

23 November 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Korea****4-5 December 2017**

This document reproduces a written contribution from Korea submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document
[phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org]

JT03423518

Korea

1. Introduction

1. Competition authorities have their own jurisdiction in which they examine and sanction against anti-competitive acts conducted according to the competition laws of each jurisdiction. The Korea Fair Trade Commission (hereinafter referred to as the “KFTC”) monitors and sanctions anti-competitive acts in the Korean markets in accordance with the Monopoly Regulation and Fair Trade Act, which was established in 1981 (hereinafter referred to as the “MRFTA”).

2. However, due to the expansion of free trade, the increase of cross-border transactions, and the emergence of multinational corporations, the impact of anti-competitive act is not confined to a single country but extends to many countries. In recent years, the number of such cases is increasing as cross-border transactions such as ICT services are increasing in number. As there is a growing need of enforcing the competition law on acts conducted in foreign countries that affect domestic markets, discussions on extraterritorial application of the competition law are being held by the competition authorities and academia.

3. Such discussions include not only whether the competition authorities could examine an act conducted in a foreign country by applying their own competition laws, but also to what extent they could impose corrective measures, ie, the scope of extraterritorial application of remedies. This is different from an issue of the general meaning of extraterritorial application, ie, the question of whether the domestic competition law can apply to an act carried out in a foreign country, and is related to excessive or inadequate enforcement of the competition law and conflicts of remedies among countries. In the following, systems and major cases related to extraterritorial reach of competition remedies of the Korean Fair Trade Act will be introduced.

2. 2. Institutional grounds for the extraterritorial reach of competition remedies under the Fair Trade Act

2.1. Applicable provisions for the extraterritorial reach of remedies under the MRFTA

4. The KFTC has imposed sanctions against the US, German and Japanese graphite electrode companies for cartel in 2002, before the grounds for the extraterritorial reach of competition remedies were specified in the MRFTA. In 2004, the MRFTA stipulated the following provisions, making it clear that the MRFTA could apply to acts affecting the Korean markets even if the acts were conducted in foreign countries.

Article 2-2 of the MRFTA (Application to Overseas Act) This Act shall apply to cases where any act committed outside the country affects the domestic market.

5. In addition, the MRFTA stipulates that the KFTC can impose corrective measures on anti-competitive mergers, abuse of market dominant position, and cartels. In light of

these regulations, it can be seen that the MRFTA stipulates not only the extraterritorial application of the MRFTA in a general meaning, but also the extraterritorial application of competition remedies. Accordingly, the KFTC has been applying the MRFTA in examining acts carried out in foreign countries, such as international cartels, mergers between foreign companies, and abuse of market dominant position conducted domestically and globally by global companies, and imposed corrective measures on overseas business activities that affected domestic markets.

2.2. The KFTC's Guidelines for Remedies

6. Since 2005, the KFTC has been operating the Guidelines for Remedies. The purpose of the Guidelines is to improve the effectiveness of remedies by presenting the principles of remedies, standards and examples of remedies by type, and thereby identifying the most appropriate and effective remedies for correction of violations.

7. The principles of remedies proposed by the Guidelines are as follows.

A. Principle of effectiveness

Remedies must be effectively imposed to correct a violation in question in an effective manner.

B. Principle of correlation

Remedies must be imposed in connection with a judgement on illegality of a violation in question.

C. Principles of clarity and specificity

Remedies should be imposed in a clear and specific manner in order for a respondent to know the remedies to be taken and in order for the KFTC to check whether the respondent implements the remedies and to sanction when the respondent fails to do so.

D. Principle of the possibility of implementation

Remedies must be imposed in a way that it can be practically and lawfully implemented by a respondent.

E. Principle of proportionality

Remedies must be imposed proportionally to the details and gravity of a violation

8. The principles of the Guidelines can also serve as a basis for determining the scope of extraterritorial reach of competition remedies. In other words, when there is an extraterritorial application of the MRFTA, the scope of remedies should be designed in accordance with the principle of proportionality within the scope of an act judged to be illegal, while ensuring the effectiveness.

