

Competition Law Enforcement on Excessive Pricing –Comparative Perspectives–

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I . Introduction

According to Adam Smith, ‘monopoly price’ is the highest price which can be got whilst the free competitive price is the lowest which can be taken.¹⁾ Likewise, there is no doubt that a high price normally means the outcome of the monopolistic market structure since a monopoly (or monopolist) is usually willing to set its price higher than other enterprises in a perfectly competitive market. Therefore, price competition is the most

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1) Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press, New York, 2008: Original Publication in 1776), p. 60.

important element of market competition because the competitive rivalry offers benefits of price-cut to consumers. For this reason, excessive pricing (or excessively high price) may violate competition law,²⁾ when a market dominant enterprise (which means the market is somewhat controlled by the enterprise) sets prices that bear no reasonable connection with the economic value of the relevant product or service. The main reason for this regulatory control is sometimes based on the conception of unfairness.³⁾

Market competition fosters an optimal allocation of resources,⁴⁾ and this is beneficial to the society as a whole. However, this benefit cannot be achieved when a price is increased by adjusting the quantity of output.⁵⁾ Some argue that the profits from excessive pricing by a monopolist can offer an incentive for other enterprises to join the market competition, because they can sell products with lower prices than the monopolist's price without any loss. This means high price induces potential rivals to enter the market. Nevertheless, when a monopolist can enjoy profits in the long term,⁶⁾ it

2) Competition law regulates economic or business practices which can create or abuse market power. Competition law is called Antitrust Law in some jurisdictions, and the same body of law in Korea is the Monopoly Regulation and Fair Trade Act(Law No. 10303, amended on 17 May, 2010). For further discussion, see also Eleanor M. Fox, "Competition", in Andreas F. Lowenfeld, *International Economic Law*(2nd edn, Oxford University Press, New York, 2008), p. 418.

3) Mark Furse, *Competition Law of the EC and UK*(6th edn, Oxford University Press, New York, 2008), pp. 328-329.

4) Allocation of resources is economically efficient if no one can conceive a better result for the society, which can achieve the social optimum. See Roger J. Van den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*(Intersentia, Antwerpen, 2001), p. 20.

5) Roger D. Blair and David L. Kaserman, *Antitrust Economics*(2nd edn, Oxford University Press, New York, 2009), p. 28.

6) There are two main methods to examine whether the price charged by an enterprise is excessive: (i) comparisons of price and (ii) profitability.

normally means that there are some barriers to the market for the entrants, which is the so-called entry barrier.⁷⁾ Therefore, if there is no entry barrier, economic and legal scholars argue that excessive pricing is not likely in the market.

As discussed above, examining excessive pricing is a kind of never-ending story for competition authorities because of diverse economic theory debates, and the economic arguments do not offer clear answers for enforcement. In particular, it is somewhat difficult to define the meaning of excessive pricing, especially in the assessment of excessiveness in pricing practices. First of all, as will be discussed below, diverse competition law jurisdictions have different views as to what amounts to an unfair difference (for considering excessive pricing) between competitive price and the charged price. Secondly, it is also difficult to define the meaning of price that would have prevailed in a competitive market.⁸⁾ Therefore, this article aims to discuss the meaning of excessive pricing through economic and legal debates. It will further explore the competition law enforcement in the EU and the US. Then, this article will compare the foreign legal techniques with those in Korea for establishing better criteria for the scrutiny on excessive pricing. Finally, it will summarise and conclude.

Between two methods, profitability is more meaningful in the scrutiny. See Alan Gregory, "Excessive Prices and the Role of Profitability Analysis", OECD Paper, available at <http://www.oecd.org/dataoecd/0/22/48848510.pdf> (last visited 9 Nov. 2011), p. 2.

7) Blair and Kaserman, *supra* note 5, p. 33.

8) Ariel Ezarachi and David Gilo, "Excessive Pricing, Entry, Assessment, and Investment: Lessons from the *Mittel* Litigation", *Antitrust Law Journal*, Vol. 76, No. 3(2010), p. 885.

II. Economic and Legal Debates on Excessive Pricing

In general, economic theory explains that market structure influences prices, which means, if there are few enterprises or competitors in the market, it is highly likely to result in an increase in market prices *ceteris paribus*.⁹⁾ Because market power is normally used as a harmful effect, it is necessary to consider its influence. To make it short, a monopoly creates economic inefficiency. In a perfectly competitive market, the output of a product tends to expand until the relevant product price meets the point to each enterprise's marginal cost of production. However, when an enterprise who holds market power controls the production of that good, the amount of output will be reduced, and the price eventually becomes high or excessive. Based on this assumption, a monopolist knows that it can set high price and also its price influences the quantity in the market, thereby setting its price above the marginal cost.¹⁰⁾

Therefore, when a monopolist limits the product output, it harms the market production, thereby resulting in distortion of resource allocation of the society.¹¹⁾ However, it is not easy to scrutinise whether the high price is set due to the market structure only because there is no clear form of standard by which excessive pricing may be identified. In particular, excessive pricing may bring incentives of other firms to enter the relevant market easily.¹²⁾ In particular, the Chicago School scholars argue that

9) Peter Davis and Liana Garcés, *Quantitative Techniques for Competition and Antitrust Analysis*(Princeton University Press, Princeton and Oxford, 2010) p. 230.

10) Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (4th edn, Pearson, Boston, 2005), p. 93.

11) fgg Phillip Areeda et al., *Antitrust Analysis: Problems, Text, and Cases*(6th edn, Aspen Publishing, New York, 2004), p. 485.

competition law agencies do not have to concern about excessive pricing.¹³⁾ If the monopolist raises prices of the product above the normal competitive price, its competitors will expand their output, thereby driving the market price down in the end. Therefore, in the long term, excessive pricing is not likely to occur in the market.¹⁴⁾

Absent entry barrier, thus, an enterprise is not willing to set price too much high.¹⁵⁾ Therefore, new or potential entrants can expand and also foster

12) Furse, *supra* note 3, p. 338.

13) The traditional approaches are based on the Harvard School of the Structure–Conduct–Performance Paradigm. According to these arguments, the economic analysis of markets is based on the 3 key elements: (i) the market structure, (ii) conduct, and (iii) performance. Therefore, the causal relationship between them is very important for competition law enforcement. Following the Harvard School, structure determines enterprises' conduct, and this eventually determines market performance. For further detail, see W. Kip Viscusi et al., *Economics of Regulation and Antitrust* (4th edn, MIT Press, Cambridge, MA, USA, 2005), p. 62.

14) Richard A. Posner, *Antitrust Law* (2nd edn, Univ. of Chicago Press, Chicago, 2001) p. 10; Daniel L. Rubinfeld, "On the Foundations of Antitrust Law and Economics", in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press, New York, 2008), p. 54. According to the Chicago School, most of the traditional assumptions with regards to monopoly, which influenced competition law enforcement in the 1950s and 1960s, were wrong. Its arguments focus on the following theories. First, efficiencies, including allocative, productive, and dynamic, are the most important objective in competition law enforcement. Second, most markets are competitive, including even which relatively few enterprises are competing. Third, monopoly power is not possibly durable because supra-competitive profits will induce entry, as stated above, especially when the price is high enough. Fourth, barriers to entry are not very significant. Fifth, monopoly leverage strategies are not rational. Lastly, competition law enforcement is reasonable only when there is a potential social welfare improvement from it.

15) The economic costs of market power is very important for deciding whether

a market performance. This argument is based on the theory of perfect competition, ie, both of free entry and exit theories.¹⁶⁾ To conclude, it is difficult to consider the rationale of excessive pricing practice in the real world because it is hard to prove the existence of excessive pricing.

The governmental intervention through competition law enforcement in case of excessive pricing is a controversial issue due to its practical difficulties, and there are no strong economic supports for the existence of excessive pricing.¹⁷⁾ Therefore, the current legal debates focus on the possibility of monopoly profits from excessive pricing in the real cases, which has to be unfairness-based. In other words, a question arises whether excessive pricing is possible. Then, the following inquiry should be that, if it is possible, how competition authorities can prove the existence of the high-price business practice. One can observe the different approaches between the EU and the US as will be discussed in Part III below.

there is any inhibition of allocative efficiency from monopoly power. See Lynne Pepall et al., *Contemporary Industrial Organization: A Quantitative Approach* (Wiley, Hoboken NJ, USA, 2011), p. 76.

16) Roger Sherman, *Market Regulation* (Pearson, Boston, 2008), p. 70.

17) M. Frank Maier-Rigaud, OECD Background Paper: Excessive Pricing, available at <http://www.oecd.org/dataoecd/1/3/48847462.pdf> (last visited 9 Nov. 2011), p. 4.

III. A Comparative Study on Excessive Pricing in the EU and the US

1. The Fairness-Focused Ruling in the European Union

Article 102 of the Treaty on the Functioning of the European Union (TFEU) applies to abuse of market dominance. Article 102 TFEU prohibits one or more enterprises that hold market dominant position or a substantial part of it abusing that position. Article 102(a) prescribes that ‘directly or indirectly imposing unfair purchase or selling prices or other unfair conditions’ can be considered as an abusive conduct.¹⁸⁾ Therefore, this provision can be applicable to excessive pricing engaged in by enterprises that hold market dominance. There have been several European Commission (hereinafter, Commission) Decisions on excessive pricing.¹⁹⁾ Some of the

18) The text of Article 102 TFEU as a whole explains that five elements must be established when this legal provision applies, such as: (i) one or more enterprises, (ii) a dominant position, (iii) the dominant position must be held within the internal market or a substantial part of it, (iv) an abuse, and last (v) an effect on inter-State trade in the EU. For further detail, see also Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (4th edn, Oxford University Press, New York, 2010), p. 261.

