PRICE FIXING IN THE UNITED STATES AND KOREA: A COMPARISON OF LEGAL FRAMEWORKS, PUNISHMENT, AND IMPACT*

미국과 한국의 가격담합: 법적 체계, 처벌 및 영향 비교를 중심으로

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ABSTRACT

가격담합은 기업 범죄의 한 형태로서, 개인 소비자들에게 직접적인 영향을 준다는 심각성을 갖고 있다. 따라서 정부는 소비자를 보호하고, 열린 자유경쟁 원리를 지키기 위해 담합과 같은 반경쟁적인 행위들을 감시와 조사를 통해 적발하여야 한다. 그러나 반경쟁 법의 시행 정도는 국가에 따라 매우 상이하다. 특히 한국은 국내외로 담합 행위의 역사가 상당하여 이에 대한 검토가 필요하며, 미국은 글로벌무역과 세계시장의 접점 국가로서 비교 될 수 있다. 본 연구는 한국과 미국 간의 차이를 설명하는 데 취지가 있으며 두 국가의 담합 관련 법적 쟁점사항을 다루고, 양국 간의 차이가 어떻게 한국에서 가격담합을 더 평범한 현상으로 만드는지 증명하였다. 본 연구는 두 국가가 유사한 점을 가지고 있을지라도 각각의 법적 체계는 구조적으로 극명한 대조를 보이며 왜 미국의 위법행위 방지가 한국보다 더욱 효과적인지 설명하고 있다.

주제어: 가격담합, 수직적 담합, 수평적 담합, 담합, 독점금지법

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Introduction

Price fixing is a universal phenomenon, but the frequency with which this illegal activity is reported in the news in South Korea (henceforth Korea) is very alarming. In 2010 alone, the Korea Fair Trade Commission (FTC) identified 3,500 cases that were suspected of being involved in collusion to fix prices. Although only 60 cases were eventually levied fines, price fixing remains a significant part of the landscape of corporate crime in Korea, for it occurs with great regularity and has involved a wide array of goods and services. And Korean firms' proclivity to engage in collusion is clearly manifested in a recent report released by the FTC, which showed that they have been slapped with a total of 2.4 trillion won ($2.1 billion) in fines by overseas antitrust regulators since 2000 (Korea Herald,2012a). In the United States alone, Korean firms had to pay about $1.27 billion in antitrust fines since 2005 and 15 Korean executives faced criminal charges. The total is the second-largest accumulated figure, following Japan whose firms accrued a total of $1.36 billion in fines during the same period. In terms of the number of firms that were slapped with fines exceeding $10 million, Korea was ranked third, along with Taiwan, with six cases, following Japan (15 cases) and the United States (9 cases). In terms of the amount of fines, three Korean firms, namely LG Dispaly, Samsung Electronics, and Korean Air, were included in the top 10 list. For example, in 2008 the U.S. Department of Justice levied $400 million in fines against LG Display for fixing prices of thin film transistor liquid crystal display, or TFT-LCD, panels with two other companies—Sharp Corp. and Chunghwa Picture Tubes. It was the second-largest antitrust fine ever levied by the US Department of Justice. In 2005, Samsung Electronics was fined $300 million for fixing the price of dynamic random access memory (DRAM) chips with its competitors in the American market. A Samsung senior executive was also sentenced to prison imprisonment for 10 months. In another case that incurred a large fine, Korean Air was charged with price fixing on passenger and cargo flights with its competitors and was ordered to pay $300 million fine.

These cases reveal two important implications for Korea. One is that the United States has a very strict law against price fixing and that guilty parties, including company executives, face criminal charges and enormous fines, penalties that are much more severe than those applied in Korea. The other is that the number of price fixing cases in the United States is far smaller than that of

