APPLYING THE KOREAN EXPERIENCE WITH ANTITRUST LAW TO THE DEVELOPMENT OF COMPETITION LAW IN CHINA†

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I. PREFACE

Economic systems can be divided into market economies and planned economies on the basis of the mechanisms by which they coordinate the economic activities of individual economic actors. China has recently adopted the market economy, common in most western countries and Korea. China has had roughly ten years of experience with a market economy, but the Chinese have yet to adopt antitrust legislation.[1] Korea, on the other hand, already has more than fifty years of experience with this kind of system and more than twenty years of experience with antitrust law, which began in 1981 with the enactment of the Monopoly Regulation and Fair Trade Act (the Korean Antitrust Act, hereinafter "KAA" or "the Act"). The KAA was meant to ensure free competition and fair trade in Korean markets.

This Essay first focuses on the process of the enactment and development of Korean antitrust law, and then provides an overview of the objectives, substantive contents, structure, and function of the KAA's enforcement agencies and enforcement procedures. Next, this Essay proposes an analysis of the root cause of the KAA's lack of success in transforming the monopolistic or oligopolistic market structure into a more competitive one, and suggests some ideas for revising the KAA. Finally, this Essay proffers lessons from the Korean experience for China.

II. ENACTMENT AND DEVELOPMENT OF KOREAN ANTITRUST LAW

Although the Constitution of the Republic of Korea promotes the principles of a market economy as the core of its economic order, the economic activities of individual agents have continuously been plagued

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† Due to circumstances beyond this Law Review's control, we have relied on the integrity of the Author for all Korean language sources cited herein and asserted facts that are not supported by a citation.

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1. Xiaoye Wang, *The Prospect of the Anti-Monopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 201 (2002).

by government intervention. This problem results primarily from the fact that the Korean government, through a series of economic development plans beginning in the 1960s, endeavored to overcome structural weaknesses and to reduce economic dependency on other countries by implementing an export-oriented economic development policy. In order to accomplish these goals, the government relied heavily on a handful of large-scale enterprises, and the government supported these enterprises through many aspects of its economic policy, including tax exemptions and a favorable distribution of bank loans. At the same time, the Korean government itself played a significant role, directly or indirectly, in developing key industries and the overall economic infrastructure.

While the early 1980s marked the emergence of Korea as a newly developed nation, government policies resulted in monopolistic domestic markets and allowed only a small number of large-scale enterprises to control most of the nation's key industries. The ramifications of these policies for the economy were numerous and diverse. First, economic power became concentrated in the hands of a few large-scale businesses and business conglomerates favored by the government during its export-driven development years. Second, the Korean government's excessive market intervention and regulation greatly impaired the functioning of the market. To cope with these problems and restore proper market function, the government enacted the KAA to promote free competition and fair trade by prohibiting the abuse of market-dominant positions, anti-competitive mergers, unreasonable cartels, and unfair trade practices. In addition, the KAA was an attempt to simultaneously deregulate many important industries. In 1986, the KAA was amended to introduce new provisions aimed at reducing excessive concentrations of economic power through heavier regulation of large-scale business conglomerates and holding companies.[2]

III. OVERVIEW OF THE KAA

A. The Objectives of the KAA

The primary objective of the KAA is to promote free competition and fair trade.[3] Because market economies cannot work efficiently without free

2. KAA has already been amended 22 times since it became effective in 1981 (the list of amendments is available at the beginning of the Act). Statutes of the Republic of Korea, Dokjummit Gongjung Gurae Gwanhan Popryul [hereinafter "Monopoly Regulation and Fair Trade Act"], Vol. 8 (1997).

3. Article 1 of the KAA distinguishes its more immediate goal (encouragement of fair and free

competition and fair trade between individual economic agents, the KAA is truly the fundamental law of economic order in Korea. The first amendment to the KAA, made in 1986, was specifically aimed at reducing the concentration of economic power.[4]

B. Substantive Components of the KAA

The substantive components of the KAA can be divided into three categories on the basis of the objectives each seeks to achieve: (1) regulations to promote and ensure free competition; (2) regulations to ensure fair trade; and (3) regulations to reduce the concentration of economic power.

