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Competition Policy in Regulated Sectors:
Focusing on the Institutional Design of the Relationship between
Competition Authority and Sectoral Regulators

규제산업의 경쟁정책:
각 산업의 감독당국과 경쟁당국 간 관계에 대한 제도 설계를 중심으로

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Limits of Competition Law¹: Korean Experience

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I. Introduction

The Monopoly Regulation and Fair Trade Act (“MRFTA”) has emerged as one of the most important piece of legislation that significantly transformed Korea’s economic system. No one expected its meteoric force when the law was promulgated in 1980. However, the status and power of the Korea Fair Trade Commission (“KFTC”), the institute entrusted with administering the law, has continued to augment as it regulates virtually every sector of the economy.. Now the KFTC takes pride in its being a cabinet-level government agency which oversees not only the enforcement of the traditional aspects of competition law but also concerns in economic concentration such as corporate governance of Korean business conglomerates or *chaebol*.²

The past two decades have witnessed the industrial policy which had governed the Korean economy give way to competition policy. Not until the late 1990s did the KFTC take initiatives to look into regulated sectors, in the wake of the Asian financial crisis that hit Korea, the Korean government realized the importance of ensuring that competition advocacy penetrated regulated sectors that were deemed as sacrosanct, that is to say effectively exempt from applications of competition law. The notion of antitrust immunity finds its statutory foundation in Article 58 of MRFTA, which reads “[T]his Act shall not apply to the legitimate acts of an enterprise or an enterprise

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¹ This expression is taken from the title of the book entitled, “The Limits of Competition Law (2005).” (by Tony Prosser).

² Youngjin Jung, Korean Competition Law: Policies and Development in Competition Law (Vinod Dhall eds., 2007).

organization conducted in accordance with any Act or any decree to such an Act.” Moreover, modeled after the Japanese Anti-Monopoly law, MRFTA explicitly exempts exercise of intellectual property rights from regulations of the MRFTA.³ From these provisions it is obvious that in certain circumstances MRFTA does not apply the acts pursuant to sector-specific regulations such as Telecommunication Business Act (“TBA”). But the devil is in the detail. To what extent is the KFTC’s jurisdiction over regulated industries circumscribed by the interpretation of these provisions.

As the KFTC aggressively enforces MRFTA, the tension between the KFTC and other sectoral regulators is on the rise. The tension between competition law and sector-specific regulations is also apparent in the international arena. In particular, public service related industries such as electricity and broadcasting enjoy a significant degree of autonomy free from competition. For instance, Article I:3 of WTO GATS defines as services within its purview, ‘services in any sector except services supplied in the exercise of governmental authority’. This service refers to any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”⁴

This article posits that a concurrent jurisdiction exercised by the competition agency over the same set of issues regarding regulated sectors could beget systemic inefficiencies. Overlapping jurisdiction means over-regulation in the particular regulated sectors. To avoid this malaise, this article attempts to proffer a practical guideline on how to allocate the competence between the competition agency and regulatory agency when intervening in regulated industries. The so-called institutional approach that the article proposes is based on the theory that each institution possesses a

³ Some scholar also views that IP law are a form of regulation. (Herbert Hovenkamp, *The Antitrust Enterprise* (2005) at 228 (“Anyone who does not believe that the IP laws are a form of regulation has not read the federal intellectual statutes and the technical rules promulgated under them.”)).

⁴ Tony Prosser, *The Limits of Competition Law* (2005) at 4-7.

distinctive area of competence, such that specific tasks can be adequately assigned to that institution.

This article is organized as follows. Firstly, it dispenses any myths concerning the dichotomy of the role of competition policy and regulatory agency, which acts as a stumbling block for a constructive discussion. Secondly it analyzes the different regulatory models in key jurisdictions-US and EU. Thirdly, it examines Korea's regulatory framework and evolution in its application. Lastly, it concludes with a proposed approach—institutional approach as a way to resolve the perennial institutional frictions.

