition that they not purchase central processing units (CPUs) from Intel's competitor, Advanced Micro Devices. On September 6, 2011, officials of the KFTC entered Google's offices to collect information and materials relating to yet another allegation of unfair trade practices by the global internet search giant. The visit was reportedly prompted by allegations from two Korean internet companies that Google had been unfairly using its Android operating system to block competitors from its search and other services on smartphones, thus enjoying a monopoly of the international mobile search market.<sup>100</sup>

The increase in investigations by the KFTC with international elements has prompted the United States and the EU to insist on including in their respective FTAs with Korea provisions of enhanced transparency with respect to competition-related investigations. These FTAs provide detailed procedural elements and requirements that a party should abide by when its competition authorities conduct their investigations. The heightened procedural requirements and awareness should put more pressure on the KFTC in the future as the United States and the EU will watch closely the KFTC's investigations involving their companies operating in Korea.

### **5.5 The Advent of the FTA Era**

The KFTC has been playing an increasingly active role in enforcing Korea's competition law and has been advocating regulatory reform and corporate restructuring. In addition to its authority to conduct investigations and to impose penalties, including broad authority over corporate and financial restructuring, the KFTC can levy heavy administrative fines for violations or for failure to cooperate with investigations.<sup>101</sup> A number of US companies have expressed concern that respondents in KFTC investigations have not been afforded sufficient opportunity to review and

---

<sup>99</sup> Id.

<sup>100</sup> Waters, Richard (2011), 'Regulators Raid Google's Seoul offices', September 7. Retrieved from <http://www.ft.com/cms/s/2/e45e207e-d8d6-11e0-aff1-00144feabdc0.html#axzz1oEPTVunJ> (last accessed 2 February 2013). In April 2011, Internet portals, NHN Corporation and Daum Communications, alleged that Google has been exploiting its position as a developer of Android mobile operating systems. The companies claim that Google makes it a point to have local smart phones preloaded with its search function.

<sup>101</sup> See USTR (n 66), at p. 231.

respond to the evidence against them, including an opportunity to cross-examine those who testify at KFTC investigatory hearings. Concerns have also been raised that procedural rules for KFTC hearings have not been sufficiently transparent and that the KFTC lacks the authority to enter into settlement agreements with respondents by mutual agreement. Another element that has changed the landscape of Korea's competition law is the spread of FTAs. The issue of competition has been tabled in all FTAs, and has ended up occupying separate chapters in the concluded FTAs.

In its 2011 National Trade Estimate Report on Foreign Trade Barriers (NTE), the United States recognizes that Korea has made an effort to address these concerns.<sup>102</sup> This was triggered by the negotiation of FTAs with many countries, including the United States. The entry into force of the US FTA will play an important role in improving the competition regime of Korea. So, in the post-FTA era, the role of the competition agency will be further expanded.<sup>103</sup> Korea is now waiting for the initiation of a new era in the competition area as well. Korea's counterparts have been aware of the importance of the competition regime in Korea and have attempted to ensure that Korean competition law is enforced fairly and faithfully. They have also desired to strengthen cooperation between the competition authorities.<sup>104</sup>

The reason why the FTAs have provided opportunities for a discussion of the competition issue is the failure of the WTO to deal with this issue. At the 1996 Singapore Ministerial Conference, the WTO adopted a competition policy, including cartel regulation, as one of the items on the agenda of further negotiations for a multilateral legal framework. The Doha Development Agenda (DDA) negotiations, however, decided to exclude competition issues from the scope of the negotiation package.<sup>105</sup>

The advent of the FTA may prompt foreign investors in Korea to be more active and alert to the Korean competition regime. For instance, foreigners have complained about restrictions on M&A in Korea. In Korea, when a company with assets or turnover of KRW200 billion or over intends to merge with another company with assets or turnover of

---

<sup>102</sup> *Id.*

<sup>103</sup> See UNCTAD (2005), 'Competition Provisions in Regional Trade Agreements: How to Assure Development Gains'. Retrieved from [http://www.unctad.org/en/docs/ditcclp20051\\_en.pdf](http://www.unctad.org/en/docs/ditcclp20051_en.pdf) (last accessed 2 February 2013), p. 432.

