경북대학교 법학연구원『법학논고』
제62집 (2018.07) 303~326면.
Kyungpook Natl. Univ. Law Journal
Vol.62 (Jul 2018) pp.303~326.

Competition Law of Exploitative Abuse*

- The *MEO* Case in the EU and Implications for Korea -

경쟁법에서의 착취남용에 관한 연구

- 비교법적 방법을 중심으로 -

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〈국문초록〉

경쟁법(competition law)에서의 시장지배적 지위의 남용 금지는 일반적으로 배제남용과 착취남용의 금지를 포함한다. 배제남용은 거래거절, 끼워팔기, 리베이트와 같이 시장지배적 지위의 사업자가 시장에서의 다른 사업자를 배제하는 활동을 포함하는 반면, 착취남용은 부당염매(혹은 약탈적 가격: predatory pricing)를 제외한 가격남용(excessive pricing)을 중심으로 가격차별(price discrimination)과 같이 차별하는 내용의 시장지배적 사업자의 행위를 말한다. 특히 가격남용과 차별남용을 포함하는 착취남용 관련 법리는 유럽연합을 중심으로 발전하고 있다. 2018년 4월에는 가격차별과 관련하여 유럽법원의 MEO판결이 있었는데, 법원은 단순한 경쟁적 불이익(competitive disadvantage)을 주는 것이 경쟁을 왜곡(distortion of competition)하는 것은 아니라고 판시하였다. 유럽법원은 MEO판결에서 2017년의 인텔 판결을 인용하여, 유럽에서는 배제남용 뿐만 아니라 착취남용에서도 경제 분석이 필요한 것으로 보고 있다. MEO판결은 우리나라를 포함하여 유럽경쟁법을 참고하고 있는 아시아 경쟁법에 영향을 줄 수 있다. 따라서 이 논문은 경쟁법에서의 착취남용 일반을 포함하여, 유럽경쟁법의 판례 발전을 중심으로 비교법적 방법으로 착취남용에 대한 최근 논의에 대해서 연구하는 것을 목적으로 한다.

주제어 : 경쟁법, 유럽연합, 시장지배적 지위 남용, 착취 남용, 가격차별

• 투고일 : 2018.06.30. / 심사일 : 2018.07.20. / 게재확정일 : 2018.07.22.

* This work was supported by the Hankuk University of Foreign Studies Research Fund of 2018.

** 법학박사. 한국외국어대학교 Language & Diplomacy학부 부교수.

I. Introduction

Social and political backgrounds frequently influence the shape of a competition regime, which indicates distinctive diversity in competition law philosophy across its borders. We can, however, observe a significant level of convergence in the substantive provisions of competition law, which come from the increasing globalisation of economies. For example, there are notable differences in the competition rules on abuse of market dominance (or monopolisation) between the EU and the US. In the EU, the concept of abuse covers both exclusionary and exploitative abuses,[1] such as excessive (or high) prices and discriminatory prices or conditions.[2] In the US, however, it is hard to find a competition law violation relating to pricing abuse because American judges believe that a high or excessive price induces more competition, thereby improving competition in the market.[3]

On the contrary, the EU has adopted a rule against exploitation of market-dominant undertakings, thereby prohibiting unfair pricing; although there have been very few unfair pricing cases in the EU.[4] In sum, the EU competition regime categorises exploitative abuse as charging excessive prices or unfair contractual terms and conditions while the US Clayton Act outlaws only price discrimination;[5] thus, there is a distinguished concept of

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1) 'Exploitative abuse' refers to a business conduct that is unfair or unreasonable to certain economic entities. See Vivien Rose and David Bailey, *European Union Law of Competition* (7th edn, Oxford Univ. Press, Oxford 2013), p. 791.

2) 'Excessive pricing' can be understood as unlawful and unfair where an undertaking with a market-dominant position sets prices that do not have any reasonable relation to the 'economic value' of the product or service in question; 'discriminatory pricing' brings anti-competitive concerns where a market-dominant undertaking charges dissimilar prices for similar products or services to different customers. See Sandra Marco Colino, *Competition Law of the EU and UK* (7th edn, Oxford Univ. Press, New York 2011), p. 304.

3) E.g., Andrew I. Gavil, 'Secondary line price discrimination and the fate of *Morton Salt*: To save it, let it go', *Emory Law Journal*, Vol. 48, No. 4, 1999, pp. 1057-1136; Daniel J. Gifford and Robert T. Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy* (Chicago Univ. Press, Chicago 2015), p. 65. See also Ohseung Kwon and Jung Seo, *[Anti-monopoly Law]* (2nd edn, Beobmunsa, Paju 2017), p. 154.

4) Gunnar Niels, Helen Jenkins, and James Kavanagh, *Economics for Competition Lawyers* (2nd edn, Oxford Univ. Press, New York 2017), p. 222.

fair competition in the EU, and fair competition may be interpreted as fair to competition or efficiency.[6] Interestingly, the public often seems to believe this notion protects competitors.