II. Myth Concerning Dichotomy of the Role of Competition Agency and Regulatory Agency

The main misconception about the remit of antitrust law is that antitrust and regulations are separate, self-contained disciplines. In other words, antitrust and regulation operate in isolation so that different economic principles govern antitrust and regulation. If this is the case, the competition and regulatory agency can exercise its respective power over the same issue and competition authorities should be allowed to exercise concurrently their jurisdiction over the same issue which is subject to regulatory agency because both agencies pursue different policy objectives.

However, antitrust and regulation are arguably guided by the same economic concept, i.e. “workable competition” or “effective competition.”⁵The concept of workable

⁵ Some scholars distinguish “workable competition” and “effective competition.” See Richard Whish, *Competition Law*(fifth edition)(2003) at 15 (“The idea of effective competition does not appear to be the product of any particular theory or model of competition—perfect, workable, contestable or any other...Effective competition does connote the idea, however, that firms should be subject to a reasonable degree of competitive constraint, from actual and potential competitors and from customers, and that the role of a competition authority is to see that such

competition coined by Professor Clark posits that perfect competition “does not and cannot exist and has presumably never existed”⁶ and “the competitive model of theory affords no reliable standard for judging real-world market conditions.”⁷ According to the concept, competition policy should not seek to achieve the ideal of perfect competition, but should, instead, formulate criteria for judging to what extent an industry is workably competitive.⁸ It is widely accepted that Korean competition policy should pursue a workable competition. For instance, Professor Ohseung Kwon, the incumbent Chairman of the KFTC also opines that “[T]oday’s competition laws in many jurisdictions aim at realizing not perfect competition, but a workable competition.”⁹The KFTC also explicitly recognizes “a workable competition” as the market condition to be pursued¹⁰ as does the Korea Communications Commission (“KCC”) on many occasions.¹¹Therefore, the concept of workable competition is the policy guide both for competition and regulation. Professor Hovenkamp also opines that “a better way to view the two enterprises [antitrust and regulation] is as complementary products.”¹²

This said, while the great majority of markets in the real world operate in a way that cost is close to price, a few markets suffer serious market imperfections such as information asymmetry, free rider problems, scale economics and network effects that

constraints are present on the market.” See also Alison Jones and Brenda Sufrin, *EC Competition Law* (2nd edition) (2004) at 14-15. (“For example, The ECJ referred to workable competition in 1976 in *Metro* but EC law now favors the concept of “effective competition” as explained below).

⁶ J.K. Clark, “Toward a Concept of Workable Competition,” *American Economic Review*, vol.30 (June 1940), pp.241-256.

⁷ F.M.Scherer and David Ross, *Industrial Market Structure and Economic Performance* (third edition) (1990), at 53.

⁸ Roger J. Van den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edition) (2006) at 71.

⁹ Ohseung Kwon, *Economic Law* (4th)(2002) at 81.

¹⁰ See KFTC Decision no.99-252 (Dec.10. 1999).

¹¹ KCC recognizes the concept in its numerous policy decisions.

¹² Herbert Hovenkamp, *The Antitrust Enterprise* (2005), at 227.

require sector-tailored specific regulation. In other words, in a market where competition cannot deliver or reap putative benefits, say, maximization of social welfare, adequate regulatory intervention should be put in place. This is when sector-specific regulation takes precedence over general competition policy. However, there is no clear line to be drawn as to when sector-specific regulation should take over. Even in a fairly competitive market, producers have a certain degree of market power over the product they produce. In a regulated industry such as telecommunication, the market power companies in the market could yield is much more pronounced than typical competitive markets because the market is controlled by elements that are characteristic of market imperfection. In this respect, it is safe to say that market power that impedes a (workable) competition exists in every market to some degree. Therefore it is a matter of policy choice, not a theoretical prescription, whether to establish a specialized regulatory agency to address the issue of market power that impinges on workable competition. Empirically, though, most countries, if not all, have adopted laws or regulations to deal with the issue of market power in the telecommunication sector.¹³ Of course, not all monopolistic industries in which one or a very few companies monopolize the market have triggered sector-specific regulation. Sector-specific regulation does not exist in respect of Microsoft's Windows OS market. Likewise, a dominant internet portal such as Google or Naver has yet to see the sector-specific regulation promulgated.

