

Unclassified

DAF/COMP/WD(2015)5

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

29-May-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**HEARING ON OLIGOPOLY MARKETS**

-- Note by Korea --

**16-18 June 2015**

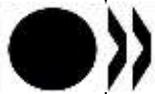
*This document reproduces a written contribution from Korea submitted for Item 5 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/oligopoly-markets.htm](http://www.oecd.org/daf/competition/oligopoly-markets.htm).*

**JT03377365**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*



DAF/COMP/WD(2015)5  
Unclassified

English - Or. English

## KOREA

### 1. Competition law related issues in oligopoly market

1. As cartel poses significant harm to the order of free market economy, it is common that competition law in each jurisdiction regulates cartel. In oligopoly market, only a few players exist, so oligopoly is more susceptible to cartels. The problem of cartel in oligopoly market is especially difficult to address in that an agreement shall exist between competitors in order for the unfair action to constitute a cartel in the legal sense. But just as regulatory authorities have so far strengthen their countermeasures, cartelists have also evolved, covering up evidence related to such an agreement or communicating with one another behind the curtain. Therefore competition authorities are faced with legal difficulties of proving the existence of an agreement. The Korea Fair Trade Commission (hereinafter referred to as “KFTC”) is also facing similar difficulties.

2. In addition, in oligopoly market with only a handful of competitors, oligopolists act on the recognition of mutual dependence, so they anticipate and respond to their competitor’s present or future actions. Therefore, even in the absence of overt agreement, they act in almost the same way which can be deemed suspicious. Such behaviors range from conscious parallelism to concerted practices, etc. It is a significant challenge for competition authorities to differentiate such actions from cartels, and take proper regulations.

### 2. Challenges from Gap between Legal Instruments and Case Law

3. Article 19 (5) of the Monopoly Regulation and Fair Trade Act (hereinafter MRFTA), which is Korea’s competition law, stipulates that when certain requirements are met, an agreement can be inferred<sup>1</sup>. That is, if a few competitors show similar or parallel behaviors in an oligopoly with high concentration ratio, it can result in anti-competitive effects as if an agreement exists. However, the reality is that cartels are conspired intelligently and covertly, so it is very difficult to prove cartel agreements. Taking such difficulty into account, Korea’s competition law has a provision that allows the presumption of an agreement, aiming at lessening the burden of proof on competition authority and securing the effectiveness of its regulation against hidden cartels.

4. In Korea, case laws deem that the provision, in its legal nature, allows presumptions of law. Therefore when statutory requirements for a presumption of law are satisfied, the presumption has the effect or force. The provision of presumptions of law shifts the burden of proof, so when the presumption of law is established, the burden of proof is now on the enterprisers to prove the non-existence of an agreement and to overthrow the presumption of law<sup>2</sup>.

---

<sup>1</sup> Article 19 (5) Where two or more enterprisers conduct an act falling under any subparagraph of paragraph (1), it shall be assumed that the enterprisers have agreed to conduct an act in association falling under any subparagraph of paragraph (1) when it is highly probable to reckon that they did the act in association regarding the characteristic of the relevant transaction, goods or services, economic reasons and ripple effects of the relevant activity, frequency, mode, etc. of contact among enterprisers.

<sup>2</sup> With respect to the presumption of fact, the courts will make judgment on whether the facts are sufficient enough to presume the action concerned.

5. The provision of presumptions of law is a rather unique policy of Korea, which is hard to find in other jurisdiction's competition law. The policy has so far been of good use on the working level, but case examples show that when administrative guidance is involved, presumptions of law can be overthrown, which has happened quite often in Korea. For instance, in 2003, the Supreme Court of Korea ruled that the presumption of cartel shall cease to take effect on the grounds that government agencies, namely the National Tax Service and the Ministry of Finance and Economy, were involved in the increase in beer prices. Another case in point was the 2005 cartel case of 11 non-life insurance companies. The court overthrew the presumption of law because of the fact that administrative guidance was provided by the Financial Supervisory Service.

6. Korea's Competition law was amended in 2007, which put heavier burden of proof on the KFTC. Now, the cartel-like behavior alone cannot be the basis for the existence of an agreement. Now there should also be a probability to conspire a cartel, taking into account various circumstantial evidence and other situations. This is why, after the amendment, working-level competition enforcers in Korea use presumptions of fact on the back of circumstantial evidence rather than presumptions of law when establishing the existence of an agreement.

### **3. Difficulties in Proving Violations of Competition Law**

#### **3.1 *Conscious Parallelism***

7. In oligopoly markets, firms are likely to develop a strong bond of mutual dependence. That is, it is easier for them to be aware of the probable actions of competitors and to pick and choose its behavior in the market based on such prediction, maximizing the profit. Therefore, by taking advantage of such nature of an oligopoly, firms can act in the same or parallel ways without any overt agreement, thereby causing an anti-competitive effect like that of a cartel. This is called conscious parallelism, a coordination of business behaviors in a parallel way without any overt agreement in the legal sense.

8. Conscious parallelism can become a problem under antitrust law. It is problematic because the coordinated behaviors look like a cartel in appearance and even cause anti-competitive effects like a cartel does. Furthermore, conscious parallelism can ended up covertly forging a real cartel without much difficulty.

