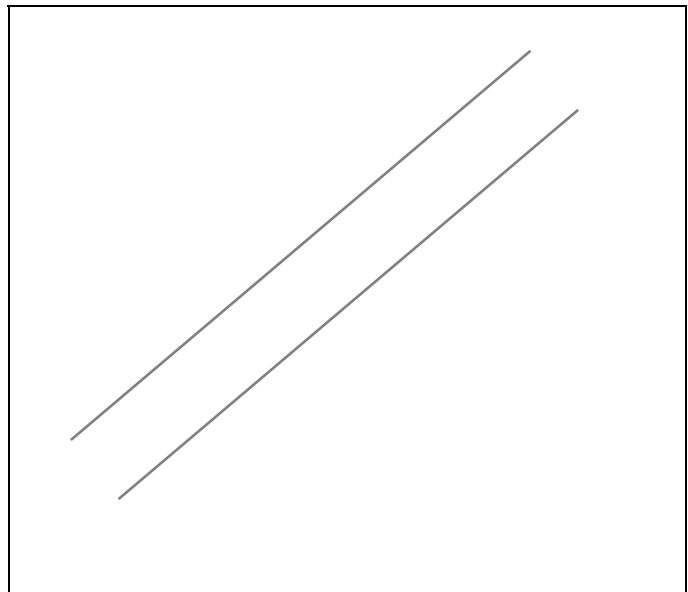


Neelie Kroes

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The Commission's Review of Exclusionary Abuses of Dominant Position



Speech before the Korean Competition Forum organised on the occasion of the Fourth Annual Bilateral Meeting on 26/27 June 2006 in Seoul

Mr. Kwon, Chairman of the Korean Fair Trade Commission (KFTC),
Mr. Kang, Vice Chairman,
Mr. Seon Hur, Secretary General,

Ladies and gentlemen,

AN-NYONG-HA-SHIM-NI-KA¹.

Thank you for inviting me to address you today. It is my pleasure to speak to such a distinguished audience. Let me first of all thank you, Chairman Kwon, for the successful organisation of this event. You have done a great job in bringing together the participants of the Korea Competition Forum here today. We are all looking forward in engaging in a debate on a true competition culture and how to strengthen it.

This year marks the 25th anniversary of the KFTC, which you will celebrate at the 4th Seoul International Competition Forum in Gyeongju City. Congratulations! I think the KFTC has every reason to be proud of the remarkable achievements realised over these years.

Competition policy in Korea

The KFTC is a relatively young agency. It has turned within a very short period of time from a receiver of technical assistance into an important adviser to other competition authorities throughout Asia. Today your authority, Mr. Kwon, has a leading role in competition policy not only in this region. But it is also increasingly active at the international level, notably in the OECD and ICN.

¹ „Good Morning“

I also see very positive developments since our previous bilateral in June 2005. I am referring in particular to the KFTC's enforcement activities against **cartels**, which is a **priority** for **both of** our agencies. Last year the competition law was reinforced by increasing the ceilings for surcharges (fines), strengthening the leniency system and giving private litigants the right to bring actions for damages against violators of the competition rules. These important amendments have already started to produce effects. Not only is the KFTC tackling more cases but the overall amount of fines imposed in antitrust cases has risen, too (from 23 million in 2004 to 215 million Euro in 2005). By the way, we are watching with interest your latest move on a number of Korean banks, which were subject to an inspection on 1 June 2006. The European Commission and the KFTC increasingly lead parallel investigations into international cartels (e.g. recently the air cargo case)..

In addition I have noted that the KFTC is stepping up its activities to **respond to abusive conduct** by companies with substantial market power. You have already taken important steps in this respect by establishing the Economic Analysis Team and the Monopoly Regulation Team. The KFTC's determined action in the Microsoft case is also a strong signal. It demonstrates that there will be fewer safe havens for companies engaging in abusive activities affecting competition.

Cooperation is all the more important as the economic ties between our countries increase and businesses on both sides are realising the opportunities. In 2005, Korea – EU bilateral trade of approximately 56 billion Euro and the EU became Korea's second largest export market (after China and ahead of the USA). Similarly, the EU has become the

largest provider of foreign direct investment to Korea, with a net stock exceeding 28 billion Euro. Both Korean and European businesses will want to benefit from a fair level playing field. A sound competition policy which addresses both private and public restrictions is a crucial factor in this regard.

