

The Comparative Analysis on the Presumption of Cartel Agreements which is unique in the Korean Cartel Regulation Provision

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Abstract

In terms of cartel regulation, Korea has a “presumption of agreement” provision that does not exist in the United States or in the European Union (EU). This provision is Article 19(5) of the Monopoly Regulation and Fair Trade Act (MRFTA). This provision was created for the convenience of enforcement because firms made cartel agreements by more sophisticated methods as the cartel regulation became more intense. Accordingly, in the continental law of Korea the approach of the courts in relation to cartel regulation is somewhat different to the United States. However, in terms of a standard for deciding specifically what to regulate as a cartel and what to permit, Korea, the United States, and the EU use generally similar standards. Prohibiting tacit agreements as cartels but not regulating conscious parallelism is common to these countries.

In relation to the effect of the presumption, the issue is whether to understand the presumption in Article 19(5) of the MRFTA as a civil procedure law presumption or as an “administrative law presumption”. In terms of methods of applying the provisions, these can broadly be divided into two methods. First, there is the stance of the Korean Supreme Court, which interprets Article 19(5) faithfully to its wording, the cases hold that if one only proves the two facts of “outward conformity of conduct” and “competition-restrictiveness”, then the firm provisionally “shall be presumed to have committed an unfair collaborative act.” Recently, however, many cases have emerged in which the presumption was rebutted. Second, the Korean Fair Trade Commission (FTC), even if it proves the “outward conformity of conduct” and “competition-restrictiveness,” does not regulate the “agreement” directly as an undue collaborative act by presumption, but it investigates deeply into the facts of an agreement to engage in collaborative acts or circumstantial facts so as to factually presume that the outward conformity of conduct was a collaborative act due to an agreement.

In fact, the result is that the presumption provision Article 19(5) of the MRFTA is enforced, differing from a civil procedure law presumption. As a result, cases follow the process of overturning the presumption again after first allowing the presumption of agreement due to Article 19(5) of the MRFTA. However in reality they regulate the cartels focusing on the same basis as the United States and the EU. The ultimate difference is that in the case of Korea, the burden of proof is on the firm to prove that there was no agreement. But, as stated above, it is ultimately desirable to amend or delete Article 19(5) of the MRFTA due to the problems of the imbalance in the burden of proof.

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I. Introduction

In terms of cartel regulation, Korea has a “presumption of agreement” provision that does not exist in the United States or in the European Union (EU)¹. This provision is Article 19(5) of the Monopoly Regulation and Fair Trade Act (MRFTA). This provision was created for the convenience of enforcement because firms made cartel agreements by more sophisticated methods as the cartel regulation became more intense. Further, this also reflects the government’s firm intention to solve the chronic problem in Korean markets of cartels being formed in various industries due to the small scale of those markets. Accordingly, in the continental law of Korea the approach of the courts in relation to cartel regulation is somewhat different to the United States. However, in terms of a standard for deciding specifically what to regulate as a cartel and what to permit, Korea, the United States, and the EU use generally similar standards. Prohibiting tacit agreements as cartels but not regulating conscious parallelism is common to these countries.

Article 19(5) states:

Where two or more enterprisers are committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed an unfair collaborative act despite the absence of an express agreement to engage in such an act.

It is possible to broadly categorize the problems raised in relation to the presumption in this provision into those regarding the conditions triggering the presumption and those regarding the effect of the presumption. In relation to the conditions triggering the presumption, in order to trigger the presumption of an agreement between firms, opinions are divided as to whether it is enough to only prove the “matching outward appearance” and “competitive-restrictiveness” of the conduct, or whether it is also necessary that there be circumstantial facts (additional factors) to trigger the presumption of an agreement between the firms. Further, regarding the “competition-restrictiveness” element that needs to be proved in order to presume the existence of an agreement, there is a case which held that this meant “competition- restrictiveness” in that state prior to the presumption of agreement. That is, one opinion is that one must judge whether or not there is “competition restrictiveness” by hypothesizing a situation where there is no agreement between firms. Another opinion is that this means “competition-

¹ EU Treaty Article 81

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

restrictiveness” in the case where the conduct has been carried out under agreement or tacit understanding. In relation to the effect of the presumption, the issue is whether to understand the presumption in Article 19(5) of the MRFTA as a civil procedure law presumption or as an “administrative law presumption”. In terms of methods of applying the provisions, these can broadly be divided into two methods.

First, there is the stance of the Korean Supreme Court, which is to interpret “presumption” as a legislative presumption. This does not require an additional circumstantial factor apart from “outward conformity of conduct” and “competition-restrictiveness”, but the presumption can be rebutted by proof that the “outward conformity” was not due to an agreement.