19) For example, the owner of an essential facility can charge a high price fee in order to drive out his or her rivals from the market when there is a vertical integration situation. Moreover, intellectual property right holders can refuse to grant licences to other enterprises in the aftermarket, especially when the customers are locked in to the manufacturer’s spare parts. This type of practices may constitute abuse of market dominance. For further discussion, see Richard Whish, *Competition Law* (6th edn, Oxford University Press, New York, 2009) pp. 714–715. Sometimes, the high price in the aftermarket occurs because of the lack of product information. There have been economic and legal debates on this issue. For example, see Benjamin

leading cases during the 1970s and 1980s were *General Motors Continental*²⁰⁾ and *British Leylands (BL)*.²¹⁾ In the *BL* case, the Commission decided that the enterprise's charging a fee was both excessive and discriminatory, emphasising its abusive conduct.²²⁾

Of course, Article 102 does not prohibit the holding of a market dominant position *per se*. It only prevents abusive conducts of market dominance. In most cases, excessive pricing is considered impossible or unlikely in the absence of market dominance.²³⁾ However, as explained by Whish, a harmful practice to consumers can be considered abusive, although it may not create that much anti-competitive effects on the market. Therefore, it is not always the case to prove that the enterprise, which violates EU competition law, derives a commercial benefit from the practice.²⁴⁾ Although the burden of proof does not seem heavy, it is yet difficult for the Commission to impose a fine for excessive pricing, as shown in *United Brands*.²⁵⁾

The European Court of Justice(ECJ) annulled the Commission's decision

Klein, "Market Power in Aftermarkets", in Fred Mcchesney(ed), *Economic Inputs, Legal Outputs: The Role of Economists in Modern Antitrust*(Wiley, West Sussex UK, 1998), pp. 57-59.

20) *General Motors Continental* 75/75 (1975) OJ L29/14. The Court held that the practice in the case was not abusive since GM had found that the price was excessively high and then reduced the charge. For further case discussions, see also Kirsty Middleton et al., *Cases and Materials on UK & EC Competition Law*(2nd edn, Oxford University Press, New York, 2009), pp. 409-410.

21) *British Leylands(BL)* 84/379(1984) OJ L207/11.

22) For further discussions, see Furse, *supra* note 3, p. 340.

23) Jones and Sufrin, *supra* note 18, p. 386.

24) Whish, *supra* note 19, p. 711.

25) Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429.

In this case, the Court quashed the Commission decision because it failed to make out a clear case.

in *United Brands*, although the Court stated that ‘charging a price which is excessive because it has no reasonable relation to the *economic value*²⁶⁾ of the product supplies ... an abuse’. Accordingly, the Court considered that excessive pricing can be blamed as an abuse of market dominance. However, the Court has not clearly explained the meaning of ‘economic value’ in the case. Therefore, there is some difficulty confirming at what point a price is abusive because it bears no clear relation to the concept of economic value. Of course, the competition authorities in the EU have tried various methodologies. Nevertheless, the difficulty to measure the economic value still remains. In the *United Brands* case, the Court concluded that a simple price difference of the relevant product, which was Banana, in Ireland and Germany had not been sufficient for the proof of violation. It further explained that, in order to establish the practice was excessive pricing, the Commission had to require the enterprise to produce particulars of all the constituent elements of its production costs. Thus, the plaintiff still bears the burden of proof based on the cost analysis which is quite difficult.²⁷⁾

This burden of proof on the Commission seems somewhat significant. In the *Helsingborg* case,²⁸⁾ the Commission dropped its investigation on an excessive pricing after an extensive investigation. In this case, the Commission did not simply considered the costs by the port when determining the existence of excessive pricing. It decided that a simple cost-plus approach was not sufficient to prove the existence of excessive pricing. It clearly examined the meaning of economic value which was discussed in *United Brands*, but could not conclude there was a violation

26) The emphasis is added by the author.

27) Whish, *supra* note 19, p. 712.

28) *Scandlines Sverige AB v Port of Helsingborg*, Commission Decision [2006] 4 CMLR 1224.

of Article 102 after scrutinising prices of charges in other ports.²⁹⁾

Although it is not an easy task for the plaintiff to prove the existence of excessive pricing as shown in case law, the ECJ suggests some guidelines for the proof. One of them is the so-called ‘yardstick competition’. In *Corinne Bodson v Pompes Funèbres*,³⁰⁾ the Court held that it must be possible to make a comparison between the prices charged by enterprises with concessions and other enterprises. This type of comparison can provide a basis for determining whether the prices charged by the concession holders are fair or not.³¹⁾ This approach is, however, possible only when a suitable and appropriate comparator exists. Therefore, the Commission, as illustrated in *United Brands*, cannot compare the prices charged in a high-price Member State against the price in a low-price Member State only.³²⁾ The price comparison should satisfy the criteria set by the Court.

2. The Effect-Based Approach in the United States

Excessive pricing may be the most intuitive form of abuse since a monopolist raises its price to consumers, thereby increasing profits. Whilst

29) Whish, *supra* note 19, p. 713.

30) Case 30/87 *Corinne Bodson v Pompes Funèbres* [1988] ECR 2479, [1989] 4 CMLR 984. This case is a ‘preliminary ruling’ case under Article 267 of the TFEU. For further detail about this method, see TC Hartley, *The Foundations of European Union Law* (7th edn, Oxford University Press, New York, 2010) Chapter 9.

31) This reasoning was confirmed in Case 110/88 *Lucazeau v SACEM* ([1989] ECR 2811, [1991] 4 CMLR 248). However, in *Ministère Public v Tournier* ([1989] ECR 2521, [1991] 4 CMLR 248), the Court held that the Commission must not consider excessive or disproportionate costs in determining the reasonableness of prices.