I am more than confident that there is significant potential for enhanced cooperation between our two agencies, both on our overall policy strategy towards **abuse of dominance** and on individual cases, which affect consumers on both sides.

This is why I want to explain to you today how I propose to improve enforcement of Europe's ban on abuse of dominant position. I will start by giving you some key information on our Discussion paper summarising these reflections and proposals. We have just come to the end of the public consultation on this Discussion Paper, and that consultation has raised a great deal of interesting issues. It is too early to give you the results of the consultation, so I hope you will understand that in today's speech I focus on the Discussion Paper itself, and not on our reactions.

The Discussion Paper on the application of Article 82 EC Treaty

The ban on abuse of dominant position is laid down in Article 82 of the EC Treaty. Effective enforcement of Article 82 is crucial to ensure an effective competition policy. And I do not have to mention here that an effective competition policy is a key factor for high competitiveness of an economy.

In Korea you know that well. Koreans are famous for their ability to adapt quickly - *pally-pally* (quickly!) are the first words a foreigner-myself included - learns arriving in this country. You very often win, because you know that good innovative products sell on their own merits. We could sometimes do with a bit more of this style of thinking in Europe. To promote this way of thinking we are currently trying to encourage innovation and risk taking as part of our Lisbon agenda for economic growth and more and better jobs.

Article 82

Article 82 of our rule book deals with unilateral conduct by an enterprise with market power, which restricts competition on the market. The exercise of market power must be assessed essentially on the basis of its **effects** in the market. There are exceptions though – take for example the ‘by definition’ illegality of horizontal price fixing.

Unilateral conduct merits the close attention of antitrust authorities worldwide. Enforcement should focus on real competition problems. I mean behaviour that has **actual or likely** restrictive effects on the market, and so harms consumers. There are two main reasons for making this the priority:

- First, Enforcement Agencies should be cautious about intervening in markets *unless* there is **clear** evidence that markets are not working well.
- Second, Enforcement Agencies don't have unlimited resources and need to focus their efforts on what makes a real difference.

You may know that I am an economist by training. Now I am an antitrust enforcer by profession! As an economist, I want an economically sound framework. As an enforcer, I need a **workable tool** for making enforcement decisions. The review I have launched is about enforcing Article 82 better. So any conclusions we reach on use of economics must also ensure the rules can be enforced **effectively**.

The concept of abuse

Article 82 serves to **protect competition** on the market. Not for its own sake, but rather as a means of enhancing consumer welfare and ensuring the efficient allocation of resources.

Exclusionary abuses often lead to customer exploitation later. The Discussion Paper focuses on this as a clear enforcement priority. Looking at exclusionary abuses, we need to prevent medium and long term harm arising from the exclusion of competitors. Predicting medium or long term harm can be difficult. But we can't just look at the short-term price effects of a certain form of conduct.

General framework

An important judgment of the European Court of Justice in the *Hoffmann-La Roche* case is my starting point for defining abuses which exclude. The Court said that the behaviour under review has to have a certain effect on the market. Second, the Court said that it is important to protect equal opportunities for residual competition.

This means two things:

- First - the conduct of the dominant firm must have the **capability** to influence the position of residual competition on the market.
- Secondly - a **likely market distorting foreclosure effect** must be established. It is not enough to prove simply the foreclosure of one or two competitors.

To prove a market distorting foreclosure effect one must examine the market coverage of the conduct. The conduct may be selective: It may target strategic customers that are important for new entrants or residual competitors. Other market characteristics - including the existence of network effects and economies of scale and scope - may also be relevant to establish a foreclosure effect. In addition the degree of dominance will be a relevant factor. All these factors must be analysed together to check whether there is a credible “theory of foreclosure” that fits the facts of the case.

Price based abuses

Exclusionary abuses may be both price based and non-price based. In non-price based abuses it is clear that some “exclusion” takes place. Contractual tying. “Pure” refusals to supply. Single-branding obligations (also known as exclusive dealing). The question is whether such exclusion is anticompetitive. In other words does it impact not only on competitors, but also on competition in the market?