The key difference between antitrust and regulation is not about workable competition as a policy guide, but about a direction of remedies. In terms of remedies, sector-specific regulation has a strong predilection for *ex ante* regulation and wider latitude to *promote* competition, instead of limiting its role to stamping down restrictive

¹³ See Damien Geradin and Michel Kerf, *Controlling Market Power in Telecommunications: Antitrust vs. Sector-specific Regulation* (2003) at 12. See also, Joachim Scherer, *Telecommunication Laws in Europe* (fifth edition) (2005); *Getting the Deal Through: Telecoms and Media* (2007).

agreements or abusive practices as in the competition law field. Regulation seeks to achieve liberalization of regulated sectors. In telecommunication sectors, regulation manifests a desire to tip the market in favor of new entrants and other operators as opposed to the incumbents. Mario Monti, the then EU Competition Commissioner, states the following as the key distinction between regulation and competition remedies:¹⁴

- Regulation is, by definition, an *ex-ante* type of intervention. Remedies imposed under regulatory intervention have the specific remit to allow competition to develop, and to increase the competitive conditions in any market in a self-sustaining manner. Their aim is, or should be, creating a pro-competitive environment in the long term, while at the same time providing, in the shorter term, the benefits to end users which the market would offer if it were effectively competitive.
- Antitrust remedies, on the other hand, have purely the objective of punishing forms of behavior which have occurred in the past, and which are seen as detrimental for the welfare of citizens/users. They assume that competitive conditions are already developed and that market structures would not be automatically conducive to their degradation.

Nevertheless, such distinction belies the fact that competition authorities also carry out a remedy that amounts to *ex ante* regulation. One of those examples is *essential facilities* doctrine, which posits that the owner of a properly defined “essential facility” has a duty to share it with others and that a refusal to do so violates competition law.¹⁵ Here competition authorities play a role as a regulator in designing conditions for access.

¹⁴ Joachim Scherer, *Electronic Communication Law and Policy of the European Union* 103-104, in *Telecommunication Laws in Europe*(fifth edition) (2005).

¹⁵ Herbert Hovenkamp, *Federal Antitrust Policy* (2nd) (1999), at 305-306.

Also competition authorities engage in *ex ante* regulation under merger control regulations. Competition authorities do not review the subject transaction retroactively. Instead the merger control of competition authorities has a lot to do with how to ensure effective competition. The authorities often render various structural or behavioral remedies and monitor the compliance as long as ten years after the issuance of such remedies. In this case the competition authorities act like typical regulators the regulated industries. Furthermore, “hybrid” remedies developed both by sector-specific regulation and antitrust, which are amalgam of *ex ante* and *ex post* regimes, have grown exponentially. The growing amalgam between *ex post* antitrust regime and *ex ante* regulatory structures can be illustrated by the increasing reliance by antitrust authorities on guidelines, policy statements, notices, and other tools in the way these authorities plan to address anticompetitive conduct that may arise in the future.¹⁶ In such a context, the antitrust authorities very much act like a bureaucracy adopting prospective rulings on the basis of past events.¹⁷ Finally, it would be a remiss if consent order or consent decree is not mentioned as antitrust authorities including antitrust court especially in the US act as a regulator. In *AT&T*, Judge Harold Greene of US District Court(antitrust court) oversaw the telecommunication market after breaking up of AT&T from 1982 until the promulgation of Telecommunication of 1996.

III. Role of Competition Policy in Regulated Sectors: US & EU Model

The 1996 Telecommunication Act in the U.S. clearly represents such *ex anti* regulations which constitute heavy-handed sector specific regulations. On the other hand, antitrust laws including Sherman Act demonstrate how *ex post* regulations

¹⁶ D. Geradin and J.G. Sidak, *European and American Approches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications*, 549 in HANDBOOK OF TELECOMMUNICATIONS ECONOMICS: TECHNOLOGY EVOLUTION AND THE INTERNET (SUMIT K. MAJUMADAR ET AL., 2005).