Korea, meaning that something must be done right in the former. As insinuated above, the severity of punishments in cases of price fixing seems far from uniform, especially when the penalties of price-fixing in the United States is compared with those in other countries, namely Korea. The United States has developed its legal framework to better enforce price-fixing penalties, while other countries, such as Korea, lack the same well-established legal framework. Thus, the latter is far more lenient when it comes to price fixing arrangements, ultimately failing to deter continuation. The question then is: What is the nature of laws against price fixing in the United States? How has the country "successfully" dealt with this serious corporate crime? What is the legal framework against price fixing in Korea? Why is this problem recurring with great frequency in Korea? This paper tries to address these questions by examining the two countries' legal frameworks against price fixing and analyzing the differences in the way authorities in the two countries handle the illegal activity. The paper will comparatively analyze the cases of price-fixing in the United States and in Korea, illustrating the respective nature of price-fixing, the legal framework for prosecution, and the subsequent penalties or the lack of. The paper thereupon determines that despite the frequency of price fixing cases in Korea, the country has yet to effectively deter anticompetitive behavior because violators are levied relatively weak penalties.

Price Fixing

There is a broad range in which price-fixing can take place. Besides the price itself or the components of the price being fixed, there can be a minimum price, or there can be a set of limitations outside of which the price can be neither increased nor decreased. In addition, there can be agreements to restrict price competition, in which competitors set price lists or agree not to charge below a determined price on the market. Moreover, the provision of discounts, transport charges, payments for additional services, the creation of credit terms, and other components of the product may be fixed (Office of Fair Trading, 2004: 14). But largely, there are two types of price fixing: vertical and horizontal.

Vertical price fixing occurs when a manufacturer sets a price for a retailer. For instance, a high-quality jeans manufacturer may not permit discounting at a retail level (Jones and Turner, 2010: 83). This is also known as resale price

maintenance (RSM). For a more recent example involving Korea, the Korea Fair Trade Commission (FTC) charged The North Face with a fine of 5.2 billion won for mandating Korean retailers to charge higher prices for its goods in order to maintain its name value and status as a premium good (McMurray, 2012).

Horizontal price fixing occurs when sellers, most commonly those at the same level of distribution, agree on set maximum or minimum prices for their goods and services. One of the most recent cases of horizontal price fixing is the case of Archer Daniels Midland (ADM), which attempted to fix the price of the worldwide lysine market in the mid-1990s. Another notable case was in 2007, when a number of airlines were fined heavily for trying to fix fuel surcharges between 2004 and 2006. As for a recent horizontal price fixing case involving Korea, Samsung and Hitachi incurred a settlement of $538 million for fixing the prices of liquid crystal displays (LCD) screens used for televisions, monitors, and laptops, and for imposing artificially inflated prices paid by consumers (Eddy, 2011).

Legal Framework against Price Fixing in the United States

Price fixing manipulates a competitive economic environment and therefore leads to serious social consequences, mostly suffered by consumers who have to face artificially inflated prices from restricted competition. In the United States, both Section 1 and Section 2 of the Sherman Act of 1890 have been used as legal justification for the prosecution of price fixing cases (see Letwin, 1981; High and Gable, 1992; Sullivan, 1991). Seeking to prevent anticompetitive behavior, Section 1 of the Act declares illegal any "contract, combination... or conspiracy, in restraint of trade," while Section 2 declares illegal any action by a singular party which seeks to "monopolize, or attempt to monopolize, or combine or conspire with other person or persons, to monopolize." However, Section 1 is the more pertinent point of discussion for the purposes of this paper.

Section 1 violations are divided into two categories, those whose actions are regarded as "per se" violations, and those that are regarded as "the rule of reason." Per se violations refer to automatic violations for which the restraining action (restraint) is considered to be almost always anticompetitive. Cases in horizontal price fixing, cartels, or group boycotts are all examples of per se violations (Jones and Turner, 2010: 84). Vertical price fixing was placed into the

category of "rule of reason" in 2007 by a controversial Supreme Court ruling[1], despite that it had previously been considered a per se violation. As a result, there has been a significant decrease in the successful prosecution of vertical price fixing cases, as it permits experts to be brought in to testify and defend the restraint as having a pro-competitive effect. This then makes it both expensive and lengthy, not to mention notoriously difficult, to prosecute cases, as vertical price fixing, such as in the case of resale price maintenance, is a strategic business practice and therefore derives benefits from the 2007 Supreme Court ruling (Gift, 2009: 1). Meanwhile, the legal language of many states still deems vertical price fixing illegal. For example, state law in California, New York, and Maryland continues to acknowledge vertical price fixing as an illegal practice. To date, horizontal price fixing violations remain per se, and are therefore subject to the rule of reason by which the anticompetitive behavior is assumed when facts that verify concerted anticompetitive behaviors are presented. Such cases require no presentation of evidence, and the risk of their anticompetitive potential outweighs any possibility of pro-competitive effects (Greenberg, 2011: 447).