32) Whish, *supra* note 19, pp. 713–714.

there have been a few pure excessive pricing cases in the EU, there is no such case in the US antitrust³³⁾ enforcement history.³⁴⁾ In the US, judges cannot be in the position of regulating prices. The US courts seemed to praise monopoly pricing rather than to blame it, as shown in *Verizon* for its incentive of entrants.³⁵⁾ Therefore, it is not possible to compare the relevant offence case of the EU with the US, but it is still possible to examine other types of pricing offence in the US.

The major reason why the public has objection to monopolists is not that the imperfect competition leads to excess profits to them, but that they create a welfare loss through misallocation of resources as stated before.³⁶⁾ In order to prevent this, section 2 of the Sherman Act condemns ‘every person who shall monopolize’, which refers to the prohibition of monopolisation.³⁷⁾ The US Supreme Court defines the meaning of monopoly power as the power to control market prices as stated in the *Du Pont* case.³⁸⁾ Accordingly, the monopoly power refers to the ability to raise price above the competitive price level without incurring any loss from its practice. In

33) The proper term for competition law in the US is antitrust law.

34) Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Applications and Measurement*(3rd edn, Sweet & Maxwell, London, 2010) p. 237.

35) *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410, 124 S.Ct. 872, 880(2004). See also Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law* (West, St. Paul MN, USA, 2010), pp. 95–98.

36) For further detail, see Donald Dewey, *The Antitrust Experiment in America* (Columbia Univ. Press, New York, 1990), p. 67.

37) For general comparison, see Femi Alese, *Federal Antitrust and EC Competition Law Analysis*(Ashgate, Hampshire England and Burlington VT, USA, 2008) Chapter 9.

38) *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391(1956).

other words, a firm must be able to control market price and exclude the existing and potential competitors.³⁹⁾

In the US, a number of business practices can be condemned illegal when they are performed by market dominant enterprises.⁴⁰⁾ Similar but not exactly same to the EU, the plaintiffs are not very successful in pricing cases. However, the US antitrust authorities are concerned about the price or supply squeeze that is a similar type of excessive pricing in vertical integration. For example, when a manufacturer with market power owns distribution channels or is vertically integrated with a down-stream firm, independent distributors in the down-stream level can have difficulty competing with the retailers of the monopolist. In particular, the monopolist can charge a higher price on the independent retailers than on its own distributor. This type is the so-called ‘price squeeze’, and this practice is also a type of abusive pricing. This strategy may work where a monopolist sets high price to eliminate the vertically unintegrated competitors.⁴¹⁾

However, in the recent case, *linkLine*,⁴²⁾ the US Supreme Court concluded that, if a monopolist does not have any duty to deal with its competitors, its price squeeze through excessive pricing would be lawful. This principle of no duty to deal with rivals was established in *Trinko*.⁴³⁾ To summarise, the US courts have held that price squeeze of excessive pricing should satisfy the following criteria: (i) the enterprise can engage in a price squeeze only

39) Blair and Kaserman, *supra* note 5, p. 130.

40) Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*(4th edn, West, St. Paul, MN, USA, 2011), p. 290.

41) *Ibid*, p. 328.

42) *Pacific Bell Tel. Co. v. linkLine Communic., Inc.*, U.S. 129 S.Ct. 1109(2009).

43) *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410, 124 S.Ct. 872, 880(2004). For further case discussions, see Hovenkamp, *supra* note 40, p. 330.

if it operates at two levels of a sector, and also only when its competitors at one level are also its customers; (ii) a price squeeze occurs when the vertically integrated enterprise's price is excessively high; and (iii) when the enterprise has a monopoly power, and its price is higher than fair price because its competitors cannot match the price in the market.⁴⁴⁾

The law-makers of the US Sherman Act did not intend the courts to examine business records for examining whether the price is reasonable or not. This means that they did not intend for judges to conclude if the enterprises' output level is sound.⁴⁵⁾ Therefore, it seems that the US courts are more likely to reject the scrutiny on excessive pricing, and their approaches to the proof requirements in price squeeze are much stricter than those in the EU. The US approach is more-effect-based rather than fairness in the EU,⁴⁶⁾ since it relies more on economic principles from the Chicago School.

As discussed above, competition laws in the US and the EU are somewhat different in excessive pricing. Whilst the US courts take the position that merely charging profit-maximising price is not an antitrust violation, the EU courts take the approach that an enterprise with market dominance has

44) *Town of Concord v. Boston Edison Co.*, 915 F.2D 17(1st Cir. 1990). For further discussion about price squeeze, see Charles J. Goetz and Fred S. McChesney, *Antitrust Law: Interpretation and Implementation*(4th edn, Foundation Press, New York, 2009), pp. 467–480.

45) Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*(Cambridge University Press, Cambridge, 2003), p. 191.

