

Soo Jin Kang
Director of Litigation Office

Ensuring due process of law is a basic requirement to realize the rule of law. Particularly in a competition law case, there is a strong need to provide the concerned parties with an adequate and fair opportunity to make their own arguments, since a fierce debate on legal and economic issues often arises and even experts are divided on whether the concerned act infringes the competition law.

As competition authorities around the world reinforce enforcement against antitrust violations of multinational companies, those companies should inevitably be subject to different administrative and judicial system of each country. This raises concerns over unjust treatment that might be given to the companies in terms of law enforcement and the legal system itself. In this regard, the ICC Best Practices are expected to serve an important role, providing unified guidelines in competition law enforcement proceedings.

Recognizing this, the Korea Fair Trade Commission (KFTC) has continued to make effort to ensure transparency, fairness and efficiency in the decision-making procedures.

Moreover the Korean court, which is in charge of interpreting the law in the final phase, maintains the stance that a decision of the KFTC which does not satisfy procedural requirements, even though it is practically valid in subject matter, is unlawful.

I would like to introduce several KFTC procedures relating to ICC Best Practices' transparency, engagement and other requirements and suggest several ideas.

First, Transparency Requirement

Case-handling procedures of the KFTC are governed by the “Monopoly Regulation and Fair Trade Act”, its enforcement decree and “Regulation on Operation of KFTC Meetings and Case-handling Procedures.

The KFTC can investigate cases *ex officio* where there is a suspicion of violation of the competition law. In addition, any person who suspects a violation of the law may submit complaints to the Commission.

If the KFTC detects unlawful anticompetitive activity or receives a complaint, it conducts a preliminary examination to decide whether the case requires an investigation by the KFTC.

Once the examination of a case is launched, an official designated as an Examiner conducts investigation to collect evidence and assesses the conduct based on the applicable law. For this, the investigation officers from the KFTC may conduct on-site investigation at an office or business place of the relevant company or business association and take statements from the parties subject to investigation or interested parties. Also, the examiner may order the concerned company to submit documents or other materials deemed necessary for the investigation and retain them if necessary.

An examiner shall conduct an investigation within the minimal scope of the authority deemed necessary for competition enforcement. In the case where the investigator carries out on-site investigation, he shall give advance notification in writing, informing the party of the purpose, period and place of the investigation. The investigation shall be carried out within the purpose and period set forth in that notification.

In the case where the examiner finds violation of the law and, consequently, corrective measures are considered necessary, the examiner draws up an Examination Report and files them with the Commissioners of the KFTC.

The report shall include an overview of the case, structure and condition of the relevant markets, factual statement of committed act and its anti-competitiveness, laws and provisions alleged to be violated, the Examiner's suggestions on the measures to be taken against the violation and other relevant documents as attachment.

Two weeks are given in principle for the respondent to reply to the Examination Report, but it can be adjusted flexibly depending on the situation. For example, where the parent company of the respondent is located in a foreign country or the case is complicated, the period can be prolonged. The respondent can also request the extension of the period.

After an Examination Report is filed, hearing is carried out in either a "plenary session" where all of the nine commissioners participate or a "chamber session" where the three of them are present, depending on the significance of the case.

In principle, the case presented to the Committee is referred to a hearing within 30days after replies of the respondents are received (Article 31 of the Regulation). The date of the hearing is notified to the defendant at least five days before the hearing according to Article 33 of the Regulation.

Procedures of hearing are similar to those of court trials. The proceedings involve identification questioning, opening statement (Examiner), counter statement (respondent), Commissioners' examination, Examiner's suggestion on the corrective measures, and closing statement by Examiner and respondent.

The time limit to the investigation or case handling process is not set in the law, except for preliminary merger review and a re-hearing case. The

decision of the former shall be made within 30 days from filing of a pre-merger notification and within 60 days for the latter. The period can be extended up to 90 and 30 days, respectively.

Furthermore if five years or more have passed since violation of the law, the KFTC shall neither take corrective orders nor impose surcharges for the offence.

After the hearing, commissioners make a decision on the measures to be taken against the respondent by agreement. If it is determined that there was a violation of the law, the commissioners may take corrective measures, impose surcharges or refer the case to the prosecutor's office for criminal investigation and prosecution. If it is decided that the defendant violated the law, but the violation is negligible, the committee may issue a warning.

Any person has access to decisions of the KFTC through its website. In principle, the disclosed decision does not include personal and confidential business information. The written decision is served on the respondent explaining in detail the penalty imposed on the defendant and the grounds for such determination.

A respondent who is dissatisfied with the decision by the KFTC may file a request for re-hearing to the KFTC within 30 days from the receipt of the written decision.

In the case where the person wants to file an appeal to the appellate court, the person shall file a lawsuit to the Seoul High Court within 30 days from the receipt of a written decision of the KFTC or KFTC decision on the re-hearing result

Comment

As shown above, KFTC's statutory provisions on the enforcement procedures seem to be quite clear judging from ICC's transparency standard.

Also, Korean court has the authority to make a final ruling when there's a discrepancy between superior and subordinate laws or vagueness of legal provisions. In most cases, the court tends to construe the statutory provisions in favor of respondent to the extent possible, indirectly encouraging the competition agency to try harder to clarify vague legal provisions.

