

The Countervailing Power Defense for Cartels Under the Monopoly Regulation and Fair Trade Act*

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Abstract

Despite being often raised by respondents being investigated by competition authorities, the countervailing power defense for collusive behavior under the Monopoly Regulation & Fair Trade Act has received relatively little attention so far. Two strands of thought continue to this day, one being that such collusion would increase market concentration by introducing newly minted market power into the market by virtue of the cartel. Another stand of thought is that all or part of the benefits garnered through the countervailing power created by the cartel will be passed on to consumers, thereby increasing their welfare. A closer look at the theory shows that indeed as the market moves from a monopoly to a bilateral monopoly (where the input seller and buyer are a monopoly and monopsony, respectively), consumers may be better off than before as output increases to more optimal levels. There are, however, important caveats to this observation, as various factors may weaken or even reverse the welfare gains mentioned above. Examples include a breakdown in negotiations between the monopolist and monopsonist, and an increase in market power or collusion on the part of the cartelists in the downstream market or other markets where they are present. Indeed, the theory of the second best teaches us that the welfare effects of both inserting and removing the countervailing cartel will be indeterminate, making it difficult for authorities to properly judge the legality of such cartels. Some have argued that a countervailing power defense should be allowed, albeit restrictively and only under certain conditions such as the lack of market power in the downstream market. However, the likelihood of high administrative costs, and concerns of underdeterrence gives one pause in allowing such a defense even in its restricted form from a policy perspective. In any event, even

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if one were to allow for such a defense, the cartelist(s) should have the burden of proof of showing that their behavior had actually increased consumer welfare. Proving such, however, will likely be a daunting task.

KEYWORDS: Countervailing Cartel, Countervailing Power, Collusion, Monopoly, Monopsony, Bilateral Monopoly, Theory of the Second Best, Soju Cartel

I. Introduction

Assume that business entities producing goods “Y” collude in purchasing “X” with price-fixing, and “X” is required for the process of producing “Y”. Imagine that the Fair Trade Commission has detected such matters and tried to apply Article 19 Paragraph 1 of the Monopoly Regulation and Fair Trade Act (hereinafter referred to as “the Fair Trade Act”), which deals with unfair collaborative acts; here, the business entities could argue that it is true that there was price-fixing, but it was an inevitable measure to confront the market dominance of a large corporation “A.” It is not a simple matter to decide whether to reject the words of these operators as a poor excuse for those who have committed illegal acts or to examine the facts of such appeals.

There is generally no doubt that monopolizing the market—whether through consolidation, unilateral acts, or joint acts—results in deadweight loss because the output of goods decreases and price rises. Regulations by the Fair Trade Act regarding unfair joint acts and corporate consolidation and abuse of market-dominating positions are based on such theoretical foundations. Looking back at the example above, one might doubt that collusion, which reduces the price of “X” again or curbs further price increases, merely corrects or mitigates existing inefficiencies if “X” is priced at a higher level than its competitive price as a result of “A’s” exercise of its market dominance.¹⁾ Furthermore, as a result of collusion, if the final

1) The above question can be raised regardless of whether the exercise of market dominance is legal or not, because static inefficiency can still occur even if such exercise of market dominance is fully legal under the Fair Trade Act.

consumers of “Y,” which is produced using “X,” become able to buy “Y” at a price lower than would have been formed without collusion, it can be argued that there is no competition-restricting effect in the first place because such action is rather beneficial to consumers.

On the other hand, there may be concerns that allowing these cartels to exist in static inefficiency would ultimately harm market competition and consumers. This is the problem of so-called countervailing cartels.²⁾

Arguments that collusion is an inevitable means of countering existing market dominance have often been raised in practice,³⁾ and in the U.S., attention has recently been paid to such arguments after Apple claimed that even if there was price-fixing in the recent “E-book Case”, it was to confront Amazon’s market dominance, so it should not be considered “illegal *per se*”⁴⁾ On the other hand, academic circles appear to have had no specific consideration other than examining countervailing cartels in relation to the authorization of collaborative acts (Article 19 Paragraph 2 of the Fair Trade Act),⁵⁾ and it seems to be common to reject such objections in practice.⁵⁾ However, in the case of collusion between Soju business entities, which was

2) The above case corresponds to the purchasing cartels, and on the contrary, there may be countervailing “supply” cartels. The countervailing cartel of the supplier side is similar to that of the buyer side in its contents and effects, but is not exactly the same. This article will conduct discussions focusing on countervailing cartels of the buyer side in line with the facts of the Soju collusion case.

3) Fair Trade Commission Resolution No. 2005-013, Aug. 11, 2005, 2004Sim-I2019 (S. Kor.) (Objection of 11 business entities participating in the purchase and bidding of Cut Out Switch ordered by Korea Electric Power Corporation); Fair Trade Commission Resolution No. 2010-059, June 16, 2010, 2009Ka-Chong2722 (S. Kor.) (Unfair collaborative acts by 11 Soju manufacturing and selling business entities)(hereinafter the “Resolution of the Fair Trade Commission on Soju Collusion”) etc.

4) Vauhini Vara, *Did Apple Fix E-Book Prices for the Greater Good?*, NEW YORKER (Dec. 16, 2014), <http://www.newyorker.com/business/currency/apple-claiming-virtue-e-book-price-fixing-case>. In the case of EU, there seems to be no precedent recognized as a justification for collusion (EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS* 261 (2nd ed., 2011)) other than that the countervailing power of the purchaser is considered to be a factor in the examination process of corporate consolidation and in determining the existence of market-dominating positions (ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW* 349-351, 933-934 (4th ed., 2010)).

5) Fair Trade Commission Resolution No. 2005-013, 2004Sim-I2019, Aug. 11, 2005 (S. Kor.); Seoul High Court [Seoul High Ct.], 2005Nu19759, Nov. 8, 2007 (S. Kor.) (quoted in Young-Dae Lee, *Legal Regulation of Monopsony*, *ISSUES AND TASKS IN THE FAIR TRADE ACT* 76-78 (2010)).

controversial regarding the demonstration of their consensus on joint acts, the Seoul High Court, exceptionally recognized the legitimacy of the countervailing cartel.⁷⁾ Therefore, based on the issue of the Soju collusion case and the ruling of the Seoul High Court, the current article will take a deeper look at whether it is actually possible—and reasonable—to allow countervailing cartels under the Fair Trade Act.

As shown in the following discussion, there is the possibility that collusion aimed at exercising countervailing power could bring an increase in consumer benefits, so the argument that this possibility needs to be considered at the examining stage is not groundless. However, there is also a good chance that there will be competition-restricting effects that will prevent or exceed such an increase in welfare. Therefore, considering the cost of law enforcement and reality of regulation, it is necessary to be very careful in accepting such arguments in collusion cases solely on the grounds of the possibility of increased welfare from the exercise of countervailing power.

II. The Countervailing Power Defense in the Soju Collusion Case and the Decision of the Court

1. *Facts of the Case*

The facts in the Soju collusion case related to the countervailing power defense are as follows: Concerning diluted Soju 10, authorized business entities were manufacturing and selling this, and the market structure of

6) Oh-Seung Kwon, *Jungsogieobui Hyeopdonghwawa Dokjeomgyujebeop* [Cooperation of Small Businesses and the Monopoly Regulation Act], 25 KYUNG HEE L. J. 89, 99-105 (1990) (In Korean); Hye-Shin Cho, *Gyeongjaengjeongchaeggwa Jungsogieobjeongchaegui Johwaleul Wihan Dogjeomgyujebeobui Gwaje* [A Study on the Problems of Korean Competition Law for the Harmonization of Competition Policy and SMEs Policy], 29 KOREAN COMPET. L. J. 464, 480-485 (2014) (In Korean).

