

**Comments of the American Bar Association Section of Antitrust Law,
Section of Business Law, and Section of International Law on the Draft
Consent Order Proposal of The Korea Fair Trade Commission**

May 2008

The Section of Antitrust Law, Section of Business Law, and Section of International Law (together, “the Sections”) of the American Bar Association (“ABA”)* appreciate the opportunity to present their views concerning the draft consent order proposal that was released by the Korea Fair Trade Commission (“KFTC”) on April 15, 2008 (the “Proposal”).¹ The views expressed in these comments are those of the Sections and have been approved by the Sections’ respective Councils. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

Executive Summary

The Sections strongly support and commend the KFTC’s proposal to introduce a consent order procedure into Korea’s Monopoly Regulation and Fair Trade Act (“MRFTA”). The Sections believe that the Proposal outlines a consent order process that seeks to incorporate each of the principal components of a sound and effective system for the settlement of alleged antitrust violations. In particular, the Proposal (i) promotes the efficient resolution of antitrust investigations, (ii) provides incentives for all parties involved to settle antitrust reviews on a voluntary basis, (iii) incorporates important features of fairness and transparency, (iv) allows for the prompt enforcement of the terms of any settlement, (v) permits modification of consent orders, and (vi) promotes consistency in the enforcement of the MRFTA. The Sections believe that these are vital characteristics of an effective consent order system. For this reason, the KFTC’s recognition and incorporation of these features is to be welcomed. The proposed consent order process will further align Korea’s antitrust system with those of other jurisdictions around the world. Finally, the Sections respectfully make the following modest suggestions for further improvement of the draft Proposal:²

* The members of the working group that drafted these comments are Rebecca Dick, Dorothy Fountain, Ronan Harty and Youngjin Jung, with comments from Robert Schlossberg and Hoil Yoon.

¹ See http://ftc.korea.kr/ftc/jsp/ftc1_branch.jsp?_action=news_view&_property=p_sec_10&_id=155291136&currPage=1&_category

² In addition to the proposal regarding the consent order procedure, the KFTC announced on April 15, 2008 and April 22, 2008, respectively, two proposals relating to Korea’s merger laws. The first proposal would amend the timing requirement for merging parties’ submission of the required premerger notification form from the current requirement of 30 days following the execution of a definitive (...continued)

- that the consent order process allow for comment by any member of the public;
- that the full text of all proposed consent orders be made publicly available (with appropriate exclusions for confidential information where necessary);
- that the KFTC may wish to reconsider whether the proposed KRW 2 million fine for violation of a consent order is sufficient;
- the KFTC provide a reasonably detailed explanation of its reasoning in its public description of why particular consent orders are accepted;
- that the KFTC be given the power to modify consent orders in appropriate circumstances (not just the power to rescind orders), and that a high standard of proof be required before an order can be modified (or rescinded);
- that a change in the relevant law be included as a potential ground for modification or rescission of a consent order, and
- that the KFTC include in all consent orders a “sunset” provision that specifies when the order will terminate.

Consent Order Proposal

The Proposal is designed to enhance the effectiveness and comprehensiveness of Korea’s MRFTA. Under the current version of that law, there is no provision by which the KFTC can reach an agreement with a party or parties under investigation regarding voluntary remedies to address alleged anticompetitive conduct. The KFTC has recognized that this creates a “gap” in its antitrust system that can result in a variety of inefficiencies and other burdens.³

(continued...)

agreement to a new requirement that the notification be filed prior to the closing of the proposed transaction. See http://ftc.korea.kr/ftc/jsp/ftc1_branch.jsp?_action=news_view&_property=p_sec_10&_id=155291136&currPage=1&_category. The second proposal would amend the Presidential Enforcement Order of MRFTA by raising the threshold amount of assets or sales that the acquiring company must have from KRW 100 billion (approximately \$100 million) to KRW 200 billion (approximately \$200 million). See http://ftc.korea.kr/ftc/jsp/ftc1_branch.jsp?_action=news_view&_property=p_sec_2&_id=155292066. While these proposals are not the subject of any detailed review in these comments, the Sections wish to note their support for both of these proposals. The first will bring Korea into conformity with the recommended practice of the International Competition Network. The second is likely to eliminate many unnecessary merger filings. The Sections support both of these goals.

³ See, e.g., Korea Fair Trade Comm’n *Recent Developments in Korea’s Competition Laws and Policies* (January 26, 2007) (KFTC announces its intention to propose a consent order procedure because of difficulties and burdens it faces without such a system), available at <http://www.ftc.go.kr/eng/>

In order to address these issues, the KFTC has now proposed what, in the Sections' view, is a robust consent order procedure.

