Korean Antitrust Experience with Multi-Sided Businesses Platform

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Summary

Case	Issue	Final Decision
(#1) BC Card et al. v. FTC (2002)	Abuse of Dominant Position ("DP")?	Supreme Court: NO
(#2) Microsoft (2006)	Abuse of DP? Unfair trade practice?	Fair Trade Commission ("FTC") : YES
(#3) BC Card et al. v. FTC (2008)	Price Fixing?	Supreme Court: YES
(#4) Tbroad GangSeo Cable TV Broadcasting v. FTC (2008)	Abuse of DP?	Supreme Court: NO
(#5) eBay Korea & Interpark Gmarket Merger (2009)	Anticompetitive merger?	FTC: YES (but Conditional approval)
(#6) FTC v. eBay Gmarket (2011)	Abuse of DP?	Supreme Court: NO
(#7) FTC v. SK Telecom (2011)	Abuse of DP?	Supreme Court: NO
(#8) FTC v. NHN (Naver) (2015)	Abuse of DP?	Supreme Court: NO
(#9) Google's mobile Apps policy	Abuse of DP?	[2013] FTC : NO [2016] FTC: Reopen

Background:

Double regulation of unilateral acts under Korean Monopoly Regulation and Fair Trade Act ("MRA")

Abuse of dominant position Article 3-2 para.1	Unfair trade practices Article 23 para. 1
1. Undue pricing 2. Undue control of supply 3. Undue hindrance of other undertaking's business 4. Undue hindrance of new market entrance 5. Undue exclusive dealing or undue significant harm to consumers' benefit	1. Undue refusal to deal or undue discrimination 2. Undue exclusion of competitor 3. Undue seducing /coercing competitor's customers to trade 4. Undue use of superior position 5. Undue restrictive trading terms or undue hindrance of other undertaking's business 6. (deleted) 7. Undue supporting acts between undertakings 8. Other undue acts

- ✓ More details in MRA Presidential Decree & FTC Guideline, but **obscure tautology**

Background:

Supreme Court's different approaches to "Undue"

Abuse of dominant position Article 3-2 para.1	Unfair trade practices Article 23 para. 1
Effect-based approach	**Formalistic approach (EU-style)**
***POSCO v. FTC* (full bench, 2007)** ➢ Undue: "Intent to monopolize or restrict competition" and "anticompetitive effect" ▪ Intent can be inferred when anticompetitive effect actually occurred	Many cases ➢ Undue: "Harm to fair trade order" or "Harm to fair competition

✓ Controversy whether "harm to fair competition order" should be the same as "anticompetitive effect" in the the *POSCO* decision

Background:

- In spite of the *POSCO* decision, a few number of Justices introduced a kind of formalism by reinterpreting "**probability**" of anticompetitive effect at the very **abstract** level in their chamber's cases (e.g., *Hyundai Motor Car v. FTC* (2010), *Hyundai Mobis v. FTC* (2014)) → These cases may loosen the effect rule
- FTC & many scholars seems still strongly favor EU-style formalistic approach to Art 3-2

- **Article 4 of MRA**: **Legal inference of DP** from market share ("M/S")
  1. **One** undertaking with M/S ≥ **50%** or
  2. When **two or three** undertakings has M/S ≥ **75%**, **any one of them** (except less than 10% undertaking)

1. BC Card *et al.* (I)

- FACT: BC Card & its member banks, LG Capital, and Samsung Card raised **merchant fees**

- **FCT (2002)**: BC (as "one economic entity"), LG, Samsung individually abused each of their DP in credit card market (Violation of Art 3-2 para. 1 No. 1)

	BC & member banks	LG Capital	Samsung Card
M/S	35%	18.8%	17%

- **Supreme Court (2005)**
  - BC & its member banks cannot be considered as one economic entity
  - Any one of plaintiffs held no dominant position

2. BC Card *et al.* (II)

- FACT: BC Card & its member banks agreed to raise **interchange fees** ("IFs") and actually raised IFs

- **FTC (2005)**
  - Plaintiffs' IFs are the same as merchant fees ("MFs")
  - Agreement is the same as "naked price fixing" of MFs (Violation of Art 19 para. 1 No. 1)

- **Supreme Court (2008):** price fixing (rejected plaintiffs' argument of "one economic entity")

Cf. BC Card system is different from VISA

3. Microsoft (FTC)

- FACT: Microsoft integrated *MSN Messenger*, *Media Player*, *Windows Media Service* into PC Windows and Windows Server O/S

- **FTC (2006)**
  - Abuse of DU in PC O/S and PC Server O/S markets (Violation of both Art 3-2 para. 1 Nos. 3 & 5)
  - Unfair trade practice (Violation of Art 23 para. 1 No. 3)

Cf. In 2007, Microsoft withdrew its appeal before Seoul High Court

4. Tbroad GangSeo Broadcasting

- FACT: Plaintiff (the only one Cable TV broadcasting firm in **Gang-seo area in Seoul**) provided its popular golden channel # 7 **to Hyundai TV Home-shopping that offered highest price**