<sup>104</sup> *Id.*, at pp. 415–17.

<sup>105</sup> The cartel regulation issue was originally included along with competition policy in the multilateral negotiation, but the 2003 Cancun Ministerial Conference dropped the competition policy issue.

KRW20 billion or over, it is required to notify the matter to the KFTC for a review of the potential anti-competitiveness of the proposed merger.<sup>106</sup> In the future, there will be more challenges to KFTC decisions and policy by foreigners in the Korean market.

The 1998 financial crisis opened the door for foreign penetration into the Korean market. For example, in 2001 only four out of 20 banks were controlled by foreign capital. In 2007, eight out of 18 banks are legally controlled and more than 50 percent owned by foreign capital. If the 1998 financial crisis opened the door for the first wave, the FTAs will do so for the second wave of foreign penetration into the Korean market. This is the new situation that Korea will have to deal with in the future.

## 6. CONCLUSION

For many ordinary Korean citizens, the KFTC is regarded as the governmental agency that is closest to their daily lives. Ever since the KFTC was delegated with strong authority to monitor business practices and ensure competition in the market, the KFTC has been faithfully fulfilling the role of 'guardian of the market economy' to promote competition in Korea and lay the groundwork for the sustainable development of the Korean economy.<sup>107</sup> It has achieved many policy objectives over the years and garnered the support of the general public. Arguably, the KFTC is also one of the strongest governmental agencies within the Korean government with its investigatory authority and extensive sanctioning powers. To many corporations operating in Korea, the KFTC appears to be the most formidable agency of the Korean government.

At the same time, aggressive investigations by the KFTC have sometimes caused domestic controversy as well. This is so, because the perception is that the competition regime is sometimes used as a tool to achieve or facilitate governmental policy objectives. Targeted companies sometimes tend to allege that political considerations are reflected in the investigations. Likewise, foreign corporations and governments have raised concerns about the robustness of investigations by the KFTC and allege that foreign corporations' activities in the Korean market are hampered by such investigations.

In any event, given its statutory authority and the important function it carries out, the role of the KFTC will continue to expand in the future in

---

<sup>106</sup> See KFTC (n 57), p. 20.

<sup>107</sup> See KFTC (n 43), at Preface.

all sectors of the Korean economy. There are many issues to be addressed and tasks to be completed in the new era, and the way in which Korea will respond to these challenges will determine the future of the Korean competition regime.

## REFERENCES

- Ahn, Yong Seok and Kim, Yujin (2007), 'Overview: Korea', in *The 2007 Handbook of Competition Enforcement Agencies* at 158. Retrieved from [http://www.lawleeko.com/pdf/Article\\_YSA\\_3.pdf](http://www.lawleeko.com/pdf/Article_YSA_3.pdf) (last accessed 2 February 2013).
- Alderman, Karen, Jun, K.T., Shin, Luke (2011), 'Korea: Overview', *The Asia-Pacific Antitrust Review 2011*. Retrieved from <http://www.globalcompetitionreview.com/reviews/33/sections/118/chapters/1221/korea-overview> (last accessed 2 February 2013).
- Gerber, David J. (2008), 'Economics, Law & Institutions: The Shaping of Chinese Competition Law', 26 *Washington University Journal of Law & Policy* 271.
- Hwan, Jeong and Lin, Kim (2009), '[Antitrust] Proposed Amendments to the Monopoly Regulation and Fair Trade Act', Newsletter of Shin & Kim, January. Retrieved from [http://www.shinkim.com/newsletter/200812/eng\\_202.html](http://www.shinkim.com/newsletter/200812/eng_202.html) (last accessed 2 February 2013).
- Jung, Youngjin (2005), 'Korean Competition Law: First Step towards Globalization', 4(2) *Journal of Korean Law* 180.
- Jung, Youngjin and Chang, Seungwha (2006), 'Korea's Competition Law and Policies in Perspective', 26 *Northwestern Journal of International Law and Business* 687.
- KFTC (2002), *2002 Annual Report*, Korea: Fair Trade Commission of Republic of Korea. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013).
- KFTC (2005), 'The Findings of the Microsoft Case', December 7. Retrieved from [http://www.ftc.go.kr/data/hwp/microsoft\\_case.pdf](http://www.ftc.go.kr/data/hwp/microsoft_case.pdf) (last accessed 2 February 2013).
- KFTC (2008), '2008 Annual Report'. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013).
- KFTC (2009), *2009 Annual Report*, Korea: Fair Trade Commission of Republic of Korea. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013).
- KFTC (2010), *2010 Annual Report*, Korea: Fair Trade Commission of Republic of Korea. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013).
- KFTC (2011a), '2011 Annual Report'. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=53&pageId=0301](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) (last accessed 2 February 2013).
- KFTC (2011b), 'The KFTC Holds its 30<sup>th</sup> Anniversary Ceremony', April 1. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=52&pageId=0201](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201) (last accessed 2 February 2013).
- KFTC (2011c), 'KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD

