

*Preliminary Draft. Please do not cite without permission of the author.
Any comments are welcomed!*

ON THE PROBLEMS OF ECONOMIC EVIDENCE IN KOREAN ANTITRUST LITIGATION: WITH SPECIAL EMPHASIS ON UNILATERAL PRACTICES

JU, JINYUL (朱 晋烈)

Prof. of Law, Direction of the Center for Law, Regulation & Economics
Pusan National University School of Law, Busan 609-735, Korea
(Email) jinyul_ju@pusan.ac.kr

<ABSTRACT>

In 2007, Korean Supreme Court delivered the first leading case of unilateral practices, *POSCO v. Korea Fair Trade Commission*, which puts stress on the importance of economic evidence based on economic analysis. Indeed, economic analysis can be the most reasonable criterion in deciding whether a certain unilateral practice should be prohibited or not. On the other hand, antitrust regulation of unilateral practices is not only economic matter but also political one. It implies that an undesirable political reason can prevail over sound economic reasoning. History shows that when the liberal party gained the political power, over-regulation of the dominant firms and type I error are more likely to happen. And when the conservative party gained the political power, both under-regulation and type II error are more likely to happen. This is one of the reasons why optimal regulation of unilateral practices is so difficult. On the other hand, misuse of economic analysis has been observed in some of antitrust cases. If economic evidence submitted by the disputing parties turns out to mislead courts, then judges will not seriously consider the weight of economic evidence itself. This is no good for antitrust enforcer, business firms, consumers in the relevant market, and ordinary people's well-being. It is sound and reliable economic evidence that can guarantee optimal regulation.

Key words: dominant firms, unilateral practices, economic analysis, optimal regulation, politics

I. INTRODUCTION

This year 2010 is the 30th year of Korean antitrust law, the Monopoly Regulation and Fair Trade Act (MRFTA).¹ However, active regulation of unilateral practices (e.g., tying, refusals to deal, predatory pricing, etc) of the dominant firms in Korea is a very recent phenomenon. In 2007, Korean Supreme Court delivered the first leading case of unilateral practices, *POSCO v. Korea Fair Trade Commission*.² In *POSCO*, the Court put the great stress on the importance of economic evidence based on economic analysis³ in deciding the case. Just one year after *POSCO*, in 2008, the Court again placed emphasis on the role of economic evidence in *Tbroad v. Korea Fair Trade Commission*.⁴ Because Korea Fair Trade Commission (KFTC)⁵ failed to submit relevant economic evidence before the Court in both *POSCO* and *Tbroad*, the Court ruled for the plaintiff in each case.⁶ As the Court fully recognize a pivotal role of economic evidence in solving the key issues concerning unilateral practices, it is not surprising to observe that KFTC and lawyers try to learn about the role of economic evidence from the United States (U.S.) and the European Union which has a long history of antitrust regulation of unilateral practices.

Most of lawyers and the big business groups in Korea welcomed the jurisprudence of *POSCO* and *Tbroad*. Indeed, advocates for the firms argue that clear economic evidence is required to condemn unilateral practices for the reason that without economic evidence type I (false-positive)

¹ The non-official English translation version of MRFTA by Korea Fair Trade Commission (KFTC) is available at <http://eng.ftc.go.kr/bbs.do?command=getList3&type_cd=23>. Only the Korean version is authentic.

² Case citation: Korean Supreme Court Full Bench Decision 2002Du8626, Delivered on 22 Nov. 2007.

³ Economic analysis encompasses, ranging from merely organizing and presenting a set of quantitative data in a specific manner, to performing in-depth statistical analyses.

⁴ Case citation: Korean Supreme Court Decision 2007Du25183, Delivered on 11 Dec. 2008.

⁵ The English website of KFTC introduces history, organization, and other information of KFTC. See <http://eng.ftc.go.kr>.

⁶ Seoul High Court has the exclusive jurisdiction of antitrust cases at first instance in which KFTC is always to be the defendant. So in Korean antitrust case, the firms are always to be the plaintiff.

error⁷ might occur, and type I error will undermine Korean economy. It seems clear that they prefer type II (false-negative) error⁸ than type I error.

On the other hand, of course, KFTC showed its big disappointment on the Court's decisions. Because KFTC believes that Korean antitrust regulation of unilateral practices should be based on the form-based approach⁹ or the *per se* rule like the jurisprudence of E.U. competition law, KFTC tend to be reluctant to recognize a critical role of economic evidence in dealing with unilateral practices. Although KFTC respects the Court's decisions, the former insists that the scope of the applicability of the latter's jurisprudence on economic evidence should be limited. Anyway, it is very interesting to observe that KFTC try to lessen its hostility against the role of economic evidence since 2009. So it is not clear that KFTC still strongly prefer the form-based approach.