In particular, this European approach has affected developing countries in Asia, and Korea is no exception. Korea adopted competition law in 1980 through the Monopoly Regulation and Fair Trade Act (MRFTA),[7] and developed legal techniques in adopting its policy promoting vigorous enforcement. The MRFTA, similar to EU competition law, contains a provision on unfair pricing. This means that the Korean competition regime shares the ideology of fair competition with the EU. In effect, most transitional economies, especially in Asia, often face large conglomerates that bring socio-political problems, causing developing countries to favour wide interpretation of fair competition in the EU for restricting exploitation by large firms.[8]

Therefore, the competition agencies in the EU and Korea, the European Commission (hereinafter the Commission) and the Korea Fair Trade Commission (KFTC), respectively, have implemented competition rules on abuse of market dominance with regard to excessive pricing and price discrimination. However, they often fail to prove anti-competitive harms through this type of business conduct because it is difficult to prove its

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5) Section 2 Clayton Act, amended by the Robinson-Patman Act. See also Douglas Broder, *US Antitrust Law and Enforcement: A Practice Introduction* (3rd edn, Oxford Univ. Press, New York 2016), pp. 22-23; Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics* (Oxford Univ. Press, Oxford 2012), p. 269. However, the US antitrust regime has shown its decline of enforcing the Robinson-Patman Act. See e.g., Rudolf J. Peritz, 'The predicament of antitrust jurisprudence: Economics and the monopolization of price discrimination agreement', *Duke Law Journal*, Vol. 1984, 1984, p. 1292; Roger van den Bergh, *Comparative Competition Law and Economics* (Edward Elgar, Cheltenham and Northampton 2017), p. 354.

6) Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing, Oxford and Portland 2012), p. 79.

7) Korean Law No. 15612, amended 17 April 2018.

8) See e.g., Barry E. Hawk, 'Article 82 and Section 2: Abuse and Monopolizing Conduct' in ABA, *Issues in Competition Law and Policy* (ABA Publishing, Chicago 2008), p. 871. For further discussions on the goals of Korean competition law, see also Youngsoo Shin, 'Reconsideration on the Purpose of the Monopoly Regulation and Fair Trade Act', *Kyungpook National University Law Review*, Vol. 37, 2011, pp. 367-400.

negative effects on consumers or its ability to distort competition.[9] In particular, a case in the EU, i.e., *MEO*,[10] involving price discrimination was recently issued; this case law would provide clearer guidance to the competition authorities and economic entities in Europe, thereby helping them better understand the meaning of exploitation through assessing the concept of a competitive disadvantage in competition law.

The *MEO* case has become useful in apprehending the trend of EU competition law and its future implications in other competition regimes because the *MEO* judgment confirmed the more-effects-based approach, as discussed in the *Intel* case.[11] In other words, it is necessary to adopt economic principles when assessing all varieties of abuse-of-market-dominance cases, which allows the US-type rule of reason. This consequently confirms the answer to difficult enquiries about fair competition. Modern competition regimes need to acknowledge the role of economic assessment, resulting in abandoning *per se* abuse or 'object-type' abuse.[12] This may globally affect competition law. In particular, it appears that the *MEO* case would influence the approach in the intellectual property field.

The Korean competition regime has followed the formalistic approach, which is an old-fashioned, form-based method from the EU, but both European agencies and courts have shifted toward the more-effects-based approaches through modernisation efforts.[13] Therefore, it is timely to

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9) See e.g., Yo Sop Choi, 'Competition Law Enforcement on Excessive Pricing: Comparative Perspectives', *Ilkam Law Review*, Vol. 21, 2012, p. 645.

10) Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, ECLI:EU:C:2018:270.

11) Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632.

12) The EU competition rule on anti-competitive agreements includes the concept of object or effect prevention of competition. In particular, the object type agreement falls within the hard-core restrictions. However, the expression of object-type abuse does not mean the courts need to examine intent of undertakings in its unilateral conduct. For a comparison with the Korean approach, see Myungsoo Hong, ['An analysis on the element of intent in the assessment of violation of competition law'], Report of LEG (2013), p. 157 et seq.

13) However, some argue that the recent trend towards more-effects-based approach is not suitable for assessing unfair pricing. See David Howarth, 'Unfair and Predatory Pricing under Article 82 EC: From Cost-price Comparisons to the Search for Strategic Standards' in Giuliano Amato and Claus-Dieter Ehlermann (eds), *EC Competition*

discuss recent developments in the EU, focusing on *MEO* and other relevant cases like *Intel*, because this discussion may help the Korean competition authorities and courts better understand the concept of competitive disadvantage in the market when they face complex issues on exploitative abuse. This article consists of four sections, including the Introduction. Section II explains the substantive provision of abuses of market dominance relating to exploitation from a comparative perspective. This section focuses on the meaning of fair competition. Section III discusses the *MEO* case, demonstrating its development in adopting economic appraisals in unilateral cases. It further provides suggestions for the Korean competition regime by debating the issue of improving consumer welfare. Lastly, Section IV summarises and concludes this article.

II. The Competition Rule of Exploitative Abuse from a Comparative Perspective

1. A comparative discussion on the concept of exploitation in competition law

Historically, our modern society has been concerned about harm from exploitation by large firms. Raising a price from a market power has been seen as a classic social harm by a monopolist,[14] namely 'a monopoly rent'.[15] 'Market power' also indicates a monopolist's ability to gain profits by increasing prices above the competitive market price.[16] Adam Smith asserted that the monopoly price is the highest while the competitive price

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Law: A Critical Assessment (Hart Publishing, Oxford and Portland 2007), p. 249. For further detail, see also Wolf Sauter, *Coherence in EU Competition Law* (Oxford Univ. Press, New York 2016), p. 42 et seq.