The Leniency Policy

A controversial policy which serves as a "carrot" that induces colluders to voluntarily divulge evidence of their anticompetitive activities is called the leniency policy. Under the policy, the "cooperating" firm receives some form of leniency, e.g., reduced fines, or amnesty (see Zingales, 2008). The leniency policy was implemented in the United States in 1978 and a verbatim account of its contents is detailed below:

> Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:
>
> 1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
> 2. The corporation, upon its discovery of the illegal activity being

1) Leegin Creative Leather Products, Inc. v. PSKS, Inc. This case overruled the former precedent case, the 'Dr Miles Case' of 1911 which ruled per se agreements as illegal.

reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out…above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.[2)]

As a result, firms race to submit applications for leniency, to be the first to destabilize the cartel in return for more "favorable" penalties. It is worth noting, however, that the leniency policy also entails a firm "stick," meaning that corporations and individuals indicted with anticompetitive activities face severe penalties policy and that the policy is only meant to facilitate more effective ways of investigating price fixing activities. In the past fifteen years, American firms have been charged a sum exceeding $5 billion for their anticompetitive activities with executives serving prison sentences (Department of Justice, 2012).

Penalties against Price Fixing in the United States

Although the 2007 Supreme Court ruling has rendered it difficult to successfully prosecute vertical price fixing cases, the general trend in the United States is increasing deterrence of price fixing by means of not only heavier fines but also criminal prosecution of individuals. In 1974, violating Section 1 of the Sherman Act became a felony with the potential for prison sentence of up to three yeas per count. In the same year, the statutory maximum fine for individuals was raised from $100,000 to $350,000 (Gollub et al., 2005: 5). For corporations, the maximum fine was increased from $1 million to $10 million in 1990 (Gollub et al., 2005: 5). Moreover, from 1987, prosecutors have been able to charge corporate fines higher than the maximum, based on the company's net sales in the affected market. This rule additionally mandates that individuals can be levied up to a $25 million dollar fine (Gollub et al., 2005: 5). These new provisions were intended to consolidate the ability of the Department of Justice to impose antitrust penalties that would reduce price fixing cases. Currently, the maximum penalty for individuals is a ten-year prison sentence and $10 million fine, while for corporations the maximum fine is $100 million, although the amount can be adjusted above the maximum fine to twice the gain or loss involved (Department of Justice, 2012), which explains why fines levied against violating corporations can amount to such a great sum.

From 1980-1999, the Department of Justice has convicted more than fifty price fixing cases per year, on average (Connor, 2002: 21). In the 1990s, nearly 80

2) Accessed from the Department of Justice of the United States: http://www.justice.gov/atr/public/guidelines/0091.htm

percent of the cases filed led to the imposition of fines, while 15 percent involved prison sentences (Connor, 2002: 21). For example, three of the executives of the aforementioned Archer Daniels Midland received the maximum three year prison sentence for being involved in the price fixing of the lysine market. In 2001, convicted price fixers served an average sentence of fifteen months, while the average fine was nearly $40 million per company, and $2 million per individual (Connor, 2002: 21). In cases involving top executives who are foreign nationals, they were required to travel from their home countries to sit in US courts. As of 2002, more than ten foreign nationals[3] have served significant sentences for their involvement in price fixing scandals, most of whom were in the food and agricultural products sector (Connor, 2002: 21). In certain cases, penalties went beyond fines and prison sentences, as in the case against the US Agency for International Development. The agency was required by the Department of Justice to pay for advertisements in the The *New York Times* and *Wall Street Journal* to make public apologies for their crimes (Connor, 2002: 21).

