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THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY

-- KOREA --

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KOREA

OBJECTIVES OF COMPETITION LAW AND POLICY AND OPTIMAL DESIGN OF A COMPETITION AGENCY

1. Introduction

Economists and competition law experts generally agree that the objective of competition law and policy is to maximise economic efficiency by promoting and protecting competition in the market. In reality, however, competition law and policy has multiple goals such as the protection of small and medium enterprises (SMEs), the creation and maintenance of employment, consumer protection in response to changing conditions of the level of economic development, pending social challenges and the level of law enforcement by the competition authority.

The important point related to the objectives of competition law and policy is that they may affect social welfare by either promoting or lessening competition. In addition, the status and role of a competition authority can be also related with the goals.

The competition authority should be endowed with power to achieve those goals and be designed to exercise the power. As such, the optimal framework for a competition authority refers to structural and functional design of a competition authority that will enable it to achieve goals to a maximum degree. The optimal design of a competition authority, therefore, can be different according to the competition law and policy goals being pursued.

Looking back on the experiences of Korea's competition law enforcement in the last 21 years, it is possible to notice that not only the goals of competition law and policy but also the design of a competition authority are not fixed and rather it can change with time and circumstances. The more valuable lesson, however, is that the primal goal of competition law and policy should be focused on economic efficiency and that the competition authority must be set up and operated to achieve it to a maximum degree.

2. Objectives of Competition Law and Policy

2.1 *Objectives of Korean Competition Law*

Article 1 of Korea's competition law, the Monopoly Regulation and Fair Trade Act (MRFTA), states that the purpose of this Act is to stimulate creative business activities, protect consumers, and promote the balanced development of the national economy by encouraging fair and free competition. For this purpose, the MRFTA prohibits the abuse of market-dominant position, prevents excessive concentration of economic power and regulates cartels and unfair business practices.

However, article 1 does not include any provisions that explicitly advocate the promotion of economic efficiency. In the past, there have been instances where the KFTC dealt with cases and made policies in consideration of objectives other than, at times contrary to, economic efficiency such as the

protection of SMEs and industrial rationalisation. At present, however, the KFTC makes policies and dealt with cases on the basis of economic efficiency that ensures maximising consumer welfare.

The MRFTA approaches economic efficiency from dynamic as well as static perspective. Practices of corporations having anti-competitive effects and thus reducing short-term economic efficiency can be exempted when these practices can create a new market or increase long-term efficiency through the development of technology that produces goods and services with better quality at lower prices. Article 59 of the MRFTA states exemptions for certain practices from dynamic perspective.

2.2 *Single Objective (Promotion of Economic Efficiency) vs. Multiple Objectives*

Similar to what Korea did in the past, many competition authorities are still pursuing goals other than economic efficiency e.g. protection of SMEs, creation and maintenance of employment, protection of domestic firms or particular industries, etc. This often happens when confidence in the importance of competition is low and when there is a lack of understanding or awareness of competition law and policy.

Korea's experience tells us, however, that it is better to pursue economic efficiency as the objective of the competition law and policy since pursuing multiple objectives can result in the following problems.

First, the competition authority can lose public support if there is inconsistency in law enforcement. In case that the political objective such as the protection of certain industries, job creation and the protection of SMEs are pursued in case dealing, it is more plausible that the same or similar cases have different outcomes. Secondly, if a competition authority pursues political goals, it may reduce consumer welfare because the authority can be captured by the interests of groups with strong power, e.g. producers and unions and thus it can infringe on the interests of consumers. Thirdly, if competition is restricted for the pursuit of goals other than economic efficiency, this may incur inefficiency and result in waste of social resources accordingly. It is desirable that non-competition policy objectives should be approached by non-competition policy methods.

3. *Optimal Design of a Competition Agency*

3.1 *Assessment Factors for Optimal Design of a Competition Agency*

As mentioned above, it is desirable that competition law and policy should have a single objective, i.e. increasing economic efficiency. A competition authority can be regarded as having its optimal design when it achieves this objective to the fullest. Therefore, a competition authority's optimal design means effectiveness. A competition authority's effectiveness is best secured by the law and must be guaranteed in operation.