7) Seoul High Court [Seoul High Ct.], 2017Nu21718, Apr. 19, 2011 (S. Kor.) (Hereinafter “High Court ruling on Soju collusion”). Unfortunately, the Supreme Court did not explicitly judge whether countervailing cartels are permitted, taking a completely different position from the court below regarding the evaluation of the problematic action (Supreme Court [S. Ct.], 2011Du16049, Feb. 13, 2014 (S. Kor.)).

the regional market was an oligopoly because of the influence of the past “1 Do–1 Company Principle” and the compulsory purchase system of local Soju.⁸⁾ Because the liquor market is a classic example of a regulated industry, Soju business entities cannot even arbitrarily manufacture or choose the bottle cap they are going to use. Alternatively, they have to use the bottle cap manufactured by the entity designated by the National Tax Service.⁹⁾ Hence, Out of 10 business entities above, except for Jinro, 9 business entities received their bottle caps from the Sewang Steel Industry, Inc. (“Sewang Steel”).¹⁰⁾ Consequently, for the nine business entities, Sewang Steel was their only supplier concerning bottle caps,¹¹⁾ and for Sewang Steel, the nine business entities were their only counterparty.¹²⁾

From late May of 2008 to early June of 2008, Sewang Steel alerted the nine business entities about their price increase plan.¹³⁾ Accordingly, Daeseon, Sunyang, and Lotte (Dusan at the time) accepted Sewang Steel’s demand in June of 2008 and paid the increased price.¹⁴⁾ However, the nine business entities, including the three entities above, compromised to request for deferment of the price increase in a meeting about Soju manufacturing, which the business CEOs called “Cheon-Uhoe.” Consequently, they sent the “Request for Postponement of Price Increase

8) High Court ruling on Soju collusion, 4; Resolution of the Fair Trade Commission on Soju Collusion, 11-12.

9) Jusebeob Sihaenglyeong [Enforcement Decree of the Liquor Tax Act], Art. 57 para. 1, 4 (S. Kor).

10) High Court ruling on Soju collusion, 22.

11) *Id.*

12) Resolution of the Fair Trade Commission on Soju Collusion, 52.

13) *Id.* at 53. Unfortunately, the period and width of the price increase are not mentioned in the Resolution of the Fair Trade Commission on Soju Collusion and the High Court ruling on Soju collusion. Also, it is not confirmed whether there was price discrimination by the Sewang Steel except for the usual volume discount.

14) It is said that diluted Soju Market at the time was composed of one high-class entity (Jinro), five middle-class entities (Geumbogju, Daseon, Lotte (Dusan at the time), Muhag, Bohae), four low-class entities (Sunyang, Chunbug, Hite, Hanlasan) (High Court ruling on Soju collusion, 4). Of the three entities Daseon and Lotte (Dusan at the time) belonged to the middle-class and Sunyang belonged to the low-class. According to the annotation on the audit report of December 2008 about Sewang Steel, Daseon and Lotte (Dusan at the time) were related parties to Sewang Steel. The influence of this relationship on the anti-competition analysis is explored in Chapter IV.

for Bottle Cap” under the name of the representative director of the nine business entities.¹⁵⁾ After receiving the request, Sewang Steel restarted the negotiation with the nine business entities and finally agreed to increase the price of the bottle cap on December 1, 2008, after the price of ethanol for Soju was increased on November 1, 2008.¹⁶⁾

2. *The Decision of the Fair Trade Commission*

The Fair Trade Commission viewed that the agreement of the nine business entities to request a deferment of the price increase while rejecting the request for price increase disturbed and restricted the business activities of Sewang Steel, as well as each of the Soju business entities, consequently constituting illegal cartel conduct substantially restricting competition regulated by Article 19 Paragraph 1 Subparagraph 9 of the Monopoly Regulation and Fair Trade Act. Although the Soju business entities acknowledged that they agreed to request a deferment of price increase and truly made such a request, they claimed that it was only an expression of their preference in response to the unilateral notice of the price increase by Sewang Steel.¹⁷⁾

15) Resolution of the Fair Trade Commission on Soju Collusion, 52.

16) *Id.* at 53. The 3 business entities who first accepted the price increase revised the tax bill and got their money back.

17) Resolution of the Fair Trade Commission on Soju Collusion, 53. Sewang Steel also claimed that the postponement of price increase was a result of negotiation with Soju business entity induced by their autonomous judgment after receiving the request. It is hard to distinguish the exact meaning of “autonomous judgment” Sewang Steel claimed, based on the resolution of the Fair Traded Commission. However, considering the claim of the Soju business entities it seems Sewang Steel claimed that their decision to start the negotiation was their own decision after recognizing the difficult situation of their counterpart and induced by absolute dominance of Soju business entities. As mentioned above the fact that Sewang Steel’s shareholder was included in the 9 business entities may have been a motivation for Sewang Steel’s prospective decision apart from the joint activity of the Soju business entities. But, if Sewang Steel’s claim is interpreted this way Sewang Steel’s re-negotiation and postponement of price increase becomes a purely benevolent act and it is hard to imagine why a company would “autonomously” consider its counterparty’s position. Even if it is constructed that this act is about the benefit of shareholder this doesn’t agree with the fact that re-negotiation and postponement of price raise were also applied to the counterparty who was not Sewang Steel’s shareholders. One may propose that Sewang Steel considered the peaceful relationship with its counterparty (and hence its own profit) when re-negotiating

However, the Fair Trade Commission saw that it was impossible for Sewang Steel to ignore the request jointly offered by all nine counterparties. Also, even if that was the case, the agreement about the terms and conditions of the transaction itself constitutes a violation of the Monopoly Regulation and Fair Trade Act, considering that such a decision should be made independently by each business entity.¹⁸⁾

3. Judgment of the Court

At first, the Seoul High Court aligned its judgment with the Fair Trade Commission in that the acts of the nine business entities were to be regulated by Article 19 Paragraph 1 Subparagraph 9 of the Monopoly Regulation and Fair Trade Act, not by Subparagraph 1 to 8 of the same paragraph, on the ground that the acts were mere requests for a deferment of the price increase rather than the agreement of the trade conditions about the price.¹⁹⁾ The court also found that there was a possibility of recognizing the restrictions of competition in that the activities of the related business

and postponing the price increase, but considering that Sewang Steel's monopoly power and that its status is protected by Liquor Tax Act there are no reason for Sewang Steel to be cautious about the relationship with Soju business entities, and even if Sewang Steel was cautious about it this fact is contrary to the Sewang Steel's claim that their decision was independent to the joint action of 9 business entities.

18) *Id.*

19) High Court ruling on Soju collusion, 21-22. However, the judgment of the Seoul High Court and the Fair Trade Commission seems to have a point in dispute. A postponement of the price increase is to maintain the current price in that period, which is not differentiated from a discount of expected price increase in that period. So, collaborative acts of buyers to postpone the price adjustment and to deny the request of the opponent to increase the price can be interpreted as the act to decide, maintain and change the price of Art. 19 para. 1 subpara. 1 of the Monopoly Regulation and Fair Trade Act. For example, it is questionable whether the court would regard the case at hand as the same as a case where business entities manufacturing and selling some goods gather opinions to move up the estimated price increase after five months to present, jointly request to big buyers, and lead to an immediate price increase. There is no substantial difference between the joint responses of Soju business entities and this case. Seung-Han Oh, *Gongdonghaengwiewui Gyeongjaengjehanseong Ipjeung [Demonstration of Competitive Limitation of Joint Action]*, ISSUES AND TASKS OF THE FAIR TRADE ACT 166 (2010) (In Korean) also points out that an act that, at first sight, is considered to fall under subpara. 9 may actually "be a type of act that directly affects prices and output."

entities in the bottle cap supply market and the Soju market were hampered by the acts of the Soju business entities.²⁰⁾

However, the Seoul High Court, unlike the Fair Trade Commission, focused on the fact that the joint responses of the Soju business entities were against the monopoly firm. Because the increase of the bottle cap price could lead to an increase in the manufacturing costs of the Soju business and, ultimately, the final consumer price, the court ruled that the joint acts of the Soju business entities had the effects of increasing consumer welfare by, at least temporarily, blocking the increase of a final goods (Soju) price; this increase in consumer welfare outweighed the anticompetition effects of the joint responses.²¹⁾ In other words, the Soju business entities indeed colluded, but illegality was found to be denied on the grounds that the substance of the action was the exercise of countervailing power against the monopoly firm (Sewang Steel), and its pro-competition effects outweighed the restriction of competition.²²⁾

20) High Court ruling on Soju collusion, 22.

21) High Court ruling on Soju collusion, 22-23.

