The Cartels and Leniency Review

Third Edition

Editor
Christine A Varney

Law Business Research

The Cartels and Leniency Review

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This article was first published in The Cartels and Leniency Review - Edition 3
(published in January 2015 – editor Christine Varney).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-35-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

A&L GOODBODY

ALLEN & OVERY LLP

ANDERSON MŌRI & TOMOTSUNE

ANTITRUST ADVISORY LLC

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COMPETITION COMMISSION OF MAURITIUS

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EDITOR'S PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part due to US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 34 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the third edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

Christine A Varney
Cravath, Swaine & Moore LLP
New York
January 2015

Chapter 19

KOREA

Sai Ree Yun, Cecil Saehoon Chung, Kyoung Yeon Kim and Seung Hyuck Han[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The Monopoly Regulation and Fair Trade Act (MRFTA) is the primary Korean competition statute. It was enacted on 31 December 1980 and became effective on 1 April 1981. The MRFTA prohibits conduct that is generally prohibited in other countries, including cartel activities, abuse of dominance, and anti-competitive mergers and acquisitions. The Enforcement Decree of the MRFTA (the Enforcement Decree) is a presidential decree setting forth specific standards and procedures to enforce the MRFTA.

The Korea Fair Trade Commission (KFTC), established pursuant to Article 35 of the MRFTA, is the primary competition enforcement agency in Korea. The KFTC possesses quasi-judicial as well as investigative authority. As such, it investigates alleged violations of the MRFTA and imposes sanctions, including fines and corrective orders, on violators. In addition, the KFTC also exercises quasi-legislative authority by issuing notifications and guidelines. While the KFTC does not have the authority to impose criminal sanctions, it may refer cases to the Prosecutor's Office for criminal proceedings.

Cartel enforcement has been one of the KFTC's enforcement priorities since its establishment in 1981. Article 19 of the MRFTA prohibits improper concerted activity (i.e., cartels). Specifically, Article 19(1) of the MRFTA prohibits businesses and individuals from agreeing with one another to unfairly restrain competition or from

1 Sai Ree Yun is the managing partner, Cecil Saehoon Chung is vice chair of the antitrust practice group and head of international antitrust, and Kyoung Yeon Kim and Seung Hyuck Han are partners at Yulchon LLC. The authors wish to thank Tae Yong Kim, foreign legal counsel at Yulchon, for his valuable assistance.

requiring others to engage in such collusion. Article 19(1) of the MRFTA expressly prohibits nine types of concerted activities:

a price-fixing agreements;
b agreements on transaction conditions;
c output restriction agreements;
d market allocation agreements;
e agreements that restrain or interfere with the establishment of facilities or equipment used to produce goods or to provide services;
f agreements that restrict certain types or specifications of goods or services;
g the establishment of a company to carry out concerted sales practices;
h bid-rigging agreements; and
i other agreements that restrain or interfere with business practices.

To date, the KFTC has issued six notifications regarding concerted activities. The most important are the Concerted Activity Review Guidelines and the Notification on Implementation of a Leniency Programme. These two notifications establish the general principles and procedures concerning the evaluation of concerted activities and the treatment of leniency applicants.

As the implementation of cartel activities has become more sophisticated in response to heightened cartel enforcement, it has likewise become increasingly difficult to prove the existence of an agreement – the most critical element of improper concerted activity. Thus, in the absence of direct evidence, the KFTC at one point resorted to Article 19(5)'s legal presumption to challenge parallel conduct. After suffering several setbacks in court, however, the KFTC has shied away from relying on this provision. Instead, recently, the KFTC has treated parallel conduct as strong circumstantial evidence of collusion as part of its *prima facie* case, rather than relying on the Article 19(5) presumption.

In its Concerted Activity Review Guidelines, the KFTC provides a more detailed explanation regarding the presumption of an agreement. Specifically, the Guidelines state that the following non-exhaustive list of conduct constitutes circumstantial evidence that may be used to presume the existence of an agreement:

a evidence, whether direct or indirect, that supports exchange of information or intent between businesses, including similar entries in business logs, parallel conduct subsequent to meetings or other communications between competitors, and the presence of competitors' confidential information in a company's internal reports;
b when certain conduct is beneficial to businesses only through concerted activity or, if engaged in individually, can only be deemed to go against the benefit of the individual businesses, including cases where prices are raised simultaneously despite the absence of an increase in raw material cost, excessive supply, reduced demand or an inventory build-up;
c when certain competitors' parallel conduct cannot be explained by the market situation, such as when the degree of pricing change is the same for the competitors even when their respective demand or supply conditions, geographic locations and raw material costs are different, or when, without concerted activity, prices cannot be raised to such a high level within a short period; and

d when suppliers engage in parallel conduct despite market circumstances that make it difficult for the suppliers to engage in parallel conduct, such as in markets with differentiated products, low transaction frequency and consumers with professional knowledge.