¹⁷ *Id.*

function in a relevant market. The function of competition law is to correct anticompetitive behaviors such as abuse of dominance by one or several firms, explicitly or tacitly colluding with one another. In the U.S. there were cases where regulatory skims have generally been more intrusive than antitrust regime. For instance, the 1996 Telecommunication Act was made up of an extremely detailed regulatory framework regulating certain areas of operators' behaviors which are also subject to the U.S. antitrust laws.¹⁸ By contrast, in the EU, antitrust principles are given a much broader role within the new regulatory framework on electronic communications.¹⁹

These two opposite positions have brought more confusion on under what circumstances competition law claims a primary jurisdiction over sector-specific regulation. A few weeks ago, in *Credit Suisse*, the U.S. Supreme Court held that the existing regulatory framework has jurisdiction over the antitrust claims in the U.S. financial market.²⁰ This decision is broadly in line with *Trinko* decision, which discusses this issue between antitrust claims and Telecommunication Act of 1996.

A. US Model: Sector-specific regulation over competition law

In the US it is the 1996 Telecommunications Act ("the 1996 Act")²¹ that dictates the regulatory regime in the U.S. telecommunications markets. The 1996 Act is made up of a set of very intricate and specific regulation that supersedes the need to apply antitrust law to maintain effective competition in the market. To illustrate a few, the 1996 Act introduced a new common carriage access regime based on the Total

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See generally Credit Suisse Sec. v. Billg*, 127 S.Ct. 2383 (2007).

²¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

Elemental Long-Run Incremental Cost (“TELIC”) pricing methodology.²² The 1996 Act also requires the existing local exchange carriers (“ILEC”) to resell their combined services in the form of UNE-P (unbundled network elements – platform).²³ Then in 2005 the FCC also put forth new unbundling rules that were significantly less comprehensive.²⁴ Hence this extensive regulatory scheme, does not leave much room for an effective application of the general antitrust law in the telecommunication industry in spite of the fact that the 1996 Act makes clear in the so-called “savings clause” that “nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust law.”²⁵ Thus, in the U.S., it is no longer antitrust law that influences and shapes policy decisions in the telecommunications sector.²⁶

In *Trinko*, the Supreme held that “[t]he 1996 Act’s provisions for access was sufficient that it would be redundant to impose a judicial doctrine of forced access.”²⁷ First, the Court found that any additional advantages that may arise from an antitrust claim is so slight that such a judicial oversight “would ... distort investment and ... [cause] interminable litigation, atop the variety of litigation routs already available to and actively pursued by [market participants].”²⁸ The Court opines that a competing communication business cannot bring an antitrust claim under the section 2 of the Sherman Act when an ILEC (*Verizon* in this case) does not comply with the Telecommunication Act of 1996 to share its network with other competitors as require. . While acknowledging the savings clause, the Court acknowledged the authority and

²² D. Geradin and J.G. Sidak, *supra* note 16, at 520.

²³ *Id.* at 521.

²⁴ *Id.* at 523.

²⁵ 47 U.S.C. §152 Note (b)(1).

²⁶ D. Geradi and J.G.Sidak, *supra* note16, at 541.

²⁷ 540 U.S. at 411.

²⁸ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S.Ct. 872 (2004).

importance of the existing telecommunication regulatory structures. The Court pointed out that the 1996 Act was also established to inhibit and remedy anticompetitive effects and any beneficial contributions to competition provided by enforcement of antitrust laws was considered to be slight.²⁹ It also viewed that the regulatory framework of the Act was sufficiently detailed enough to remove any major risk of anti-competitive harm.³⁰ In particular, the Court noted that “allegations of violations of the Communication Act are difficult for a ‘generalist’s antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and ILECs implementing the sharing and interconnection obligations.”³¹The Court recognized that while the telecommunication market needed a tight supervision,³² antitrust courts lacked the expertise to fully and competently explain or perform such detailed supervision..³³

The *Trinko* Court’s views on the competence of antitrust law in heavily regulated sectors were seconded by the Supreme Court’s recent decision in *Credit Suisse*. In *Credit Suisse*, the Court reasoned that “any enforcement –related need for an antitrust lawsuit is unusually small,”³⁴ especially since the Securities Exchange Commission (“SEC”) itself already enforces the necessary rules and regulations required to deter conducts that distort competition in the market.³⁵ While Securities

²⁹ *Id.* at 399.