22) On the following appeal, the Supreme Court differentiated its view on the characteristic of the joint responses of the Soju business entities from the Seoul High Court and the Fair Trade Commission. The Supreme Court judged that acts at hand did not constitute the joint action of Art. 19 para. 1 subpara. 9 on the ground that they could be interpreted as requests of the guarantee of negotiation opportunities of the trade terms and its acceptance by the counterparty, rather than infringement of the rights of the price negotiation of related Soju business entities, because the joint responses of the Soju business entities were mere "suggestions" to reconsider or postpone the decision to increase the price of the bottle cap which had decided on the unilateral notification of Sewang Steel, and Sewang Steel also provided the opinion that it decided the postponement of the bottle cap price increase autonomously (Supreme Court [S. Ct] 2011Du16049, Feb. 13, 2014 (S. Kor)). It seems that the judgment of the Supreme Court was the logical consequence of the application of Art. 19 para. 1 subpara. 9 of the Fair Trade Act to the acts at hand. However, as noted earlier, it is questionable whether Art. 19 para. 1 subpara. 9 should be applied to the joint responses of Soju business entities.

III. Issues Regarding Countervailing Cartels Under the Current Legal System

1. Possibility of Softcore Collusion

The reason the Seoul High Court accepted counterarguments supporting the countervailing cartel in the Soju collusion case was that the competition-restricting effect of collusion was outweighed by the positive effect of such behavior on addressing the damages from a monopoly (inefficiency in final consumers paying a price higher than the competitive price). Hence, it is logical to argue that the countervailing cartel has a “combination” of both anti-competitive and pro-competitive effects.²³⁾

The way that the nature of a countervailing cartel is understood is critical because outright price-fixing that is classified as hardcore collusion can have dual characteristics within a countervailing cartel. That is, the countervailing cartel is logically capable of softening any form of collusive behavior. Accordingly, those who believe that the standards of assessing illegality should vary depending on the characteristics of collusive behavior may find countervailing cartels difficult to deal with in terms of the assessment system.

If the current law adopts the “*per se illegal*” rule or other similar legal principles, as in the competition laws of some major countries, accepting counterarguments supporting the countervailing cartel is equivalent to granting a new (and possibly significantly broad) exception to the aforementioned rule.²⁴⁾ It is not clear whether the Monopoly Regulation and

23) See Seung-Han Oh, *supra* note 19, at 162-164, for collective action with complex effects.

24) In the United States where a certain type of collusion is treated as “*per se illegal*”, discussions on the countervailing cartel are focused on to what extent exceptions to the rule are permitted (Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L. J. 195, 232-234 (2001)). Under a competition law framework that adopts the “*per se illegal*” rule, in the case where collusion is an ancillary restraint necessary to achieve the efficiency that cannot otherwise be achieved, the review is made according to the rule of reason as an exception (ABA Section of Antitrust Law, *Antitrust Law Developments*, 56-59 (2012)). However, the argument supporting the countervailing cartel is that collusion is not ancillary to create efficiency, but collusion itself relieves inefficiency. This is not because any efficiency is created

Fair Trade Act has any standard when it comes to the assessment of the illegality of collusion. However, considering that the Korean Supreme Court requested the determination of the scope of related markets regarding collusion that amounted to a hardcore cartel,²⁵⁾ one can at least say that the Supreme Court has not strictly adopted the rule.²⁶⁾ Therefore, although the countervailing cartel argument should not be regarded as unacceptable legalistically, the fact that there is no precedent that has adopted the “*per se illegal*” rule does not necessarily mean that all cases of collusion require a review of competition-restrictiveness, regardless of the content of collusion.²⁷⁾ Hence, it remains unclear to what extent and level the countervailing cartel argument needs to be reviewed. To solve this issue, a more in-depth examination of the impact of the countervailing cartel is necessary. Discussions regarding favorable methods to handle countervailing cartels in the process of assessing collusions will be meaningful only after it becomes clear whether there is the possibility that countervailing cartels can improve consumer welfare and, if so, in what

among collusion participants or in a market, but because counterparty to transactions has market power. Thus, it is difficult to accept the countervailing cartel as an ancillary behavior necessary to achieve efficiency (Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L. J. 1640-1641 (2007)).

25) Supreme Court [S. Ct], 2010Du11757, Apr. 26, 2012 (S. Kor.).

26) Seung-Yeop Baek, *Gyeongseoungcarteleui Gyeongwooaeo geu Wibeobseong Pandane Isseoseo Gwanryeon Sijangui Hwoekjeongyi Pilyohanji Yeobu Deung* [Whether Demarcation of Related Markets is Needed in Assessing Legality Even in the Case of Hard Cartels], 91 SUPREME COURT CASES 755, 759-760 (2012) (In Korean). For opinions that cases even before the above Supreme Court decision clearly did not adopt the “*per se illegal*” rule, see Jae-Hun Jeong, *Boodanghan Gongdonghaengwiwa Gwanryeonshijangui Hwoekjeong* [Unfair Collusion and Demarcation of Related Markets], 686 BEOPJO 305-306 (Nov. 2013) (In Korean); YOUNG-CHEOL IM, GONGJEONGGEOLAEBOB [FAIR TRADE ACT] 222 (1st ed., 2007) (In Korean). On the other hand, for views that the Supreme Court did not completely rule out the “*per se illegal*” rule competition restrictions are assessed as an exception in the case in which ancillary restraints were placed to achieve pro-competitive effects, see Seung-Han Oh, *supra* note 19, at 177-179.

27) Jae-Hun Jeong, *Id.* at 315-316. The Supreme Court ruling, in the case of the fee collusion between credit card issuers, also suggests that “Businesses’ joint decision-making such as deciding or adjusting prices results in the situation affecting or being feared to affect price decision, therefore businesses’ collaborative act has to be seen as unfair”, and thereby there can exist a difference in the unfairness examination depending on the content and nature of the collusion even though we do not adopt the “*per se illegal*” rule (Supreme Court [S. Ct.], 2008Du21058, Mar. 26, 2009 (S. Kor.)).

cases.

2. Relationship with the Collaborative Act Authorization System

According to the Fair Trade Act, even if it is an unfair collaborative act, it is allowed if it is authorized. Article 19 Paragraph 2 of the Fair Trade Act stipulates improvement of the competitiveness of small and medium enterprises (Subparagraph 6 of the paragraph) as one of the purposes of collaborative practices which can be authorized. Article 28 of the Enforcement Decree of the Fair Trade Act, which specifies the standards for authorization, stipulates that collaborative acts can be authorized when the effect of strengthening bargaining power on the terms and conditions of the participants of collaborative acts (all of whom must be small or medium enterprises) is clear and that the participants cannot “oppose” large enterprises by any means other than engaging in the cartel conduct.²⁸⁾ As such, because the Fair Trade Act provides a limited opportunity to obtain authorization for a countervailing cartel, a question may arise as to whether a countervailing cartel that is unauthorized or ineligible for authorization is not permitted.²⁹⁾

However, for the following reasons, the existence of a collaborative act

28) Art. 28 of the Enforcement Decree stipulates that authorization is possible in other cases as well. For example, if the effect of improving productivity in terms of quality and technology of small and medium enterprises by the collaborative act is clear (subpara. 1), or if the participants (all small or medium enterprises) cannot compete efficiently against large enterprises by any means other than engaging in the cartel conduct (subpara. 3), authorization is also possible. However, these are distinguished from a countervailing cartel as they refer to the case of enhancing competitiveness through efficiency improvement in a horizontal relationship rather than a vertical relationship, which is the case of a countervailing cartel. On the other hand, the countervailing power under the Fair Trade Act is also considered in the examination of business combinations (Examination Standards for Corporate Consolidation VI.2.(b).(2) and VI.4. (S. Kor.)) and examination of market dominating position (Examination Standards for Abuse of Market Dominating Position III.3.(c). (S. Kor.)).

29) Tae-Won Song, *Gongdonghaengwi Gwajinggeum Jibhaengsi Budangseong Yosoui Golyeo Pilyoseong [Necessity to Consider Factors of Unfairness when Executing Penalty Surcharges for Collaborative Acts]*, 60 DONG-A L. R. 232 (2013) (In Korean) refers to the justification claim of countervailing cartel made by the participants of collaborative acts, and takes the view that the claim cannot prevent the establishment of an unfair collaborative action unless prior authorization is obtained pursuant to Art. 19 para. 2 of the Monopoly Regulation and Fair Trade Act (S. Kor.).

authorization system does not necessarily mean that unauthorized countervailing cartels must be prohibited unconditionally:

First, the authorization system targets “unfair” collaborative acts, as stipulated in the law.³⁰⁾ However, the purpose of the countervailing cartel defense is to argue that the cartel is not unfair in the first place because the cartel leads to an increase in consumer welfare; in other words, the pro-competitive effect of the cartel outweighs the anti-competitive effect. As such, the countervailing cartel defense and collaborative act authorization system are different in their target actions and stages.³¹⁾

Second, Article 19 Paragraph 2 of the Fair Trade Act stipulates that in addition to improving the competitiveness of small- and medium-sized enterprises (SMEs), for the purpose of research and technology development, a cartel is eligible for authorization. Meanwhile, for the evaluation of a collaborative act for research and technology development, regardless of whether the act was authorized or not, the efficiency resulting from it is to be considered in the illegality examination stage.³²⁾ Therefore, it is contrary to current practice to say that the reasons listed in Article 19 Paragraph 2 cannot be considered in the illegality examination. Rather, it seems more reasonable to understand that the authorization system provides an opportunity to resolve legal anxiety and the risks of enterprisers in advance without waiting for the illegality examination stage to achieve the purposes of industrial policies.