II COOPERATION WITH OTHER JURISDICTIONS

Article 36-2 of the MRFTA provides the statutory basis of cooperation between Korea and other countries for competition enforcement. Under Article 36-2(1), the Korean government may enter into an agreement with another country for the purpose of enforcing the MRFTA, so long as the agreement does not contravene the laws or interests of Korea. Under Article 36-2(2), the KFTC may assist the counterparty government's enforcement of its laws. Furthermore, Article 36-2(3) provides that, even in the absence of a formal agreement, the KFTC may, upon the request of a foreign government, assist that government in enforcing the latter's laws, as long as it guarantees reciprocal assistance in identical or similar matters.

Moreover, the Korean government has made various efforts to enhance cooperation with the competition authorities of other jurisdictions. In recent years, the KFTC has held bilateral conferences with the competition authorities of the United States, Japan, Russia and China. Notably, in 2009, Korea entered into an agreement concerning cooperation on anti-competitive activities with the EU, the first of its kind between Korea and a foreign country. In April 2014, Korea entered into a memorandum of understanding (MOU) with Brazil, raising the total number of MOUs with foreign countries to 14.

The KFTC successfully cooperated with foreign competition authorities for the first time in the 2010 international *Air Cargo* cartel. In that case, 21 air cargo carriers from 16 countries colluded on air cargo rates on various routes, including outbound routes from and inbound routes to Korea (from Japan, Hong Kong and Europe) between December 1999 and July 2007. The KFTC planned and conducted a dawn raid in coordination with the US Department of Justice and the European Commission.

In Korea, there is no mechanism that allows foreign competition authorities to request confidential information obtained by the KFTC through, for instance, its leniency programme. Nor is there a US-style discovery system that provides access to other parties' information. Indeed, Article 22-2(2) of the MRFTA prohibits disclosure of information obtained by the KFTC from leniency applicants or investigation targets cooperating with the KFTC, except where the initial information provider has consented to disclosure or the information is needed for purposes of related litigation. Thus, Article 22-2(2) may be used by the KFTC as a statutory basis for refusing to comply with other jurisdictions' requests for information.

On the other hand, Korean law provides for the extradition of criminal offenders either through individual treaties with foreign countries or through the Extradition Act. Where an extradition treaty with a foreign country is in effect, that treaty supersedes the Extradition Act. In the absence of an applicable extradition treaty, the Extradition Act applies, irrespective of whether the Korean government is making an extradition request with a foreign government, or vice versa. This statute, however, applies only

where the underlying crime is punishable by capital punishment, life imprisonment or imprisonment for more than one year under the laws of Korea and the other jurisdiction at issue.[2] In addition, the statute provides for the extradition of only those offenders who have been found guilty, are under investigation or on trial in the jurisdiction requesting extradition. The Ministry of Justice and the Prosecutor's Office may request the Seoul High Court to review and approve extradition requests.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Under Article 2-2 of the MRFTA, the MRFTA applies to all conduct that has an effect on the Korean market. Thus, when a foreign entity's conduct has an effect on the Korean market, the MRFTA applies even when the foreign entity has no presence in Korea or the conduct at issue did not take place in Korea.

Article 2-2 of the MRFTA was enacted in December 2004. However, even prior to the enactment of Article 2-2, the KFTC followed the international trend of extraterritorial application of competition law by finding in several cases that price-fixing conspiracies carried out by foreign entities outside Korea affected competition in the Korean market. Thus, the KFTC imposed corrective orders as well as administrative fines in the 2002 *Graphite Electrodes* cartel[3] and the 2003 *Vitamins* cartel.[4] On appeal, Korean courts upheld the KFTC's decisions in the two cases.[5]

Under Article 19(2) of the MRFTA, certain types of anti-competitive concerted activities are permitted if they promote economic or industrial policies, meet the special requirements set forth in the Enforcement Decree and are approved in advance by the KFTC at the parties' request.