Notable Cases of Price Fixing in the United States

Recent examples of prosecuted price fixing cases in the United States demonstrate the expansive range of the damages and consequences wrought by anticompetitive collusive activities. In 2007, the Department of Justice found British Airways and Virgin Airways to be guilty of colluding to fix fuel surcharge prices between 2004 and 2006. Although Virgin Airways was granted immunity, British Airways was fined $300 million. During this period, fuel surcharge prices increased from approximately $8 to $75 (BBC, 2007). The Archer Daniels Midland case was, of course, a precedent, in which the company was fined over $100 million and three executives served extensive prison sentences for their roles in colluding to manipulate the worldwide lysine market in 1997. In 2003, the construction firm Halliburton was also found guilty of repeatedly overcharging the government for fuel, construction services, and other services during the first and second Iraq wars.

In 2011, the automotive industry was involved in yet another case of price fixing. California-based Maxzone Vehicle Lighting Corporation and Sabry Lee USA

3) Kim Jeom Su, the president of Sewon America, paid a $75,000 fine for his involvement in a price fixing case.

Inc. were fined $43 million and $200,000, respectively, under the Sherman Act. The former president and CEO of Maxzone, Polo Shu-Sheng Hsu, was sentenced to 180 days in prison and fined $25,000 for his role (Halcom and Walsh, 2011). In the automotive sector, the Japanese-based DENSO Corporation, along with four other companies, was charged for colluding to fix prices and rig bids for heater control panels in cars sold in the United States. A DENSO executive, Makoto Hattori, was given a 14-month prison sentence and was fined $20,000. Eight other executives were also sentenced, with the jail time ranging from one to two years. Moreover, the fines for the companies were over $700 million. Furukawa Electric Co. Ltd, DENSO Corporation and Yazaki Corporation entered guilty pleas and were forced to pay a total of more than $748 million in criminal fines (Department of Justice, 2012).

As noted above, there were also prominent cases involving Korean conglomerates. In 2005, Samsung Electronics was imposed a $300 million fine by the Department of Justice for colluding to manipulate dynamic random access memory (DRAM) semiconductors. The price fixing had a direct impact on computer makers Dell, Apple, and Hewlett Packard. In addition to the fine paid by Samsung, Hynix, a Korean manufacturer, and Infineon Technologies AG, a German manufacturer, were forced to pay $185 million and $160 million fines, respectively. In 2007, Korean Air, along with other airlines, was charged for price fixing. The Department of Justice alleged that between January 2000 and July 2006, Korean Air conspired with other airlines to fix passenger fares and fuel surcharges on cargo shipments on routes between the United States and Korea. Korean Air was levied a fine of $300 million.[4] Such cases elucidate the international scope of price fixing and the increasing complexity that prosecution entails. Nevertheless, that the amount of the average fine has increased over the last several years as well as the incarceration of individuals involved in the crime underscores the increasing severity of penalties issued by the Department of Justice.

4) This case, which involved the largest fine ever levied against a Korean firm for any kind of corporate crime, received very little media attention in Korea, reflecting the business-friendly nature of the Korean media.

Legal Framework against Price Fixing in Korea

The Korea Fair Trade Commission (FTC) has jurisdiction over the enforcement of the Monopoly Regulation and Fair Trade Act (MRFTA) which was enacted in December of 1980 (Ministry of Legislation, 1980).[5] Korea's fair competition law is more similar to that of the European Union than that of the United States, although some of the specifics are similar to those of the United States. For example, Article 19 of the MRFTA, which contain laws designed to regulated collusion, resembles Section 1 of the Sherman Act in the United States (Lee, 2005: 158). To be more specific, Article 19 (1)

> prohibits contract, agreement, resolution or any other means by and among enterprises, that unreasonably restricts competition, to engage in concerted practices (i) fixing, maintaining or changing price, (ii) determining terms and conditions of trade, (iii) restricting production, delivery, transportation or trade, (iv) restricting territory or customers, (v) restricting the establishment or extension of facilities, (vi) restricting types or specification for the production or trade of goods, (vii) establishing a company, etc., to jointly carry out or manage material parts of a business, or (viii) that substantially suppresses competition in a market by means of interfering with or restricting other person's business (Lee, 2005: 158).

As it can be seen, Article 19 (1) contains a list of activities that are prohibited because they are considered anticompetitive practices. Also, Article 19 (1) prohibits even mere agreements to get involved in collaborative practices. That is, even a "meeting of minds" for the purpose of collusion is deemed a violation of the law of fair competition.

