The Private Competition Enforcement Review

Fifth Edition

Editor

Ilene Knable Gotts

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For further information please email
Adam.Sargent@lbresearch.com

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CONTENTS

EDITOR'S PREFACE

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties.The process imposes high litigation costs (both in time and money) on all participants and promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs has created an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near future, particularly involving intellectual property rights and cartels.

The United States has not been alone, however, in having a long established private litigation history. Brazil, for example, has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly/market closure claims since the 1950s. Nonetheless, Brazil – as well as many of the other jurisdictions discussed in this book – has seen an increasing role for private antitrust litigation in the past few years. In addition, other jurisdictions have more recently initiated private litigation regimes (for instance, Israel and Poland) as a complement to increased public antitrust enforcement. In some jurisdictions (e.g., Lithuania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In some of these jurisdictions, legislation is pending that would potentially provide a greater role for private enforcement (e.g., Norway and Switzerland). Many jurisdictions still have very rigid requirements for 'standing', which limits the types of

cases that can be initiated (e.g., Switzerland). Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled. In other jurisdictions, the interface between leniency programmes (and cartel investigations) and private litigation is still evolving; in these jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable. Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants (e.g., Hungary).

The European Union remains in a state of flux. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions […]. The model is based on compensation through single damages for the harm suffered.' The key recommendations included collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia entered into a new round of consultations and may combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress, a mechanism that is highly controversial in Europe. It is not clear whether the policy review being undertaken will conclude any time soon. The EU has also issued a report regarding quantifying damages.

Even in the absence of the issuance of final EU guidelines, the Member States throughout the European Union have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these jurisdictions have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages.

Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions are not available except to organisations formed to represent consumer members. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition

Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland).

The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pre-trial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction appears to be to acknowledge that private antitrust enforcement has a role to play. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also only recently has a derivative shareholder action been filed. In other jurisdictions, the transformation has been more rapid. During the past year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the past year alone, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect purchaser claims (e.g., Korea).

Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified.

Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to proposed legislative changes. The one constant across all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
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Chapter 17

KOREA

Sai Ree Yun, Kum Ju Son, In Seon Choi and Seung Hyuck Han[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

During the past year, a large number of consumers brought a joint private action for damages against an alleged oil cartel formed by four Korean oil refinery companies. In another case, a local confectionery company successfully brought a private action for damages against a wheat flour cartel. There have also been private actions against a sugar cartel, a school uniform cartel, a credit card VAN (value added network) cartel, a subway-construction bid-rigging cartel, and a condominium cartel.

Until recently, the Korea Fair Trade Commission ('the KFTC') was primarily responsible for enforcing competition law in Korea. Private parties rarely brought suit for competition law violations. Private enforcement actions, however, have seen a dramatic increase. Such increase may be attributed to better awareness of the availability of damages claims on the part of the general public. The increase in joint private actions may be the result of developments in technology and media that have allowed for information-sharing and efficient communication among putative private plaintiffs. Statutory and regulatory amendments have also facilitated increased private enforcement activity; for example, the 2004 amendments to the Monopoly Regulation and Fair Trade Act ('the MRFTA') encouraged private litigation by abolishing the requirement that the KFTC's corrective measure must be finalised before a private plaintiff can bring suit for antitrust damages under the MRFTA.

Prior to these widespread private enforcement activities for competition law violations, civil suits for competition law violations were considered essentially the same as tort law claims; thus, claims for damages for competition law violations were brought as civil claims under the Korean Civil Act. Although this option is still available to

1 Sai Ree Yun and Kum Ju Son are partners, and In Seon Choi and Seung Hyuck Han are associates at Yulchon LLC.

plaintiffs, the MRFTA provides an alternative basis for damages claims – specifically for competition law violations – that is being increasingly utilised. The primary reason may be that, while the absence of extensive discovery under Korean law makes it difficult for plaintiffs to prove the basic elements, such as intent, negligence or causation, required for typical tort claims under the Korean Civil Act, the MRFTA does not require yet allows the courts in private antitrust actions to base their findings on decisions of the KFTC.