As of 2010, it seems to me that both KFTC and lawyers for the firms commonly believe that antitrust enforcer should do "more economic analysis" before condemning a unilateral practice. Indeed, economic analysis is essential for the optimal antitrust regulation¹⁰ of unilateral practices. By the term of "optimal regulation" I mean the regulation which can minimize both type I error and type II error as well. On the other hand, since misuse of economic analysis has been observed in some of antitrust cases, it seems that judges have curiosity about the credibility of economic evidence itself. In academia, some support economic analysis, others not.

In this essay, bear in mind that antitrust provides the same protection to economic freedoms that human rights accords to political liberties,¹¹ and it is "an imperfect tool for the regulation of competition"¹² at the same time, I try to answer the questions: What is the role of

⁷ For the purpose of this essay, type I error means "condemnation of benign or procompetitive unilateral practice." False-positive error can undermine the credibility of antitrust/competition law and policy. Cf. Alison and Brenda Sufrin (2008), at 311.

⁸ For the purpose of this essay, type II error means "not condemnation of anticompetitive unilateral practice."

⁹ This approach put emphasis on the form that the behavior of the dominant firm takes, rather than on its effects. Cf. Alison and Brenda Sufrin (2008), at 294. European Court of Justice has supported this approach.

¹⁰ Antitrust regulation is different from traditional regulation. The latter tends to be industry-specific and to involve the direct setting of prices, product characteristics, or entry. By contrasts, antitrust regulation tends to focus on maintaining competition. See Winston (2006), at 1.

¹¹ Cf. Handler (1963), at 557.

¹² Easterbrook (1984), at 39.

economic evidence in antitrust regulation of unilateral practices? Can “more economic analysis” guarantee optimal regulation?¹³ And what is the consequence of misuse of economic analysis in the context of Korean politics? Part II of this essay briefly introduces Korean antitrust regulation of unilateral practices. While part III examines the positive role of economics in regulation of unilateral practices, part IV discusses limits of economic analysis. Lastly, Part V addresses political aspects of economic analysis.

II. KOREAN ANTITRUST REGULATION OF UNILATERAL PRACTICES

1. Korean Big Business Groups and Antitrust Regulation

Korea has achieved a miracle economic growth since the Korean War (1950-1953). As of 2009, GDP per capita was about 17,000 U.S. dollars, which almost four hundred times bigger than 50 years ago. This remarkable economic success of Korea could be achieved by the government-led economic development strategy which started from the early of 1960s.

During the period from 1960s through 1980s, the central government planned the export-led industrialization strategy, and directly allocated scarce resources to the big business groups (e.g., SAMSUNG, HYUNDAI, DAEWOO), the so-called *Chaebol*(財閥).¹⁴ Indeed, the government intensively and directly controlled market in almost every way. First, the government planned the economic development projects per five-years. And then the government-selected big business groups worked day and night to implement the projects. In this process, the government granted the big business groups significant privileges.

On the other hand, during the period from 1960s through 1970s, it was observed that the big business groups dominated overall Korean economy, and abused their market power. Unethical and unfair business practices of the big business groups were so widespread that consumers and small firm business strongly condemned over the *Chaebol*. For this reason, there were several

¹³ Maybe we can raise the same questions to the issues of optimal regulation of horizontal mergers.

¹⁴ In political context, the word of *Chaebol* has a negative meaning in Korea. People tend to use *Chaebol* when they condemn unethical or illegal business practices of the big business groups.

attempts to introduce competition law. But the big business groups successfully blocked these attempts.

However, on 27 September 1980, at last Korean government introduced monopoly regulation clause at the Constitution level. Article 120 paragraph (3) of the 1980 Korean Constitution (eighth revised version) stipulated that “Adverse effects of monopoly and oligopoly shall be properly controlled and regulated.” Just two month after the above article, MRFTA was enacted on December 31, 1980. The Act prohibited various anti-competitive unilateral practices. Even though, in reality, MRFTA was never actively enforced during 1980s, it was remarkable thing that the Korean competition law and policy obtained its legal foundation at the level of the Constitution.

Now, article 119 paragraph (2) of the current 1987 Korean Constitution (ninth revised version) stipulates that “The State may regulate and coordinate economic affairs in order...to prevent the domination of the market and the abuse of economic power and to democratize the economy...” Compared to the U.S. and other western countries, this is a quite distinctive feature in Korea that regulation of anticompetitive practices is a matter of constitution rather than a mere legislative act of congress.¹⁵ Based on article 119 (2) of the Constitution, MRFTA has prohibited various anti-competitive unilateral practices, i.e., abusive acts of market dominant firms as following:

- “1. act of determining, maintaining, or changing the price of commodities or services unreasonably;
2. act of unreasonably controlling the sale of commodities or provision of services;
3. act of unreasonably interfering with the business activities of other enterprisers;
4. act of unreasonably impeding the participation of new competitors;
5. act of unfairly excluding competitive enterprisers or act that may considerably harm the interest of consumers.”¹⁶

¹⁵ Cf. Handler (1962), at 957-58 (“[Antitrust] has become part of our unwritten constitution. It is the economic counterpart of the Bill of Right.”)

