

A Study on Extraterritorial Application of Korean Competition Law

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I. Introduction

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In recent years, the world is experiencing globalization. As international investment and trade become liberalized, the restrictions and regulations on the investment and trade have greatly decreased, and trans-border activities have faced lesser barriers. At the same time, however, national governments have expanded their regulations of international economic activities and investment. In line with this, recently, national governments have increasingly applied their domestic laws extraterritorially to business conducts taking place outside their territories. This extraterritorial application¹⁾ of domestic laws causes problems such as diplomatic frictions among the investing and trading partner countries.

This phenomenon also applies to the field of competition law.²⁾ Although there is uncertainty in respect of jurisdictional problem, extraterritorial application of competition law has become more common in both the United States of America ("U.S.") and the European Union ("EU"). However, aggressive unilateral enforcement in the field of competition law has caused conflicts among the nations. For example, serious jurisdictional conflicts happened between the U.S. and other states over the extraterritorial application of the U.S. competition law on anticompetitive conducts abroad.

Recently, in March 2002, the Korean Fair Trade Commission ("KFTC"), the Korean competition authority, for the first time applied the Monopoly Regulation and Fair Trade Act of Korea ("KFTA"), which is a Korean competition law, to international cartels of graphite electrodes (which were agreed and performed among foreign companies) extraterritorially. This implies that the Korean competition authority has become proactive in applying the Korean competition law extraterritorially, deviating from the past passive attitude in this respect. The second case of the extraterritorial application of Korean competition law with respect to international cartels of vitamin by the KFTC took place in April 2003.

This article mainly focuses on the issues of extraterritorial application of the Korean competition law, which is described in Part III, (i) discussing the controversy whether the current KFTA can be interpreted to be allowed to apply the domestic competition law

1) In this article, "extraterritorial application of domestic law" means the "application of domestic law by a state to a foreign national's conducts, the whole or part of which is engaged outside the territory of that state."

2) The term of "competition law"(which is commonly used in the European countries) may be exchangeable with the term of "antitrust law" (which is commonly used in the United States of America). For consistency, in this article, the term of "competition law" is used.

extraterritorially, (ii) reviewing the relevant specific provisions of the KFTA with respect to the extraterritorial application issues, (iii) discussing the issues on procedural jurisdiction regarding service of process, investigation procedure and enforcement procedure, and finally (iv) examining the recent two cases where the Korean competition law was applied extraterritorially by the KFTC with respect to international cartels (more focusing on the first case of graphite electrodes in 2002). For better understanding of the theories or doctrines regarding the extraterritorial application issues for competition law, this article, in Part II, also briefly reviews the several cases decided by the U.S. courts regarding extraterritorial application of the U.S. competition laws as well as the cases of extraterritorial application of the EU competition law developed in the EU.

II. Extraterritorial Application of the U.S. Competition Law and the EU Competition Law

This Part overviews the extraterritorial application of the U.S. competition law and the EU competition law, focusing on the doctrines or theories developed by the U.S. courts and the European Court of Justice, respectively.

1. Extraterritorial Application of the U.S. Competition Law

This Section examines briefly the overview of the U.S. competition law and then reviews the landmark four cases decided by the U.S. courts adopting the different doctrines or principles with respect to extraterritorial application of the U.S. competition law.

(1) Overview of the U.S. Competition Law and the Extraterritorial Application Issue

The controversy on the scope of extraterritorial application of the U.S. competition law is derived from Sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act provides that "[E]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." Further, Section 2 of the Sherman Act states that "[E]very person who shall monopolize, or attempt to monopolize, or combine or conspire ... to monopolize any part of the trade or commerce

among the several States, or with foreign nations shall be deemed guilty of a felony...” The Sherman Act, however, provides no clear guidelines or directions regarding jurisdiction over a U.S. company’s acts abroad or a foreign company’s activity within its own territory.³⁾ Only references in the Sherman Act to trade “with foreign nations” imply that the Sherman Act was intended to regulate certain foreign conducts that restrain or monopolize the trade within the U.S.⁴⁾ So, the issue of extraterritorial application of the U.S. competition law has been developed by the U.S. courts as described below.

(2) The Case of *America Banana Co.* (1909): Strict Territoriality Principle

In 1909, in the case of *America Banana Co. v. United Fruit Co.* (“*America Banana Co.*”)⁵⁾, the U.S. Supreme Court applied a traditional strict territoriality principle, ruling that acts committed outside the U.S. are not governed by the Sherman Act. In the case of *America Banana Co.*, American Banana Co., an Alabama corporation, brought action against United Fruit Co., a New Jersey corporation and sought damages under the Sherman Act, alleging that United Fruit Co. conspired with the Costa Rican militia to monopolize the production and exports of bananas from Central America to the U.S. and had the Costa Rican militia confiscate its banana plantation by such conspiracy.⁶⁾

In this case, Justice Holmes stated that “[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”⁷⁾ Thus, the U.S. Supreme Court held that the Sherman Act could not regulate the alleged monopolization and confiscation plan by reasoning that the seized plantation was with the jurisdiction of Costa Rica and the injury complained of happened outside of the territory of the U.S.⁸⁾

This strict territorial approach had been maintained until 1945 when the U.S. court adopted

3) Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and the European Community Approaches*, 33 VIR. J. INT’L L. (1992), recited in Won-Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and its Adoption in Korea*, 7 SINGAPORE J. OF INT’L AND COMPARATIVE L. (2003), at 2 (which is expected to be published in December 2003 and is available on the web site of <http://www.krf.or.kr>).

4) Id.

5) 213 U.S. 347 (1909).

6) Id. at 349, 354-55.

7) Id. at 356.

8) Id. at 357-58.

the so-called "intended effects" doctrine in the case of *United States v. Aluminum Co. of America*⁹⁾, as described in detail below, although in some cases, such approach had been applied more flexibly.

(3) The Case of *Alcoa* (1945): "Intended Effects" Doctrine

A totally different approach was taken in the case of *United States v. Aluminum Co. of America* ("*Alcoa*") in 1945. In *Alcoa* case, the U.S. government as plaintiff alleged that Aluminum Limited, a Canadian subsidiary of Aluminum Co. of America, participated in international cartels with other several European companies intending to fix a quota on aluminum imported to the U.S.¹⁰⁾ The U.S. government sought to challenge Aluminum Co. of America's monopolization of its foreign commerce and its related conspiracy with Aluminum Limited.¹¹⁾

In this case, the Court of Appeal for the Second Circuit held that "[I]t is a settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends."¹²⁾ Thus, Judge Learned Hand stated that "the Sherman Act would be applicable to the agreements abroad if they were intended to, and did have, some effects on foreign trade or commerce of the U.S."¹³⁾

The so called *Alcoa's* "intended effects" doctrine gained acceptance in the U.S., and so the Department of Justice continued to press for the extraterritorial application of the Sherman Act.¹⁴⁾ However, this theory was criticized by many other foreign countries as an excess of jurisdiction under public international law, and such countries as Australia, France, the U.K., the Netherlands, and New Zealand have responded by enacting "blocking statutes" which intend to prevent the enforcement of the U.S. competition law.¹⁵⁾

9) 148 F. 2d 416 (2nd Cir. 1945).