The MRFTA initially stipulated in Article 19 that violators of fair competition, such as price fixing behaviors, are subject to a surcharge not to exceed an amount equivalent to five percent of the turnover determined by Presidential Decree (Ministry of Legislation, 1980). This surcharge percentage was later reduced to three percent, and can only be applicable to companies that occupy 'market-dominant' positions, meaning that they either hold over fifty percent of the

5) Chapter 35 of the MRFTA.

market share or have annual sales revenue of at least one billion won. Also, unlike the Sherman Act, the MRFTA does not specifically differentiate between vertical and horizontal price fixing arrangements. A noteworthy development in recent years is the frequency with which the corrective orders of the FTC have been challenged by firms charged for price fixing. Indeed, prior to 1994, Korean firms rarely appealed corrective orders of the KFTC to an appellate court, the Seoul High Court, but such challenges have significantly increased since then (Lee, 2005: 157).

The Leniency Policy in Korea

The leniency policy was implemented in Korea in 1997. Under the policy, the Korea Fair Trade Commission grants immunity from any fine or penalty to the first firm to report the existence of a cartel (see Kim, N. and Kim, 2010; Choi, 2011).[6] The second firm to do so gets a 50 percent reduction in fines. Firms, in acknowledging their culpability, which cooperate with, and give additional information to, the FTC also get various levels of reduction in fines, typically ranging from 10 to 50 percent reduction. The purpose of a sliding scale in the reduction of fines is to encourage a "race to confess" among parties involved in price fixing activities. As a result, firms in Korea race to submit applications for leniency, to be the first to destabilize the cartel in return for more favorable penalties (Kim, H. and Nam, 2010). As noted above, however, whereas the leniency policy in the United States is implemented along with increasingly severe penalties, the policy in Korea has been exploited by conglomerates as a means of evading more severe punishment. For example, in the 2008 case involving price fixing of laptop and television products by Samsung and LG, the latter had its fine entirely removed for being the first to report the cartel. The fact that it was the two firms' third violation in a two-year span is a testimony to just how ineffective the policy is in Korea as a deterrent mechanism (Economist, 2012).

6) Along with the leniency program, an "Amnesty Plus" program also enables an implicated company to gain immunity if it provides evidence on another price-fixing case.

Penalties against Price Fixing in Korea

Like Japan, Korea, in most cases, has only fined up to 10 percent of estimated damages from the collusion and has rarely ever sentenced violators. The FTC has the jurisdiction, but it is required to hand over the case to the prosecutors for indictment. Korea has supposedly been striving to strengthen its law against price fixing, especially since 2000 amid a worldwide movement to deal strictly with corporate cartels, as global markets become more integrated. However, Korea's effort to curb price fixing has been far from being successful, considering that the number of price fixing cases has increased over the years, that the leading *chaebeol* have been frequently and repeatedly involved, and that a wide array of consumer products and services has been involved. In 2010, the FTC identified over 3,500 cases of price-fixing, but a mere 66 cases ultimately incurred fines. The average penalty amounted to only 2.3 percent of unjustly earned revenue, far from the aforementioned 10 percent. As such, Korean laws against collusion are egregiously lenient, going hand-in-hand with the country's business-friendly atmosphere and persisting "economic growth first and foremost" policy. Another factor that "encourages" Korean firms to persist in price fixing is the aforementioned leniency program for cartel participants.

Notable Cases of Price Fixing in Korea

It is noteworthy that three of the ten largest fines levied to date for price fixing in the United States involved Korean conglomerates. In addition to the high-profile price-fixing cases in the US, the FTC has enforced the MRFTA in several notable domestic cases. In January 2012, the Fair Trade Commission fined Samsung Electronics Co. and LG Electronics Inc. a combined total of 44.64 billion won ($38.5 million) for price-fixing of their major home appliance products (Korea Herald,2012b). Samsung and LG Electronics were fined 25.81 billion won and 18.83 billion won, respectively, for rigging prices of laptop computers, flat panel TVs, and washing machines. However, LG has had its fines waived because it was the first to report about their illegal activity to the FTC. And that is not the first time the same two conglomerates were implicated in price fixing. In 2010, the two companies were also fined large sums when they were found to have

fixed prices of air conditioners and televisions that were sold to government offices. That the two electronics giants that currently dominate the local electronics market and hold a combined market share of more than 90 percent of washing machine and flat panel TV sales and 58 percent of laptop computer sales committed similar unfair trading activity in the past, in 2008 to be exact, reflects how deep-seated price rigging practices are among Korean conglomerates.