46) Some scholars argue that fairness in Article 102 does not necessarily come into play in other types of abuse rather than pricing ones. See Michal S. Gal, "Convergence of Competition Law Prohibitions: Foundational Issues", in Josef Drexler et al.(eds), *Economic Theory and Competition Law*(Edward Elgar, Cheltenham UK and Northampton MA, USA, 2009), p. 181.

a legal obligation not to charge excessive prices, although the proof requirements of excessive pricing are quite complex. Addition to this proof debate, some scholars argue that the welfare harms from monopoly price can be offset by several positive effects. The prospect of receiving monopoly profits may give the incentive to enterprises for developing new products or improving technology.⁴⁷⁾

Overall, the fundamental difference existing between the two jurisdictions is well illustrated in *Verizon* in the US and *United Brands* in the EU as discussed before.⁴⁸⁾ However, since the Korean authorities have adopted the legal techniques in the EU, it would be worthy discussing the elements of breach of Article 102, with regards to excessive pricing. The ideology behind Article 102 application has influenced the Korean enforcement.

IV. Proposals: Competition Law and Policy on Excessive Pricing in Korea

If a monopolist establishes a set of the same price for all entities in the market, one can assume that price is normally higher than the price in the competitive market, and this is called a uniform price. The monopolist can also charge different prices or can cut price in order to eliminate its competitors, which is predatory pricing because it normally prefers a more complex system of discriminatory prices to charging a single price.⁴⁹⁾

47) Carlton and Perloff, *supra* note 10, p. 99.

48) Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart Publishing, Oxford, 2011), p. 404.

49) Sherman, *supra* note 16, p. 74; M.A. Utton, *Market Dominance and Antitrust*

In order to prohibit diverse pricing abuses above, Article 3-2(1) of the Monopoly Regulation and Fair Trade Act(hereinafter, MRFTA) deals particularly with abuse of market dominance and prohibits unreasonably determining, maintaining, or changing prices. Article 2(7) MRFTA defines the market dominant enterprise as referring to any enterprise who enjoys market dominance and possibly charges the excessive prices.⁵⁰⁾ Such as in the EU, the Korean provision on abuse of market dominance also includes the language of ‘fairness’. The idea of fairness, which illustrates a market dominant enterprise must not unduly prevent small and medium-sized enterprises’ business activities or harm consumers, shapes enforcement policy in both of Korea and the EU.⁵¹⁾ In some cases in both jurisdictions, it seems to accept the rules on unfair price, although enforcement of this type is somewhat limited in practice.⁵²⁾ Therefore, the generally accepted rationale for prohibiting excessive pricing under the MRFTA is to prevent harms to consumers, even though it is yet a hard task for the Korea Fair Trade Commission(KFTC) to prove unfair price due to difficulties in measuring the costs and lack of comparable markets, such as in the EU.⁵³⁾

Policy(2nd edn, Edward Elgar, Cheltenham UK and Northampton MA, USA, 2003), p. 25.

50) For further detail, see Mark Furse, *Antitrust Law in China, Korea and Vietnam*(Oxford University Press, New York, 2009), pp. 246–250.

51) In the application of Article 3–2 MRFTA, a balance test of consumer benefit or other pro–competitive benefit is crucial in Korea as proved in some cases. For further discussion, see Yo Sop Choi, “Analysis of the Microsoft, Intel and Qualcomm Decisions in Korea”, *European Competition Law Review*, Vol. 31, No. 11(2010), pp. 474–475.

52) Robert O’Donoghue and A. Jorge Padilla, *The Law and Economics of Article 82 EC*(Hart Publishing, Portland OR, USA, 2006), p. 7.

53) Bong Eui Lee, “Consumer and the MRFTA”, in Jungsung Yeo et al. (eds), *Consumer and the Rule of Law*(Seoul National University Press, Seoul, 2008),

Article 3-2 of the MRFTA covers taking undue advantage of consumers by using market power to charge grossly excessive prices.⁵⁴⁾ The KFTC has generally applied a two-stage test to assess whether the price is excessive: first, comparing actual costs and prices and second, determining whether the price is excessive in itself or by comparison to competitor's products. Of course, pursuing excessive pricing only makes a sense where there are significant barriers to entry. Absent this, competition is usually a better way to remedy excessive prices given the enormous difficulties of identifying a competitive price.⁵⁵⁾

Like other competition authorities, there have not been many cases of excessive pricing in Korea due to its difficulty examining unfairness in pricing. There are two major KFTC decisions: *Haitai Co. Ltd.*⁵⁶⁾ and *Hyundai Motors*.⁵⁷⁾⁵⁸⁾ However, since the parties in the cases did not appeal, it is somewhat difficult to observe the courts' opinion about excessive pricing. There was a recent court judgment, *BC Card and 12 Banks*,⁵⁹⁾ with regards

p. 73.

54) See also Article 5 of the Enforcement Decree of the MRFTA.

55) O'Donoghue and Padilla, *supra* note 52, p. 195.

56) KFTC Decision 15 Jan. 1992, No 92-1. The KFTC also decided that two other biscuit companies violated Article 3-2(1): KFTC Decisions 15 Jan. 1992, No 92-2 and 92-3 on Lotte Co. Ltd. and Crown Co. Ltd. respectively. See also Sangyong Park and Kisup Um, *Principles of Economic Law*(2nd edn, Bubmunsa, Seoul, 2006), p. 79.

57) KFTC Decision 3 Sept. 1999, No 99-130.

58) In these cases, the KFTC did not scrutinise the existence of excessiveness. The mere reduction of 9-20% product contents and the price increase of 3-4.4% were sufficient to start investigations. See Bong Eui Lee, "Control of Exploitative Abuse in Korea", *Journal of Korean Competition Law*, Vol. 22(2010), p. 143.