- **FCT (2007)**
  - Abuse of DU (M/S 100%) in Gang-seo area market to hinder U-ri TV Home-shopping that wanted to use channel # 7 but did not want to pay highest price (Violation of Art 3-2 para. 1 No. ③)

- **Supreme Court (2008)**
  - Error in defining relevant market
  - No anticompetitive effect in the nation-wide TV Home-shopping market

5. eBay Korea & Interpark Gmarket Merger

➢ **FTC decision (2009)**

	Two-sided markets = Two relevant markets	
	Online OpenMarket service market (for Merchants)	**All kinds of online shopping service market (for Consumers)**
Anticompetitive Merger?	**(M/S 87.5%)** YES	(M/S 37%) NO

- Conditional approval: *No* increase of commission fees for three years

✓ **Comments:** *Relevant market is not the same as any one-sided market of the so-called "two-sided markets."* At any rate, (considering no charge on Consumers) even monopolistic prices on Merchants maybe not so bad

6. eBay Gmarket (*ex* Interpark Gmarket)

- ❖ FACT: Interpark Gmarket asked seven merchants (paying commission fee) to deal with consumers (no fee) only through its online OpenMarket ("OOM") service

- ➢ **FCT (2007)**
- ▪ Abuse of **DP (M/S 39%) in OOM service market** to exclude competitors (violation of Art 3-2 para. 1 No. 5)

- ➢ **Supreme Court (2011)**
- ▪ Plaintiff held DP in OOM service market
- ▪ But no anticompetitive effect in OOM service market

- ✓ **Comments**: Relevant market may extend beyond OOM market. At any rate 39% is not enough to assure dominant power to raise commission fees.

7. SK Telecom

- ❖ FACT: SKT provided online SKT/DRM-MP3 music files download and streaming service ("Melon"); and also put SKT/DRM chip on SKT-MP3 play mobile phone
- ➢ **FTC (2007)**: Rapid growth of 'Melon' in Online music market was the result of abuse of DP in the mobile telecommunication market through SKT-MP3 mobile phones and its non-open DRM policy (Violation of Art 3. para. 1 Nos. 3 & 5)
- ➢ **Supreme Court (2011)**
- ▪ Error in defining relevant market
- ▪ No anticompetitive effect (rejected FTC's arguments based on both EU-style formalism and leverage theory)
- ✓ **Comments**: Some argues SKT/DRM is illegal technical tying. But it is not.

8. NHN (Naver)

- FACT: Plaintiff (Internet portal service provider like *Yahoo*) and PANDORA TV (Free-video provider like *YouTube*) agreed that (i) Plaintiff provides its special search service (for free) to PANDORA and (ii) PANDORA does not include any Advertisement in its free-video searched by Plaintiff's search engine NAVER without Plaintiff's consent.

- **FCT (2008):** NAVER abused its DP in free-video search market (not including Google's search service) to hinder PANDORA's business (violation of Art 3-2 para. 1 No. 3)

- **Supreme Court (2014)**
  - Error in defining relevant market
  - Even in the narrowest relevant market, no anticompetitive effect

9. Google (FTC)

- ❖ FACT: Google and Korean mobile phone makers agreed to pre-install Google Apps on Android O/S smart phones

- ➢ **FTC (2013)**
- ▪ In Korean internet search engine market, Google M/S was about 10% (Cf. Naver M/S 75%)
- ▪ No abuse of DP

- ✓ After recent EU's decision (April 2016), Korean mass media criticized FTC's the above decision
- ✓ Considering EU's decision, FTC reopened the case but in a different way (possibility of using **Art 23**)

Concluding Remarks

- Since the *POSCO* decision, Supreme Court has rejected FTC's arguments based on formalism in four cases (# 4, 6, 7, 8)
- But FTC may condemn an act of multi-sided businesses platform (e.g., *Google's Apps policy*) under **Art 23** (formalistic approach)
- Regardless of Art 3-2 or Art 23, enforcement of MRA based on EU-style formalism would result in serious false-positive error
- However not only FTC but also many scholars & even politicians strongly favor formalism → may lead some Justices to lessen the meaning of the *POSCO* decision
- *Rhetoric* of *consumer choice or welfare* can be misused to protect small-sized competitors

Thank You!

Appendix 1

Three types of MRA enforcement

Type	Limit	Practice
Administrative (by FCT)	n/a	Main (Administrative Fine, Cease & Desist Orders)
Criminal (by Public Prosecutor Office)	only when FTC or other three governmental branches asked Supreme Public Prosecutor Office	Very rare (but increasing)
Civil	only monetary damage claim	Very rare

Appendix 2

Administrative antitrust procedures

① FTC decision → [First Appeal] ② **Seoul High Court: exclusive jurisdiction** (only three special administrative chambers # 2, 6, 7) → [Final Appeal] ③ **Supreme Court (over 20 antitrust cases per year)**

- FTC is always 'defendant' in administration cases
- Increasing critics against FTC's quasi-judicial role mainly because of the problem of due process ("FTC judges its own cases")
- At Supreme Court, *full bench ca*se is very rare. 99.9% cases are decided by the chamber consisting of four Justices