¹⁶ This is the non-official English translation of art. 3-2 para.1 of MRFTA by KFTC.

2. Korean Supreme Court's Decisions on Unilateral Practices

In 2007, the Supreme Court of Korea in *POSCO v. KFTC* firstly recognized the effects-based approach¹⁷ to the matter of unilateral refusal to deal.¹⁸ In *POSCO*, the Court opined that illegitimate refusal to deal in MRFTA means abusive conduct by a dominant firm that may cause restrictive effect on competition. In addition, the Court said that it is required for KFTC to prove the intention or purpose of a dominant firm to cause restrictive effect on competition. The intention or purpose can be presumed from objective facts that show “restrictive effect on competition, such as increased price of the product, decreased output of the product, no innovation for the product, decreased number of competitors, decreased [product] diversity, etc.” According to the Court, KFTC failed to prove that POSCO had the intention or purpose to restrict competition. Finally, the Court concluded that POSCO’s refusal to deal with Hyundai HISCO did not cause any restrictive effect on competition.¹⁹

In 2008, just one year after *POSCO*, the Court in *Tbroad v. KFTC*²⁰ reaffirmed its effects-based approach in *POSCO* in deciding whether the plaintiff firm’s conduct (a regional cable broadcast company’s reallocation TV channels among TV program providers) in the relevant market is illegal. In *Tbroad*, KFTC strongly argued the so-called “the transfer of market dominant power” theory, which is almost the same theory of “monopoly leverage” in U.S. The Korean Supreme Court rejected it, like the U.S. Supreme Court rejected monopoly leverage theory in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.²¹ However, it should be noted that the Korean Supreme

¹⁷ This approach put the stress on the economic effects of the behavior of the dominant firm, rather than the form. The U.S. Supreme Court has supported this approach.

¹⁸ In 1990s and 2000s, POSCO produced ‘hot rolled steel,’ a raw material from which various types of derivatives, including high strength steel for automobiles, could be produced. In 1997, 1998, 2000, and 2001, Hyundai HISCO, a manufacturer of steel products for automobile, requested POSCO to supply the last’s product, hot rolled steel, to the first. However, POSCO decided to refuse supply its product to Hyundai HISCO based on the reason that the first produced the product only for its own use, and the last could purchase hot rolled steel coils from China and/or Japan. Hyundai HISCO complained to KFTC. After investigation, KFTC held that POSCO was dominant in the market for the product and had abused its dominant position by committing illegitimate refusal to supply it to Hyundai HISCO. See Ju (2008), at 144.

¹⁹ See *id.*, at 144-45.

²⁰ Case citation: Korean Supreme Court Decision 2007Du25183, Delivered on 11 Dec. 2008.

²¹ 540 U.S. 308 (2004).

Court did not deny monopoly leverage theory itself under MRFTA. Therefore it can be said that there is a possibility of rebirth of monopoly leverage theory in the future.

In spite of the victory of the effects-based approach over the form-based approach in both *POSCO* and *Tbroad*, KFTC seems still strongly supports the form-based analysis. Not surprisingly, KFTC has expressed its opinion that the *POSCO* rule should be applied only to the matter of “refusal to deal.” And also not surprisingly, antitrust lawyers and economists tend to support the effects-based approach or the rule of reason in *POSCO* and *Tbroad*. In Korea, two seminal cases *POSCO* and *Tbroad* did open the door to debate the role of economic analysis in antitrust regulation of unilateral practices.

III. POSITIVE ROLE OF ECONOMIC ANALYSIS

What can the disputing parties in antitrust litigation do with economic analysis in regulating unilateral practices? Surely there can be various different answers for various different reasons. Maybe someone who strongly believes that economics is truly a rigorous science, like physical science, can say that economic analysis give the disputing parties the most powerful tool to persuade courts. The basic idea that economic analysis is a positive science can be traced to the era 1930s and 1940s when modern young economists, such as Terence W. Hutchison²² in United Kingdom or Paul Samuelson²³ in U.S., adopted the scientific methodology of physical science. Indeed, it is well know that Paul Samuelson, the first American Nobel prize winner in economics, used to apply mathematical physics in analyzing human behavior in market.

Mainstream economics tends to explain human behavior in the same way Newtonian physics scientists observe and predict the movements of particles in the physical world. For instance, Milton Friedman, a great leader of the Chicago school of economics in 1960s and 1970s, said: “[p]ositive economics is, or can be, an “objective” science, in precisely the same sense as any of the

²² Cf. Hutchison (1938) (arguing that economics should adopt the methodology of physical science).

