Overlapping Regulations by Sector-specific Regulators and the Competition Authority in South Korean Telecommunications and Financial Industries

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Introduction

While problems associated with overlapping regulations between sector-specific regulators and the KFTC in Korea are severe, it does not appear that the prospects for a resolution are bright. There is a mandatory consultation which has been provided by Article 63 of the MRFTA. This requires that the competent administrative authority shall seek, in advance, consultation with the Fair Trade Commission(FTC), where it wishes to propose legislation or amend enactments containing anti-competitive regulations such as restrictions on the fixing of prices or the terms of transaction, entry to markets, business practices, unfair collaborative acts, prohibited practices of an enterpriser or an enterprisers organization, etc. and where it wishes to approve or make other measures involving anti-competitive factors against an enterpriser or an enterprisers organization. Nonetheless several conflicting provisions and jurisdictional ambiguities remain that have contributed to overlap conflicts over the years.

The MRFTA was enacted in 1981 and, during the early years of the MRFTA, there were no problems associated with overlapping regulations. However, problems associated with overlapping regulations appeared in the financial industry when the KFTC included such industry within the scope of the MRFTA in 1984. With respect to the telecommunications industry, problems associated with overlapping regulations appeared in the 1990s, due to entrance of new types of businesses, such as data communications, into the telecommunications market and issues regarding restraints on competition surfaced.

This article will review problems associated with overlapping regulations in the telecommunications and financial industries below, where such problems are particularly severe, and provide possible solutions.

Overlapping Regulations in the Telecommunications Industry

History of Overlapping Regulations in the Telecommunications Industry

One area in which problems associated with overlapping regulations by sector-specific regulators and the KFTC has been prominent is the Korean telecommunications industry. Previously, the

telecommunications industry was regulated by the MIC and the Ministry of Postal Service prior to the MIC. However, from 2008, the KCC, which is an integrated regulatory agency that was formed to deal with the modern trends of integration/convergence between broadcasting and communications, regulates the telecommunications industry in order to more efficiently regulate the broadcasting and communications industries.

The MRFTA has been enacted since 1981 and the KFTC has been the agency in charge of its enforcement. With respect to the Public Telecommunications Business Act (effective as of September 01, 1984), which was enacted subsequent to the MRFTA, there were no provisions that overlapped with those of the MRFTA. Also, while the Basic Act on Telecommunications (effective as of September 01, 1984) included a provision concerning the duty to share essential facilities among telecommunications carriers, there were no overlapping provisions in the MRFTA regarding such a duty.

Problems associated with overlapping regulations did not arise for about ten years after the enactment of the MRFTA. The first instance where telecommunications industry-related laws overlapped with the MRFTA appears to be the Telecommunications Business Act, which became effective as of December 11, 1991. Specifically, the Telecommunications Business Act required common telecommunications carriers to obtain the approval of the Minister of Postal Service (currently the Chairman of the KCC) when seeking to acquire or merge with another telecommunications carrier in whole or in part (Telecommunications Business Act, Article 9). Such Act also provided that the Minister of Postal Service may intervene to foster a reasonable level of competition among telecommunications carriers (Telecommunications Business Act, Article 37).

However, since the MRFTA provided that all business combinations must be examined by the KFTC, all mergers and acquisitions between telecommunications carriers were concurrently examined by the KFTC and the Ministry of Postal Service. Problems regarding overlapping regulations began to arise in the 1990s when the Telecommunications Business Act started to regulate unfair business practices and business combinations. The foundation for such regulation was laid by the diversification in communications services, as manifested by new forms of telephone services such as data communications, which, in turn, were brought about by advances in communications technologies as well as through the introduction of competition in the telecommunications industry, which was previously considered a monopolistic industry.

Also, Article 36-3 of the Telecommunications Business Act (effective as of January 31, 1997) added a new provision that prohibited telecommunications carriers from engaging in unfair business practices. Specifically, it identified discriminatory practices, refusal to share facilities and unreasonably high costs for interconnection as such unfair business practices.

In 2003, the MIC attempted to elevate the status of the "Types and Criteria of Prohibited Acts in the Telecommunications Business," from a notification to a Presidential Decree. However, it faced

opposition from the KFTC during the inter-ministerial consultation that followed. The KFTC argued that (1) regulating a matter already regulated by the MRFTA with a strengthened Enforcement Decree of the Telecommunications Business Act would subject telecommunications carriers to dual regulations, (2) the KFTC was better qualified to handle matters pertaining to unfair business practices and (3) identical criteria should be applied to all industries. The Office of Government Policy Coordination in the Prime Minister's Office eventually stepped in to resolve the resulting conflict (the circumstances surrounding such conflict will be discussed in greater detail below). Since then, amendments by the MIC or the KCC have consistently given rise to conflicts between one of those agencies and the KFTC.