Second, there is the EU stance, which provides for a special presumption under administrative law. This is interpreted as a “triggering requirement” or “commencing conditions” (Auffangtatbestand, Aufgreiftatbestände), where the competition authorities prove that there was an agreement and the burden of proof shifts to the defendant firm.

II. Background to Adoption of 19(5) of MRFTA

1. State of cartels in Korean market

Korea’s industrial structure was formed into an oligopoly system in the major heavy industries in the process of promoting rapid economic development. Under this industrial structure it was easy to form cartels as the firms required only very little outlay. This is thought to be the reason for the emergence of cartels in industries such as oil refining, petrochemicals, paper manufacturing, cement and steel. For instance there are only two coffee manufacturing companies in Korea – Dong Suh Foods Co. Ltd. and Nestle Korea Ltd.

In terms of indexes showing the extent of market monopolization and oligopolization, one can cite the HHI (Herfindahl-Hirschman Index) and CR2 (concentration ratio for two firms). KFTC requested the Korea Development Institute (KDI) to investigate Korea’s HHI and CR. KDI found that Korea’s HHI and CR were much higher than in the US and Japan, showing that the extent of monopolization and oligopolization in Korea is very serious (Heo, 2004,539).

Turning to the industries where cartels arose, of the industries needing sanctions for cartelization, the field which most frequently had cartels arise was the manufacturing industry (42%).

Recently, cartels in the service field, such as education, real estate etc. have been forming, increasing dramatically post-1997.

2. Empirical Evidence of damage from cartels

KFTC discovered a price cartel between three school uniform businesses and gave corrective orders regarding these in May 2001, calculating the cost saving to consumers (damage to consumers) to be approximately 60 billion Won annually. As a result of market research carried out after the corrective measures in relation to the school uniforms cartel, it became apparent that blouses/blazers dropped 30 thousand Won and shirts 10 thousand Won in price. This was calculated considering the trade volume of school uniforms was 1.5 million. As a result of the KFTC uncovering a tendering cartel between construction companies that participated in public construction works and giving correcting orders, the successful bid rate for public works fell from 87% in 1997 to 75% in 2000, considering the scale of public construction works in Korea it can be presumed that this had the effect of saving the national budget (damage from cartels) 4 trillion Won annually. In the case of the lead electrode international cartel, for the five year period of the cartel, this brought about an approximate 50% price increase in the Korean market, including electric oven businesses, and it was calculated that domestic businesses suffered damage of approximately \$139 million (183 trillion Won).

3. Origins of Undue Collaborative Act Provisions

(1) Cartel regulation at the time of introduction of MRFTA

The direct cause for the commencing of efforts to regulate cartels in Korea in 1963 was the so-called “three powder profiteering incident” which occurred in that year. This incident saw manufacturers of the so-called “three powders” ie., cement, wheat flour and sugar, take monopoly profits by raising greatly their prices through cartels. Sparked by this incident, the monopolists’ unfair conduct gave rise to major public criticism politically and socially, so a public debate started regarding the enactment of a fair trade law to prevent monopolization.

(2) Amendment of 31 December 1986 – Introduction of presumption article

Since proving the existence of cartels is difficult, even though we have seen above that their ill-effects are large, the 1986 amendment introduced the system of presuming undue collaborative acts, which is understood to be a characteristic of Korea’s MRFTA regulations, to solve this problem.

(3) Amendment of 5 February 1999

The competition-restrictiveness of cartels, since they are generally a “ceasefire agreement” between enterprises to stop competition itself, is much more direct than mergers. In contrast, in the case of mergers, there are pro-competitive points such as economies of scale and efficiencies in enterprise management and it is difficult to find the competition restrictiveness in mergers themselves. Accordingly, in the case of merger regulations, in order to regulate only competition-restrictive mergers by examining whether there is competition-restrictiveness after defining the relevant market, Article 7(1) provides that “no one shall practically suppress competition in a particular business area.” In the case of cartels, however, based on a judgment that there is no need to go strictly through this process, the 5 February 1999 amendment changed the MRFTA Article 19(1) from indicating “that practically restrict competition in a particular business area” to “that unfairly restricts competition.”

III. Presumption of Agreements and the standard for rebuttal

Naturally, the issue is what sort of conduct to regulate as a cartel and what limits should be in place. As we shall see below, this can be examined by comparing past KFTC decisions and the United States and EU cases where an additional circumstantial factor was demanded, with factors that the Korean Supreme Court has considered when overcoming the presumption of agreement.

