

Commitment Decisions in the Antitrust Enforcement of Korea: A Comparative Study with the Settlement systems of the US and the EU

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Abstract

Since the turn of the century, an increasing number of competition regimes have adopted 'settlement' or 'commitment' procedures in an effort to promote flexible and streamlined antitrust enforcement. Korea is one such regime to have introduced a commitment mechanism in the past decade. Yet, the first 7 years of the MRFTA regime have only given rise to 4 competition-based consent decisions. Considering the successful uptake of commitment procedures in numerous other jurisdictions and their attractiveness to both competition authorities and businesses alike, we might therefore ask why Korea's own procedure has yet to be actively utilised. This paper conducts a comparative legal study between the commitment regime in Korea and its counterpart regimes in the United States and the European Union. Of particular note is the practical significance of a unique condition within Korea's commitment procedure which requires an applicant to propose consumer damage relief as a remedy within their submission. The paper reviews the effect that this condition has had on utilisation of the procedure and suggests how it can operate in harmony with other aims of the consent decision mechanism in the future.

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- * All view expressed in this paper are personal, and should not be construed as reflecting the opinion of the KFTC or above mentioned persons.

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1. Introduction

Korea introduced a commitment mechanism¹; namely, its ‘consent decision procedure’ which was established under the Monopoly Regulation and Fair Trade Act (MRFTA) in December 2011.² Yet, the first 7 years of the MRFTA regime have given rise to only 4 competition-based consent decisions before the Korea Fair Trade Commission (KFTC).³ Considering that the United States antitrust agencies resolve ‘most of their civil antitrust cases’ with commitment procedures⁴, and that even the European Union which also has a relatively short history, has resolved 35 cases out of 57 antitrust cases, which is 61 %, with the commitment decisions since 2004 until 2016⁵, an average of less than 1 case of the commitment decisions per year, compared to the average of 2.6 cases per year in cases of abuse of market dominant position alone,⁶ shows that it is somewhat under-utilised.

The objective of this paper is to establish whether steps can be taken to enhance the effectiveness of Korea’s commitment procedure in practice. In pursuit of this, the paper examines the potential obstacles which may have obstructed the active use of the procedure, which forms the basis of a further discussion around enhancing the efficiency of the procedure while also preserving its credibility and the KFTC’s accountability. Of particular note here is the practical significance of a unique condition within Korea’s

¹ The terminology of this procedural system varies depending on the jurisdictions: the European Commission refers to this tool as commitment decision; the United States as settlement, while agencies’ final decision is called ‘consent order’ in the FTC and ‘consent decree’ in the DOJ; Korea as consent decision. This paper mostly uses the term ‘commitment decision’ in general, but it uses each jurisdiction’s own term when discussing it specifically.

² The supporting rules of the consent decision scheme followed soon after, in April 2012.

³ In Korean competition law, the MRFTA outlines rules relating to traditional antitrust enforcement (i.e. those regarding cartel activity and abuses of a dominant position) and merger control, both of which are subject to the same procedures during consent decision applications. To date, only one merger case (out of four competition cases in total) has come before the KFTC via the consent decision procedure. The focus of this paper is mainly on commitments within antitrust enforcement.

⁴ OECD, ‘Note by the United States on the Roundtable on Commitment Decisions in Antitrust Cases’ (DAF/COMP/WD(2016)23), Emphasis added.

⁵ OECD, ‘Note by the European Union on the Roundtable on Commitment Decisions in Antitrust Cases’ (DAF/COMP/WD(2016)22).

⁶ KFTC, the Statistical Yearbook of 2017.

commitment procedure which requires an applicant to propose consumer damage relief as a remedy within their submission. The paper reviews the effect that this condition has had on utilisation of the procedure and suggests how it can effectively operate within the consent decision mechanism.

As a means of anchoring its findings, the research conducts a comparative legal study between the commitment regime in Korea and its counterpart regimes in the United States and the European Union. The substantive legal framework of each jurisdiction is examined, alongside their key procedural features and institutional designs. Specific insights are drawn from the evolution of the US settlement procedure within its political and institutional context, thus providing lessons that juvenile regimes may learn from.⁷ Equally, while the EU commitment procedure has a relatively short history, it offers valuable observations on how a jurisdiction seeks to adapt, interpret and establish its own standards within a newly introduced commitment regime.

The paper proceeds as follows. Section 2 reviews the general features and rationales underpinning commitment procedures in the context of antitrust. It then explores some of the academic and practitioner commentary that has emerged since the procedure's inception. Section 3 undertakes a comparative analysis of the commitment regimes in Korea, the US and the EU, allowing the paper to evaluate the effectiveness of the Korean regime by using the US and EU experience as a standard. Drawing on this analysis, Section 4 posits a series of recommendations aimed at delivering improvements to the Korean commitment regime. Section 5 offers concluding remarks.

⁷ The commitment procedure in the EU is said to be largely inspired by the US consent decree; Cengiz, F. (2011). Judicial review and the rule of law in the EU competition law regime after *Alrosa*. *European Competition Journal*, 7(1), 130; Wils, W. P. (2008). Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, *World Competition*, 31, 335, 339. Indeed, most jurisdictions have drawn on the US experience when seeking to introduce settlement regimes into domestic law.

2. Commitment procedures in general

2.1. Definition and the Common features

In antitrust enforcement, a commitment decision is a formal decision that resolves a dispute between a competition authority and a firm that is alleged to have infringed competition law, without the need to reach a finding of illegality. Instead of imposing retribitional sanctions on the firm, the procedure delivers a legally binding and enforceable measure for correcting the effects of the alleged anticompetitive practice.

Commitment procedures tend to share the same basic structure: (i) the need for an initial assessment or analysis of competition concerns by the agency, (ii) the voluntary nature of the commitments proposed by the parties, (iii) a market test or public consultation of the proposed commitments, and (iv) the adoption of a legally binding commitment decision without sanctions.⁸ Though it may look like a voluntary application of the parties for the commitment decision, it is the competition authority that indicates that a specific case is suitable for a commitment decision after finishing the initial investigation. If the case is less serious, thus does not deserving of prohibition decision, the competition authority evaluates the case as more suitable for a commitment decision, and lets the parties know what the authority's initial concern is and the possibility of the initiation of the commitment procedure. It is entirely up to the competition authority to decide whether or not to initiate the procedure and to determine the appropriateness of the proposed commitments.

Through public consultations, market participants, industry experts, consumers and other stakeholders each have an opportunity to comment on whether the proposed commitments are sufficient to eliminate the anticompetitive harm and prevent a recurrence of the conduct in the future. This process exposes the proposed commitments to a further robustness check, both substantively and procedurally. After engaging with

⁸ OECD, Executive Summary of the Roundtable on Commitment Decisions in Antitrust Cases (DAF/COMP/M(2016)1/ANN5/FINAL).

the parties on any amendments that have been made to the proposals following public consultation, the competition authority will formally adopt the commitment decision. Given the legally binding nature of the decision, a firm must ensure compliance with its commitments or otherwise face the competition authority imposing civil penalties and/or pursuing criminal prosecutions.

2.2. The Policy Purpose served by Commitment Decisions

The main purpose of incorporating commitment decisions into an enforcement regime is to enhance administrative efficiency and effectiveness, thereby enabling prompt improvements to markets that have allegedly fallen victim to anticompetitive practices.⁹ Efficient enforcement is especially significant to competition authorities, who are tasked with protecting competition and consumers on limited resources. In antitrust cases, it can take many months for agencies to compile robust evidence of the illegality among firms, not least due to the numerous technical assessments and economic checks associated with concepts such as SIEC, SLC, market power and dominance. Moreover, a case can endure for many more years if decisions are appealed, creating the risk of anticompetitive harm continuing in the interim, as well as causing severe delays to remedies aimed at correcting this harm.

Considering that the primary purpose of a competition agency is to encourage, safeguard and restore competition in markets, the swiftness and effectiveness of its enforcement are important virtues. A commitment procedure can enhance an agency's efficiency by markedly streamlining its procedure, in the sense that the alleged infringer does not contest the agency in court. This also frees up resources, which the competition authority can reallocate to pursue other cases and investigations. Indeed, the availability of a commitment procedure means the agency can be more selective in the cases it pursues;

⁹ In a communication to the European Parliament on the functioning of Regulation 1/2003, the European Commission noted that 'Article 9 pursues the objective of enhancing administrative efficiency and effectiveness in dealing with competition concerns identified by the Commission where the undertaking concerned voluntarily offer commitments with a view to address these concerns.'

less serious cases can be ‘disposed’ of under the procedure, allowing the authority to pursue more serious infringements via the litigation route. Alternatively, it can focus on more important issues and design more effective remedies within a case.

For the parties alleged to have infringed competition law, commitment decisions offer two big benefits: (i) an exemption from administrative penalties, and (ii) a reduced chance of being engaged in follow-on private damages actions, since the evidentiary weight of the commitment decision on culpability is limited by the law in most jurisdictions. Also, the risk of losing reputation from a violation of the law can be reduced with the commitment decision since it is the proceeding to find a rational solution rather than to punish. Thus, the presence of commitment procedures is intended to encourage the accused to avoid the litigation route and, instead, take voluntary remedial action by granting benefits to businesses, thereby contributing to rapid market recovery and greater procedural efficiency. However, the fact that these benefits are bestowed upon businesses alone can also be seen as enforcement losses from the competition authority’s point of view.¹⁰ Therefore, it is logical that such costs should be accounted for when jurisdictions devise new commitment decision procedures. The extent and management of these costs should also be reviewed periodically when the competition authority evaluates its enforcement performance. This is discussed further in the next section.

2.3. Benefits and risks associated with commitment decisions

Korean studies into commitment decision have mainly centred on the incentives to utilise such mechanisms in order to understand the benefits they offer in pursuit of policy goals. In contrast, following the EU Court of Justice’s (CJEU) decision in the *Alrosa* case,¹¹ the potential risks associated with the ‘excessive’ use of commitment procedures have attracted increasingly more attention. In the United States, although there is an extensive academic literature on the effects and desirability of settlement decisions, the issues are

¹⁰ Wils, W. P. (2008). Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, *The World Competition*, 31, 335.

¹¹ Case T-170/06, *Alrosa v. Commission* [2007] ECR II-2601.

not necessarily confined to public-private settlements in antitrust enforcement.¹² Consent decrees are widely deployed by the US government which can litigate against private parties, with notable examples to be found in the areas of the environment, employment discrimination, securities law violation, etc.¹³ This subsection will examine the literature surrounding the advantages and disadvantages of commitment decisions in terms of their relationship with infringement decisions (and the optimal use of both procedures within a competition regime), the procedural rights involved and scope for judicial review, and some attentive points in designing remedies.