Also in March 2012, the FTC charged four major local noodle makers a combined fine of 135.4 billion won ($119.6 million) for fixing prices of ramen for many years (Dongailbo,2012). The commission reported that the fine has been levied on Nongshim Co., Samyang Corp., Ottogi Ltd. and Korea Yakult for artificially setting prices on their products from 2001 to 2010. Nongshim, which allegedly played a leading role, was fined 107.7 billion won, and Samyang 11.6 billion won. Ottogi and Korea Yakult were levied with fines of about 9.7 billion won and 6.3 billion won, respectively. The clandestine deals were made under the disguise of exchanges of market information, and Nongshim, which has more than 70 percent market share of ramen, allegedly raised its price first, and the other companies followed suit.

These scandalous cases were preceded by equally deplorable cases of price fixing in Korea. In January 2012, thirteen chemical fertilizer companies were fined a combined total of 82.8 billion won ($71.7 million) for collusion in open biddings hosted by Nonghyup, the National Agricultural Cooperative Federation. This case was perceived to be more appalling since their illegal activity has affected farmers, a majority of whom barely manage to make a living. In October 2011, twelve life insurance companies were fined a total of 365.3 billion won ($315 million) by the FTC for price fixing (KoreaHerald,2011). The companies implicated in the case included most of the biggest names in the industry, i.e., Samsung, Kyobo, Korea Life, Mirae Asset, ING, KDB, AIA, Metlife, Shinhan, Allianz, Heungkuk, and Dongyang. Through collusion, these companies raised the insurance premium charged on customers and reduced insurance payments to customers. This was done through fixing interest rates, including the "expectation interest," which had set the level of insurance premium between 2001 and 2006. Samsung was given the highest fine of 157.8 billion won, followed by Kyobo with 134.2 billion won and Korea Life with 48.6 billion won. The rest of the colluding companies received lesser fines.

In February 2011, the FTC fined thirteen electric wire manufacturers, including the leading Korean cable manufacturer, LS Cable and Samsung

Electronics, a total of KRW 56.5 billion for price fixing (KoreaTimes,2011). LS Cable, Gaon Cable, and Taihan Electric Wire were forced to pay 34.02 billion, 6.75 billion and 3.03 billion won in fines, respectively. In February 2009, five largest beverage companies in Korea, namely Lotte Chilsung, Coca Cola Korea, Haitai Beverage, Donga Otsuka, and Woongjin Food, were charged for collusion to hike prices from February 2008 to February 2009 (KoreaTimes,2009). Lotte Chilsung, the largest beverage maker in the country with more than 36.7 percent of the market share, was fined 21.7 billion won. The company is alleged to have led the way in raising the prices first, while the other four companies followed suit about a month later each time. Besides the fine on Lotte Chilsung, the FTC levied a 2.4 billion won fine on Haitai and a 1.5 billion won fine on Woongjin. Coca Cola and Donga Otsuka, on the other hand, were granted immunity from prosecution, as they were the first to report about the violation to the FTC, four days after the investigation began.

Price Fixing in the United States and Korea: A COMPARISON

Despite the large fines levied on violators of honest competitive standards, price fixing remains a significant part of the landscape of corporate crime in Korea. The persistence of price fixing may be due to the traditional emphasis on cooperation over competition in Korea (Kwon, 2003: 4). Another explanation may be that the practice of fair market competition is still relatively new to Korean firms, for the country began industrializing only in the last half century or so. Nonetheless, the sheer difference in numbers of identified cases of price fixing in Korea in 2010 testifies to the enormity of the problem. While 3,500 cases were identified by the FTC, with 60 leading to fines, only 80 such cases were filed in the United States. Just by looking at these numbers, it seems that the simultaneous use of sticks and carrots is much more effectively implemented in the United States than it is so in Korea. Perhaps the court's unforgiving ruling on company executives, e.g., prison sentences, the public nature in which cases are prosecuted, and the resumption of an effective leniency policy are all notable differences between the manner in which price fixing is prosecuted as a criminal offense in the United States and in Korea.