1. Distinction between tacit agreement and conscious parallelism

While it is possible to explicitly agree to an undue collaborative act, these have almost ceased to exist since competition authority regulation tightened, and the major part of these agreements are now conducted tacitly. Tacit agreements and conscious parallelism are similar in the points that both types of conduct have a conformity of outward appearance, while it is hard to find direct evidence of an agreement. In the case of tacit agreement, however, regarding the point that there must at least have been a “meeting of minds”. It is different from “conscious parallelism” which exhibits conformity of conduct as a result of interdependence without any communication of intention.

Conscious parallelism may frequently occur in oligopolistic markets where only a few firms exist. This is because, in oligopolistic markets, the pattern of the firms’ conduct is interdependent (Areeda & Hovenkamp, 2003, 1429a). Each firm competing in the oligopolistic market, by merely

observing the conduct of other firms and then based on its own prediction and simply adjusting prices or setting production levels, may produce economic effects the same or similar to cartels (Areeda & Hovenkamp, 2003, 1429b). That is, in the case of conscious parallelism, even if there is no agreement between the firms, they may try to fix prices at a level higher than the competitive price and set production levels at a level lower than production levels in competitive markets through a process of rational decision-making.

Should merely conscious parallelism be viewed as illegal, then where there is interdependency in oligopolistic markets, one may not expect legal conduct by firms which would force firms to make irrational decisions. Accordingly illegality merely due to conscious parallelism is not accepted (Areeda & Hovenkamp, 2003, 1432d3).

2. Korean Cases relating to the interpretation of the presumption article

In order for there to be a presumption of “agreement between firms” based on Art 19(5) of the MRFTA, recent Korean Supreme Court decisions have consistently held that it is sufficient merely to prove “conformity of outward conduct” and “competition-restrictiveness” and that there is no need in addition to this to prove circumstantial facts so as to presume the firms’ agreement or tacit understanding. (Supreme Court decision of 3.15.2002; Supreme Court decision of 5.27.2003) This view states that the circumstantial facts for presuming an agreement or tacit understanding are rather circumstantial evidence to presume in fact an “agreement” of Article 19(1).

Meanwhile, the Korean Supreme Court held that one may rebut the presumption of agreement in the following sorts of cases:

First, the presumption of agreement to engage in collaborative acts under Article 19(1) can be rebutted by proving that there was no agreement to engage in undue collaborative acts and that the conformity of conduct was ultimately coincidental and arrived at independently according to the managerial judgments of each firm without any agreement, even though the same or similar conduct appeared externally. (Supreme Court decision of 12.12.2003; Supreme Court decision of 2.28.2003)

Second, one can rebut the presumption by proving circumstances that lead one to accept that the same or similar conduct appearing externally was not a collaborative act by any cartel agreement but for some other reasons. (Supreme Court decision of 12.12.2003; Supreme Court decision of

2.28.2003; Supreme Court decision of 1.28.2005)

Third, under oligopolistic market structures, the market leader with a high market share sets the price by its independent decision while weaker firms set their price imitating this unilaterally. In such a case, if the market leader sets the price in light of the circumstances of the market such as the hitherto customs, as long as there are no special circumstances where it can be predicted that the follower firms set their prices in alignment with this, the presumption of agreement to engage in undue collaborative acts under Article 19(5) is rebutted. (Supreme Court decision of 5.28.2002)

These standards, as we shall see below, are similar in content to the additional circumstantial evidence required for regulating conscious parallelism as a form of cartel in the USA and the EU cases.

3. USA and the EU Cases

In the United States, in order for conscious parallelism to be prohibited as a cartel one must provide circumstantial evidence of various sorts to make the presumption of agreement possible. The “outwards conformity of conduct” amounts to only a single factor in detecting and commencing investigations into the cartel.

According to “Antitrust Guidelines for Collaborations among Competitors” of the United States and “Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements” of the EU, where an agreement has been found, first it is classified as either a “hard-core cartel” or “soft-core cartel” and they are regulated based on judging hard-core cartels as per se illegal without examining the competition-restrictiveness additionally and judging the competition-restrictiveness of soft-core cartels according to a rule of reason at the next stage.

In the United States *Petroleum Products Antitrust Case* (906 F. 2d 432, the 9th Cir. 1990), price cartels were the issue. Accordingly, it was a case where it would be held to be per se illegal so long as an agreement was proven. Yet in this case the agreement was not recognized directly as parallel price-fixing, i.e. conscious parallelism was found, and the United States 9th Circuit Court of Appeal did not recognize the cartel as there was insufficient circumstantial evidence to presume an agreement. In this case much importance was placed on the proof of contact between enterprisers, especially internal documents regarding meetings between staffs of the petroleum companies and the testimony of the staff who had attended the meetings. In particular, the detailed explanation regarding the credibility of the

testimony of relevant staff, and how this was evaluated in relation to the presumption of collusion, was very prominent.