Furthermore, the amended MRFTA has also introduced a provision that alleviates the plaintiff's burden of demonstrating the amount of damages arising from competition law violations. By allowing the courts to estimate damages taking into account the result of evidentiary investigations and the content of the pleadings, the provision makes private damages claims much more feasible than before.

The Korean courts have issued several major decisions on private enforcement, including opinions in a lawsuit against petroleum companies in Korea for bid rigging in supplying fuel to the Korean military. In December 2009, the Seoul High Court ordered each of the five petroleum companies to pay damages related to the above-mentioned bid rigging. On 28 July 2011, however, the Korean Supreme Court reversed the High Court decision by holding that the plaintiff's method of damages calculation was incorrect and remanded the case to the High Court.[2] The Supreme Court decision is significant in that it is the first case in Korea in which the Supreme Court issued a detailed opinion on the appropriate method of damages calculation in private enforcement actions arising from a cartel. Another recent case involved private individuals who suffered economic injuries from a wheat flour cartel. After filing a lawsuit, they successfully recovered damages.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

In Korea, claims for damages arising from competition law violations are considered equivalent to civil claims for damages arising from tort violations. Thus, a private litigant may elect to bring civil suit in the applicable district court to seek damages for a violation of either Article 56 of the MRFTA or Article 750 of the Civil Act.

Article 56 of the MRFTA provides as follows:

> *If an enterprise or an enterpriser's organization violates the provisions of this Act, and thereby gives a person any damage, he/she or it shall be liable for compensation of such damage to the person: Provided, that the same shall not apply where the enterpriser or the enterpriser's organization verified that he/she or it violates the provision of this Act without any deliberation or any negligence.*

Article 750 of the Korean Civil Act provides as follows:

> *Any person who causes losses to or inflicts injuries on another person by an unlawful act, wilfully or negligently, shall be bound to make compensation for damages arising therefrom.*

2 Supreme Court (July 2011, 2010Da18850).

Because a damages claim based on a MRFTA violation could only be brought after the KFTC's corrective measure had become final, resorting to tort actions under the Korean Civil Act had been the preferred course of action; however, amendments to the MRFTA removed such restrictions. As a result, the majority view in Korea is that the right of claim under the MRFTA and the right of claim under the Civil Act can co-exist with each other. In practice, most actions refer to both grounds as the basis of their actions.

The advantage of bringing actions under the MRFTA is that the victim does not need to prove the intent or negligence of the defendant, whereas with tort claims based on the Korean Civil Act, the plaintiff needs to prove these elements. Claims for damages pursuant to Article 56 of the MRFTA may only be brought against 'enterprises' and not private individuals. Claims under the Korean Civil Act, however, have no such restrictions, as can be seen from the above quotation.

To date, however, recourse to private relief has been limited in practice due to difficulties in calculating damages and in establishing causation between an antitrust violation and injury. Article 57 of the MRFTA provides for recognition of amounts of damage, discussed in detail in Section VIII, *infra*. The statute of limitations for damages claims pursuant to competition law violations is the earlier of either three years from the date on which the injured party became aware of the violation or 10 years from the date on which the violation occurred. Recently, a dispute has arisen on the issue of exactly when the statute of limitations begins to run. Possible starting points include (1) the date of the KFTC's announcement of its post-hearing decision in press release form, which often predates the date of a formal opinion by a month or two; (2) the date of the KFTC's adoption of its formal opinion; (3) the date of the KFTC's public disclosure of the formal opinion on its official website; and (4) the date of a final judicial decision upon an appeal of the KFTC's decision. It remains to be seen how the courts will address this issue.

III EXTRATERRITORIALITY

Article 2-2 of the MRFTA applies to any activity that takes place overseas if the activity has an effect on the domestic market. As such, the MRFTA applies to all conduct that affects the Korean market, regardless of whether the conduct took place within the Korean territory. In this case, an 'effect on the domestic market' is considered to exist not only when goods and services are supplied by entities participating in a cartel within Korea, but also when there is no actual presence of such entity in Korea and the relevant goods and services are imported from abroad into the Korean market, or even when Korean consumers purchase directly from foreign entities.

When a cartel-related activity is determined as having an effect on the Korean market, the KFTC has the authority and the jurisdiction to investigate the matter. When a foreign competition authority investigates possible cartel activity, however, the KFTC would have no interest in such investigation unless it affects the Korean market.