Under Article 58 of the MRFTA, legitimate business practices in accordance with law or orders issued pursuant to law are exempt from sanctions otherwise provided for under the MRFTA. In response to some cartel participants' assertion that their conduct was in accordance with a supervisory agency's administrative guidance, the KFTC grants exemptions only in those cases where the administrative guidance at issue is based on express statutory provisions. If the administrative guidance at issue is not based on express statutory provisions or is based on a comprehensive supervisory authority granted

2 Under Article 66(1)(9) of the MRFTA, a participant in an improper concerted activity is punishable by a term of imprisonment not exceeding three years or a criminal fine not exceeding 200 million won, or both.

3 KFTC Case No. 2002-077, announced on 4 April 2002.

4 KFTC Case No. 2003-098, rendered on 29 April 2003.

5 Korean Supreme Court Case No. 2004Du11275, announced on 24 March 2006 (the *Graphite Electrodes* case) and Seoul High Court Case No. 2003Nu9000, announced on 24 November 2004 (the *Vitamins* case). The appellants in the *Vitamins* case withdrew their appeal to the Korean Supreme Court after the Seoul High Court affirmed the KFTC's decision on all grounds.

under Korean laws governing administrative organisation, the KFTC does not grant exemptions under Article 58. Case law tends to support such interpretation of Article 58.

A participant in an overseas cartel may advance an affirmative defence that the relevant conduct did not have any effect on the Korean market. However, there is no Korean Supreme Court decision that provides a bright-line test for evaluating effects on the Korean market. An analysis of the KFTC's various international cartel cases reveals that an international cartel is deemed to have had an effect on the Korean market where there was a specific pricing agreement regarding the Korean market and the agreement was implemented by, for instance, selling the products or services at issue at the agreed-upon price in the Korean market. In particular, the higher Korean customers' dependence on the imported products or services at issue, the greater the likelihood of the effect on the Korean market will be (e.g., the 2002 *Graphite Electrodes* case and the 2009 *Marine Hose* case). Recently, in the 2014 *Air Cargo* cartel decision, the Korean Supreme Court narrowed the scope of the 'effect on the Korean market' under Article 2-2 to a 'direct, substantial and reasonably foreseeable effect' on the Korean market.[6] In July 2014, the KFTC announced a proposal to amend Article 2-2 of the MRFTA pursuant to the foregoing Korean Supreme Court decision.

IV LENIENCY PROGRAMMES

The Korean leniency programme has been in effect since April 1997. Its purported goal is to erode trust among cartel participants and to induce voluntary reporting by cartel participants by granting an exemption from or reduction in administrative fines. This goal has been codified into Article 22(1) of the MRFTA. Article 35(1) of the Enforcement Decree provides the specific criteria governing exemptions from or reductions of sanctions. The KFTC has also issued a notification regarding the leniency programme (the Leniency Notification) to establish the specific procedures of the programme.

Under Article 35(1) of the Enforcement Decree, to benefit from the leniency programme, a leniency applicant must satisfy the following requirements:

a at the time the applicant reports the cartel activity at issue, the KFTC has not received any information about the cartel activity or has not obtained sufficient evidence to prove it;

b the applicant reports the cartel activity and fully cooperates with the KFTC by submitting relevant information throughout the investigation; and

c the applicant has ceased its involvement in the cartel.

The applicant that reports its cartel activity before the commencement of the KFTC's investigation and that is the first to provide sufficient evidence of that cartel will be granted an exemption from administrative sanctions, such as corrective orders and administrative fines, as well as from referral to the Prosecutor's Office. Even when the KFTC has already begun its investigation, the first applicant to present sufficient evidence of the cartel

6 Korean Supreme Court Case No. 2012Du13665, announced on 16 May 2014 (the *Air Cargo* case).

and fully cooperate with the KFTC's investigation will be granted an exemption from administrative sanctions and from referral to the Prosecutor's Office. The second-in-line applicant to present sufficient evidence of the cartel and fully cooperate with the KFTC will be granted a 50 per cent reduction of administrative fine and exemption from criminal referral.[7]