It is also true in Korean cases that evidence relating to contacts between companies' staff is the most important material in the contest of presumption of cartel agreements. In the majority of KFTC decisions and Korean Supreme Court judgments, however, there is not a very deep analysis regarding the internal positions of the staff who participated in the meetings, especially in the aspects of how much influence they have in price determination, and how to judge their hearsay evidence.

The KFTC, in the case concerning a price cartel between Dong Suh Foods and Nestle Korea in Korea's coffee market which is a perfect oligopolistic market, provided only its consideration for conclusions that the exchange of information was between the sales staff of branch offices, not the responsible staff at the head offices and that the meeting time coincided with the price rising time. But there is no explanation regarding the contents of the specific testimony of the relevant witnesses.

In this case the Korean Supreme Court held that "Where two firms which shared the domestic coffee market raised the price of the coffee products competitively in order to expand their market shares, considering the peculiar circumstances of the domestic coffee market at that time when if your product was cheaper than that of the competitor it did not sell well, the competition-restrictiveness was lacking." (Supreme Court decision of 3.15.2002) Thus, the Court did not allow the presumption of agreement in Article 19(5) of the MRFTA. The expression used was "competition-restrictiveness", but the contents were the same as the circumstantial evidence for the presuming the agreement.

In the *Reserve Supply Corporation v. Owens-Corning Fiberglass Corporation* case (971 F.2d 37, the 7th Cir. 1992), the United States 7th Circuit Court of Appeals did not find an agreement regarding the conformity of price i.e. conscious parallelism. Similarly, the Korean Supreme Court overturned the presumption of agreement in the *Four Tissue Paper Manufacturers* price leadership case (Supreme Court decision of 5.28.2002). The two cases have four things in common with each other.

First, the standard prices were uniform in the relevant market, but actual supply price was discounted according to the individual pricing negotiation with distributors, so agreement could not be presumed from the uniformity of standard prices. Second, products were highly standardized and raw materials were identical or similar. Third, the fact of the price increases had already been notified to distributors. Fourth, in oligopoly markets the phenomenon of price leadership exists between competitors.

But the Korean case examined whether an agreement should be presumed or not depending mainly on price leadership. However, the US case provided specific criteria to determine whether parallel conduct was due to price leadership or conspiracy. In judging this, the US court engaged in detailed analysis of relevant market structure and distribution customs. In particular, that decision held that it was important to show whether the profit that the firms gained in the relevant market was supra-competitive profit due to the existence of a cartel or normal profit.

The *Woodpulp Ahlstrom and Others v. Commission* case in the EU (89, 104, 114, 116-17, 125-129/85[1993] E.C.R. 1-1307) is similar to the *Three Paper manufacturers* demurrer case in Korea (KFTC 1996.10.15, Decision No. 96-19) in the following points. First, the demander of the product was in a superior position to the supplier and prices were set uniformly according to the requirements of the demander. Second, there was almost no difference in raw material price as the product was of the same grade and there was no difference in quality. Third, price discrimination between firms was not permitted, as the number of the demanders was limited.

In the Korean case the KFTC presumed the existence of an agreement, based on correspondence between the firms, even though the product, newsprint, had similar causes for the price increase, such as the same grade, quality and price of raw materials. Furthermore the purchasers, newspaper firms, were not necessarily in superior positions compared to the suppliers, paper manufacturers.

By adopting the principle of requiring proof of additional factors in the *Woodpulp* case, the European Court of Justice imposed a very strict burden of proof on the plaintiffs. The plaintiff had to provide conclusive, clear and consistent proof. Parallel conduct would not be sufficient proof of a cartel. If this standard had applied in the KFTC, the plaintiff in the above decision, it could not have provided sufficient proof because the parallel price increases could not necessarily be explained solely by a prior agreement in view of the newsprint product and its market characteristics.

4. Legal Presumption and Factual Presumption in civil procedure law

A “presumption” is generally the conclusions drawn about one fact from another fact. There are “factual presumptions” and “legal presumptions”.

“Factual presumptions” refer to presumptions carried out in the application of rules of experience, which related to conclusion of a primary fact from one or several indirect facts based on rules

of experience in a specific case (Ho, 2004, 429).

“Legal presumptions” refer to presumptions which have become legal provision, which reflect rules of experience in legislation. There are cases where a certain fact is presumed and others where a certain right is presumed by a legal provision (Ho, 2004, 448).