Third, because the collaborative act authorization system approaches the countervailing cartel from an industrial policy point of view, there is a difference in policy considerations and purposes between the authorization system and whether to allow the countervailing cartel regarding competition policy. In other words, it cannot be said that the authorization system and illegality examination completely overlap.

Fourth, although it is being criticized, the judicial precedent is that even in the case of a collaborative act that is not authorized, the reasons for authorization prescribed by the law are again considered at the unfairness

30) MYUNG-JO YANG, GYEONGJEBEOP [ECONOMIC LAW] 329 (3rd ed., 2015) (In Korean).

31) Naturally, even though the act takes the form of a countervailing cartel, if the anti-competitive effect is greater, it may be subject to authorization.

32) See Examination Standards for Joint Act V.1.(b). (S. Kor.).

examination stage.³³⁾ Therefore, it is inconsistent with the precedent that the claim of a countervailing cartel is fundamentally blocked at the stage of illegality or unfairness examination because the collaborative act was not authorized.

In conclusion, considering whether or not a cartel falls under a countervailing cartel during the examination is not ruled out by law. A detailed examination of the effect of countervailing cartels on competition and consumer welfare will follow.

IV. Effects of Countervailing Cartels on Consumer Welfare and Competition

1. *Economic Fundamentals of Countervailing Cartels: The Theory of the Second Best*

According to the Theory of the Second Best, when there is an inefficient market that is not achieving Pareto optimum in more than one condition, correcting one of those conditions (i.e., matching it to the Pareto condition) does not necessarily lead to an improvement in efficiency.³⁴⁾ If only one condition hinders Pareto efficiency, correcting it will increase efficiency because it becomes Pareto optimum; but if other aspects also fail to meet Pareto optimum, it is unclear whether such correction will improve economic efficiency or not.³⁵⁾ The Theory of the Second Best has been primarily used as a rationale for being cautious about interventions because

33) Supreme Court [S. Ct.], 2003Du9251, Aug. 19, 2005 (S. Kor.). For a critical view on the precedent, see *supra* note 3, at 239.

34) R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11-12 (1956), as reprinted in EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 175 (2nd ed., 2011).

35) PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, ANTITRUST ANALYSIS 28 (6th ed., 2004). The authors explain the alignment of the wheels of the car as an example. If only one wheel is misaligned, the car will go straight if it is realigned correctly, but if there are more than one wheel that are misaligned, it cannot be concluded that aligning one of them will make the car move forward correctly, nor make it safer than before. This is because if the individual effects of the misalignment of each wheel were offset by each other and the car could run straight, correction of one of the wheels could make the operation worse.

it cannot be concluded that the involvement of competitive law in individual anticompetitive behavior necessarily improves the overall efficiency of the relevant market.³⁶⁾ Likewise, it can be used as a theoretical basis that countervailing cartels should not be banned on every occasion.³⁷⁾ If countervailing cartels actually have the effect of correcting the harm caused by monopolies, banning countervailing cartels while leaving the market monopoly situation in tact may result in worsening market efficiency. Below, we utilize this theoretical framework to develop the discussion.³⁸⁾

2. Existing Inefficiency (I): The Harm Caused by Supply Monopoly

In the case of Soju collusion, if Sewang Metal Co. and the nine Soju businesses are considered a related market, Sewang Metal Co. is in the position of being an exclusive supplier.³⁹⁾ When buyers collude against an exclusive supplier, inefficiency of the existing market in the framework of the Theory of the Second Best is the harm caused by the supply monopoly.

Figure 1 illustrates the output and price in the situation of a monopoly of element X , which is used to produce goods Y . In the competitive market, the price and quantity are determined at the point where the market demand and supply curves meet (P_c, Q_c). On the other hand, in the monopoly market, social welfare losses occur as the supply of X decreases and the price rises compared with those of the competitive market because the supply of the monopolist (Q_m) is determined at the point (c) where the monopolist's marginal revenue curve⁴⁰⁾ and the marginal cost curve meet.⁴¹⁾

36) *Id.* at 28-29.

37) EINER ELHAUGE, *supra* note 34, at 174-175.

38) For the purpose of this paper, the subsequent discussion presupposes that the joint response between soju business entities falls under the joint act of Art. 19 para. 1 of the Fair Trade Act as the Seoul High Court did.

39) For the convenience of the discussion, it is assumed that the nine soju business entities have no possibility of switching their supplier to another bottle cap manufacturer nor other bottle cap manufacturers may enter the current or potential market. Likewise, it is assumed that Sewang Metal Co. cannot secure Jinro Co. as a new source of demand.

40) The marginal revenue curve of a monopolist is below the demand curve. Unless

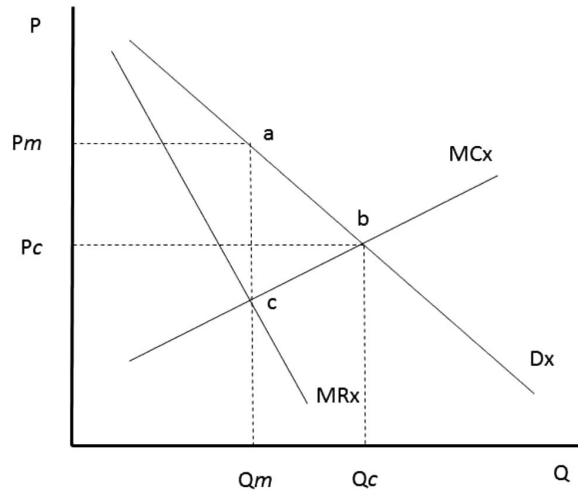


Figure 1.

3. Existing Inefficiency (II): The Harm Caused by Monopsony (Collusion)

Considering that the relevant market here is composed of Sewang Metal and nine operators, the joint response of all consumers to Sewang Metal creates a state of a so-called monopsony in the market, where there is only one consumer.⁴²⁾ Also, according to the Theory of the Second Best, the harm of a monopsony resulting from cartels corresponds to another existing inefficiency in the market.

complete price discrimination is possible, a reduction in the price of goods would require a reduction in prices for all goods previously produced, as well as the last goods produced, resulting in a steep fall in the monopolist's marginal revenue curve compared to the demand curve.

41) In (Figure 1), the social welfare loss portion is the area of the triangle *abc*. It should be noted, however, that (Figure 1) illustrates static inefficiency in terms of price and quantity. The potential for monopoly profit generation can increase the pro-competitive incentives such as investment and technological innovation and depending on the characteristics of the market (e.g. natural monopolies), it may be prerequisite for pre-investment. Therefore, this needs to be considered also when making evaluations regarding countervailing cartels.

42) Indeed, it may be different from the case of a normal monopsony in that negotiation between participants and related costs are incurred. The negotiation and its costs will be elaborated in Section IV. 5. below.

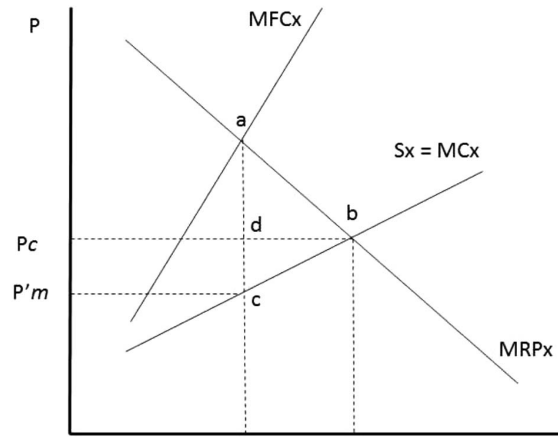


Figure 2.