On 19 June 2012, the Enforcement Decree was amended to enhance cartel regulation and prevent abuse of the leniency programme. Under the amended provision, Article 35(1)(6) of the Enforcement Decree:

a in a two-party cartel, while the first leniency applicant is still eligible for an exemption from sanctions, the second leniency applicant is not automatically eligible for any reduced sanctions; and

b once two years have passed since a member of a cartel filed the first leniency application with the KFTC or began to cooperate with the KFTC as the first party providing cooperation with respect to the cartel, any other member of the cartel is not eligible for reduced sanctions.[8]

On 19 November 2014, the KFTC proposed revisions to the Leniency Notification, which include:

a eliminating the KFTC Secretariat's practice of issuing preliminary or provisional markers for leniency standing;

b clarifying the definition of 'repeat offender';

c introducing an 'advisory' provision stating that a leniency applicant, after being granted an exemption from or reduction of sanctions under the leniency programme, may not deny facts admitted in its leniency application;

d relaxing the evidentiary burden borne by leniency applicants; and

e clarifying restrictions on second leniency applicants.

After a 20-day public consultation period (19 November 2014 to 9 December 2014), the KFTC will undertake the actual revisions, which will in all likelihood closely mirror the proposed revisions.

In addition, under the Korean amnesty plus programme under Article 35(1)(4) of the Enforcement Decree, if a party in one cartel qualifies as the first or second party to report another cartel to the KFTC or to cooperate with the KFTC's investigation of the second cartel, and if the second cartel is smaller than the first cartel, then that party may be granted a mitigation of corrective order and an additional maximum 20 per cent reduction of administrative fine for the first cartel activity in addition to any other credit

7 While only the first two leniency applicants regarding a particular improper concerted activity are eligible for exemption from or reduction of administrative fine under the leniency programme, as the case may be, later applicants or non-applicant parties are each eligible for a maximum 30 per cent discretionary reduction of administrative fine for cooperation with the KFTC under the KFTC's Administrative Fine Notification.

8 As noted above, however, even late-filing applicants may receive discretionary cooperation credit in some situations.

it may be eligible for in connection with the first cartel. On the other hand, under Article 16 of the Leniency Notification, if the magnitude of the second cartel activity is greater than the first, then, depending on how much larger the second cartel is, the party may be eligible for a 30 per cent, 50 per cent or even 100 per cent reduction of administrative fine for the first cartel.[9] However, even if a party meets the requirements for the leniency programme and the amnesty plus programme, it will lose such status if it has forced another party to participate in, or to continue to participate in, the cartel activity, or such party has been a repeat offender of Article 19(1) of the MRFTA within the past five years.[10]

In 2002, the KFTC also introduced a whistle-blower programme that provides a monetary reward to the first informant who presents sufficient evidence of a cartel. It was introduced to encourage market participants, individuals employed by cartel participants and the general public to report cartels. On 6 November 2012, in an effort to further promote the whistle-blower programme, the KFTC increased the maximum monetary reward from 2 billion won to 3 billion won. From 2002 to November 2014, the KFTC awarded a total of approximately 1.3 billion won to whistle-blowers in over 40 cases.

Under Article 7 of the Leniency Notification, in principle, a leniency application must be prepared and submitted through use of the KFTC's leniency application form. If the applicant needs a substantial period of time for collecting evidence, or if there are special circumstances preventing the applicant from submitting evidence at the same time as the application submission, the applicant may submit an informal application. However, the applicant must submit a revised application within 15 days of the submission of the informal application. At the request of the applicant demonstrating justifiable grounds for further extension, such as collection of evidence, the KFTC may extend the deadline for a revised application submission by up to 60 days under Article 8 of the Leniency Notification. The KFTC also has discretion to grant extensions longer than 60 days in exceptional cases where the KFTC acknowledges the necessity for such extensions (e.g., in international cartel cases).

V PENALTIES

The MRFTA provides for corrective orders, administrative fines and criminal sanctions.

i Corrective orders

Under Article 21 of the MRFTA, the KFTC may order cartel participants to terminate their participation in the cartel at issue, to publish such order and to implement other necessary measures, including rescission of the illegal agreements and disqualification from future bidding. Pursuant to its Corrective Measure Guidelines, the KFTC may not only issue an order prohibiting certain conduct, but may also issue an order to perform certain remedial actions, including modification or deletion of a contractual provision and rescission of agreement.