3. KFTC's cases of extraterritorial reach of competition remedies

3.1. International cartels area

9. The KFTC has been applying the MRFTA when the international cartels affect the domestic market since the aforementioned cartel case of graphite electrode companies. Corrective measures for international cartel cases have mainly been in the form of orders for recurrence prevention, which can be regarded as extraterritorial reach of competition remedies.

10. A case in point is where in 2010, the KFTC imposed a corrective measure to prohibit cartel for fuel surcharges of 26 domestic and foreign air cargo carriers on routes to and from Korea. In particular, the KFTC imposed corrective measures through cooperation with the US and EU competition authorities.

3.2. M&A area

11. The KFTC examines mergers between foreign companies and imposes structural and behavioral measures with extraterritorial effects.

12. For example, in 2015, in an acquisition of Freescale by NXP, a global semiconductor company, the KFTC imposed a structural measure on NXP, ordering it to sell its RF Power Transistor business in Asia and Europe to a third party. With the imposition of such a measure, the KFTC considered that the acquisition would have anti-competitive effects in the entire world market, and as a result of the acquisition, the domestic market would be virtually monopolized since domestic consumers are only using NXP and Freescale products.

13. In addition, in the Microsoft's acquisition of Nokia's handset business in 2015, the KFTC accepted the commitment submitted by Nokia which aimed to address concerns over Microsoft's patent abuse. With regard to the commitment, it was considered important that Microsoft could abuse patent rights against domestic smart phone manufacturers as it held a number of cellular related patents and produced handsets. To be specific, behavioral measures were imposed on Microsoft, including that Microsoft should comply with the FRAND commitment, and that Microsoft should not seek an injunction or a prohibition of import order on the basis of infringement of those SEPs against handsets or tablets made by Korean domiciled manufacturers.

3.3. Abuse of market dominant position area

14. The KFTC has been actively monitoring and sanctioning abuse of market dominant position by global enterprises since the 2000s.

15. For example, in 2006, the KFTC imposed a corrective measure on Microsoft for bundling its Media Server, Media Player, and Messenger with the PC Windows operating system. Specifically, Microsoft was ordered to separate Media player and Messenger from its Windows OS, install competing products in its Operating system, and block interoperability between the Window Messenger and MSN Messenger. However, the application of the corrective measure was confined to products supplied only in Korea. This is because while the PC server and operating systems markets to which tying products were belonging were defined as a world market, media server and media player server, and messenger program markets to which tied products were belonging were

defined as a domestic market. Therefore, the KFTC concluded that it would be sufficient to limit the geographical scope of the corrective measure to the domestic market in order to address its anti-competitive effects.

16. Meanwhile, in recent years, cases related to abuse of SEPs in the field of ICT such as semiconductor and communication technologies have been emerging as a problem for many competition authorities. The abuse of SEPs in this field is becoming more and more influential not only in Korea but also in the global market due to the global standardization in technologies and growing influence of global enterprises with market dominance. In this situation, the KFTC recently imposed a corrective measure on Qualcomm for its abuse of SEPs as follows.

3.4. Abuse of market dominant position by Qualcomm in 2017

17. The KFTC concluded that QI, QTI, QCTAP, headquartered in the US and Singapore, refused to license or imposed restrictions on the license for the cellular SEPs to domestic and overseas chipset manufacturers while attaching unfair conditions to the license agreements with domestic handset manufacturers by supplying its modem chipset to them only when they accept the Qualcomm's license conditions. Therefore, the KFTC prohibited such practices and imposed corrective measures on Qualcomm ordering it to license its SEPs in accordance with its FRAND commitment.

18. This case was related to the cellular SEPs license market and the cellular modem chipset market, and the geographical scope of the both markets were defined as a global market since Qualcomm's practices drew no distinction between the domestic and overseas markets. Therefore, in view of the fact that it was difficult to limit the scope of corrective measures to the domestic market for correcting such practices and addressing the anti-competitive effects, the KFTC imposed extraterritorial remedies to include Qualcomm's business activities overseas. In particular, the scope of the patents that were subject to remedies were not limited to ones applied or registered in Korea.