In the case where legal facts are presumed, the party may directly prove the conditional fact (B) provided that it bears the burden of proving according to general evidentiary principles. Or it may alternatively prove facts basic to a presumption (A), which are easier to prove. In cases where there is proof of facts basic to a presumption (A) since the conditional fact (B) is then presumed, the effect is the same as the case where the presumed fact is proved directly. Legal presumption provisions have the effect of easing the burden of proof in the sense that they permit the choice or alteration of the matters to be proved.

Parties trying to avoid the application of a presumption provision when disputing a legal presumption may either contest the facts basic to the presumption (A) or dispute the conditional fact (B), which has been presumed, in an effort to remove the effect of the presumption. First, in the case where one contests the facts basic to the presumption (A) it is sufficient to disturb the facts basic to the presumption through counterevidence. In contrast, in the case where the facts basic to the presumption (A) are proven, this is different from a factual presumption because it is not merely an issue of the judge’s deliberation in the sense of the scope of their free deliberation, so the presumption must be rebutted with strong counterevidence. The cases also, in the case of a legal presumption of fact, state that the party asserting the contrary fact bears the burden of proof. In this sense, one can say that the burden of proof has been shifted (Song, 2004, 636-637).

5. Examination

In the United States and EU there is no presumption provision in the legislation allowing presumption of an agreement so that only a factual presumption through proving circumstantial facts exists, and that competition-restrictiveness is not a matter which is required to be proven for the factual presumption and must always be proved separately by the competition authorities. This reveals a significant procedural difference from the Korean cases. However, in terms of a delimitation line for recognizing agreements in specific cases to regulate cartels, Korea draws a similar boundary line to the EU.

In the result, the difference is in the issue of allocating the burden of proof. The Korean

Supreme Court, after presuming an agreement provisionally bound by Article 19(5), may overturn the presumption where it is inappropriate in specific cases. But the firms who deny the fact, which are subject to the presumption, bear the burden of proof. In contrast, in the United States and EU cases the burden of proof of additional circumstantial evidence remains with the competition authorities. While the Korean Supreme Court, in consideration of this irrationality, views the “presumption” in Article 19(5) of the MRFTA as a legislative presumption, by applying loosely the extent of proof needed for overcoming the legislative presumption, comparatively easily allow the rebuttal of the presumption. However, this has resulted in the legal principle of the presumption being applied inconsistently.

Accordingly, the KFTC, which regulates collaborative acts or the plaintiff seeking compensatory damages for violation of MRFTA, is exempted from the responsibility to prove the existence of the agreement, while the firms, in order to overcome the presumption, must prove the fact that their conduct’s conformity was not based on an agreement but was the result of the individual firm’s independent managerial decision. However, since there is no direct proof that can show the non-existence of an agreement, there is no choice but to disprove this by indirect evidence. Yet this is much more difficult than proving the existence of an agreement, and in some cases this may be practically impossible to prove.

A firm, in order to overcome the presumption, can only prove the non-existence of indirect certain facts supplied by the KFTC, particularly that there was no restriction on competition, or provide other circumstantial existence to prove the non-existence of an agreement. However proving that there was no restriction on competition, is not a simple factual matter. Therefore where the KFTC has adduced that there is competition-restrictiveness and presumed the agreement, even if the firm makes a different assertion, it is not easy to succeed in disproving this as it is a value judgement regarding “competition-restrictiveness.” When proving the non-existence of an agreement the circumstantial facts must show that there was no agreement. Yet in the process of proving this assertion, ultimately the legal presumption and factual presumption overlap in that the judgment process is the same as the presumption of agreement in fact by circumstantial facts (Lee, 2002, 78).

This stance ossifies the free economic activity of firms which may be called a “cartel” so that in terms of interpretation an administrative presumption approach is appropriate, or in terms of legislative reform, the deletion of Article 19(5) of the MRFTA is desirable.

IV. Interpretation of “Presumption”

1. Legal Presumption approach – stance of the Korean Supreme Court

The cases view the “presumption” in Article 19(5) of the MRFTA, interpreting it faithfully to its wording, as a civil law legal presumption in the nature of a presumption of a fact. Article 19(5) of the MRFTA is viewed as a legal presumption of a fact because literally it is a presumption carried out by applying a legal provision in a regulation directly and it is a provision that presumes a certain fact (B) where there is a certain factual premise (A). Accordingly, parties that have to rebut a legal presumption must perfectly prove the truth of opposing facts which are sufficient to overturn the facts presumed. It is not sufficient that the court has some doubt about the existence of the presumed facts (Yun, 2002, 236)

If the party cannot rebut with certainty the fact presumed at law, then it suffers the disadvantage of the burden of proof.