- International Cartel', October 28. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=52&pageId=0201](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201) (last accessed 2 February 2013).
- KFTC (2011d), 'The Number of Conglomerate-Affiliated Corporations Concluding "Common Growth Arrangements" with SMEs Has Exceeded 100', December 21. Retrieved from [http://eng.ftc.go.kr/bbs.do?command=getList&type\\_cd=52&pageId=0201](http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201) (last accessed 2 February 2013).
- Kim, Chul-Ho (2008), 'Amendments to the Monopoly Regulation and Fair Trade Act', Newsletter of Shin & Yu, August. Retrieved from [http://www.hwawoo.co.kr/newsletter/eng/newsletter\\_200808eng.html](http://www.hwawoo.co.kr/newsletter/eng/newsletter_200808eng.html) (last accessed 2 February 2013).
- Kim, Tong-hyung (2011), 'Government out of Options on Inflation', *Korea Times*, July 26. Retrieved from [http://www.koreatimes.co.kr/www/news/biz/2011/07/123\\_91658.html](http://www.koreatimes.co.kr/www/news/biz/2011/07/123_91658.html) (last accessed 2 February 2013).
- 'Korea Tops Asian Competitiveness Ranking' (April 2011), newsletter of the Embassy of the Republic of Korea in the USA. Retrieved from [http://www.dynamic-korea.com/news/view\\_news.php?main=KTD&sub=ECO&uid=201100337220&keyword=](http://www.dynamic-korea.com/news/view_news.php?main=KTD&sub=ECO&uid=201100337220&keyword=) (last accessed 2 February 2013).
- Lee, Nam-Kee (2002), *Toward a Mature Market Economy: Competition Law and Policy in Korea*, Korea: Korea Fair Trade Commission.
- Lee, Sanghyun (2007), 'Using Action in Damages to Improve Criminal Penalties against Cartel: Comparative Analysis of Competition Law of United States and South Korea', *International Trade Law Journal* 55.
- OECD (2000–1), 'Annual Report on Competition Policy Developments of Korea', p. 6. Retrieved from <http://www.oecd.org/dataoecd/52/34/39554122.pdf> (last accessed 2 February 2013).
- OECD Report (2002), 'Competition Law and Policy in Korea'. Retrieved from <http://www.oecd.org/dataoecd/21/8/34834187.pdf> (last accessed 2 February 2013).
- OECD Report (2010), 'Economic Survey of Korea 2010', p. 1. Retrieved from [http://www.oecd.org/document/24/0,3343,en\\_2649\\_34111\\_45393816\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,3343,en_2649_34111_45393816_1_1_1_1,00.html) (last accessed 2 February 2013).
- Park, Si-soo (2011), 'Plea-Bargaining Plan Put on Hold', *Korea Times*, May 3. Retrieved from [http://www.koreatimes.co.kr/www/news/nation/2011/05/117\\_86372.html](http://www.koreatimes.co.kr/www/news/nation/2011/05/117_86372.html) (last accessed 2 February 2013).
- Peterson, Mark (1983), 'The Extraterritorial Effect of Federal Criminal Statutes: Offenses Directed at Members of Congress', *Hastings International and Comparative Law Review* 773.
- Pyo, Hak-kil (2009), 'Global Financial Crisis and the Korean Economy: Issues and Perspectives', in *Korea's Economy 2009*, Korea: Korea Economic Institute, Korea: Korea Economic Institute and the Korea Institute for International Policy, pp. 8–15.
- Samsung Economic Research Institute (2005), 'Korea's Manufacturing Sector to Maintain Steady Growth', January. Retrieved from <http://www.seriworld.org/06/wldNewsV.html?mn=D&mncd=0406&key=20050110220002&sectno=> (last accessed 2 February 2013).
- Seo, Jee-yeon (2004), 'FKL Lodges Complaint on Fair Trade Revision', *Korea Times*, November 29. Retrieved from <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=0000017245> (last accessed 2 February 2013).