Reviewing the case, it is concluded that the respondents are operating the same licensing policy and modem chipset supply policy in global markets. Accordingly, the violation of the alleged respondents in the case is not solely confined to the patents registered in Korea and to Korean enterprises, but it is occurring both at home and abroad simultaneously, and is affecting not only domestic but also overseas markets. Therefore, regarding the corrective measures and the scope of their extraterritorial application, it should be examined in terms of securing the effectiveness of the measures and the principle of proportionality according to the details and gravity of the violation in order to effectively correct the violation in the markets and address its anti-competitive effects. It is reasonable that the corrective measure and its scope of application are not simply confined to the Korea region and patents registered in Korea considering the following facts :

1. First, the violation the respondents committed is structurally maintaining and enhancing unfair transaction orders and causing anti-competitive effects at a global level. Second, its anti-competitiveness in the global market is also negatively affecting domestic markets and consumers. Third, it is difficult and ineffective to distinguish the correction measure for the domestic and foreign application, since the effects of the violation are linked as their business policies and transaction practices are linked.

2. The scope of the corrective measure is limited to the modem chipset manufacturers and handset manufacturers that are judged to have a direct, substantial and reasonably predictable impact on the domestic market, in accordance with the Article 9 of the corrective orders.
3. The issue of an international comity related to the enforcement of laws in other countries is a matter to be considered when the corrective measure for a case is in conflict with the law enforcement of foreign countries and is not a matter caused simply by including an act conducted overseas into the subject to the corrective measure.

Currently, in this case, the corrective measure does not come into conflict with the enforcement of the existing foreign laws and as in the case of Article 10 of the corrective orders, "if a binding final judgment, action or order of a foreign court or competition authorities established after the date of the imposition of the corrective measure is incompatible with this corrective measure and therefore it is impossible to comply with both of them at the same time, the respondents may request the Commission to review the corrective measure it imposed", any potential issue of conflicts caused by enforcing the foreign laws can be addressed.

19. With regard to this, there were some arguments that imposing a corrective measure on the patents applied or registered in foreign countries should be refrained for an international comity since it may infringe the sovereignty of another country and the applicable scope of corrective measures should be limited to patents registered only in Korea.

20. In response, the KFTC's written resolution states the reasons for the imposition of extraterritorial remedies as follows.

21. The details are described as follows.

22. Qualcomm's abuse of SEPs is not limited to a specific region but has an impact on the global market and has a negative effect on consumers in Korea. If the patents subject to the corrective measure are limited to patents registered in Korea, corrective measures will be virtually ineffective and the negative effects of Qualcomm's abuse on the Korean consumers will not be sufficiently resolved. This is also the case even if the subject to the corrective measure is limited to the modem chipset and handset sold in Korea.

23. To be specific, a case can be assumed in which Qualcomm revises the modem chipset supply contract and license contract with the handset manufacturers according to the corrective measure. Major handset manufacturers are selling handsets to all of the world's markets, and end markets where handsets with modem chipset purchased from Qualcomm are finally sold are not limited to specific countries. In addition, Qualcomm does not execute different license agreements by region or attach different conditions for each country. Given this point, it is difficult to take effective corrective measures if the scope of the measures is limited to domestic patents or products sold only in the domestic market.

24. In addition, setting different licensing conditions only in the Korea region might be in violation of the FRAND commitment which requires non-discriminatory licensing.

25. In the end, imposing a corrective measure limited to products sold in Korea or patents registered in Korea will not be an effective means of restoring competition in the Korean market.

26. Meanwhile, the remedies cover trading partners which were confined to the specific scope in a reasonably predictable manner. In other words, Qualcomm is not required to comply with corrective measures for all modem chipset manufacturers and handset manufacturers worldwide, and the scope is limited as follows.

