New Theory for the Vertical Regulation in Korea

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Various elements are comprehensive factors in the determination of anti- and pro-competitiveness of vertical restraints. This article attempts to examine the Korean case as an example of a developing country regarding competition law on vertical restraints and to trace and forecast the development of the Korean competition law and policy

1. INTRODUCTION

The Republic of Korea (hereafter, Korea) has shown a rapid economic growth for the past sixty years since the Korean War. In particular, Korea has established a reputation of achieving a high rate of economic growth through a policy of coordinating large business group activity with that of government, which has been recognised as export-led policy. These large Korean business groups, so-called Chaebols,[1] have a unique corporate structure only existing in Korea and have played an important role in the business environment for the purpose of contributing to national economic growth. The Korean government's coordination with Chaebols and its support for the export-led policy during the 1960s and 1970s allowed Chaebols' total monopolies.[2]

As the concern about market concentration increased during the 1970s, the government has developed its competition law since 1980 to prevent further market dominance.[3]

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[1] *Chaebol* is a form of Korean large business groups or conglomerates. The Korean word means a business group or a trust. *Chaebol* refers to the several large and family-owned business groups that used to be supported by the Korean government. *Chaebols* cooperated with the government in the field of economic planning and R&D. However, after the Monopoly Regulation and Fair Trade Act legislation in 1980, the government has tried to encourage competition amongst *Chaebols* to avoid monopolies.

[2] *See Ha-Joon Chang, The Political Economy of Industrial Policy*, St. Martin's Press, New York, 1994, 92; Myungsoo Hong, *Chae-Bol-Ui-Kyoung-Jae-Ryok-Jib-Jung-Kyu-Jae [Regulations on Economic Concentration of Chaebol]*, Kyoungin Publishing, Seoul, 2006, 20-65. Since the early 1960s, Korea has demonstrated a very remarkable economic growth and an economic structure change. Between 1965 and 1986, Korea's annual per capita GNP growth showed 6.7% that was significantly high compared with that of 2.9% of the developing world as a whole. During the time of rapid economic growth, the government's intervention in the market influenced the allocation of resources amongst industrial activities such as through taxes and subsidies, credit rationing, various sorts of licensing, and the creation of public enterprises. The fundamental policy for this is to strategise export-led policy. See also Larry E Westphal, 'Industrial Policy in an Export Propelled Economy: Lessons From South Korea's Experience' (2001) 4 The Journal of Economic Perspectives, page 41.

[3] See Ohseung Kwon, *Kyoung-Jae-Bub [Economic Law]*, (5th ed.), Bubmunsa, Seoul, 2005, pages 93-105; Hak-Kuk Cho, 'Gong-Jung-Go-Rae-Ui-Bal-Jeon-Bang-Hyang [Blue Print for Korean Competition Law Development]' in Ohseung Kwon (ed), *Ja-Yoo-Kyung-Jaeng-Kwa-Gong-Jung-Go-Rae [Free Competition and Fair Trade]*, Bubmunsa, Seoul, 2002, page 55-6. In the 1990s, the average Concentration Ratio (CR) 3 of the business sectors that had market size over 112 million Korean Won was 72.6%, and the average Herfindahl-Herschman Index (HHI) of the same sectors was 3,260. The concern about economic concentration was brought especially in the industries such as oil refinery (CR3: 85.7%), automobile (94%), iron and steel (85.8%), and broadcasting and wireless communication (72.2%).

Through the Financial Crisis in 1997, the Korea Fair Trade Commission (KFTC) has revised its competition policy to a level stricter than that set out in the first legislation and has focused on preventing the anti-competitive abusive conduct of Chaebols.[4] Along with the regulation on abuse of dominance, the KFTC has tried to develop the regulation of vertical restraints. However, this remains one of the difficult subjects of its competition policy.

Although economic analysis is essential to assess the effects of vertical restraints,[5] a consensus view of the effects of such restraints in the Korean market has not yet emerged. Some critics argue that a mere legal reasoning or defective economic theory leads to several results that are detrimental to both competition and public policy.[6]

The improvement of competition policy on vertical restraints also raises other concerns such as the opening of the market to foreign competitors. This is because vertical arrangements in the domestic market are the gateway of international trade. Concerned about international trade, the KFTC is considering how the application of competition law can encourage domestic enterprises to compete vigorously with other foreign competitors. At the same time, it should ensure fair benefits for consumers and small and medium-sized enterprises (SMEs) from fair and free competition, as well as the encouragement of efficiency and innovation.

The globalization through international trade requires domestic competition law not to improperly weaken the potential for competitiveness of domestic enterprises.[7] Therefore, the KFTC should be concerned about its competition policy regarding international trade and economic growth. It is not difficult to imagine that the economy of a developing country such as Korea can be drastically influenced by international trade. Where a country heavily relies on efficient and effective international trade in order to achieve the goal of economic growth, a sound vertical regulation should be one of the most important parts in competition legislation. It flows from this that the relevant Korean authority for the application and development of competition policy should be taking into account the economic principles and evidence applicable to vertical restraints.

The KFTC has demonstrated willingness to proceed with regulatory reform with regard to vertical restraints. However, its legal provisions do not give clear guidance to competition lawyers and enterprises regarding efficiency-improvements. Unlike other competition regimes, the KFTC has not set an appropriate economic justification in order to achieve efficiency as a goal of competition law. The KFTC has also shown a lack of capacity in assessing the pro- and anti-competitive effects of vertical restraints. In particular, the *Anti-Chaebol* competition policy has not always had beneficial effects. Despite the necessity of the large enterprises' contribution to efficiency-improvement and economic development through vertical practices, the KFTC has not fully considered the problems in its regulation on vertical restraints. Its occasionally flawed decisions have resulted in harm to competition as well as to the economy. The KFTC should therefore examine closely whether it needs to balance efficiency and pro-competitive effects of vertical restraints, anticipating vigorous competition after market opening to foreign competitors –the so-called globalised competition.[8]

[4] There has been the criticism against the national Chaebol policy that the Financial Crisis was mainly brought by the Chaebols' excessive investment and market dominance.

[5] Vertical restraints are related to the supply of goods or services between enterprises that operate at different stages of a production and distribution. Whilst the main aim of anti-competitive horizontal agreements is a collusive strategy, the concern arising from vertical is an exclusive or foreclosing one. For the further discussion, see Michael D. Whinston, Lectures on Antitrust Economics, The MIT Press, London, 2006, page133.

[6] See Oliver Williamson, 'Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach', (1979) 127 University of Pennsylvania Law Review, page 953.

[7] See C.J. Green and D.E. Rosenthal (eds), Competition Regulation in the Pacific Rim, Oceana Publications, New York, 1996, Foreword. For further discussion about complementaries between international trade and competition law, see also Kevin C. Kennedy, Competition Law and The World Trade Organisation: The Limits of Multilateralism, Sweet & Maxwell, London, 2001, page 2-5.

[8] See Dong Won Suh 'Enforcement Direction of Competition Law' (2005) 4 Journal of Korean Law, page 29. The author argues the Korean economy has become exposed to international competition with acceleration of globalisation.