9 The scale of an improper concerted activity is determined on the basis of relevant sales.

10 Article 35(1)(5) of the Enforcement Decree; Article 6(3) of the Leniency Notification.

ii Administrative fines

The KFTC may impose an administrative fine not exceeding 10 per cent of the relevant sales turnover as determined pursuant to the Enforcement Decree. However, if no relevant sales revenue was generated, or if it is difficult to calculate the relevant sales revenue, the KFTC may issue an administrative fine not exceeding 2 billion won under Article 22 of the MRFTA. Under Article 9(1) of the Enforcement Decree, relevant sales revenue refers to the amount of sales that the offender generated in a certain transaction area by selling the relevant products or services during the cartel period; the purchase price of the products or services at issue, if the cartel activities were carried out in relation to the purchase of products or services; or the contract price in cases of bid rigging or similar conduct.

An administrative fine is calculated in two steps. First, the basic fine amount is determined by multiplying the relevant sales revenue by a multiplier that can be up to 10 per cent but that varies depending on the gravity of the violation. Second, the basic fine amount is then adjusted in consideration of various factors, including the duration and frequency of the violation, aggravating circumstances and mitigating circumstances.

Aggravating circumstances include the following:

a the entity at issue was the leader or instigator of the cartel;
b the entity at issue took retaliatory measures against another entity that did not participate in the cartel;
c the entity at issue or its employees obstructed or refused to cooperate with the KFTC investigation into the cartel;
d a high-level executive of the entity at issue was involved in the cartel; and
e the entity at issue participated in the cartel within three years after it was sanctioned by the KFTC for participation in another cartel.

Mitigating circumstances include the following:

a non-performance of the cartel agreement;
b nullification of a bid submitted as part of bid rigging;
c insignificant role in the cartel (e.g., participation in the cartel as a result of another's suggestion or deception);
d full cooperation with the KFTC investigation into the cartel;
e remedial measures voluntarily undertaken; and
f entering into the cartel agreement through negligence in the ordinary course of business or notwithstanding substantial compliance efforts by the entity at issue.

iii Criminal sanctions

Under Article 66(1)(9) of the MRFTA, a cartel participant can be punished with imprisonment for a term not exceeding three years or a criminal fine not exceeding 200 million won. Under Article 70 of the MRFTA, a criminal sanction may also be imposed on a representative, agent, employee or other member of the corporation that has participated in a cartel.

Until the 16 July 2013 amendment to the MRFTA, the KFTC had exclusive, discretionary authority to refer a violation of the MRFTA to the Prosecutor's Office, except for cases where the Chief Prosecutor requests the referral directly. Under the new

law, however, the KFTC is required to refer a matter to the Prosecutor's Office when requested by the Chief Prosecutor, the Chair of the Board of Audit and Inspection, the Chair of the Public Procurement Service or the Chair of the Small and Medium-Sized Business Administration. Since the amendment came into effect on 17 January 2014, the KFTC has displayed a tendency to utilise the criminal referral authority more aggressively against individuals as well as businesses, although the Chair of the Board of Audit and Inspection, the Chair of the Public Procurement Service and the Chair of the Small and Medium-Sized Business Administration have not yet exercised their newly gained powers in earnest.

iv Consent decrees

Although the MRFTA was amended in December 2011 to provide for consent decrees for certain types of competition law cases, they are not available for cartel activities. Hence, under the MRFTA, there are no early resolutions and settlement procedures for cartel activities.

VI 'DAY ONE' RESPONSE

The KFTC frequently conducts dawn raids on suspected competition law violators. Under Article 50(2) of the MRFTA, when the KFTC deems it to be necessary for the enforcement of the MRFTA, KFTC officials may enter the office of a potential offender to inspect business and management conditions, and examine accounting books, documents, electronic data, voice recordings and images. The KFTC may also demand that an interested party or witness appear before it or make a statement. Moreover, under Article 50(3) of the MRFTA, the KFTC has the authority to demand submission of relevant materials during an onsite investigation, and to seize and take custody of materials during an onsite investigation.

In cartel investigations, the KFTC generally conducts dawn raids. During a dawn raid, it typically demands submission of materials, seizes materials, and takes statements from officers and employees of the dawn raid target. If the target is unable to provide materials demanded by the KFTC during a dawn raid, it must provide an explanation of its inability to do so; in certain cases, the person in charge of the demanded materials may be required to prepare a statement. In some cases, a dawn raid may last several weeks.