The problem is that the level of a competition authority's optimal design can not be quantitatively measured. Fortunately, however, optimal design can be categorised into a few characteristics even if it can not be measured. According to the KFTC's 21 years of experience in competition law enforcement, the factors necessary for optimal design of a competition authority are; structural and operational independence from other governmental bodies, the power to achieve its goals effectively, the competition authority's capacity to fulfil such power efficiently, transparency and effectiveness in case dealing and deterrence against law violations. Although the presence of all these factors does not inevitably lead to

optimal design of a competition authority, it would be very difficult for a competition authority to achieve effectiveness if these factors were not available.

3.2 *Structural & Operational Independence*

In Korea's experience of competition law enforcement, the structural and operational independence of the competition authority has been the most important factor in determining its optimal design. Above all other forms of independence, it is most important that the competition authority should be free from the influence of any other government body or politics. What is more, independence should be protected by law.

It is only when independence from politics and other government bodies is maintained that law enforcement and policy decision can be made by the competition principle alone. Only under such conditions can the competition authority represent the interests of the general consumers without being captured by other interest groups when carrying out competition advocacy in privatisation of state-owned enterprises and deregulation.

An important part of a competition authority's structural independence is, not only its independence from other bodies within the government, but also the protection for the status of commissioners including the chair and vice chair. In addition, the competition authority's independence in its operations should be as secure as its legal independence. If the authority were influenced in its daily operations by other governmental bodies and politics, its legal independence would be of no use.

In Korea, the KFTC was in the Economic Planning Board (EPB) from April 1981 until April 1994. Not only was it limited in its activities but also there were some cases where law enforcement was distorted for the pursuit of objectives besides the competition principle. Recognising these problems, Korean government separated the KFTC from EPB in April 1994 and placed it under the Prime Minister as an independent, vice-ministerial body. In April 1996, it was elevated to an independent, *ministerial* body. It was a turning point that increased consistency in case dealing and strengthened its competition advocacy role.

In order to free from political interference, qualification requirements (Article 37), the term (Article 39) and the status security (Article 40) for the commissioners including chair and vice chair is strictly stated in the MRFTA.

For countries at the early stage of economic development in which government intervention and anti-competitive regulations are prevalent, case dealing alone is not enough to spread competition culture into the every corner of the market. To promote and protect competition, competition advocacy role by competition agency is very important in these countries. In Korea, independence of the KFTC from government in 1994 was a catalyst for increased advocacy role. One of the competition advocacy role is that article 63 of the MRFTA requires other administrative bodies to consult with the KFTC prior to making or revising laws or regulations that can be anticompetitive. From 1991 to 2001, the number of consultations is 3,654. The KFTC recommended deletion or revision of anti-competitive regulations in 767 cases (20.9%), 581 of which were accepted (75.7%). Looking at the table below, the rate of acceptance has been increasing significantly since the KFTC became an independent agency in 1994.

No. %)

Year	Total cases of Consultation	Recommendations Requested	Recommendations Adopted
2001	432	53 (12.3%)	47 (88.7%)
2000	481	60 (12.5%)	51 (85.0%)
1999	561	72 (12.0%)	64 (88.0%)
1998	563	173 (30.7%)	127 (73.4%)
1997	408	139 (34.1%)	106 (76.3%)
1996	293	91 (30.7%)	77 (84.6%)
1995	205	93 (30.7%)	61 (66.0%)
1994	323	24 (7.4%)	8 (33.3%)
1993	181	18 (9.9%)	13 (72.2%)
1992	129	11 (8.5%)	7 (63.6%)
1991	78	33 (42.3%)	20 (60.6%)
Total	3654	767 (20.9%)	581 (75.7%)

3.3 *Power to Achieve Policy Objectives Effectively*

No matter how secure its structural and operational independence, a competition authority can not be effective if it does not have the necessary power for achieving its objectives. The competition authority must have the authority to order the submission of documents, oral testimony, etc. that are necessary for the investigation and decision making of the cases. The competition authority must have the power to correct anti-competitive practices and, when deemed necessary, impose surcharge and fines against violators. It must also have the means to force relevant parties to observe the law and implement the orders when they refuse to co-operate, provide false material and fail to execute correction orders. The law must guarantee such powers. In Korea, Chapter 10 "Investigation Procedures and Other Matters" and Chapter 14 "Penal Provisions" of the MRFTA stipulate the KFTC's power in detail.

