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Independent Sector Regulators – Note by Korea

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

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1. Introduction

1.1. Industries regulated by independent sector regulators

1. The independent sector regulators target the industries in general that can have market failure by nature when resource allocation is solely left at the hands of the market and are likely to harm public interest. The target sectors are usually technical and specialized industries such as broadcasting, communications and finance. Independent sector regulators in Korea include but are not limited to: the Korea Communications Commission (hereinafter referred to as “KCC”), the Financial Services Commission (hereinafter referred to as “FSC”), the Electricity Regulatory Committee, etc.

2. The KCC and the FSC, the two prime examples of independent sector regulators, were established as administrative commissions pursuant to Article 5 of *the Government Organization Act*, out of the need to provide independence in performing their duties. The KCC is responsible for regulating broadcasting and communications services and protecting the users. The FSC is charged with policy making and supervisory function in the financial sector.

	Korea Communications Commission (KCC)	Financial Services Commission (FSC)
Legal Ground	Act on the Establishment and Operation of Korea Communications Commission	Act on the Establishment, etc. of Financial Services Commission
Purpose	Actively respond to the convergence between broadcasting and communications sector Promote freedom and public interest of broadcasting	Advance financial industry and preserve financial stability Secure sound credit order and fair financial trade practices Protect financial consumers and investors
Key Function	Formulate policies on broadcasting Conduct market supervision, enforce against violations, and protect users Manage broadcast frequencies and resources	Develop financial policies and regulations Supervise and examine financial companies Protect consumers and provide damage relief
Organization	5 commissioners Two including chairperson are nominated by the President, and the other three are nominated by the National Assembly.	9 commissioners ¹

¹ One chairperson, one vice-chair, Vice Minister of Economy and Finance, Governor of Financial Supervisory Service, Chair of Korea Deposit Insurance Corporation, Deputy Governor of Bank of Korea, two financial experts endorsed by the FSC chairperson, and one representing business field endorsed by Chair of Korea Chamber of Commerce and Industry

1.2. Evaluation on market competition

3. Independent sector regulators in Korea conduct market assessment in order to justify the regulatory intervention and promote competition. The KCC conducts ‘Broadcasting Market Competition Evaluation’² on a yearly basis to create efficient and fair competitive environment. The FSC set up ‘the Committee for evaluation of competition in financial industries’ in July 2018. Since then, the Committee has carried out competition assessment on each financial sector.³

1.3. Pros and cons of sector regulators from competition point of view

4. Independent sector regulators regulate a specific industry in a wide range of aspects including market entry, non-discriminatory access to essential facilities, desirable level of technology, marketing schemes, etc. When sector regulators are given jurisdiction over competition laws, they may possibly perform better due to their specialized expertise. On the other hand, they have disadvantages due to their susceptibility to capture and inconsistency in enforcement outcome.

Pros	Cons
<ul style="list-style-type: none"> ● Specialized expertise and extensive information ● Sufficient available enforcement resources ● Enhanced compliance by closer supervision 	<ul style="list-style-type: none"> ● Inconsistency in enforcement between industries ● Increased costs for inter-agency coordination ● Passive enforcement (regulatory capture)

1.4. Rationales for independent regulators

5. Independent sector regulators regulate specific industries that are technical and specialized. Thus, they can better deal with innovative technologies through active decision-making based on independence and expertise. For instance, the FSC is proactively pursuing regulatory reform by organizing a task force, consisting of private experts like entrepreneurs in fin-tech businesses to speed up financial innovation through boosting fin-tech.

6. Independent sector regulators are established to develop policies in a specific industry utilizing diverse ideas and perspectives of various members. They ensure terms of office for the members, and work through the group decision-making process. The 4th industrial revolution is characterized by decentralized and networked system, and horizontal cooperation among diverse kinds of members is highlighted. Accordingly, independent sector regulators are needed for responding to the advancement of new technologies.⁴

² Article 35-5 of the Broadcasting Act

³ Competition assessment was conducted in 2018 on insurance, real estate trust and banking, and in 2019 on securities and savings bank industry.

⁴ The conventional regulatory system may be outdated for keeping up with the rapid advancement of new technologies. Regulators, in turn, cannot actively make decisions amidst the uncertainty of new technologies or resolve conflict among different stakeholders. For example, the Ministry of Land, Infrastructure, and Transport of Korea could not come up with meaningful solutions regarding car sharing services faced with a backlash of the existing taxi operators. At the moment, the government created a consultative body with stakeholders to reach a social compromise.

2. Independence of Regulators

2.1. Importance of Independence

7. Independent regulators were born out of the need to prevent the National Assembly and the elected president from wielding their political influence over controversial issues involving acute conflicts of interest. Securing independence is critical for independent regulators in order to make policy-making and enforcement actions in more efficient and democratic way in consideration of ideas from various sources and multi-faceted stakeholders.

2.2. Ways to ensure independence

8. In general, independent regulators are provided with structural independence for their autonomous operation and at the same time for curbing their abuse of discretion. The decisions are made by a group of commissioners who share the authority and are secured of their terms of office for a set period of time.