For example, the previous regulation under "the notice on surcharge imposition" stated surcharges are aggravated when a director is involved in a cartel conspiracy. Regarding the provision, the court determined that a director means only a director registered in the corporate registry, excluding unregistered one. Accordingly, the KFTC amended the notice to clarify the definition of a director, whereby a director now includes an unregistered or de facto director.

The KFTC also made several institutional improvements to case-handling procedures based on the report of a task force comprising practicing lawyers, legal scholars, economists and other outside experts. The cases in point are introducing extended hearing system (2004) and preparatory procedures for hearing, expanding the scope of documents accessible to a respondent to include supporting documents and Examiner's suggestion on corrective measures(2007, 2009), and providing further protection of confidential business information submitted by a respondent (2009).

「The ICC Best Practices」 recommends that information exchange between a respondent and competition agency be conducted in a transparent manner in every stage of investigation and deliberation.

Transparent disclosure of information is essential to ensure the adequate defense of a respondent and help the competition authority closely examine factual evidence.

However, in my opinion, finding a balance between transparency in the investigation process and measures against obstruction or interference of investigation is also important.

Particularly, there are an increasing number of cases where companies attempt to obstruct or interfere with investigation by obtaining information on the investigation in advance and concealing or destroying the relevant materials. Also, there is a need to ensure confidentiality and expeditiousness to some extent. Therefore, only pursuing transparency in investigation is not desirable given that lax control of antitrust violations caused by interference by investigated companies is sure to lead to harm for the entire consumers.

Now, let's think about Engagement Requirement

There is no such regulation that prevents the respondent from officially contacting the investigator or the Examiner, or presenting opinions in the course of the investigation. The contact between the investigator/the Examiner and the respondent is usually made in an office, investigation room or conference room.

However, since specific description of violations, the level of evidence or other details are not revealed to the respondent during the investigation in principle, so the respondent is to be aware of the suspected violation or investigation result when the Examination Report is served.

The KFTC provides the relevant parties with sufficient opportunity through various policies like preparatory hearing procedures or extended hearings to express their opinions orally as well as in writing.

Once the answers of the respondent on the examination report are submitted, the chairman of a session may allow preparatory hearing procedures to be conducted, if necessary for efficient hearing. During the preparatory session, main issues and evidence are reviewed thoroughly enabling the respondent to clearly understand arguments of the Examiner and to express opinions on them. It makes the overall hearing process more efficient, since the issues on which the two parties reach an agreement can be excluded from the hearing.

To ensure fairness in the hearing, the KFTC adopted adversarial proceedings where the Examiner and the respondent are given the same status and have equal opportunity to present oral arguments on the committed act and its anti-competitiveness.

In addition, the respondent and the Examiner, if considered necessary, may request an examination of evidence or presence of witness or competition law experts as a person of reference to seek their opinions (Article 41 of the Regulation). In such case, the person of reference can be cross-examined.

Comment

「EU Best Practices」 considers very important holding a dialogue and regular meetings between a competition agency and respondent not only in the course of hearing but investigation. Meetings with a respondent or interested party can prove to be useful for a competition agency to accurately examine factual evidence and take an administrative measure accordingly, given that information collection only from obtained documents has its limitation.

However, a question can be raised on whether it is actually possible to meet with a respondent for discussion of contentious legal and economic issues of the case even before an Examination Report is made. It is especially so considering a respondent is a subject of investigation as well as discussion .

It is believed, therefore, in-depth research is needed on when and how (in which stage of an investigation and in what manner) discussion of contentious issues can occur between a respondent and competition agency.

Confidentiality Requirement

The KFTC also prevents the business secret infringement in the course of hearing by implementing appropriate regulations. If the respondent wants to make statements including confidential information, he/she may present written statements which specify the scope of the confidential information and desirable measures for its protection at least five days prior to the opening of the session. If the request is accepted, necessary measures will be taken, for instance, ordering other respondents to leave the room temporarily while the protected information is presented to the Committee. The information regarded as confidential is excluded from the disclosed decision later on.

Hearing also can be conducted separately for each respondent in the case where there is a need to protect confidential business information from other companies or identity of leniency applicants.

Non-discrimination & Accountability

The KFTC shares the view that ensuring non-discrimination and accountability in the case-handling process is important. With the increase in the number of cases against multinationals, the KFTC is making constant effort to bring substantial improvement in this aspect.

For example, in the case of Intel's market dominance abuse (2008) the KFTC came to a conclusion through only two rounds of hearing, because the contentious issues were reviewed in several written opinion exchanges and one round of preparation process.

Occasionally, a hearing can be adjourned and extended to the next round, if the case is found hard to produce the resolution in just one round of hearing. For instance, the cases of market dominance abuse by Microsoft (2005) and Qualcomm (2009) went through seven and six rounds of hearing, respectively.

Furthermore, the KFTC provides simultaneous interpretation by installing interpretation booths at the request of foreign respondents or interested parties so that they can effectively exercise their defense right.

I am sure the KFTC will take more steps to improve procedural fairness through various methods including steady communication with non-governmental actors.

Thank you for your attention.