1. Regulations to Promote and Ensure Free Competition

In order to promote and ensure free competition in the market, the KAA regulates economic agents and activities that could undermine conditions of free competition, such as monopolies, oligopolies, mergers, and collaborative activities and cartels. With regard to monopolies and oligopolies, the KAA does not explicitly prohibit the possession or acquisition of this sort of power, instead, it forbids the abuse of a market-dominant position. In other words, the KAA restricts anti-competitive or unfair behavior of market-dominant firms, rather than prohibiting monopolization or attempts to establish a monopoly.

As it is difficult to assess whether a firm possesses a market-dominant position or not, the KAA includes a presumptive clause that considers a firm to be market-dominant if it meets the conditions stated in Article Four.[5] The KAA, as amended in 1996, requires that the Fair Trade Commission (hereinafter the "KFTC" or the "Commission") establish and enforce measures designed to promote competition in markets where monopolies and oligopolies have long been entrenched. Korean economic

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economic competition) from its ultimate goals (stimulating creative business activities, protecting consumers, and promoting the balanced development of the national economy) by stating that, "The purpose of this Act is to encourage fair and free economic competition by prohibiting the abuse of market-dominant positions and the excessive concentration of economic power and by regulating improper concerted acts and unfair business practices, thereby stimulating creative business activities, protecting consumers, and promoting the balanced development of the national economy." *Id.* art. 1.

4. Act No. 3895 (July 24, 1986). Whether or not the revision that added regulating concentration of economic power as a legislative goal is appropriate is still a subject of great debate.

5. If the market share of one enterprise is greater than fifty percent or the combined market share of less than three enterprises is above 75 percent, excluding any enterprise with a market share of less than 10 percent, then the firm is considered market-dominant. Monopoly Regulation and Fair Trade Act, art. 4(1)-(2) (Korea).

policy reflects a clear understanding that it is impossible to render a market more competitive simply by forbidding the abuse of a market-dominant position.[6]

As for mergers, the KAA prohibits those that would substantially restrict competition in any relevant market,[7] while allowing mergers as an exception when the efficiency-enhancing effects of a merger far exceed the potential harms of restrained competition, or when the merger involves an enterprise for which the paid-in-capital was less than the total assets on the balance sheet for a considerable period of time, thus deeming its revitalization impossible.[8] Recognizing the difficulty of determining whether a merger substantially restrains competition or not, the KAA's 1996 amendment added a presumptive clause that made certain mergers[9] presumptively illegal.[10] The KAA also prohibits mergers by means of compulsion or any other unfair measure.[11] Whether this clause is well suited to the purpose of the KAA, however, remains questionable.

The KAA basically prohibits collaborative activities and cartels that unreasonably restrict competition. Cartels, however, may be permitted if deemed necessary for achieving certain desirable ends, including: (1) industrial rationalization; (2) promotion of research and technological development; (3) resolution of economic depression; (4) promotion of industrial restructuring; (5) rationalization of terms of trade; and (6)

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6. *Id.* art 3.
7. *Id*. art. 7(1).
8. *Id.* art. 7(2).
9. The KAA presumes that competition is in effect suppressed in a particular business area if a business combination falls under either of two categories. The first category includes situations where the total market share (meaning the sum of the market shares of all affiliates) of the parties to the business combination meets all of the following categories:

> (a) the combined market share meets the criteria for a market-dominant enterprise; (b) the total market share is the highest in the business area concerned; and (c) the difference between the total market share and the market share of the corporation with the second highest market share (the corporation with the highest market share, excluding the corporation that is a party to the combination of enterprises is more than 25 percent of the said sum of market share.

Monopoly Regulation and Fair Trade Act, art. 7(4)(1) (Korea).

The second category includes business combinations by large-scale corporations, either directly or through a specially-related person, in the following categories:

> (a) business combination in an area of trade where the market share of the small-and-medium enterprises is more than two-thirds pursuant to the Framework Act on Small and Medium Enterprises; and
> (b) acquisition of more than 5 percent of the market share as a result of said business combination.

Id.