Similar exclusionary effects may be achieved through pricing:

- Very high stand-alone prices in comparison to a low bundled price for two products may “tie” the two together. This can be as effective as contractual tying.
- Asking a very high price for a product or combining a high upstream price with a low downstream price may amount to a “constructive” refusal to supply.
- High rebates given on condition of single branding may have the same effect as contractual non-compete obligations.
- Last but not least, predatory pricing is, of course, meant to exclude competitors.

However, low prices and rebates are, normally, welcome: they are good for consumers. So how do we decide what is “competition on the merits” when it comes to price based conduct? “Competition on merit” takes place when an **efficient** competitor who does not have the benefits of a dominant position is able to compete against the pricing conduct of the dominant company.

The Discussion Paper describes *one* possible approach to pricing abuses, based on a theoretical competitor of similar efficiency. This competitor would have the same costs as the dominant player. In this scenario, action by the dominant player to exclude this equally efficient competitor is, by definition, abusive. There may be other approaches and the public consultation has generated a great deal of debate on this issue which we are now considering carefully.

Efficiencies

Another widely debated issue is whether it is desirable or even possible for there to be an “efficiency defence” under Article 82. I think we must take into account that the same type of conduct can have efficiency-enhancing as well as foreclosure effects.

The dominant company should be able to demonstrate that the following conditions are fulfilled:

- First, the efficiencies should be realised or be likely to be realised as a result of the conduct concerned.
- Second, they should be “conduct-specific”. The unilateral conduct must be indispensable to deliver these efficiencies.
- Third, the efficiency gain should outweigh the negative effects of the conduct concerned.
- Fourth, competition must be maintained in respect of a substantial part of the products concerned.

Where these conditions are met, efficiencies might be an acceptable defence. But let’s not forget that there are numerous types of abusive conduct where there are no efficiencies at all. One recent example in Europe is the *AstraZeneca* case. AstraZeneca misused the patent system to extend patent rights and thus its dominant position. This behaviour was certainly not motivated by efficiency considerations.

Where are we now in the process?

On 19th December last year we published a Discussion Paper on the application of Article 82 to exclusionary abuses.

The publication of the Discussion Paper has been met with wide interest in the antitrust community. The Paper has been discussed at a number of conferences both in Europe, the United States and in Canada. The Paper was in public consultation until 31st March. We received more than 120 submissions.

The next step was a **Public Hearing** that was held on 14th June. This focused on the most topical issues raised in the submissions. The event attracted about 350 participants from most European countries as well as from the United States, Japan and Korea. The speakers included company representatives as well as prominent competition law practitioners, economists and academics. I am very happy that the public discussion attracted such a large and distinguished audience. This shows the importance the competition community attaches to the Commission's Article 82 Review. The discussion has focused on the most difficult aspects of the Review. We will now have to reflect on this discussion and the comments received in the public consultation before deciding how to move the Review forward.

Concluding remarks

Ladies and gentlemen,

Today I have tried to give you an overview of how Europe is rethinking its approach to abuses that exclude. We want sensible "rules" for deciding when conduct may exclude competition. At the same time, we know the benefits of free competition. Like you in Korea, we rely on our

big companies to compete alongside everyone else. That means we need to help companies to assess better when they are on safe ground.

This approach brings the benefits of **solid economic** thinking while at the same time giving clear indications to companies and maintaining workable enforcement rules. It is only a first step. We are also reviewing the other categories of abuses (exploitative and discriminatory abuses).

I come to your beautiful country today as a representative of Europe. We in Europe – and I as European Competition Commissioner – are most interested in your ideas on the issues I have set out today.

I would like to close my speech today with a simple reflection. We live and work in a global village. In Korea, as Europe, we set very high standards for ourselves. We judge people and businesses on their merits, and we want others to do the same. I am pleased to be here with you today. We may be on two sides of the world, but on this matter, we stand for the same principles. For me, that is a source of great pride.

Thank you for your attention.

KAM-SA-HAM-NI-DA².

² „Thank you“