In Korea, bills (or amendments) are submitted by the government or by National Assemblymen directly to the National Assembly. While inter-ministerial consultations were conducted prior to submissions by the government, submissions by members of the National Assembly did not involve inter-governmental consultations in the past and this resulted in overlapping regulations that were undetected. Such practices are believed to be the cause for increasing overlapping regulations in the Korean telecommunications industry. Fortunately, submissions by members of the National Assembly now involve inter-governmental consultations, under the supervision of the Ministry of Legislation, and instances of overlapping regulations are expected to decrease dramatically in the future.

Current Status of Overlapping Regulations in the Telecommunications Industry

Regulation of Business Combinations among Telecommunications Carriers

All telecommunications carriers must be licensed by the KCC and a licensed carrier which intends to conduct an M&A through business transfer or merger, among other means, must report it to, and be approved by, the KCC, regardless of the size of its business.

Article 18 of the Telecommunications Business Act provides that the authorisation of the KCC is required for acquisitions of businesses from common carriers, mergers, the sale of approved telecommunications line facilities and instances where 15 percent or more of the stocks issued by a common carrier are held. Section 6 of the same Article provides that the KCC, in approving such activities, must confer with the KFTC. It is mandatory for the KCC to confer with the KFTC regarding anti-competitive effects that may arise from all M&As between and among telecommunications carriers.

If the KCC receives an application for approval of an M&A from a telecommunications carrier, it should examine the application based on the Telecommunications Business Act and, in the process, request the KFTC to examine potential anticompetitive effects. The KCC requested the KFTC's opinion in 10 cases in 2009, 10 cases in 2010 and eight cases in 2011. The KFTC must examine the

potential anticompetitive effects of the relevant M&A and give its opinion to the KCC. In the past, there was a case where the KCC approved an M&A, although the KFTC determined that the M&A could have anticompetitive effects, which is explained below.

The above provision overlaps with Article 7 of the MRFTA. Specifically, the MRFTA provides that any act that substantially restricts competition is prohibited and identifies stock acquisitions, interlocking directorates, mergers, acquisitions of other businesses by assignment and participation in the establishment of a new company as such acts.

Since both the Telecommunications Business Act and the MRFTA fail to explicitly state that telecommunications carriers need to report only to the KCC, there is disagreement among scholars[1] and businesses are also uncertain whether to report to only the KCC or to both the KCC and the KFTC. Owing to this lack of clarity, some M&As between telecommunications carriers were reported to the KFTC (seven cases in 2009, 10 cases in 2011 and no case in 2011), all of which were transferred to the KCC.

Furthermore, because there are no clear provisions as to whether the Chairman of the KCC should fully adopt the KFTC's opinions without any amendments or whether the KCC may amend or supplement such opinions, confusion arises in practically performing the agency's responsibilities.[2]

Regulations on Unfair Business Practices by Telecommunications Carriers

Article 50 of the Telecommunications Business Act defines prohibited acts as those acts that injure or are likely to harm fair competition or the interests of users. Specifically, unfair discrimination or refusal to deal under the above Article is described as: (1) unfair discrimination or refusal to deal regarding provision or joint use of telecommunications facilities, (2) use, for one's own business operations, of other telecommunications carriers' information which was acquired in the course of providing or jointly using telecommunications facilities, (3) calculating rates for the use of telecommunications facilities in an unfair manner, (4) providing telecommunications service in a manner that deviates from the terms and conditions of user agreements and (5) refusing to share profits with content-providers or limiting such profit-sharing.

Also, Article 54 of the Telecommunications Business Act precludes application of the MRFTA when a telecommunications carrier that has violated any of the above prohibited acts is ordered to take corrective measures under Article 52 of the same Act or is fined under Article 53 of the same Act by the KCC.

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[1] Won Woo Lee et al., *A Study on the Relationship between General Competition Authority and Sector-Specific Regulators of the Telecommunications Industry: Recommendations for Establishment of Their Respective Desirable Roles* (December 2008).

[2] Ho Young Lee, *A Study on the Relationship between Industry Regulation and Competition Laws* (October 2009).

With respect to the meaning of Article 54 above, there are two competing schools of thought.[3] The first school of thought is the belief that, since the Telecommunications Business Act is a special law, the MRFTA is precluded from areas that are within the scope of the Telecommunications Business Act. The other school of thought is that, since Article 54 is limited to cases in which corrective measures or fines have already been imposed, the KFTC may initiate an investigation or impose corrective measures or fines if the KCC has not already done so.