As an actual example, in the vitamins cartel consisting entirely of foreign entities, it was determined that the cartel had an effect on the Korean market, regardless of where the conduct took place, and the KFTC imposed administrative fines and corrective

orders. Thus, if there is cartel activity that has occurred outside Korea, but such activity is determined as having an effect on the Korean market, the possibility of the KFTC's imposing administrative fines or corrective orders may not be precluded, even if it is determined that no cartel activity took place in Korea.

IV STANDING

Under the Korean Civil Procedure Act, anyone claiming to have suffered injury from competition law violations has adequate standing to bring a claim. Thus, anyone, including competitors or end users that do not have direct dealings with offenders, is able to bring claims for damages. If, on review, it is determined that a basis for the claim does not exist, the claim will be dismissed.

On the other hand, as the MRFTA states that enterprises or organisations in violation of competition law and consequently causing damage to another party will be liable, only enterprises or enterprise organisations may become defendants in an MRTFA case. Thus, even when the violation is carried out by an individual employee of an enterprise, a claim against such individual cannot be brought under the MRFTA.

V THE PROCESS OF DISCOVERY

Despite the lack of formal provisions for discovery under the relevant laws of Korea, the general court procedures provided under the Korean Civil Procedure Act require the presiding judge to assign the relevant parties with obligations to submit relevant materials. In practice, plaintiffs who do not have sufficient information to support the case often take advantage of the document production request system.

It is also the case that the MRFTA requires the KFTC to submit its records on the case when ordered by a court by stating as follows:

> *Article 56-2 (Transmission of Records)*
> *Where a lawsuit for liability for damages is instituted under Article 56, the court may request the Fair Trade Commission to transmit the records of the particular case (including protocols and stenographic records of examination of persons concerned, references and expert witnesses, or all judicial evidence).*

Moreover, with respect to the documents submitted pursuant to a leniency application in a cartel case, the KFTC and its officials may provide these documents to other parties not related to the case at hand if 'it is necessary to file and conduct, etc. the legal suits related to the relevant case':

> *Article 22-2 (Reduction, Exemption, etc. for Voluntary Reporters, etc.)*
> *(2) The Fair Trade Commission and public officials under its control shall net supply or divulge information and data related to voluntary reporting or giving report, such as the identity, detail of information, etc. of the persons who have filed the voluntary report or cooperated except for the cases prescribed by Presidential Decree, such as the cases, etc. necessary for the execution of litigation.*

Enforcement Decree to the MRFTA Article 35(2)
Cases where the identity of those who voluntarily report or cooperate in an investigation, details of reporting, and other matters concerning reporting may be divulged to a third party under Article 22-2(2) of the Act shall fall under any of the following subparagraphs:
1. Where those who voluntarily report consent to provide the information concerned;
2. Where the information is necessary to file a lawsuit related to the case concerned, and implement thereof, etc.

Thus, for cases previously investigated by the KFTC, essentially the same evidence that the KFTC utilised may be used by private plaintiffs against the parties in private enforcement actions.

In December 2011, Korea amended the MRFTA by adopting the consent order system. A respondent in a KFTC investigation may enter into a consent order with the KFTC to resolve the matter by agreeing to refrain from the alleged anti-competitive conduct and to make restitution. However, the consent order procedure is not applicable to cartel activities listed under Article 19-1 of the MRFTA. In addition, certain other practices that are objectively anti-competitive and have a significant adverse effect are not eligible for the consent order procedure. For those matters that are eligible for consent order treatment, respondents are not admitting any wrongdoing by entering into a consent order with the KFTC. Thus, as is also the case in the United States, the existence of a KFTC consent order does not constitute *prima facie* evidence of a violation in follow-on private actions in Korea.

VI USE OF EXPERTS

The use of experts in competition law violations mainly concerns assessment of damages rather than establishing violations; this is based on the fact that most private enforcement actions for competition law violations are brought after disposition by the KFTC. As such, the main issue at trial is the scope of damages to a particular plaintiff and assessment of specific damages amounts, as violations are generally considered to have been shown by the KFTC during administrative proceedings.