- Shanahan, Deirdre (2005), 'International Competition Law: Real World Issues and Strategies for Success', Paper presented at conference on 'The Development of Antitrust in China, Korea and Japan', held in Montreal, Canada, June 16–17, 2005.
- Shin & Kim (2008), 'Notification of the Draft Bill to Amend the Monopoly Regulation and Fair Trade Act and its Enforcement Decree', Newsletter of Shin & Kim, April 30. Retrieved from [http://www.shinkim.com/upload\\_files/newsletter/antitrust\\_080430\\_eng\(1\).html](http://www.shinkim.com/upload_files/newsletter/antitrust_080430_eng(1).html) (last accessed 2 February 2013).
- 'Summary of the Administrative Procedures of the KFTC Investigation'. Retrieved from <http://www.apeccp.org.tw/doc/Korea/Admin/a0403.html> (last accessed 2 February 2013).
- The Bank of Korea (2010), *The Korean Economy*, Korea: Korea Economic Institute and the Korea Institute for International Policy, p. 3.
- 'The International Comparative Legal Guide to Enforcement of Competition Law 2009' (2009). Retrieved from <http://www.iclg.co.uk/khadmin/Publications/pdf/3005.pdf> (last accessed 2 February 2013).
- UNCTAD (2005), 'Competition Provisions in Regional Trade Agreements: How to Assure Development Gains'. Retrieved from [http://www.unctad.org/en/docs/ditclp20051\\_en.pdf](http://www.unctad.org/en/docs/ditclp20051_en.pdf) (last accessed 2 February 2013).
- USTR (2011), '2011 National Trade Estimate Report on Foreign Trade Barriers'. Retrieved from <http://www.ustr.gov/about-us/press-office/reports-and-publications/2011-0> (last accessed 2 February 2013).
- Waters, Richard (2011), 'Regulators Raid Google's Seoul offices', September 7. Retrieved from <http://www.ft.com/cms/s/2/e45e207e-d8d6-11e0-aff1-00144feabdc0.html#axzz1oEPTVunJ> (last accessed 2 February 2013).
- WEF (2011), 'The Global Competitiveness Report 2010-2011'. Retrieved from [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2010-11.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf) (last accessed 2 February 2013).
- World Trade Organization (WTO) (2010), 'WTO Trade Profiles 2010'. Retrieved from [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles10\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles10_e.pdf) (last accessed 2 February 2013).
- Yonhap News (2011), 'Confirmation Hearing of the New Chief Justice' (the press report of the confirmation hearing of Seung-Tae Yang, candidate for the Chief Justice of the Korean Supreme Court), September 6. Retrieved from <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=001&aid=0005252450> (last accessed 2 February 2013).