In connection with the unfair business practices as set forth under the MRFTA, Appendix 3 of the Enforcement Decree of the Telecommunications Business Act identifies specific practices in the following table:

MRFTA, Article 23	**Enforcement Decree of the Telecommunications Business Act, Appendix 3**
Refusal to deal: Collaborative refusal to deal Unilateral refusal to deal	Delay in reaching or refusal to reach an agreement
Discriminatory practices: Price discrimination Discriminatory contract terms Favouring of subsidiaries Collaborative discrimination	User discrimination Carrier discrimination Imposition of discriminatory conditions
Exclusion of competitors: Unfair discounts Payment of unfairly high prices	None
Unfair inducement of customers: Inducement by offering unfair benefits False inducement of customers Other forms of unfair inducement	Unfair user discrimination Disruption of selective use of telecommunications services
Coercive dealing:	Product bundling

[3] Lee et al., *supra* note 1.

Tying Coerced sales to employees Miscellaneous (threat of retaliation)	Restriction of user options
Abuse of bargaining position: Coerced purchases Demand for a certain level of profits Forced sales targets Retaliation, interference with management	Disruption of selection or use of telecommunications services
Restrictive conditional dealing: Exclusive conditional dealing Restriction on market or trading counterparts	Disruption of selection or use of telecommunications services
Disruption of business activities: Unfair use of technology Unfair employment and inducement of competitors' employees Disruption of business relocation	Refusal to reach an agreement
Unfair assistance in funds, assets and personnel	None

Regulation of Service Rates

Article 28 of the Telecommunications Business Act provides that a telecommunications carrier should notify the KCC of its service rates and obtain authorisation thereof and that the KCC should make its decision based on the impact such rates will have on the market, whether such rates are reasonable in the light of general public interests and whether such rates harms competition.

The MRFTA prohibits abusive pricing under Article 3-2 and regulates unfair pricing practices such as unfair discounts under Article 23.

Regulation of Essential Facilities

With respect to essential facilities, the Telecommunications Business Act contains the following provisions: (1) permission for multiple system operators to provide transmission and line facilities to common carriers under Article 31, (2) permission for common carriers to provide telecommunications facilities under Article 35, (3) duty to grant joint utilisation of subscriber lines for common carriers to other telecommunications carriers when requested under Article 36, (4) permission for common carriers to grant joint utilisation of radio communications facilities to other common carriers under Article 37, (5) permission for telecommunications carriers to grant interconnection of telecommunications facilities to other telecommunications carriers when requested under Article 39, (6) permission for common carriers to grant joint use of their telecommunications facilities to other telecommunications carriers when requested under Article 41, (7) permission for common carriers to provide information when requested under Article 42 and (8) duty to report any agreements reached with other telecommunications carriers for common carriers and facilities management agencies under Article 44.

Article 5 of the Enforcement Decree of the MRFTA defines refusing, discontinuing or limiting the use or access to essential facilities to other enterprises without justifiable reasons as abuse of market dominance.

Examples of Overlapping Regulations

SK Telecom's Acquisition of Shinsegi Communications

SK Telecom, a mobile telecommunications operator, acquired 51.19 percent of the shares of Shinsegi Communications, another mobile telecommunications operator, in December 1999, and filed a business combination report to the KFTC. However, since the KFTC determined that the proposed merger would restrict competition in the mobile telecommunications market, it granted a conditional approval of the merger in May 2000 on the condition that the merged company's market share should be reduced to below 50 percent by the end of June 2001, which reduction SK Telecom was able to achieve within the prescribed period.[4]

In September 2001, SK Telecom submitted its application for approval of the merger to the MIC and the MIC adopted the decision of the KFTC by approving the merger without any additional conditions in January 2002.

SK Telecom's Acquisition of Hanaro Telecom

[4] SK Telecom did not have to drop any of its subscribers to meet the KFTC's requirement because the number of mobile network subscribers was increasing exponentially at the time. Instead, it only needed to restrain itself in accepting new subscribers. Also, the KFTC allotted a sufficient period for SK Telecom to meet the market share target. Since the KFTC's condition that the merged company's market share be below 50% applied only for a specific period, there are currently no restrictions on SK Telecom's market share.