10) *Id.* at 442.

11) *Id.* at 421.

12) *Id.* at 443.

13) *Id.* at 444.

14) Roger P. Alford, at 9, *recited in* Won-Ki Kim, at 5.

15) The OECD, COMPETITION LAW ENFORCEMENT (1984), Annex III, *recited in* Takaaki Kojima, *International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy*, Weatherhead Center for International Affairs at Harvard University (2002), at 4. This is available on <http://www.wcfia.harvard.edu/fellows/papers01-02/kojima.pdf>.

(4) The Case of *Timberlane* (1976): Interest Balancing Theory

In response to such antagonistic reactions of other foreign states, the U.S. courts began to show some restraints in the extraterritorial application of the U.S. competition law. In 1976, in the case of *Timberlane Lumber Co. v. Bank of America et al.* ("*Timberlane*"),¹⁶⁾ the U.S. court held that the intended effects doctrine of *Alcoa* was incomplete since it failed to consider other foreign states' interests.¹⁷⁾ That is, in *Timberlane* case, the court adopted so-called "interest balancing" theory.

In this case, *Timberlane Lumber Co.*, an American lumber company, argued that its efforts to acquire a Hondurian mill to be used for exports to the U.S. were frustrated by the Hondurian conduct that had been engineered by the defendants, the plaintiff's competitors, and an American bank. The Ninth Court of the U.S. adopted a tripartite test to determine whether the court should exercise extraterritorial jurisdiction: first, there must be some effect, actual or intended, on American foreign commerce in the alleged restraints; second, the effect must be sufficiently large to constitute a cognizable injury to the plaintiff that the U.S. antitrust laws should apply; and finally, the court should determine whether the interests of the U.S. were sufficiently strong over those of other nations to justify an assertion of the extraterritorial authority.¹⁸⁾

Further, the U.S. court detailed seven factors for the above third interest balancing test. The seven factors are the following: (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the locations or principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the U.S. as compared with those elsewhere; (5) the extent to which there is an explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the U.S. are compared with conduct abroad.¹⁹⁾ These factors are largely drawn from the Second Restatement of Foreign Relations Law,

16) 549 F. 2d 507 (1976).

17) *Id.* at 612.

18) *Id.* at 614.

19) *Id.*

(5) The Case of *Hartford Fire* (1993): Return to "Intended Effects" Doctrine

In 1993, in the case of *Hartford Fire Insurance Co. v. California* ("*Hartford*"),²⁰⁾ the U.S. Supreme Court reaffirmed the intended effects doctrine, ruling that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effects in the U.S.

In *Hartford Fire* case, 19 states including California and various private parties brought suit against several U.S. insurance companies and a group of London reinsurance companies, alleging that an international conspiracy had occurred, mainly in London, to restrict coverage terms and conditions on commercial insurance policies, effectively restricting certain forms of insurance coverage available in the U.S.²¹⁾ The U.S. court upheld the extraterritorial application of the Sherman Act without considering the interests of a foreign sovereign country. That is, the court took a restrictive view on the balancing interest test, holding that the only substantial question is whether there is a true conflict between domestic and foreign law.²²⁾ The court stated that "the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the U.S. antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct," and further argued that "no conflict exists where a person subject to regulation by two states can comply with the laws of the both."²³⁾ The U.S. court found that no such conflict exists since British law did not require the defendants to act in some fashion prohibited by the law of the U.S.²⁴⁾

Thus, this judgment, which is criticized by some commentators, is regarded as a return to the "intended effects" doctrine. After *Hartford Fire* case, the U.S. federal courts consistently have taken the following position: first, the court should confirm whether foreign conduct was intended to have, and in fact did have, some substantial effects in the U.S.; and second, if the effect test is met, principle of international comity should be taken into account only if "there is in fact a true conflict between domestic and foreign law."

2. Extraterritorial Application of the EU Competition Law

20) 595 U.S. 764 (1993).

21) *Id.*

22) *Id.* at 798.

23) *Id.* at 799.

24) *Id.*

This Section examines briefly the overview of the EU competition law and then reviews the important two cases decided by the European Court of Justice ("ECJ") applying the doctrines different from those adopted by the U.S.

(1) Overview of the EU Competition Law

The most important rules of the EU competition law are described in Articles 85 and 86 of the Treaty of Rome, or the "EC Treaty" establishing the European Community. Article 85 (currently Article 81) regulates agreements between enterprises, while Article 86 (currently Article 82) prohibits abuses of market dominant position.²⁵⁾

The EU competition law has three distinctive characteristics: (1) "[EU] competition law aims at ensuring that the Common Market works effectively; (2) Article 85 has been built into a procedure for declaring inapplicable the Article's prohibitions against agreements which restrict competition where certain efficiency and consumer benefits arise; (3) [EU] analysis is somewhat less driven by hard economic theories than analysis found in the U.S. decisions in recent years."²⁶⁾

The EU Commission, the administrative body of the EU, has the primary authority of regulating and enforcing the competition rules under the Council Regulation 17 procedure.²⁷⁾

(2) The Case of *Dyestuffs* (1972): Economic Unit Doctrine

The Articles 85 and 86 of the EC Treaty do not explicitly describe jurisdictional limit. So, it may be said that the evolution of the extraterritorial application issue is similar to that of the U.S.²⁸⁾

In the case of *Imperial Chemical Industrial Ltd. v. Commission* ("*Dyestuffs*"), the ECJ

25) Stephen Johnson, *EU Competition Law* at 341, in RALPH H. FOLSON, PALPH B. LAKE, VED. P. NANDA, EDS., EUROPEAN UNION LAW AFTER MAASTRICHT: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET (1996), recited in Il Hyung Jung, *A Comparative Study on the Question of Extraterritorial Application of the Competition Law*, 18 DICKINSON J. OF INT'L L., 305, 320 (2000).

26) Stephen Johnson, at 341, recited in Il Hyung Jung, at 321.

27) Stephen Johnson, at 343, recited in Il Hyung Jung, at 321.

28) Il Hyung Jung, at 32.

neither accepted traditional principles of sovereignty nor applied the intended effects doctrine to the sensitive issue of extraterritorial application. Instead, the ECJ adopted the "economic unit" doctrine. In *Dyestuffs* case, Imperial Chemical Industrial Ltd. ("ICIL"), a U.K. company then outside the Community, was charged with the dyestuffs cartels by the EC Commission which imposed fines on ICIL. ICIL argued that the EC Commission was not authorized to impose such fines on it under the international law principle of sovereignty and under the EC Treaty itself.²⁹⁾

While the EC Commission did not accept ICIL's argument under the intended effects theory, the ECJ rejected the ICIL's contention applying the economic unit doctrine. That is, the ECJ determined that decision on the extraterritorial application issue was not necessary, since a subsidiary of ICIL was located within the Community, and further ruled that the jurisdiction over the ICIL's antitrust conduct was adequate through the control of its subsidiary located in the Community since "the applicant was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in the Common Market and in fact used this power upon the occasion of the three price increases in question."³⁰⁾

(3) The Case of *Wood Pulp* (1988): Place of Implementation Doctrine

In the case of *Wood Pulp*, the ECJ adopted the "place of implantation" doctrine, solving the problem where non Community entity does not have its subsidiaries, its branches or agencies in the Community.