2.3.1 Procedural selection criteria for optimal enforcement

2.3.1.1 Advantages and disadvantages of each procedure

The tabling of a normal infringement decision confirms the finding of a clearly prohibited anticompetitive practice, founded on a judgment that there is a violation of the law. Thus, once an infringement decision is finalised by the court, a clear legal precedent is created which, particularly in conjunction with the imposition of a penalty, is intended to have a strong deterrent effect. It also facilitates the potential of follow-on private actions for damages. On the other hand, since it does not conclude on the illegality of the alleged anticompetitive behaviour, the value of commitment decisions as a form of legal precedent is weaker. Moreover, the absence of administrative fines results in less deterrence, both to the parties concerned and other potential infringers. It is also said to be less beneficial for the victims of the violation to file damage for compensation to the court.¹⁴

¹² A large proportion of this literature focuses on settlements between private parties; Georgiev, G. S. (2007). Contagious efficiency: the growing reliance on US-style antitrust settlements in EU law. *Utah L. Rev.*, 1015-1016.

¹³ *Id.* 993. See also, Ginsburg, D. H. (2005). Comparing antitrust enforcement in the United States and Europe. *Journal of Competition Law and Economics*, 1(3), 427-439 regarding basic contextual characteristics of both jurisdictions.

¹⁴ The pros and cons of commitment decisions are commonly recognised among competition authorities and practitioners, as is evident from discussions at the OECD Roundtable on Commitment Decisions in Antitrust Cases, see *supra* note 5, above; Italianer, A. (2014) To commit or not to Commit? Deciding between Prohibition and Commitments. European Commission Competition Policy Brief, (3); Marsden, P. (2015). Towards an Approach to Commitments That Is Just Right. *Competition L. Int'l*, 11, 71.

Reflecting on the ‘enforcement gains and losses from settlements’ relative to litigation, Wils suggests the most appropriate circumstances to select the commitment decision for optimal antitrust enforcement¹⁵ in dealing with an individual case, on the premise that both commitment and infringement procedures pursue the same purpose for effective suspension and prevention of infringements. He suggests that, although the normal procedure can contribute to (a) clarification of the law, (b) the establishment of legal precedent, and (c) the reinforcement of deterrence when the remedy is accompanied by a sufficiently high fine,¹⁶ those enforcement gains are attained after a ‘long and costly’ procedure in some cases¹⁷.

Wils claimed that timeliness of ceasing the on-going infringement is particularly valuable for remedies, citing his book¹⁸, since deterrent effects tend to decrease as the passage of time between the violation and the punishment grows longer.

Considering the risks associated with the normal procedure, two potential enforcement gains that the commitment decision can deliver are “speed and lower costs”. It enables the agencies to obtain earlier result, and the shorter procedure saves administrative resources per case, consequently contributing to enhancing the agency’s capacity for detecting anticompetitive practices and disposing of cases.

¹⁵ Wils, W. P. (2008). Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, *World Competition*, 31, 344-349.

¹⁶ Wils discusses three different effects of the imposition of fines: one is the function of “public censure”, the confirmation of businesses’ law-abiding attitude; the second is “disgorgement”, when the fine equals illicit gains, and “punishment” after the equal point; and thirdly “deterrent effect” when the fine is sufficiently high, on the future infringement of both the undertakings concerned and others. *Id.*, 344-345.

¹⁷ Wils takes the Irish Ice Cream case and PVC Cartel case as examples. In the Irish Ice Cream case, the Commission adopted a decision in March 1998. The defendant had applied for annulment of the decision before the Court of First Instance which rejected the application in October 2003, and finally the case ended at the Court of Justice in September 2006. (Case C-552/03 Unilever v Commission [2006] ECR I-9091). In the PVC Cartel case, the Commission adopted a decision in March 1998. The defendant had applied for annulment of the decision before the Court of First Instance which rejected the application in October 2003, and finally the case ended at the Court of Justice in September 2006. (Case C-552/03 Unilever v Commission [2006] ECR I-9091)

¹⁸ Wils, W. (2002). *The Optimal Enforcement of EC Antitrust Law: A Study in Law and Economics* (Vol. 33). *Kluwer law international*.

Thus, he concludes, from the perspective of optimal enforcement, that commitment decisions should only be used when the enforcement gains, the speedier outcome and the resource savings, outweigh the enforcement losses such as less clarification of the law, less deterrent effect, no disgorgement of illicit gains and punishment, and less possibility of follow-on actions. For example, if the case is so novel that a new theory of harm needs to be developed¹⁹, or if the case is so serious and obvious an infringement that the main objective of the enforcement is deterrence and public censure, both cases should be dealt via the infringement procedure. In other words, commitment decisions should not be selected for either novel nor very serious cases.

2.3.1.2. Premise for maximising the enforcement gains

To make the enforcement gains from settlement exceed the enforcement losses, there are some practical points that competition agencies should bear in mind:

First, whether to initiate the commitment decision procedure or not should be decided by agencies' discretion to discern in which specific case the enforcement gains exceed its losses. The option to finalise a case via the commitment decision procedure is not the defendant's right. Next, to discover the seriousness of each case in its procedure, the competition authority should avoid the urge to conclude the settlement at too early a stage of the investigation, when it has not yet been established which procedure would most likely contribute to optimal enforcement under the facts of the case. Lastly, the competition authority may periodically evaluate the policy and procedure of the commitment decision to verify whether it generates the enforcement gains expected of it and, thus, whether usage of the procedure can be justified.

¹⁹ Some of the literature in Korea insists that the commitment decision procedure should be appropriate for the fields with a new issue considering its ability to induce flexible remedies. But since it is difficult to narrow the boundary between the legal and illegal area without the final judgment of the court, infringement decisions would be more appropriate in a novel case. Marsden also forwards the opinion that adopting the commitment procedure is acceptable where 'competition concerns are clearly set out and a clear and effective remedy has been offered in a timely manner'; Marsden, P. (2015). Towards an Approach to Commitments That Is Just Right. *Competition L. Int'l*, 11, 71.

However, the more important premise is that the competition authority should build and maintain a credible reputation in handling cases successfully in the normal procedures so that defendants can be willing to settle without expecting much in the way of rewards under the commitment procedure.²⁰ Kovacic also suggests competition authorities should build a reputation from their institutional design, assignment of function, and aim-setting, to maintain good quality of work for their effective enforcement.²¹ Therefore, this effectiveness can be achieved not only by the institutions themselves, but through the credible reputation of an agency's overall activity. In other words, a rapid settlement between agencies and companies can be negotiated not necessarily by procedural efficiency, but by the company's tendency to comply with what agencies decide due to the agency's good reputation in their ordinary enforcement activities. Such reputation can be consistent and transparent exercise of discretion, robustness and thoroughness in handling cases, for example.

2.3.2. Due process and scope of judicial review

One of the common concerns regarding commitment decisions is judicial reviewability, which is related to the scope of the agency's discretion under the commitment decision scheme. Third party rights are also an issue since the agreement is reached solely between the agency and the alleged infringers. In the case where a third party was affected by a commitment decision, the courts have enquired as to whether third parties have rights of defense as a party concerned under the commitment procedure.

²⁰ The author does not mean that it is possible to settle weak cases. In this context, the ability to obtain desirable remedies through the commitment decision increases when the competition authority demonstrates that it is likely to succeed in proving its case via the infringement decision route, and many cases have been upheld by the courts.

²¹ Further exploration on how public agencies build a reputation for their effective enforcement can be found in Kovacic, W. E. (2014). Creating a Respected Brand: How Regulatory Agencies Signal Quality. *Geo. Mason L. Rev.*, 22, 237; and Marsden, P. (2015). Towards an Approach to Commitments That Is Just Right. *Competition L. Int'l*, 11, 71.

2.3.2.1. Discussion in the EU after the Alrosa decision

The extent and limits of the agency's discretion in light of the principle of proportionality and the limits of judicial review was established in the CJEU's ruling in the *Alrosa* case. It is the only case in which a commitment decision has been ruled upon by the CJEU since Regulation 1/2003 was introduced. The rights of third parties is also dealt with in the decision.

The CJEU held that the proportionality test is less strict than in the case of an imposed remedy under Article 7. This is because Article 7 (meaning by infringement decision) and Article 9 (meaning by commitment decision) have different objectives and use different mechanisms. Article 9 is designed to provide a more rapid solution to the competition problems identified by the Commission. Thus, the task of the Commission under the Article 9 procedure is confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment. In contrast, Article 7 expressly indicates that the Commission may impose on the undertakings remedies that are proportionate to the infringement committed and necessary to bring the infringement to an end effectively.

In other words, the Commission should assess whether the commitments offered are proportionate to what is needed to remedy the competition concern. It does not have to consider what would have been imposed in the prohibition decision. Since the CJEU regarded the commitment decision as more akin to contract law rather than looking at it in public law perspective, it assumes that undertakings offering commitments in Article 9 cases, by having similar bargaining power to the agency, consciously accept that the concessions they make may go beyond what the Commission could impose on them in an Article 7 decision. Therefore, the application of the principle of proportionality is confined to verifying that the commitment proposed addressed the concerns expressed, and that the commitments is not less onerous to address those concerns adequately, taking into consideration the interests of third parties. Therefore, judicial review for the commitment decision is to review the lawfulness of the assessment of the Commission.

It relates solely to whether the Commission's assessment is manifestly incorrect.

The CJEU also held that a third party is not a 'party concerned' in the sense of Article 27(2) of Regulation 1/2003, thus it does not have a right of access to the Commission's file in case being conducted under the commitments procedure.

The *Alrosa* decision is evaluated as having realised the concerns raised regarding the possibility of the Commission not carrying out a careful and thorough investigation that is necessary in the general procedure to draw out appropriate commitments and procedural rights of the concerned party and the third party as well as the possibility of a final judicial review becoming more lax compared to a general procedure.²²

2.3.2.2. Discussion in the US about the limits of the judicial review

The US Congress introduced the Antitrust Procedures and Penalties Act, also known as the "Tunney Act", in 1974 to require government's scrutiny of settlements to appear on the public record. The Tunney Act requires the US Department of Justice (DOJ) to give public notice of proposed settlements 60 days before the entry of a consent decree and to solicit public comments. The DOJ should file a 'Competitive impact statement' with the court. The court decides to enter the consent decree only if it finds that the decree is in the public interest.²³ Congress intended for the court to review the proposed consent decree more substantively rather than as a mere formality, and for the settlement process

²² Many commentators suggest that the CJEU should have expanded the scope of the judicial review on the commitment decision cases, and established a stricter principle of proportionality; Jones, A., & Sufrin, B. (2016). *EU competition law: text, cases, and materials*. Oxford University Press., 989; Cengiz, F. (2011). Judicial review and the rule of law in the EU competition law regime after *Alrosa*. *European Competition Journal*, 7(1), 127-153; Wagner-Von Papp, F. (2012). Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the Struggle for Competition Law. *Common Market L. Rev.*, 49, 929; Jenny, F. (2015). Worst Decision of the EU Court of Justice: The *Alrosa* Judgment in Context and the Future of Commitment Decisions. *Fordham Int'l LJ*, 38, 701.