9. Specifically, independent regulators are to feature diversity and autonomy in their institutional and organizational framework. In terms of personal organization, two of the five KCC commissioners are nominated by the President, one commissioner by the Ruling Party, and the remaining two by the Opposition Party. The FSC commissioners include top executives of the Ministry of Economy and Finance, the Korea Deposit Insurance Corporation, the Financial Supervisory Service, and the Bank of Korea, as well as experts from private sector. Meanwhile, the KCC and the FSC are administrative commissions established pursuant to Article 5 of *the Government Organization Act* that provide them with independence in performing their duties.

2.3. External control for independent regulators

10. As independent sector regulators are given too much power encompassing policy making and regulatory enforcement, there have been concerns about the possibility of increased burden on the businesses and insufficient protection of consumer interest. Accordingly, external supervision to some extent is necessary to keep proportionality of regulations by independent regulators. Independent regulators are subject to control from the National Assembly through the inspection of their activities, and also under the control of government over their budget compilation. In addition, their regulatory measures against businesses are overseen by the judiciary and the Constitutional Court.

3. Relationship between independent sector regulators and competition authority

3.1. Consultative advice by competition authority

11. The KFTC proposes opinions in various ways to other regulatory bodies including independent sector regulators in order to promote competition. The mandatory prior consultation with the KFTC regarding enactment and revision of laws and regulations affecting competition is a case in point. With the *prior consultation system*,⁵ administrative

⁵ Article 63 of the Monopoly Regulation and Fair Trade Act

bodies including independent sector regulators are required to seek prior consultation with the KFTC before proposing any legislation or an amendment to regulations containing competition restrictive elements, such as constraints on prices, entries, business practices, etc. In that case, the KFTC may give advice to the relevant authority as to the repeal and/or revision of such competitively adverse factors. This prior consultation system has been enacted to proactively prevent anti-competitive rules and regulations from being created or enhanced, and has been contributing to more competitive market environment.

3.2. Prevention of overlapping law enforcement

12. Independent sector regulators have the merits of making more informed decisions and seeking appropriate measures earlier on certain issues based on their expertise in a particular sector. On that ground, some sector regulators are attempting to secure and enhance their concurrent jurisdiction over competition matters that used to be enforced by the competition authority. This can lead to overlapping regulations between sector regulators and competition authority, which are likely to occur in enforcing mergers and unfair trade practices.

13. In the sectors of finance, broadcasting and communications, one of the criteria that the sector regulators take into account when approving a proposed merger is whether there is a competitive concern.⁶ This may duplicate with the KFTC competitive assessment in merger review. However, this duplication does not make the problem of inconsistency in merger review since the sector regulators are required by the law to consult with the KFTC in advance on whether a proposed merger will substantially restrict competition before they make a decision.⁷

14. In addition, some types of infringements, such as abuse of superior power and other unfair practices prohibited by the sector specific laws⁸ can be overlapping with unfair trade practices prohibited by the *Monopoly Regulation and Fair Trade Act* (hereinafter referred to as “*MRFTA*”). There is also a legal instrument to mitigate the potential problem of this overlapping jurisdiction. For example, the *Telecommunications Business Act* stipulates that when the KCC imposes any measure or surcharge against a telecommunications company for infringements, the KFTC shall not sanction the company for the same conduct under the *MRFTA*.⁹

3.3. KFTC’s cooperation with independent sector regulators

15. When an independent sector regulator is given jurisdiction to enforce competition law in a specific sector, inter-agency coordination between competition authority and the regulator is needed to ensure consistency in enforcement consequences. For this reason, the KFTC signed an MOU with the FSC in 2007 to come up with an efficient regulatory

⁶ Article 18 (2) 3 of the Telecommunications Business Act, Article 4 (2) of Act on the Structural Improvement of the Financial Industry

⁷ Article 4 (4) of Act on the Structural Improvement of the Financial Industry, Article 18 (6) of the Telecommunications Business Act

⁸ Article 50 (1) of the Telecommunications Business Act, Article 52-2 of the Banking Act

⁹ Article 54 of the Telecommunications Business Act

framework in the financial sector.¹⁰ The MOU contains cooperation mechanism between the two regulators with regard to enforcing on mergers, cartels, unfair trade practices, etc.¹¹ The KFTC also has an MOU with the KCC signed in 2008, aiming to prevent overlapping regulations and minimize inconvenience of businesses.¹²

¹⁰ The MOU was revised in 2015.

¹¹ Main components of the MOU between KFTC and FSC include: (1) Before approving a merger pursuant relevant laws, the FSC should consult in advance with the KFTC on the competitive effects; (2)The KFTC the exclusive jurisdiction in cartel enforcement; (3) In order to prevent duplicate enforcements, each should inquire the other party before launching an investigation on unfair trade practices or unfair labeling advertising; (4)The parties will have regular consultative meetings at working level.

¹² Main components of the MOU between KFTC and KCC include: (1) The parties will establish a consultative mechanism to prevent overlapping regulations on unfair practices in communications market; (2) Consultation will be held upon request from a party or a company under investigation, regarding unfair conducts that are subject to regulations by both parties; (3) As agreed upon by the consultation, one of the parties will take full responsibility as the primary enforcer against the target allegation while the other party will not launch its investigation; (4) When the parties agree via consultation that each party carries out investigation pursuant to the respective laws, they will try their best not to impose overlapping or conflicting measures.