In particular, the Sections commend the KFTC for having proposed a structure that incorporates the principal features and characteristics of a sound and effective consent order process. Our comments below are organized around these elements.

A. *The Proposed Procedures Promote the Efficient Resolution of Antitrust Investigations*

The Sections believe that the Proposal will encourage the efficient resolution of antitrust investigations. The Sections believe that this is a desirable goal because it can save valuable resources without sacrificing effective law enforcement. In this regard, the Sections note that in the United States a very significant number of investigations by the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") are resolved by means of a consent order process which -- particularly in the case of the FTC -- is similar to the Proposal.⁴ In the Sections' view, the consent process in the United States has, in general, worked well and is now an integral part of antitrust merger review.

The Sections believe that the Proposal has the potential to enhance materially the operation and enforcement of the MRFTA. In particular, the Sections note the consent structure outlined in the Proposal is, for the most part, clear, straightforward, definite, and reasonably rapid. It is based on the concepts of (i) negotiating the terms of a satisfactory resolution with the KFTC staff (Article 51-2(1)), (ii) acceptance by the Commission itself (Article 51-2(2)-(3)), (iii) publication of the order with an explanation and opportunity for public comment (Article 51-3(2)), and (iv) enforcement of the order by the KFTC (Article 51-4). This uncomplicated structure is likely to encourage and promote use of the system, thereby avoiding lengthy antitrust investigations that would otherwise be costly and resource-consuming.

⁴ See, e.g., FEDERAL TRADE COMM'N & DEP'T OF JUSTICE, ANNUAL REPORT TO CONGRESS, FISCAL YEAR 2006 (2007) (of the sixteen merger transactions the FTC decided to challenge in its fiscal year 2006, nine of the challenges were resolved pursuant to consent orders. The seven remaining transactions were abandoned), available at <http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf>

B. The Proposal Outlines a Consent Order Process that Provides Incentives for Both Sides to Resolve Matters on an Agreed-Upon Basis

The Sections believe that an additional feature of the Proposal that is likely to make it effective is that it provides benefits for both the KFTC and the party or parties that are the subject of an antitrust investigation. In particular, the consent order procedure allows the KFTC to conserve and more efficiently deploy its limited resources, thereby providing the opportunity for more widespread enforcement of the MRFTA. For the parties to an investigation, they too have the opportunity to save resources, while at the same time they can actively participate in the formulation of a voluntary settlement that does not require an admission of any violation of law. In the Sections' experience, this latter feature has been an important part of the consent order process in the United States and the KFTC is to be credited for incorporating that element into its Proposal.

C. The Proposal Recognizes the Importance of Transparency in the Consent Order Process

The Sections believe that if a consent order process is to achieve legitimacy and widespread use, it must be transparent: the system must (i) provide for the publication of any settlements, (ii) allow for comments from interested parties or the general public, and (iii) require the relevant enforcement agency to explain its decisions. The Proposal, in large part, achieves these objectives.

For example, Article 51-3 obliges the KFTC to consider all matters associated with any potential consent order and to publicize the order and allow for comment. The Sections believe that these provisions are especially important. Public support for, and respect and acceptance of, a consent order process is in large part dependent on the presence of mechanisms designed to ensure that (i) the regulatory body explain why it proposes to take the action in question, and (ii) at the very least, those who may be affected by the action have an opportunity to be heard prior to the action becoming final. In this regard, Article 51-3(2) provides that the "concerned parties" are to be given a period of at least 30 days before the consent order becomes final in which to submit their views to the KFTC. In order to permit this to occur, the KFTC is to "notify the concerned parties or publish [the draft order] in an official gazette or website." The Sections support this procedure because of its contribution to the goal of transparency. However, it is not clear to the Sections whether Article 51-3(2) contemplates that all draft orders will always be made available for comment to the public, or whether only the "concerned parties" will be permitted to comment. **The Sections respectfully suggest that the consent order process allow for comment by any member of the public, in large part because of the difficulty in identifying accurately a comprehensive list of "concerned parties."** Allowing for comment from the public (as is the case with consent orders in the United States) will ensure that no interested constituency is overlooked, and it will not in the Sections' experience result in an unwieldy or unworkable process.