To achieve economic growth and solve the general problems in the KFTC's policy, this article aims at introducing a new model of regulatory reform of the Korean competition law and policy on vertical restraints. It first scrutinises whether the current Korean vertical regulation can satisfy the various tasks that should be achieved. Then it explains the failure of the KFTC's implementation of competition law to achieve the purposes of the law, especially to obtain economic growth through increased efficiency. Finally, it suggests an amendment to the Monopoly Regulation and Fair Trade Act (MRFTA),[9] the Unfair Business Practice (UBP) Guidelines,[10] and Resale Price Maintenance (RPM) Guidelines[11] by creating new guidelines on vertical restraints. This proposed amendment would result in the achievement of the various aims of economic and competition policy. This suggests that the KFTC needs to experiment with competition laws that are practised in other competition regimes which already have a long history of examining their competition theories and practices. The KFTC can be more effective by modifying its regulation through adopting legal techniques and models from other countries. This method of a comparative analysis is beneficial since different competition regimes around the world can offer a larger variety of solutions than could be made in a system within one country.[12]

2. Korean Competition Law and Policy on Vertical Restraints

(A) The various purposes of the Korean Competition Law

Article 1 of the MRFTA states the purposes of the Korean competition law. Its ultimate aim is to promote fair and free competition, which mainly focuses on restricting market dominance. By achieving this, competition law can attain the goals of (i) encouraging creative enterprises' activities, (ii) protecting consumers, and (iii) balancing development of national economy. Moreover, Article 119(2) of the Constitution of Korea[13] ensures the implementation of the MRFTA, articulating that the state may regulate and coordinate economic affairs to maintain the balanced growth and stability of the national economy.[14]

Because the large enterprises' market dominance had been created by the national economic policy and influenced the domestic market significantly, the KFTC has developed the law to prevent further market dominance at any cost –although its legal provisions may harm the national economy. This can, therefore, bring some arguments that the current Korean vertical regulation is inconsistent with the aims of total welfare achievement (features (i) and (ii) of the competition law stated above). Shortly after discussing this, this article will consider the aim (iii) of a balanced economic growth and stable national economy.

Firstly, the existing Korean competition law of vertical restraints does not encourage enterprising activities in the market because it does not provide a sufficient degree of tolerance of vertical arrangements that may improve inter-brand competition and efficiency. The regulation strictly curbs efficient vertical arrangements in the market if enterprises have some degree of market power.[15] It can be reasonable to apply competition law strictly where the market is evaluated as highly dominated by monopolists. However, along with this concern, the law also aims at encouraging enterprises' (including large ones) activities overall. The current law is, nevertheless, so strict on vertical restraints that it does not properly implement efficiency-led ideas which may encourage enterprising activities where

[9]Monopoly Regulation and Fair Trade Act (amended by law No. 9554, Mar. 25, 2009).
[10]Guidelines for review unfair business practice (KFTC established rule No. 26 of the KFTC amended on Mar. 11, 2005).
[11]Guidelines for review resale price maintenance (KFTC established rule No. 34 enacted on Aug. 30, 2006).
[12]See K. Zweigert and H. Kötz, An Introduction to Comparative Law, (3rd ed.) Oxford University Press, Oxford, 1998, page 3.
[13]Constitution of Republic of Korea (amended Oct. 29, 1987).
[14]Article 1 of the MRFTA further implies that the Korean competition law should prevent abuse of market dominance and excessive economic power of large enterprises and regulate improper concerted acts and unfair business practices. This is to guarantee a proper distribution of wealth, to thwart the market domination and the abuse of economic power, and to democratise the economy through the harmony amongst economic entities. Article 119(1) of the Constitution also declares constitutional provision to ensure the free and fair market. It states, 'the economic order of the Republic of Korea is based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs'.
[15]The KFTC provides some efficiency-led measures such as the UBP Guidelines, which will be discussed below. However, it does not give a sufficient degree of efficiency consideration compared with other competition regimes.

the enterprise has some degree of market power. If competition law is very strict on business activities based on the size of enterprise, despite its efficient activities such as vertical arrangements (for example, which may reduce transaction costs), the enterprising activities will be discouraged.[16] This problem can flow from the absence of a sufficient and effective presumption of market dominance based on a market share threshold test that can inform the balancing of pro- and anti-competitiveness by vertical restraints.

Secondly, the current strict rule on vertical restraints does not protect consumers' benefits –as required for the protection and development of consumer welfare. Exclusionary restraints may harm consumers where an enterprise has a significant market power.[17] However, the consumer welfare implications of most forms of business conduct of vertical restraints are beyond the knowledge of almost all lawyers and economists.[18] Vertical restraints, by decreasing intra-brand competition, provide consumers with valuable promotional information and services,[19] which increase inter-brand competition, enhance sales, and thereby increase consumer welfare. In the absence of vertical restraints, distributors will be unwilling to pay the cost of pre-sale services because other distributors can take a free-riding on the service investment. Economic approach theorists argue that the benefits to consumers from free-riders[20] with lower prices would be only on a short run basis.[21] In other words, although consumers may get benefits from free-riding distributors for their low price for a short run, it can harm more on the whole market and result in loss of consumer welfare in the long run. Even though the current guidelines of the KFTC illustrate some efficiency justification,[22] the criteria for exemption are not very clear. In particular, the KFTC's decision in *DPK International*,[23] a territorial restriction case, showed its lack of capacity in understanding this justification.[24]

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[16]Regarding transaction cost arguments, see R.H. Coase, 'The Nature of the Firm' (1937) 4 Economica, page 403. It is rational to assume transaction consideration to determine the size of the enterprise, the cost of marketing and competition law litigation. For example, an enterprise will not take a risk of high cost litigation although its practice is efficient.

[17]See V. Korah and D. O'Sullivan, Distribution Agreements under the EC Competition Rules, Hart Publishing, Oxford, 2002, page 2.

[18]See F.H Easterbrook, 'Vertical Arrangements and the Rule of Reason' (1984) 53 Antitrust Law Journal, page 153.

[19]See L.G. Telser, 'Why Should Manufacturers Want Fair Trade?' (1960) 3 Journal of Law and Economics, pages 86-90. For argument about the infra-marginal consumer against the pre-sale service theory, see also William S. Comanor, 'Vertical Price Fixing – Vertical Market Restrictions, and the New Antitrust Policy' (1985) 98 Harvard Law Review, pages 991-2.

[20]Free-rider or free-riding problem incurs where no economic entity is willing to contribute towards the cost of something when he or she expects that someone else will bear the cost in order to get benefits.

[21]See Richard A. Posner, Antitrust Law, (2nd ed.) The University of Chicago Press, Chicago, 2001, pages 171-6. However, some scholars disagree with this assertion. Because of imperfections in the market for consumer goods, there is no guarantee that restraints, by providing point-of-sale information and services, will necessarily increase consumer welfare. Competition in consumer good industries is by nature imperfect. See also Alden F Abbott 'Paradox Regained: Towards a "New Economic Approach" to Vertical Restraints Policy' (1980) 48 The George Washington Law Review 568-9.