14) Cosmo Graham, *EU and UK Competition Law* (2nd edn, Pearson, Harlow 2013), p. 141.

15) Barry J. Rodger and Angus MacCulloch, *Competition Law and Policy in the EU and UK* (5th edn, Routledge, Oxon and New York 2015), p. 108.

16) See e.g., Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard Univ. Press, Cambridge MA 2005), p. 95.

is the lowest.[17] His statement presented a monopolist's harm to consumers by exploiting their welfare.[18] Furthermore, commentators have explained that monopolists often try to categorise prices through various methods, and this type of practice may reduce consumer welfare.[19] Where an undertaking can practise persistent price discrimination, it may thus prove the existence of market power.[20]

In addition, the EU has clarified its objective of a "highly competitive social market economy" as prescribed in Article 3(3) of the Treaty on the European Union (TEU).[21] The idea of social market economy is based on ordoliberalism,[22] which has developed the imposition of 'special responsibility' on a business with a market-dominant position;[23] this is the so-called "native European abuse control approach".[24] Furthermore, this notion influenced the implementation of the rule on exploitation and discrimination in Article 102 of the Treaty on the Functioning of the European Union (TFEU), prohibiting abuse of market dominance. Therefore, the EU competition authorities are concerned about excessive pricing of large undertakings, but there is no clear "standard formula by which excessive pricing may be identified".[25]

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17) Adam Smith, *Wealth of Nations* (first published 1776, Oxford Univ. Press, New York 2008), p. 60.

18) Consumer injury is one of the important criteria for concluding a violation of price discrimination law. See e.g., Herbert Hovenkamp, 'Market Power and Secondary-Line Differential Pricing', *Georgetown Law Journal*, Vol. 71, 1983, p. 1158.

19) Lawrence A. Sullivan, et al., *The Law of Antitrust: An Integrated Handbook* (3rd edn, West Academic, St. Paul 2016), pp. 61-62.

20) See e.g., Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and It's Practice* (3rd edn, West Academic, St. Paul 2016), p. 767.

21) See Alison Jones and Brenda Sufrin, *EU Competition Law* (6th edn, Oxford Univ. Press, New York 2016), p. 32.

22) Commentators explain that ordoliberalism is based on the pursue for improving 'moralistic and humane values by fusing economic and legal understanding into a comprehensive account of a just and liberal social order'. See Daniel Crane and Herbert Hovenkamp, *The Making of Competition Policy: Legal and Economic Sources* (Oxford Univ. Press, New York 2013), pp. 252-253.

23) Case 322/81, *Michelin I* [1983] ECR 3461; see also Jones and Sufrin, op cit, p. 357.

24) Stephen Martin, 'The Goals of Antitrust and Competition Policy' in ABA, *Issues in Competition Law and Policy* (ABA Publishing, Chicago 2008), p. 22.

25) Marco Colino, op cit, p. 315.

Article 102 TFEU provides a list of prohibited abuses and does not spell out that it is an exhaustive list. For example, Article 102(a) widely covers all type of exploitative abuse by stating unfair prices and trading conditions; Article 102(b) encompasses all exclusionary abuses; Article 102(c) broadly covers discriminatory abuses; and Article 102(d) deals with tying and bundling.[26] Importantly, the settled case law of the Court of Justice of the European Union (CJEU) has confirmed that the goal of Article 102 is to protect consumers directly or indirectly from exploitative and exclusionary abuses.[27] There were numerous cases relating to excessive pricing in the EU, but the CJEU held that it is crucial to provide evidentiary proof excessive pricing, considering its "economic value".[28] In contrast, some commentators criticise that the standard of proof for the competitive disadvantage in Article 102(c) is lower than that for exclusionary abuses.[29] However, this approach was eventually revised in the *MEO* case, which is further discussed in Section III.

The MRFTA also contains an analogous provision in Article 3-2, with its prohibition of abuses of market dominance; it also broadly covers both exclusionary and exploitative abuses. In particular, Article 2-3(1)(2) and (5) MRFTA prohibit unfair restrictions on outputs and impeding consumer interests. Similar to the case law relating to discrimination under Article 102(c) TFEU,[30] the Korean case law of exploitation is often confusingly implemented as criticised in the *T-Broad Gangseo Broadcasting* case.[31] In that case, the Supreme Court of Korea held that the undertaking's practice had resulted in disadvantages on a certain firm, but it would not generate anti-competitive outcomes. This holding implied that a simple disadvantage does amount to exploitation in violation of Article 3-2, which seems to be

26) Jones and Sufrin, op cit, p. 354.
27) Ibid, p. 355.
28) Case 27/76, *United Brands v. Commission* [1978] ECR 207.
29) Jones and Sufrin, op cit, p. 560.
30) For the implementation of Article 102(c) TFEU, the Commission needs to satisfy 3 conditions: (i) dissimilar conditions, (ii) equivalent transactions, and (iii) a competitive disadvantage. See Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge Univ. Press, Cambridge 2010), p. 105.
31) Supreme Court of Korea, Judgment 2007Du25183, 11 December 2008.

in line with the EU's *MEO* judgment.