In *Wood Pulp* case, the EC Commission charged several non-Community companies with price fixing of wood pulp sold to buying companies in the Community under Article 85 of the EC Treaty. In this case, although the EC Commission adopted the intended effects doctrine, the ECJ developed the place of implementation doctrine, which is so called a "modified intended effects" doctrine.³¹⁾

In detail, regarding the issue of extraterritorial application, the ECJ ruled that "[A]n

²⁹⁾ Id. at 322.

³⁰⁾ 1972 E.C.R. 619, *recited in* Il Hyung Jung, at 32.

³¹⁾ James J. Freidberg, *The Convergence of Law in an Era of Political Integration: the Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV., 289, 321 (1991), *recited in* Il Hyung Jung, at 323.

infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof ... The decisive factor is therefore the place where [the agreement] is implemented.”³²⁾ The ECJ further stated that “[T]he procedures in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub agents, or branches within the Community in order to make their contracts with purchasers within the Community.”³³⁾

III. Review of Extraterritorial Application of the Korean Competition Law

This Part discusses the controversy whether the extraterritorial application is allowed under the current Korean competition law, examines the specific provisions of the KFTA relating to extraterritorial application, discusses the issues on procedural jurisdiction such as service of process, investigation procedure and enforcement procedure, and then reviews the two cases where the Korean competition authority applied the KFTA extraterritorially with respect to international cartels (more focusing on the first case of international cartels of graphite electrodes).

1. Discussion as to Whether Extraterritorial Application of the Korean Competition Law is Recognized under the KFTA

There are separate arguments as to whether extraterritorial application of the KFTA is allowed under the current KFTA: some commentators argue that the Korean competition law can not be applied to foreign companies whose activities are done in a foreign state; and others argue that the Korean competition law can be applied to foreign companies even if their activities are done in a foreign state. Below are discussed the details of those two separate arguments.

(1) The Argument that Extraterritorial Application is not Recognized under the Current

32) 1988 E.C.R 5193, 5243, *recited in* Il Hyung Jun, at 323.

33) *Id.*

KFTA

The following are the main reasons why extraterritorial application of the Korean competition law can not be allowed under the current KFTA: (i) there are no explicit provisions allowing extraterritorial application under the current KFTA; (ii) extraterritorial application of the Korean competition law is not in conformity with traditional international law principle based on territorial principle; (iii) extraterritorial application of the Korean competition law is likely to raise counter measures to be made by a foreign state or incur political conflicts; and (iv) the current provision regarding unfair international contracts³⁴⁾ implies that the Korean competition law can not be applied to other international contracts or agreements which are not covered by such current provision regarding international contracts.³⁵⁾

(2) The Argument that Extraterritorial Application is Recognized under the Current KFTA

Some argue that extraterritorial application of the Korean competition law can be recognized based on the following, among others: (i) the interpretation of the relevant provisions under the Korean competition law allows extraterritorial application of the Korean competition law in order to protect domestic market and customers since the purpose of the Korean competition law is to protect fair and free competition; (ii) it is doubtful whether the territorial principle is still regarded as generally acceptable international law principle; and (iii) extraterritorial application of the Korean competition law can be recognized based on the principle of economic unit doctrine or intended effects doctrine as adopted by the ECJ or the U.S. court, respectively, since such application is compatible with "international comity".³⁶⁾

2. Analysis of Major Provisions of the KFTA Where Extraterritorial Application of the Korean Competition Law is Concerned

34) Article 32 of the KFTA. Please see below III.2.(4) for more detailed discussion.

35) Hyun Yoon Shin, *Extraterritorial Application of the Current Monopoly Regulation Act* (Korean), YEONSE JOURNAL OF LAW, Vol. 2, 1992, at 525-26.

36) Bong Eui Lee, *Extraterritorial Application of Monopoly Regulation* (Korean), JOURNAL OF COMPETITION LAW, Vol. 4, 1992, at 76-79

The major activities where the extraterritorial application issue needs to be reviewed under the current KFTA can be categorized as following: 1) abuse of market domination position, 2) international mergers or consolidations,³⁷⁾ 3) international cartels, and 4) unfair international contracts. Below are discussed those activities in more details.

(1) Abuse of Market Domination Position

Under Article 3-2, Paragraph 1 of the KFTA, a company having market domination position "in the relevant market" is prohibited from abusing such market domination position such as unfairly determining, maintaining, or changing prices of products or services.

Until February 1999, when the KFTA was amended, the extraterritorial application regarding foreign companies' abuse of market domination power held not been permitted since under the then KFTA, the firms having market domination position had been designated and publicly disclosed by the KFTC, and foreign firms had been excluded from such designation. However, the amended and currently effective KFTA abolished such designation system.

Further, it is noted that under Article 4, Paragraph 2 of the Enforcement Decree of the KFTA, a market share, which is a crucial criterion for determining whether a company has a market domination position or not in the relevant market, is calculated for only "domestic" market. Thus, it is interpreted that if a foreign company has a local presence (e.g., its subsidiary, branch or agency), the KFTA is applied to such a foreign company as long as it has a market domination position in the domestic market of Korea through such entities. Further, it would be reasonable interpretation that even if a foreign company does not have any local presence in Korea, if such a foreign company has a market domination position in the domestic market of Korea, then such company would be also subject to the KFTA with respect to such company's acts of abuse of market domination position. With respect to the matter as to whether the KFTA may be applied to a foreign company which has market domination position in other foreign country's market or in the worldwide market (but not having market domination position in the Korean market) and then abuses its market

37) Under Article 7, Paragraph 1 of the KFTA, the term of "mergers or consolidations" comprises of the following five types: i) acquisition of shares of other companies, ii) interlocking directorship, iii) mergers, iv) business transfers, and v) participation in establishment of a company.

domination position in the territory of Korea (e.g., unfairly increasing the price of the products sold in the domestic market of Korea), although theoretically it may be argued that the KFTA is also applied to such case, it is very difficult to imagine such case happening in practice. Further, under the current KFTA, which provides that the market share, which is an important criterion for determining the market domination position, should be determined by the domestic market of Korea, such argument would be unlikely to be acceptable, and it appears that the necessity for regulating such case would not be so great.