[22]E.g., sec. III.1.A.(4) of the UBP Guidelines.

[23]The KFTC Decision 2000-163, 15 Nov. 2000.

[24]DPK International Co., the Domino Pizza franchisor, was found responsible of violating the law for its territorial restriction arrangement. Although DPK's vertical restraint could improve efficiency by improving inter-brand competition, the KFTC heavily relied on its inhibiting intra-brand competition. Moreover, DPK's market share was approximately 10% that was significantly lower than its competitor, Pizza Hut's 50%. For more discussion, see Sung-Un Yoon 'Franchise-Wa-Kyoung-Jaeng-Jae-Han [Franchise and Restriction on Competition]' in Ohseung Kwon (ed), Ja-Yoo-Kyoung-Jaeng-Kwa-Kong-Jung-Ko-Rae [Free Competition and Fair Trade], Bubmunsa, Seoul, 2002, pages 500-14.

Competition policy cannot be properly viewed in isolation. It should be considered as part of governmental micro- and macroeconomic policies in general, including industrial and international trade policies.[25] In examining competition policy in the terms of overall government policies, competition policy-makers should not assess market power only but also the consequences of regulation on pro-competitive business practices such as vertical restraints.[26]

The Korean competition law has not been considered as the means of promoting the development of national economy. The KFTC's policy has sought to balance the power of the *Chaebols* by fostering the emergence and support of SMEs. The KFTC has not sufficiently considered the improvement of international competition and economic growth through vertical restraints. The Korean competition authority is more concerned with vertical foreclosure and entry barriers than it is with efficiency. However, the aim of balanced economic growth cannot be achieved by a prohibition of large enterprises and the protection of SMEs but rather by a balanced approach to trade-offs between pro- and anti-competitiveness. Therefore, the KFTC should establish a fair trade order without impeding the growth of enterprises.[27] The KFTC should ask the right questions to elicit valuable guidance for harmonising the purposes of the Korean competition law.

(B) Argument for statutory reform

If the law is not appropriate to obtain the objectives of competition policy, it should be amended. This section contains a short summary and an evaluation of the framework of the Korean competition law on vertical restraints, and further considers two main issues: (i) the unclear standard of scrutiny, grounded mainly in the wrongful presumption of market dominance and (ii) the improper legal provisions to implement the law for balancing pro- and anti-competitive effects.

In overall, the legislation of the MRFTA has been somehow motivated by microeconomic considerations of efficient resource allocation and effective competition.[28] In addition, macroeconomic concerns such as international competition and economic growth have been adopted.[29] Accordingly, a general concept of the total welfare was laid down by the MRFTA as the criterion by which the KFTC was to assess the effects of exercise of market dominance. A result of this is that the vertical regulation under Articles 3-2, 19, 23, and 29 of the MRFTA has not fully developed in its implementation of the law.

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[25] See J. Vickers and D. Hay 'The Economics of Market Dominance' in D. Hay and J. Vickers (eds), The Economics of Market Dominance, Basil Blackwell, Oxford, 1987, page 2.

[26] Ibid, 3-4. The KFTC hardly considers that the exercise of vertical restraints with some market share may be used for pro-competitive purposes. The only solution for this is to find the best inference of economics and a comparative competition law study for examining whether vertical practices with some degree of market power can be neutral for promoting welfare and economic growth.

[27] See Young-Dae Lee 'How Many Magic Rings: Economic Review of Korean Antitrust Law' (2003) 9 Journal of Korean Competition Law, page 260.

[28] Kwon, *above* note 3, pages 82-9.

[29] The administrative policy of competition with macroeconomics has its long history. For example, even the statutes concerning price stability were legislated in the 1970s, e.g., the Price Stabilisation and Fair Trade Act (Law No. 2798, Dec. 31 1975). These statutes were, however, withdrawn shortly after legislation for the externality outcomes. This macroeconomic concern can be also observed in the M&A control. Under the efficiency defence of merger stated in sec. VIII. 1 of the M&A Review Guidelines (KFTC Guidelines No. 2007-12, 20 Dec. 2007), the KFTC offers exemption benefits on the mergers that may contribute to the national economy such as (i) job creation, (ii) development of regional economy, (iii) development in supply chain, (iv) stability of national supply (energy), and (v) elimination of pollution. For further discussion regarding the correlation between competition law and economic growth, see also Dina I. Waked 'Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law' (2008) 1 Global Antitrust Law Review, pages 73-7.

I. Articles 3-2, 19, 23, and 29 of the MRFTA

The first step in measuring the pro- and anti-competitiveness of a business practice which falls within the jurisdiction of a competition authority is assessing market power. If the enterprise does not have a significant market power, its vertical restraint may give pro-competitive benefits. However, the probability of its anti-competitiveness increases where the market power of the enterprise is significant.

Article 3-2 of the MRFTA prohibits abusive conduct of an enterprise holding a market dominant position.[30] Article 23 of the MRFTA also prohibits unfair business practices, regardless of whether these are unilateral or collusive.[31] Article 3-2 of the MRFTA, somewhat confusingly, overlaps with Article 23 of the MRFTA regarding vertical restraints such as refusal to deal, exclusive dealing, territorial restriction, and tie-ins.[32] Article 23 of the MRFTA prohibits anti-competitive and unfair business practices in general, irrespective of market share, hence preventing the further strengthening of a dominant position. Article 3-2 of the Act, on the other hand, prevents abusive conduct of a market dominant enterprise which is exclusionary in intent. Therefore, some scholars argue that there is a clear difference between these two provisions based on the fact that Article 23 of the Act is based on an *ex ante* approach but Article 3-2 of the Act is regarded as *ex post* provision.[33]

In particular, because of the different amount of fines which may be imposed for breaches of the two provisions, market dominant enterprises would have the incentive to take scrutiny under Article 23 of the Act rather than the scope of Article 3-2 of the Act. Traditionally, where an enterprise infringes both provisions, Article 3-2 of the Act foremost activates because Article 3-2 bears the privileged name of 'special provision'. Although the KFTC is supposed to apply one of two provisions to one case, it still opens a possibility of applying both provisions to one case. For instance, the KFTC found that *Microsoft Corp* had infringed both of Articles 3-2 and 23 of the MRFTA based on the fact that its tying practices extended to different products.[34] Therefore, this unclear-cut implementation can be used as a discriminatory and unfair measure against large enterprises.[35]

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[30]Article 5 of the Enforcement Decree of MRFTA (amended by Presidential Decree No 21148, Dec. 3, 2008) also illustrates the types of and criteria for abusive activities: (i) fixing, maintenance, or alternation of price, (ii) controlling output, (iii) hampering of business activities, (iv) hindering of market entry, and (v) exclusive dealing.

[31]This provision prevents most of the vertical restraints.