59) KFTC Decision 28 Mar. 2001, No 2001-40; Supreme Court, 9 Dec. 2005, 2003Du6283.

to the increase of cash advance interest rate and other fees. In fact, in this case, the Korean credit card service market was oligopolistic since three enterprises' total market share was about 70 per cent. However, because the KFTC failed in finding the enterprises' collective market dominance, the Court held that there was no breach of Article 3-2. Therefore, it is hard to observe the Court's view on excessive pricing.⁶⁰⁾ However, there is no doubt that the Korean competition authority has shown its focus on fairness in its implementation of the MRFTA on pricing.

The meaning of unfair price in Korea refers not only to the price-cut but also output restriction for its similar effect on the market. The KFTC decided in *Shindongbang* that the enterprise had reduced its output significantly, thereby to control the price in the soybean oil market. The KFTC reasoned that the practice had been unfair since the demand for the product increased. Furthermore, the sale of the enterprise decreased whilst the total stock held by the enterprise was quite noteworthy. There was no sufficient evidence for objective justification that the enterprise had to reduce the output. In particular, the profits of the sale increased after its output restriction, which means the enterprise tried to control the price for future profit. The KFTC concluded that it violated Article 3-2 of the MRFTA.⁶¹⁾ The Supreme Court affirmed the KFTC decision.⁶²⁾

However, in another case of output restriction, the Court annulled the

60) For further detail, see also Ohseung Kwon, *Economic Law* (8th edn, Bubmunsa, Seoul, 2010) pp. 149–151; Hyun Yoon Shin, *Economic Law* (3rd edn, Bubmunsa, Seoul, 2010) pp. 151–152; Donghoon Kim et al., *Competition Law* (HUFs Press, Seoul, 2011), pp. 155–156.

61) KFTC Decision, 4 Nov. 1998, No 98–252.

62) Seoul High Court, 6 Oct. 1999, 99Nu3524; Supreme Court, 25 Feb. 2000, 99Du10964.

KFTC decision. In *Jeil Jedang*,⁶³⁾ the Supreme Court held that the enterprise's output restriction was objectively justifiable since it controlled its output based on the possible problem of lack of supply due to a significant demand for the relevant product from financial crisis. Therefore, it was an essential and rational business practice.⁶⁴⁾ The difference between the two cases above is that the Court examined whether the enterprise held stocks or not in order to conclude the intention for potential profits through output restrictions.⁶⁵⁾

Overall, this approach is somehow similar to that in the EU, especially based on the fairness-basis. The ECJ has adopted a definition of excessive pricing that appears to follow the German ordoliberalism,⁶⁶⁾ although its definition is vague and thus difficult to implement in practice.⁶⁷⁾ Scholars

63) KFTC Decision, 4 Nov. 1998, No 98-251.

64) Supreme Court, 24 May 2002, 2000Du9991.

65) In *Namyang*(KFTC Decision, 9 Jun. 1998, No 98-112; Supreme Court, 24 Dec. 2001, 99Du11141), the Supreme Court focused on the interpretation of 'substantial period of time' in examining output reduction and stock increase. It held that the KFTC had to prove there was adverse effect against market demand from output restriction based on the long-term period. For the case analysis, see Ho Young Lee, *Theories and Practices of the Monopoly Regulation and Fair Trade Act*(Hongmunsa, Seoul, 2006) pp. 57-59.

66) This ideology comes from the Freiburg School. It rejected both Nazi totalitarianism and state socialism, and is the mixture of idea of liberal thought. This theory has influenced the evolution of social and economic policy in the EU. See David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, New York, 2003) p. 232. For further discussion about social market economy and the influence of ordoliberalism, see Ki-Su Lee and Jin-Hee Ryu, *Antitrust and Consumer Law* (8th edn, Sechang Publishing, Seoul, 2009) pp. 21-30; Kwon, supra note 60, pp. 51-52. For the discussion about Article 119(2) of the Constitution and case laws, see also Dongkwon Shin, *Antitrust Law* (Parkyoungsa, Seoul, 2011), pp. 8-12.

explain that the EU courts adopted two tests proposed by ordoliberalists for deciding the existence of abuse, such as (i) the reduction of competitive opportunities of the competitors of the dominant firm, and (ii) the existence of conduct characterised as non-performance-based competition.⁶⁸⁾ This ideology has influenced the implementation of Article 102 TFEU for the consumer protection-focused policy, ie, based on the fair competition principle.⁶⁹⁾

In particular, the EU competition authority has established four standards for the excessive pricing scrutiny, which the KFTC can adopt: (i) price-cost comparisons, (ii) price comparisons across markets or competitors,⁷⁰⁾ (iii) geographic price comparisons,⁷¹⁾ and (iv) comparisons over time.⁷²⁾ The KFTC Guidelines for the Review of Abuse of Market Dominance⁷³⁾ provide

67) O'Donoghue and Padilla, *supra* note 52, p. 604.

68) James S. Venit, "Article 82: The Last Frontier—Fighting Fire With Fire?", *Fordham International Law Journal*, Vol. 28(2005), p. 1165.

