

The Development of Antitrust in China, Korea and Japan

International Competition Law: Real World Issues and Strategies for Success

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Deirdre Shanahan¹
Counsel for Asia-Pacific
Bureau of Competition
Federal Trade Commission

In Korea and Japan, governments and the public learned the hard way that economic growth and consumer welfare depend on competitive markets. Both now understand that the key to having competitive markets is a competition policy grounded in sound legal and economic principles. In 1993, China amended its Constitution to recognize a “socialist market economy” to replace the planned economy system. The concept of a “competition culture” is emerging though its precise nature and scope is unclear.

I. China

With the current focus on the draft Anti-Monopoly Law, many are unaware that competition laws do exist in China. Since 1993 China has been developing a legal system for the socialist market economy. The legal provisions are dispersed in various laws and regulations and enforced by different government agencies. These include most notably the 1993 Anti-Unfair Competition Law, the Price Law of 1997, the 2003 Provisional Regulation of Foreign Investors Merging with or Acquiring Domestic Enterprises as well as various administrative regulations. The Provisional Regulation mandates pre-closing notification of certain acquisitions by foreign firms. The U.S. Government submitted comments on the Provisional Regulation which, among other things, urged the separation of competition and foreign investment reviews and an appropriate nexus between the transactions to be notified and the Chinese economy. While the text did not change, we note that although notifications have been made, to our knowledge no formal review has taken place.

The draft Antimonopoly Law represents a ten-year effort to formulate a comprehensive competition law that is expected to bring some cohesion to the Chinese competition law regime. The draft addresses key substantive areas of antitrust law – anticompetitive agreements, abuse of

¹The views expressed in this presentation are those of the author and do not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner.

a dominant market position and merger control – and provides for the establishment of a competition enforcement authority. The Ministry of Commerce (“MOFCOM”) had the initial lead in drafting a comprehensive competition law. Now the drafting process is in the hands of the State Council Legislative Affairs Office.

Given China’s inexperience with antitrust concepts, over the past year the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) have been active in providing advice to government officials and academics involved in drafting this law. Last July, the DOJ and the FTC sent a high level delegation to Beijing to begin discussions aimed at contributing to the development of China’s competition law and policy. We met with key agencies and officials, academics and representatives of the U.S. business community. The visit included a day-long meeting on competition law and policy hosted by the Director General of MOFCOM’s Department of Treaties and Law. We shared important lessons of our own experience, emphasizing certain key principles: the goal of protecting competition, not competitors; not using competition law to achieve other social and economic objectives; maximizing efficiency even if smaller, traditional competitors do not survive; the importance of consumer welfare economics, and protection of intellectual property.

The discussions continued last October when a Chinese delegation led by officials from MOFCOM and including officials of the Finance and Economic Committee of the National People’s Congress visited Washington. Our meetings, chaired by Chairman Majoras and Assistant Attorney General Pate, provided the opportunity to learn and comment on approaches and issues under consideration in drafting the new law and to continue to share our views of a sound competition law and effective enforcement agency.

Most recently the FTC and the DOJ participated in the May 23-24 International Seminar on the Draft Anti-Monopoly Law hosted by the State Council Legislative Affairs Office. FTC General Counsel Blumenthal and Deputy Assistant Attorney General Delrahim were asked to address outstanding issues relating to several of the eight chapters of the draft law and to provide suggestions on improving the draft.

While the draft law is progressing in the right direction, we still have some broad concerns. These include the draft law’s goal of “fair” competition, the role of undefined, non-competition factors in assessing conduct and agreements and granting exemptions, and the frequent lack of a clear delineation of legitimate competitive conduct from that which injures the competitive process. China faces a particular challenge in making the transition to a market economy. A major objective of the Anti-Monopoly Law is to control public restraints on competition by administrative monopolies. While the U.S. does not have a great deal of relevant expertise, the European Commission, the Federal Antimonopoly Service of Russia and others are also providing advice.

The U.S. agencies will continue to offer assistance to the Chinese government in developing a competition law based on sound legal and economic principles. Officials from the FTC and DOJ will participate in a symposium on competition policy and legislation sponsored

by the State Administration for Industry and Commerce and Asian Development Bank on June 27 and 28. Afterwards they will meet with various government officials, including legislative experts, and academics regarding any follow-up issues to the State Council Legislative Affairs seminar held in May.