10. Monopoly Regulation and Fair Trade Act, art. 7(4) (Korea).
11. *Id.* art. 7(3).

strengthening of the competitiveness of small- and medium-sized businesses.[12] As proof of a meeting of the minds is both crucial and difficult in these cases, the KAA provides that when two or more enterprises commit any of the acts listed in Article 19(1), the parties shall be presumed to be a cartel, and, therefore, substantially restraining competition (despite the absence of an explicit agreement to engage in such an act).[13]

2. Regulations to Ensure Fair Trade

The KAA prohibits various anti-competitive methods and unfair trade practices under the rubric of "unfair business practices" in order to maintain fair competition and trade. The Act thereby forbids enterprises from engaging in any act listed under Article 23(1) that is likely to impede fair competition and/or trade or to cause affiliated corporations or other enterprises to commit such an act. In order to effectively prohibit these "unfair trades or practices," the types of, and criteria for, such trades or practices are clearly set forth by presidential decree.[14]

The KAA also prohibits enterprises from engaging in any act that might hamper fair trade or restrain competition,[15] and outlaws any act that can be considered as resale price maintenance.[16] However, certain resale price maintenance is allowed. Exceptions include situations where the actions are deemed justifiable,[17] and those actions regarding publications specified in the Presidential Decree, or commodities meeting all of Article 29(2)'s conditions and that the KFTC has designated in advance as being eligible for Resale Price Maintenance.[18] Additionally, the KAA prohibits enterprises or trade associations from entering into international agreements or contracts that provide for acts constituting unreasonable restraints of competition, unfair trade or business practices, or resale price maintenance. However, should the KFTC determine that the effect of the agreement upon competition in a relevant market is negligible or that there are other unavoidable reasons for the contract, such contracts may be permitted.[19]

12. *Id.* art. 19(2).
13. *Id.* art. 19(5).
14. *Id.* art. 23(2), 36.
15. *Id.* art. 26.
16. *Id.* art. 29(1) (saving clause).
17. *Id.*
18. *Id.* art. 29(2).
19. *Id.* art. 32.

3. Regulations to Reduce the Concentration of Economic Power

The KAA controls holding companies and activities between subsidiaries belonging to large business groups in order to reduce the concentration of economic power. Its mechanisms of control include regulation of cross shareholdings, total amount of equity investment, debt guarantees for affiliated corporations, and anti-competitive subsidies.

The establishment of holding companies was prohibited in 1987, but has been allowed since 1999 in order to encourage company restructuring.[20] There are still, however, stringent restrictions on the establishment of holding companies because they can easily become a means to concentrate economic power.[21]

The KAA first defines "Chaebol" as large business groups,[22] and then establishes control over those groups that fit the criteria provided therein.[23] Subsidiaries belonging to these business groups are subject to the strict regulations provided in the KAA, including the prohibition of cross shareholdings[24] and debt guarantees for affiliated corporations,[25] and limitations on the total amount of equity investment, currently set at twenty-five percent.[26] In addition, improper subsidies and other forms of

20. *Id.* art. 8.

21. *Id.* art. 8(2)-(3).

22. This approach is very similar to that of the Japanese Antitrust Act, however it ignores the fundamental difference between Korean *Chaebol* and Japanese *Keirestu*. While the former is actually controlled by one individual or his close family members, the latter is not. If then, Korea takes this approach, it would overlook issues specific to Chaebol, such as concentration of equity ownership and its resultant management inefficiencies.

23. The Fair Trade Commission shall designate corporations as belonging to large enterprise groups, subject to limitations on debt guarantees, in accordance with procedures established by Presidential Decree, and shall notify such companies of their membership in this group. *See* Monopoly Regulation and Fair Trade Act, art. 14(1) (Korea).

24. These restrictions will not apply to: a merger of companies, or the acquisition by transfer of a whole business; or execution of security rights or receipt of accord and satisfaction *Id.* art. 9(1).

25. Limitations on debt guarantees for affiliated corporations were first adopted in the third revision of the Act in 1992. Originally, the limitation was two hundred percent of the company's net worth, however by 1996, this figure was reduced to one hundred percent. In 1998, to accommodate the International Monetary Fund's (IMF) demand for the complete removal of debt guarantees between affiliated corporations, the KAA was amended to prohibit any new debt guarantees and mandated complete removal of any existing debt guarantees by March 31, 2000. *See generally id.* art. 8(3).