²³ 15 U.S.C. § 16(a). Whereas the FTC consent orders do not require judicial approval. However, the FTC's consent orders must be published in the Federal Register for sixty days to obtain public comments. 16 U.S.C. § 16.

to become transparent. It amended the Tunney Act in 2004 to reinforce the responsibility of the court to secure “public interest” in the settlement procedure.

However, the court interpreted that it was outside the judiciary's authority to actively engage with the consent decree. In the Microsoft case,²⁴ where the settlement was reached before trial, the D.C. Circuit held that the scope of the relevant Tunney Act inquiry is limited to an evaluation of the decree itself, and the district court does not have the authority to conduct its own investigation of alleged anticompetitive conduct, neither does it have the power to inquire into the internal decision-making processes of the DOJ in the absence of evidence of its improper behavior. The court must approve the relief accepted by the government if it is within the “reach of the public interest”. The court should pay attention to the settlement’s clarity, its compliance mechanisms, and it can inquire into its purpose, meaning, and efficacy. It also emphasised that the court should be careful to find appropriateness of the settlement when the third parties contend that they would be positively injured by the decree.²⁵ However, the same court made it clear that the judge can review more extensively the consent decree in the case where it already followed the evidentiary proceedings. After the amendment in 2004, however, the court continues to interpret its authority to scrutinise the settlement narrowly.²⁶ The D.C. Circuit seemed to refrain from invading the government’s prosecutorial discretion. More active intervention of the court would undermine the incentives of defendants for the successful settlements.

Congress also took particular care not to undermine the efficiency of the consent decree since it recognised that the merits of the consent decree, which enables innovative remedies and solves many cases by efficiently using limited resources, are not possible through the general procedure. In the 2004 amendments to the Tunney Act, Congress

²⁴ *United States v. Microsoft Corp.*, 56 F. 3d 1448 (D.C. Cir 1995).

²⁵ Gavil, A. I., Kovacic, W. E., & Baker, J. B. (2002). *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, 2003 (American Casebook Series) at 1124-1128, regarding the background for implementing the Tunney Act, and the interpretation by the court and current operating status.

²⁶ *Id.*, at 1125, 1126.

made clear its intent to preserve the practical benefits of utilising consent decrees, adding the instruction that “nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” It is ‘very unusual’ for an evidentiary hearing related to a DOJ’s settlement.²⁷

To sum up, both in the US and the EU, the court tends to narrow the scope of judicial review of commitment decision, and widely acknowledges the discretion of the competition authority. However, many commentators are concerned that such interpretation of the commitment decision can modify the detection of competition law violation and distort the obvious role of a competition authority, namely the corresponding punishment, and can sanction beyond what is necessary to rectify and regulate the relevant market to a large extent, thereby causing results that had not been intended.

2.3.3. Some risks in designing remedy in the commitment decision

2.3.3.1. Tendency toward a regulatory characteristic in designing remedies

Ginsburg and Wright suggest that the nature of commitment decision process is much more like “rule-making and regulation” rather than law enforcement.²⁸ And the increased use of this regulatory tool has results in the shift from a litigation-oriented regime to a regulatory regime with problems beyond the one-time disadvantage in the individual settlement case. This change, which the authors observe the US has experienced, requires

²⁷ 15 U.S.C. § 16(e)(2), and OECD, ‘Note by the United States on the Roundtable on Commitment Decisions in Antitrust Cases’ (DAF/COMP/WD(2016)23), Emphasis added.

²⁸ Other research by the authors discusses the agencies’ movement from “actively litigating antitrust cases to settling cases through consent decrees” and they refer to the seriousness the change as a “culture of consent” for it altered agency’s decision-making structure and even the overall role in the end. Ginsburg, D., & Wright, J. (2013). *Antitrust Settlements: the Culture of Consent*.

the competition authority to possess different expertise and reallocate their resources, as well as make changes to its aim and role.²⁹ Thus, the authors suggest that these costs should be considered when the competition authority weighs its pros and cons of adopting a commitment decision.³⁰

2.3.3.2. Less opportunity to battle for a meaningful legal precedent and alienation of economic analysis

Ginsburg and Wright emphasise the importance of litigation in the development of the law and economics. They argue that there are benefits that can be attained ‘only’ through litigation.³¹ This might be better suited to the US where the boundaries of legitimate business practice can be clarified through litigation since substantive law principles are largely established in the courts. Still, it is true that commitment decision provides less legal certainty than the litigated procedure does. Furthermore, the authors ask special attention to be paid to the historical fact that it was the litigation that had induced the change from rule of per se illegality to a rule of reason in dealing with vertical restraints in the US antitrust enforcement. And the evolutions of an economic approach, as authorities’ economic knowledge and empirical learning develops, should be recognised and adapted by the courts through litigation.

2.3.3.2. The risk to consumer welfare through inappropriate remedy

Unlike the remedies produced through a fully-contested procedure, the remedies from the settlement can be less severe, and sometimes result in adverse effects for consumers. The authors pointed out that the initiation of the commitment procedure can be an “abuse” of agency power when the remedy goes well beyond the one that could have been obtained

²⁹ Wright, J., & Ginsburg, D. (2016). The Costs and Benefits of Antitrust Consents.

³⁰ *Id.*

³¹ Emphasis added. In Europe, there is far greater use of guidelines and soft law, than in the US where case law is still extremely important.

in an infringement decision “reasonably and lawfully”³². The examples of the “abuse” were the remedy that imposing restrictions on merging parties’ employment decisions, requiring the firms to make charitable contributions unrelated to damages compensation, and inducing concessions by more than is necessary.³³ The authors also think it is problematic when the remedy requires the competition authority to supervise the companies’ compliance for an extended period of time, even though the remedy can prevent anticompetitive harm. The authors take an example in the FTC’s consent decree with Intel Corporation.³⁴ That decree prohibited Intel from making any change to the design of some of its products that do not provide an actual benefit to the products, and it restricted Intel’s ability to offer some discounts to its customers on complicated terms, which makes the FTC become involved in particular transactions. The authors conclude that the FTC undertook its regulatory role in this case, i.e. it acquired a role in supervising the product design, innovation, and engineering decisions of a firm.³⁵ This deviation from appropriate remedies is harmful not only to the parties of the commitment decision and their customers by raising their transaction costs but also to the non-parties by giving them inaccurate signals about what competition authorities think ‘desirable’ competition is.

2.3.3.3. Using commitment decisions for a specific purpose in the regulatory sector

As far as the regulatory characteristic of the commitment decision regime is concerned, there are some cases in the EU using the commitment decision procedure to pursue regulatory goals in its exclusionary practice cases of the *E.ON* and 10 other energy companies, followed by the Commission’s energy sector inquiry. And the Commission has been criticised for it.³⁶ In contrast, there is a literature where the author observes the

³² The authors categorise the examples of cases where “abuse” or “misuse” of agency power occurred in both American and European competition authorities in their article; Ginsburg, D., & Wright, J. (2013). *Antitrust Settlements: the Culture of Consent*.

³³ *Id.* at 4.

³⁴ In Intel Corp., FTC Docket No. 9341, 2010 WL 452454 (2, Nov, 2010)

³⁵ Ginsburg, D. & Wright, J. *supra* note 32.

³⁶ Jones, A., & Sufrin, B. (2016). *EU competition law: text, cases, and materials*. Oxford University Press., 983; Cengiz, F. (2011). Judicial review and the rule of law in the EU competition law regime after *Alrosa*. *European Competition Journal*, 7(1), 138.

Commission's "suboptimal" use of the commitment decision in the electricity market.³⁷ The author admittedly points out that competition enforcement in Europe sometimes becomes a tool for pursuing regulatory goal rather than pure competition goal. He argues that the Commission could take pro-active approach to overpricing of the dominant firm in the electricity market by pragmatically using the sector-inquiry, commitment decision, and structural remedies. He discusses it was possible since the regulatory objective was clearly defined and the Commission's incentive to promote this objective was strong. He also finds out that there is some risk of instrumentalisation of competition rules that should be borne in mind.

2.3.4. Summary of the literature

According to observations from the literature and court decisions, both in the EU and the US, commitment decisions represent a procedure whereby the discretion of the competition authorities is highly enjoyed for the purpose of the efficiency and flexibility. It is important for the competition authority to have expertise, conscientiousness and judgment to weigh up a considerable number of factors to decide as to whether to initiate the procedure, and whether to accept commitments. It is important not only to have such qualities, but to have a credible reputation for those qualities to obtain both procedural savings and market benefits from a timely resolution of the competition concerns.

The literature evaluates the commitment decision as efficient and effective in the restoration of competition which is welcomed by the public as well. However, it is not sufficiently effective to establish the legal precedent, and deter the anticompetitive behaviour of both the company that allegedly infringed the competition rule and others that potentially infringed the rule. There are procedural concerns about third party rights and judicial reviewability.

³⁷ Sadowska, M. (2013). *Committed to reform? Pragmatic antitrust enforcement in electricity markets* (Doctoral dissertation, alma).

Moreover, historical observations from the US antitrust regime require those who recently adopted the commitment decision to be cautious in designing and operating their own system. Intensive reliance on the settlement has potential harms that can hinder the development of competition law and economics. It also can reduce the legitimacy and responsibilities of the competition authorities.

2.3.5. Useful observations for Korea's commitment decision

The merits and demerits of the commitment decision also has many implications to the operation of consent decision in Korea in each stage:

To discern whether the termination of the case with commitments would be appropriate, it is essential to refer to the judging criteria suggested by Wils. As we have seen above, the advantage of the commitment decision and that of the prohibition decision should be weighed up in each case, and especially cases with the new legal issues or uncertain theories of harm and/or where a high need for deterrence means commitments are not appropriate.

And when assessing the adequacy of the commitments or proposals of the parties concerned, special attention should be paid not to create remedies that over-regulate the company's future behaviour. Too much focus on the prevention of recidivism or compliance not only forces the disproportionality issue on the company but also incurs the cost of the implementation and the monitoring of the commitments, both to the agency and the company. It should be noted that there is a possibility to invade the third party's right by the commitments designed by only the agency and the parties concerned. Proportionate corrective measures are important as much as in the prohibition decision to ensure the credibility of the new system.

3 Comparison on the Commitment Decision in the United States, Europe and Korea

As observed above in the section 2.1, procedural features in the basic structure of commitment decisions are similar in most jurisdictions. The procedure is initiated by the agency when the undertakings that allegedly infringed competition law propose commitments. If the agency thinks that the commitments would address the competition concerns initially assessed and expressed by the agency, it conducts a public consultation with the proposed commitments. Depending on the result of the public consultation, the agency adopts the final commitment decision without finding illegality of the alleged infringement, or reopen the normal contested procedure. The common features of the 3 jurisdictions are illustrated in the Table 1.