However, there are existing differences between the two competition regimes as follows. First, the MRFTA provides Article 23, prohibiting unfair business practices, and this broadly covers almost all types of unfair conduct. Moreover, the application of Article 23 overlaps with unilateral conduct under Article 3-2. Among others, the spin-off legislation of fair competition from Article 23, such as franchise, large-scale distribution, or subcontract areas, has a stringent and formalistic provision. This black-list provision often includes exploitative abuses like unfairly fixing consideration in subcontracting, which easily leads to a violation.[32] The recent case law on fixing consideration in subcontracting has amended the formalistic approach,[33] but this provision is still considered a straitjacket-type or quasi-*per se* illegal approach, because the KFTC need not prove anti-competitive effects; the existence of a unilateral decision in the process of the agreement and unfair consideration in subcontracting is sufficient.

Second, the law of exploitation in Korea does not seem to influence the area of exclusionary abuse or other fields, such as intellectual property. Nevertheless, recent case law development in the EU as shown in *Intel* and *MEO* demonstrate the heavy burden of anti-competitive effects of exclusionary or exploitative abuse. Additionally, many believe that the recent EU cases will affect the appraisals in the Article 102 TFEU cases relating to Standard Essential Patent (SEP) and its Fair, Reasonable, and Non-Discriminatory (FRAND) conditions. In other words, the two cases of *Intel* and *MEO* would confirm the economic principles for the assessment of unilateral conduct, even in FRAND cases, because FRAND is related to issues of discrimination and exploitation.[34] In sum, the *MEO* case has become influential in the EU, and may eventually affect other competition

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32) See e.g., Yo Sop Choi, 'The Korean Fair Trade Law Relating to the Subcontracting Field: A Critical Review on the Prevention of 'Fixing Unreasonable Consideration', *Hongik Law Review*, Vol. 19, 2018, pp. 451-471.

33) Supreme Court of Korea Judgment 2016Du35540, 7 December 2017.

34) See e.g., Korea University ICR Center Report, ['Recent Case Law Development in the EU: Article 102(c) TFEU and MEO'] (2 May 2018), available at http://www.icr.re.kr/publication2 (last visited 21 July 2018).

regimes in the world.

2. Competition law for fairness: A comparative study

As discussed earlier, there is no robust formula for assessing excessive pricing. The only way to determine excessive pricing is to measure the economic value[35] of the product or transaction in question and the market entry barrier.[36] Due to intrinsic difficulties, the Commission often applies Article 102 TFEU to excessive pricing by a market-dominant undertaking, where its conduct also relates to exclusionary abuse.[37] The Commission has been concerned about an exploitative abuse where it is a *de facto* discriminatory abuse.[38] The most recent case of pure excessive pricing discussed by the Commission was *Port of Helsingborg*.[39] In this case, the Commission appeared to rely on the CJEU's judgment on *United Brand Chiquita* (UBC);[40] the Commission decided that economic value could not be concluded by adding more costs to the product's profit margin[41] that would be "a predetermined percentage of the production costs".[42]

This decision demonstrates a practical difficulty in collecting sufficient evidence to determine that a market-dominant undertaking charges excessive pricing.[43] Strictly speaking, it is not easy to find a real indicator explaining an exact economic value of goods because the competition

35) The first test of economic value was discussed in Case 26/75, *General Motors Continental v. Commission* [1975] ECR 1367.

36) Marco Colino, op cit, p. 315; Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3rd edn, Oxford Univ. Press, New York 2014), p. 513.

37) Marco Colino, op cit, p. 315.

38) Pablo Ibanez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 *Common Market Law Review*, p. 145.

39) Cases COMP/A.36.570/D3 [2006] 4 CMLR 22, COMP/A.36.568/D3 [2006] 4 CMLR 23, 23 July 2004.

40) Case 27/76, *United Brands v. Commission* [1978] ECR 207.

41) Commentators often discuss the importance of calculating profit margin for determining whether the price is unfair. See Pinar Akman and Luke Garrod, 'When are excessive prices unfair?', *Journal of Competition Law & Economics*, Vol. 7, No. 2, 2011, p. 416.

42) Helsingborg, para. 199; see also Marco Colino, op cit, pp. 317-318.

43) Marco Colino, op cit, p. 318.

agency needs to rely on a hypothetical market price from perfect competition.[44] Furthermore, having a market-dominant position is not *per se* illegal, and imposing a burden of avoiding excessive pricing may influence firms' incentives to reduce costs and investment for innovation. In addition, some assert that excessive prices induce more competition by attracting entrants;[45] the market is thus self-correcting.[46] This argument has been confirmed in the US courts, where US antitrust lawyers believe that the mere possession of monopoly power and the charges of monopoly pricing are lawful and are considered to be a crucial factor of the 'free-market system'.[47]

In effect, several cases of pure excessive pricing have been recently discussed in a number of EU Member States. For instance, the UK's Competition Appeal Tribunal (CAT) quashed fines on two pharmaceutical undertakings, Pfizer and Flynn, for their price increase of 2,600% because the UK Competition and Markets Authority (CMA) had failed to identify "a benchmark price or price range" that would be essential for examining the "conditions of normal and sufficiently effective competition".[48] A similar conclusion was also made in South Africa.[49] This case law highlights the

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44) Rodger and MacCulloch, op cit, p. 109.