In December 2007, SK Telecom became the largest shareholder of Hanaro Telecom, a local landline telephone operator, by acquiring 38.89 percent of Hanaro's shares, and submitted an application for approval of the stock acquisition to the MIC, which then consulted with the KFTC under the Telecommunications Business Act. The KFTC determined that the proposed stock acquisition would restrict competition in the landline telephone market and suggested to the MIC that such acquisition be conditioned upon prohibition of restrictive tying arrangements and prohibition of refusal to grant requests for 800MHz roaming without justifiable reasons. The MIC adopted the KFTC's suggestions, except for the prohibition of refusal to grant requests for roaming and some other conditions, and approved the stock acquisition. On the other hand, the KFTC believed the MIC's decision was unreasonable and issued its own corrective order containing the prohibition of the refusal to grant requests for roaming in March 2008, to which the MIC made no official objection or response. SK Telecom complied with the KFTC's corrective orders and there have been no complaints filed by other companies in relation to SK Telecom's non-compliance with such orders.

Unfair Business Practices by Telecommunications Carriers

The issuance of corrective orders by both the KFTC and the MIC in connection with subscription fee exemptions is a case which concerns overlapping regulations regarding the same act. Specifically, while the MIC issued its corrective order on the grounds that such exemption constituted discrimination, the KFTC determined that such exemption constituted unfair inducement of competitors' customers.

Also, in examining the new service rates of LG Telecom, the MIC and the KFTC had divergent views. In September 2006, the MIC suggested that the new rates should be modified because LG Telecom's new rates could indirectly exclude competing landline carriers. In contrast, the KFTC determined that the new rates were not sufficiently low to exclude competing landline carriers and approved such new rates.

Other examples of overlapping regulations concern cases in which the two agencies were concurrently conducting investigations the same matter. For example, when the MIC was investigating three mobile telecommunications operators in connection with the opening of wireless networks in 2005, the KFTC was also conducting the same investigation.

In 2004, both the MIC and the KFTC investigated the three mobile telecommunications carriers in connection with false or misleading advertising by those carriers. Even if no corrective orders are issued, concurrent investigations by two agencies for the same matter would be considerably burdensome. A joint investigation was not considered because it was deemed to be ineffective. The MoU executed between the MIC and the KFTC provided the procedures to avoid concurrent investigations, which are explained in the following paragraphs.

Efforts to Eliminate Overlapping Regulations

Essential Facilities

In an effort to prevent overlapping regulations in connection with access to essential facilities in the telecommunications industry, the KFTC and the MIC agreed in March 2001 that the Telecommunications Business Act should take precedence over the MRFTA with respect to essential facilities by signing an MoU.[5] At the time, the KFTC attempted to amend the MRFTA to regulate denial of access to essential facilities as a form of abuse of market dominance. The MIC opposed the amendment because the Telecommunications Business Act already contained provisions regarding essential facilities and the MoU which was ultimately agreed upon is the culmination of the agencies' efforts to resolve the deadlock on such issue.

According to the MoU, the agreed upon procedures are as follows:

First, if the KFTC detects any issues in connection with access to essential facilities in the telecommunications industry, it would notify the MIC and inquire whether the Telecommunications Business Act applies.

Second, the MIC must provide its opinion to the KFTC within 15 days of receipt of the KFTC's inquiry. If the MIC determines that the Telecommunications Business Act applies, it must, within sixty days of providing its opinion to the KFTC, take necessary measures to provide reasonable access to essential facilities.

Third, if the MIC determines that the Telecommunications Business Act applies and it has taken necessary measures or the MIC determines that the matter under consideration is authorised under the Telecommunications Business Act, the KFTC should not apply the MRFTA to such conduct.

Prohibited Practices

With respect to prohibited practices for telecommunications carriers, the MIC and the KFTC agreed to execute an MoU in November 1999.[6] In such MoU, the MIC and the KFTC agreed to amend the MRFTA's provision that precludes imposition of corrective measures or fines under the MRFTA, if those provisions under the Telecommunications Business Act have already been applied by the MIC. More specifically, the term "against the same act of the same carrier" under the

[5] *Memorandum of Understanding on the Matter of Essential Facilities* (March 19, 2001).

[6] *The Terms of Agreement in Connection with the Memorandum of Understanding between the Ministry of Information and Communication and the Korea Fair Trade Commission* (November 1999).

MRFTA was amended to "*on the same grounds* against the same act of the same carrier" (emphasis added). The MIC and the KFTC also agreed to amend the MIC's official notification regarding the types and criteria of prohibited practices by reflecting the intent of the MRFTA to the extent possible and through mutual consultation between the agencies. Furthermore, the MIC and the KFTC agreed that acts of false or misleading labelling or advertising by telecommunications carriers would be regulated by the KFTC, whereas advertisements that violate user agreements would be regulated by the MIC.