26. Limitations on equity investment were first implemented in 1987. These limitations were lifted by revisions made in 1998 during the so-called "IMF-era" because it was thought that the limitations might hinder company restructuring plans. Ultimately, however, the amendment resulted in a dramatic increase in the amount of equity investment between subsidiaries of large-scale business groups, was used to reduce debt ratios on paper without any actual increase in the net worth, and to gain control of subsidiaries without acquiring additional shares. In response, the limitations were re-adopted in the amendments of December 1999, and came into effect in April 2001.

subsidiary support that could hamper fair trade and competition are prohibited.[27]

C. Enforcement of the Act

1. The Fair Trade Commission

The KAA is enforced by the Fair Trade Commission, a quasi-judicial regulatory agency. The KFTC is composed of nine commissioners, including a chairman, a vice-chairman, three standing, and four non-standing commissioners.[28] The Commission's jurisdiction encompasses virtually all antitrust enforcement in Korea. It investigates suspected violations[29] and, when a violation of the Act is found, the KFTC issues corrective measures and attempts to ensure violator compliance with such measures; if necessary, surcharges are imposed, and criminal prosecution is pursued against the violator. Any party that wishes to claim damages resulting from a violation of the KAA may bring a private suit against the violator after the Commission's corrective measures become definite and final. Furthermore, the public prosecutor may indict the violator for violations of the Act.

A Secretariat within the Commission is responsible for the day-to-day business of the Commission,[30] and consists of a secretary general, six bureaus, and four regional offices.[31]

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27. As a result of the KFTC's "Guidelines on Unfair Trade Practices by Large Business Groups" formulated in July 1992, the Fair Trade Commission began to expand its supervision over indirect anti-competitive activities between subsidiaries. These activities took many forms, including the trading of goods and services at extremely favorable terms, however, the Commission's supervision was limited by its inability to supervise more direct violations such as the provision of other subsidiaries with temporary payments, loans, manpower, and real estate. The amendments of 1996 established a legal basis for Commission authority to supervise all anti-competitive activities and, in July 1997, the Commission formulated the "Guidelines on Anti-Competitive Transactions between Subsidiaries Belonging to Large Business Groups" in order to ensure "the fairness and transparency of its enforcement." In addition, the 1999 amendments to the Act granted the Commission authority to request information regarding financial transactions in order to effectively investigate possible violations of anti-competition laws.

28. Monopoly Regulation and Fair Trade Act, art. 37(1) (Korea).

29. According to the KAA, any person who deems that a violation of the Act has occurred or is occurring, may report it to the Fair Trade Commission. *Id.* art. 49(2).

30. *Id.* art. 47.

31. Presidential Decree 16725.

2. Administrative Procedures

The enforcement procedures set forth in the KAA include the investigation of suspected violations, the ability to order or recommend corrective measures, and the power to impose surcharges.[32]

Under the KAA, anyone who discovers a violation may report it to the Commission, and the Commission may then conduct an investigation on its own authority.[33] An injured party, however, has no legal right to require the Commission to undertake an investigation. Investigations are generally conducted by the Secretariat through authority delegated by the Commission. If it is deemed necessary, designated staff members of the Secretariat may take appropriate measures to collect information, examine materials at the suspected violator's place of business, or summon the parties for an investigative hearing.

When the Commission determines that there has been a violation, under certain circumstances, the Commission may simply recommend that the violator comply with specified corrective measures. The violator must notify the Commission of its intentions to comply with the suggested measures, and if it does, corrective measures pursuant to the KAA are a sufficient remedy. In cases where the alleged violator does not agree to take voluntary action, the Commission makes a final enforcement decision after giving the alleged violator and any interested third parties an opportunity to present their opinions. The final decision may include an administrative order for correction of the illegal conduct, a surcharge, or a criminal prosecution. Corrective orders include, among others, cease-and-desist orders, orders to lower prices, and public acknowledgment of the violations. Surcharges can be imposed on those who violate most of the substantive provisions of the KAA. In imposing surcharges, the Commission must take into account the nature and extent of a violation, the duration and frequency of that violation, and the amount of benefit accrued as a result.[34]

Interested parties may appeal the Commission's decisions to the Seoul High Court under Articles 54 and 55, and ultimately, to the Supreme Court.