[32]See Jungwon Song, *Ca-Ru-Tel-Mit-Bul-Gong-Jung-Go-Rae-Haeng-Wui-Kyu-Jae [Regulations on Cartels and Unfair Business Practices]*, Parkyoungsa, Seoul, 2005, 486. The MRFTA has a similar statutory structure to the Japanese antimonopoly law (AML). Article 3-2 of the Act has its model from Article 3 of the AML in its prohibition of abuse of market dominance. However, some scholars argue that the form of Article 3-2 of the MRFTA was borrowed from the provision of Article 22 of the German competition act, *Gesetz gegen Wettbewerbeschänkungen (GWB)*. Others also explain that Article 23 of the Act is the influence of Section 5 of the US Federal Trade Commission Act. See also Y. Lee, above note 27, page 249.

[33]*Ibid*, Song, 485-6. In addition, the author argues that there is another distinction between Articles 3-2 and 23 of the MRFTA by the terms. Article 3-2 of the MRFTA is applicable only to enterprises with market dominance. Therefore, this provision is called, *Teuk-byol-kyu-jung* (special provision) for preventing market dominance. On the contrary, Article 23 of the MRFTA applies to all the enterprises including market dominant enterprises where they have businesses in the Korean market. Article 23 of the Act is, thus, named *Il-ban-kyu-jung* (general provision) which can be applicable to any enterprises. Hence, there is a possibility that an enterprise with a market power may infringe both of the Articles 3-2 and 23. In addition to this, there is another issue that can be created by the application of these two. The fine on the violation of Article 3-2 of the MRFTA is heavier than that of Article 23. The fine on the Article 3-2 violation is maximum 3% of the turnover which is more than that of Article 23 as its 2% of the turnover.

[34]The KFTC Decision 2006-42, 24 Feb. 2006. The KFTC decided that *Microsoft* coerced consumers to purchase other products by abusing its dominant position in the Windows PC system market, and it restricted consumers' choice to have a better quality product. This conduct, therefore, violated Article 3-2 of the MRFTA. Moreover, the KFTC condemned *Microsoft* impeded competition by tying and resulted in driving out its rivals from the market by establishing entry barrier, which infringed Article 23. This case is very abnormal comparing with the EC case of *Microsoft* (COMP/C-3/37.792, 24 March 2004) because *Microsoft* infringed only Article 82 of the EC Treaty based on the fact that it abused its dominant position though tie-ins.

[35]Because *Microsoft* dropped its appeal in 2008, it is difficult to observe the Korean courts' opinion about the KFTC's decision. Microsoft submitted a letter for the withdrawal of the legal suit, and the KFTC settled this case by agreeing to it. See KFTC, *Newsletter*, Issue 4, October 31, 2007, page 10, retrieved 11 March 2009. <http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=10>.

Article 19 of the MRFTA prohibits only horizontal agreements as a *per se* violation, and Article 23 of the MRFTA prevents anti-competitive and unfair business practices regardless of unilateral or collusive and also either horizontal or vertical. This provision may cause confusion to the economic entities with experience of competition law provisions outside Korea.[36]

Vertical restraints involving price continue to be per se unlawful under Article 29 of the MRFTA although a rule of reason approach is followed for vertical non-price restraints under the Article 23 of the MRFTA. Economic analysis supports this step in respect of vertical non-price restraints on intra-brand competition and would justify a similar approach for vertical restraints involving price where the resale price maintenance (RPM) is maximum or recommended. However, it is unclear whether Article 29 of the MRFTA is necessary to be applied when other provisions can cover vertical price cases. The KFTC can prevent anti-competitive RPM by Article 19 of the MRFTA because this provision already prohibits price fixing.

II. Presumption of market dominance: unclear statements creating uncertainty

The most troublesome question is the way to construe the most proper assessment of the relevant market and of market dominance. This question is essential to determine whether a business practice by way of a vertical restraint harms competition. To infringe Article 3-2 of the MRFTA therefore, an enterprise should be first presumed as a market dominant enterprise. The MRFTA states that an enterprise shall be presumed to be a market dominant enterprise where (i) the market share of one enterprise is 50% or more under Article 4(1), or (ii) the total market share of three or less than three enterprises is 75% under Article 4(2).

To illustrate an example regarding market share consideration under Article 4 of the MRFTA, presume there are five enterprises whose market shares in a certain relevant market are respectively, for instance, A: 45%; B: 25%; C: 16%; D: 9%; and E: 5%. In this case, Article 4(1) of the MRFTA cannot be applied since there is no enterprise with the market share over 50%. Therefore, only Article 4(2) of the MRFTA is applicable. Because the sum

[36]In the United States, Section 1 of the Sherman Act prohibits anti-competitive agreements and Section 2 prevents monopolisation and attempts to monopolise. EC competition law also has the provisions of Articles 81and 82EC Treaty for anticompetitive agreements and abuse of dominant position, respectively.. Nevertheless, the Korean competition law does not have this distinction.

of the A, B, and C's market shares is 76%, these enterprises are presumed as market dominant enterprises. Therefore, in this case, A, B, and C shall be regarded as market dominant enterprises. This presumption of market dominance under the law is not very practical, and Vertical restraints involving price continue to be *per se* unlawful under Article 29 of the MRFTA although *a rule of reason* approach is followed for vertical non-price restraints under the Article 23 of the MRFTA. Economic analysis supports this step in respect of vertical non-price restraints on intra-brand competition and would justify a similar approach for vertical restraints involving price where the resale price maintenance (RPM) is maximum or recommended.[37] However, it is unclear whether Article 29 of the MRFTA is necessary to be applied when other provisions can cover vertical price cases. The KFTC can prevent anti-competitive RPM by Article 19 of the MRFTA[38] because this provision already prohibits price fixing.

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[37]Vickers and Hay, *above* note 25, page 7. See also Keith N Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, Cambridge University Press, Cambridge, 2003, pages 257-61.

[38]Article 19 of the MRFTA prevents only horizontal price-fixing. However, if Article 19 prohibits any price restraints regardless of horizontal and vertical, it will be the major RPM provision. This issue will be further discussed below.

[39]This presumption test can be made after market definition.

[40]However, those whose market share is less than 10% shall be excluded under so-called *de minimis* rule. Addition to market share, according to the sec. III of the guidelines for review abuse of market dominant position (Notification No. 2002-6, amended on May 16, 2002), the KFTC considers following factors to decide market dominance: (i) entry barriers, (ii) rival enterprises' market power, (iii) possibility of collusion, (iv) substitutability of goods and services, (v) market foreclosure, (vi) financial strength, and (vii) other considerations such as possibility of changing trading partners.

[41]Because D and E's market shares are less than 10%, they will not be presumed as market dominant enterprises.