45) Giorgio Monti, *EC Competition Law* (Cambridge Univ. Press, New York 2007), pp. 218-219.

46) There are some disagreements on this assertion. See e.g., Ariel Ezrachi and David Gilo, 'Are excessive prices really self-correcting?', *Journal of Competition Law & Economics*, Vol. 5, No. 2, 2008, pp. 249-268.

47) *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 US 398, 124 S.Ct. 872, 157 L.Ed2d 823 (2004); for a comparison with the US, see also Eleanor M. Fox and Damien Gerard, *EU Competition Law: Cases, Texts and Context* (Edward Elgar, Cheltenham and Northampton 2017), p. 171.

48) Tatiana Siakka, "Squire Patton Boggs: UK Competition Appeal Tribunal Quashes Fines in First Pure Excessive Pricing Case" (14 June 2018), available at https://www.lexology.com/library/detail.aspx?g=2dd6f1d6-3aab-428d-b467-15010f24ee4f&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=lexology+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2018-06-20&utm_term= (last visited 21 June 2018).

49) The court of South Africa discussed the importance of a profitability analysis in an excessive pricing case. See Claudio Calcagno and Mike Walker, 'Excessive Pricing: Towards Clarity and Economic Coherence', *Journal of Competition Law & Economics*, Vol. 6, No. 4, 2010, p. 908.

burden of proof relating to exploitative abuses.

Likewise, it is timely to discuss the complex issue of unfair pricing and the concept of competitive disadvantage. Many countries, including Korea, have established pricing regulatory frameworks in a number of network and utility sectors for several reasons.[50] In this case, governments often establish a regulatory system of *ex ante* price control.[51] Among other factors, consumer welfare or efficiency lies at the heart of price regulation in these industries. Except in this case it seems that excessive intervention of pricing in the process of competition may harm consumer welfare in the long run. If we excessively emphasise fairness in the market for protecting competitors, it would harm the competitive process, thereby reducing consumer welfare. In other words, unclear standards of examining unfair pricing may bring more confusion in the market.[52]

Therefore, it is necessary to examine whether the market in question is characterised by high fixed costs and low marginal costs.[53] In this case, imposing pressures on undertakings to commit the rule on excessive pricing may result in notable profit losses when they cannot recover the costs due to the high level of market intervention.[54] Consumer welfare, then, should play an important role by examining anti-competitive effects from exploitation because consumer interest should be interpreted as an ultimate goal of competition law in Korea.[55] Critics also argue that a plaintiff should

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50) Niels, et al., op cit, p. 222.

51) Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford Univ. Press, New York 2015), p. 761.

52) Some assert that the concept of fairness is vagrant because unequal bargaining power may often lead to the conclusion of unfair economic behaviour. See Phillip Areeda, et al., *Antitrust Analysis: Problems, Text, and Cases* (7th edn, Wolters Kluwer, New York 2013), p. 22.

53) The cost-plus formula or price comparison formula is the most acceptable test for unfair pricing. See Mark Furse, 'Excessive prices, unfair prices and economic value: The law of excessive pricing under Article 82 EC and the Chapter II Prohibition', *European Competition Journal*, Vol. 4, No. 1, 2008, pp. 80-81.

54) Geradin, et al., op cit, p. 270.

55) Youngdae Lee and Kyoungkyu Choi, ['A discussion on the practice of harming consumer interests as one of the abuses of market dominance'], Discussion at the Law and Economics Group Papers (8 June, 2012), p. 105 (on file with author).

prove that a business practice of imposing unreasonable disadvantage on its rivals at least harms competition to establish a violation of competition la w.[56] Therefore, the current assessments on excessive pricing in several competition regimes above can be considered as the more-effects-based approaches.

Ⅲ. Recent Development of the Rule of Exploitative Abuse: *Intel* and *MEO*

1. European case law: The interpretation of competitive disadvantage

The *MEO* case involves price discrimination that is an exploitative abuse. In the *MEO* case, a television broadcaster complained that GDA, a collecting society, had abused its market position by charging a higher royalty for audio-visual content than its rival in the market; but the Portuguese competition agency decided that the different royalty rate had not brought any anti-competitive concerns. *MEO* did not accept this decision and brought the case in front of the Portuguese competition court, and the court referred enquiries to the CJEU, which is the preliminary reference.[57] In this case, GDA provided a three-tariff wholesale offering which was imposing different tariffs on numerous undertakings between 2010 and 2013, providing the paid TV signal transmission service and content.[58]

The CJEU held that it was necessary to find that GDA's practice had been discriminatory and that it had tended to distort competition.[59] It then

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56) John Harkrider, 'Proving Anticompetitive Effect' in ABA, *Issues in Competition Law and Policy* (ABA Publishing, Chicago 2008), p. 829.

57) For the case detail, see Jennifer Boudet, et al., 'EU Court's Analysis of "Competitive Disadvantage" in Rare Price Discrimination Case', Covington Competition (23 April 2018), available at https://www.covcompetition.com/2018/04/eu-courts-analysis - of-competitive-disadvantage-in-rare-price-discrimination-case/ (last visited 4 June 2018).