³⁰ For example, the statute requires an incumbent LEC to be on good behavior in its local market in order to enter the long-distance market in the first place. Also, authorization by the FCC requires state-by-state satisfaction of the competitive checklist which includes the non-discriminatory provision of access to UNEs. *See id.* at 412.

³¹ *Id.*

³² *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 415.

³³ *Id.*

³⁴ *Credit Suisse Sec. v. Billig*, 127 S.Ct. 2383, 2389 (2007).

³⁵ In *Credit Suisse*, financial investors alleged that underwriter investment banks violated antitrust laws when they formed syndicates to help execute initial public offerings (IPOs) for several hundred technology-related companies. The underwriters, however, moved to dismiss, claiming that federal securities law impliedly precludes application of antitrust laws to the

Exchange Act and SEC's regulations lack the "savings clause" as provided in the Telecommunication Act of 1996, the Court held that the securities law "implicitly" precludes the application of the antitrust laws to the conduct alleged in that case.³⁶ Thus, the antitrust tribunals' potential lack in specialized detail in the relevant regulated sectors were considered by the Court to be especially costly harming the fair competition in the market while the SEC had the "expertise to distinguish what is forbidden from what is allowed."³⁷

B. EU Model: Competition Law over Sector-specific regulation

With the development in the electronic communications markets, free competition is becoming an increasing crucial element. Hence, the EU's new framework on electronic communications aims at gradually strengthening antitrust law authority over sector-specific regulation to encourage more effective competition.³⁸ Of course it is generally considered that it would take some time before this phase out is completed and until then sector-specific regulation will retain a significant importance, at least for the next few years.³⁹ The new framework is made up of five directives: one is a framework directive, and the other four directives are detailed guidelines respectively dealing with authorizations, universal service, access and interconnection, and data protection and privacy in the telecommunication sector.⁴⁰ The new framework turns on the concept of Significant Market Power (SMP).⁴¹ This redefined SMP defines

conduct in question. *Id.* at 2388-89.

³⁶ *Id.* at 2384, 2389-97.

³⁷ *Credit Suisse Sec. v. Billig*, 127 S.Ct. 2386.

³⁸ Directive 2002/21 of March 7, 2002 on a common regulatory framework for electronic communications networks and services, O.J. 2002 L108/33 ("Framework Directive"), Recital 27.

³⁹ Joachim Scherer, *supra* 14, at 103.

⁴⁰ L.J.H.F. Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation (2nd)* at 7-28.

⁴¹ Commission Guidelines of July 11, 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications

market dominance under the competition law as laid out in Article 82 of the EC Treaty. Regulatory obligations can be imposed on operators holding SMP in one given market after a four-step analysis, which requires coordinated efforts of the EC Commission and the National Regulatory Authorities (NRA).⁴²

As stated above, to a large extent competition law concepts formed the basis for the new SMP framework. Under this system, sector-specific regulation plays only a subsidiary role in conditioning the telecommunication sector. For instance, before demanding compliance to its regulations, the NRAs need to demonstrate that the market distortion at issue is better served by imposing the regulation rather than competition law. Thus, the SMP regime gives more reign to ex post competition law, which is less intrusive than sector-specific regulation.⁴³

In EU, competition law is the driving force in shaping the telecommunication sector. First, since the telecommunications market completely opened up in January 1998, EU competition law played a significant role in maintaining an environment that could encourage competition and development. More importantly, competition law concepts and principles are at the core of the new regulatory framework on electronic communication sectors meaning EU competition authorities are to play a crucial role in the new SMP regime in electronic communications: key regulatory decisions, such as market definition, identification of SMP operators, and adoption of remedies must be in conformity with antitrust principles.⁴⁴ In terms of Commission decisions, there has been a significant escalation of enforcement policy under article 82 in the telecom sector, illustrated by *Wanadoo*⁴⁵ and *Deutsche Telekom* in 2003, where the Commission

networks and services, O.J. 2002 C165/06.

⁴² D. Geradin & J.G. Sidak, *supra* note 16 at 542-544.

⁴³ *Id.* at 544-545.

⁴⁴ *Id.* at 550.