²³ Cf. Paul Samuelson (1947). Compare this book to any recently published mathematical physics books, e.g., George Arfken and Hans Weber, *Mathematical Methods for Physicists*, 2005, Academic Press. In regard to mathematical methodology, maybe lay person can hardly find out any difference between two books.

physical sciences.”²⁴ And Thomas Ulen pointed out: “[i]t is vital to the full understanding of economics as a science to stress the methodological aspects of the empiricism that guides science.”²⁵

There is little doubt that economics may provide “a framework to think about the way in which each particular market operates and how competitive interactions take place.”²⁶ Economic analysis can be used to provide valuable support for antitrust arguments under MRFTA regarding the relevant market definition, competitive effects, barriers-to-entry, and efficiencies, etc. For example, to condemn a certain unilateral conduct by a firm under MRFTA, first of all, KFTC should prove that the firm in issue has dominant position in the relevant market. The Supreme Court in *POSCO* said that it is necessary to define the “relevant product market” and the “relevant geographic market” before deciding that firm in issue has a dominant position in a given market.²⁷ According to *POSCO*, market definition is the first step for identifying market dominant position. It means that KFTC can not condemn a firm for anticompetitive practices without defining market.

Then, how “market” should be defined? Of course, there can be various different definition of market. Economic analysis, such as “SSNIP”²⁸ test, may be helpful in testing various definitions of market. In addition, economic analysis also can be used to prove that a firm in the relevant has market dominant position, and a conduct of a dominant firm caused anticompetitive effect.

It seems that the primary contribution of economic analysis to antitrust regulation of unilateral practices is an empirical foundation in order to prove or disprove assertions that are based on a particular economic theory or hypothesis. There are some advantages of economic analysis which include: “(1) it can be used to show whether certain factors affect or do not affect another particular factor or events; (2) it can be used to show the likelihood that one event or fact is causally related to another; and (3) it allows for the aggregation of all the material data on a particular issue,

²⁴ Friedman (1966), at 4.

²⁵ Ulen (2006) at 656.

²⁶ European Commission Competition DG (2010), para. 1, at 3.

²⁷ Supreme Court of Korea Full Bench Decision 2002Du8626 (Delivered on 22 Nov. 2007), at 3.

²⁸ It stands for ‘Small but Significant and Non-transitory Increase in Price.’ For more explanation of the SSNIP test, see Jones and Sufrin (2008), at 66.

thereby avoiding the danger of selecting an devaluating only a limited and unrepresentative set of data points.”²⁹

IV. LIMITS OF ECONOMIC ANALYSIS

1. PROBLEM OF MISUSE OF ECONOMIC ANALYSIS

Can economic analysis guarantee optimal regulation? The answer depends on if economic analysis is sound and accurate. If we can perfectly measure the net effect of any unilateral practice with economic analysis, it would make a sense that antitrust law can be or should be substituted by antitrust economics,³⁰ which mainly consists of industrial organization theories and econometrics.³¹ On the other hand, it might be fair to ask the question as to whether we can expect that modern economics is able to measure the net effect of unilateral practice without any error or any manipulation or any distortion. In the real world, economic analysis cannot provide us full understanding of economic consequences of a unilateral practice. Even worse, there is a possibility of misuse or manipulation of economic analysis.

Of course, the possibility of misuse or manipulation of economic analysis comes from inherent limitation of human being’s ability. In regard to this, a commentator pointed out:

“[E]conomic theory has encompassed so many possibilities that anything is possible in principle. The difficulties of empirical analysis force economists to make judgments about which interpretation is most plausible. The facts usually are sufficiently unclear that different equally skilled analysts can reach widely conflicting conclusions. It is a commonplace that formal statistical

²⁹ See Houthakker (1999), at 1.

³⁰ For a general introduction to antitrust economics, see, e.g., Winston (2006); Buccirosi (ed.) (2008); Blair and Kaserman (2008). I do not mean the authors have actually argued that antitrust law should be substituted by antitrust economics.

