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Principles of Antitrust Policy Enforcement and Lessons from the Korean Experience

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I. Introduction

Since the enactment of the *Monopoly Regulation and Fair Trade Act* ("MRFTA") in 1981, Korean antitrust law has made significant strides in both scope and depth. The MRFTA has been amended over 30 times, with a major restructuring in December 2021. A key development has been the introduction of regulations targeting *chaebols* (large business conglomerates) beginning in 1986. These reforms were driven by concerns over systemic risks posed by concentrated corporate power — highlighted during the Asian Financial Crisis of the late 1990s — and by political momentum toward "economic democratization." In addition, Korea has enacted a series of sector-specific laws to curb unfair practices in subcontracting, large-scale retailing, franchising, and agency relationships. This expansion reflects a dual focus: regulating the dominance of *chaebols* and protecting small and medium-sized enterprises ("SMEs"), which together define the unique character of Korean competition policy.

Beyond expanding enforcement to address Korea-specific challenges — such as the power imbalance between large and small firms — Korean antitrust policy has also evolved in its application of core competition principles. Notably, enforcement has shifted from a formalistic, rule-based approach to a more nuanced, effects-based framework. This modern approach considers both anticompetitive harm and potential efficiencies, enabling more balanced and economically sound decisions. Over the past two decades, economic analysis has played an increasingly central role in investigations. While antitrust economics and industrial organization theory have long influenced policy, it was only in the early 2000s that economists began actively participating in enforcement cases, providing expert analysis for both the Korea Fair Trade Commission ("KFTC") and defendants.

Despite these advancements, there remains

[1] This article is based on Chapter 7 of my forthcoming book, *Antitrust Policy in Korea: An Economic perspective*, to be published by Springer Nature in November 2025. Reference to 'this book' within the article pertain to that volume.

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substantial room for further rationalization and refinement. The following section offers recommendations to enhance Korea's antitrust enforcement grounded in established principles, informed by past regulatory experience, and responsive to emerging industrial and technological challenges.

II. Principles of Antitrust Policy Enforcement

There is broad consensus among legal scholars, economists, and practitioners — developed over more than 130 years — on the fundamental principles guiding antitrust enforcement. Key shared understandings include the following.

A. Consumer Welfare as a Central, but Not Exclusive, Objective

Traditionally, competition policy has aimed primarily to enhance consumer welfare. However, this does not imply that consumer welfare is its sole objective, nor that "consumer" refers only to end users. Across jurisdictions and over time, competition policy has pursued multiple goals — some aligned with, and others potentially in tension with, consumer interests. For example, Korea's MRFTA explicitly states in Article 1 that its objectives include both "protecting consumers" and "promoting balanced economic development." This broader mandate reflects constitutional principles, such as Article 119 of the Korean Constitution, which calls for "economic democratization through harmony among economic agents." The focus of antitrust enforcement has also evolved in response to changing economic and technological conditions. In the U.S., the Great Depression led to a more permissive stance in the 1930s, including exemptions for cartels. More recently, the rise of dominant digital platforms has prompted renewed calls for stronger antitrust intervention globally. Despite these shifts, the consumer welfare standard remains a central—though not exclusive—benchmark. Importantly, "consumer" should be interpreted broadly to include indirect customers, workers, consumers of rival firms, and minority shareholders.

B. Protecting the Competitive Process, Not Individual Competitors

Antitrust policy is designed to safeguard the competitive process — not to protect inefficient or less capable competitors from market forces. This principle is especially relevant in cases involving exclusionary pricing practices, such as predatory pricing, loyalty rebates, and margin squeezes. Many economists advocate the "as-efficient competitor" standard, which protects only those rivals that are as efficient as the dominant firm. This approach preserves incentives for price competition and innovation, often using the dominant firm's own costs as a

benchmark. However, in digital markets, this framework may overlook structural disadvantages faced by new entrants. Incumbents often benefit from economies of scale, network effects, and privileged access to user data — advantages that are difficult for newcomers to replicate. These asymmetries can prevent even potentially efficient entrants from competing effectively. Therefore, while the "as-efficient competitor" test remains a useful tool, it should be applied with caution in digital markets. Policymakers and enforcers should consider whether current inefficiencies stem from industry-specific barriers rather than firm-specific shortcomings and assess the potential for new entrants to evolve into viable competitors over time.