⁴⁵ Case COMP/38.233- *Wanadoo Interactive*.

announced its judgment of antitrust violation for the first time in 20 years.

Deutsche Telekom AG(DT)⁴⁶ case was one of the first example in such a legal context. As a dominant market player, DT was ordered to share its telephone network with competitors on an “unbundled basis.” Without such unbundled access to the pre-existing lines, it is impossible for new entrants to the telecommunication market to compete against old members of the market like DT, and a competitive market environment cannot be promoted. However, DT imposed higher rate on new entrants to the market for using local loops (lines for competitors) than it imposed on normal consumers for using the retail line. On May 21, 2003, European Commission regarded this as margin squeeze by DT and prohibited such tactics that abused the power of its dominant position in the market. This is an example of a case where the European antitrust law encroached into a sector over which member countries used to exert its regulatory hands. In reality, despite the Access Notice and the nature of telecom networks, there has been no abuse case in the telecom sector relying on the doctrine of essential facilities that has resulted in a decision.⁴⁷

IV. Role of Competition Policy in Telecommunication Sectors: Korea

In Korea it is the Ministry of Information and Communication (MIC) that is responsible for the telecommunications sector. Pursuant to the revision of the Telecommunications Business Act (“TBA”) in 2002, regulatory functions regarding prohibited acts were transferred to the KCC. Article 33-4 of TBA provides that MIC shall exert efforts to construct an efficient competition system and to promote fair competitive environments, in the telecommunication business. Article 36-3 of TBA prohibits telecommunication

⁴⁶ Case COMP/37.451 – Deutche Telecom AG, OJ L263/9, 14.10.2003.

⁴⁷ See Nikoliakos, Access Agreements in the Telecommunications Sector – Refusal to Supply and the Essential Facilities Doctrine under EC Competition Law (1999) 20 ECLR 399.

business operators from committing any act that undermines or is feared to undermine fair competition and users' interests. Article 36-3 of TBA lists the acts that are considered as such harmful acts. For instance, it is prohibited to make unfair discrimination when providing telecommunication facilities or information, or unfairly refuse to enter into an agreement, or fail to execute the concluded agreement without any justifiable reasons. However, the concern is that the same prohibited acts may also constitute a violation of certain provisions of MRFTA, with the result that the same offense may come under the double jurisdiction of two different acts. At the first blush, it appears that TBA may trump MRFTA as Article 37-3 of TBA provides that in case where corrective measures are taken against this act or an administrative surcharge is imposed under relevant provisions of TBA, sanctions cannot be imposed under MRFTA on the same grounds against the same acts of the relevant business operator. However, it is not clear to what extent KFTC is deprived of the competence of exercising its jurisdiction. Some scholars have gone so far as arguing that the KFTC may not take up the case if the KCC does not take a measure.⁴⁸ However, most scholars take a more expansive view that KCC does not have exclusive jurisdiction over the issues that are regulated by TBA. At any rate, Article 37-3 suggests that TBA drafters' intention was to bestow primary jurisdiction to MIC on the issues that are covered by the relevant provisions of TBA.

A majority of cases in Korea that raised the issue of jurisdictional conflicts have to do with cartel regulation. Since MIC/KCC does not have the competence to regulate cartel, the issue of concurrent jurisdiction rarely came to the fore although strong reactions from the MIC were occasionally demonstrated against the KFTC. Hence in most cases the issue is to what extent the acts in question fall under the explicit immunity under the MRFTA. Oftentimes the acts of the relevant companies go beyond the permitted

⁴⁸ Jeong-hoon Park, Protection of Telecommunication Users under Telecommunication Business Act & Fair Competition Among Telecommunication Operators (1998) at 47.

perimeter of the law. The central question is how to interpret the relevant statute that appears to provide for exemption.