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32. The Fair Trade Commission may impose compulsory enforcement charges instead of surcharge upon those who breach provisions pertaining to the restriction of business combinations. Monopoly Regulation and Fair Trade Act, art. 17(3) (Korea).

33. *Id.* art. 49.

34. Monopoly Regulation and Fair Trade Act, art. 55(3) (Korea).

3. Private Actions

A party who is damaged by a violation of the KAA can bring a private suit against the violators for damages only after corrective measures ordered by the Commission have become definite and final. Under the Act, then, no private suit may be pressed unless a Commission investigation takes place, and results in the issuance of corrective measures for the violation. Unlike general suits for damages, there is no need for a plaintiff to prove intent or negligence by the defendant.[35] Private parties are authorized to bring suits for damages arising out of a tort independent of private actions pursuant to the provisions of the KAA.

4. Criminal Prosecution

In general, violations of the substantive provisions of the KAA and failure to comply with resulting corrective measures are punishable by imprisonment of up to two years or fines not to exceed one hundred fifty million Won.[36] Criminal prosecution may not be advanced until the Commission has filed a complaint.

IV. ASSESSMENT OF THE ACT AND SUGGESTIONS FOR REVISION

A. Assessment on the Effectiveness of the Act

Since 1981, the enforcement of the KAA has contributed greatly to the importance acceded to fair trade and free competition in the market and to public opinion, as well as to lessening anti-competitive or unfair trade practices. The Act, however, is not free from criticism—especially from academic and business circles. In general, it is argued that the Act cannot fully succeed in converting a monopolistic or oligopolistic market structure into a competitive one, and does not effectively reduce the concentration of economic power.[37]

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35. Monopoly Regulation and Fair Trade Act, art. 56 (Korea).
36. *Id.* art. 67.
37. Yang Myong Cho, *Assessment and Perspective of Korean Antitrust Law*, J. COMPETITION L. 12 (2002).

B. The Reason for Shortage in Reforming Market Structure

We begin with the reason behind the KAA's failure to reform the market structure. First, the KAA is inherently flawed. Generally speaking, monopolization or oligopolization occurs when a fraction of existing competitors succeed in gaining a controlling share of the market through technological advancement or capital accumulation. In Korea, however, the government is partly responsible for incidents of monopolization as it was the government that created a number of monopolies through the favors it bestowed upon a few large-scale enterprises during the process of economic development. Moreover, while the United States has developed antitrust laws to prevent markets from becoming monopolized or oligopolized, the Korean government did not institute its own antitrust legislation until monopolization had permeated most domestic markets. The KAA, therefore, faced serious obstacles from the very beginning.

Second, the KAA might have been more effective had the government rigorously enforced the KAA by regulating abuses of market power. Unfortunately, this did not happen. This becomes very clear when we compare the Korean experience with the implementation of antitrust legislation in Germany—a system that took a very similar approach to antitrust regulation as that of Korea. If we reflect on the past practices of the KFTC, we see that the Commission was not terribly aggressive in its regulation of monopolies, mergers, and collaborative activities until at least 1997.

C. The Reason for Failure in Reducing Concentration of Economic Power

There are many explanations for the KAA's failure to reduce the concentration of economic power. The most persuasive reason is that the KAA, in its current state, is inherently incapable of bringing about the desired reduction of concentration in economic power. To regulate the concentration of economic power effectively, careful study of the causes of concentration, and the appropriate measures for reducing or alleviating the concentration should have been conducted before the KAA was drafted. As a result of this failure, only a few means of accumulating economic power, such as establishment of holding companies, cross shareholdings, and debt guarantees for affiliated corporations, were prohibited or regulated. Because the KAA has not adopted any provisions regarding the dissolution of existing concentrations, the KAA may be useful in preventing greater concentration of economic power, however,

current measures provided by the KAA cannot be expected to alleviate or resolve the concentration of economic power problem itself.