C. Equal Application to Domestic and Foreign Firms

Antitrust laws should apply equally to both domestic and foreign companies. Most jurisdictions adopt the "effects doctrine" in extraterritorial enforcement, asserting jurisdiction over foreign conduct that significantly impacts domestic markets. For instance, under the U.S. *Foreign Trade Antitrust Improvements Act* of 1982, antitrust laws apply to foreign commerce — excluding imports — only when the conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Korea similarly applies the effects doctrine, as demonstrated in several high-profile cases involving foreign firms. These include abuse of market dominance cases against Microsoft (2006), Intel (2008), Qualcomm (2010 and 2017), and Siemens (2018); merger reviews involving Microsoft and Nokia (2015), and Delivery Hero and Woowa Brothers (2021); and cartel enforcement in the Graphite Electrodes case (2002). There is broad consensus that enforcement standards should be consistent regardless of a firm's national origin. However, concerns persist that competition authorities may be tempted to favor domestic firms or, conversely, unintentionally disadvantage them through regulations aimed at domestic market concerns. To maintain credibility and fairness, competition agencies must ensure strict neutrality in enforcement, avoiding both protectionism and reverse discrimination.

D. Independence from Non-Competition Policy Objectives

Antitrust enforcement should remain independent from industrial policy and other non-competition objectives. Industrial policies often promote "national champions" or restructure industries by supporting selected firms — approaches that are inherently non-neutral and risk distorting market dynamics. Using competition policy to advance industrial goals can reinforce monopolistic structures and undermine the integrity of antitrust enforcement. Similarly, antitrust should not be

repurposed as a tool for price control. Korea's *Price Stabilization and Fair Trade Act* of 1976, which focused on curbing inflation after the oil shocks of the 1970s, is not considered the origin of Korean antitrust law for this reason. While competition can contribute to lower prices and innovation over time, antitrust enforcement is ill-suited to address short-term inflationary pressures. Attempts to suppress price increases through antitrust action during inflationary periods risk ineffectiveness and may erode the credibility of competition authorities.

E. Flexibility and Adaptability in Enforcement

Antitrust law has historically been enforced with flexibility, adapting to changing market conditions, technological developments, and political priorities. Statutory language is often deliberately broad to allow interpretive discretion. For example, the U.S. *Sherman Act* of 1890 prohibits "every contract, combination, or conspiracy in restraint of trade" and "monopolization, attempted monopolization, or conspiracy to monopolize." Later statutes like the *Federal Trade Commission Act* and *Clayton Act* (both enacted in 1914) filled gaps but also avoided exhaustive definitions of prohibited conduct. This legal ambiguity reflects the U.S. common law tradition, which relies on case-by-case adjudication. Even in civil law jurisdictions like Korea and Germany, where statutes are more codified, enforcement involves interpretive discretion. Outcomes often depend on the enforcement agency's priorities and judicial interpretation. This flexibility is essential, as many antitrust issues exist in a legal and economic "grey area," requiring nuanced judgment to distinguish between pro-competitive and anti-competitive behavior. Consequently, the intensity and direction of enforcement fluctuate over time, shaped by prevailing economic conditions and societal values. In today's fast-evolving digital economy, where new business models and market dynamics emerge rapidly, adaptability is not just a feature of antitrust enforcement — it is a necessity.

III. Lessons from the Korean Experience

A. Chaebol Antitrust Policy

Over the past four decades, Korea's chaebol regulations have evolved significantly, shaped by economic crises and shifting political priorities. Regulatory measures targeting ownership and control structures — particularly those aimed at limiting the concentration of power within chaebol families and curbing opportunistic behavior — have been progressively strengthened. Key turning points include the late 1990s foreign exchange crisis, which exposed structural vulnerabilities, and

growing public demand for "economic democratization." While the current framework is relatively robust, further streamlining and adaptation are needed to meet future challenges.

Many aspects of chaebol regulation extend beyond traditional antitrust boundaries. Some aim to protect minority shareholders, others seek to separate industrial and financial capital, and still others address wealth transfers during leadership succession. Comprehensive oversight by the KFTC would require a unified regulatory purpose and consistent criteria — difficult to achieve given the diversity of policy goals. A one-size-fits-all approach is impractical. Certain issues fall outside the KFTC's jurisdiction and are better addressed through corporate, financial, and tax law. For example, Korea's exceptionally high inheritance tax — up to 60 percent including business succession surcharges — is among the highest in the OECD. This creates strong incentives for chaebol leaders to exploit regulatory loopholes to transfer assets to heirs, undermining the effectiveness of existing rules. Without reforming this tax burden, enforcement efforts may continue to face structural limitations.