58) *MEO*, para. 8.

59) *MEO*, para. 25.

concluded that a mere practice of immediate competitive disadvantage does not amount to distortion of competition.[60] Therefore, the competition agency and court needed to examine all circumstances of the discriminatory practice.[61] In sum, the CJEU held that a violation of Article 102(c) requires "an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interests of one or more of those partners".[62] In fact, the CJEU confirmed this rationale in the *Intel* judgment[63] by providing an analogous approach.[64] The *Intel* case held that "the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors".[65] This presents the increasing role of economic analysis in the competition courts, demonstrating notable convergence between law and economics.[66]

There is no doubt that the preliminary ruling of the CJEU on *MEO* has become a landmark case for a number of reasons. First, the CJEU affirmed that price discrimination is not a *per se* abuse.[67] Second, the *MEO* judgment confirms its focus on anti-competitive effect (distortion of competition) in the assessment of Article 102, as shown in *Intel*. This judgment is echoed in *Intel*;[68] namely, a withdrawal from a stringent formalistic approach.[69] Third, the *MEO* ruling may offer some important

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60) *MEO*, para. 26.
61) *MEO*, para. 31.
62) *MEO*, para. 37.
63) Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632, para. 139.
64) Jakob Dewispelaere, 'The *MEO* ruling: applying Intel to discriminatory pricing' (25 April 2018), available at http://competitionlawblog.kluwercompetitionlaw.com/2018/04/25/*MEO*-ruling-applying-intel-discriminatory-pricing/ (7 June 2018).
65) *MEO*, para. 31.
66) T. Randolph Beard, David L. Kaserman, and Michael L. Stern, 'Price discrimination and secondary-line competitive injury: The law versus the economics', *Antitrust Bulletin*, Vol. 53, No. 1, 2008, p. 75.
67) Boudet, et al., op cit.
68) Daniel Mandrescu, 'Price discrimination and abuse of dominance - *MEO* Case C-525/16' (1 May 2018), available at http://coreblog.lexxion.eu/price-discrimination-and-abuse-of-dominance-*MEO*-case-c-525-16/ (last visited 8 June 2018).
69) IP-Portal, 'CJEU on the concept of "competitive disadvantage" point c, second paragraph of Article 102 of the TFEU' (25 April 2018), available at https://www.ippt.eu

guidance on the enquiry about FRAND and SEP licences because the *MEO* case was about charging different royalties.[70] This argument may lead to the issue of research and development (R&D) costs and profit margins in the SEP case in considering implementing the rule on exploitative abuse.[71]

Before the *MEO* judgment, the General Court (GC) in the *Clearstream* case clarified the meaning of a competitive disadvantage, which is the practice of hindering "the competitive position of some of the business partners of that undertaking in relation to the others … [leading] to a distortion of competition".[72] The GC dismissed the undertaking's application for annulment of the Commission decision, but it confirmed the relationship between competitive disadvantage and distortion of competition. Hence, EU case law has confirmed that the principle of the effects-based approach to abuse of market dominance can be applied not only in assessing exclusionary abuse, as discussed in *Intel*, but also exploitative abuse, as shown in *MEO*. Therefore, the case law of Article 102 has brought administrative costs for economic analysis.

As discussed in the previous section, despite existing resistance to convergence relating to the competition rules on unilateral conduct among countries,[73] we can observe notable convergence in the analyses of pricing abuses across the Atlantic. This may help us understand the trend of approaches to exploitative abuse. In sum, the competition authorities and courts need to examine distortion of competition in all kinds of abusive conduct.

/items/ippt20180419-cjeu-MEO-v-autoridade-da-concorrencia (last visited 7 June 2018).

70) Pat Treacy, Stephen Smith, and Matthew Hunt, 'The CJEU guidance in *MEO* on price discrimination in licensing may also impact FRAND/SEP licences' (25 April 2018), available at https://www.lexology.com/library/detail.aspx?g=9c267e92-6025-4dd4-9bf4-f097b2c8d0a4 (7 June 2018).

71) Some argue that this assertion, however, fails to consider several problems as follows: (i) calculating R&D cost is not practically easy; (ii) setting a cap on the profit-margin in IP would penalise the efforts of investment; (iii) continuous high margin is hardly observable; and (iv) the profit-margin of market dominant firm does not itself abuse. See Geradin, et al., op cit, 257-258.

72) Case T-301/04, *Clearstream Banking AG v Commission* [2009] ECR II-3155, 191-193. For further detail, see Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (5th edn, Hart Publishing, Oxford and Portland 2016), p. 242.

73) Hawk, op cit, p. 872.