Another sharp criticism of the current KAA regulatory regime is that its measures are at odds with the primary aim of the legislation of ensuring and encouraging free competition and fair trade in the market. In other words, before regulating activities such as the establishment of holding companies, cross shareholdings, total amount of equity investment, and debt guarantees for affiliated corporations, there must be some explanation as to why these activities are harmful to free competition and fair trade. The KAA itself provides us with no justification for its regulations and, as a result, businesses are often skeptical of the KAA's regulations.

D. Legislative Suggestions to Improve the Korean Antitrust Act [38]

For the Act to work more efficiently as the fundamental law of a Korean market economy, a number of revisions are suggested herein. These recommendations are grouped according to the substantive, agency-wide enforcement, and procedural aspects of the Act.

1. Substantive Aspects of the Act

First, the KAA's criteria for determining whether a company has a market-dominant position are far too generous. Indeed, even those with market-dominant power are, in fact, seldom regulated. Hence, in order to make the KAA more practically efficient, the presumptive criteria should be as stringent as comparable German law.[39]

Second, the KAA's prohibitive criteria regarding mergers are set so high that they are virtually useless in practice. In order to enhance the efficiency of merger control, the criteria regarding horizontal mergers should be revised in a manner that has greater practical effect.[40]

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38. For more information on suggested legislative amendments of Korean Antitrust Law, see Ohseung Kwon, *Suggestion to Amend Korean Antitrust Law*, 41 SEOUL NAT'L U. L.J. 122 (2000).

39. The German Antitrust Law presumes enterprise to be market-dominant when the combined market share of three or fewer enterprises reaches 50 percent, or when the combined market-share of five or fewer enterprises reaches two-thirds. Gesetz gegen Wettbewerbsbeschränkungen [Law Against Restraints of Competition] v.27.7.1957 (BGB1IS.1085).

40. In my opinion, if we are to presume anti-competitiveness on the basis of market share, it is better to choose a standard of selective criteria rather than the cumulative approach taken by current legislation. For example, current legislation presumes that enterprise is market-dominant if: (a) it has a combined market-share that meets the criteria set forth by the presumptive clause; and (b) it has a combined market share that is the biggest in the market and exceeds the second largest enterprise by more than twenty-five percent of market share.

Additionally, new provisions designed specifically to control conglomerate mergers should be introduced.[41]

Furthermore, while the KAA lists eight types of restricted anti-competitive cartels, this legislative approach does not provide for the new types of cartels that will inevitably arise with changes in the market and in sales techniques. From a practical standpoint, the KAA should add an inclusive clause of a general nature regarding restricted anti-competitive cartels, rather than trying to define and list different specific types of cartels.

In addition, while the KAA includes provisions regarding a meeting of the minds in cartel regulation, its provisions are written in such broad and unreasonable terms that it is of little practical use in regulating cartels. Legislation should be introduced to revise the KAA in a manner that allows for more effective control over concerted actions.

Finally, the KAA lists seven types of unfair trade or business practices. The KAA states that the types of and criteria for such practices shall be determined by Presidential Decree. The problem with this approach, however, is that subjecting a violator to criminal charges when the elements of that crime are determined by presidential decree is that it may conflict with the principle of *nulla poena sine lege*. This approach may also render the Act ineffective in terms of regulating new types of unfair trade or business practices. In order to effectively regulate various unfair trade or business practices, it would be wiser to retain only the general provision in the KAA that prohibits unfair trade or business practices, thereby allowing the specific types of outlawed practices to be decided by the Commission or the Court. Further, the provisions pertaining to restriction of international contracts, resale price maintenance, or trade associations should be deleted—there is simply no reason to regulate these things separately.