69) For further discussion, see Anca Daniela Chirita, "Undistorted, (Un)fair Competition, consumer Welfare and the Interpretation of Article 102 TFEU", *World Competition: Law and Economics Review*, Vol. 33, No. 3 (2010), p. 417–436.

70) In particular, the UK competition authority used the evidence of excessive pricing through price comparisons in *Napp Pharmaceutical Holdings Ltd* (CA98/2/2001 [2001] UKCLR 597). For further detail, see Sandra Marco Colino, *Competition Law of the EU and the UK* (7th edn, Oxford University Press, New York, 2011) pp. 318–319. There are 3 types of price comparisons, such as geographic comparison, comparison over time, and comparison across competitors. See also Maier–Rigaud, *supra* note 17, pp. 50–51.

71) Lee, *supra* note 58, p. 142. The author argues that, since it is quite difficult to use the cost–price method, geographic market comparisons are very meaningful in Korea.

72) O'Donoghue and Padilla, *supra* note 52, p. 613.

73) Notification No. 2009–62, 6 Oct., 2009, Part VI, secs. 1 and 2.

some guidance for the scrutiny, but they are not very clear for enforcement. The Korean enforcement agency can thus consider the EU's criteria, and it can also examine enforcement in other jurisdictions where the EU criteria cannot be possible in some cases.

For example, there is a very interesting case of excessive pricing in South Africa. The South African Competition Tribunal(hereinafter, Tribunal) denied the role of price regulator in examining abusive conduct of excessive pricing, and held that it was not in a position to determine the competitive price. However, the Tribunal chose to take a structural approach in examining the existence of excessive pricing. It concluded that the market share of the enterprise was 100 per cent, and this meant there was no potential competitor. It, thus, ruled that the market structure had reflected the absence of cognisable competition considerations, and the price was excessive in relation to the economic value.⁷⁴⁾ Considering the approach in the South African case, it is not impossible to bring a suit against a market dominant enterprise practising excessive pricing. When it seems difficult to have a price comparison, the agency can use the market structure consideration.

Most of Asian competition authorities seem to adopt the EU approach rather than the US. Including the Korean provision, other competition authorities,⁷⁵⁾ such as India and China, also provide legal provision on unfair

74) Bishop and Walker, *supra* note 34, pp. 243-244.

75) For example, the Competition Act of 2002 (amended in 2007) of India Article 4(2)(a) also prohibits unfair or discriminatory price in purchase of goods or services. 'Unfair price' includes excessive pricing. See T. Ramappa, *Competition Law in India* (2nd edn, Oxford University Press, New Delhi, 2009) p. 150. For general discussions in comparative perspectives, see also, Tae-Jin Kim, "An Overview of Current Discussions Regarding Initiatives for Amendment to the Japanese Antitrust Law", *Ilkam Law Review*, Vol. 13, (2008), p. 125 *et seq.*

pricing.⁷⁶⁾ Of course, excessive pricing has been one of the most difficult subjects and also subjected to diverse levels of competition law enforcement around the world.⁷⁷⁾ Therefore, there is no doubt that, if a competition authority accepts more-fairness ideology in enforcement, the approaches in the EU and South Africa are clearly beneficial rather than the US one.

V. Conclusions

Scholars assert that the price set by a monopolist is higher than the one in the competitive market.⁷⁸⁾ However, as illustrated above, markets are somewhat complex. In a quite number of cases in diverse jurisdictions, competition law enforcement against excessive pricing is considered relatively costly, and there is no sufficient level of evidence that a strict enforcement creates social gains.⁷⁹⁾ Therefore, it is unwise to implement excessive pricing provisions without clear criteria.

The existing approaches to excessive pricing are somewhat controversial when the enterprise holds market power, since the monopolists may raise prices, thereby causing harms on consumers or fostering misallocation of

76) Article 17 of the Chinese Anti-monopoly Law prohibits 'selling commodities at unfairly high prices'. For further discussion, see Furse, *supra* note 50, p. 89.

77) Ezarachi and Gilo, *supra* note 8, p. 873.

78) Lawrence A. Sullivan and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* (2nd edn, Thomson-West, St. Paul, MN, USA, 2006), p. 36.

79) For the discussion about costly enforcement of competition law, see also Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, Cambridge MA, USA, 2005), p. 55.

resources. However, it is very difficult for the competition authorities to prove whether there is any abusive conduct since a high price also means there would be vigorous price competition under *ex ante* thoughts. For this complex issue, the EU and especially the US enforcement agencies would not easily bring the lawsuit with regards to excessive pricing.

In fact, it is difficult to observe the generally accepted definition of excessive pricing in economics and also legal principles since it is deeply related to fairness, especially in Korea. Accordingly, there have been discussions about pros and cons of the governmental intervention on excessive pricing, but the defenders for intervention assert that markets are not self-correcting as the Chicago School argues. Excessive pricing reduces consumer welfare. However, it is also possible that regulatory failure in competition enforcement may aggravate market failure and that market intervention is very unnecessary since excessive prices are competed away. Furthermore, price regulation and remedies or sanctions are difficult to devise in practice.⁸⁰⁾

The possible argument with regards to excessive pricing is that the mere monopolistic price-setting is unlawful since it is equivalent to a cartel, agreeing on a fixed price. When the plaintiff considers this argument, a large market share leads to a presumption of violation of competition law and other defence such as of efficiency is not possible.⁸¹⁾ However, competition law enforcement which controls high prices may impede rather than foster competitive process. Therefore, the market intervention should be limited to industries where (i) it is protected by high entry barriers, (ii) the enterprise enjoys considerable market power,⁸²⁾ and (iii) investment and innovation

80) Maier-Rigaud, *supra* note 17, p. 8.