9. However, the general consensus is that conscious parallelism cannot be deemed as an agreement, in many cases including the 2013 instant noodle cartel case, the courts made it clear that conscious parallelism itself cannot constitute a cartel agreement. The courts state that a cartel is recognized only when there is sufficient circumstantial evidence beyond conscious parallelism such as information exchange, and the courts provided examples of such circumstantial evidence as follows:

- Prices are set at the same level in a situation where prices cannot be the same without an agreement between enterprisers.
- The enterprisers concerned have colluded before.
- - As soon as the enterprisers communicated, their prices changed by the same amount or proportion at or around the same time, or the enterprisers exchanged information not about the overall market conditions such as gross outputs or market prices but about specifics such as individual enterpriser's inventory or product price.

10. In conclusion, even when conscious parallelism is pervasive in oligopoly markets and has an anti-competitive effect similar to a cartel, if the KFTC does not have sufficient circumstantial evidence to presume an agreement, or if it does have sufficient circumstantial evidence but cannot prove the relationship between the conscious parallelism and the evidence, the KFTC's power is limited.

### 3.2 *Exchange of information as evidence of agreement*

11. Article 19 (5) of the MRFTA stipulates that when certain requirements are met, an agreement can be presumed, which reduces the burden on the competition authority to prove a hidden agreement.

12. Moreover, the KFTC's guidelines on reviewing concerted actions states that even when there is no direct evidence of the existence of an agreement, an agreement can be presumed if there is a significant probability to make such a presumption. More specifically, the guidelines lists four circumstantial evidence as follows based on which an agreement can be inferred.

- When there is evidence of direct or indirect exchange of information or communication of minds.
- When it is recognized that an action can contribute to the profit of the enterprisers concerned only when the action is taken collectively. In other words, had the action been taken individually, the result would have been counterproductive.
- If the enterprisers' adoption of uniform business practices cannot be explained by the result of market situations.
- When the coordination of behavior is deemed difficult to take place without an agreement under the given industrial structure.

13. Among the evidence mentioned above, the exchange of price-related information between enterprisers is the topic which the KFTC and the courts have some different perspectives, especially on whether such exchange can be the evidence of an agreement.

14. For example, in 2011, the KFTC imposed remedies and fines against 16 life insurance companies for unfairly and collectively setting product prices on the grounds that from 2001 to 2006 they exchanged their expected interest rates, which were the information not confirmed yet, therefore not announced to the public.

15. With respect to this decision, the Supreme Court ruled it is hard to conclude that the exchange of information itself has unfairly impeded competition in the market, and concluded that the reciprocity of communication of minds is additionally needed<sup>3</sup>.

16. In the instant noodle price fixing case in 2013, the high court concluded that the exchange of price-related information itself cannot prove that there was a cartel agreement. The court ruled that Article 19 (1) of the MRFTA does not have a separate provision dedicated to the exchange of information between enterprisers and although Article 19 (5) stipulates that from the "frequency and mode of contact among enterprisers" an agreement can be presumed, this is only one out of many grounds for the presumption of law<sup>4</sup>. In the ruling, the court also gave examples of circumstantial evidence from which an agreement can be inferred: when the exchange of information is reflected in the decision making process and resulted in the same prices; when the behavior at issue is in line with an existing agreement.

17. Therefore, even when it is evident that price-related information is exchanged, the KFTC cannot infer an agreement, if additional evidence it provides to the court cannot live up to the level the court demands, in which case the effectiveness of the KFTC's regulations can be challenged.

---

<sup>3</sup> The Supreme Court's ruling in 2014 on the expected interest rate cartel case of 16 life insurance companies.

<sup>4</sup> The high court's ruling in 2013 on the instant noodle price fixing case

#### 4. Remedies and tools

18. If the existence of a cartel agreement is confirmed, the KFTC imposes fines and/or orders to cease of violations as remedies against cartels, and these are relatively clear. However, when there is no agreement at all such as conscious parallelism, it is hard to prove an agreement and to take measures against such cases.

19. As for M&As, there is no problem of proving an agreement, so it is easier to take remedies against anti-competitive M&As in an oligopoly.

20. However, M&A cases require stricter analysis on the anti-competitive nature than cartel cases and the coordinated effect is one of the important criteria of the analysis. That is, the KFTC determines whether the M&A and subsequent decrease in the number of market players raise the possibility of collective action and push down the incentive to compete, reducing competition and pushing up prices. When it comes to M&As in oligopolies, if they are deemed highly likely to take coordinated actions such as information exchange, the KFTC takes due measures against such risks. The measures can be either structural or behavioral.

21. For example, in the 2011 M&A case where Western Digital acquired Viviti Technology, the KFTC raised concerns that too small number of competitors will compete in the post-merger market, which is highly susceptible to collusion. Therefore, it imposed structural measures of divesting major assets to new entrants to maintain competition in the market.

22. Another case in point is the 2013 M&A case where ASML acquired Cymer. Enterprisers in upstream markets have to open up their confidential information to have business with those in downstream markets. Taking this into account, the KFTC raised concerns that the ASML's acquisition of Cymer is highly likely to result in the exchange of information, so it took behavioral measures, making the sales business unit of Cymer be operated independently from ASML and imposing the duty of establishing a firewall around the unit, thereby prohibiting the exchange of confidential information.

23. However, such measures are only preventative measures responding to future changes M&As can cause in the economy, so if the prediction of the KFTC turns out wrong, the risk of Type I or Type II errors can be greater than that of cartel cases.