The Antitrust and International Sections of the American Bar Association have jointly submitted comments on this and an earlier draft of the Anti-Monopoly Law. Those comments are generally consistent with the positions of the U.S. antitrust agencies.

The ultimate question is whether and when the draft Anti-Monopoly Law will be enacted. One controversial issue that may delay enactment relates to the establishment of the new competition authority. Will an existing agency enforce the new law and if so, which one – the Anti-Monopoly Office of MOFCOM or the State Administration for Industry and Commerce? Or will a new agency be formed with personnel drawn from both? This issue must be resolved before the draft law is submitted to the National People's Congress. Current views among Chinese government officials indicate that a unified competition law will be enacted but the expected date of enactment ranges from mid 2006 to as late as 2007.

II. Japan

When the Antimonopoly Act was enacted in 1947, the Japanese society believed in harmonious cooperation rather than competition between businesses. There was also a period when industrial policy was given priority over competition policy. In Japan this is popularly referred to as the “Dark Ages of the Antimonopoly Act.” Faced with mounting demands by the U.S. and other countries for a more competitive and open Japanese market, the Japanese government has implemented various measures including strengthening the structure and role of the Japan Fair Trade Commission (“JFTC”).

Let me mention a few recent examples. In his policy speech to the Diet in May, 2001, Prime Minister Koizumi specifically stated that the Government would strengthen the structure of the JFTC so that the agency can serve as a “guardian of the market” and vigorously promote competition policy. The JFTC at that time was a subsidiary agency in the Ministry of Public Management, Home Affairs, Post and Telecommunications. In April 2003, the JFTC was transferred to the jurisdiction of the Cabinet Office and achieved the status of an independent agency. This move fulfilled one of the U.S. Government's primary recommendations in the ongoing U.S.- Japan Regulatory Reform and Competition Policy Initiative.

In addition, the Government of Japan has approved increases in the staff of the JFTC and its budget. The U.S. Government has recommended, and the JFTC acknowledges, the need to bolster the economic and legal capabilities of JFTC staff. As one step, the JFTC has established a Competition Research Policy Center in their General Secretariat to promote theoretical studies of competition policy from economic and legal perspectives and bolster the JFTC's economic analysis abilities through joint studies with outside experts. The JFTC has also begun trying to bring in experienced legal experts and economists by offering fixed term

contracts.

Over the past few years the JFTC has conducted a comprehensive review of its current system of administrative and criminal measures and recommended improvements, many of which the U.S. Government has called for in the regulatory reform talks. The JFTC review has culminated most recently in the most significant amendments to the Antimonopoly Act (“AMA”) in decades. On April 20th the Diet enacted amendments to increase the surcharge (administrative penalties) rate for hard core cartel conduct (price and output restraints) and bid rigging. For example, the surcharge against large-sized enterprises increased from 6% to 10% and 15% for repeat offenders. While the U.S. government supported a higher increase, this is a step in the right direction.

The AMA amendments incorporated a leniency program providing immunity from, or reduction in, the applicable surcharge payment in accordance with statutory standards and introduction of compulsory investigatory powers – a search warrant power – for criminal investigations where a criminal accusation is being pursued. In addition, certain enforcement procedures of the AMA were revised to afford greater due process and prompt and efficient investigation and hearing procedures. I understand that the topic of enhancing due process in JFTC administrative procedure will be under study over the next few years.

While steps have been taken to strengthen the JFTC, there have been calls for further improvement. For example, a 2004 OECD study observed that the JFTC devotes less attention to mergers than enforcers in other jurisdictions and accepts commitments or conditions that seem unlikely to provide significant assurance that competition problems will be corrected. I will only comment that although the JFTC has not issued a formal decision rejecting a merger in decades, as part of its pre-notification consultation procedures the agency identifies problematic transactions and negotiates corrective measures. In practice, if the JFTC advises that it has concerns, the parties either correct the problem or abandon their plans.

A top enforcement priority of the JFTC is bid-rigging. Last May, in one of its biggest bid-rigging investigations to date, the JFTC filed an accusation with the Public Prosecutor General against eight companies suspected of rigging bids for steel bridge construction projects ordered by the Ministry of Land, Infrastructure and Transport (MLIT). Fourteen executives from eleven firms were arrested. In mid-June JFTC filed charges against eight of the fourteen arrested executives and another eighteen companies in connection with the same (MLIT) tenders. The JFTC plans to issue administrative surcharge orders as well. The case may further expand, as public prosecutors are investigating these companies' successful bids on Japan Highway Corporation steel bridge contracts and the role of retired Japan Highway officials hired by the companies implicated in bid-rigging.