Korea's experience with chaebol regulation offers valuable lessons for managing the growing influence of large digital platforms. Just as chaebol policy evolved to address concentrated economic power, global efforts — such as the EU's *Digital Markets Act* ("DMA") — reflect similar concerns about platform dominance. Rather than creating entirely new laws, Korea could integrate platform-specific oversight into its existing business group regulatory framework. The KFTC's experience with both *ex ante* regulation and *ex post* enforcement (e.g. cross-subsidization, self-preferencing) provides a strong foundation for this approach. However, a key challenge is that current chaebol regulations apply only to domestic firms. This raises the risk of "reverse discrimination" if foreign platform companies operating in Korea are not subject to equivalent scrutiny. Ensuring a level playing field — where all firms compete under the same rules — is essential for fairness and credibility.

Finally, the concept of the *chaebol* itself deserves reconsideration. While the MRFTA uses the term "large business group," this book uses "chaebol" to emphasize the unique governance and ownership structures historically associated with Korean conglomerates. Yet the landscape has changed: i) Generational transitions have occurred, often multiple times. ii) New conglomerates, especially in the digital sector, have emerged. iii) Regulatory reforms have curbed many past abuses. iv) Global competition discourages inefficient management. The KFTC has played a vital role in correcting structural failures, but the need for intensive intervention may be diminishing. This does not mean existing regulations should be dismantled, but rather that they should evolve towardsfocusing on fair

competition, innovation, and proportionate, forward-looking enforcement.

B. *SMEs Antitrust Policy*

The concept of *SMEs antitrust policy* may be unfamiliar to many competition law experts. In this context, it refers to regulatory efforts aimed at protecting SMEs from abusive practices by larger firms with superior bargaining power — such as restricting competition, employing unfair methods, or imposing unjust trading terms. This should be clearly distinguished from *SME subsidization policy*, which involves financial support and other non-competitive measures.

Under Article 45 of the MRFTA, various business practices may be classified as unfair trade practices. These include restrictions on competition, unfair methods, and unjust terms of trade. To optimize enforcement and resource allocation, the KFTC should focus on practices that directly restrict competition — such as refusal to deal, discriminatory conduct, exclusionary tactics, tie-in sales, conditional transactions, and resale price maintenance. Other types of unfair practices, particularly those involving trade terms or bargaining imbalances, could be delegated to the Fair Trade Mediation Agency, the Ministry of SMEs and Startups, or resolved through civil litigation. These cases typically do not require complex economic analysis and can be adjudicated based on fairness. This streamlined approach should also apply to Korea's four sector-specific laws governing subcontracting, large-scale retailing, franchising, and agency relationships. These statutes are rooted in the concept of "abuse of superior bargaining position" and should be evaluated primarily on the fairness of trade terms. Article 45(6) of the MRFTA, which addresses such abuses, is often considered the foundational provision for these sectoral laws.

Even within competition-restricting practices, enforcement should prioritize cases involving firms with relative bargaining power. Currently, most Article 45 cases do not require a finding of market dominance — except those involving abuse of superior position. Introducing a standard of "trade dominance" or "relative market power" could help concentrate enforcement on more impactful cases. Germany's Section 20 of the *Competition Act* offers a useful model, targeting firms with relative or superior market power even if they lack formal dominance. The KFTC often applies Article 45 alongside Article 5 (abuse of market dominance), especially when proving dominance is difficult due to contested market definitions or ambiguous concentration levels. If penalty surcharges were calibrated based on the degree of trade dominance or power

imbalance, [3] the need for dual application of Articles 5 and 45 could be reduced. Article 5 would then apply to clear cases of dominance, while Article 45 would address situations where relative power is evident but dominance is uncertain.

This reformulation — focusing on competition-restricting conduct by firms with superior bargaining positions — is particularly relevant in the digital economy. The EU's DMA of 2022, for example, allows for the designation of "gatekeepers" subject to *ex ante* obligations, even without traditional market dominance. In digital markets, dominance is often difficult to define narrowly. Practices like most-favored-nation clauses ("MFNs") or self-preferencing may stem from ecosystem-level power rather than dominance in a specific market. In such cases, the KFTC may struggle to apply Article 5 effectively. A reformed Article 45 framework — centered on unfair practices by firms with superior bargaining positions — would allow for more flexible and effective enforcement. Enhanced penalty surcharges could be imposed where appropriate, enabling the KFTC to address harmful conduct in digital markets without being constrained by rigid dominance thresholds.

C. Market Dominance Abuse Regulation

The sophistication of a country's competition policy is often reflected in its approach to regulating abuse of market dominance — particularly in how it defines relevant markets and analyzes competitive effects. Robust economic analysis is essential to ensure reasoned and credible enforcement, both in dominance cases and merger control. Over the past two decades, the KFTC has made steady progress in this area. A key milestone was the Supreme Court's 2007 *Posco* decision, which emphasized the need to assess both the intent and effect of conduct aimed at maintaining or strengthening market dominance. This ruling spurred the KFTC to adopt more advanced analytical tools and methodologies.