In addition, there is an argument that it would be desirable to expand the scope of the relevant market (which is a domestic market) at Korea in calculating market share of a concerned company so that the foreign market directly relevant to domestic market such as export and import markets of Korea can be included.³⁸⁾ However, it is doubtful whether the export market should be included in the scope of the domestic market, although the need for including the import market for the relevant product is recognized.³⁹⁾

In general, as multinational firms increasingly enter the Korean domestic market in a globalized economy, it would be more necessary to apply the KFTA to such multinational companies, regardless of whether they have local presence or not in Korea, which abuse their market domination position in the territory of Korea. And it would be reasonable interpretation that the scope of the domestic market should include the relevant import market of Korea in calculating market share in the domestic market of Korea.

(2) International Mergers or Consolidations

Under Articles 7 and 12 of the KFTA and the regulations thereof, it is not quite certain whether the KFTA would be applied to international mergers or consolidations extraterritorially since the definitions of "large company," "conglomerate business group," "specially-related persons," or "affiliated companies," which are subject to mergers or consolidations under the KFTA, can be interpreted to cover only domestic companies, not foreign companies.

38) Hun Je Suh, *Proposed Amendments to the Korean Fair Trade Act for Extraterritorial Application* (Korean), HUMAN RIGHTS AND JUSTICE (No. 265), Sept. 1998, at 29.

39) It is known that in practice, the KFTC includes such import market in calculating market share in a domestic market.

Despite such uncertainty, it is known that the KFTC has taken a position that the KFTA could be applied to international mergers or consolidations (which take place outside the territory of Korea) extraterritorially. In line with this, further, the KFTC has recently revised relevant regulation (which is the Guideline for Notification on Mergers or Consolidations), the amendments of which became effective on July 1, 2003 and provide that international mergers or consolidations between foreign companies should be notified to the KFTC if total assets or sales of at least one of the merging companies are 100 billion Won or more and the "domestic sales of both the merged and merging companies," respectively, are 3 billion Won or more. (Such standard of "domestic sales of both the merged and merging companies" implies that it intends to regulate international mergers or consolidations if such mergers or consolidations affect the domestic market of Korea.)

However, for more clarification, it would be more desirable to amend the current relevant provisions of the KFTA to explicitly allow extraterritorial application with respect to international mergers or consolidations.

(3) International Cartels

As discussed below, the KFTC applied the KFTA extraterritorially with respect to international cartels.

In this connection, it is noted that there is an ambiguity as regards to whether Article 19, Paragraph 2 of the KFTA, which provides for the approval of the exempted cartels (e.g., for industry rationalization, R&D, and industry and corporate restructuring), is also applied to foreign companies extraterritorially since the relevant regulations in this respect may be interpreted to be applied to only domestic cartels between domestic companies.⁴⁰⁾ However, it would be more reasonable interpretation that Article 19, Paragraph 2 of the KFTA is applicable to international cartels between foreign companies and domestic companies.⁴¹⁾

(4) Unfair International Contracts

40) See Hun Je Suh, at 32-33.

41) Id. at 33.

Article 32, Paragraph 1 of the KFTA provides that a company is not permitted to enter into unfair international contracts (the detailed types of which are prescribed in Article 47 of the Enforcement Decree of the KFTA⁴²⁾) with respect to unfair cartels, unfair trade acts and resale price maintenance. Further, the relevant regulations thereof issued by the KFTC prescribe more detailed types of unfair international contracts. Thus, application of Article 32, Paragraph 1 of the KFTA is limited to the types of international contracts prescribed by Article 47 of the Enforcement Decree of the KFTA and the relevant regulations with respect to three types of the acts such as unfair cartels, unfair trade and resale price maintenance. Thus, it is criticized that such provision for international contracts does not comprise of international mergers or consolidations or abuse of market domination position by a foreign company, which are regarded as types of international contracts required for tight regulation.⁴³⁾

It is known that the legislation purpose of such provision is to regulate only domestic companies which enter into unfair contracts with foreign companies, although as a result, such provision indirectly may regulate such foreign companies.⁴⁴⁾ In response, however, there is an argument that such provision should not be interpreted to exempt foreign companies completely from such application of unfair international contracts, although there is a practical problem in enforcing the provision to foreign companies which do not have any business entities in the territory of Korea.⁴⁵⁾

On the other hand, Articles 19, 23 and 29 of the KFTA generally prescribe unfair cartels, unfair trade acts and resale price maintenance, respectively, and thus, it is interpreted that such provisions apply to domestic contracts entered into between domestic companies. In addition, the relevant regulations under Articles 19, 23, and 29 of the KFTA generally prescribe the acts in regard of unfair cartels, unfair trade and resale price maintenance which are applicable to domestic contracts, while the relevant regulations under Article 32 of the KFTA more specifically prescribe the acts such as unfair cartels, unfair trade and resale

42) Article 47 of the Enforcement Decree of the KFTA prescribes seven types of international contracts as following:

(i) contracts for introduction of intellectual property rights, (ii) contracts for introduction of copy rights, (iii) contracts for introduction of know-how, (iv) contracts for introduction of franchise, (v) contracts for co-research development, (vi) contracts for import agency, and (vii) contracts for joint-venture investment.

43) Id. at 34.

44) Hwan Chung, *Extraterritorial Application of the Korean Antitrust Law* (Korean), in OH SEUNG KWON, *FREE COMPETITION AND FAIR TRADE*(Bobmun Publishing Co., Ltd., 2002), at 776.

45) Hun Je Suh, at 33.

price maintenance which are applicable to international contracts. Thus, there is a room for discrepancy between domestic contracts and international contracts, although the concerned acts are the same, and there is a possibility that domestic companies entering into domestic contracts could be discriminated unfavorably against foreign companies entering into international contracts.⁴⁶⁾ Therefore, to prevent such discrimination against domestic contracts involving domestic companies, there is an argument that the provision for international contracts and the relevant regulations thereof should be abolished so that such contracts be regulated by the general provisions such as Article 19, 23 and 29 of the KFT A.⁴⁷⁾

3. Issues on Procedural Jurisdiction in Respect of Service of Process, Investigation Procedure and Enforcement Procedure

In relation to extraterritorial application of competition law, the issues of service of process, investigation procedure and enforcement procedure need to be discussed since the concerned foreign companies are located outside the territory of Korea. Here those issues are discussed in more details.

(1) Service of Process

In order to initiate the procedures of investigation of the accused foreign companies and the enforcement of the regulators' decision or a court's judgment, the service of process to such foreign companies should be properly made. The KFTA is silent as to such service of process to foreign companies, which are located outside of the territory of Korea. And the Regulation Concerning KFTC's Meeting Operation and Case Procedure (the "Procedure Regulation") issued by the KFTC does not directly prescribe the methods regarding such service of process, but indirectly refers to such manner of service of process by the provision stating the period of service of process to a foreign company located outside the territory of Korea. In more detail, Article 3 of the Procedure Regulation refers to Article 16, Paragraph 2 of the Administrative Procedure Act which provides that "the period of service of process to a company located in a foreign country shall be determined by the

46) Id. at 34.

47) Id.; Hwan Chun, at 776.