The use of experts in private enforcement proceedings may be by plaintiffs, defendants or the courts. Although plaintiffs and defendants are free to submit economic analysis or otherwise have experts provide their opinions, the court may also appoint its own expert to provide economic analysis, as was the case in the military petroleum cartel case. The courts are free to determine whether to accept or deny analyses submitted to the court as evidence. Even when economic experts are appointed directly by courts, the courts are not bound to use the information provided by such experts. In reviewing the military petroleum cartel, the Seoul High Court rejected the economic analysis submitted by the defence and by its own appointed expert, and instead chose to accept the analysis of the plaintiffs' expert. Although the Supreme Court later held that the method of calculation of damages chosen by the Seoul High Court was wrong, the Supreme Court did not rule out the Court's ability to independently examine and make a decision on the amount of damages.

In July 2010, the KFTC issued the Guideline on the Submission of Economic Analysis Evidence. The purpose of the Guideline is to promote the use of objective and reliable economic analysis in determining violations and also provide clear standards to enhance credibility in competition enforcement.

VII CLASS ACTIONS

Class actions are not recognised under Korean law. However, there may be multiple parties to a single lawsuit. Therefore, where the rights or liabilities forming the object of a lawsuit are common to many parties, or are generated by the same factual or legal causes, these may join in the lawsuit as co-litigants.[3] The same also applies where the rights or liabilities forming the object of a lawsuit are of the same type, or are generated by the same sort of factual or legal causes.[4]

Although class actions are not allowed in Korea and individual private actions have tended to be against local companies, the increasing number of private actions in Korea indicates the long-term potential for private enforcement of competition law against international anti-competitive activity. Korea is seeking to expand the implementation and enforcement of its antitrust laws and will likely continue to develop effective private remedies in the Korean market so that Korean consumers need not rely on the laws of other countries for compensation, as well as deterring foreign anti-competitive conduct.

Recently, oil consumers filed an action against oil companies for allegedly forming a cartel to set the price of LPG and other types of oil. The case is currently before the trial court, and we understand that there are thousands of plaintiffs. There are also several actions with enormous amounts at stake ongoing based on several cartel cases, including the credit card VAN cartel, subway construction bid rigging, and condominium price-fixing cartel. Moreover, although not as frequent as cartel cases, there also have been a few private actions following the KFTC's investigations of unfair trade practices in general, including a private action in which dozens of film investors and producers sued theatre operators for the latter's unfair trade practices.

The Consumer Protection Act[5] allows actions through which consumer protection groups are able to bring collective actions on behalf of consumers with similar interests. The provision only applies, however, to actions initiated by representative organisations such as consumer organisations or non-profit entities that meet the qualifications prescribed. Despite its limitations, such regulatory mechanism provides a starting point for group actions by entities that have the knowledge and expertise required to bring a claim on behalf of those that have suffered harm. These consumer actions should also prove useful in cases where the wider public has been harmed by infringers.

3 Section 65 of the Korean Civil Procedure Act.

4 Ibid.

5 Article 70 of the Consumer Protection Act.

VIII CALCULATING DAMAGES

Treble damages or other types of punitive award are not recognised under Korean competition law. The Korean courts tend to adopt the approach established by the Supreme Court, where damages in private enforcement actions should be equivalent to 'the difference between the economic status of the plaintiff absent the defendant's violation and the current status resulting from the defendant's violation.'[6]

i Calculation of damages

Calculation of damages in private actions for cartels is generally assessed based on the difference between the price fixed through the cartel and the price that would have prevailed in the absence of cartel activity.[7] If it is difficult to establish a competitive price, the MRFTA provides a basis for the courts to recognise damages despite such limitations by stating as follows:

> *Article 57 (Recognition of Damages Amount)*
> *Where it is recognised that damages is caused by the act of violating the provisions of this Act, but it is extremely difficult to verify the fact that is necessary to determine the amount of such damage in light of the character of the fact, the court may recognise a reasonable amount of damage based on the gist of entire arguments and the outcome of investigating evidence.*

In the same vein, the courts have also tended to protect parties that are the victims of cartel activities by stating that 'negation of damages by cartelists on the basis of inability to provide concrete proof of amount of damages will not be accepted.'[8] Despite having established that damages cannot be calculated based on assumptions or that price increases due to factors unrelated to the cartel should not be included in any calculation of damages, the courts recognise that proving exact damages may be difficult and thus find it sufficient to show analytical calculations based on reasonable methods.