[42]See also Sang-Yong Park and Ki-Sub Um, *Kyoung-Jae-Bub-Wol-Lon [Principles of Economic Law]*, (2nded.) Parkmunsa, Seoul, 2006, pages 72.

neither effectively prevents anti-competitive abusive conduct of market dominance nor improves efficiency by vertical restraints. For example, enterprises B and C can infringe Article 3-2 of the MRFTA despite their small market shares (25 and 16% respectively) which are not very influential in the market.[43]

The guidelines for the review of abuse of market dominant position[44] provide various methods to examine market dominance along with the market share test. However, because the market share guidance is the most important factor, the supplementary factor criteria are not very helpful when the KFTC heavily relies on market share test. The KFTC has not established a clear statement of threshold for presumption of market dominance although the market share test is the foremost criterion for presumption in the test of market dominance.[45] This unclear market dominance test generates uncertainty in the implementation of the MRFTA. To estimate the margin from trade-offs between pro- and anti-competitive effects by vertical restraints, a market share threshold test is crucial for granting legal certainty.

3. Theory of Vertical Regulation Reform

(A) Amendments to statutes

I. Articles 3-2, 4, 23 and 29 of the MRFTA

In vertical cases, the absence of market power may often be the determinative issue.[46] The simplest solution would be to presume the legality of all vertical restraints based on market power, and therefore, the market share threshold test is the centre of assessing market power.[47] The test of dominance based on a certain standard of market share would eliminate the ambiguity in litigation. The presumption of market dominance regarding market share is, therefore, very important in distinguishing Articles 3-2 and 23 of the MRFTA. The difference between unilateral and concerted actions is irrelevant based on the definition of a market dominant position in this distinction.[48] Because market dominance distinguishes the application of Articles 3-2 and 23 of the MRFTA, a presumption of market dominance would need to enquire into the real pro-competitive effect on the market. Although the KFTC is concerned about the market concentration problem, enterprises with less than a 50% market share should be presumed to have no significant market power.

Most of the foreign competition regimes do not usually have a presumption of market dominance according to a market share threshold test determined by statute.[49] However, the

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[43] E.g., *Interpark G Market Corp.*, KFTC Decision 2007-555, 18 Dec. 2007.
[44] KFTC Notification No. 2002-6 (amended on May 16, 2002).
[45] The UBP Guidelines provide safety zone of 10% market share threshold as the block exemption measure for some vertical arrangements. However, this clause simply overlaps with the exemption of Article 4 of the MRFTA.
[46] See E. Elhauge and D. Geradin, *Global Competition Law and Economics*, Hart Publishing, Oxford, 2007, page 451.
[47] However, the enterprises' collective action in distribution should be condemned as *per se* violation under Article 19 of the Act.
[48] This is because horizontal concerted action is the *per se* violation under Article 19 of the MRFTA.
[49] Elhauge and Geradin, *above* note 46, page 236. The EC and US competition regimes do not have a particular regulation for this. However, Japanese competition authority imposes special remedies to under the existence of a monopolistic situation. Market dominance is defined to exist when an enterprise has a market share over 50% or two enterprises' is over 75% under Sections 2(5) and 3 of the Japanese AML. This market dominance presumption is similar to that of the MRFTA.

case law in the EC and US regimes indicates the concern of assessing market power and dominance. The US Supreme Court has designated that market shares above 66% indicate monopolistic position.[50] In the EC regime, the European Court of Justice (ECJ) also held in *Hoffman-La Roche*[51] that a highly important factor for the presumption of market dominance is the existence of very large market shares.[52] In *AKZO*, the ECJ referring to *Hoffman-La Roche* indicated that 50% of market share could be considered as very large, thus will create a presumption of market dominance. Moreover, according to the guidance issued by the Commission on the application of Article 82, the extension of the market share and the length of the of time that such market share has been held in market operates as an indicator of the existence of dominance, although other market considerations should be taken into consideration[54] . This would be the case where an undertaking holds more than 50% market share.[55]

As seen in the two regimes, less than 40% of market share would not indicate market dominance although the other factors can also be considered for the presumption of market dominance. Unlike the KFTC's, moreover, both competition regimes do not necessarily indicate the total market share of a certain number of enterprises, the so-called concentration ratio (CR) test to presume the enterprises' market dominance.[56] The approaches of these two regimes are successful in inducing creative business activities at a vertical level and may also give a legal certainty in vertical cases along with the development of case law by *the rule of reason* and *per se rules*.[57] The Korean competition system has not borrowed the idea of tolerance in vertical cases,[58] and the KFTC continues to condemn enterprises with some degree of market power where vertical restraints are imposed. Although the Korean market is more concentrated than other developed countries, the KFTC can still apply the similar market dominance presumption as long as the domestic market is open to international competition.

[50] *Ibid*, page 245. See also Andrew I. Gavil 'Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance' (2004) 72 Antitrust Law Journal, pages 11-2. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 76 S. Ct., 1264 (1956) at 379, observing that *du Pont* produced 75% of the cellophane sold in the US and that the enterprise may be presumed to have monopoly power; *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072 (1992) at 481, holding that a 80-95% market share is enough to survive summary judgment, and describing a prior case as holding that over two-thirds of a market is a monopoly; *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S. Ct. 632 (1911), over two-thirds of the market and over 80% of the field of comparable cigarettes constituted a substantial monopoly.

[51] Case 85/76, *Hoffman-La Roche & Co AG v Commission*, [1979] ECR 461, [1979] 3 CMLR 211.

[52] Elhauge and Geradin, *above* note 46, page 246; Einer Elhauge 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review, page 259. In this case, ECJ stated that the existence of a dominant position may also derive from several factors. The enterprise had approximately from a 75 to 87% market share.

[53] Case C-62/86, *AKZO Chemie BV v Commission*, [1991] ECR I-3359.

[54] Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings COM (2008), paragraph 15..

[55] From the Commission perspective, a firm holding a market share of 40% or below is not likely to have dominant position, yet possible under certain circumstances. See *Ibid*, paragraph 14.

[56] See R. O'Donoghue and J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006, page 115; Femi Alese, *Federal Antitrust and EC Competition Law Analysis*, Ashgate, Hampshire, 2008, pages 187-203. Although the EC Commission does not take into account this CR test, it examines competitor's market power. In general, the EC Commission has considered market dominance where the market share difference between the dominant enterprise and its next largest competitor is to exceed 20%.

[57] The Korean competition authority and the courts adopted *the rule of reason and per se rules* from the US regime only. The EC regime does not accept *the rule of reason*, e.g., Case T-528/93, *Métropole Télévision SA v. Commission* [1996] ECR II-649, [1996] 5 CMLR 386. The Court of First Instance (CFI) expressly rejected *the rule of reason*.

[58] Some critics may argue that the safety zone in the UBP Guidelines indicates the idea of tolerance on vertical restraints. However, it merely offers a 10% market share threshold test that may be considered as only *de minimis* rule.

Article 4 of the MRFTA states that (i) 50% of market share of a single enterprise, or (ii) 75% of the total market share of three or less enterprises (CR3) will create a presumption of market dominance. The KFTC's approach may create a risk of condemning an enterprise whose practices do not harm competition in the market where the enterprise has less than 50% market share. Therefore, the KFTC should remove the presumptive provision of CR3 in the second limb of the test, although the rest of the presumption could be retained.