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administrative authority considering the period for mails or communications." In addition, public notice or announcement such as through newspapers, gazette and internet is allowed when the method of the service of process is implausible or the address of the concerned person can not be confirmed by usual manners, under Article 14, Paragraph 4 of the Administrative Procedure Act which is referred to by Article 3 of the Procedure Regulation of the KFTC. Thus, it may be argued that they imply that the service of process by post or by other communications to a foreign company is allowed as one method of service of process.⁴⁸⁾ Further, the internal guideline of the KFTC in this matter prescribes that a notice to a foreign company regarding commencement of review procedure or the KFTC's decision or resolution shall be made by registered mails by making service of process to address, habitant or office of such a foreign company.⁴⁹⁾

In the case of graphite electrodes, as discussed below, based on the above regulations and the internal guideline of the KFTC, the KFTC made a service of process to business offices of the concerned companies located outside the territory of Korea by registered mails as well as through public notice.⁵⁰⁾ The accused foreign companies in this case objected to this method of service of process since such manner of the direct service of process via registered mails and public notice has no grounds under the relevant law or statute which is silent as to method of the service of process to a foreign company, although this argument has not been accepted by the KFTC.⁵¹⁾ Some concerned foreign companies in an appeal case also argued that in addition to the absence of the relevant law or statute prescribing the method of service of process applicable to a foreign company, (i) there are no bilateral or multilateral agreements or treaties between Korea and other foreign countries regarding the service of process of administrative purpose documents, and (ii) a direct service of process to a foreign company is in conflict with international law principle such as international comity and may cause diplomatic frictions.⁵²⁾ These arguments have not been accepted by the KFTC, too.⁵³⁾

48) See Hwan Chung, at 778.

49) Id. at 779.

50) Decision No. 2002-077 (April 4, 2002) of the Korean Fair Trade Commission, at 13. This is *available on* the KFTC web site of <http://www.ftc.go.kr>.

51) Id. at 13-14.

52) Decision No. 2002-26 (Aug. 23, 2002) of the Korean Fair Trade Commission, at 4. This is *available on* the KFTC web site of <http://www.ftc.go.kr>.

53) Id. at 5-6.

The above arguments raised by the accused foreign companies in the first case of extraterritorial application of the KFTC in international cartels implies the following two things: (1) the KFTA should be amended to add an explicit provision allowing the direct service of process to a foreign company (e.g., by post) and (2) bilateral or multilateral agreements with other foreign countries should be made regarding the service of process for administrative purpose documents.

(2) Investigation Procedure

Another issue to be considered in applying the KFTA extraterritorially is regarding the investigation of the acts by accused foreign companies to be claimed to be in violation of the KFTA and discovery of the relevant evidence. Practically, it is very difficult to investigate the violative acts of the foreign companies involved or to discover the relevant evidences since they are located in foreign countries unless they have local presences in Korea such as their affiliates, branches or offices. Further, even if the concerned foreign companies do not comply with the investigation process by the KFTC,⁵⁴⁾ there are no methods for the enforcement thereof under the KFTA since, in practice, the enforcement of any penalty or fine to be imposed on such foreign companies is almost impossible unless they have any local presence in Korea. Thus, as long as such foreign companies involved do not cooperate with the KFTC's investigation process voluntarily, it is almost impossible to investigate the accused foreign companies or inquire the relevant foreign witnesses without the cooperation of the states where such foreign companies are located. In this connection, it may be noted that in the graphite electrode case, the KFTC confessed that they had much difficulty in conducting the investigation since the cartel participants did not have any local presence such as affiliates or branches.⁵⁵⁾

Thus, to solve this problematic issue, although it would be considered that incentives (e.g., reduction of surcharge or fine to foreign companies which actively and voluntarily cooperate with the KFTC investigation procedure) are to be conferred (However, this method will have some limitation.),⁵⁶⁾ it would be more efficient way to pursuit bilateral or multilateral

54) See Articles 50 and 69 of the KFTA.

55) The Korean Fair Trade Commission, *Korea's Experience in Attacking the International Cartel and the Need for International Cooperation*, OECD Contribution Paper (June 14, 2003), at 5-7. This is available on the KFTC web site of <http://www.ftc.go.kr>.

agreements between other foreign countries in respect of the KFTC's investigation or discovery procedures.

(3) Enforcement Procedure

The most practical and important issue in relation to extraterritorial application of competition law is regarding the enforcement of the domestic competition authority's decision or the court's judgment against foreign companies. As long as the effective enforcement means are not guaranteed, extraterritorial application will not be so meaningful in a sense. Enforcement of judicial judgment (such as monetary damages against a foreign company) or administrative sanctions (such as imposition of surcharge against a foreign company) will not be practically workable without the cooperation of other foreign countries where the concerned foreign companies are located, unless such foreign companies have any assets in the territory of Korea to be confiscated.

Thus, to solve this enforcement problem, it would be more desirable to pursue bilateral or multilateral agreements or treaties with foreign countries to seek cooperation of such other states.

4. The Case of International Cartel of Graphite Electrodes (2002): The First Case of Extraterritorial Application of the Korean Competition Law

On March 20, 2002, the KFTC announced that the KFTC decided to take a corrective order and impose a surcharge of 11.2 billion Won (which is equivalent to US\$ 8.5 million) on six graphite electrodes manufacturing companies (which are from the U.S., Germany and Japan) that have been found to participate in the international cartels of graphite electrodes.⁵⁶⁾ This case is marked as the first case for the extraterritorial application of the KFTA. This

56) In the graphite electrode case, a surcharge imposed on one Japanese company participant has been reduced considering that the company actively cooperated with the KFTC investigation process. Decision No. 2002-077 (April 4, 2002) of the Korean Fair Trade Commission, at 15. If a company cooperates with the KFTC's investigation process in the cartel case, a reduction of surcharge is allowed under Article 22-2 of the KFTA. Please note that such reduction of surcharge is only permitted in the cartel case.

57) The Korean Fair Trade Commission, Press Release dated March 22, 2002 (English version). This is available on the KFTC web site of <http://www.ftc.go.kr>. "Graphite electrodes" are columns of graphite that are used for heat generation in steel milling and steel scrap recycling in electric arc furnaces. Id.

case is discussed in more details below.