Figure 2 shows the input quantity and price of factor X in a monopsony market. MRP_x is a curve that represents the marginal revenue product of a factor from the standpoint of a monopsony firm, that is, the increase in the total revenue, additionally obtained from good Y for every additional unit of factor X input quantity.⁴³⁾ S_x is the supply curve for factor X .⁴⁴⁾ Furthermore, MFC_x is a curve representing the marginal factor cost of a monopsony firm, that is, the increase in the total cost that must be additionally paid for every additional unit of factor input quantity.⁴⁵⁾ In the case of a monopsony, the input quantity of X (Q'_m) is determined at the

43) First, for convenience of discussion, it is assumed that the final product market(downstream market) in which the monopsony company operates is in a competitive situation. In this case, the marginal product curve is the same as the curve representing the value of the marginal product. It should be noted that a monopsonist for a factor of production does not necessarily have monopoly power or dominance in the market for goods produced from the factor. (Alexander, *supra* note 24, at 117-119 (The author illustrates this with the example of the coal market.); John B. Kirkwood, *supra* note 47, at 1531-1532).

44) Since it is assumed that the supply of X is competitive, the supply curve is also the marginal cost curve (MC_x) of factor X .

45) The reason that the marginal factor cost curve rises steeper than the factor supply curve is that, unless perfect price discrimination is possible, a monopsony firm does not only bear the additional cost of the last factor for every additional input of a factor, but also a higher price of all factors as the factor price as a whole rises.

point (a) where the marginal factor cost curve and marginal revenue product curve meet, not the supply curve of the factor, and the price of X according to the input quantity becomes $P'm$. In other words, compared with a competitive market (Qc, Pc), the input quantity (employment) of a factor decreases, and the factor price also decreases compared with that of the competitive market.

Under a monopsony, less than the socially appropriate input quantity of factor is put (employed), resulting in social deadweight loss similar to the case of a supply monopoly, while wealth transfers from the factor supplier (producer) to the monopsony firm as the monopsony firm purchases the factor at a reduced price.⁴⁶⁾ The transfer of wealth is likely to reduce the supplier's (expected) income, thereby reducing not only the output quantity of the factor, but also the incentives for technological development and innovation; hence, there is a possibility, at least theoretically, of reducing efficiency in the long run, in addition to the losses discussed above.⁴⁷⁾

Meanwhile, because the production cost decreases if a monopsonist reduces the cost of factors of production, it could be expected that the monopsonist would reflect (i.e., price cut) the reduction of cost in the end consumer price, as the Seoul High Court stated in the case of collusion of Soju companies. However, the influence of a monopsony on costs in the downstream market should be examined in more detail.⁴⁸⁾

46) In (Figure 2), social welfare loss is the area of triangle abc , and the area of $dcP'mPc$ corresponds to wealth transferred from suppliers to monopsonist company as a result of monopsony.

47) John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 Bos. U. L. REV. 1483, 1497 (2012); Hillary Greene, *Non-Per Se Treatment of Buyer Price-Fixing in Intellectual Property Settings*, 10 DUKE L. & TECH. REV. 1, paras. 36-42 (2011) (The author points out that it is difficult to exactly judge whether dynamic technological innovation is hindered if licensees of intellectual property rights form cartel).

48) In case of monopoly, since increase in price of factor and decrease in output would generally cause decrease in output of end good, upward pressure upon prices of end good takes place. If it is difficult for demanders of factor to increase prices because the market of end good is competitive, increase in prices of factor could lead to removal of the very demanders from the market and so on. Likewise, in the case of monopoly, it is easy to understand intuitively that upward pressure upon prices also takes place in the downstream market because prices of factor increase, but in the case of monopsony, intuition is not always consistent with the facts as will be seen in a later discussion.

The structure of the market of good *Y*, here produced using an object of monopsony named factor *X*, could range from a competitive market to a monopoly market. For example, there could exist only one company buying *X* in a certain region because of the high shipping cost of *X*. In that case, the company would become a monopsonist of *X*. Nevertheless, the relevant market of *Y* in which the company participates could be competitive enough. This is because the other companies that produced *Y* (or another product replaceable with *Y*) using *X* (or another factor replaceable with *X*) produced in another region could participate in the market as a competitor.⁴⁹⁾ In contrast, if *X* is a necessary factor in *Y* and no particular substitute for *Y* exists, a monopsonist could be in the position of a supply monopolist in the market of *Y* as well.

First, let us assume that the downstream market is competitive. In that case, the monopsonist company is also in the position of a price taker in the downstream market. As seen from the above, because a monopsony results in a decrease in the price of *X*, the amount of input of *X* decreases. If the amount of the input of *X* decreases, the amount of the output of *Y* produced using *X* also decreases. Therefore, a monopsonist company would produce less of *Y* with less of *X*. However, because market *Y* is competitive, even if the supply by the monopsony firm decreases, this amount would either be insignificant from the perspective of the overall market or would be covered by additional supply by the monopsony firm's competitors in market *Y*. Hence, the decrease in supply by the monopsony firm will have no impact on the price of *Y*.⁵⁰⁾ In other words, if the downstream market is competitive, the monopsony in the upstream market has little impact on the supply and price of the downstream market's products. Conversely, if the upstream market's monopsony firm has monopoly power or market dominance in the downstream market, a reduction in the supply of *Y* by the monopsony firm can significantly

49) For a real case of buying cartel where a buyer of factor was a participator in competitive downstream market like this, see U.S. Supreme Court [S. Ct.], *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219.

50) ROGER D. BLAIR & JEFFERY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 45-47 (1st ed., 2011). (On the other hand, the authors believe that the decrease of supply of *Y* by the monopsony firm has at least a slight effect even when the monopsony firm has no market dominance in the downstream market).

reduce the quantity of Y available in the downstream market, resulting in Y 's price increase.⁵¹⁾ In conclusion, the Seoul High Court's optimistic expectation that a decrease in the price of input goods (or curbing a price increase) will lead to a decrease in the price of final goods (or curbing a price decrease) in monopsony situations is not in line with reality.⁵²⁾ Rather, a monopsony in the upstream market has no effect on consumer welfare in the downstream market (if the downstream market is competitive) or may even have an adverse effect on it (if the downstream market is not competitive).⁵³⁾

51) *Id.* at 47-48.

52) In the U.S., *Balmoral Cinema v. Allied Artists Pictures Corp.*, 885 F.2d 313 (6th Cir. 1989) explicitly acknowledged that the countervailing buyer power defense can have a positive impact on consumer welfare. The Sixth Circuit Court, like the Seoul High Court, stated that a collusion that creates countervailing power (*de facto* monopsony) can lower the consumer price in the downstream market. This ruling has been criticized as a hasty or incorrect conclusion for reasons examined earlier. (*Id.* at 40).

53) Paul L. Yde & Michael G. Vita, *Merger Efficiencies: Reconsidering the "Passing-On" Requirement*, 64 ANTI-TRUST L. J. 735, 735-747 (1996). The paper argues that if the parties in a combination of enterprise achieve cost savings through synergy, the likelihood of the effect of such savings being transferred to consumers (for example, to lower consumer prices) is higher when the combined entity acquires market dominance or already has it (generally when it is deemed that anti-competitive effect due to combination is high). According to the authors, if the combined entity does not have market dominance and therefore is operating as a price taker in a competitive market, it has no incentive to lower the price as it can sell all of its productive output at the current market price, while enjoying increased profits from the cost savings. Conversely, if the combined entity has market dominance (for example, if it is a monopolist), it has strong economic incentive to lower the price (leveraged by a portion of the cost savings) as lower price can lead to increased profits. In the case of a monopoly, cost savings induce the marginal cost curve to move downward, and as a result, the price at the intersection point of the marginal cost curve and the marginal revenue curve (the quantity at this point is the profit maximizing quantity for a monopoly firm) is lower than the price before the combination. If the authors' assertions are valid, it may be questionable that such conclusion is incompatible with the former conclusion, that there is a price decrease when a monopsony firm in the upstream market exercises monopolistic power in the downstream market. The two conclusions are compatible, however, and the difference between the two cases lie on the change in quantity supplied. The former monopsony model assumes a scenario in which the decrease in the quantity of inputs leading to a decrease in the quantity of final goods supplied, whereas in the latter model, the authors assume a scenario in which the combined entity increases the quantity supplied. These two models are not necessarily incompatible. For example, the combination of enterprise may result in cost savings irrelevant to the price level of the input elements, and cost savings due to decrease in the unit price of input elements may be attributable to bulk purchases (in this case, the increase in input

However, is it right to conclude that the Seoul High Court's conclusion is wrong? As shown in the following discussion, we see that it may be premature to believe so.