2. Some implications for Korea: The future of competition law and policy

There are discussions on whether the *MEO* judgment provides important guidance for assessing FRAND royalties during the licensing negotiation because the case dealt with fair prices, and may be interpreted broadly.[74] Some commentators have argued that this judgment may provide broad implications in the FRAND context. This case may thus become essential in interpreting FRAND since discriminatory pricing among licensees is still controversial. In effect, the Commission has confirmed that SEP holders should not discriminate against licensees who are similarly situated under FRAND commitments. However, it has not clarified the requirements of proof for an Article 102 violation, such as whether it is sufficient to prove distortion of competition between the similarly situated implementers or certain harm to a licensee rather than harm to competition.[75]

In the *MEO* case, the CJEU confirmed that price discrimination is a violation of Article 102 TFEU where the discrimination leads to a distortion of competition. Some assert that the Court's conclusion may provide guidance about the scope of charging different royalties to similarly situated licensees without infringing on FRAND commitments, unless it distorts competition.[76] In particular, the developed case law relating to excessive pricing, especially of *UBC* or *Helsingborg*, is not very helpful or useful in identifying excessive pricing or appropriate levels of royalty fees.[77] The mere statements of the product's economic value in *UBC* and of "exceptional circumstances" in *Huawei*[78] do not articulate a criterion of

74) Avantika Chowdhury, 'Discrimination or differentiation? Price discrimination as an abuse of dominance', OXERA (May 2018), available at https://www.oxera.com/Latest-Thinking/Agenda/2018/Price-discrimination-how-much-is-too-much.aspx (last visited 4 June 2018).
75) See Treacy, et al., op cit.
76) Id.
77) See e.g., Monti, op cit, p. 219.
78) Case C-170/13, *Huawei Technologies Co. Ltd. v. ZTE Corp and ZTE Deutschland GmbH*, ECLI:EU:C:2015:477.

excessive pricing or discriminatory abuse.

Nonetheless, the European case law seems to establish a clearer standard for assessing abuse of market dominance. The competition rule on exploitative abuse, including excessive pricing, may be used as protection against a targeted small and medium-sized enterprise (SME) or competitor, which impedes the competitive process. The concept of promoting economic freedom often relates to the idea of fairness that leads to a strong argument for protecting SME.[79] Nevertheless, protection of SME or certain undertakings may harm consumer welfare when it merely imposes an obligation to charge a reasonable price without economic consideration. In effect, a more-effects-based approach to exploitative abuse should focus on consumer welfare[80] because this may eliminate possible confusion between the two arguments: protection of competitor(s) or competition.[81]

Therefore, the competition authorities and courts need to focus on improving consumer welfare by appraising a possible distortion of competition from the abuse in concern.[82] The traditional two-prong test on examining excessive pricing may then be relevant; a comparison of the cost and price of production and a determination of excessive pricing itself, or by comparing the price with those of the rivals.[83] As discussed in Section II, it is also possible to calculate the profit margin in excessive pricing, but it should be used for assessing the market entry barrier or market power[84] because establishing the standard of what amounts to excessive profit-margin is not easy.[85]

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79) Joanna Goyder and Albertina Albors-Llorens, *EC Competition Law* (5th edn, Oxford Univ. Press, New York 2009), p. 10.

80) See e.g., Gormsen, op cit, p. 110.

81) See e.g., Federico Etro and Ioannis Kokkoris, 'Toward An Economic Approach to Article 102 TFEU' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (Oxford Univ. Press, New York 2010), p. 8.

82) Some argue that the total welfare of price discrimination is ambiguous. See Mark Armstrong and John Vickers, 'Price Discrimination, Competition and Regulation', *Journal of Industrial Economics*, Vol. 41, No. 4, 1993, p. 355.

83) Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge Univ. Press, New York 2013), p. 222.

84) Niels, et al., op cit, p. 232.

85) Geradin, et al., op cit, p. 274.

In addition, regarding FRAND, several competition regimes have struggled to establish concrete criteria for determining whether discriminatory royalty fees violate competition law. In particular, the KFTC issued its decision on Qualcomm for an infringement of FRAND commitment.[86] The KFTC asserted that Qualcomm had coerced mobile phone businesses to accept unfair licensing terms and conditions. The market-dominant undertaking further refused to license its competitors by avoiding its FRAND terms. Accordingly, the KFTC concluded that Qualcomm's practices had constituted abuse of market dominance under Article 3-2 MRFTA.

It is too early to conclude the exact implication of the *MEO* case on FRAND because the CJEU did not discuss whether its interpretation of competitive disadvantage in Article 102(c) TFEU can be applicable to FRAND or excessive pricing. Moreover, the *MEO* case did not involve FRAND terms, which does not include the exceptional circumstances in the EU case law like *Huawei*.[87] However, one may argue that the *MEO* judgment is likely to affect development in the assessment of FRAND cases. To date, many believe that, where the exploitative abuse at issue is not anti-competitive,[88] the business practice does not constitute an abuse under competition law. Therefore, it appears that identifying the borderline between the appropriate rewards of SEP as the result of R&D investment for innovation or dynamic efficiency and the unlawful use of market power through exploitative abuse has become essential;[89] the *ex post* reward from R&D efforts by charging high fees encourages *ex ante* investment in innovation.[90] In consideration of this specific issue, it is necessary to examine the scope of discrimination in FRAND commitments. At that same time, we need to admit that the problem of assessment cost of analysing profit margins in excessive pricing (or FRAND) is a difficult subject.

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86) KFTC Decision No. 2017-025, 2015Sigam2118, 20 January 2017.
87) Case C-170/13, *Huawei,* ECLI:EU:C:2015:477.
88) Faull and Nikpay, op cit, p. 512.
89) See e.g., Rose and Bailey, op cit, pp. 815-816 & 818-819.
90) Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing, Oxford and Portland 2013), p. 238.