As for the methods of calculation of damages, there are several methods currently under discussion, including the before-and-after method, the yardstick/benchmarking method and the difference-in-difference method. It is in the court's discretion to select which method would be the most appropriate. The Korean courts in the past not only used the relatively simple yardstick/benchmarking method but also sometimes relied on the more complex economic theory-based methods such as the difference-in-difference method.[9] Moreover, the Supreme Court in the military petroleum cartel case held that the yardstick/benchmarking method selected by the trial court was not an appropriate method in that particular situation. In response to the trial court's reference to Singapore as the yardstick for the calculation of competitive price and amount of damages, the Supreme Court held that the Singapore market is not similar to the Korean market,

6 Supreme Court (June 1992, 91Da33070).

7 Seoul Central District Court (May, 2009, 2006Gahap99567).

8 Seoul High Court (December 2009, 2007Na25157).

9 Seoul Central District Court (January 2007, 2001Gahap10682); and Seoul Central District Court (May 2009, 2006Gahap99567).

as the latter is subject to oligopoly, and thus a simple comparison with the Singapore market is not appropriate.[10]

Calculation of damages from exclusionary conduct such as refusal to deal may be derived from profits that may have been realised during the relevant terms absent the refusal to deal. In a previous case, the Seoul High Court assessed damages based on the average monthly operating profits prior to termination of the transaction.[11] In a case where the plaintiff mitigated damages by transacting with a third party after termination, the profit realised in the new transaction was deducted from assessment of damages.[12]

ii Limitations on damages

The Korean Civil Act takes contributory negligence into account when calculating damages. In the event of any negligence on the part of the damaged party, the court is required to take such negligence into account in determining the scope of liability and assessing the amount of damages.[13] It has also been recognised by the courts that the injured party has a general duty to limit damages resulting from the violation.[14] In a case regarding bid rigging by suppliers of vaccines to local clinics, the Seoul High Court, while recognising the damages caused to the plaintiffs by the actions of the cartel, also noted that the bids were submitted at identical prices for an extended duration. Negligence of the plaintiffs' failure to adequately enquire into the situation was recognised, and as a result, the amount of damages to be paid to the plaintiffs was reduced by 50 per cent.[15]

In the meantime, the principle of offset of profits and losses under the Civil Act is fully applicable. Under this principle, where the injured party received not only losses but also profits from any illegal conduct, the amount of profits shall be deducted from the calculation of damages. Nevertheless, the Supreme Court held that where the state is an injured party of a cartel, this principle is not applicable with respect to the administrative fine imposed and paid by the offender – in other words, such administrative fine is not deducted from the calculation of damages.[16]

iii Lawyers' fees

Lawyers' fees, although recognised, are limited to a prescribed amount and are in principle borne by the losing party.

IX PASS-ON DEFENCES

Pass-on defences or indirect claims are not clearly established in competition law violations in Korea. Academic discussions, however, are leaning towards the recognition of indirect

10 Supreme Court (July 2011, 2010Da18850).

11 Seoul High Court (June 2006, 2001Na54832).

12 Daejeon High Court (July 1998, 98Na268).

13 Articles 396 and 763 of the Korean Civil Act.

14 Supreme Court (July 2003, 2003Da22912).

15 Seoul High Court (May 1998, 97Na4465).

16 Supreme Court (July 2011, 2010Da18850).

claims under the Korean legal system as well as recognising the necessity for pass-on defences in competition law violations, based on the general theory of compensation for actual damage under Korean law. It is notable that the currently ongoing private actions arising from the oil cartel case and the credit card VAN cartel case are indirect claims.