In 2003, the MIC attempted to elevate the status of its official notification, which defined prohibited practices, to that of an enforcement decree. When the KFTC opposed such an attempt and insisted on resolving the issue of overlapping regulations, the Office of Government Policy Coordination in the Prime Minister's Office intervened. As a result of such intervention, it was decided that unfair business practices in general would be regulated by the KFTC, whereas the MIC would deal with technical matters requiring industry-specific expertise and practices injurious to the interests of telecommunications users.

More specifically, it was decided that the KFTC would investigate and handle unfair collaborative acts (cartels), misleading or false labelling/advertising, unfair inducement of customers, exclusive dealings, abusive pricing and unfair discounts, whereas the MIC would investigate and handle charging of unfair prices, unfair contracts, refusal to interconnect, discriminatory practices against specific customers and discriminatory practices in service selection. As to product bundling, while the KFTC was placed in charge of every industry, including the telecommunications industry, it was decided that the MIC would also have the authority with respect to product bundling in connection with the sale of telecommunications services.

In 2008, the Presidential Council on National Competitiveness, which is a presidential advisory body, and the Ministry of Legislation headed the Overlapping Regulatory Legislation Reform Task Force, which addressed possible solutions to overlapping investigations of and sanctions against unfair business practices in the communications market. Subsequently, the KFTC and the KCC agreed to establish an advisory board to prevent overlapping regulations of unfair business practices in the communications market and minimise inconveniences for businesses by signing a new MoU.

Such MoU also established that one organisation or business under investigation may make a request for an advisory board to convene for the purpose of designating an agency that would be solely responsible for the investigation and any sanctions, and the first meeting of the advisory board, called the "Conference for Prevention of Overlapping Regulation in the Communications Market", was held in February 2009.[7]

[7] KFTC Press Release, *Conference for Prevention of Overlapping Regulations of Unfair Business Practices in the Communications Market Held by the KFTC and the KCC* (February 5, 2009).

Television Home Shopping Commercials

To resolve the problem of overlapping regulations in connection with television home shopping commercials, the KFTC and the Korea Broadcasting Commission (currently the KCC) agreed to execute an MoU in May 2007.[8] According to such MoU, it was agreed that each agency would be permitted to take necessary measures under the relevant law it administers against television home shopping businesses for their violation of advertisement-related laws.

Such MoU also provided that one agency should suspend its investigation if the other agency was in the process of investigating or completed the investigation of the same matter and to consult with the relevant agency. Additionally, it was decided that one agency is not to take any additional measures if it was determined based upon its consultation with the other agency that such agency's measures comport with the intent of the law it administers.

On the other hand, if it were determined that the other agency's measures were insufficient in contents or their methods, it was decided that the relevant agency would be allowed to take additional measures on the condition that it includes the details of the other agency's measures in its investigation report. If the measures to be taken are financial in nature (e.g., imposition of fines) and the other agency has taken similar measures, it was decided that such fines should be calculated in view of the financial measures that the other agency had already taken.

Recommended Solutions

Legislative Reform and Restrictions on New Overlapping Regulations

The most reliable method of resolving the problem of overlapping regulations in the telecommunications industry is to have a clear division of responsibilities between the regulatory agencies through legislative reform. However, a clear division between the relevant regulatory agency and the KFTC, through legislative reform, without encountering any conflicts, is unlikely to be successful because it would be impossible for any law to encompass all new forms of communications services that utilise ever-advancing information technology and all new forms of unfair business practices in the telecommunications market.

Despite such difficulties, defining the procedures for resolving problems of overlapping regulations in more detail will help. For instance, the aforementioned MoU between the KFTC and the MIC provided various procedures for resolving overlapping regulations and codifying the procedures in

[8] Inter-Ministerial Conference on Overlapping Regulations Reform in Television Home Shopping Commercials (March 2007).

similar MoUs and providing more detailed procedures, as required, would significantly reduce overlapping regulations.

It is also crucial to make efforts to limit new regulations that are overlapping and, in order for this to be successful, inter-ministerial consultations that are conducted prior to enactments or amendments of laws must be fully utilised.

Division of Responsibilities Between the KFTC and the KCC

In order to adequately address the problem of overlapping regulations in the future, basic principles regarding the division of responsibilities between the KFTC and the KCC must be in place. The KFTC, through its enforcement of the MRFTA, is experienced with standards or principles that can apply commonly to all industries. For instance, the KFTC is considered more experienced than the KCC in defining markets and analysing the effects on competition and consumer welfare.

Conversely, the KCC has more expertise than the KFTC regarding the nature or technical aspects of the telecommunications industry. Therefore, stipulating principles for the division of responsibilities between the two agencies in view of each agency's advantages and expertise over the other agency will not only contribute to the advancement of the telecommunications industry, but it will contribute to the protection of consumer welfare.