³¹ Econometrics is the application of statistical techniques to economic data in order to evaluate economic theories. In antitrust litigations econometrics can be used for developing an empirical foundation in order to prove or disprove assertions that are based on a particular economic theory. See American Bar Association Section of Antitrust Law (ed.) (2005), at 1.

studies of economic phenomena have inherent drawbacks. The design, accuracy and extent of data are always insufficient.”³²

In addition, with regard to uncertainty of economic analysis, it is interesting to remind what Frank Easterbrook wrote in his 1984 article. Easterbrook said:

“If we assembled twelve economists and gave them all the available data about a business practices, plus an unlimited computer budget, we would not get agreement about whether the practice promoted consumers’ welfare or economic efficiency more broadly defined. They would discover some gaps in the data, some avenues requiring further explanation...”³³

In 2008, Daniel Rubinfeld observed: “[a]s we move through the first decade of the new millennium, we continue to see a variety of economists’ perspectives on antitrust law and its enforcement.”³⁴ According to him, there are four main differences among economists: first, “differences as to whether economic efficiency should be the sole norm in antitrust”; second, “differences in economists’ views of the ability of courts to sort out complex legal and economic questions and the ability of antitrust authorities to successfully undertake and complete investigations accurately and in a timely manner”; third, “differences as to the importance of economic theory and empirical regularities”; and fourth, differences as to “the ability to the authorities and the courts to successfully enforce the antitrust laws in complex cases.”³⁵

There can be no doubt that human society is totally different from the Newtonian world because human being is not a particle or nuclear of physical matter. So I assume that even today’s most advanced economics cannot fully explain and predict the exact quantitative effects of any particular unilateral practice on market. As Frank H. Knight³⁶ properly pointed out, a science of

³² Gordon (2002), at 12-13.

³³ Easterbrook (1984), at 11.

³⁴ Rubinfeld (2008), at 56.

³⁵ See *id.*, pp. 56-57.

³⁶ Frank H. Knight tremendously influenced the formation of the Chicago school of economics of 1960s and 1970s. But his philosophical attitude to economics is quite different from that of the Chicago school. See, e.g., Knight (1922), at 580-81 (“It is impossible to ?? for many concept of “social efficiency” in the absence of some general measure of value[.] It must be ultimately be recognized that only within rather narrow limits can human conduct be interpreted as the creation of values of such definiteness and stability that they can serve as scientific data, that life is fundamentally an exploration in the field of values itself and not a mere matter of producing given

human behavior is hardly possible because “in contrast with physical objects, human behavior is so saturated with varied make-believe and deception, not clearly separable from the realities.”³⁷

Indeed, as Richard Schmalensee puts it, “[i]ndustrial organization economics is hardly an exact science. Economists cannot testify with the confidence of experts on ballistics or fingerprints — or at least they should not.”³⁸ Even though almost 48 years have passed since Milton Handler’s mention, “[r]efinements in the techniques of economic analysis will enable the courts better to cope with the problem of monopoly,”³⁹ it seems that the role of economic analysis in antitrust cases is still limited. For example, with regard to market power, as Dennis Carlton puts it, “ambiguity in what [economic] analysts mean by market power (price above marginal cost, or excess profits) cannot be resolved by market share. . . In Section 2 cases, the full antitrust analysis is difficult because any increase in market power typically has to be weighed against any benefits of the alleged bad act.”⁴⁰

In regard to the question whether it is possible to measure the net effect of any unilateral practice on competition in dynamic market, we know that there is no such thing as Laplace’s omniscient calculator. Any effect of human behavior on competition cannot be measured like a weight, height, width, volume, or temperature of a certain physical matter. At best we can roughly estimate the effects of unilateral practices. But estimation can never be free from error and/or manipulation. With regard to this, the use of economic evidence in courtroom usually raises two problems: (i) economic data uncertainty; and (ii) the misuse of economic analysis.⁴¹ Data uncertainty arises because economic analysis often cannot provide clear answer to question that have grave implications in courts. Economic data can be used to support a range of propositions by the

values.”); Knight (1941), at 752 (“It is [economic principles’] function to describes an ideal, not the reality; and it is an ideal for social policy and not merely the pattern to which the individuals wishes and tries to conform.”). For a discussion of Frank H. Knight’s thought of economics, see Buchanan (1987), at 61-75; Wick (1973), at 513-15; Taylor (1957), at 342-45.

³⁷ Knight (1951), at 8.

³⁸ Schmalensee (1987), at 42.

³⁹ Handler (1962), at 958.

⁴⁰ Carlton (2007), at 3.

⁴¹ See Ju (2008), at 150.

opposing parties. Although economic analysis is valuable, it can be accompanied by the possibility of its misuse.⁴²

Maybe the very fact that we still suffer uncertainty of antitrust law in dealing with real cases well proves that economic analysis has a restricted role in antitrust law. Particularly, when the interpretation of the result of an economic analysis is obscure, any argument based on economic analysis will end up with new invitation for further debate over the usefulness of economic analysis itself. Besides, it is important to note that undue overlooking of any possible misuse of economic analysis will invite cynical attack against economic analysis itself.