The cases may presume in fact through the proof of circumstantial facts an agreement or tacit understanding under Article 19(1) of the MRFTA, but the presumption of agreement under Article 19(5) makes it clear that this is a legal presumption (Supreme Court decision of 3.15.2002, 99du6514, 6521).

2. Administrative Law Presumption Theory

This opinion takes the view that the MRFTA presumption is a unique administrative law presumption that is different from a civil procedure law presumption. The KFTC must commence specific procedures where its conditions are satisfied, and these may be called “triggering requirements” or “commencing conditions” (Auffangtatbestand, Aufgreiftatbestände). However, one must make sure that this does not displace the principle of the power of the KFTC to conduct investigations under Article 49 of the MRFTA. Accordingly, this presumption has no direct relationship with the evidential burden or formal burden of proof, it only relates to a substantial burden of proof. That is, where the conditions of the presumption are satisfied, it is not the fact that the burden of proof shifts and the party has to provide counterevidence in order to rebut the presumption, rather that the KFTC still bears the duty to investigate comprehensively the existence of an agreement. Despite the KFTC carrying out its duty faithfully where there still remains some uncertainty, the enterpriser who wishes to rebut the presumption at that point for the first time comes to bear the burden of proof (Kwon, 2002, 277).

Article 81 of the EC Treaty provides:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market.

In practice, in Europe “concerted practices” are triggering requirements under Article 81 of the EC Treaty, and are used as means for detecting cartels (Änderung des GWB (1973), BT-Drucks. 7/765, S. 10).

The problem arises regarding the extent to which the KFTC must engage in investigative activities to carry out its duties faithfully. In cases where it cannot be said that the KFTC did not carry out its duties faithfully, one can point out that the legal ramifications of this are not clear. According to the administrative law presumption theory, if the KFTC does not carry out faithfully its investigatory activities for distinguishing whether or not there has been an agreement, then it cannot apply the presumption provision.

3. Problems with the theory in the Cases of Korean Supreme Court

In the Korean Supreme Court cases, that the “presumption” in Article 19(5) of the MRFTA is viewed as a civil procedure law presumption so that it is easy to admit collaborative acts and then the process of rebutting this is repeated results from a misunderstanding in the communication between the government authorities that drafted the MRFTA and the courts. In the case of the MRFTA, there are many cases in which the KFTC drafts this. Accordingly, the stance of the KFTC is the most consistent with the legislative purpose of the drafting of the MRFTA. The KFTC in the past has taken the stance of additionally requiring proof of circumstantial facts even when the elements of “outward conformity of conduct” and “competition-restrictiveness” under the Article 19(5) are proven.

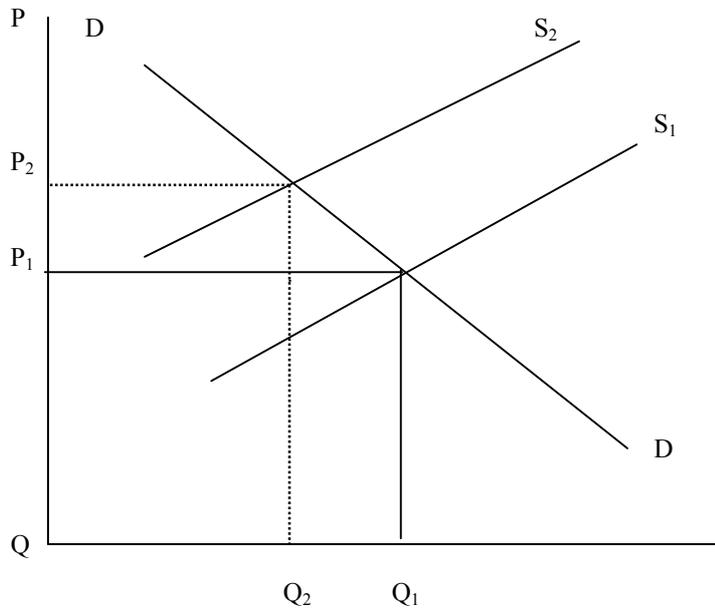
In Article 19(5) the expression “that practically restrict competition in a particular business area” also appears to have the purpose of reasonably restricting the scope of the Article by considering additional circumstantial facts, and not just prohibiting unconditionally as undue collaborative acts the conformity of conduct in relation to price, trading conditions and delivery.

In the MRFTA, inasmuch as it is a law that regulates the economic life of the citizenry, legal certainty is very important, so the courts cannot accept the unfiltered stance of the KFTC and must consider the legal certainty of a law from the perspective of the citizenry. The Korean Supreme Court, based on this ideal, interprets this Article from the perspective of the whole legal order.