2. Enforcing the Agency-wide Aspects of the Act

The KFTC is a quasi-judicial administrative agency in charge of the adjudication and development of antitrust policy. However, the Commission's current structure is not sufficiently organized effectively to

41. The current KAA presumes anti-competitiveness only in the case of a large-scale enterprise entering into a new market previously inhabited by only small- to medium-sized enterprises. In order to make the Act more effective in controlling conglomerate mergers, it is necessary to introduce provisions that would presume anti-competitiveness even where there is a merger of large-scale enterprises, a merger of a large-scale enterprise's subsidiaries, or a subsidiary of a large-scale enterprise's acquisition of other enterprises.

execute its judicial functions. The Commission should be reorganized in a manner that strengthens its autonomy and enhances its expertise. More precisely, the Commission should be divided into two separate parts, with one division taking charge of judicial decisions and the other handling the creation of the Nation's competition policy. Ideally, as with the German Bundeskartellamt,[42] the judicial division would be further divided between seven and nine subdivisions, each responsible for a different industrial sector. Each subdivision would be led by a commissioner, who would be aided by a division chairman[43] and two assistant officers. The policy-making branch should be strictly limited to implementing long-term competition policies, repealing anti-competitive statutes, and seeking cooperation with related organizations at home and abroad. For the Commission's two divisions to perform optimally, the Commission as a whole should be staffed by lawyers and economists with expertise and experience in antitrust law and industrial organization.

3. Procedural Aspects of the KAA

Public enforcement of the KAA is primarily the responsibility of the Commission because the Commission analyzes and assesses market structure and performance—a process necessary for a determination of whether a certain business practice is illegal or not. This is especially true in cases where there has been abuse of a market-dominant position or an anti-competitive merger. This same sort of detailed analysis and assessment is not, however, required in cases involving unfair trade practices or hardcore cartels. This is because the legality of these actions is relatively easy to determine. The Commission should, therefore, concentrate its resources on controlling the abuse of market-dominant positions or anti-competitive mergers rather than on unfair trade practices or hardcore cartels. Because unfair trade practices and hardcore cartels can be more efficiently controlled through private enforcement or criminal procedure, limitations on these current methods should be dismissed, and new legal procedures such as injunctions and class actions should be made available.

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42. For more information on the structure of the Federal Cartel Office of Germany, see Ohseung Kwon, *A Study on Merger Control*, BUBMOONSA 85 (1987).

43. In this case, all commissioners of the Commission should be converted into standing members.

V. LESSONS FOR CHINA FROM THE KOREAN EXPERIENCE

It is very encouraging that the Chinese government has finally decided to adopt a system of antitrust laws as a part of its transition from a planned economy to a market economy. This Author sincerely hopes that China's efforts will yield beneficial results and suggests that China learn a great deal from Korea's experience with antitrust law. After an examination of international economic development, one finds that while the United States and numerous European nations enacted antitrust legislation during the early stages of monopolization in order to prevent monopolistic or oligopolistic behavior in Korea and China, antitrust legislation is viewed more as a means of facilitating economic transition; Korea's antitrust legislation assisted the nation in its transition from a government-oriented economy into a market-oriented economy during the 1980s. Also, today, China is instituting antitrust legislation to aid its own transition from planned economy to market economy. It appears that the only difference between the two countries is that while Korean legislation was aimed at regulating monopolization and oligopolization caused by natural economic development policies, China's legislation will regulate the government's monopoly established under the old socialist regime.

Although China is trying to control monopolization or oligopolization as part of the transformation of its highly monopolized market structure, it must adopt an abuse-control system rather than the cause-control system of monopolization adopted in Korea; imposition of a cause-control system in China could seriously threaten the functioning of the entire domestic economy, despite the fact that the abuse-control system is somewhat less effective in reforming the market structure. Many years have elapsed since the KFTC began monitoring the abuse of market-dominant positions, however monopolistic and oligopolistic market structures are still very much intact. The Chinese should take the Korean experience into account as they adopt an abuse control system in order to prevent repetition of Korea's mistakes.

When antitrust laws were adopted as a means of economic transition in countries where the government had exercised tremendous control over the national economy, law enforcement agencies have found it difficult to perform their duties free from governmental influence or interferences. These countries also tend to lack native experts with sufficient professional knowledge or experience in competition law and industrial organization. Some critics have charged that the dearth of autonomy and expertise in the KFTC is the primary reason for the Act's insufficient

performance. China must take care to secure its system's autonomy, and to recruit properly qualified experts for its enforcement agency.

Finally, the opportunities for criminal prosecution and private litigation under the Chinese system should be expanded; prosecutors and private individuals should be allowed to participate in enforcing the law; and the system itself should include a set of legal procedures, such as injunctions and class actions that encourage this private enforcement.