2. TOWARD OVERCOMING LIMITS

Economic analysis cannot always give the disputing parties the right answer. This just reflects the limited ability of human being to study economic behavior in “extremely complex industrial democratic society.” As Evans and Padilla properly put it, “[i]t is unrealistic to ask economics to provide off-the-shelf guidance for the myriad fact patterns that one encounters in real-life antitrust.”⁴³ But still we need to move towards “sound” economic analysis that can separate procompetitive conducts from the anticompetitive practices.⁴⁴

As far as the disputing parties have a tropism which inclines to condemnation of “dominant firms”⁴⁵ or condemnation of “the big government”⁴⁶ and also “easy solutions for complex problems,”⁴⁷ moreover, if economic analysis cannot be free from errors or manipulations, I think that the slogan “more economic analysis” may turn out to be a dangerous thing which could mislead us: total prohibition of any conducts of dominant firms or no regulation of unilateral practices at all. Surely it does not mean that economic analysis itself is dangerous. Rather, it just

⁴² Id.

⁴³ Evans and Padilla (2005), at 97.

⁴⁴ Cf. id., at 97-98.

⁴⁵ This may lead us to the *per se* illegal rule.

⁴⁶ Under this situation, people may think that the *per se* legal rule is much more plausible than *per se* illegal. In my view, it can go along with Chicago school’s political and philosophical attitude toward antitrust regulation. Though theory and political attitude is different from each other, sometimes it is difficult to separate the latter from the former. Cf. Bork (1978); Posner (2001).

⁴⁷ This could make us prefer the *per se* rule to the rule of reason.

means that economic analysis is no panacea. Of course, it also can be said that legal analysis is not a panacea. I guess this is why Frank Easterbrook supposed “a series of simple filters” instead of complex antitrust analysis.⁴⁸ According to his suggestion, “[e]ach filter should be designed to screen out beneficent conduct and pass only practices that are likely to per se approach the judgment that such screening should be done by category of case rather than one cost of decision by rule is occasional over- and under-breath.”

It seems to me that Easterbrook’s filters can make more type II error in real cases. His argument is that if we cannot avoid both type II error and type I error at the same time, the former is better for us than the latter because “if the court errs by condemning a beneficial practice, the benefits may be lost for good....If the court errs by permitting a deleterious practice...the welfare loss decreases over time.”⁴⁹ and “[j]udicial errors that tolerate baleful practice are self-correcting, while erroneous condemnations are not.”⁵⁰ It seems that Easterbrook’s argument is based on the assumption that “[m]onopoly is self-destructive. Monopoly prices eventually attract entry.”⁵¹ This is very similar to what Justice Scalia opined in *Trinko*:

“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — at least for a short period — is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”⁵²

With regard to Justice Scalia’s opinion above, Robert Pitofsky named it as “an unusually benign view of monopoly power.”⁵³ Harvey Goldschmid commented that Justice Scalia’ view above in *Trinko* seriously undermines the traditional policy underpinnings of Section 2 of the Sherman Act which concerns about “the traditional evils of dominance or monopoly power — excessive price,

⁴⁸ Easterbrook (1984), at 39.

⁴⁹ *Id.*, at 2.

⁵⁰ *Id.*, at 3.

⁵¹ *Id.*, at 2.

⁵² 540 U.S. 398 (2004), at 7.

⁵³ See Pitofsky (2008), at 107.

misallocation of resources, and loss of dynamic efficiency.”⁵⁴ Goldschmid also pointed out that excessive concern about false-positive error has lulled antitrust authorities and courts into a “false sense of complacency about dominant firms.”⁵⁵

If economic analysis is far from 100% perfect, then what can we do with the rule of reason? In my view, the meaning of the word “reason” in “the rule of reason” has nothing to do with the mandatory use of economic analysis. In this sense, it is important to note that the rule of reason should not be confused with economic analysis itself. Even under the rule of reason, we are able to condemn unilateral practice in issue without economic analysis, especially when it is impossible or meaningless to estimate the net effect of unilateral practices.⁵⁶ This approach also should not be confused with the *per se* illegal rule. In a certain situation, the *per se* rule is just another name of the rule of reason which reasonably ignore economic analysis. Of course, the *per se* rule can be condemned when it does not have a reasonable reason to ignore economic analysis. In this sense, the *per se* rule is not always opposite to the rule of reason. At any rate, the rule of reason should not be too complex to use it as judicially manageable standard.⁵⁷

Perhaps, it is beyond our ability to have the only one right answer to the question: “what we can exactly and cannot do with economic analysis in pursuing optimal regulation of unilateral practices?” Answers will be depends on whether and how we can overcome the problems of tropism and manipulation with our bounded rationality.

Precisely because human beings are imperfect, antitrust economics cannot be perfect. Naturally, antitrust rules are imperfect. Maybe it is better to give up seeking optimal regulation. In the real world, we always suffer both over-regulation and under-regulation. Maybe we have to accept it as unpleasant truth. Then we can feel more comfortable to say that there are so many things

⁵⁴ See Goldschmid (2008), at 125.

⁵⁵ *Id.*, at 127.