Table 1. Comparison of the US, EU and Korean commitment decision regimes

	USA		EU	Korea
	FTC	DOJ		
Name	Consent Order	Consent Decree	Commitment Decision	Consent Decision
Legal basis	Administrative Procedure Act 554(c)	Tunney Act (APPA)	Article 9 of Regulation 1/2003	Monopoly Regulation and Fair Trade Act
Requirement for initiation	No special requirement	No special requirement	In the case where the Commission does not intend to impose a fine (not applicable to secret cartels falling under the Leniency Notice)	The remedy should be appropriate for improving competition and relieving consumers from damage ³⁸
Merger applicability	Yes	Yes	No	Yes
Approval by court	NO	Yes	No	No

³⁸ MRFTA § 51-2(2). This can be common criteria for evaluating remedies, however the MRFTA prescribes it as a requirement to initiate the commitment decision procedure.

Public Comment	Must be solicited (30 days)	Must be solicited (60 days)	Must be solicited (Not less than 1 month)	Must be solicited (60 days)
Admission of infringement by the parties	No	No	No	No
Sanctions for non-compliance	Yes	Yes	Yes	Yes
Utility of the commitment decision for private litigation	No evidentiary value	No evidentiary value	No prejudice to the power of national competition authorities or courts to make such a finding	No one shall assert that the relevant activities violate the law due to the commitment decision

Based on these common frameworks, this section reviews the process of the commitment decision in each jurisdiction, paying particular attention to aspects that contribute to the procedural economy compared to that of the prohibition decision. It also observes each procedure to determine if there is a special mechanism to ensure the due process in the commitment decision. It briefly examines if each of the agencies can include monetary remedies such as compensation for victim from the infringement of antitrust law in the commitments.

Firstly, however, it is necessary to understand each jurisdiction's enforcement. In the United States, the Department of Justice (DOJ) has authority to enforce the Sherman Act, both civilly and criminally, and to enforce the Clayton Act civilly. The Federal Trade Commission (FTC) has authority to investigate and to civilly to prosecute the same conduct under section 5 of the FTC Act. The EU Commission has power to enforce the provisions relevant to the competition of the Treaty on the Functioning of the European Union (TFEU) civilly. The KFTC has power to enforce the MRFTA both civilly and criminally.

3.1 The US³⁹

3.1.1. Legal framework and procedural aspects

The United States antitrust agencies – the DOJ and the FTC (collectively, the ‘agencies’) resolve most of their civil cases including both non-merger and merger cases with commitment decision proceedings. Litigated civil cases are said to be ‘rare’⁴⁰. Civil consent decrees of the DOJ are governed by the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 (APPA), also known as the Tunney Act. The legal basis for the FTC’s settlement is Administrative Procedure Act (APA)⁴¹, and the procedures for settlement of the FTC’s cases are stipulated in the FTC’s Rules of Practice.⁴²

The key difference between the procedures of the agencies is that the consent decrees of the DOJ require court approval to enter into the settlement and to obtain effective decrees, whereas the negotiation and entry of the consent orders of the FTC is determined by its internal administrative process. But the procedures of the agencies are functionally identical.

The agencies do not adopt the consent decree or consent order to resolve the allegations in the hard-core horizontal conduct that DOJ prosecutes criminally, such as price-fixing, market allocation, or bid rigging.⁴³ The OECD reports on the US says that there is no specific business sector that is more subject to the settlement than others.

There should be a sound basis for both agencies to believe that a violation has occurred

³⁹ This part referred to the OECD paper on the US as in *supra* note 4, and Jacobson, J. M. (2007). Antitrust Law Developments (sixth). American Bar Association.

⁴⁰ OECD, *supra* note 4. Emphasis added.

⁴¹ 5 U.S.C. § 554(C). The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest:...

⁴² 16 C.F.R. § 2.31. ~ § 2.34 for precomplaint stage, § 3.25 for postcomplaint stage.

⁴³ The FTC does not have authority to pursue criminal prosecutions and it refers such cases to DOJ.

or is likely to occur⁴⁴ for considering the remedy for settlements⁴⁵. The remedy should be written clearly and be enforceable. The remedy should (1) stop the illegal practices alleged in complaint, (2) prevent their renewal, (3) restore competition to the state that would have existed if the violation had not occurred. The parties admit certain facts to establish jurisdiction, waive their rights to any further proceedings, and agree to be bound by the terms of the final order. The agencies issue or file a complaint setting out the relevant facts and alleging how the parties have violated the law.

The agencies conduct a thorough assessment of the possible effectiveness of the proposed remedy through a process for public scrutiny and comment: The Tunney Act requires the DOJ file a competitive impact statement (CIS) along with the proposed consent decree. Both the CIS and the proposed decree must be published in the Federal Register within 60 days. The aim of publishing this information is to notify interested parties of their opportunity to comment on the proposed decree before its consideration by the court. All the comments and the DOJ's responses should be filed and published in the Federal Register at the close of the period. The FTC also has the public comment process after the Commissioners' vote to accept the proposed remedy. The FTC invites comments for 30 days.

As for the monitoring and enforcement of the settlement, the final provisions allow the agencies to monitor compliance. Each agency allocates resources to overseeing compliance with remedies. At the DOJ, the staff that concluded the investigation is responsible for monitoring the decree and ensuring compliance. At the FTC, the Compliance Division attorneys are responsible for monitoring and enforcing the Consent Order. The Compliance Division also helps draft the settlement documents and participate in settlement negotiations.

The final decision in a consent decree and consent order have the same legal effect as a

⁴⁴ The DOJ's Assistant Attorney General (AAG) must conclude that a violation has occurred. The FTC must find reason to believe that a violation has occurred by majority vote of Commissioners.

⁴⁵ The term 'remedy' is equivalent to 'commitments' in the European Commission's commitment decision.

litigated decision. Thus, the final decree or order can be enforced as any final decision, and in case the defendant violate the final decision, the sanctions that agencies can seek are also same as in the normal litigated decision. Since the DOJ's decrees are court orders, DOJ institute an action for contempt of court. A civil contempt action is to compel compliance with the court's order, and can involve the Division seeking injunctive relief and/or fines. A criminal action is to punish the violator and deter future conduct. It may be punished by a fine, imprisonment for senior directors, or both. In the violation of the FTC's order, civil penalties from a federal court can be imposed for punishment and deterrence purpose. Additional injunctive relief can be sought to force the violating firm to comply with the consent order. The penalties can be imposed once the fact the defendant violated a "clear and unambiguous" provision of the decree is proven without having to prove the anticompetitive effect of the alleged conduct or the violation of the decree.⁴⁶

Consent decrees and consent orders have no evidentiary value in private lawsuits for damages. Section 5(a) of the Clayton Act, which permits private plaintiffs to use government's final judgment or decree as prima facie evidence in recovering treble damages for injuries from antitrust violation, shall not apply to consent judgments or decrees. Accordingly, third parties may not use an agency's settlement as evidence of a violation.⁴⁷

3.1.2. The feature of the negotiations and due process

The US settlement procedure looks more streamlined than any other jurisdictions. There is no time limitation for the firm to apply for the settlements: negotiations may occur at any stage during the investigation or even litigation stage. There is no requirement that the parties make the first offer. When the staff's anticompetitive concerns become clear,

⁴⁶ United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998)

⁴⁷ The standard decree of DOJ states that the defendants "have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law." The FTC's consent order contains similar language.

at some point the parties may engage in discussions on how to resolve the concerns and how to design the remedy. If those discussions reach an agreement between the agency staff and defense counsel, one of the parties prepare the first draft of the remedy. These discussions can proceed over weeks or months depending on the complexity of the matter.⁴⁸

In the most part, there is no special provision that explicitly states the procedural exemption or abbreviation for the settlements compared to the litigated procedure. One can find the statutory difference between the litigation and the settlement in the ex parte communication prohibition. In the FTC's adjudicative procedure, communication between the administrative law judge (ALJ) and the staff of the FTC is not allowed without the parties' presenting, whereas in the settlement process ex parte communication is allowed.⁴⁹ The settlement procedure essentially facilitates a cooperative relationship between the agency and the parties.

The procedural right of the parties and administrative transparency of the negotiation is ensured during the public comment period. The Tunney Act does not only require the government to prepare the CIS and proposed the consent decree, it also requires a defendant to file with the court descriptions of all communications on its behalf concerning the consent decree with any officer or employee of the US. Any written comments to the proposed consent decree and the government's responses to the comments should be filed and published in the Federal Register. There are some cases where the FTC permits the respondent to argue in favour of the settlement, though the respondent does not have right to argue.⁵⁰ The Tunney Act also authorises the third-parties to participate only if they do not seek to intervene.⁵¹

3.1.3. Monetary remedies in the public antitrust enforcement system

⁴⁸ OECD, 'Note by the United States on the Roundtable on Commitment Decisions in Antitrust Cases' (DAF/COMP/WD(2016)23).

⁴⁹ 16 C.F.R. § 4(f). *Bristol-Myers Co. v. FTC*, 469 F.2d 1116, at 1119-1120 (1972)

⁵⁰ Jacobson, J. M. (2007). *Antitrust Law Developments* (sixth). American Bar Association. At 675, 676.

⁵¹ *Id.* At 707.

It is generally reasonable to observe the US antitrust agencies' right to impose financial remedies since the power to design monetary remedies in the commitment decision is not separated. Rather, such remedies within commitment decisions are the consequence of the settlement from the normal procedure where the agencies intended to impose monetary remedies.

The DOJ has the broad legal authority to pursue all sorts of remedies against antitrust defendants. Thus, it has authority to impose. In other words, in the case where the DOJ intends to impose fine on the alleged violation, if the case settled, the consent decree can contain the fine.

In contrast, the FTC's authority is limited to pursuing "equitable" remedies which involve court orders directing a defendant or defendants to engage or desist in certain behaviour.⁵² The court can order a defendant to pay monies in certain circumstances by exercising its equitable powers. Since 1999, there has been some cases where these equitable remedies that involve a defendant paying monies for "disgorgement" purposes, some of which have been closed with settlements during the proceeding.⁵³ In the FTC's enforcement policy, seeking disgorgement in antitrust cases was new, whereas it had long sought disgorgement of profits in consumer protection cases.⁵⁴ In the US, an antitrust enforcer plays the role of detecting violations of law and effectively correcting such wrongdoings, and the victims themselves carry out the disgorgement of undue profits through private

⁵² 15 U.S.C. §13(b).

⁵³ *FTC v. Mylan Labs., Inc.*, 62 F.Supp. 2d25 (D.D.C.1999); *FTC v. The Hearst Turst*, No. 1:01CV00734(D.D.C. Dec.14, 2001); *FTC v. Perrigo Co.*, No. 1:04CV01397 (RMC) (D.D.C. July 21, 2006); *FTC v. Lundbeck Inc.*, 650 F.3d 1235 (8th Cir 2011).