Whilst examining abuse of dominance at a horizontal level, the presumption of market dominance can still be positioned more strictly than the vertical one even if the KFTC sets a 50% market share presumption. It is reasonable for the KFTC to condemn an enterprise's practices where that enterprise maintains a market share of between 30% and 50% in horizontal or unilateral cases. The KFTC should also design new guidelines on abuse of market dominance, stating a special clause of tolerance for vertical cases. It should provide a legal measure stating that a market share of less than 50% in vertical cases may not create a presumption of abuse.

To sum up the suggested amendment, in order to establish the presumption of market dominance under the MRFTA, (i) an enterprise should have 50% of market share in the relevant market regardless of being a horizontal or vertical level and (ii) enterprises with less than 10% shall receive the benefits from *de minimis* exemption under Article 4 of the MRFTA. Additionally, under the guidelines on abuse of market dominance, the KFTC may prevent acts of an enterprise with a market share of between 30% and 50% only in horizontal cases. However, an enterprise whose market share does not fall within Article 4 of the MRFTA and of the guidelines may still violate Article 23 of the MRFTA. Then, an enterprise with a market share of less than 30% could receive an automatic exemption of both provisions where the practice is vertical except hard-core restrictions.[59]

It is also necessary for the KFTC to consider its change of RPM policy.[60] The economic consequences of RPM are not undesirable in almost all circumstances because most are beneficial to consumers, distributors, and manufacturers alike.[61] In particular, the MRFTA is almost the only competition legislation that maintains a statutory provision for RPM practices by authorisation. As an example in another regime, the US Congress once gave the competition authorities the power to authorise RPM within their state borders in 1937,[62] responding to the US Supreme Court's *per se* judgment in *Dr. Miles*.[63] Forty years later, the

[59]This block exemption regulation for the vertical practices with 30% market share and hard-core restrictions will be considered below.
[60]For more discussion about the Korean RPM provisions, see Ho Young Lee, *Dok-Jum-Kyu-Jae-Ui-Ie-Ron-Kwa-Sil-Jae [Theory and Practice of Monopoly Regulation and Fair Trade Act]*, Hongmunsa, Seoul, 2006, pages 388-98.
[61]Easterbrook, above note 18, 156. See also Walter Adams 'Resale Price Maintenance: Fact and Fancy' (1955) 64 *The Yale Law Journal*, page 974.
[62]The Miller-Tydings Act of 1937, 50 Stat. 693. See also Rudolph J.R. Peritz, *Competition Policy in America: History, Rhetoric, Law*, Oxford University Press, Oxford, 1996, pages 153-6.
[63]*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376 (1911).

regulation for authorisation was withdrawn.[64] The US courts, however, again recognised RPM including minimum RPM as one of the efficiency-enhancing practices like other types of vertical non-price restraints.[65] In the *Leegin* case,[66] the US Supreme Court abandoned the *per se rule* for minimum RPM and held that the *Dr. Miles* precedent should be overruled and judged by *the rule of reason*.

The KFTC added the RPM provision, although Article 19 of the Act already prohibited price fixing as a *per se* violation. Since RPM practices in some cases –except minimum RPM combined with market power– are pro-competitive, the KFTC should withdraw the current provision of Article 29 of the MRFTA.[67] The existing provision simply gives the KFTC an exemption power regarding a certain type of vertical price practice, especially in, for example, the publishing industry.[68] However, this regulatory provision does not give a further efficiency-enhancement and may impede pro-competitive practices, for instance, in franchise contracts that require an RPM practice to prevent free-riding.[69]

In conclusion, the KFTC should provide more flexible guidelines for RPM practices, which allow enterprises to benefit from the operation of *a rule of reason*. Despite some *rule of reason* judgments of the courts on RPM,[70] the KFTC still continues measuring the RPM under a strict rule. Subsequent economic literature and other competition regimes' current approach to vertical price restraints (including minimum RPM) have focused the attention, in a more sophisticated manner, on the efficiency issue.[71] If Article 19 of the MRFTA replaces the current Article 29 of the MRFTA, the RPM Guidelines should also be withdrawn.[72]

II. Articles 19 and 23 of the MRFTA

To create a new Korean vertical regulation, the KFTC should provide a clear legal measure relating to vertical agreements. In particular, it needs to create a separate legal provision on vertical cases from that contained within Article 23 of the MRFTA. Other competition regimes have drawn clear distinctions between two legal provisions: (i) preventing unfair or anti-competitive agreements regardless of horizontal or vertical and (ii) preventing market dominance or monopolisation. This measure can give a clear picture to enterprises and

[64] The *per se rule* was restored for all states by the Consumer Goods Pricing Act of 1975, 89 Stat. 801 after its withdrawal. See H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (3rd ed.) Thomson West, St. Paul, 2005, pages 55-6.

[65] *Ibid*, pages 471-9. The author illustrates the historical development of RPM in the US.

[66] *Leegin Creative Leather Products, Inc. v. PSKs, Inc*, 551 U.S. (2007).

[67] See Ohseung Kwon, 'Retrospect and Prospect on Korean Antitrust Law' (2005) 4 Journal of Korean Law, page16. The author argues Article 29 MRFTA should be withdrawn since Article 23 MRFTA rather than Article 19 covers RPM cases.

[68] Article 43 of Enforcement Decree of Monopoly Regulation and Fair Trade Act (amended by presidential decree No. 21148, December 3, 2008).

[69] The present Fair Franchise Transactions Act (amended by the law No. 8630, August 3, 2007) covers franchise cases. Under Article 12(1) of Franchise Act, vertical restraints such as refusal to deal, territorial restrictions and etc. are prohibited. This Act foremost applies where both of Article 23 of the MRFTA and Article 12 of the Franchise Act are applicable.

[70] *Namyang Dairy Products Co., Ltd v. KFTC*, Supreme Court 99*Du*11141, 24 Dec. 2001; Maeil Dairy Industry Ltd v. KFTC, Supreme Court 2000Du1829, 31 May 2002. However, the judgments in these cases do not give a clear efficiency-justification but indicate the criteria of coerciveness in the RPM cases.

[71] G.A. Hay 'Vertical Restraints After Monsanto' (1985) 70 Cornell Law Review, page 422.

[72] For further arguments, see Ho Young Lee, 'Su-Jik-Jeok-Go-Rae-Jae-Han-Ui-Kyu-Jae [Restrictions on Vertical Restraints in Korea]' in Ohseung Kwon (ed.), *Gong-Jung-Go-Rae-Wa-Bub-Chi [Fair Trade and Regulation]*, Bubmunsa, Seoul, 2004, pages 622-3.

competition lawyers. However, since Article 19 of the Act covers only horizontal cases,[73] it may create uncertainty to enterprises. Moreover, Article 19 of the MRFTA does not clearly state that it is only applicable to horizontal agreements despite the KFTC's implementation of the restriction merely to horizontal concerted acts.[74] Therefore, the KFTC can maintain Article 23 of the Act as a provision for preventing unfair and anti-competitive practices regardless of whether these are unilateral or concerted, and should apply Article 19 of the MRFTA to horizontal and vertical cases.[75]

If the KFTC amends its implementation of the law to both horizontal and vertical actions, it should also revise Article 19(2) of the MRFTA. This provides exemptions where the business practices satisfy the criteria of industrial rationales, such as the promotion of research and development (R&D) or the enhancement of the SMEs' competitiveness with the authorisation of the KFTC.[76] The KFTC should amend this exemption provision from a method of notification to a system of block exemption. The KFTC, then, needs to provide new vertical guidelines to illustrate detailed criteria in offering block exemptions.