⁵⁶ Although Milton Handler expected in 1962 that “[t]he rule of reason will be reshaped in order that the law may keep pace with the dynamic growth of our economy and the rapid rate of technological advance,” even in the 21st century, it is still extremely difficult to reshape the rule of reason to properly incorporate the concept of dynamic competition in antitrust regulation of unilateral practices in advanced technology industry. Cf. Handler (1962). at 958; Rubinfeld (2004), at 476-501; Ellig and Lin (2001), at 16-44; Goldon (2002), at 1-23.

⁵⁷ Cf. Hovenkamp (2008), at 118 (“More complex rules are not helpful if they cannot be effectively applied.”)

economic analysis cannot do. On the other hand, regardless of our imperfectness, we may decide to seek optimal regulation. Of course, one may ask that: “even though we already know we can hardly get optimality, why should we pursue that? Isn’t it a waste of time?” However, we need to remind ourselves that today’s affluent society, which ancient cave men never even dreamed or pursued, is the result of the continued intellectual adventure of ancient men. Then why not to continue intellectual adventure toward optimal competition?

V. CONCLUDING REMARKS

[1] Considering the fact that the increasing numbers of antitrust cases involving complex economic issues and the increasing status of economic analysis in antitrust cases, it is natural to say that economic analysis can be the most reasonable criterion in deciding whether a certain unilateral practice should be prohibited or not. In theory, there is no doubt that economic evidence is essential for proper regulation of unilateral practices. In the real world, however, it should be noted that there always exists a possibility of misuse and/or abuse of economic analysis. In particular, abuse of economic analysis will undermine the credibility of economic evidence itself. Once the reliability of economic analysis itself is undermined, it would be extremely difficult to use the economic evidence as the most reasonable criterion for optimal regulation. Then an undesirable political decision can more easily ignore sound economic reasoning, and distort market. In this sense, as far as the problem of misuse and/or abuse cannot be properly solved, it would be hard to say that more economic analysis can guarantee optimal regulation.

[2] Antitrust regulation of unilateral practices of the big firms is not only economic matter but also political one. Top-of-top-level politicians’ mind toward the big business groups and small business greatly affects the direction of KFTC’s antitrust enforcement. This implies that an undesirable political consideration can so easily prevail over sound economic reasoning in antitrust regulation of unilateral practices. From the perspective of public choice, it can be assumed that KFTC has incentive to argue the form-based approach (or the *per se* rule) before courts because this may give KFTC more power to regulate. On the other hand, it can be said that the dominant firms has strong incentive to argue the effects-based approach (or the rule of reason) because this may

give them higher possibility to avoid antitrust regulation. So there always exist a possibility that the dominant firms abuse economic analysis to mislead antitrust enforcer and courts. However, abuse of economic analysis in antitrust litigation is the worst strategy for the dominant firms. If economic evidence submitted by the plaintiff turns out to mislead courts, then judges will not seriously consider the weight of economic evidence itself. Then the dominant firms will miss a good chance to use economic analysis as the most reasonable criterion in antitrust regulation of unilateral practices. Then, consequently, the form-based approach will prevail over the effects-based approach. In this sense, “not abusing economic analysis” seems the best legal strategy for the big firms.

[3] Under the situation in which economic analysis is frequently misused and/or abused, political sentiment is more likely to prevail in antitrust regulation of unilateral practices. From the perspective of public choice, it is not difficult to expect that top-of-top level politicians deal with unilateral practices in such a way as to maximize their own interests. Surely, the big firms have a lot of money which can be used for lobbying. But CEOs of the big firms have just few votes. When ordinary people in small business strongly feel against unilateral practices, politicians have strong incentives to treat harshly the big firms. Because the number of people in small business is quite bigger than that of CEOs in the big firms, it is not surprising that politicians may force antitrust enforcer to prohibit any unilateral practices regardless of economic effect. This consequence cannot be good for both lawyers for the big firms and antitrust enforcer. Until when the political logic turns out to cause a serious harm to our economy and society, we can hardly see the rebirth of economic analysis as the most reasonable criterion for optimal regulation.

Korean history shows that when the liberal party gained the political power, both (i) over-regulation of the big business groups and (ii) type I error are more likely to happen. And when the conservative party gained the political power, both (i) under-regulation and (ii) type II error are more likely to happen. No one can deny that top-of-top level politicians may easily change KFTC’s regulatory policy toward the big business groups. It implies that antitrust regulation of unilateral practices can be also affected by political factors. Surely, this is no good for KFTC, business firms, consumers in the relevant market, and ordinary people’s well-being. Bad news is that it is difficult to expect top-of-top level politicians always respect sound economic reasoning. But Good news is that Korean Supreme Court required sound economic reasoning for KFTC to deal with antitrust matters.