The U.S. antitrust agencies and the JFTC have a long-standing cooperative relationship. Last September we held the 26th annual bilateral antitrust consultations between our agencies. In recognition of this cooperative relationship, we signed in 1999 a bilateral antitrust cooperation

agreement with the goal of strengthening cooperation. Since 1999 there has been an increased level of contacts between our staffs, including visits by JFTC study groups, annual meetings between staff on merger and non-merger topics, and the establishment of a working group on competition and intellectual property law.

III. Korea

The Korean government's policies in the 1960s emphasized government protection and intervention rather than competition in the domestic market. These policies ultimately led to monopolistic and oligopolistic structures, little foreign competition, and a concentration of economic power. In retrospect, the Korean government acknowledges that government-led development and the failure to establish an efficiently functioning market system exacerbated the effects of the financial crisis in 1997. The lesson learned, in the words of a former Chairman of the Korea Fair Trade Commission, is that "a developed economy and balanced growth can only be achieved when all the players – the government, the private sector and consumers – become competition minded."²

In 1994, the Korea Fair Trade Commission ("KFTC") became an independent body, reporting directly to the Prime Minister. Since 1996, the KFTC Chairman has had the status of a minister and participates in meetings of the Cabinet and economic ministers. This contact has strengthened the KFTC's advocacy role expressly authorized by the Monopoly Regulation and Fair Trade Act ("MRFTA"). The Act requires other Korean government agencies to notify the KFTC of proposed laws and regulations that might restrain competition and authorizes the KFTC to provide its views on minimizing any adverse competitive effects. In this important area of competition advocacy, the KFTC has been proactive in promoting regulatory reform by reviewing existing regulations. In 2004 alone after KFTC consultation with relevant ministries, 56 competition-restrictive regulations were abolished or revised to foster competition. This year the KFTC will continue these efforts to improve other anti-competitive regulations and identify so-called sub-rules, such as guidelines, that excessively burden businesses.

Unlike many competition authorities, a significant focus of KFTC work is not "conventional" competition enforcement but the structural problems of large business conglomerates or chaebols. The chaebols -- the primary vehicle for investment and development -- served as the growth engine of the Korean economy prior to the financial crisis. The KFTC has adopted several measures to address structural problems of chaebols aimed at enhancing transparency of business management and fairness in inter-affiliate transactions. Many of the KFTC enforcement actions involve internal cross-subsidization. Some in the past have criticized the KFTC for expending too much of its resources on the problems of chaebols.

The KFTC has started to become an important player in recent enforcement efforts

²Dr. Nam-Kee Lee, *Toward a Mature Market Economy: Competition Law and Policy in Korea* (2002), at 139.

against international cartels, as seen by its enforcement actions against the graphite electrodes cartel in 2002 and the vitamin cartel in 2003. In addition, the KFTC requested amendments to the MRFTA that passed in December 2004. The amendments double the maximum surcharge rate that the agency can levy on cartels from 5% of related sales to 10% and improve the KFTC's ability to enforce against foreign companies engaged in anticompetitive activities such as international cartels. The amendments also enhance the corporate leniency program adopted in 1997 by creating incentives to be the first informant. In April of this year, the KFTC launched a system of monetary rewards for anyone who informs the agency of violations of specified illegal behavior including cartel conduct.

The KFTC also amended its merger law in a way that increases conformity with Recommended Practices of the International Competition Network ("ICN"). Effective July 2003, the KFTC modified its reporting regulations to require foreign companies to notify certain significant mergers or acquisitions occurring between foreign companies outside Korea. In compliance with ICN Principles and Recommended Practices, Korea introduced a new local nexus threshold in addition to the existing threshold of total assets and turnover. In its press release, the KFTC stated: "By introducing the local nexus, the notification system will advance to global standards."

The relationship between the U.S. antitrust agencies and the KFTC is a strong one. We have established a tradition of antitrust consultations that dates back to 1996. As with the JFTC, we have established a working group with the KFTC on competition and intellectual property law. We have frequent contacts with KFTC staff on matters of mutual interest. As a formal acknowledgment and deepening of our cooperative relationship, we are in the process of negotiating a bilateral antitrust cooperation between our two countries.