A. Immunity

As mentioned above, Article 58 of MRFTA provides for regulatory antitrust immunity. This is an explicit statutory exemption similar to, Article 125 of Insurance Business Act provides for explicit exemption with respect to mutual agreement among insurance companies. But it is unclear what laws provide the grounds for the immunity because Article 58 of MRFTA does not specify the name of the laws. The Korean Supreme Court construed the term “legitimate acts in accordance with laws and regulations” under Article 58 of MRFTA in a strict manner. The Court held that [legitimate acts] refer to “the minimum necessary act executed within the scope of laws, or order stemming from such laws, that specifically acknowledge the exemption of free competition in businesses that require a high level of government regulation from the perspective of public interests where the monopolistic position of the business is guaranteed by government permits, as well as in businesses that recognize the reasonableness of restricting competition due to the characteristics of the relevant business.” The Court’s purported theory appears to accord with the theory of implied exemptions or implicit immunity. The US Supreme Court enunciated this principle in *Gordon v. New York Stock Exchange*.⁴⁹ The Court held that, where it appears to a court that antitrust enforcement would “disrupt” or be “repugnant” to a pervasive regulatory scheme, it may hold that the activity is implicitly immune. The Court also found that “[r]epeals of the antitrust laws ... have only been found in cases of plain repugnancy

⁴⁹ 422 U.S. 659 (1975).

between the antitrust and regulatory provisions.”⁵⁰ Nevertheless, it is practically very difficult to ascertain *ex ante* a given law that provides antitrust exemption.

In a famous local exchange call case the KFTC levied more than US\$ 100 million on KT, the largest landline telephone carrier for its collusion with its competitor *Hanaro Telecom*. One of the issues presented in this case was whether the subject price collusion could be subsumed as “legitimate acts in accordance with laws” under Article 58 of MRFTA. The KFTC held that the acts should be the minimum necessary act executed within the scope of laws, or order stemming from such laws, that specifically acknowledge the exemption of free competition in businesses and found that the articles KT cited were not within the meaning of Article 58 of MRFTA. For instance, the Court held that Article 33-4 of TBA is just declaratory in nature.

In sum the KFTC is aggressive in enforcing MRFTA by strict construction of the immunity provision.

B. Administrative Guidance and Cartel

Similar to Japan, Korea has an idiosyncratic regulatory ordinance called “administrative guidance.” Administrative guidance plays an important role along with formal government measures in Korea. In the fixed line telephone call case, KT’s argument was that it was merely complying with the administrative guidance issued by MIC, which it had no choice but to follow in practice. The KFTC rejected this argument on the grounds that MIC’s request and consultation were not binding in practice and the price collusion was not causally linked with MIC’s request and consultation. In this case, the KFTC’s position was that only acts in accordance with the legitimate administrative

⁵⁰ United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 350-51 (1963) (footnote omitted).

guidance with a specific statutory foundation fall into “legitimate acts in accordance with the laws” under Article 58 of MRFTA. This means that it is very difficult to meet the requirements recognized by the KFTC.

C. Others

The KFTC has been aggressive about enforcing MRFTA in the telecommunication sector. As mentioned before, its enforcement effort is more pronounced in cartel regulations. Major telecommunication operators were punished with heavy financial penalties for their collusive behaviors. The KFTC used to actively enforce regulations on unfair trade practices under Article 23 of MRFTA across a wide area. In the past the KFTC expended a significant amount of resources on unfair trade practices that did not have a direct relationship with securing competition in the telecommunication sector. However, in recent years KCC has emerged as the primary regulator against unfair trade practices in the telecommunication sector.

Korea has not recorded a *Trinko*-type case yet, which would involve the application of provision of MRFTA related to abuse of market dominance to issues concerned with related provisions under TBA on essential facilities. Indeed there was a case where a mobile telecommunication carrier was found to abuse its position of market dominance under MRFTA, but this case did not coincide with issues that are regulated by TBA.

Merger control in respect of basic telecommunication operators involves both MIC and KFTC. In this case MIC should consult with the KFTC to approve merger and acquisition of basic telecommunication operators under Article 13 of TBA. This means that the locus of merger control in respect of basic telecommunication operators is moved to MIC away from the KFTC by virtue of the latest passage of the TBA

provision on merger control. As a result the issue of concurrent jurisdiction has been nicely fixed. In other words, this is an example of a system of cooperation between institutes that is put in place with respect to merger regulation.