In the United States, there are many mechanisms through which antitrust practices are discouraged, the most important of which is the maximum penalties

for such behavior. In 2004, US President George Bush signed a legislation that drastically boosted the maximum penalties and sent a stern message that white-collar crime, especially those affecting consumers, will be under special government scrutiny. With the new measures, the maximum corporate fines were increased ten-fold and the possible prison sentences and fines for individuals were tripled. Enforcement of such penalties has likewise been severe, with the incarceration of not only the most culpable but also multiples of individuals involved. In addition to the lengthier prison sentences and the larger number of indictments against individuals, the Department of Justice has in some cases required companies to make public apologies via printed media. It is because of these austere mechanisms that companies are encouraged to take advantage of the leniency program, because the failure to do so can have grave consequences. If the pleading for leniency is no longer an available option, individuals still have a plenty of good reasons to come forward at an earlier stage of the investigation in order to minimize penalties. It is also worth noting that in the United States each penalty against price fixing works in coordination with one another to create a holistic and comprehensive approach that discourages and deters repeated offenses.

Another reason the leniency policy in the United States is working better than it is so in Korea is its transparency, which enables companies to predict the outcome of the process. In Korea, the confidence in the policy seems to come from the understanding that it can function as an escape route from harsher penalties. The fundamental difference underlining both policies is that only one party can qualify for leniency under the leniency policy of the United States, whereas in Korea, both parties benefit, as illustrated by the 2008 LG and Samsung case. The leniency policy in the United States truly embraces the prisoner's dilemma as an either-or scenario, where only one party can benefit from cooperation, thus destroying trust among cartel members and discouraging repeated offenses. If the potential negative consequences of collusion do not outweigh the potential benefits of collusion, then any resulting fine can just be viewed as collateral damage to the parties involved. Rather than working towards permanently making price fixing arrangements untenable, an ineffective leniency policy only fails to send a strong enough message of deterrence, prompting even instant noodle companies to participate in such anticompetitive scheming.

In order for the FTC to achieve significant reduction in antitrust cases, it must realize that large conglomerates are continually violating fair competition practices because the penalties are not greater than the potential gains from

collusion. Korea must join the ranks of the economically advanced nations where the penalties for price fixing are so great that violating companies, in some cases, suffer losses that significantly damage their ability to continue their businesses. Furthermore, the FTC should drastically increase the penalties against price fixing, especially against repeat offenders. Imposing criminal punishment on the individuals deemed culpable should also be a natural next step in rooting out price fixing. In addition, the leniency program must be revised so that only one company may apply for leniency and amnesty. If the leniency mechanism functions as it does in the United States, it can serve as a much more powerful deterrent and discourage repeated collaboration as it would lead to the destruction of trust within a cartel. The fact that Samsung and LG have been fined three times in the last two years for repeatedly colluding in price fixing schemes is a clear indication that the current measures are not strong enough to prevent repeated violations.

Conclusion

Price fixing is one of the most serious forms of corporate crime. In terms of its negative impact on consumers, it is probably the most damaging one. It is true that the United States has had antitrust legislation far longer than Korea, and the evolution of this legislation has taken place through a process of trial and error. Nonetheless, the extent of price fixing in Korea demands immediate action, for the practice is so widespread that it seems like practically every service and good, big and small, especially those belonging to conglomerates, is somehow implicated in this type of illegal activity. The only reason more products are not found to have been involved in price fixing in Korea is that they have not yet been investigated. Furthermore, the frequency with which Korean products and services are involved in price-fixing cases in both domestic and international markets has been a source of embarrassment for the public. More importantly perhaps, consumers have been the victim of this egregious crime. The source of the continuing violation of antitrust legislation in Korea can be traced partially to the ineffective provision of stronger penalties that work towards deterrence of future cases.