In a recent wheat flour cartel case, the Seoul Central District Court took into account the amount of damages passed on to indirect purchasers. Despite rejecting the defence's argument for a pass-on defence on the basis that 'the excess price resulting from the cartel was already determinative of losses incurred by the direct purchasers' and that 'recoupment of losses through increase in price does not affect the calculation of damages', the court recognised it may take into consideration whether damages had been passed on, the extent to which they had been passed on and possibility of double payment through claims by indirect purchasers.[17]

X FOLLOW-ON LITIGATION

Prior to the 2004 amendment of the MRFTA, plaintiffs were required to wait until finalisation of corrective measures by the KFTC before bringing a claim for competition law violations; in addition, the defendant was not allowed to invoke any defence in civil court proceedings. However, the amended MRFTA has abolished such requirement and the plaintiff is free to bring a claim for damages at any time, even during investigation of the case by the KFTC.

If the KFTC proceedings have been finalised for the relevant case, the court is not bound by any facts as determined by the KFTC, but such findings may be presumed by the courts in practice.[18]

As the administrative proceedings and civil claims for violation of law are considered to be independent from one another, any administrative fines imposed on the defendants do not affect any damages to be paid to plaintiffs.[19] It is also noteworthy that in a recent case, the plaintiffs in private actions sought to intervene in an administrative appeal case, which was filed by the defendants of the relevant private actions seeking to overturn the KFTC's sanctions, as a supplementary party for the purpose of securing the materials and information helpful to their private actions. However, the Seoul High Court disallowed the intervention attempt by such parties based on the reasoning that the plaintiffs in the private actions do not have sufficient legal interest in the outcome of administrative appeal cases, especially given that the MRFTA amendment of 2004 allowed the private action to proceed without the final judicial determination of the KFTC's sanctions.[20]

17 Seoul Central District Court (April 2009, 2006Gahap995657).

18 Supreme Court (April 1999, 89Gakha29075).

19 Seoul High Court (December 2009, 2007Na25157).

20 Seoul High Court (June 2011, 2010Nu32084).

XI PRIVILEGE

Despite the topic of the attorney–client privilege being addressed in the Korean Criminal Procedures, it has not been formally recognised in civil cases by statute or code under Korean law. However, the right to legal counsel is a constitutional right in Korea,[21] and the attorney–client privilege is considered to exist along the lines of this constitutional right, as confidentiality in communication with an attorney is essential to receiving effective legal counsel.

Documents submitted to the KFTC are considered confidential and may not be provided to others by the KFTC. However, as explained above, Article 56-2 of the MRFTA requires the KFTC to produce records in the event of a court order.

Moreover, as described above, Article 22-2(2) of the MRFTA and Article 35(2) of the Enforcement Decree of the MRFTA permit the provision of leniency-related documents if they are necessary for the relevant lawsuits.

These disclosure requirements under certain circumstance may deter potential leniency applicants from coming forward. There are ongoing discussions to exempt leniency applicants from such court-ordered disclosure requirements.

XII SETTLEMENT PROCEDURES

Should the parties agree to resolve a dispute through mutual concessions, the Korean Civil Act allows such a compromise.[22] In addition, the Korean Civil Procedure Act allows a court, commissioned judge or entrusted judge to render an *ex officio* ruling recommending a compromise in order to settle a case.[23] Pursuant to this authority, a court may recommend a settlement without full litigation, also taking into account the parties' interests and surrounding circumstances.

XIII ARBITRATION

An arbitration clause in the agreement or contract among the parties would require courts to dismiss a claim should it be filed with them.[24] The Arbitration Act also provides that arbitral awards have the same effect on the parties as the final and conclusive judgment of the court.[25]

In the absence of an arbitration clause, the Judicial Conciliation of Civil Disputes Act allows the parties to a civil dispute to file an application for mediation with the courts.[26] Although mediation through such procedures has the same effect as a settlement

21 Article 12.4 of the Constitution.

22 Article 732 of the Korean Civil Act.

23 Article 225 of the Korean Civil Procedure Act.

24 Article 9 of the Arbitration Act.

25 Article 35 of the Arbitration Act.

26 Article 2 of the Judicial Conciliation of Civil Disputes Act.

in court, a party may also file an objection against the rendered decision, which would start civil proceedings against the other party.[27]

XIV INDEMNIFICATION AND CONTRIBUTION

Contributions from co-defendants are recognised by the Korean Civil Act, under which a joint violation of competition law would be considered a joint tort for which each tortfeasor is to be held jointly and severally liable for the entire damage.[28] Compensation for damages by a single defendant in its entire amount would eliminate liability against other co-defendants. The defendant that paid the entire damages may seek contributions from the co-defendants for the excess amount.[29]