V. Conclusion - Proposed Institutional Approach

Korea has not been confronted with the issue of concurrent jurisdiction as in *Trinko*. As a result, it would be difficult to compare the Korean law and practice with that of US. Given the KFTC's strict interpretation of Article 58 of MRFTA, there is little likelihood that acts in accordance with TBA is exempted from application of MRFTA. In this regards, Korean law and practice regarding the issue of current jurisdiction is closer to the EU model than US model. As a matter of policy, is it proper for the KFTC to aggressively step over the line into the realm of MIC/KCC?

This article argues that KFTC and MIC/KCC should respect each other's regulatory realm for the most efficient use of resources and competence. After all, both agencies are supposed to pursue the same workable competition in the telecommunication sector. The basic idea of what this article terms as the institutional approach is that each institution possesses a distinctive area of competence, such that specific tasks can be adequately assigned to that institution.⁵¹ Certainly, assignment of

⁵¹. This approach is predicated upon "legal process theory." It is a synthesis of Langdellian formalism and legal realism, to major scholarly pursuits that took center stage before World War II. (See Edward L Rubin, *The New Legal Process, The Synthesis of Discourse, and The Microanalysis of Institutions*, 109 Harv. L. Rev. 1393, 1394 (1996); (William N. Eskridge, Jr. & Philip P. Frickey eds, 1994). Its central idea is that each governmental institution possesses a distinctive area of competence. The focus on institutional competence in the legal process theory was developed by Justice Frankfurter. In a government that seeks to advance the public interest, each organ has a special competence or expertise (William N. Eskridge, Jr & Philip P. Frickey, *The Making of the Legal Process* 107 Harv. L. Rev. 2031, 2032 (1994)).

certain tasks to institutions ill-equipped for them will beget systemic malfunctions. Therefore, it is important to delineate and assign the appropriate tasks to the right institutions in order to enhance the capacity of each institution to effectively deal with various issues in the telecommunication sector.

Given the scarce resources and decentralized nature of the system, the functional division of human capital is the key to achieve an effective system. Effectiveness is one of the most important virtues to pursue in every legal system.⁵² The emphasis on the importance of adequate institutional arrangements in addressing specific problems, instead of focusing on the formalistic quest for what an appropriate rule is, takes center stage in contemporary legal scholarship. It is a practical application of the so-called process-oriented approach,⁵³ arguably the mainstream of contemporary legal theories, so that it could answer such important questions as allocating regulatory jurisdictions among various domestic institutions.

Similar discourse abounds in the US. Some commentators argue that “continued reliance on the Federal Communication Commission (“FCC”) is the worst way to superintend competition policy in the telecommunication industry—except for the alternatives.”⁵⁴ The most important element or value in the institutional approach is expertise. No one would deny that KFTC and MIC/KCC has unmatched expertise in administering its respective laws.⁵⁵ In this regards, the current status of practice in the telecommunication sector in Korea is moving in the right direction. The KFTC takes the

⁵² See generally Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, *Yale L. J.* 107 (1997),

⁵³ See also Henry M. Hart, Jr & Albert M. Sacks, *The Legal Process* 696, 1009–10, 1111.

⁵⁴ Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads* (2007) at 419. These authors cite Winston Churchill’s famous remark in 1947 (“Many forms of Government have been tried, and will be tried in this world of sin and woe... No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”

⁵⁵ *Id.* at 419-429. In addition to institutional expertise, determinacy, neutrality and humility have been suggested for the criteria by which each agency is evaluated.

leading role in regulating cartel. In contrast, MIC/KCC concentrates in abuse of market dominance (*re essential facilities*) and various unfair trade practices being observed in the telecommunication market. Attention should be directed to examine the validity of implied immunity developed in the US in interpreting Article 58 of MRFTA.

Human institution is constantly evolving. The issue of concurrent jurisdiction is the outgrowth of institutional evolution of KFTC and MIC/KCC. Sometimes less is more. Humility is the perennial virtue. Placing a limit on the reach of competition law reduces institutional frictions and minimizes waste of scare resources. Instead of aggressive assertion of jurisdiction, cooperative institutional arrangements will beget optimum result. A cooperative arrangement between KFTC and MIC regarding merger review is a case in point.