System of Cooperation Between the KFTC and the KCC

Although past inter-agency MoUs provided for advisory boards to be operated by the agencies involved, such boards have not been fully utilised. Nonetheless, such advisory boards need to be fully utilised in order to standardise the establishment of basic principles and mutual consultation in specific cases.

As a part of the mutual consultations, exchanges of inter-agency personnel could be considered. In the past, large-scale inter-ministerial personnel exchanges took place in Korea, and such exchanges are considered to have contributed significantly to eliminating inter-ministerial conflicts. For instance, the KFTC and the KCC could consider seconding their personnel to the other agency for one or two years.

Furthermore, there is a need to better utilise coordination of responsibilities by upper-level governmental agencies such as the Office of Government Policy Coordination in the Prime Minister's Office. For instance, the conflict in 2003 between the KFTC and the MIC, in which the Office of Government Policy Coordination in the Prime Minister's Office played the role of a mediator, can serve as a model.

Overlapping Regulations in the Financial Industry

History of Overlapping Regulations in the Financial Industry

The financial industry is regulated by the FSC (known as the Financial Supervisory Commission prior to March 2008) under relevant financial laws such as the Banking Act. The MRFTA, which became effective in 1981, did not cover financial and insurance businesses.[9] However, the Enforcement Decree of the MRFTA, which became effective in July 1984, created problems of overlapping regulations by including financial and insurance businesses within its scope.[10]

The health of the Korean financial industry became the main issue in the course of overcoming the Korean financial crisis in 1997 and the global financial crisis in 2008. As a result, many argued that a system of advanced supervision or regulation was needed to prevent excessive competition in the financial industry and such arguments have been the cause of increasing conflicts between the financial regulators and the KFTC.

Even in the present, many in the financial industry argue that large financial institutions such as large banks are needed. If that school of thought prevails, the financial industry is likely to become highly concentrated and the conflicts between the financial regulators and the KFTC may become worse in the process. The grounds for arguing that mega banks are necessary are, for example, that, even if a Korean company wins a large-scale construction project in a foreign country, a Korean financial institution cannot undertake financing for such project and the Korean company has to rely on foreign financial institutions.

On the contrary, people who oppose mega banks argue that the damage would be greater at the time of a financial crisis if there are mega banks and that the financial industry would be more profitable with small-sized financial institutions because they can perform financial business in line with the conditions of local or regional communities.

The controversies over mega banks clearly came to the fore in Korea in the course of the sale of the Woori Bank financial group. Woori Bank was established through consolidation of insolvent banks by investment of public funds after the 1997 Asian financial crisis. The government is the major shareholder of Woori Bank and is preparing to sell its shares since Woori Bank is now profitable.

[9] While Article 2 of the MRFTA provided a definition of an enterprise and included manufacturing, construction, wholesale and retail businesses, as well as miscellaneous businesses prescribed by the Presidential Decree, within its scope, it did not previously cover financial and insurance businesses. However, the amendment to the Enforcement Decree of the MRFTA in 1984 brought financial and insurance businesses within the purview of the MRFTA.

[10] Overlapping regulations were limited to unfair business practices and collaborative acts because the Enforcement Decree provided in the addenda that the MRFTA's scope as to insurance businesses would be limited to those practices. However, subsequent amendments to the MRFTA gradually brought insurance businesses within the MRFTA's fold and the amendment of 1999 completely brought insurance businesses within the MRFTA's scope.

The Korea Development Bank, a public financial institution, attempted to buy Woori Bank in 2011, arguing that the government should approve its merger because Korea needs a mega bank. However, the Korea Development Bank is not likely to be authorised to acquire Woori Bank at the moment because the leading opposition political party, among others, is strongly opposed to it.

Current Status of Overlapping Regulations in the Financial Industry

Both the MRFTA and financial laws regulate unfair business practices against consumers by financial institutions. For instance, Article 52-2 of the Banking Act prohibits unreasonable demand for collateral, demand to open an account and deposit a portion of a loan amount in that account (or in an existing account) and unreasonable infringement of customers' rights and interests by taking advantage of superior bargaining power as unfair business practices and these overlap with unfair business practices prohibited under Article 23 of the MRFTA and abuse of market dominance prohibited under Article 3-2 of the MRFTA.

Also, under Article 52-3 of the Banking Act, banks are required to provide information on the range of interest rates and the method of calculating the same, the time when such interest is paid or imposed and supplementary benefits and fees in advertising the bank products, so as not to mislead customers. Article also stipulates that banks are required to comply with the Labelling and Advertising Act, which is administered by the KFTC, when there is information that may be a key factor for customers in selecting bank products. Since the Labelling and Advertising Act prohibits false or misleading, derogatory and unreasonable comparative advertising, there is one law in Korea, which covers both monopoly and unfair trade practice regulation. The official name of this law is also called the "Monopoly Regulation and Fair Trade Act".