4. *Intersection Between Monopoly and (Collusive) Monopsony: Issue of a Bilateral Monopoly*

The joint response situation of the nine business operators discussed in the Soju collusion case is a so-called bilateral monopoly, in which both the supply and purchase in the bottle cap market are monopolized.⁵⁴⁾ When a monopoly and monopsony coexist for an identical good, the inefficiency is larger—or at least no more efficient than in the case where the monopoly is either on the supply side or demand side only. However, an actual analysis confirms that the opposite results can (unexpectedly) be obtained.⁵⁵⁾

Figure 3 illustrates the state of a bilateral monopoly, in which both the supply and purchase of Factor X are all monopolized. This figure is similar to Figure 1 superimposed over Figure 2. Much like the previous example, it is assumed that factor X is put into the production of good Y.⁵⁶⁾ First, let us look at the supply side of factor X. In the state of a bilateral monopoly, the demand curve of factor X that the supply monopolist faces is identical to

elements would even lead to an increase in the production of final goods) rather than monopsony power.

54) 'Bilateral monopoly' on one good, and 'successive monopoly' that can lead to so-called double marginalization, should be distinguished. The latter refers to the state of supply monopoly in the upstream market and downstream market respectively (PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 27-28 (para. 758) (2012).), and as pointed out previously, demand monopoly does not necessarily imply supply monopoly in the downstream market. Therefore, bilateral monopoly cannot be said to result in or accompany successive monopoly in all cases.

55) In the past, the conventional view was that the market under bilateral monopoly will converge to somewhere in between the price and output level in the market situation under supply monopoly and that under demand monopoly respectively, but it is proved to be misconceived, at least in the theoretical sense. (See Roger D. Blair, David L. Kaserman & Richard E. Romano, *A Pedagogical Treatment of Bilateral Monopoly*, 55 SOUTHERN ECON. J. 831, 831 (1989).)

56) It is common to set the ratio of X to Y as 1:1 in the economic analysis of bilateral monopoly, for clarity and convenience in calculating. For the sake of this paper, detailed technical analysis is not being made here, but the readers who are interested can look at the following paper: *Id.* at 834.

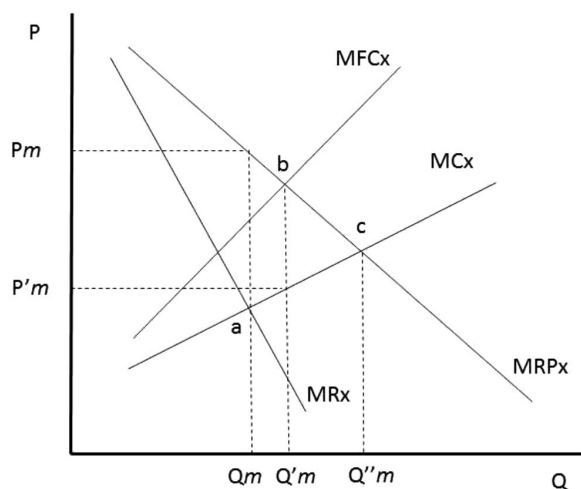


Figure 3.

the marginal revenue output curve (MRP_x) of the demand monopolist. As previously shown, MR_x , which is the marginal revenue curve of the supply monopolist, shows a steeper fall than MRP_x . In the state of a pure supply monopoly, instead of bilateral monopoly, the output of factor X (Q_m) is determined at point a , where MR_x intersects with MC_x , which is the marginal cost curve for factor X , and the resulting (monopoly) price of factor X is P_m . However, the demand of factor X is also monopolized, so the demand monopolist considers its marginal factor cost (MFC_x) in purchasing. In the state of a pure demand monopoly, instead of a bilateral monopoly, the output of factor X that the demand monopolist will purchase (Q'_m) is Point b , an intersection between MRP_x and MFC_x , and the resulting price of factor X is determined at P'_m located on MC_x .

For both monopolists, after maximizing the joint profit, it is most advantageous for each monopolist to allocate it appropriately to each other. To determine the input of X that maximizes the joint profit, suppose that a monopoly and monopsony are consolidated into a single company. From the perspective of the consolidated company, the input of X that maximizes the profit gained from producing good Y equals Q''_m , which is the amount of input to the point (c) where the marginal cost of X (MC_x) is identical to the marginal revenue product of X (MRP_x). It is the input that maximizes the joint profit of both companies (a monopoly and monopsony) without

any consolidation under bilateral monopolies. Therefore, a rational monopoly and monopsony first set the input to $Q''m$ to maximize the joint profit and then allocate the maximized joint profit through a negotiation on the price of X to each other.⁵⁷⁾ This is because doing so can increase profits more than when in a monopoly or monopsony. Furthermore, as can be seen from Figure 3, the input of X $Q''m$ is greater than $Q'm$ (in the case of monopoly) or $Q'm$ (in the case of monopsony), and the output of Y also increases compared with a monopoly or monopsony,⁵⁸⁾ hence increasing consumer welfare in the downstream market.⁵⁹⁾ The above analysis leads to the conclusion that bilateral monopolies are more beneficial to consumer welfare than a monopoly.⁶⁰⁾

We can apply the analysis to the Soju collusion case. The conclusion of the Seoul High Court that the collusion of Soju companies contributed to consumer welfare is reasonable if we understand the essence of the case as follows:⁶¹⁾ The Soju companies formed a cartel (to create monopoly over demand) against Sewang Metal, buying more bottle caps than they could without a cartel, hence increasing the supply of Soju compared with the case of a monopoly.⁶²⁾ Following the logic above, the rebuttal of a

57) ROGER D. BLAIR & JEFFERY L. HARRISON, *supra* note 50, at 129-131 considers the situation where the downstream market is monopolized by a monopsony, inducing the negotiation of the price of X is under a certain scope, and the price of X plays a role in allocating the joint profit to each other in this case.

58) Between Qm and $Q'm$ one is not always higher than the other. The size relation depends on the elasticity of the demand and supply. (Peter J. Hamer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L. J. 949, 966 (2004).)

59) This is a conclusion assuming that the competition in the downstream market is static. Regardless of what competition the downstream market is in, once we fix the type of competition, it leads to the same conclusion.

60) Peter J. Hamer & William M. Sage, *supra* note 58, at 966; ROGER D. BLAIR & JEFFERY L. HARRISON, *supra* note 50, at 136.

61) According to the explanation above, it seems that one inefficiency (monopsony and vice versa) offsets the other inefficiency (monopoly on supply and vice versa), ultimately resulting in increased efficiency. It is the case where the logic of the Theory of the Second Best applies that punishing and banning the demand cartel between soju companies does not always increase consumer welfare.

62) It should be noted that the explanation above differs from the Seoul High Court's ruling that the cost-cutting effect due to decreased factor prices would have simply been conveyed to consumers.

countervailing cartel should be widely recognized and considered at the screening phase. There exist some factors that hinder the derivation of the outcome of the bilateral monopolies discussed above, and there also exist potential factors that can still harm consumer welfare, even if we can derive the outcome.

5. Review of the Factors that may Affect the Direction of Consumer Welfare Effects of Countervailing Cartels that Build a Bilateral Monopoly

1) The issue of negotiations between the two parties and the participants involved in the collusion

An important precondition for bilateral monopolies increasing consumer welfare is that both monopolists engage in negotiations first and that the negotiations are successful. As seen in the model above, there are enough economic incentives for both sides to engage in negotiations with each other, but there are many factors in the real world that will make negotiations between rational parties difficult. Examples include the lack of accurate information and understanding of market conditions (such as the conditions of a bilateral monopoly), strategic actions by both sides in allocating joint profits (pricing X), and the risk of a breakdown of negotiations.⁶³⁾ If negotiations fail or break down, it will be difficult to guarantee the effect of increasing consumer welfare.