Despite these improvements, the KFTC still trails leading authorities in jurisdictions such as the U.S., U.K., and EU — particularly in terms of in-house economic expertise. The number of Ph.D.-level economists within the KFTC remains limited. To close this gap, the KFTC should expand its budget for economic analysis, recruit more highly trained economists, and appoint a senior chief economist to lead the function.

[3] The current maximum of penalty surcharges is set at 6 percent of relevant sales for market dominance cases and at 4 percent for unfair trade practice cases. However, the KFTC determines the actual penalty level within these limits based on the guideline of imposing penalty surcharges, considering various relevant factors.

Crucially, economists should be involved from the outset of investigations — helping define markets and assess competitive effects before enforcement positions are finalized. Currently, economic input often comes late in the process, which can compromise objectivity and analytical rigor.

Many of Korea's major dominance cases have involved multinational firms — such as Microsoft, Intel, Qualcomm, and Google. These cases have allowed the KFTC to benchmark its practices against global standards. Early cases, like Microsoft's tying practices (2006) and Intel's conditional rebates (2008), closely followed EU precedents. More recent investigations — such as Qualcomm's licensing model (2017) and Google's anti-fragmentation agreement (2021) — demonstrate the KFTC's growing confidence in raising novel issues and independently managing complex cases. This marks a promising shift toward greater institutional maturity.

In multinational cases, enforcement priorities may vary depending on whether dominant firms are domestic or foreign. For example, the EU's DMA targets gatekeepers such as Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft — all based in the U.S. or China. In contrast, Korea's platform economy features strong domestic players like Naver (search), Coupang (e-commerce), and Kakao (social networking), which often compete directly with global giants. In this context, the KFTC must maintain a balanced and independent stance — distinct from both U.S. and EU approaches. To ensure enforcement is perceived as impartial and not protectionist, the KFTC must apply rigorous economic analysis when defining markets, establishing dominance, and evaluating competitive effects. This analytical discipline is essential not only for credibility but also to ensure enforcement promotes competition without shielding inefficient domestic firms.

D. Merger Regulation

Economic analysis plays a critical role in merger review. The KFTC has increasingly adopted advanced tools — such as critical loss analysis, diversion ratios, natural experiments, merger simulations, and upward pricing pressure (UPP) — to define relevant markets and assess competitive effects. While progress has been commendable, further improvements are needed. Strengthening the economic analysis team and involving economists early in merger investigations would enhance analytical rigor. In particular, the KFTC should prepare to evaluate non-horizontal mergers more systematically, especially in the digital platform economy. Updating merger guidelines to clarify expectations and ensure consistent enforcement would be a valuable step forward.

A key lesson from Korea's experience is that

merger regulation must remain focused on promoting competition — not serving broader industrial policy goals. The 1999 *Hyundai Motor–Kia Car* merger illustrates this tension. Amid the East Asian financial crisis, Hyundai Motor was the only viable acquirer for the financially distressed Kia Car. Government concerns over creditor losses and job cuts likely influenced support for the merger. Similarly, the 2000 *SK Telecom–Shinsegi Telecom* merger significantly increased market concentration, reinforcing SK Telecom's dominance. Despite serious anticompetitive concerns, the merger was approved with a behavioral remedy requiring SK Telecom to reduce its market share below 50 percent — a condition widely criticized for its ineffectiveness.

Departures from core competition policy objectives can have lasting consequences. The *Hyundai–Kia* merger created a domestic monopoly in passenger vehicles, strengthening labor bargaining power and contributing to wage disparities across sectors. While some argue the merger enabled global competitiveness through scale and financial strength, the *SK–Shinsegi* merger offers no such trade-off. Instead, it burdened the telecommunications regulator with maintaining competition through "asymmetric regulation," which restricted SK Telecom's ability to compete aggressively. Unlike Hyundai Motor, SK Telecom has not achieved notable global success, raising questions about the justification for allowing such market concentration.

The conflict between competition and industrial policy remains relevant today, as seen in the *Korean Air–Asiana Airlines* merger initiated in 2022. The Korea Development Bank ("KDB"), a major creditor of Asiana, provided public funds to rescue the airline and led efforts to sell it. After Hyundai Development Company withdrew due to COVID-19-related uncertainty, KDB selected Korean Air as the acquirer. Unlike the *Hyundai–Kia* merger, this deal faced intense international scrutiny. The KFTC imposed structural remedies, and foreign competition authorities demanded even stricter conditions — ironically, measures that may weaken the merged entity's competitiveness, contrary to KDB's stated goals. While the merger may allow Korean Air to monopolize Korea's two flag carriers and enable KDB to recover its loans, it is unlikely to fulfill the ambition of creating a "global top 10 airline." Unlike the *Hyundai–Kia* merger, which arguably accepted monopolization as a trade-off for global competitiveness, the *Korean Air–Asiana* merger lacks a similarly compelling justification.