By classifying this provision mechanically, however, the stance of the cases is an overly artificial interpretation, which states that where the two conditions of “competition-restrictiveness” and “outward uniformity of conduct” are satisfied the agreement is legally presumed as a matter of course. Competition-restrictiveness is an issue of value judgment and not a factual one so viewing this as a fact required to be proven separately is overly formalistic. When one follows this sort of mechanical interpretation, the agreement is presumed only as a direct result of having proved the two elements of “competition-restrictiveness” and “outward conformity of conduct.” Accordingly, before proving competition-restrictiveness, it is still the stage prior to the agreement being presumed. Hence the cases contain the extreme formalism of having to assume that there is no agreement when judging the competition-restrictiveness.

For example, in the case of a price cartel or a market division cartel, the parties usually have agreed not to compete on price or to divide the market, and since this sort of agreement itself is a “ceasefire agreement” to cease competition one can admit its competition-restrictiveness. In the case of price cartels, however, as we shall see below, simply because price have risen uniformly, leaving aside any agreement, it is difficult to see this as competition-restrictive. Even in market division cartels, cases where markets become divided coincidentally or of their own accord absent any agreement, it is hard to admit the competition-restrictiveness. Exceptionally, in the case of trading condition cartels, if trading conditions become uniform this may promote price competition, so there is a need to reexamine competition-restrictiveness.

Let's assume the perfect competition market where the goods traded are identical. In this market, in the case of a rise in the price of raw materials, the supply curve shifts from S_1 to S_2 , and corresponding to this the market price rises from P_1 to P_2 and the quantity supplied shrinks from Q_1 to Q_2



That is to say, even in the case of perfect competition, there can be any number of cases that could occur in which price rises at the same level and production volumes shrink. The same phenomenon may occur even in the case of an oligopolistic market operating competitively.

Accordingly, in an oligopolistic market, the fact that the prices rise uniformly and production volumes fall may be the result of competition or the result of an agreement. It is irrational to presume directly the existence of an agreement merely because price rises and supply volume shrinkages appeared uniform outwardly. Viewed this way, in an oligopolistic market, the fact that prices rise at the same level is a necessary condition to show substantive competition-restrictiveness, but it is not a sufficient condition.

South Korea's "Guidelines for Collaborative Acts" were established in May 2002 with reference to "Antitrust Guidelines for Collaborations among Competitors" of the United States and the EU's "Guidelines on the applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements" and altered to suit Korea's circumstances. Under the Korean regulatory framework, at the stage of examining the illegality of cartels, one must first classify it as either a hard-core cartel or soft-core cartel. Hard-core cartels such as price-fixing cartels are judged per se illegal without examining the

competition-restrictiveness separately. Soft-core cartels are judged in terms of their competitive-restrictiveness by applying the rule of reason. That is, hard-core cartels are found illegal directly once an agreement is proved, while soft-core cartels are illegal provided that competition-restrictiveness is proved together with an agreement.

Yet the Korean Supreme Court cases do not distinguish between hard-core and soft-core cartels, holding that an agreement may be presumed where one can prove “outward conformity of conduct” and “competition-restrictiveness”.

Accordingly, the words “committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area” in Article 19(5) of the MRFTA should not be interpreted mechanically so as to judge separately “competition-restrictiveness” and “outward conformity of conduct”, but so as to mean that it will regulate the outward conformity of conduct, i.e. conscious parallelism as undue collaborative acts in a way that is restricted appropriately.

4. Norms of the Administrative Law Presumption Theory

The fact that the legislators used the term “presumption” in the MRFTA Article 19(5), in contrast to the term “deem”, was so that it would be able to be comparatively easy to rebut. The same term “presumption” is used in Article 19(5), however, because as the regulation of undue collaborative acts tightened the firms did not hold meetings or draw up agreements naively like in the old days, but engaged in collaborative acts secretly by increasingly sophisticated methods, so one see that it was legislation with the object of lessening the difficulties of proof. One can express cartel regulation as an eternal race between competition authorities and firms. The special character of cartels makes 100% proof nearly impossible. In such a case, if the KFTC proves circumstantial evidence to about 80%, the legislative purpose was to allow regulation by presuming the undue collaborative act.

Accordingly, where conditions of MRFTA Article 19(1) are fulfilled, the agreement is not directly presumed, and the KFTC initiates regulatory procedures. In the case where parts of the case remain unclear despite the KFTC carrying out its duties faithfully, it is appropriate that the existence of an agreement be presumed and the firm from that point for the first time bears the burden of proving the non-existence of the agreement.