It can be said that in the Soju collusion case, several factors increased the possibility of success in negotiations and settlements. Because of the nature of the regulatory industry, the market structure was stable, creating favorable conditions for negotiations to be concluded smoothly. It was also helpful that some of the nine operators included shareholders of Sewang Metal. On the other hand, negotiations must be concluded not only between the two parties, but also between those involved in the collusion because the Soju operators have achieved a monopoly on demand through collusion, which means that the cost of negotiations increases more than the

63) ROGER D. BLAIR & JEFFERY L. HARRISON, *supra* note 50, at 136-138; Jonathan B. Baker, Joseph Farrell & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 ANTITRUST L. J. 637, 638-641 (2008).

usual bilateral monopoly situation. Therefore, based on the circumstances above, it is hard to conclude whether there would have been no negotiation problems in the Soju collusion case.

2) *Problems with the direction of the marginal cost curve of an element*

In the case of demand and bilateral monopolies, a reduction in component prices leads to a decrease in component output because the marginal cost curve of the component increases. The reason why bilateral monopolies can increase consumer welfare in the downstream market more than in a monopoly is that they are likely to reverse a reduction in the output of these factors. If the marginal cost curve of an element is flat or falling rather than rising, none of these premises can be established. It is common to assume that the marginal cost curve usually rises. However, some have pointed out that in the oligopoly market, the demand-only model is difficult to apply to the real world because the marginal cost curve is often flat or gently falling in production.⁶⁴⁾

However, just because the marginal cost curve of the element is flat or falling cannot be the sole reason for rejecting the claim that a supply monopoly was exercised through collusion.⁶⁵⁾ In the Soju collusion case, it is difficult to confirm the direction of the marginal cost curve at the bottle cap production point of Sewang Metal only with the Fair Trade Commission Resolution and Seoul High Court's decision. In addition, if the marginal cost curve was downward, freezing or lowering the price of the bottle cap may have resulted in increased output. Therefore, a more specific market analysis is needed to determine the actual results.

3) *The issue of possible degradations of competition in the downstream market*

The bilateral monopoly assumes a complete monopoly on the part of the consumer. Then again, we can assume that countervailing cartels are otherwise constructed by some consumers at a sufficient level to exert

64) Jonathan B. Baker, Joseph Farrell & Carl Shapiro, *Id.* at 641.

65) Conversely, suppose that suppliers exercise supply monopoly power through collusion against existing demand monopoly companies. In this case, if suppliers' marginal cost curves are falling, increasing factor prices by allowing supply monopoly collusion against demand monopoly may reduce factor inputs, not increase them, and ultimately reduce consumer welfare.

counterforce. In this case, the cartel participants may demand that the monopolistic supplier discriminate in their favor (at the expense of the competitors).⁶⁶⁾ If the monopolistic supplier replies to such a demand and treats consumers differently and, as a consequence, the competitors who do not participate in the collusion bear higher factor prices than the collusion participants, competitors may be excluded, or at least competition, such as price, may weaken in the downstream market where the collusion participants are active.⁶⁷⁾

However, there is a counterargument here: From a monopolistic supplier's point of view, discrimination will not occur or is unlikely to occur because a reasonable monopolistic supplier would not want the demand for the elements to be monopolized and, thus, would not respond to the discriminatory treatment demands of the collusion participants that bring about such results and because, as a monopolist, there is no possibility of falling into a collective action dilemma.⁶⁸⁾ However, even in

66) The discriminatory treatment of monopolistic suppliers is not necessarily limited to existing market participants. If the monopolistic supplier directly or indirectly reveals that unfavorable conditions will be imposed on new entrants, it could create an effect that hinders market entry. In this case, the cartel will be able to block potential competitors through the monopolistic supplier.

67) John B. Kirkwood, *supra* note 47, at 1537-1543. describes these attempts as anticompetitive competitors raising rivals' costs on the assumption that they are counter-competitive through a corporate consolidation, and the same logic may apply to countervailing cartels.

68) A typical case in which a collective action dilemma arises is when a market-dominant manufacturer requires individual distributors to make exclusive dealings. From the distributor's point of view, it would be a reasonable choice not to comply with the manufacturer's demands as above, because the more competitive the supply market, the more they benefit from a lower supply price. Nevertheless, it is a matter of so-called collective action that distributors make different choices, and the reasons are as follows: When a manufacturer attempts to exclude its competitors by using exclusive dealings, it requires distributors that can compete effectively with the competitors to reject the manufacturer's demands, and if individual distributors alone or only the distributors insufficient to compete were to reject the manufacturer's demands, they would accept the manufacturer's requests to avoid cost (damage) caused by such pointless refusal. Conversely, if the distributor is convinced that all other distributors or distributors sufficient to compete would refuse, the manufacturer's attempt will eventually be blocked even if he himself does not refuse, so he accepts the manufacturer's demands with the aim of obtaining short-term benefits from accepting them. Eventually, in any case, the result (all distributors accepting the demands of the manufacturer) is against the interests of the distributors.

this case, a monopolistic supplier can be induced to discriminate between consumers, as required by the cartel participants. This is because the cartel participants can offer monopolistic suppliers more favorable conditions for the distribution of joint profits of bilateral monopolies or, separately, promise to allocate additional profits through future-acquired control in the downstream market.⁶⁹⁾

However, if the purchasing prices of the participants in the collusion were different from each other before the countervailing cartel was established, the homogeneity of the cost of the components between the participants could undermine this price competition in the downstream market. On the other hand, when the concentration of the downstream market is high, this may increase concerns about collaboration effects, such as oligopolistic coordination.⁷⁰⁾

In addition, the possibility of countervailing cartels turning into cartels in the downstream market cannot be ruled out.⁷¹⁾ In particular, allowing countervailing cartels may increase the incentive for additional collusion by reducing the cost (or risk) of the participants attempting separate collusion in the downstream markets or other adjacent markets. For example, if discussions on illegal agreements (e.g., cartels in the downstream market) are held together with legally acceptable agreements (countervailing cartels), it will be more difficult to detect such illegal discussions or agreements, thus reducing the risk of punishment.⁷²⁾

In the Soju collusion case, there was no discriminatory treatment problem because all nine operators participated, and it is difficult to conclude that the dominance of the Soju businesses was particularly strengthened because the structure of the downstream market was already fixed because of regulations. However, it is worth noting that in addition to

69) EINER ELHAUGE, *supra* note 34, at 176.; Oh-Seung Kwon, *supra* note 5, at 96. also raises concerns that monopolists might together exploit consumers if the market monopolizes as a result of the exercise of counterforce.

70) ROGER D. BLAIR & JEFFERY L. HARRISON, *supra* note 50, at 139.

71) *Id.* at 138-139. PHILLIP E. AREEDA & HERBERT HOVENKAMP, 12 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 163 (para. 2015b) (2012) (the authors also raise concerns about double marginalization of sequential monopolies).

72) This can be easily understood when compared with cases in which separate meetings or additional contacts are required for illegal discussions.

the issue of bottle caps, other competitive factors (such as offering prizes) agreed upon during the discussions in the downstream market were found guilty of collusion, and that such discussions on the agreements took place in similar places (such as Cheonwoohoe).

4) *The issue of possible disruptions of competition outside the downstream market*

As a result of countervailing cartels, the degradation of competition effects can occur outside the downstream market. One example is the decline in incentives for the investment and innovation of the aforementioned component suppliers.⁷³⁾ This is because the emergence of countervailing cartels leads to a decrease in the expected returns from the perspective of existing supply monopolists, unless negotiations between the two sides are successfully concluded in a bilateral monopoly or there is assured compensation through a demand monopoly. When it comes to these concerns, because the reduction in innovation in the component market is not profitable, even from the perspective of the collusion participants, reasonable demanders may think that such concerns will not be realized because they guarantee the supply monopolist's profit at a level where the appropriate degree of innovation could be maintained. However, leaving aside the difficulty of rational judgment of demanders because of incomplete information, there is no guarantee that such judgment will induce innovation beyond a socially appropriate level. This is because in some cases, socially beneficial innovations can be disadvantageous to demanders.⁷⁴⁾

73) For corporate consolidation that generates competitive forces against suppliers, see John B. Kirkwood, *supra* note 47, at 1551-1552 for the views that raise such concerns. Tom Campbell, *Bilateral Monopoly in Mergers*, 74 ANTITRUST L. J. 521, 530 (2007) suggests that the increase in component prices due to corporate consolidation causing supply monopoly against existing demand monopoly would not reduce incentives to monopolize as it does not affect efficiency of the original demand monopoly; however, it is reasonable to think that incentives for investment and innovation may also decrease as long as expected return due to monopoly decreases.