To sum up, the actions of the government of the United States against price fixing can be summarized at both the individual and corporate level. At the

individual level, prison sentences have been handed out to send a clear message that the person who is engaged in collusion for price fixing will have to personally "pay" for the crime, i.e., spending one's precious time locked up in prison, away from the family. The prospect of prison sentence does send a very powerful message, because very few, if any, individuals in their right minds are willing to make that kind of personal sacrifice for their companies. At the corporate level, the US court has been merciless with fines against firms caught for price fixing. As noted above, the court has routinely levied fines of hundreds of millions of dollars. What is the message? It does not pay to commit price fixing; the company loses not only everything it has gained from price fixing but also lose much, much more, even putting the company in danger of going bankrupt. The media in the United States also have done their part in harshly criticizing corporations caught for price fixing, bringing the issue to the attention of the public. It is interesting to note that all of this has taken place in a country that has been relatively more business-friendly than other economically advanced nations.

In Korea, in contrast, laws against collusion are egregiously lenient, going hand-in-hand with the country's business-friendly atmosphere and persisting "economic growth first and foremost" policy. Another factor that "encourages" Korean firms to persist in price fixing is the aforementioned leniency program for cartel participants. Simply put, the leniency policy is abused in Korea. When investigations on price fixing begin, parties to the cartel, i.e., corporations involved in price fixing, seem to take turns to be the first to report their anticompetitive practices to authorities. The first whistleblower, of course, walks away with immunity from any type of prosecution, including fines. Even for other partners who are actually prosecuted, the penalty is not too worrisome, for the fine is often "manageable." "Heavy" fines are seldom levied, but when they happen, corporations end up paying substantially less fines through negotiations and lawsuits. So, the unintended message is clear: It pays to collude with competitors to fix prices, because getting caught simply means paying only a small portion of the illegally earned revenue. While the media in the United States has been more faithful in their role as a watchdog of corporate activities, the media in Korea, especially those with conservative orientation, has often turned a blind eye to price fixing cases. In fact, corporate crimes, the most of serious of which is price fixing, are underreported by the news media in Korea. As a result, consumers in Korea largely remain ignorant, unaware and passive about the issue. Due to the

media's inattention to the issue, indeed, price fixing has never been at the center of public consciousness or debate. This is unjust, for it is the consumers who are the ultimate victims in paying higher prices for the goods and services. One way to redress this problem is to, like the Department of Justice in the United States has done at times, require companies that have been convicted for price fixing to make public apologies via printed media. In this way, these firms are penalized not only financially but also lose face.

As the recently-ratified free trade agreements with the United States and European Union come into effect, the FTC will need to watch the state of prices more closely than they did in the past. The elimination of trade barriers should have a positive impact on price decreases for many foreign imported goods, but it is a growing source of concern for the FTC that the prices have not shown notable decreases. Despite its shortcomings, the seeds for a developing more effective enforcement system have been sowed, and it is expected that the Korean government will continue to acknowledge the importance of maintaining and enforcing strong competition policies. In closing, what this paper has attempted to do is to offer a possible course of action based on the policy changes made by the United States Department of Justice, as it more effectively has sought to put a clamp on price fixing behavior.

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투고일자 : 2012. 11. 15
게재일자 : 2012. 12. 17

ABSTRACT

PRICE FIXING IN THE UNITED STATES AND KOREA: A COMPARISON OF LEGAL FRAMEWORKS, PUNISHMENT, AND IMPACT

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One of the gravest forms of corporate crime is price fixing, whose consequences ultimately have a direct impact on the individual consumer. Thus, governments must take on monitoring, inquiring, and prosecuting anticompetitive practices in order to protect both the consumer and the idea of free and open competition. However, the extent to which anticompetitive legislation is enforced varies greatly from country to country. In particular, South Korea, a country with a considerable history of both international and domestic price fixing activities, calls for examination. And the United States serves as a point for comparison, for the country is the nexus of global trade and world markets. This paper seeks to identify the discrepancies between the two countries in addressing price fixing as a legal issue, demonstrating how such discrepancies serve to explain why price fixing scandals have become a more pedestrian phenomenon in South Korea. The paper illustrates that although the two countries have a few similarities, their respective legal frameworks are structurally stark in contrast, which explains why deterring illegal practices in the United States is far more effective than doing so in Korea.

Keywords: price fixing, vertical price fixing, horizontal price fixing, collusion, antitrust laws