V. Legislative Reform

In the case of conscious parallelism, this is not regulated directly as a cartel; rather as an additional factor that triggers the presumption of agreement is the legal enforcement trend in each country. With reference to this, it is desirable that Korea also should not presume an agreement and regulate it as an undue collaborative act, merely because it is provided that 2 or more firms engaged in conduct listed in Article 19(1) of the MRFTA. Rather it is desirable that this Article be amended in the direction of presuming the existence of an agreement only in the cases where the court comprehensively considers matters such as the relevant market structure and performance, barriers to entry, and market power of firms, and when there is no alternative explanation other than that this is the result of an undue collaborative act (Kwon, 2002, 279).

It would be induced to a factual presumption to prove the existence of an agreement based on rules of experience. Accordingly, it is appropriate that the proof of this additional factor be left to a factual presumption proving an “agreement” in Article 19(1) of the MRFTA, and that Article 19(5) be deleted.

VI. Conclusion

In interpreting Article 19(5) faithfully to its wording, the cases hold that if one only proves the two facts of “outward conformity of conduct” and “competition-restrictiveness” that the firm provisionally “shall be presumed to have committed an unfair collaborative act.” Recently, however, many cases have emerged in which the presumption was rebutted, in the cases when proving the fact that there was no agreement regarding an undue collaborative act, when proving circumstances in which one can accept that outwardly same or similar conduct there was not a collaborative act due to an agreement, or when in an oligopoly a market leader with a high market share set a price based on its independent judgment which was subsequently imitated by following firms unilaterally. Since the conditions of the presumption of agreement in terms of the interpretation of Article 5(5) of the MRFTA were loosened, the courts have found the appropriate outcome by limiting appropriately the presumption of agreement in specific cases. Also, the KFTC, even if it proves the “outward conformity of conduct” and “competition-restrictiveness,” does not regulate the “agreement” directly as an undue collaborative act by presumption, but it investigates deeply into the facts of an agreement to engage in collaborative acts or circumstantial facts so as to factually presume that the outward conformity of conduct was a collaborative act due to an agreement. In fact, the result is that the presumption provision Article 19(5) of the MRFTA is enforced, as it is in the United States and the EU, differing from a civil procedure law presumption.

As a result, cases follow the process of overturning the presumption again after first allowing the presumption of agreement due to Article 19(5) of the MRFTA. However in reality they regulate the cartels focusing on the same basis as the United States and the EU. The ultimate difference is that in the case of Korea, the burden of proof is on the firm to prove that there was no agreement. However, as stated above, it is ultimately desirable to amend or delete Article 19(5) of the MRFTA due to the problems of the imbalance in the burden of proof.

References

Article 19(5) of the Monopoly Regulation and Fair Trade Act,

[http://ftc.go.kr/data/hwp/monopoly\(6705\).doc](http://ftc.go.kr/data/hwp/monopoly(6705).doc), 1.8.2005

Article 81 of the EC Treaty, http://europa.eu.int/comm/competition/legislation/treaties/ec/art81_en.html.

1.7.2005.

Guidelines on the applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements,

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001Y0106\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001Y0106(01)&model=guichett), 1.5.2005

Ho, Moon Hyuck, 2004, *Civil Procedure Law*, Bobmunsa

Heo, Seon, 2004, *KFTC's Enforcement and Henceforth Task of Cartel Regulation*, Fair Trade and Rule of Law, Bobmunsa

Kwon, Ohseung, 2002, *Economy-law*, Bobmunsa

KFTA Guidelines for Collaborative Acts, www.ftc.go.kr, 1.8.2005

Lee, Bong-ui, 5.2002, *Presumption of Cartel Agreement*, JURIST

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* vol. VI §1429a, 207 (2d ed., Aspen Law & Business 2003)

Song, Sang Hyun, 2004, *Civil Procedure Law*, Pakyoungsa

Yun, Seong-un, 2002, *Presumption Provision of Cartel Agreement*, Free Competition and Fair Trade, Bobmunsa

Precedents

Supreme Court decision of 3.15.2002, 99du6514,6521

Supreme Court decision of 5.28.2002, 2000du1386

Supreme Court decision of 2.28.2003, 2001du1239

Supreme Court decision of 5.27.2003, 2002du4648

Supreme Court decision of 12.12.2003, 2001du5552

Supreme Court decision of 1.28.2005, 2002du12052

Wood pulp □-A. Ahlström and other v. Commission Case 89,104,114,116~17,125~129/85 [1993] E.C.R. 1-1307,

<http://europa.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=80029289T19950227&doc=T&ouvert=T&seance=ARRET>

Änderung des GWB (1973), BT-Drucks. 7/765, S. 10.