The KFTC, which was established based on this law, conducts activities to promote both competition and fair trade practices. The false/exaggerative advertising was also regulated by the Monopoly Regulation and Fair Trade Act when this act was first enacted. The separate "Act on Rationalising Labelling and Advertising" was enacted in 1999, which is also enforced by the KFTC, and also requires important information that may influence consumer decisions to be included in all advertisements, as there is an element of overlapping in regulations.

In particular, the Act on Registration of Credit Business and Protection of Finance Users regulates false or misleading advertising of lenders in a manner similar to the Labelling and Advertising Act. Moreover, the Labelling and Advertising Act does not allow the KFTC to unilaterally investigate financial institutions' advertising and requires the KFTC to report any such advertising it deems unreasonable to the FSC and to make a request to the FSC to handle the matter. The KFTC, however, may handle any case that it directly receives.

The Act on Structural Improvement of the Financial Industry and the Financial Holding Companies Act requires any merger between financial institutions to be authorised by the FSC. In examining a merger proposal, the FSC must determine whether the proposed merger would substantially restrain competition among financial institutions and it must confer with the KFTC in making such determination. Since such Act only requires consultation with the KFTC, there is disagreement as to whether the FSC should fully adopt the KFTC's opinion or whether it may consider the KFTC's opinion only as a reference and then make a different decision.[11]

Since financial laws are silent as to unfair collaborative acts and only the MRFTA regulates such acts, there are no overlapping regulations in that area. Nonetheless, there was disagreement as to whether the MRFTA applies to collective actions of financial institutions if such actions resulted from the administrative guidance of the FSC. In such a case, the Supreme Court of Korea held that the MRFTA applies to any additional agreement that deviates from the FSC's administrative guidance[12] and the KFTC established the Examination Guideline for Unfair Collective Acts Involving Administrative Guidance in December 2006.

As to standardised contract terms, both the FSC and the KFTC have the authority to examine such terms. The Financial Investment Services and Capital Markets Act, effective as of February 2009, provides that the FSC should report to the KFTC standard contract terms with respect to securities, futures and indirect investments it receives from financial institutions and that the KFTC should request the FSC to issue sanctions.

Examples of Overlapping Regulations

Charging Unreasonable Interest

One example of overlapping regulations is the case in 2005 in which both the KFTC and the FSC sanctioned commercial banks for their failure to adjust interest rates of variable rate loans despite the reduction in the market interest rate. More specifically, despite the one-percent drop in market interest rates between 2002 and 2005, commercial banks continued to apply a fixed interest rate. In March 2005, the FSC determined that such acts by the banks were harmful to the interest of consumers and ordered those banks to lower the interest rates for their loans. The banks refunded the interest that was overcharged to their customers irrespective, of such an order. In June 2005, the KFTC issued a corrective order and imposed an administrative surcharge of US$6.3mn on such banks and the banks protested that the KFTC's sanction constituted dual regulations.

[11] Lee, *supra* note 2.
[12] Supreme Court Case No. 2002*Du1*2052.

Collusion Among Automobile Insurance Carriers

From 2003 to 2006, eight automobile insurance companies failed to compensate their policyholders for rental car services while the policyholders' vehicles were being repaired after an accident. In November 2006, the FSC ordered the eight insurance companies to conduct their own investigation and report their findings and, in December 2006, such insurance companies decided to refund the unpaid insurance benefits to their policyholders. Meanwhile, consumer advocacy groups reported the above fact to the KFTC in November 2006 and the KFTC, after its own investigation, found that the insurance companies had collectively agreed not to pay for rental car services, issued a corrective order and imposed administrative surcharges of US$2mn in November 2007 against such insurance companies.

Efforts to Eliminate Overlapping Regulations

In November 2007, the KFTC and the FSC executed an MoU in an effort to solve the problem of overlapping regulations. Such MoU outlined the division of responsibilities between the agencies with respect to areas such as business combinations, unfair collaborative acts, unfair business practices, false or misleading labelling and advertising and standard contract terms, among other areas, the details of which are discussed below.[13]

Regarding business combinations, the MoU required the FSC, in examining a merger between financial institutions under the Act on the Structural Improvement of the Financial Industry or the Financial Holding Companies Act, to confer with the KFTC regarding the effect of the proposed merger on competition in the relevant market. The MoU also required the KFTC to fully consider the FSC's opinion on financial market-specific issues in its examination of the impact on competition.