81) Hylton, *supra* note 45, p. 194.

play a relatively minor role.⁸³⁾ In particular, with regards to innovation-focused industry,⁸⁴⁾ it is very difficult to measure the relationship between cost and price,⁸⁵⁾ which means it is almost impossible to decide whether there is excessive pricing in intellectual property right cases.⁸⁶⁾ However, this is not always the case. For example, recently, the EU Commission seemed to start investigations on Samsung, regarding high royalty payments of 3G patent.⁸⁷⁾

There exist differences in competition law enforcement, with regards to how best to protect the competitive process, but the gap has become narrow currently. This means that their approaches to when to intervene the market converge due to the adoption of more-economics-based principles with diverse legal techniques.⁸⁸⁾ Likewise, the Korean competition authority needs

82) Some scholars argue that, where there are entry barrier and long-term sustained monopoly such as in the regulated market, it is necessary for the authorities to intervene the market. See Lee, *supra* note 58, p. 127.

83) O'Donoghue and Padilla, *supra* note 52, pp. 637–638.

84) Some argue that the US antitrust jurisdiction has accepted the ideology of non-intervention in innovation industries in exclusionary cases. See Eleanor M. Fox, “Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide”, *Utah Law Review*, Issue 2006 (2006), p. 729.

85) The innovation issue is always deeply related to the consumer welfare for consumer preferences on the new products from innovation. See Josef Drexler, “Real Knowledge is the Know the Extent of One’s Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases”, *Antitrust Law Journal*, Vol. 76, No. 3 (2010) p.707.

86) Bishop and Walker, *supra* note 34, p. 238.

87) <http://www.thenewamerican.com/world-mainmenu-26/europe-mainmenu-35/9673-eu-antitrust-agency-probing-apple-and-samsung> (last visited 14 Nov. 11).

88) Philip Marsden and Liza Lovdahl Gormsen, “Guidance on Abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure”, *Antitrust Bulletin*, Vol. 55, No. 4 (2010), p. 878.

to establish clear criteria for excessive pricing examination. The ultimate goal of competition law should be the protection of competition rather than a simple ideal of protection of competitors or consumers only. The first test for protection of competition would be the sound approach to excessive pricing.

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[국문초록]

경쟁법상 착취가격납용에 관한 논의
- 비교법적 방법으로 -

최요섭*

독점규제 및 공정거래에 관한 법률, 제3조의2는 시장지배적 지위의 사업자가 상품의 가격이나 용역의 대가를 부당하게 결정·유지 또는 변경하는 행위와 상품의 판매 및 용역의 제공을 부당하게 조절하는 행위를 금지함으로써, 정당한 이유 없이 가격을 현저하게 상승시키거나 공급을 제한함으로써 발생하는 가격의 상승과 같은 반경쟁적인 효과를 규제하고 있다. 시장지배적 지위를 이용한 직접적인 가격상승이나 공급의 제한은 유효경쟁의 상황에서는 이루어질 수 없는 가격을 설정함으로써, 소비자와 거래상대방의 이익을 저해하는 결과를 발생시키며 이는 경쟁에 반하는 결과를 낳을 수 있다. 따라서 우리나라를 포함한 각국의 경쟁당국에서는 위와 같은 행위를 규제하는 규정을 가지고 있으나, 실질적으로는 경쟁당국이 시장에서의 가격을 규제할 수 있다는 측면에서 적지 않은 논쟁이 있다.

지나친 가격의 규제는 곧 경쟁당국이 가격을 통제하는 기관으로 인식될 수 있으며, 이러한 규제는 시장경제에서의 자율적인 가격형성을 저해할 수도 있다. 따라서 신규진입을 저해하는 진입장벽 혹은 관련시장에서 완전독점시장의 경우를 제외하고 위와 같은 착취가격납용(excessive pricing)을 규제하기는 어려운 것이 사실이다. 특히, 당해 경쟁당국이 정확하게 가격과 비용에 관한 정보를 획득하는 것이 쉽지 않고, 기술개발

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및 지식재산권과 관련한 분야에서 관련 사업자의 가격설정을 지나치게 통제한다면 향후에 전반적으로 사회후생을 감소시키는 결과를 낳게 될 가능성이 있다. 따라서 우리나라를 비롯하여 외국 경쟁당국에서는 가격 남용과 관련하여 특별히 주의하여 법을 집행하고 있다. 이러한 상황에서 최근 OECD의 가격남용과 관련한 논의는 의미가 있다 할 것이다. 본 연구에서는 외국 경쟁법에서의 착취가격남용에 대한 규제를 살펴보고, 우리나라 규제의 내용과 향후 발전방향에 대해서 논의하고자 한다.

주제어: 착취가격남용, 경쟁법, 독점규제 및 공정거래에 관한 법률, 공정거래위원회, 시장지배적 지위남용, 반독점금지법