9. In the corrective orders, the modem chipset manufacturers and handset manufacturers shall refer to the modem chipset manufacturers or the handset manufacturers corresponding to the following A to B.

A. Modem chipset manufacturer

1. A modem chipset manufacturer and its subsidiaries headquartered in Korea
2. An enterprise or its subsidiaries supplying modem chipset to handset manufacturers of the following 9. B. 1) to 3).

B. Handset manufacturer

1. A handset manufacturer and its subsidiaries headquartered in Korea
2. An enterprise that sells handsets in Korea or to Korea and its subsidiaries
3. An enterprise or its subsidiaries supplying handsets to the following 9. B. 2).

27. The scope of such a corrective measure can be viewed as a reasonable range to restore competition in the domestic license market and modem chipset market, and ultimately to protect domestic consumers in the handset market, which is their front industry.

28. First of all, the range of the handset manufacturer is composed of (i) domestic manufacturers and (ii) manufacturers that sell handsets in Korea, and the range of the modem chipset manufacturer includes (iii) domestic manufacturers and (iv) modem chipset manufacturers supplying modem chipset to handset manufacturers of (i), (ii) which affect the domestic market. That is, foreign modem chipset or handset manufacturers that do not affect the domestic market were not included in the scope of the corrective measure.

29. In addition, the KFTC's corrective measure was designed with maximum consideration for an international comity, so that it could be flexibly applied to avoid any conflict with judgments, decisions and orders in other jurisdictions.

30. Above all, the KFTC's corrective measure contained an order for Qualcomm to negotiate with SEPs practitioners sincerely in accordance with industry practices and good faith and a prohibition on forcing SEPs practitioners to accept unfair conditions prescribed by the KFTC. This was the least required to restore the market competition. Therefore, even if the authorities or courts in other countries make a different judgment from the KFTC regarding the violation of Qualcomm's business practice, or if it imposes a new obligation on Qualcomm, it is highly unlikely that the measures of that country will conflict with the KFTC's corrective measure.

31. Furthermore, taking into account the possibility that judgments, measures and orders in other jurisdictions may conflict with the corrective measure of the KFTC, the followings are included in the corrective measure of the KFTC so as to flexibly resolve conflicts between corrective actions.

10. If a binding final judgment or action of a foreign court or competition authorities established after the date of the imposition of the corrective measure is incompatible with this corrective measure and therefore it is impossible to comply with both of them at the same time, the respondents may request the Commission to review the corrective measure it imposed.

32. There have been no precedents like this. However, this time around, the KFTC took into account facts that various countries are paying attention to this case, and there might be efforts to find different solutions due to differences in national systems. This would be a precedent to show a measure to take into account the issue of an international comity in extraterritorial reach of competition remedies.

4. Conclusion

33. As economic activities of cross-border market players are becoming common, the competition authorities of each country are required to examine the activities of global companies with market dominant position under the competition law principles and correct their unfair practices. In particular, the development of the ICT industry and the proliferation of the digital economy are presenting great challenges to the competition authorities of each country.

34. In such a situation, imposing too narrow a corrective measure on an anti-competitive act that affects the global market not only fails to achieve the goal of redressing market distortions, but also poses a risk of causing a paradoxical result that distorts free competition by requiring an enterprise discriminatory acts.

35. The competition authorities, of course, should be careful not to over-enforce when designing a corrective measure for anti-competitive acts that affect the global market. To this end, it is necessary to strengthen the cooperation among the competition authorities in order to achieve the common purpose of restoring the competition order of the market. For example, it is necessary to further develop the cooperative framework of the competition law enforcement, which has been discussed at international organizations such as the OECD. In particular, it is required to accumulate the best practices of cooperation between countries.

36. However, in reality, it is not easy to cooperate internationally at the stage of investigation and enforcement, and sometimes urgent measures may be required depending on the situation of each country. In this case, the competition authorities need to set a reasonable range of corrective measures to address distortions in their markets while considering an international comity at the same time.