(1) Facts

According to the KFTC's investigation, six foreign companies (four Japanese companies, one U.S. company and one German company)⁵⁸⁾ which comprise approximately 80% of the worldwide graphite electrode market held the several executive officer meetings and working-level meetings in London, Tokyo and other cities during the period of May 1992 to February 1998, reached an agreement on the price-fixing and market allocation targeting the world market, including the Korean market, regarding the graphite electrodes, and implemented their agreements.⁵⁹⁾ The notable detailed agreements are as follows: 1) they agreed that in the home market where a company manufacturing such graphite electrodes exists, if the concerned manufacturing company increases sale price of graphite electrodes, then other manufacturing companies would increase such prices as well; 2) in the non home market where a company manufacturing such graphite electrodes does not exist (which are most Asian countries but Japan), they agreed on specific sale prices; 3) they also agreed that there would be no rebate nor discount on such agreed prices; 4) they agreed on restrictions on exports of such graphite electrodes and market allocation; 5) they agreed that a premium would be imposed on large sized (28 inches to 30 inches) expensive graphite electrodes, and that such graphite electrodes would not be allowed to be exported to the country where the cartel member companies are located; and 6) they agreed that the technology on producing such graphite electrodes would not be provided to the companies which do not participate in such international cartels.⁶⁰⁾

The KFTC's investigation has also revealed that (i) Korean steel manufacturers that use electric arc furnaces and have a complete dependency on imports for their graphite electrodes incurred significant financial damages (which were estimated as approximately US\$139 million) due to the international cartels by such six manufacturing companies; and (ii) the Korean steel manufacturing companies imported graphite electrodes amounting to

58) The six companies are the following: UCAR International Inc. (U.S.), SGL Carbon Aktiengesellschaft (Germany), Showa Denko K.K. (Japan), Tokai Carbon Co., Ltd. (Japan), Nippon Carbon Co., Ltd. (Japan), and SEC Corporation (Japan). Id.

59) Id.

60) Id.

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US\$553 million from the six manufacturing companies from May 1992 to February 1998, and during that period, the import price increased from an average of US\$2,255 per ton in 1992 to an average of US\$3,356 in 1997 (which is an increase of approximately 48.9%), and after the expiry of such period, the import price plunged; and (iii) Korea's major industries such as automobile and shipbuilding were also adversely influenced by such international cartels.⁶¹⁾

(2) Major Issues

1) Issue of Lack of Jurisdiction

During the course of the KFTC's investigation, two Japanese companies declined to attend the hearings because of lack of jurisdiction, while other remaining four companies complied with the hearing procedures.

Responding to such Japanese companies' argument with respect to lack of jurisdiction, the KFTC asserted that since (i) although the agreement regarding international cartels was made outside the territory of Korea, the implementation of such agreement was made within the territory of Korea (i.e., the sale of graphite electrodes was made to Korean companies), and (ii) the Korean market had been severely affected by such cartels, two companies should be subject to the Korean jurisdiction.⁶²⁾

2) Issue of Service of Process

In addition, six accused companies argued that the direct service of process to such six foreign companies by post delivery should not be regarded as proper service of process to a foreign company since the relevant laws or statutes are silent as to the method of the service of process to a foreign company (which is located outside the territory of Korea) so that such direct mails to a foreign company has no grounds under the relevant law.

In response, the KFTC asserted that the service of process to such foreign companies via mails is proper and effective because (i) the service of process to such foreign companies by

61) Decision No. 2002-077 (April 4, 2002) of the Korean Fair Trade Commission, at 10-12.

62) Id. at 11.

post is one of the methods which are allowed under Articles 14 through 16 of the Korean Administrative Procedure Act which are applied to the competition law case under the Procedure Regulation issued by the KFTC, (ii) they had a knowledge of receipt of such service of process anyhow based on the facts that some accused companies attended the hearing meetings, while other companies notified the KFTC of their intention not to attend the meetings, and (iii) there is a similar EU case where the ECJ decided that the service of process via mails to companies located in non-member countries is proper and effective.⁶³⁾

Further, in an appeal case, five companies among six companies argued that (i) the direct service of process via mails to foreign companies has no grounds since there exist no bilateral or multilateral agreements between Korea and other foreign countries regarding the service of process of administrative purpose documents, and (ii) the direct service of process to a foreign company is in conflict with international law principle such as international comity and so may cause diplomatic frictions.⁶⁴⁾

In response, the KFTC asserted that (i) the fact that there exist no bilateral or multilateral agreements regarding the service of process to a foreign company for administrative purpose documents implies that such service of process to a foreign company may follow the methods permitted by the domestic relevant law and regulations; (ii) thus, it is interpreted that Article 14 of the Administrative Procedure Act (which is referred to by Article 3 of the Procedure Regulation of the KFTC) allowing the service of process via mails also applies to the service of process to a foreign company in addition to a domestic company; (3) direct service of process to a foreign company via mails is permitted as proper method of the service of process by the Korean Supreme Court's ruling in a certain tax law case; (4) based on the fact that the accused companies had knowledge of the receipt of the service of process made via mails and of the contents of the notices and replied with their opinions, such direct service of process via mails should not be viewed as divesting them of their rights of defenses from the perspective of purpose of the service of process; and (iv) even assuming that direct service of process via mails to a foreign company is not permitted, the KFTC also adopted a public notice or announcement (such as through KFTC's internet homepage in English and a KFTC bulletin in the government complex) as a supplementary

63) Id. at 13.

64) Decision No. 2002-26 (Aug. 23, 2002) of the Korean Fair Trade Commission, at 4.

method of the service of process which is permitted when the service of process becomes impossible, and thus the service of process taken by the KFTC in this case became effective.⁶⁵⁾

(3) KFTC's Decision and Implication

The KFTC has made a conclusion that such six accused companies violated the provision of Article 19, Paragraph 1, Item 1 of the KFTC which provides that "a company shall not agree on being engaged in determining, maintaining, or changing the price with other companies which causes restraining competition unfairly," based on the fact that (i) they agreed on increase and maintenance of selling price of graphite electrodes (although the agreements were made outside the territory of Korea) and implemented such agreements in the territory of Korea, and (ii) the import price of such graphite electrodes by the Korean steel manufacturing companies, which wholly rely on imports of such graphite electrodes, increased significantly during the above cartel period and plunged after the expiry of that period (which means that the Korean markets have been adversely influenced by such international cartels) and therefore, it is regarded as restraining fair and free competition, which is one of the crucial factors violating the provision of Article 19, Paragraph 1 of the KFTC.⁶⁶⁾ Therefore, the KFTC made a decision that a corrective order be issued to, and a surcharge of 11.2 billion Won be imposed on, six graphite electrodes manufacturing companies.⁶⁷⁾

It is notable that in applying the KFTA extraterritorially in the international cartel case, the KFTC has interpreted the scope of a "company" (defined in Article 2, Item 1 of the KFTA and mentioned in Article 19, Paragraph 1, Item 1 of the KFTA) more broadly so that it includes a foreign company as well as a domestic company.⁶⁸⁾ That is regarded as one of the strong arguments that the extraterritorial application of the KFTA can be recognized under the KFTA.

In sum, it is evaluated that the KFTC's decision in this concerned case is based on the

65) Id. at 5-6.

66) Decision No. 2002-077 (April 4, 2002) of the Korean Fair Trade Commission, at 11-12.

67) The Korean Fair Trade Commission, Press Release dated March 22, 2002.

68) Decision No. 2002-26 (Aug. 23, 2002) of the Korean Fair Trade Commission, at 3-4.