XV FUTURE DEVELOPMENTS AND OUTLOOK

Private enforcement has become more prevalent as an enforcement mechanism for competition law violations in Korea. Generally, plaintiffs tend to wait for decisions to be issued by the KFTC for MRFTA violations – especially in cartel cases – before initiating civil litigation. In addition to claims for monetary damages, there are discussions to permit injunctive relief actions to prevent continuing or recurring harm. However, it remains to be seen whether any legislation providing injunctive relief actions will get enough support in the National Assembly. Major cases, such as claims for damages in the school uniform case, the sugar cartel, oil companies cartel, credit card VAN cartel, and condominium cartel, remain pending. Decisions in those major cases are likely to determine the direction of private competition enforcement in Korea with regard to important issues such as indirect claims, causation and experts' methods for calculating damages.

27 Article 36 of the Judicial Conciliation of Civil Disputes Act.

28 Article 760 of the Korean Civil Act.

29 Supreme Court (June 1992, 91Da33070).

Appendix 1

ABOUT THE AUTHORS

SAI REE YUN

Yulchon LLC

Sai Ree Yun is one of Yulchon's founding partners and is recognised as a pioneer in Korean antitrust law. He has handled a wide range of antitrust matters before the Korea Fair Trade Commission, in court and in private transactions. Mr Yun represented the winning parties in three groundbreaking antitrust cases: *AMD v. Intel*; *RealNetworks v. Microsoft*; and various IT companies in the case against Qualcomm. He also successfully represented Hyundai Motors in its acquisition of Kia Motors (the largest automotive industry acquisition in Korean history), and KTF in its merger with KT, the largest telecommunications industry merger in Korean history.

Mr Yun serves as the vice president of the Korea Competition Law Society, director of the Korea Competition Forum and has acted as a non-governmental adviser to the International Competition Network since its establishment. Frequently recognised for his antitrust work, Mr Yun lectures and speaks at many conferences and institutions.

Mr Yun holds LLB and LLM degrees from Seoul National University, an LLM from Harvard Law School and a JD from the University of California, Hastings College of Law. He is admitted to practise in Korea and the United States.

KUM JU SON

Yulchon LLC

Kum Ju Son is a partner at Yulchon who practises primarily in the areas of antitrust, broadcasting and telecommunications, general corporate matters and litigation. Mr Son successfully advised on alleged unfair concerted activities between the major oil companies, five beverage companies, the credit card companies, Qualcomm's abuse of market dominance and other antitrust matters before the Korea Fair Trade Commission, in court and in private transactions. He also advises the Korea Communications Commission as outside counsel on all corporate-related matters.

Prior to joining Yulchon, Mr Son served as a judge for eight years where he presided over civil, criminal and administrative cases.

Mr Son graduated from Seoul National University in 1995 and completed training at the JRTI in 2001. He completed his LLM at Seoul National University in 2008. Mr Son has also studied abroad; he completed an intellectual property research course at Waseda Graduate Law School in Japan and was a visiting scholar at the North Carolina State University School of Law.

IN SEON CHOI

Yulchon LLC

In Seon Choi is an associate at Yulchon who practises primarily in the areas of antitrust law, health care and general corporate matters. Ms Choi successfully assisted various clients in many cartel cases including the KFTC's global cartel investigation in the air cargo industry, and also advised on many alleged cartel activities between the major oil companies, the credit card companies and the construction companies in Korea.

She received an LLB from Korea University and completed training at the JRTI in 2008. She is admitted to practise in Korea.

SEUNG HYUCK HAN

Yulchon LLC

Seung Hyuck Han is an associate at Yulchon who practises primarily in the areas of antitrust law and telecommunications and broadcasting. Before joining Yulchon in 2007, Mr Han was a judge advocate for the Korean Army.

Mr Han received an LLB from Seoul National University and is admitted to practise in Korea.

YULCHON LLC

Textile Center 12F
944-31 Daechi 2-dong, Gangnam-gu
Seoul 135-713
Korea
Tel: +82 2 528 5200
Fax: +82 2 528 5228
mail@yulchon.com
www.yulchon.com