E. Cartel Regulation

While competition naturally drives lower prices and improved quality, it should not be misused as a direct tool to suppress inflation. Price increases are typically driven by macroeconomic factors — such as supply shocks or demand surges — and cannot be effectively addressed through microeconomic instruments like competition law. During inflationary periods, governments may be

tempted to use antitrust enforcement, particularly cartel investigations, to curb politically sensitive price hikes in essential goods. It has been suggested that the KFTC has occasionally used the threat of investigations in industries such as kimchi, ramen, and soju to deter price increases. While such actions may yield short-term relief, they risk distorting market signals and leading to inefficient resource allocation. Antitrust enforcement — especially in cartel regulation — should remain focused on preserving competitive market dynamics and long-term consumer welfare, not responding to transient populist pressure.[4]

IV. Conclusion

Criminal prosecution is the most severe form of antitrust enforcement. Korea, along with Japan and the United States, permits criminal sanctions for cartel offenses, unlike most jurisdictions that rely on civil or administrative penalties.[5] Under the MRFTA, the KFTC holds exclusive authority to initiate criminal proceedings, ensuring that indictments are grounded in specialized expertise. However, this exclusivity has been controversial. Prosecutors argue it may lead to under-enforcement, particularly in serious cases involving hard-core cartels such as price-fixing, market allocation, and bid rigging. In 2018, the KFTC and the Prosecutors' Office agreed to abolish the KFTC's exclusive right to accuse in hard-core cartel cases, allowing prosecutors to independently initiate charges. However, this proposal was excluded from the 2020 MRFTA amendment, reportedly due to political considerations.

Many antitrust experts, including myself, support maintaining the KFTC's exclusive right to file criminal charges, for several reasons. i) Preventing Over-Enforcement: Antitrust violations often involve complex economic assessments. Unrestricted criminal prosecution could lead to misjudgments and deter legitimate competitive behavior. ii) Moderated Exclusivity: The MRFTA already requires the KFTC to file complaints in serious cases and

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[4] This issue is relevant to the recent debate over whether the KFTC should introduce a regulation capping food delivery service fees.

[5] Among the 34 OECD member countries, only 13 impose criminal penalties for violations of competition law. Of these, five countries—Canada, the U.K., Austria, Denmark, and Ireland—limit criminal sanctions to cartel offenses. Two countries—France and Iceland—extend criminal liability to both cartels and abuse of dominance. Another five—the United States, Japan, Greece, Norway, and Israel—apply criminal penalties to a broader range of violations, including cartels, dominance abuses, and anticompetitive mergers. In contrast, Korea imposes criminal penalties for all violations under the MRFTA, making its enforcement regime one of the most comprehensive among OECD jurisdictions. See Ji, C.H., *Exclusive Right to Accuse: The Age of Passion*, Holliday Books, 2021 [in Korean].

allows requests from the Prosecutor General and other high-ranking officials. iii) Insulating Enforcement from Politics: Preserving the KFTC's gatekeeping role helps ensure decisions are based on legal and economic reasoning, not political or bureaucratic agendas.

Penalties for cartel conduct have been significantly strengthened. In 2020, the maximum surcharge was raised from 10 to 20 percent of relevant sales. In 2019, punitive damages of up to three times the harm caused were introduced. The KFTC has also increased the frequency of criminal accusations, enhancing deterrence. To further improve deterrence and ensure fair compensation, Korea should consider introducing Anglo-American–style class action lawsuits in antitrust cases, particularly those involving cartels. Such mechanisms allow a representative plaintiff to file claims on behalf of a group, with outcomes applying to all unless individuals opt out. Korea took a similar step in 2004 with the *Securities-Related Class Action Act*. A comparable system for antitrust would empower final consumers — who are often dispersed and individually affected to a minor extent — to collectively seek redress. Currently, civil damage claims are primarily pursued by government agencies, public corporations, and large firms with the resources to litigate. Final consumers, despite being the most broadly affected, often lack the capacity to initiate lawsuits. A class action mechanism would enable these consumers to seek compensation collectively, strengthening deterrence and promoting distributive justice by ensuring fairer recovery across both direct and indirect purchasers.