⁵⁴ It is possible as the FTC has power to litigate the firm providing facts such as the violation of an undertaking, and damages amount that the FTC has identified, etc., then the court will make a final decision. For example, in Reebok case, the FTC charged the firm with its deceptive advertising of EasyTone shoes. Reebok paid \$25 million for refunds as part of its settlement agreement with the FTC. *Federal Trade Commission v. Reebok International LTD* (2011), Docket No. 1:11CV2046.

litigations. Following its first disgorgement case in 1999, the FTC adopted a Policy Statement on Monetary Remedies in Competition Cases to provide guidance to the business community on the monetary remedies against antitrust defendants in 2003. In 2012, the Statement was withdrawn because the Statement of 2003 “chilled” the pursuit of monetary remedies, and in order that the agencies should pursue monetary remedies more frequently by asserting that the Supreme Court decisions had made it more difficult for a private plaintiff to bring a successful antitrust case.⁵⁵

Even though there are still ongoing discussion on what the proper role of monetary remedies in the public antitrust enforcement system within the FTC⁵⁶, the common premise of the discussion can be inferred, that is, if the private antitrust lawsuits do not work well enough to accomplish the deterrence mission, public enforcement should supplement the roles by seeking disgorgement in its remedies.

Until recently, the FTC has sought disgorgement in the cases of the pharmaceutical industry.⁵⁷ Also, such remedy as the owner of standard-essential patents either cannot enforce the patents or must license the patents on a royalty-free basis can be disgorgement in its nature even though the remedy was imposed as a ‘cease and desist order’ in that the remedy effectively takes profits away from the defendant.⁵⁸ A defendant in one of such

⁵⁵ Statement of the Commission, Effecting the Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47070 (July 31, 2012), available at <https://www.ftc.gov/public-statements/2012/07/statement-commission-regarding-withdrawal-commissions-policy-statement>, Speech by former Commissioner, Joshua D. Wright, Federal Trade Commission, The Federal Trade Commission and Monetary Remedies (July 19, 2013), <https://www.ftc.gov/public-statements/2013/07/federal-trade-commission-and-monetary-remedies>.

⁵⁶ Some commissioners warn the possibility of over-deterrence in seeking disgorgement in vertical restraint cases. Speech by Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC’s Antitrust Mission (April 20, 2016), <https://www.ftc.gov/public-statements/2016/04/dollars-doctrine-damage-control-how-disgorgement-affects-ftcs-antitrust>.

⁵⁷ FTC v. Shire ViroPharma Inc., No. 1:17-cv-00131-UNA (D.Del. filed Feb. 7, 2017); FTC v. Endo Pharma, No. 2:16-cv-1440 (E.D.Pa. Mar. 30, 2016); FTC v. Cardinal Health, No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015); FTC v. AbbVie, Inc., No. 2:14-cv-05151 (E.D.Pa. Sept. 8, 2014); FTC v. Cephalon, Inc., No. 2:08-cv-2141 (E.D.Pa. Nov. 18, 2013).

⁵⁸ For example, Union Oil Co. of Cal., 140 F.T.C. 123 (2005); Dell Computer Corp., 121 F.T.C. 616 (1996);

cases, argued that the royalty-free licensing requirement in that case amounted to ‘confiscation and disgorgement’.⁵⁹

3.2 The EU⁶⁰

3.3.1 Legal framework and procedural aspects

The EU commitment scheme was introduced through Article 9 of Regulation 1/2003 in 2004⁶¹. The Article provides that “where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.”

There have been more commitment decisions than had been anticipated when Regulation 1/2003 was adopted. From 2004 until June 2016, out of 57 antitrust decisions (cartel cases not included), 35 decisions concerned commitment decisions; 16 cases are concerning Article 101 TFEU prohibiting anticompetitive agreements, 18 cases are concerning Article 102 TFEU prohibiting abuse of dominance, and one case involved concerning both Articles.⁶²

Robert Bosch GmbH, No. C-4377 (F.T.C Nov. 21, 2012). Recited from the speech by former Commissioner, Joshua D. Wright, Federal Trade Commission, The Federal Trade Commission and Monetary Remedies (July 19, 2013).

⁵⁹ Respondent’s Trial Brief at 189, Union Oil Co. of Cal., 140 F.T.C. 123 (2005) (No.9305).

⁶⁰ This part referred to the OECD paper on the EU as in *supra* note 5, Jones, A., & Sufrin, B. (2016). *EU competition law: text, cases, and materials*. oxford university Press; Whish, R., & Bailey, D. (2015). *Competition law*. Oxford University Press, USA; Blanco, L. O., & Read, A. (2006). *European Community competition procedure*. Oxford University Press; Antitrust Manual Procedure, Module 16, March 2012; Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, *Official Journal of the European Union*, C 308, 20.10.2011, p.6-32.

⁶¹ Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁶² OECD, ‘Note by the European Union on the Roundtable on Commitment Decisions in Antitrust Cases’ (DAF/COMP/WD(2016)22).

Commitment decisions are not appropriate in cases where the Commission intends to impose a fine in accordance with Recital 13 in the preamble of Regulation 1/2003. The Best Practice guidance⁶³ says that, consequently, the Commission does not apply the Article 9 procedure to secret cartels that fall under the Leniency Notice. However, there are such commitment decision cases involving price-fixing and resale maintenance, such as the *E-books* case,⁶⁴ that could have been imposed a fine if it was dealt in the prohibition decision. Considering its practice, the examples of inappropriate cases for the commitment decision would be the grave violations that cannot be tolerated without monetary sanctions. Thus, Recital 13 is interpreted that the Commission cannot simultaneously adopt monetary sanctions and commitment decision. The Commission also explains that the seriousness of the infringement is an important element for the choice between a prohibition decision and a commitment decision, and that adequate punishment and strong deterrence should be ensured through the prohibition decision in case of a serious violation.

Unlike the US antitrust system, the European Commission has a separate commitment procedure in merger review system from that of an antitrust enforcement. The power to take a commitment decision arises only where the Commission otherwise intends to adopt a prohibition decision under Article 7. The Commission explained that the theory of harm and the standard for judging illegality is same both in prohibition decision and commitment decision, but that level of necessary qualitative and quantitative analysis and evidence is required higher in the prohibition decision.⁶⁵

Article 27(4) requires the Commission to conduct a market test by publishing the drafted commitments and to collect comments from interested third parties including competitors and customers for at least one month. After receiving the comments from the market test,

⁶³ Commission Notice on Best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, *Official Journal of the European Union*, C308, 20.10.2011, para.116.

⁶⁴ Case 39.847, IP/12/1367.

⁶⁵ DG Comp, Policy Brief (2014), To commit or not to commit? Deciding between prohibition and commitments.

a state of play meeting is organized to let the parties know the substance of the comments. The commitments may or may not be amended after the market test, before adopted as a final decision. With the adoption of a commitment decision, the Commission concludes that there are no longer grounds for action by the Commission. The commitment decisions are without prejudice to the powers of national competition authorities and courts to make a future finding of infringement in accordance with Recital 13. Recital 22 also notes that the commitment decisions do not affect the power of the courts and the competition authorities of the Member States to apply Article 101 and 102 of the TFEU.

The commitments, equivalent to the remedy in the US system, should be unambiguous and self-executing for the implementation. The implementation process should be designed in such a way that the company has an incentive to properly implement the commitments. To ensure such incentive, the model text for divestiture commitments for mergers can be followed if it is applicable for the commitments in an antitrust case. When necessary, a monitoring trustee and/or divestiture trustee can be appointed to assist the Commission in its supervision of the implementation.

Article 9 decisions can indirectly lead to fines, that is, the Commission can impose a fine if the company breaches its commitments pursuant to Article 23(2)(3). This fine obliges the company to implement the commitment as offered. The Commission does not need to establish a breach of Article 101 or 102 TFEU to impose such a fine, but simply has to show that the company did not comply with the commitment. These fines cannot exceed 10% of the global annual turnover of the undertaking concerned, of which the exact amount and the criteria is same as those under Article 7. There is only one case where the Commission imposed such sanction for non-compliance with a commitment decision.⁶⁶ Pursuant to Article 9(2)(b) of Regulation 1/2003, the Commission may re-open proceedings if an undertaking acts contrary to the commitment.

⁶⁶ Summary of Commission Decision of 6 March 2013, Official Journal of the European Union. In this case, the Commission imposed a fine of EUR 561 million on Microsoft for its failure to comply with its commitment.

3.2.2. The feature of the negotiations and due process

The Commission provides the predictability on how the commitment procedure goes descriptively through the Commission notice on best practices for the conduct of antitrust proceedings.⁶⁷ The discussion for the commitment can be initiated at any time during an investigation by the parties concerned voluntarily or through encouragement of the Commission staff. It is recommended that the undertaking should express their interest in discussing possible commitment at the earliest possible stage. For undertakings considering whether to apply the commitments or not, a “state of play” meeting can be held where the Commission would provide the information on its preliminary competition concerns and possible timeframe of the potential commitments design. If the parties show the willingness to propose commitments, the Commission will issue a “preliminary assessment” identifying the competition concern with the main facts of the case. If the proposal is made after the issuance of the statement of objections, statement of objections serves as a preliminary assessment. After receiving the preliminary assessment, the parties will have one month to formally submit their commitments.

The requirements that would be strict in the adversarial procedure become somewhat relaxed since the commitments procedure is being carried out based on the consultation between the agency and the respondent. Preliminary assessment can be shorter and less detailed than a state of objections. However, it constitutes a formal act of the Commission, on the basis of an empowerment by the Commission and under its responsibility. The Hearing Officer guarantees that the procedural rights of the parties are respected by the Commission during all types of competition proceedings. The parties to the proceedings that offer commitments may call upon the Hearing Officer at any time during the commitment procedure in relation to the effective exercise of their procedural rights.⁶⁸ Commitment decision can be contested within two months of its adoption before the

⁶⁷ Commission Notice on Best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, *Official Journal of the European Union*, C308, 20.10.2011, p. 6-32.

⁶⁸ Decision 2011/695/EU of the President of the European Commission of 13 Oct 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, *Official Journal of the European Union*, L275, 20.10.2011.

General Court of the European Union by any interested third party in accordance with Article 256 and 263 TFEU. The Decision of the General Court can be appealed to the Court of Justice of the European Union.

3.2.3. Monetary remedy in the commitment decision in Europe

Regulation 1/2003 does not specify the type of commitment. Thus, it is not clear whether the commitment can include some form of monetary remedies and/or compensation to the victims. There has not been such a case under the Regulation 1/2003. Since the commitment decision in the EU can be initiated only in the cases where the Commission does not intend to impose a fine in accordance with Recital 13, which means initiation of the commitment procedure is possible when the Commission judged the deterrent purpose of the enforcement is relatively weaker than other purpose, theoretically, it can be somewhat difficult to induce the commitments for monetary remedies in light of the deterrence.