The KFTC could usefully adopt the method set out in Article 81(3) of the EC Treaty.[77] This exemption is granted if the agreement contributes to improving the production or distribution of goods or promoting technical or economic progress, whilst allowing consumers a fair share of the resulting benefits. However, this exemption cannot be allowed where: (i) the agreement is not indispensible to the attainment of these objectives or (ii) there is a possibility of eliminating competition in respect of a substantial part of the products.[78] This provision along with the EC Regulation 2790/99[79] (EC vertical regulation) can give a guarantee of pro-competitive results in relation to vertical arrangements. The KFTC can uphold Article 19 of the MRFTA for vertical cases with a slight amendment to its exemption clause. If the KFTC implements Article 19 of the MRFTA for controlling vertical agreements, its legal provision should ensure the block exemption that is indispensible for the market, which will subsequently reduce the administrative costs.

[73]Article 19 of the Act prevents (i) price fixing, (ii) determining terms and conditions, (iii) limiting outputs, (iv) territorial restrictions, (v) prevention of facilities, (vi) restriction of types of products, (vii) jointly managing main parts of business, and (viii) any practice lessening competition.

[74]H.Y. Lee, *above* note 72, pages 617-8.

[75]See Min Ho Lee 'Recent Developments in the Treatment of Collusion by Korean Courts' (2005) 4 Journal of Korean Law, page 159.

[76]Article 19(2) of the MRFTA gives exemption benefits to horizontal agreements from authorisation by the KFTC where the practices are for (i) industry rationalisation, (ii) R&D improvement, (iii) resolving economic depression, (iv) industrial restructuring, (v) rationalisation of international terms and conditions, and (vi) enhancement of SMEs' competitiveness. These terms and expressions are not very clear to justify the arrangements for both of horizontal and vertical agreements. The KFTC offers details of criteria for exemption through the sec. III of the guidelines for review cartel [amended on December 21, 2007]. Nevertheless, this guidance of balance test of anti- and pro-competitive effects is not also clear. Moreover, this guidance is only for horizontal cases.

[77]The prohibition of agreements contained in Article 81(1) EC Treaty is tempered by Article 81(3), which provides that an arrangement infringing that prohibition may still benefit from exemption.

[78]For further discussion, see Wolfgang Kerber and Simonetta Vezzoso 'EC Competition Policy, Vertical Restraints, and Innovation: An Analysis from an Evolutionary Perspective' (2005) 28 World Competition, pages 510-2; Joanna Goyder, *EU Distribution Law* (4th ed.) Hart Publishing, Oxford, 2005, 30-2; Richard Whish, *Competition Law* (6th ed.) Oxford University Press, Oxford, 2009, pages 151-61.

[79]Regulation 2790/99 OJ L336/21 on the application of Article 81(3) of the Treaty to categories of vertical agreements.

To conclude, vertical agreements that can benefit from exemption under Article 19(2) of the MRFTA should be considered lawful if the practice satisfies the following criteria: (i) an enterprise entering into vertical restraints lacks market power under the definition set by Article 4 of the MRFTA; and the agreement should either (ii) improve production and distribution, (iii) enhance R&D, (iv) promote state economic development, (v) improve competitiveness of SMEs; and (vi) should not increase its benefits by harming consumers.[80] The amendments to Articles 3-2, 4, 19, and 23 of the MRFTA can give Article 3-2 of the MRFTA a full authority to curb anti-competitive abusive conduct by dominant enterprises. Then, Article 23 of the MRFTA will be considered as a provision for unilateral or concerted acts which do not infringe Article 3-2 of the MRFTA where the enterprise is not market dominant. Moreover, Article 19 of the MRFTA will prevent anti-competitive agreements regardless of whether these are horizontal or vertical and regardless of market share. Often the best the KFTC can do is to offer a guidance of possibilities of some pro- and anti-competitive effects by vertical restraints. When the anti-competitive explanations have been eliminated, the pro-competitive explanations remain.[81] For this reason, the KFTC should provide new guidelines for the application of Article 19 of the MRFTA to vertical restraints (hereafter, new vertical guidelines) that ensure efficient and pro-competitive vertical arrangements.

(B) Modernisation: New Vertical Guidelines

I. One-Size Fits-All Approach

The UBP and RPM Guidelines do not have an adequate level of balancing pro- and anti-competitiveness of vertical restraints. They can be replaced by the new vertical guidelines which cover both vertical price and non-price restraints. The new guidelines can allow an efficiency justification for vertical restraints. For the progressive development of the new vertical guidelines, the KFTC should distinguish between price and non-price restraints.

Regarding non-price restraints, the KFTC needs to, firstly, illustrate how they might encourage distributor investments to develop demand for manufacturers' goods in the relevant market.[82] Secondly, the KFTC should scrutinise whether vertical non-price restraints may result in the promotion of inter-brand competition. All these pro-competitive justifications resonate as persuasive with competition lawyers and economists because the enterprises' incentives give them more confidence in their business profits.[83]

With regard to the vertical guidelines for price restraints, the guidelines should articulate that certain restraints, such as minimum RPM with some degree of market power, should be regarded as quasi-*per se* violations of hard-core restriction. This standard does not have to require pre-existing market power. It allows for the possibility that an enterprise that does not possess significant market power will acquire it through a vertical arrangement by increasing

[80] Easterbrook, *above* note 18, page 159. The author's suggestion of several vertical exemption criteria can be considered in the Korean regime.
[81] *Ibid*, page 145.
[82] Elhauge and Geradin, *above* note 46, page 651. The authors assert that a price restraint could not accomplish the same thing because the manufacturer could later add extra dealers who could free-ride on the investment and erode it with non-price competition or the manufacturer might adjust (or fail to adjust) future price.
[83] *Ibid*.

the competitors' distribution costs.[84] For that reason, it does not require evidence that the enterprises have a significant market power at the time the agreement is entered into. Such an approach does, however, require evidence that the minimum RPM is likely to enable an enterprise to raise prices above the competitive level by raising entry barriers, driving rivals from the market, or increasing competitors' distribution costs.[85]

II. New safe harbour: market share threshold test

The central issue under the new guidelines will be to solve the problems of trade-offs between pro- and anti-competitive effects. Competition policy-makers should examine the market power and anti-competitive effects to allow for positive effects of vertical restraints. To establish a certainty in efficient vertical practices, the KFTC should examine the market share threshold test. It therefore should create a new safe harbour of the 30% market share threshold test to fit into the more inter-brand-competition-justified policy based on the certainty. This safe harbour provision is praised in another competition regime. The EC competition regime provides a good example of competition policy on vertical restraints.