<REFERENCES>

- American Bar Association Section of Antitrust Law (ed.). 2005. *Econometrics: Legal, Practical, and Technical Issues*, National Book Network
- Blair, Roger D. and David L. Kaserman. 2008. *Antitrust Economics*, 2nd ed., Oxford University Press
- Bork, Robert H. 1978. *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, Inc., Publisher
- Buccirossi, Paolo (ed.). 2008. *Handbook of Antitrust Economics*, The MIT Press
- Buchanan, James M. 1987. "The Economizing Element in King's Ethical Critique of Capitalist Order," *Ethics*, 98(1)
- Carlton, Dennis W. 2007. "Market Definition: Use and Abuse," *Competition Policy International*, 3(1)
- Easterbrook, Frank H. 1984. "The Limits of Antitrust," *Tex. L. Rev.*, 63(1)
- Ellig, Jerry (ed.). 2001. *Dynamic Competition and Public Policy*, Cambridge University Press
- Ellig, Jerry and Daniel Lin. 2001. "A Taxonomy of Dynamic Competition Theory," in Ellig (ed.) (2001)
- European Commission Competition DG. 2010. *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Article 101 and 102 TFEU And in Merger Cases (2010)*, available at <http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf>
- Evans, David S. and A. Jorge Padilla. 2005. "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach," 72 *U.Chi.L.Rev* 73
- Friedman, Milton. 1978. "The Methodology of Positive Economics," in Milton Friedman, *Essays in Positive Economics*, University of Chicago Press
- Goldon, Richard L. 2002. *Antitrust Abuse in the New Economy: The Microsoft Case*, Edward Elgar
- Goldschmid, Harvey J. 2008. "Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act," in Robert Pitofsky (ed.) (2008)
- Handler, Milton. 1962. "Some Unsolved Problems of Antitrust," 62 *Colum.L.Rev.* 930
- Handler, Milton. 1963. "What Is Wrong With the Antitrust Laws?" 8 *Antitrust Bull* 567
- Houthakker, Hendrik S. 1999. "Expert Testimony by Economists: What Makes It Effective?" in Slotje (ed.) (1999)

- Hovenkamp, Herbert. 2008. "The Harvard and Chicago Schools and the Dominant Firm," in Robert Pitofsky (ed.) (2008)
- Hutchison, Terence W. 1938. *The Significance and Basic Postulates of Economics*, Macmillian
- Jones, Alison and Brenda Sufirin. 2008. *EC Competition Law*, 3rd ed., Oxford University Press
- Ju, Jinyul. 2008. "How to Deal With Complex Economic Evidence in Korean Antitrust Litigation," 5 *Korean Journal of Law and Economics* 141
- Knight, Frank H. 1922. "The Ethics of Competition," *Quarterly Journal of Economics*, 1
- Knight, Frank H. 1941. "The Significance and Basic Postulates of Economic Theory: A Rejoinder," *The Journal of Political Economy*, 49(5)
- Knight, Frank H. 1951. "The Rôle of Principles in Economics and Politics," *The American Economic Review*, XLI(1)
- Kwoka, John E., Jr. and Lawrence J. White. 2004. *The Antitrust Revolution: Economics, Competition, and Policy*, 4th ed., Oxford University Press
- Pitofsky, Robert (ed.). 2008. *How the Chicago School Overshot the Mark: The Effect of Conservative Economics Analysis on U.S. Antitrust*, Oxford University Press
- Posner, Richard. 2001. *Antitrust Law*, 2nd. ed., The University of Chicago Press
- Rubinfeld, Daniel L. 2008. "On the Foundations of Antitrust Law and Economics," in Robert Pitofsky (ed.) (2008)
- Rubinfeld, Daniel L. 2004. "Maintenance of Monopoly: U.S. v. Microsoft(2001)," in John E. Kwoka, Jr. and Lawrence J. White (2004)
- Samuelson, Paul. 1947. *Foundations of Economic Analysis*, Harvard University Press
- Schmalensee, Richard. 1987. "Horizontal Merger Policy: Problems and Changes," *Economic Perspectives*, 1(2)
- Schmalensee, Richard. 2008. "Thoughts on the Chicago Legacy in U.S. Antitrust," in Robert Pitofsky (ed.) (2008)
- Scherer, F.M. 2008. "Conservative Economics and Antitrust: A Variety of Influences," in Robert Pitofsky (ed.) (2008)
- Slotje, Daniel J. (ed.). 1999. *The Role of The Academic Economist in Litigation Support*, Elsevier

Taylor, O.H. 1957. "Frank Knight's Perspective "On the History and Method of Economics"," *The Review of Economics and Statistics*, 39(3)

Winston, Michael D. 2006. *Lectures on Antitrust Economics*, The MIT Press

Wick, Warner. 1973. "Frank Kight, Philosopher at Large," *The Journal of Political Economy*, 81(3)