In the EU, the role of the competition authorities and private parties is rather distinguished. Unlike the US, the primary and desirable function of the private suits is compensation.⁶⁹ Competition authorities aim to protect the public interest by enhancing competition and consumer welfare, which mainly focuses on punishment, and deterrence. However, private damages actions are rather rare for some reasons.⁷⁰ While many commentators consider how to activate the private litigation to compensate victims of competition law infringements, Bourgeois and Strievi suggest that public enforcement tools should be alternatively used to achieve earlier compensation for consumers.⁷¹ The main idea is to provide an incentive for alleged infringers to compensate consumers at the stage of public enforcement by accepting the monetary remedies and terminating the investigation through the commitment procedure. However, it is arguable if it is possible to include

⁶⁹ Whereas the US more emphasizes the private parties' role of the law enforcement such as detecting or deterring the violation in a private litigation action.

⁷⁰ The reasons are analyzed in European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2 Apr. 2008, COM (2008) final.

⁷¹ Bourgeois, J. H., & Strievi, S. (2010). EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag. *World Competition*, 33, 241.

such monetary remedies in the commitments merely because the compensation plan is voluntarily proposed.⁷² Similar attempt to use public enforcement tools for speedier and easier compensation has been made by the competition agencies such as CMA in the UK, where the companies can submit the voluntary redress scheme in exchange for a reduction of the fine in the infringement decision.⁷³

3.3 Korea

3.3.1. Legal framework and procedural aspects of consent decision of KFTC

An enterprise undergoing an investigation or deliberation by the KFTC (hereinafter “applicant”) can apply for a consent decision for voluntary correction of anticompetitive status quo, relief of damages to consumers, improvement of competition.

The scope of the consent decision is relatively narrow. It excludes all types of the cartels, including so-called softcore cartel, and any violation that requires prosecution under Article 71 (Filing of Complaint).⁷⁴ These exemptions were added in the process of the consultation with the Ministry of Justice for the introduction of a consent decision since the Ministry of Justice was concerned about the possibility that the right of accusation which KFTC exclusively had on violators might limit their function of prosecution on them due to the overuse of the consent decision.⁷⁵ However, considering that only 10 % from all cartel cases is accused and that there is overlapping area among cartel, merger, and abusing conduct, exempting all types of cartel cases may have some possibility to cause confusion in adopt the commitment procedure in some types of the conduct.⁷⁶

⁷² Wagner-Von Papp, F. (2012). Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the Struggle for Competition Law. *Common Market L. Rev.*, 49, 929.

⁷³ Guidance for the businesses regarding approval of redress scheme can be found on the CMA’s website, <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>

⁷⁴ Article § 51-2 (1), MRFTA.

⁷⁵ Kim, Y. (2012). Introduction of the consent decision of the Fair Trade Act and future direction of operation, *Journal of Korea Fair Competition Federation*.

⁷⁶ Lee, B., Kim, K., Bok, H. (2015). A study on the normative justification and effectiveness of the consent

Apart from the statutory exemption, the KFTC also considers the importance of cases and obviousness of evidence when it determines whether to initiate the consent decision procedure or not.⁷⁷ When the KFTC disapproved the Qualcomm's application for the consent decision procedure, one of the reason to reject it was its importance and obviousness of the case.⁷⁸

An applicant should file an application with a written statement specifying the fact indicating the alleged violation, "measures for correction" (hereinafter "remedies" or "commitments") to restore competition, and to relieve or prevent harm to consumers or other enterprises. The remedies proposed by the applicant should make a balance with the expected remedy and other sanctions when the conduct is dealt in the normal procedure.⁷⁹ As for the "other sanctions", since administrative sanctions under the MRFTA mainly consist of corrective measures and fines, the applicants for the commitment decision should submit remedies in consideration of the size of the expected fines. To assess this, the examiner is required to report the expected fine in case the fine is to be imposed in the prohibition decision.⁸⁰ However, the Act does not specify how the companies concerned should be financially burdened through the consent decision. In the practice of the KFTC, as will be seen below, the applicant should submit the financial plan corresponding to the amount of the penalty.

A brief outline of consent decision procedure is as follows. When an enterprise applies for a consent decision, the KFTC determines whether to initiate a consent decision. If an

decision, *KOFAIR*, 51, 52.

⁷⁷ Article § 5 (2), Rules on operation of, procedure for, etc. system for resolution by agreement, Fair Trade Commission-Public Notification No. 2014-2015, Revised on April. 2014 (hereinafter "Rules").

⁷⁸ The main reason for the disapproval was its inappropriateness of the remedies that the firm proposed to recover competition in the relevant market.

⁷⁹ Article § 51-2 (3), MRFTA, The remedies proposed by the parties concerned should meet all the following requirements: 1. It shall be balanced against the corrective measures or/and other sanctions, which are expected when it is judged that the relevant activities violate the Act, and 2. It should be appropriate to restore competition, protect consumers, or other enterprises.

⁸⁰ Article § 5 (1) 4.(d), Rules.

application is filed during the investigation, the KFTC decides whether to convene the procedure after the investigation is over.

After the examiner consults with the applicant about the proposed remedy, then the examiner drafts a consent decision examination report, and brings it to the committee along with the proposed remedy. The committee deliberates the report and decides whether to initiate the procedure considering the necessity of the consent decision procedure and validity of remedial measures. If the committee decides to initiate the procedure, it fixed a tentative consent decision plan.

The KFTC needs to hear public opinions including that of the interested parties, relevant administrative institutions concerned for more than 30 days and not more than 60 days pursuant to the At Article 51-3(2). In this stage, the KFTC is obliged to consult with the Prosecutor General about the tentative consent order plan. The committee decides a final consent order after considering the collected opinions.

As for the effects of a consent decision, it does not necessarily mean that the KFTC admits the conduct is illegal, and no one can insist that the conduct is in violation of the Act just based on the fact that a consent decision is received. Once it is decided finally, the consent decision is considered one of the administrative measures of the KFTC, and accordingly, the enterprise has an obligation to follow the consent decision. In the case where the consent decision is not executed, the consent decision shall be cancelled or a fine that does not exceed 2 million KRW per day will be levied for the compliance.

3.3.2. The feature of the negotiations and due process

There are not many provisions in the Act where the negotiated settlement gets procedurally more simplified than in general procedures. The supporting rule assumes the possibility to replace an investigation report, which is equivalent to the statement of object in the EU, with ‘a notification of the outline of the result of investigation in written form’ when the applicant applies for the commitment decision before receiving an investigation

report.⁸¹ The Act, rather, emphasizes the strictness of the due process in the consent decision. For example, the Act stipulates that the KFTC should decide whether to convene the procedure after it finishes the investigation when there is an application for the consent decision before the investigation is over.⁸² In accordance with the Act, the supporting rule also requires the investigator to send ‘the outline of the result of the investigation’ after completing the investigation of the relevant conduct.⁸³

As for the procedural right, the parties concerned have the same right as in the infringement decision since where the Commission makes or cancels the decision as to whether to convene the commitment decision and whether to accept the proposed commitments, it undergoes deliberation and resolution following the same classification under the infringement decision. In addition, the right for both the parties concerned and the third party to appeal to the court is largely interpreted as guaranteed by the general administrative principle because much academic literature and the practice find the nature of the commitment decision in Korea as an administrative disposition rather than the contract. Also, the third parties’ right can be safeguarded by the public comment process in the commitment procedure.

Even though the Act and its supporting rule well encompass what is needed in the procedure, it is somewhat unsure how the actual negotiation process is carried out. It is partly because of the lack of precedent for both the agency and applicants. For the predictability and consistency of the proceeding both to the agency staff and the potential applicants, it is necessary to establish guidance which illustrates the detailed process of the procedure so that it could provide clear instructions on timely communication between the agency and the applicants as much as possible.

3.3.3. Monetary remedy in the commitment decision in Korea

⁸¹ Article § 4 (1), Rule.

⁸² Article § 51-2 (3), MRFTA.

⁸³ Article § 4 (1), Rule.

The consent decision in Korea is recognized as the tool of compensation for consumer harm from the alleged anticompetitive conduct of the firm which applies for the commitment decision. The KFTC defines the consent decision as follows: “A consent decision refers to an agreement or settlement that promptly closes a case without confirming the illegality of the conduct if an enterprise... proposes remedies such as consumer damage relief or recovery, and the KFTC recognizes the validity of its remedy proposal.⁸⁴ And in the proceedings, the Commission determines whether to commence the procedure, considering the necessity of swift remedy or direct compensation for the damage to consumers.⁸⁵ Thus, the Act requires for the remedies proposed by the parties concerned to be appropriate to restore competition, OR protect consumers, or other enterprises.⁸⁶

Since the remedy proposal for restoring competition is selectively stipulated, and not all competition cases involve consumer damage, the element of restitution can be interpreted as it is required ‘only when monetary loss has occurred and victims and amount of damage can be specified’.⁸⁷ The supporting rule on the consent decision also provides that the applicant should specify the methods and procedures for the compensation in its application form when any economic loss occurs and the victims and the amount of loss can be specified.⁸⁸ Still it is not clear if ‘appropriate measures to protect consumers and other enterprises’ means the direct relief of the consumer that can be achieved in the private damages litigation. In most competition cases, there are many instances where unlawful conduct exists but the damage that consumers suffered due to that conduct are not tangible enough. For instance, when Naver misled the consumers by not clearly indicating some search results are paid advertisements, it was not clear how much loss the general consumers suffered.

⁸⁴ OECD, ‘Note by Korea on the Roundtable on Commitment Decisions in Antitrust Cases’ (DAF/COMP/WD(2016)26).

⁸⁵ Article § 51-3 (1), MRFTA

⁸⁶ Article § 51-2 (3), MRFTA

⁸⁷ Song, T. (2018). Consideration on Securing Accountability of Competition Regulation Enforcement by Consent Order under the Monopoly Regulation and Fair Trade Act

⁸⁸ Article § 4 (3), Rule

However, in practice, the remedies of the antitrust cases consist of two parts: the one for the competition, the other for the restitution. So far, in the 3 non-merger cases, all the applicants submitted their restitution remedies with estimated surcharges that would have been imposed in the infringement decision regardless of whether or not there has been specified victims and damage caused by the alleged anticompetitive practice. When it was not easy to specify the damage, the monetary remedies were adopted in the form of the fund for the improvement of the relevant market's competition environment. The examples of the funds can be illustrated as in the cases below.