Article 81(1) EC prohibits vertical agreements which may affect trade between Member States and which distorts competition within the Common Market. However, Article 81(3), the EC vertical regulation, and the EC vertical guidelines[86] provide exemptions from specific categories of vertical restraints and concerted practices.[87] The European Commission is aware that vertical restraints can have negative effects on competition only where significant market power exists.[88] The market share threshold test is, therefore, important to prevent possible abuses since it is more likely for undertakings to get exemptions by the tolerant policy on vertical restraints.[89] This approach also gives a legal certainty. These provisions not only prevent possible abuses of an enterprise's market power but also allow economic justification for reasonable business practices.[90]

[84] For further discussion of raising rivals' costs, see Steven C. Salop and David T. Scheffman 'Raising Rivals' Costs' (1983) 73 The American Economic Review, pages 267-71; Thomas G. Krattenmaker and Steven C. Salop 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96 The Yale Law Journal, pages 230-49.

[85] See Kevin J Arquit 'Market Power in Vertical Cases' (1992) 60 Antitrust Law Journal, page 930.

[86] Commission Notice, Guidelines on Vertical Restraints [2000] OJ C 291/01, [2000] 5 CMLR 1074.

[87] *De Minimis* Notice [OJ 2001, C368/13] also gives sufficient guides of safe harbour rule for vertical agreement exemptions. If the parties' market shares do not fall within the *De Minimis* threshold, they should be determined by the EC vertical regulation.

[88] See V. Verouden 'Vertical Agreements and Article 81(1) EC: The Evolving Role of Economic Analysis' (2003) 71 Antitrust Law Journal, pages 526-7. Where an undertaking's market share does not exceed 30%, it will get block exemption benefits unless the agreement contains hard-core restrictions such as minimum RPM or absolute territorial restriction.

[89] This EC Commission's approach to vertical restraint justification is clearly explained in the para.116 of the EC vertical guidelines. The EC Commission recognises the free-riding problem enough to justify vertical restraints that do not harm competition in the market. Nevertheless, to justify vertical restraints regarding the free-riding problem, the EC Commission is concerned more about pre-sale services. Therefore, free-riding justification might not apply to after-sale services.

[90] The US Department of Justice also used to have guidelines for vertical restraints, providing market share threshold test. The now-withdrawn 1985 Vertical Restraints Guidelines of the Department of Justice utilised a screen of 10-20% for territorial and customer restraints, exclusive dealing, and 30% for tying. See Charles F Rule 'Statement of Charles F. Rule Acting Assistant Attorney General Antitrust Division before the Committee on the Judiciary United States Senate Concerning the Justice Department's Vertical Restraints Guidelines on July 16, 1985' (1985) 54 Antitrust Law Journal, page 381.

The EC regime's provision is suitable for the Korean market since it gives more legal certainty and also flexibility in application of the law by means of the 30% market share threshold test. For that reason, an appropriate degree of market share threshold test should be included as the core part in the new vertical guidelines in order to give a certainty of enterprises' business practices.

III. Criteria of Anti-Competitiveness Presumption

The KFTC has to examine the degree of market power held by a company in vertical cases, nevertheless market power cannot be the only facet of its analysis. As a practical matter, the KFTC's analysis may often reach the same results as a market power screen, but it should involve a more sophisticated economic analysis that has as its goal the measurement of each restraint's economic effect on the competitive process. The KFTC needs to focus on inter-brand competition, specifically in horizontal cases –at either the manufacturer or the distributor level. It recognises that vertical restraints may facilitate collusion as well as enhance or protect a single enterprise's market power. Therefore, the standard in the new guidelines should consider all potential anti-competitive aspects of vertical restraints. The KFTC also has to list restrictions on minimum RPM with market power and non-price restraints with RPM, and should be hostile to these business practices although they may be only intra-brand restraints. Along with this hard-core restriction, the KFTC should consider other factors that may significantly impede competition through vertical restraints.

Certain vertical restraints with some market power can improve inter-brand competition. However, there is still a risk of excessive anti-competitive effects where the enterprise leverages horizontal or vertical market power through vertical foreclosure; the raising of entry barriers; and collusion. These, certainly, have a negative impact on competition, which the KFTC should be most concerned about.

In addition, the new guidelines should include the criteria for analysing whether there are less restrictive means as alternative to restraints.[91] Despite the possible anti-competitive effects, restraints in certain circumstances generate valuable information and services by preventing free-riding. Recognising the value of such information and services, the KFTC can be reluctant to strike them down unless less drastic means for generating the same information and services are available.[92] If there is an alternative mean of providing the same pro-competitive effect or efficiency, the KFTC should prevent these vertical restraints.[93] The new guidelines should include all of the considerations and criteria for the harmful factors by vertical restraints.[94]

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[91]This clause can be followed by the similar way in Article 81(3) EC Treaty.

[92]Abbott, *above* note 21, page 579.

[93]*Ibid*, pages 582-3.

[94]An efficiency presumption is important to provide the main framework of the new guidelines, but the efficiency justification can be subject to challenge with regard to strategic purposes and oligopolistic relations. For further discussion, see also Oliver Williamson, *Antitrust Economics: Mergers, Contracting, and Strategic Behavior*, Basil Blackwell, Oxford, 1987, pages 128-30.

4. Conclusion

The Korean market has traditionally been considered as excessively concentrated by a few large enterprises, and the existing legal provisions on vertical restraints have not promoted efficiency and pro-competitive activities for this fear. The KFTC has not established satisfactory theories of vertical restraints and has shown its unfledged implementation of the law. Because the Korean competition law sufficiently controls market dominance and economic concentration, the KFTC's unnecessary concerns about vertical restraints can impede pro-competitive effects. Furthermore, the KFTC does not clearly implement the law in the context of economic theory, although some cases could have been covered by efficiency theories.[95] These cases still illustrate that the courts and the KFTC should develop their rationale to reach the evidentiary argument for vertical restraints. Although the KFTC's decisions in some cases were founded on economic theory, it has a long way to go to reach a sufficient level of efficiency-enhancement. The KFTC should bear this burden since its wrongful decisions may create a significant amount of costs to enterprises.

This article has considered the further development of vertical regulations in a way that may fit into the aims of the Korean competition law and national economy. However, several issues still remain unsolved. No satisfactory consequences will be reached until the courts carry out a comprehensive analysis of vertical restraints. A full economic enquiry into the actual impact of every vertical restraint would place a burden on the courts.[96] However, the retreat from the rigid rules by amendment will offer a potential change in examining vertical restraints. Then, the courts' analysis will play a relatively major role.

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[95] E.g. some RPM cases regarding pre-sale services, *L'Oreal Korea*, KFTC Decision 2002-368, 24 Dec. 2002; *Audi Volkswagen Korea Corp.*, KFTC Decision 2008-477, 31 Oct. 2008.

[96] G.A. Hay, *above* note 71, pages 444-5.