"intended effects" doctrine of the U.S. and the "place of implementation" theory of the EU. It is also noteworthy that this case is marked as the first case of extraterritorial application of the KFTA by the Korean competition authority, shifting from its past passive position. The KFTC further evaluates that this case has made Korea the fourth country after the U.S., EU and Canada with respect to extraterritorial application of domestic competition law for this concerned graphite electrodes case.⁶⁹⁾

5. The Case of Vitamin International Cartel (2003): The Second Case of Extraterritorial Application of the Korean Competition Law

On April 23, 2003, the KFTC decided to issue a corrective order to, and to impose an surcharge of 3.9 billion Won (equivalent to US\$3.1 million) on, six vitamin producers located in Switzerland, Germany, France, Japan and the Netherlands, which have been found to participate in the vitamin international cartels.⁷⁰⁾

The KFTC argued that six companies which comprise 90% market share in the world bulk vitamin market agreed to allocate sale volume and coordinate selling price of bulk vitamins such as vitamin A, E, B5, D3, and Beta Carotene in the global market including the Korean market during the period of September 1989 through February 1999.⁷¹⁾ The KFTC further has found that the related industries in Korea, which mainly rely on the imports of such bulk vitamin, imported around US\$185 million from the above six companies during the above cartel period.⁷²⁾ It was also revealed that during that period, the import price of bulk vitamin for Korean domestic companies had increased, while after termination of such cartels, the import price plunged.⁷³⁾ Therefore, the KFTC has made a conclusion that the six

69) The Korean Fair Trade Commission, Press Release dated March 22, 2002.

70) The Korean Fair Trade Commission, Press Release dated April 25, 2003 (English version). This is *available* on the KFTC web site of <http://www.ftc.go.kr>. Such six companies are the following: F. Hoffmann La-Roche Ltd. (Switzerland), BASF A.G. (Germany), Aventis S.A. (France), Eisai Co., Ltd. (Japan), Daiichi Pharmaceutical Co., Ltd. (Japan), and Solvay Pharmaceutical B.V. (the Netherlands). Id.

71) Id. Bulk vitamin is used in manufacturing animal feeds, medicine, foods and cosmetics. Id. The period and the participating companies for cartels for each vitamin are the following: (1) Vitamin A: September 1989 through February 1999; Roche, BASF and Aventis; (2) Vitamin E: September 1989 through February 1999; Roche, BASF, Aventis, and Eisai; (3) Vitamin B5: January 1991 through February 1999; Roche, BASF, and Daiichi; (4) Vitamin D3: January 1994 through June 1998; Roche, BASF, Solvay and Aventis; and (5) Vitamin Beta Carotene: September 1992 through December 1998; Roche and BASF. Id.

72) Decision No. 2003-098 (April 29, 2003) of the Korean Fair Trade Commission, at 15. This is *available* on the KFTC web site of <http://www.ftc.go.kr>.

companies violated the provision of Article 19, Paragraph 1, Item 1 of the KFTA based on the same arguments adopted in the graphite electrode case, as discussed in III.4. above.⁷⁴⁾

This is marked as the second case for the extraterritorial application of the Korean competition law, following the case of international cartel of graphite electrodes. This case clearly implies that the KFTC is strongly committed to the enforcement of the Korean competition law against anti-competitive practices of foreign companies, which adversely affect Korean companies and consumers.⁷⁵⁾

IV. Conclusion

In this article, the U.S. courts' landmark cases with respect to extraterritorial application of the U.S. competition law as well as the important cases decided by the ECJ have been reviewed. International conflicts over the extraterritorial application of domestic competition laws have been historically caused by the unilateral extraterritorial enforcement of the U.S. competition laws based on intended effects doctrine, due to the different positions held regarding the state jurisdiction.⁷⁶⁾

As economic globalization develops, the trans border cartels and multinational mergers or consolidations cases have significantly increased and are expected to continue to increase. In response, a significant number of states have commenced to apply their competition laws to foreign companies' anti competitive acts conducted abroad, which affect the relevant markets.⁷⁷⁾

In line with this, the Korean competition authority recently applied the Korean competition law to international cartels conducted by foreign companies abroad but allegedly affected the Korean domestic market. This implies that the Korean authority has shifted its attitude for the extraterritorial application issue from the past passive position into more aggressive position. Although there is an argument that the actions taken by the Korean competition

73) Id.

74) Id at 16-17.

75) The Korean Fair Trade Commission, Press Release dated April 25, 2003.

76) Takaaki Kojima, at 36.

77) Id.

authority with respect to the international cartels cases “should not be regarded as an overall application of the Korean [competition] law, but rather as limited application to international cases of serious illegality,”⁷⁸⁾ the two cases for international cartels decided by the KFTC should be evaluated as a landmark in the history of the extraterritorial application of the Korean competition law.

In addition, as discussed above, there is a controversy over whether the extraterritorial application is allowed or recognized under the current KFTA, and this article takes a position that it would be more reasonable interpretation that the extraterritorial application is in general allowed under the current KFTA. However, there is some ambiguity in certain provisions of the KFTA with respect to extraterritorial application of the KFTA. For example, there is uncertainty whether the current provision of the KFTA regarding mergers or consolidation covers international mergers or consolidations between domestic Korean companies and foreign companies as well as between foreign companies, although it is known that the KFTC has taken a position that the KFTA could be applied to international mergers or consolidations and further the KFTC has revised the relevant regulation requiring the notification with respect to international mergers or consolidations between foreign companies. However, for more clarification, it would be more desirable that the current provision of the KFTA be amended to explicitly allow extraterritorial application with respect to such international mergers or consolidations.

Furthermore, there are some problems in the matter of procedural jurisdiction such as service of process, investigation procedure and enforcement procedure in relation to extraterritorial application of the Korean competition law. Therefore, it is argued in this article that (1) with respect to the method of service of process, the current KFTA should be amended to allow the direct service of process via mails to foreign companies, and bilateral or multilateral agreements with other foreign countries should be made regarding the service of process for administrative purpose documents; (2) to solve the problems arising from the difficulty of investigating the accused foreign companies in relation to the KFTC's investigation procedure, it would be necessary to pursue bilateral or multilateral agreements between Korea and other foreign countries in this respect; and (3) to solve the problems in relation to enforcement of the domestic competition authority's decision or the

78) Won-Ki Kim, at 25.

court's judgment against foreign companies, it would be desirable to pursue bilateral or multilateral agreements or treaties with foreign countries to seek cooperation of such other states.

Finally, considering that the need for extraterritorial application of domestic competition law becomes increased as the nation's economy is globalized, this article argues that the explicit 'general' provision allowing the extraterritorial application of the KFTA be added in the KFTA, as seen in the case of Germany,⁷⁹⁾ in addition to the amendment of the KFTA to allow the extraterritorial application regarding individual specific activities such as international mergers or consolidations.