3.3.3.1 Naver and Daum

Naver and Daum, both are the portal service providers and market dominant enterprises in Korea's Internet search market and online advertising market⁸⁹. They provided information search results and their own paid services through an integrated search method, and posted advertisements without distinguishing among three of them. They also imposed the advertisement agencies restrictions not to attract more than a specific number of advertisers from other competing agencies. The KFTC sent them an investigation report which stated that their conduct had violated the prohibition of abuse of market dominant position.

Each company submitted the remedy which consisted of two parts: the first one is(was?) for recovery of competition, the other one for damage relief measures. In their remedies, Naver and Daum resolved to indicate paid services and changed the display to eliminate the possibility of confusion. Additionally, they notified the fact that they are changing the way they show paid services and advertisements according to the consent decision. As for the restrictions on advertisement agencies, both Naver and Daum stopped the conduct and abandoned their restrictive policy on the advertisement agencies.

⁸⁹ Naver and Daum have a market share of 70% and 20% respectively in Korea's Internet search service market and portal online advertising market as of 2013.

Apart from remedies for competition, Naver established non-profit foundations for dispute settlements related to the Internet search industry and supported the 100 billion KRW project by directly managing a mutual-growth support project. Daum also paid 4 billion KRW for a funding project to support online consumers and relevant small-medium-sized enterprises.

In the Naver's case, the initial remedy proposal submitted by Naver was disapproved because there was no consumer damage relief plan. Ever since this first commitment decision case in the KFTC, every applicant in the non-merger case has provided a monetary remedy proposal in its application for the commitment decision.

3.3.3.2. SAP⁹⁰

SAP⁹¹ was under investigation for abusing its superior bargaining position. SAP did not allow customer companies to partially terminate the license or maintenance agreements, in the event of mergers or other changes in circumstances. Secondly, there were provisions allowing SAP to arbitrarily terminate contracts with its suppliers reselling SAP's software any time it gives three-months notice.

In its remedy, the company committed itself to adopt a policy on partial termination of agreements and deleting provisions on arbitrary termination of agreements by itself. Additionally, the company proposed commitments that it will come up with effective measures for customer companies, suppliers and trade counterparts through providing affected companies with damage redemption and support for mutual prosperity worth 18.51. billion KRW.

⁹⁰ KFTC, Adopted the Final Consent Resolution for SAP Korea, Press Release (October, 2016). Find out more on the website http://www.ftc.go.kr/solution/skin/doc.html?fn=3f41fa9b68773c3dc03e5380272be1dc5655297dc5eac8551fa2eaa2d131750d&rs=/fileupload/data/result/BBSMSTR_00000002402/.

⁹¹SAP, which produces and sells software for businesses, has market share of 49.7% and 46% for Enterprise Resource Planning (ERP) and Supplier Relationship Management (SRM) respectively in Korea.

The KFTC evaluates the case that the customer companies of the SAP are expected to benefit from the decision, such as the reduction of unnecessary maintenance expenses, and that the SAP's commitment would contribute to the creation of jobs through nurturing human resources specializing in big data industry.

3.3.3.3. Other cases where the application has been disapproved

There were 3 more applications for commitment decisions in which the KFTC did not allow the initiation of the procedure: In the CJ CGV and Lotte Cinema's abuse of market dominant position case, where the film business firms discriminatorily increased the number of screens and extended the screening period for the movies that were distributed by themselves or their own affiliates, the KFTC did not approve their commitments because the level of their violation was serious and obvious; in the Qualcomm's abuse of market dominant position case, where Qualcomm refused or restricted the licensing of mobile communications SEPs that are essential in manufacturing and selling the chipsets market, the KFTC found the proposed commitments was not sufficient to remove the competition concern; in the Hyundai Mobis' abuse of superior bargaining position case, where Hyundai Mobis had set an excessively high goal of selling its car components and forced its regional agencies to purchase them to achieve the target, the KFTC did not approve its proposed commitments because they were not enough to prevent recurrence and to remedy the damage.

3.4. Observation of the differences among the 3 jurisdictions

Although there are many similarities in terms of legal framework and basic structure of the proceeding of the 3 jurisdictions as seen above in the section 2.1. and the table 1 of the section 3, there are substantial differences in practice.

Whereas both the US and the EU well recognise and utilise the advantage of the commitment decision, in Korea, neither competition authority nor companies seem to

have found strong motivation to actively use or apply for it. The US' extensive utilisation of the negotiated settlement initially resulted from the strong incentives to the companies which can avoid involving the private damages litigation after the consent order or consent decree, and now it has become default to the competition authorities since they discovered its effectiveness and efficiency. The usage of commitment decision in the EU is also active due to its convenience in the procedure both to the agency and the businesses. There is another incentive for the application for the commitment decision to the businesses, in that they can be exempted from the potential fines that could be imposed in the infringement decision. In the KFTC, apart from the fact the agency does not have to establish the fact and theory of harm as strong as in the infringement due to less fierce battle, the procedure itself does not seem to have much difference from that of the prohibition decision in light of the procedural economy. But the businesses still have incentives for the application due to the exemption from the fine.

In formality, the framework of the commitment proceedings conducted by the 3 jurisdictions looks very similar, particularly in that there are few provisions that specify the procedural differences between the commitment procedure and the normal procedure. However, as for the negotiation process, the US and the EU have established practices where the competition agency initiates the procedure having know-how how to make the companies get involved at the appropriate timing. In contrast, the KFTC does not seem to have such established practices though it provides a specified process both in the Act and its supporting Rule.

As for the monetary remedy, in general, seeking disgorgement of ill-gotten profit is an effective way of deterrence in that it does not require an antitrust enforcer's cost of oversight to ensure compliance compared to behavioural or structural remedies. In the US, disgorgement has mainly been carried out by the victims themselves through private litigations, and the imposition of the administrative fines has not been common. However, the FTC has sought disgorgement in some cases since 1999, and most of such cases were settled in the form of consent orders or consent decrees. Whereas, in the EU, the public enforcer carries out a deterrent role by imposing administrative fines, and the private parties' role in these private litigations was mainly recognized as seeking compensation.

And the Regulation 1/2004 is silent on the possibility of the monetary remedies in the commitment decision, nor does such a case exist so far under the Regulation 1/2004 scheme. However, arguably, some literature suggests the possibility and desirability of the voluntary redress plan in the commitment decision for the benefit of the consumer. The KFTC is rather similar to the EU regime. It has sought disgorgement by imposing administrative fines. The private litigation, whether for compensation or for deterrence, is not actively utilized in Korea. The KFTC emphasizes the function of consumer damage relief in the commitment decision. It is an attempt to supplement the function of a private litigation through the public enforcement. Therefore, the KFTC has included the redress plans in all the antitrust cases where it adopted the commitment decision so far.

Table 4. Practical comparison among 3 jurisdictions

	USA	EU	Korea
Frequency of utilization	More than 90 % of civil antitrust cases	61.4 % of non-cartel cases ⁹²	4 cases since 2011
Incentive for the applicant	Less opportunities from the treble damages action (Article 5 of Clayton Act)	Less time consuming, exemption from fines, less opportunities from private litigation	Exemption from fines
Feature of the negotiation	Streamlined procedure, much cooperating between agencies and the firm.	Streamlined procedure, predictability is provided by the Best Practice, procedural right can be consulted with Hearing Officer	Procedure is very similar to that of the infringement decision, procedural right is ensured at the same level as in the infringement decision
Monetary remedies	Possible in the FTC, some discussion is going on	Arguably possible, no case	Possible, mandatory if applicable

⁹²The resource of the statistics is from the OECD, 'Note by the European Union on the Roundtable on Commitment Decisions in Antitrust Cases' (DAF/COMP/WD(2016)22). The European Commission does not adopt the commitment decision in hard-core cartel cases.

4 Recommendation for Korea's consent decision scheme

4.1 Overall evaluation of Korean consent decision

Korea's commitment decision can be said that it is mainly designed to alleviate some concerns raised at the time of introduction of this system. There were some public opinions that the efficiency achieved by the exemption from fines was not consistent with the value of justice that the KFTC had pursued. Thus, considering this context, it is understandable the Act adopted stricter conditions and scope for the commitment procedure to initiate than those of other countries. Meanwhile, the commitment decision cannot effectively pursue the procedural efficiency since the KFTC cannot enjoy its discretion that the commitment decision is supposed to essentially promote.

On the other hand, the KFTC had considered using the consent decision as a consumer relief measure especially for damages compensation. A director who committed to revising the Act for the introduction of the commitment decision explains that although the KFTC made efforts to facilitate the smooth procedure of damage suits, civil suits filed were still insufficient, and that introducing the consent decision would allow a more rational and flexible remedy.⁹³ And it became one of the underlying reasons that had been brought up by the KFTC to persuade those who were against it. As observed above, regardless of whether the competition authority grasps the role of a private litigation as compensation or as a deterrence, there have been attempts, or at least discussion, to supplement the function of a private litigation through the public enforcement when it is not functioning properly. As for the KFTC, it seems to recognize the role of the private litigation as compensation, and it is trying to absorb the function of the compensation into the commitment regime.

Also there are some benefits for the competition authority to contribute to the objective of providing compensation for consumers. From a consumer standpoint, it is a quicker

⁹³ Kim, Y. (2012). Introduction of the consent decision of the Fair Trade Act and future direction of operation, *Journal of Korea Fair Competition Federation*.

and much easier way to get compensation. In most cases, in the situation where there is little private litigation by individual, nor collective, consumers, it would be unexpected or unanticipated compensation. However, it can be argued that requiring financial expenditure reduces the incentive for the application for the commitment procedure since the main incentive can be to avoid administrative fine in the infringement procedure in Korea where the private litigation for damages compensation is not actively utilised. However, considering that there have been steady, though they are rare, applications by the companies which noticed that the KFTC would impose fines, the willingness of the companies to offer commitments facing a risk of being found guilty does not seem to be lowered by the low private litigation pressure in Korea.⁹⁴

However, the Act is not specific enough under what condition and how the legislators intend to achieve the consumer relief through the commitment procedure. There is not a set of rules which should have been made beforehand toward the procedure of realizing damage compensation through the commitment decision. So far, as illustrated above, the consumer relief remedies are submitted and implemented as a form of the fund which is somewhat far from the direct compensation. Accordingly, even though the idea of using the commitment procedure as a tool for compensation is novel and can be desirable, but it is difficult to carry out the system at this moment, and will even become a factor that undermines administrative efficiency since there is no precise rule or guidance.

In this section, the study reviews the possible operating measures that can be improved without the revision of the law on procedural efficiency at the National Assembly and then seeks a desirable consumer compensation scheme through the commitment decision.

4.2 Recommendation for the enhancement procedural efficiency

⁹⁴ This system may be attractive to the business parties considering the size of the penalties imposed by the KFTC in the standard investigative process. And as international cases increase within the KFTC, applications are still expected by the foreign companies.