3.4 *Capacity of the Competition Authority*

Competition law is enforced and policy implemented by the competition authority itself. No matter how independent it is or how sufficient its power, the competition authority can not achieve effectiveness if it does not have the capacity to conduct the required activities. Competition law is a field that covers economic reality. That is why the staff of competition authorities must have a good understanding on economic reality as well as theories of economics and law.

It is crucial, therefore, that competition authorities should have enough economists and legal experts and it should encourage exchange of information and knowledge between them to take advantage of their expertise. In addition, it should disseminate expertise and information within the organisation through programs such as periodical staff training, exchange of experience with foreign competition authorities, continued communication with domestic and foreign experts. More importantly, the organisation must not remain static and should be changing to meet new demands and challenges.

Taking into consideration that the KFTC is largely organised around the economists in part due to its establishment in EPB, it is actively recruiting legal experts. Not only does the KFTC hold the Thursday Forum each week to provide an arena for discussion between KFTC staff and experts in the relevant fields, it also provides up-to-date information and know-how by translating publications of the OECD, U.S., EU and other advanced organisations.

3.5 *Transparency and Efficiency in Case Dealing Procedures*

When the transparency and efficiency in case dealing procedures are high, it commands more public confidence and generates higher compliance with the decisions.

The most important point concerning transparency in case dealing procedures is that the related parties should be provided information with prompt and timely manner on the cases they are involved. By doing so, uncertainty between the competition authority and the related parties can be resolved at an early stage and thus the possibility of mistakes in investigation and as well as the number of complaints against the decision by the competition authority can be reduced. The competition authority's process of dealing with the case and its decision can be assessed differently or potentially be mistaken. Therefore, transparency should be accompanied by the right to appeal the competition authority's decision to the court. Investigation and decision can have an impact not only on the interested parties but also on the third parties. If possible, the competition authority's decisions should be publicly released or provided through press conferences to the public.

A competition authority's investigation of a company should be restricted to the minimum necessary degree since it may cause burdens/costs to the interested parties. This is why cases must be processed as quickly as possible and why the competition authority must eliminate uncertainty for the interested parties as possible by issuing the necessary document submission orders in succession.

In an effort to enhance transparency in its case procedures, the KFTC allows all investigated parties to bring its decision to the appeal courts (Article 54). The KFTC notifies respondents of the processing of case during the investigation pursuant to the MRFTA regulations on Investigation Procedures and Other Matters. It also informs the general public of its decision through press releases and conferences.

3.6 *Deterrence against Competition Law Violations*

In order to deter violations of competition law, the loss from penalties must outweigh the expected gains from the anticompetitive, illegal acts. If the penalty is lighter than the anticipated gains, the incentive to violate competition laws will be greater and competition authority surveillance will not be enough to enforce laws. Therefore, penalties must be raised, or surveillance reinforced, in order to deter competition law violations effectively.

Since the appropriate penalty differs depending on the types of violation and the countries, it is difficult to generalise on what the adequate level of punishment should be. The types of penalties should include not only tools to offset the profits and stop the violators from continuing their illegal activities, but also punishments against refusal or delay of the correction orders issued by the competition authority. Along with public enforcement, private enforcement by related parties who suffer loss from anti-competitive practices of others must be secured.

According to the MRFTA, the KFTC can issue corrective orders and impose surcharges according to the types of violation. Additional fine or/and imprisonment can be imposed on respondents when they fail to comply with the orders (Chapter 14). The MRFTA also provides for damage claims by private persons (Article 56 & 57).

4. Relationship between Objectives and Optimal Design

So far, we have examined the objectives and optimal design of competition authorities in light of the Korean experience. For Korea, it is hard to see that there is clearly positive relationship between objectives of competition law and optimal design of a competition authority. It seems, however, that the more experience of law enforcement, the greater the priority on economic efficiency rather than multiple objectives and the greater awareness on the competition authority's optimal design. A competition authority's optimal design seems to be more dependent on factors such as the country's level of competition law enforcement, public awareness of competition policy and the judicial system rather than the objectives of the competition law.

Judging from this, there is a high possibility that competition policy in countries with relatively little experiences in law enforcement will begin with various objectives other than economic efficiency, which ensures maximising consumer welfare, such as protection of SMEs or fostering of particular industries, but will change towards focusing on economic efficiency when it has accumulated experience. In addition, it is also likely that greater attention will be paid to optimal design issues such as the competition authority's independence.