79) See Article 98, Paragraph 2 of the German Competition Restraint Law. The proposed language to be considered as 'general' provision might be the following: (1) "This Act (i.e., KFTA) shall be applied to the acts restraining competition which may affect the jurisdiction even if such acts took place outside the territory of the jurisdiction of the KFTA" or (2) "This Act shall apply to a company which has conducted the acts as prescribed by each relevant provision of this Act regardless of its nationality or location address." In case of adding this 'general' provision in the KFTA, certain provisions such as those on economic concentration regulation (e.g., regulation on large business group and holding company), whose purpose seems to regulate only domestic companies, should be exempt from the application of such general provision. In this connection, there is an argument that it would be difficult to adopt such general provision in the KFTA (although this will be more definite way for the extraterritorial application) since such general provision could not be found in other similar laws such as the Korean Civil Code or administrative laws, except for the Korean Criminal Code, and the German legislation has a special legislative history in adopting such general provision. Hun Je Suh, at 27.

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國文抄錄

독점규제법의 역외적용에 관한 연구

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본 논문은 독점규제및공정거래에관한법률(이하 “독점규제법”이라 함)의 역외적용과 관련한 여러 가지 문제점에 대하여 분석, 검토하고 그 개선방안을 제시하는 데 있다.

세계경제가 글로벌화되어 가고 국제적인 카르텔(부당한 공동행위) 및 다국적회사간에 합병 내지는 통합이 증가하면서 선진국을 비롯한 각국은 그들 나라의 국내 독점규제법 내지는 경쟁법을 그 국가 영역 밖에서 일어나고 그러한 국내 경쟁법 위반 행위가 그 국내시장에 영향을 미치는 외국회사의 행위에 대하여도 적용하기 시작했다. 특히, 미국이나 유럽연합은 비록 국내법이나 유럽연합 관련법에서 이러한 경쟁법의 역외적용에 관한 명시적인 규정이 없음에도 불구하고, 관련 법원의 판결에 의하여 역외적용에 관한 여러 가지 이론을 발전시켜 오면서 그 영역 밖에서 일어난 외국회사의 경쟁법 위반행위를 규제하여 왔다.

이와 관련하여 우리 나라 공정거래위원회도 최근 2002년 3월에 처음으로 외국회사들이 행한 국제카르텔 행위(흑연전극봉 사건)에 대하여 우리 나라 독점규제법을 적용하였다. 이러한 공정거래위원회의 독점규제법 역외적용 첫 사례는 과거 공정거래위원회의 역외적용에 관한 보수적인 입장에서 보다 적극적으로 독점규제법을 역외적용 하겠다는 의지를 보여준 것이라고 볼 수 있다.

이러한 면에서 본 논문은 우선 경쟁법의 역외적용에 관한 다양한 이론을 고찰하기 위하여, 미국의 법원에 의하여 발전되어 온 “영향이론” 및 “균형이론” 등을 그 관련 판례를 살펴보면서 고찰하고, 유럽연합의 경우에도 “경제적 단일체 이론” 및 “실행지 이론” 등 유럽재판소가 발전시켜 온 역외적용 이론을 관련 사건들을 살펴보면서 고찰하였다. 이는 공정거래위원회가 최초로 독점규제법의 역외적용을 한 사건에서 채택한 역외적용 이론을 살펴보는 데 도움이 된다.

한편, 우리 나라 현행 독점규제법이 역외적용을 허용하는지 여부에 대하여서는 논란이 있다. 즉, 현행 독점규제법의 규정상 역외적용을 허용하기가 어렵다는 주장이 있는 반면에 현행 독점규제법상 역외적용에 관한 명시적인 규정은 없지만 해석상 역외적용이 가능하다는 주장도 있다. 예를 들어, 현행 독점규제법은 그 적용 대상인 '사업자'의 정의에 명시적으로 외국사업자를 포함한다는 규정은 없지만 그 해석상 적용 대상에 외국사업자도 포함할 수 있다는 점 등을 해석상 역외적용이 가능하는 논거로 든다. 이와 관련하여서 본 논문은 역외적용의 필요성을 직시하고 적용가능설의 입장을 취하고 있다.

또한 현행 독점규제법상 역외적용이 가능한지 여부에 대하여 명확하지 않은 규정이 있다. 예를 들어, 현행 독점규제법상 기업결합과 관련한 규정과 관련해서는 그 규제 대상인 '대규모회사', '제열회사', '특수관계인' 등의 개념이 국내회사만을 염두에 두고 있다고 해석될 수도 있기 때문에 외국회사간 또는 외국회사와 국내회사간의 국제적인 기업결합에 대해서는 독점규제법을 적용할 수 없다고 볼 수도 있다. 물론 공정거래위원회는 2003년 7월 1일 "기업결합의신고요령"을 개정하여 일정한 요건을 충족하는 외국회사간 또는 외국회사와 국내회사간의 기업결합의 경우에 그 신고의무를 부과함으로써 현행 규정상으로도 그러한 국제 기업결합에 대하여 국내 독점규제법을 적용할 수 있다고 볼 수도 있으나, 보다 명확하기 위해서는 하위 규정이 아닌 상위 법에서 독점규제법의 역외적용이 가능하도록 명시적으로 관련 조항을 개정하는 것이 바람직하다고 본다.

이외에도, 역외적용과 관련하여 공정거래위원회나 법원의 관련 외국사업자에 대한 문서송달, 조사절차 및 집행절차 등의 절차적 관할권에 대한 문제점도 다분히 있다. 공정거래위원회의 흑연전극봉 사건에서 피심인들이 주장한 것처럼, 외국사업자에 대하여 우편에 의하여 직접 문서를 송달한 것이 현행 관련법상 법적 근거가 있는지에 대한 문제점을 던져 주고 있다. 따라서, 이러한 문제점을 해결하기 위해서는 외국사업자에 대한 우편 문서송달을 독점규제법이 인정하는 외국사업자에 대한 문서송달의 방법으로 명시적으로 독점규제법에 규정할 필요가 있으며, 또한 행정문서에 관한 외국사업자에 대한 문서송달에 관하여도 관련 국가간의 양자간 또는 다자간 협정을 체결하는 것이 필요하다고 본다. 또한, 공정거래위원회의 조사절차와 관련하여서도 상대국의 협력 없이는 그 실효성이 없기 때문에 역외적용과 관련된 외국사업자에 대한 조사절차를 효과적으로 시행하기 위해서도 양자간 또는 다자간 협정에 의하여 그 문제점을 해결하는 것이 바람직하다고 본다. 외국사업자에 대한 역외적용 집행도 상대국의 양해와 협조 없이는 사실상 불가능하다는 점을 고려할 때 이러한 문제점을 해결하기 위해서도 양자간 또는 다자간 협정의 체결 등 국제적인 협력을 모색하는 것이 좋은 방안으로 생각된다.

이외에도 경쟁법의 역외적용이 세계적인 추세임을 감안할 때, 우리 나라 독점규제법의 역외적용 여부에 대한 해석상의 논란의 여지를 없애고 또한 외국 및 외국사업자에 대하여 우리 나라 독점규제법의 역외적용 의지를 보다 확고히 보여주기 위해서도 독일 경쟁제한방지법의 예에서 보듯이 현행 독점규제법에 역외적용을 인정하는 조항을 명시적으로 두는 것이 바람직하다고 본다.