The procedural efficiency that the consent decision system pursues should result in the promptness of effective restoration of competition in the market. Thus, it does not only necessarily mean the time saved at the KFTC stage, considering in infringement decisions “finality” is often only achieved years after the agency’s decision, as appeals to courts tend to double the time to obtain a final decision.⁹⁵ Rather, it is desirable to secure time sufficient for making a decision whether to trigger the consent decision procedure and come up with appropriate remedies. Moreover, Korea's consent decision system is relatively young, and therefore has not earned enough trust by the public or companies.⁹⁶ The efficiency of procedures will be enhanced as the experiences of operating the consent order system by the KFTC accumulate. The efficiency will not just be improved by specifying every little detail in the law.

However, after the KFTC has some know-how in operating the procedure and practices in place, it may be necessary to make detailed provisions in order to enforce law in a consistent manner. As in the EU, it is desirable to give businesses the predictability on how the actual practice proceeds when the firm applies for the consent decision, what the consultation, or negotiation is like, what remedies are more likely to be accepted by stipulating the possible process in the provisions of the guidance. It is significant to ensure credibility by establishing consistent and predictable practice especially in exercising a broad margin of the discretion. In doing so, there are a few things to bear in mind.

First, the KFTC should be able to lead each case from its beginning. For this purpose, appropriate criteria should be established, and shared internally. On the sidelines of the appropriateness of the remedies, the staff will need to be well-informed of the criteria that set out which cases are appropriate to be resolved through commitment decision and enforce the law in a consistent manner. As we have seen above, the commitment

⁹⁵There is a literature investigated how quicker was the resolution in the commitment decision in abuse of dominances cases, where the author concluded it is not taken for granted. Mariniello, M. (2014). *Commitments or prohibition? The EU antitrust dilemma* (No. 809).

⁹⁶ There is a literature that also discusses tension between efficiency and legitimacy in the negotiated enforcement scheme: Gerard, D. (2014). *Negotiated Remedies in the Modernization Era: the limits of effectiveness*.

procedure will not open in cases where the commitment decision would undermine deterrence, and/or the issue is too complicated or novel to be clarified. It is also important to inform the parties of what the agency's opinion is about the procedure selection as well as the anticompetitive concern. We have witnessed that both antitrust enforcers in the US and Europe convey the concerns to the respondents in a stage where they are convinced that violations had taken place, and mutually ask for the possibility of negotiations. When the case is not right for a commitment decision, the staff of the KFTC could clearly notify it to the potential applicants before they apply.

Second, it is necessary to design the remedies not to raise the monitoring cost too much. The remedies submitted voluntarily by businesses may be more flexible to some extent, but excessive deviation from the framework of the remedial measures would not be proper in terms of efficiency. It is too early to generalize the tendency of the competition remedy in the consent decision cases in Korea, but it does not seem to deviate much from the ones in the normal decision so far. However, it should be noted that the principle for the remedy should be followed in a similar manner in the commitment procedure. There is a 'Guidelines for Remedy Operation' for the normal procedure in the KFTC. It stipulates that the proportionality shall be applied to the remedies, and there should be effectiveness, clarity, concreteness and enforceability. These principles are applicable to the commitments.

4.3 Recommendation for utilization of the monetary remedies

Before discussing the consumer relief plan within the commitment procedure, it is necessary to separately delve into the provision that requires consideration of the possible amount of fines in designing the commitments as already illustrated in the Section 3.3.1. This provision is more related to the disgorgement, a remedy requiring the alleged infringer to pay back its ill-gotten gains. This resulted in some kinds of financial expenditures plan regardless of whether or not the damage actually occurred in the cases. However, it can be a disincentive to the potential applicant of the commitment procedure, and can induce an irrelevant remedy in the end. Therefore, this paper recommends:

First, in the procedure selection, in cases where there is a great need for deterrence, it may be better not to initiate the commitment procedure. Especially, for the time being while the commitment procedure is not well understood and supported by the public, it is necessary to operate the criteria more rigorously.

Secondly, it should be noted that the commitment decision scheme can indirectly lead to fines. In the US and the EU, considerable fines equivalent to what would have been imposed in the infringement decision can be imposed if the company breaches its commitments. The agency does not have to establish a breach of the relevant provisions or anticompetitive effect of that violation. For now, the MRFTA only provides periodic penalty payments to ensure compliance with the commitments. However, it is desirable to establish more powerful sanctions on the potential breach of the commitments to ensure the accountability of the scheme.

Lastly, it is possible to carefully design such a competition remedy which in effect has a disgorgement consequence rather than creating a fund of some irrelevance or far from the interest of the competition authority. Creating a fund can be one of the options, of course, and there are more examples such as reduction of bank charge and royalty rate, lowering of the energy fare, reimbursement of the surcharge paid by consumers or customers in the past⁹⁷, or royalty-free licensing as above seen in the cases of the FTC. Most of the examples can be an example of compensation at the same time as this Section will discuss in the section below. But again, special care should be paid not to intervene in the market improperly, especially in the vertical restraint cases where there can be pro-competitive effects. Also, the monitoring cost of the competition authority should be considered.

Regarding the consumer relief for damages compensation, 3 questions should be answered for the successful implementation in the public enforcement system using the

⁹⁷There are some cases where the European Commission informally settled in return for the compensation commitments under Regulation 17/62. Bourgeois, J. H., & Strievi, S. (2010). EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag. *World Competition*, 33, 241.

commitment procedure. Those are ‘to whom, how much, how’ should compensation be paid. This paper assumes the answers to the questions should be different from those in the private litigation in the court since the purpose of the policy is to supplement the role of the court which is costly to access and it is difficult for consumers to establish the breach of the antitrust law.

In the same vein, even though the MRFTA is silent about how it would implement damages compensation through the consent decision, it can be well interpreted to have intended a different scheme from that of the court decision. It can be also inferred from the cases where the KFTC adopted rather flexible way to recover the harm caused by the alleged infringement as illustrated in the Section 3.

In the competition authority’s compensation scheme, the scope of victims of an infringement can be wider than in the court litigation. The recipient of the compensation does not necessarily have to be limited to only past victims. A consumer who did not even buy the items because of the high price can be the victim in this public compensation scheme. The competition authority can design the monetary remedies to have future consumers, or potential victims of the violation, and the victims who did not keep their proofs of payment compensated as the compensation is part of public enforcement of competition law, not as a substitute for private damages actions.⁹⁸

For the same reason, the amount of compensation to each individual consumer does not need to depend on the same criteria and proof requirements that is required in the court. The amount of individual compensation should be proposed by the company. The competition authority would rather not spend its time and specialty to determine the exact amount of compensation since it is not consistent with the aim of the commitment procedure in light of saving resources and enhancing the efficiency. The role of the competition authority is only to decide whether or not to approve the proposed remedy plan and give the company the reward in return for the compensation plan. In deciding whether or not to accept the remedy, it is desirable to consider if the accumulated amount

⁹⁸*Id.*

of compensation is equivalent to the potential fines that could have been imposed in the infringement decision for the purpose of deterrence. The compensation can be made through various methods without having to be confined to refund the overpaid price.⁹⁹

This idea is beneficial not only to the consumer, but also to the infringer company even when the overall sum to spend is the same in that it can avoid the one-time strong financial impact on it when the compensation is paid over a certain period of time according to Bourgeois, J. H., & Strievi, S¹⁰⁰. It can be beneficial to the competition authority if the increased public interest in and awareness of the competition results in activating private damages in court or enhancing incentives to file a complaint with a competition authority, which promotes the deterrent effect¹⁰¹.

The problem is how the compensation should be done (better awarded/arranged) in the practice of the competition authority. In most antitrust cases, it is difficult to recognize the damage that is in a causal relationship with the infringement and to calculate the loss. And in the process where the victims are not the ones who carry out the negotiation, the competition authority is responsible for preventing cheap settlement. In order to accomplish this aim, the law should require the company to get through the evaluation process by the designated organization or experts when it submits its monetary remedy plan. For some victims who want to deal with the same issue in the court individually, it is better to operate the compensation plan on an opt-out basis. A legislation to refer to is CMA's voluntary redress plan.¹⁰²

Unlike the consumer case, due to its complexity and the difficulty in seeking the compensation that will satisfy victims of anticompetitive practice, it may not be desirable

⁹⁹However, it is important to note that allowing business to choose the methods of compensation has the risk of insufficient remedies and being used as a marketing tool.

¹⁰⁰*Supra* note 97.

¹⁰¹*Id.*

¹⁰² There are few cases where the redress plan was made by this scheme since the reward is a reduction of fines in the infringement decision. In contrast, the incentive for redress plan can be stronger in the commitment decision since its reward is exemption and earlier finality. More details on the voluntary redress scheme of the CMA can be found at <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>.

to leave the contents and procedural tool to be open in seeking compensation. The competition authority should find a “fair” level of compensation on behalf of the consumer, while adhering to procedural efficiency. Therefore, the consumer relief remedy of the KFTC can be refined more and improved in the same direction as using designated organizations in seeking the compensation.

5 Conclusion

Exercising a broad margin of discretion in the commitment decision requires much of a sign for a mature competition authority. The competition authority should possess functions that are ‘state of the art’ to operate the commitment procedure satisfying all the parties, including general consumers. Clarity and procedural economy combined with expertise, reasonableness and conscientiousness, and communication skills. Thus, the commitment procedure can be a challenge to test the KFTC’s maturity. What is more meaningful for the KFTC is not just an improvement of the consent decision itself, but the improvement of the substantive and procedural problems, the ones that lie underneath the MRFTA, and that can be observed only after the introduction of the new procedural system. As Willian Kovacic pointed out, it is because there are ‘equilibration’, adjustments in one element of the antitrust system that can be accentuated or offset by changes in another element¹⁰³. Therefore, although this study has only briefly reviewed some academic issues raised during the implementation of the consent decision in Korea, further research should be undertaken for its sound policy and enforcement.

Further research may look at how the KFTC can design a remedy in its consent decision scheme effectively. This could include to what extent and how a commitment decision could achieve the deterrence effects in its remedy plan. It is to find a way to obtain credibility of the consent decision in connection with the negative recognition and emotion of the enterprises and people not to trust in the use of agency’s the discretion. It might be meaningful and helpful to research what businesses recognize and evaluate

¹⁰³ Kovacic, W. E. (2012). *The Institutions of Antitrust Law: How Structure Shapes Substance*.

regarding the commitment decision and its remedies as well as what the competition authority does. To improve the policy of compensation within the commitment procedure, it appears to be necessary to well establish its policy purpose and methods considering that there is a fundamental difference between the role of the public enforcement and private parties' litigation, a study does not necessarily need to refer largely to the court's procedure. Rather, an intensive comparative study on the monetary remedies that are combined with a voluntary redress plan or commitment procedure in other jurisdictions is likely to give useful implications to the KFTC's policy even though some of those jurisdictions are also going through some trial and error.