Ⅳ. Concluding Remarks

The topic of necessary and appropriate governmental power to regulate competition has long been one of the critical issues around the world. In particular, it seems almost impossible to have a single opinion about this issue when it involves exploitative abuse. There are divergent views on the concept of exploitative abuse and competitive disadvantage. However, the EU has issued a landmark judgment on price discrimination, and this case can offer some guidance to Korea when the KFTC implements the analogous provision on discriminatory abuse. In particular, the KFTC needs to understand that the concept of 'fair competition' is not equal to 'exploitative abuse'. Fair competition does not require consumer welfare, while the assessment of exploitative abuse demands the proof of harm to the consumer.[91]

In particular, the idea of enhancing consumer welfare through preventing distortion of competition should play a key role of competition law enforcement. With regard to unfair pricing, one needs to consider the practical meaning of consumer interests from public enforcement because governmental intervention of a competition authority is regulatory by its very nature. The public authorities should also admit that there are practical difficulties in ascertaining whether price-setting by a market-dominant undertaking is sufficiently excessive to be designated as unfair,[92] which imposes a duty of proving the economic value of the product or service at issue.[93] In other words, it is not an easy task to determine whether price discrimination is "a desirable response to competition", resulting in efficiency.[94]

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91) Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford Univ. Press, New York 2011), p. 276.

92) For example, before the modernisation in the late 2000s, many criticised that the EU competition authority's approach to pricing had not provided legal certainty and had not accepted economic principles. See Peter Oliver, 'The Concept of "Abuse" of a Dominant Position under Article 82 EC: Recent Developments in Relation to Pricing', *European Competition Journal*, Vol. 1, 2005, p. 337.

93) Albertina Albors-Llorens and Alison Jones, 'The Images of the "Consumer" in EU Competition Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing, Oxford and Portland 2018), pp. 73-74.

Some assert that competition law itself is one of the most complex and technical fields of law,[95] which highlights the difficulties in assessing the negative and positive effects of a business conduct of concern. In fact, the recent *Qualcomm* case in Korea and the *MEO* case in the EU have brought interesting questions for competition law: can discriminatory and excessive pricing be an abuse under competition law? As critics argue, exclusionary (anti-competitive) effect is a necessary condition for determining a violation of exploitative abuse.[96]

In conclusion, the idea of fair competition for fair pricing in the EU has helped establish rationale for prohibiting unfair pricing and discriminatory abuse. The settled case law in the EU, such as *Intel* and *MEO*, demonstrate the meaning of the more-effects-based approach in the assessment of an abuse,[97] which has resulted in a pro-economic principle. The EU case law demonstrates that a mere competitive disadvantage cannot be an abuse, and its recent development relating to exploitative abuse can be an important inference, which may influence the Korean competition regime. It hints at why a mere disadvantage does not mean a distortion of competition as discussed from the *MEO* test. Without eliminating an ambiguous indicator of fair competition against exploitative abuse, it is impossible to establish a sound competition law system.[98] Korean case law provides little guidance in determining exploitative abuse, and the recent EU cases provide some implications for Korea.

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94) Edward H. Cooper, 'Price Discrimination Law and Economic Efficiency', *Michigan Law Review*, Vol. 75, 1977, p. 969. In contrast, some argue that price discrimination does not provide efficient outcomes. See also Aaron Edlin, et al., 'Is perfect price discrimination really efficient? Welfare and existence in general equilibrium', *Econometrica*, Vol. 66, No. 4, 1998, pp. 897-922.

95) Goyder and Albors-Llorens, op cit, p. 3.

96) See e.g., Akman, op cit, p. 307 et seq.

97) Pablo Ibanez Colomo, 'The Future of Article 102 TFEU after Intel', *Journal of European Competition Law & Practice*, Vol. 9, 2018, p. 293.

98) Hawk, op cit, p. 873.

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[Abstract]

Competition Law of Exploitative Abuse*
- The *MEO* Case in the EU and Implications for Korea -

Choi, Yo-Sop**

Competition rules on abuses of a market-dominant position prohibit both exclusionary and exploitative abuses. In particular, exploitative abuses widely include business conducts of pricing abuses like excessive pricing and price discrimination. In effect, most competition regimes, such as of Korea, the EU, and the US, are concerned more about exclusionary abuses than exploitative abuses. Among others, the legal techniques and theories of exploitative abuses have developed mainly in the EU. However, it is also true that the number of exploitative abuses is not noteworthy in the EU because the European courts have established a significant burden of proof regarding exploitative abuses, especially in excessive pricing. In particular, the CJEU issued a landmark judgment on MEO in April 2018, and many believe that this case will influence the case law development across the border. The MEO Court held that a mere practice of imposing a competitive disadvantage does not conclude distortion of competition. This appears that it is necessary to consider economic analyses in the assessments of Article 102 TFEU cases of both exclusionary and exploitative abuses. The European more-effects-based approaches may affect the competition regimes in the developing world including Korea.

Keywords : competition law, European Union, abuse of market dominance, exploitative abuse, price discrimination

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* This work was supported by the Hankuk University of Foreign Studies Research Fund of 2018.

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translations of the Korean works in brackets […] are author's own and unofficial.