With respect to unfair collaborative acts by financial institutions in connection with financial transaction-related issues, such as interest rates, fees and other conditions, the MoU provided that the KFTC would address such matters under the MRFTA. The MoU also provided that the FSC, in performing its duties under the relevant financial laws, may issue administrative guidance and that the MRFTA should not apply to individual actions performed within the scope of such administrative guidance.

Furthermore, the MoU provided that the KFTC should, in examining unfair collaborative acts, fully take into consideration the FSC's opinion as to whether administrative guidance was warranted and

[13] MoU between the Korea Fair Trade Commission and the Financial Supervisory Commission to Establish an Efficient Regulatory System for the Financial Industry (November 27, 2007).

the scope and contents thereof and that the FSC, when issuing administrative guidance, should remind financial institutions not to engage in unfair collaborative acts.

In connection with unfair business practices, the MoU provided that each agency may initiate its own investigation and take any measure it deems necessary. However, in order to minimise the burden on financial institutions from overlapping investigations or sanctions, the MoU provided the following guidelines.

First, each agency, prior to commencing an investigation against a particular financial institution, should inquire from the other agency whether such agency was in the process of investigating the same financial institution and keep in strict confidence any information it learns in the process with respect to the other agency's investigation.

Second, if the other agency already commenced an investigation, both agencies are to suspend any ongoing investigation and consult with each other through an advisory board (that is to be subsequently established) regarding the agency that will be in charge of the investigation, as well as the method, duration and time thereof.

Third, if the other agency is in the process of completing, or already has completed, taking corrective measures, no further investigation is to be conducted. In the event that one agency determines that the other agency's measures are consistent with the intent of the law it administers, it should not take additional measures. However, if the measures are deemed insufficient, the agency may take additional measures, after consulting with the aforementioned advisory board.

With respect to abuse of market dominance, as well as unfair business transactions of financial institutions against other financial institutions, the MoU placed the KFTC fully in charge.

With respect to false or misleading labelling and advertising, the MoU stipulated that each agency may initiate its own investigation and take any measure it deems necessary under the relevant law it administers. Similar to the case of unfair business practices, the MoU provided that each agency may take additional measures if the other agency has commenced or completed an investigation in connection with false or misleading labelling or advertising and the measures taken by such other agency are deemed insufficient.

Finally, with respect to standard contract terms, the MoU provided that each agency may examine standard contract terms and take necessary measures under the relevant law it administers. The MoU also stated that the two agencies are to jointly examine possible solutions to a reform of the regulatory system as to standard contract terms and to adopt the findings when the relevant law is amended.

Recommended Solutions

The solutions to the problem of overlapping regulations in the financial industry are similar to those suggested for the telecommunications industry, that is, the division of responsibilities between the two agencies should be clearly made through legislative reform, and a detailed agreement or system for consultation should be in place to address any unavoidable overlap in responsibilities.

Conclusion

Since the history of each nation's socioeconomic development is unique, the appropriate relationships between sector-specific regulators and the competition authority are also unique for each nation. Therefore, it is important for each nation to devise a solution that best suits its needs while taking advantage of various examples of other nations.

In an effort to foster cooperation between sector-specific regulators and the competition authority, the Organisation for Economic Cooperation and Development suggests the following: inter-agency exchange of agents or directors, affording the competition authority the opportunity to offer their opinions when a sector-specific regulator is making its decision and the opportunity for sector-specific regulators and the competition authority to informally exchange information.[14]

In the case of Korea, the problem of overlapping regulations has mostly arisen since sector-specific regulators, in amending the laws they administer, have started to regulate areas such as unfair business practices and business combinations, which are areas that have traditionally been under the purview of the KFTC. Inter-ministerial consultations during the legislative process are likely to reduce overlapping regulations significantly and establishing an inter-agency system for cooperation and procedural rules for addressing overlapping regulations must be emphasised. Further, inter-agency personnel exchange must be fully utilised to strengthen mutual understanding and cooperation among agencies.

This article attempts to explain the problems associated with overlapping regulations in the telecommunications and financial industries. Besides the above industries, there are also problems associated with overlapping regulations with respect to electricity and energy-related industries, the broadcasting industry and the medical industry. While the problems associated with overlapping regulations are not as severe in such industries as is the case with the telecommunications industry or financial industry, it is important that such problems be prevented or subsequently controlled. It may be said that the specific methods for prevention or subsequent control would be the same for the telecommunications and financial industries.

[14] Korea Development Institute, *A Study on Methods to Realise Rational Regulation by Sector-Specific Regulators and Competition Authority* (2008).

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