74) Hillary Greene, *supra* note 47, at para. 39. Think about destructive innovation that can disrupt downstream markets. In the Soju collusion case, it is difficult to determine exactly whether the incentives for the investment or innovation of bottle cap production of the Sewang Metal co. were hindered by the countervailing cartel based on the facts provided in Fair Trade Commission Resolution and the high court decision regarding the soju collusion.

Meanwhile, like the downstream market discussed above, if the upstream market (factor market) is not a complete monopoly, competition in the upstream market may be hindered if countervailing cartelists discriminate among the upstream market participants.⁷⁵⁾ There is also no guarantee that the cartelists will use their countervailing power (market dominance) only against the monopolists that were originally targeted. For example, consumers may expand their opportunity to build a demand cartel for factor X by additionally colluding against suppliers that produce other factors, such as factor Z (because the cost of establishing additional collusion is reduced because of the existing countervailing cartel), and this expansion can be maintained, irrespective of whether the suppliers of factor Z have monopoly power.

Although there may be other factors that affect consumer welfare other than those listed above, it is clear that consumer welfare is still likely to be hampered, even if there is a shift from a monopoly to a bilateral monopoly under a countervailing cartel. Then, from the viewpoint of law enforcement, it is necessary to decide whether to not allow the countervailing power defense on the grounds that it does not always lead to an increase in consumer welfare or to examine the effect of the countervailing cartel in detail because there still is a possibility of an increase in consumer welfare. Some may argue that conducting an anticompetition analysis is an approach consistent with the current examination system because the countervailing cartel is a joint act with a complex nature that can also have an effect of increasing efficiency, here according to the classification of the Examination Standards for Joint Act, but a more careful approach is needed from a legal policy point of view. In the next chapter, we will examine the legal and policy problems related to the countervailing power defense.

However, considering the characteristics of related businesses and the relatively short period of time to postpone the increase, it would be hard to say that the effect of the degradation effect was significant.

75) Warren S. Grimes, *supra* note 24, at 200-201. For the possible anti-competitiveness at a further upstream market stage, *see* John B. Kirkwood, *supra* note 47, at 1554-1557.

V. Legal Policy Review of Countervailing Cartels

Legal policy concerns when it comes to allowing countervailing cartels have already been raised about the accreditation system for the joint acts for the purpose of cultivating countervailing power of SMEs.⁷⁶⁾ The core of the concern is that this construction in countervailing power could eventually solidify the monopoly on both sides.⁷⁷⁾ In particular, some point out that once a countervailing cartel is allowed, another countervailing cartel that opposes the resulting market dominance would have to be allowed, which will lead to the successive emergence of cartels, which will undermine the overall efficiency of the market.⁷⁸⁾

The problem does not stop here. If a countervailing cartel is allowed, in most collusion cases, the participants will argue that they were colluding for countervailing.⁷⁹⁾ This is because in real markets, full competition is extremely rare, and it is common for the counterparty (a victim of collusion) to have a certain market dominance or price determination. In this case, requiring the Fair Trade Commission to identify whether it actually constitutes a countervailing cartel that increases consumer welfare every time not only takes a considerable amount of time and money but is also feared to result in the underdeterrence of the cartel by reducing its power of execution.⁸⁰⁾

76) Oh-Seung Kwon, *supra* note 5, at 96.

77) *Id.* at 96.

78) Warren S. Grimes, *supra* note 24, at 200-201 (The author compares the successive emergence of cartels to the spread of a “virus”). Seoul High Court [Seoul High Ct.], 2005Nu19759, Nov. 8, 2007 (S. Kor.) also points out that allowing collusion in a monopsony market is problematic since it results in virtually always permitting collusion in public order cases.

79) PHILLIP E. AREEDA & HERBERT HOVENKAMP, *supra* note 71, at 162 (para. 2015b).

80) In the U.S., it is suggested to determine whether the counterpart's acquisition or exercise of monopolistic power is illegal before allowing countervailing cartel. If it is illegal, it is desirable to enforce the competition law first rather than correct the counterpart's illegal monopoly with countervailing power and pleading countervailing cartel may be considered only if it is impossible (John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIAMI L. REV. 1, 53-54 (2014); ELHAUGE, *supra* note 34, at 175.).

The participants in the countervailing cartel will argue that they had no choice but collusion, but in fact, it would be preferable if the market's operations weakened or destroyed the existing monopoly.⁸¹⁾ If it is argued that a monopoly cannot be corrected by market power, it is rather doubtful whether the market itself is a natural monopoly and requires direct price control by the government.⁸²⁾ In this case, allowing countervailing cartels is like replacing government regulations with those of private companies because it is unreasonable to expect private parties that are pursuing their own interests to always act in a way that maximizes market—and economy—wide efficiency.⁸³⁾

Because of these problems, some suggest setting very strict requirements to allow countervailing cartels only in exceptional cases.⁸⁴⁾ Although these attempts to take only the positive aspects of the countervailing cartel are significant, there are still unresolved problems. As the Theory of the Second Best shows, no one, including law enforcement agencies, can make accurate predictions about how adding new distortions (i.e., countervailing cartels) to situations where parts of the market are already monopolized (i.e., distortions exist) would impact consumer benefits. Thus, even if one tries to establish permissibility requirements in advance, it is difficult to know whether allowing countervailing cartels—

81) Oh-Seung Kwon, *supra* note 5, at 96 also indicates that it is difficult for existing market forces to last for a long time due to rapid changes in the market environment. Suppose that, in fact, the operation of the market extinguishes existing monopoly power. If a countervailing cartel is built in the meantime, even if monopoly power is extinguished, the distortion of the market remains (only in a different direction). Furthermore, as seen in Chapter IV., the establishment of a countervailing cartel can rather hinder the natural extinction of existing monopoly, as cartel participants can collaborate with their counterpart to exclude potential and practical competitors.

82) ELHAUGE, *supra* note 34, at 175.

83) Chris Sagers, *United States v. Apple and the Contemporary Legitimacy of Antitrust*, 6 CPI ANTITRUST CHRONICLE 1, 3 (2012) (“If there is one regulator that does not share the public interest, it is a conspiracy of competitors.”).

84) See Kirkwood, *supra* note 80, at 51-63. It cites the legitimacy, significance, sustainability, and permanence (i.e., condition difficult to correct with the power of the market or law), and the inability to secure or exercise new market forces in downstream markets of the counterpart market force, as major requirements.; Grimes, *supra* note 24, at 234-240; Hillary Greene, *supra* note 47, at paras. 67-85 (Provides elements of countervailing cartels among consumers regarding Intellectual Property Rights).

and to what extent – would be beneficial to society; here, the risk of underdeterrence is greater than the risk of overdeterrence, thus resulting in virtually disallowing countervailing cartels. Furthermore, even if a law enforcer supposedly has the ability to predict the future – which of course is not possible in the real world – the market situation constantly changes, and the countervailing cartel that seems good today may become harmful before long; thus, it is impossible to regulate cartels following this constantly changing market situation.⁸⁵⁾

VI. Conclusion

As seen above, in the Soju collusion case, the insights of Seoul High Court that the collusion of Soju providers against monopolizing companies can increase consumer welfare is not always wrong. Also, when there are multiple market distortions, as in this case, correcting a single distortion (the collusion of Soju providers) cannot always be said to increase consumer welfare.

Conversely, expecting that a countervailing cartel working against monopoly will bring down the consumer price in the downstream market does not conform to reality, while a countervailing cartel that initially intended to countervail against a monopolizing power may be undermining competition and decreasing consumer welfare. Just as it is hard to estimate the effect of countervailing cartels when both monopoly and countervailing cartels exist, it is difficult to predict whether establishing a countervailing cartel under a monopoly will increase consumer welfare.

Even if countervailing cartels are allowed in a limited way on the grounds that they do not necessarily inhibit consumer welfare, the question remains whether law enforcement can afford the subsequent administrative costs. Furthermore, this requires caution, here considering the softening effects and that the possibility of further collusion may lead to under-regulation of collusion. In these circumstances, countervailing cartels may

85) ELHAUGE, *supra* note 34, at 177.

be allowed; at least cartelists claiming legitimacy should bear the burden of proof that countervailing cartels can increase consumer welfare seems reasonable – but in light of the reasons above, it is unlikely that any cartelist would be able to successfully meet the burden of proof.