Finally, the Sections fully support the provisions of Article 51-3(2)(i)-(iv) that set forth the details of what the KFTC is required to make public in connection with a proposed order (*i.e.*, summary of the conduct at issue, identification of the relevant provisions of the law, description of the corrective measures contemplated by the order, and any other information that might be relevant). It is unclear to the Sections, however, whether this provision is intended to require publication of the full text of the proposed consent order. **In light of their experience in the United States, the Sections respectfully recommend that the full text of all proposed consent orders be made publicly available (with appropriate exclusions for confidential information where necessary).**⁵

D. The Proposal Provides for the Enforcement of Consent Orders

A crucial component of any consent order procedure is an effective means of (i) ensuring compliance with the terms of any order and (ii) imposing penalties in the case of a breach. The Proposal includes several provisions relevant to these issues. In particular, Article 51-2(5)(ii) provides that the KFTC has the power to rescind a consent order if the company that is the subject of the order fails to comply with its terms. If this were to occur, the KFTC could resume its proceedings against the company (Article 51-2(5)). Presumably, this will act as an incentive for the company to comply with the order. In addition, Article 51-4(1) provides for the imposition by the KFTC of a daily fine of up to KRW 2 million per day (approximately \$2,000) on a party who fails to comply with a consent order. The Sections support the grant of a penalty power to the KFTC. However, the imposition of a \$2,000 per day fine on a large corporation may not provide a sufficient incentive against violation of a order in certain circumstances. Other jurisdictions have chosen higher penalty levels. In the U.S., for example, the penalty may be up to \$11,000 per day. In the European Union, a fine of up to 10% of worldwide turnover may be imposed. **The KFTC may wish to reconsider whether the proposed KRW 2 million fine is sufficient.**

Finally, Article 51-4(3) provides that parties that are subject to a consent order shall submit reports to the KFTC regarding their compliance with the terms of the order. It is the Sections' experience that periodic compliance reports during the term of any order can be an important means of ensuring that the goals of the order are fulfilled.

⁵ As the consent order procedure gains acceptance and is utilized more frequently, one likely consequence is that the number of contested cases with full, reasoned opinions will decline. This brings with it the danger that there will be less in the way of established precedent available to guide parties in the future regarding which practices may violate the antitrust laws. **For this reason, the Sections urge the KFTC provide a reasonably detailed explanation of its reasoning in its public description of why particular consent orders are accepted.**

E. The Proposal Provides that Consent Orders Can be Changed

The Sections believe it is appropriate that any consent order procedure include provisions that permit the antitrust authority to modify the order in certain circumstances. In this regard, the Sections note that Article 51-2(5) of the Proposal permits the KFTC to *rescind* an order if (i) relevant facts and circumstances have changed, (ii) the parties to the order have failed to comply with its terms, or (iii) the order was based on inaccurate or incomplete information. **The Sections respectfully suggest that the KFTC also be given the power to *modify the order in these circumstances*.** It may well be that complete rescission of an order is unnecessary, and it seems appropriate that the KFTC should have the necessary degree of flexibility. **However, the Sections also respectfully recommend that a high standard of proof be required before an order can be modified (or rescinded).** The legitimacy of a consent order system is likely to be undermined if the orders that are issued pursuant to the system can easily be changed. It is also not clear to the Sections whether the Proposal's first enumerated circumstance for possible rescission (*i.e.*, where the "relevant facts and circumstances have changed") is intended to include changes in the law applicable to the conduct at issue. If that is the intent of the Proposal, the Sections support that approach. **If that is not yet within the scope of the Proposal, the Sections respectfully recommend that a change in the relevant law be included as a potential ground for modification or rescission of a consent order.**

Finally, the Sections respectfully urge the KFTC to include in all consent orders a "sunset" provision that specifies when the order will terminate. The time period in question may differ by transaction, but the Sections believe that it is fair to let parties that are subject to an order know for how long they will be subject to its terms, and it is beneficial for the enforcing agency to know for how long it will be required potentially to devote resources to the order. Moreover, there comes a period of time after which the remedy imposed by an order is no longer appropriate or effective.

F. The Proposal Promotes the Consistent Application of the Antitrust Rules

With the exception of conduct that is subject of a criminal referral under Article 71(2) of the MRFTA, the consent order structure set forth in the Proposal is to apply to all conduct that allegedly may violate the MRFTA. This includes mergers, single-firm conduct and concerted action. The Sections support the approach that, from a procedural perspective, the same consent order rules should apply to all conduct. This is likely to promote consistency, as well as to foster respect for the system. While the KFTC will most likely be obliged to issue guidelines for the type of remedies that are likely to be acceptable for particular types of conduct (as it has already done in the merger context, for example), the Sections support the view that the procedural rules and framework should be consistent.

Conclusion

The Sections strongly support the KFTC in its consent order initiatives. We have provided in these comments some modest suggestions that the Commission may wish to consider as it finalizes its rules. The Sections very much appreciate the opportunity to submit these comments and hope that the KFTC will find them to be of assistance.