Under Article 69-2(1)(7) of the MRFTA, obstruction or refusal to cooperate – whether through concealment or destruction of materials, refusal to allow access to materials, or forgery or falsification of materials – is punishable by an administrative fine not exceeding 200 million won. In addition, under Article 69-2(1)(7), any individual involved in any of the foregoing conduct is punishable by a fine not exceeding 50 million won. Further, under Article 66(1)(11) of the MRFTA, any individual that obstructs, avoids or refuses to cooperate with a dawn raid through verbal or physical abuse, or refusal to grant access to the premises, is punishable by imprisonment not exceeding a period of three years or a criminal fine not exceeding 200 million won.

If a document demanded by the KFTC contains confidential information, the document should be so indicated, and a copy rather than the original document should

be submitted to the KFTC. After documents have been submitted to the KFTC, copies of the submitted documents and a list of the submitted documents should be maintained by the dawn raid target. Strictly speaking, at present, Korean courts do not recognise attorney–client privilege as that term is commonly understood.

The KFTC's investigative authority only reaches the office or place of business, and designated places indicated on the KFTC's request for appearance. However, although controversial, the KFTC maintains that automobiles used for business purposes and personal lockers within the premises of an office or place of business may be inspected. On the other hand, once the KFTC has referred a case to the Prosecutor's Office for criminal proceedings, the Prosecutor's Office may only inspect an individual's private space under search and seizure warrants.

VII PRIVATE ENFORCEMENT

Under Article 56(1) of the MRFTA, if an entity violates the MRFTA, it has the responsibility to compensate the resulting victims. Thus, victims of a cartel can ask for compensation from the cartel participants. The MRFTA does not limit the scope of entities that are eligible to seek compensation. Thus, in principle, anyone injured by a cartel – including competitors, suppliers and consumers – may seek compensation.

Under Article 750 of the Korean Civil Code, a victim who has been injured by a cartel can claim damages. When claiming damages under the Civil Code, the plaintiff is normally required to prove the intent or negligence of the defendant. However, under the MRFTA, the defendant in a private damages case bears the burden of proof to disprove the existence of intent or negligence. This shifting of the burden of proof to the defendant for a claim of compensation under the MRFTA is a safeguard for victims of MRFTA violations, and also serves as an indirect deterrent to MRFTA violations.

However, even in an action brought under Article 56 of the MRFTA, the plaintiff still bears the burden of proof for causation, the existence of injury, and the amount of damages. In practice, it is not only difficult to prove causation, but it is also extremely difficult to calculate the precise amount of damages. Because of this difficulty, where the injury resulting from the defendant's cartel activity has been proved but it is substantially difficult to prove the precise amount of damages, the court may recognise a substantial amount of damages based on the facts under Article 57 of the MRFTA. Currently, there are no US-style treble damages for cartel violations; however, discussions are ongoing about enacting some type of treble or other form of punitive damages to further deter cartels.

Traditionally, the enforcement of the MRFTA was, in practice, entirely dependent upon the KFTC's public enforcement, while private enforcement by the victims of MRFTA violations, such as competitors, suppliers or consumers, was negligible. Recently, however, a number of improvements to the private enforcement system have led to an increasing number of private actions claiming damages for MRFTA violations.

Recently, during the announcement of its 2013 policy plan, the KFTC disclosed plans to adopt a collective litigation system as a means to eradicate cartels. The collective litigation system might take an opt-out form similar to a class action, where the effect of the ruling will reach all victims who have not explicitly opted out of the class.

Under the MRFTA, the completion of a public enforcement proceeding is not a prerequisite for bringing a damages claim against cartel participants. Furthermore, under the MRFTA, a victim of a cartel is also not required to report the cartel to the KFTC before pursuing a damages claim.

In private damages cases, the courts are not bound by the KFTC's factual findings. Korean courts have consistently held that 'the facts found by the KFTC do not bind Korean courts in their decisions but are only taken to be presumptively true'.

VIII CURRENT DEVELOPMENTS

The KFTC has gradually expanded the scope and degree of its cartel regulation. In 2013, it identified 46 cartels and imposed approximately 364.7 billion won in administrative fines. Notably, it referred 13 cartel cases to the Prosecutor's Office in 2013 but only two cases in 2012. This trend shows the KFTC's intention to expand criminal enforcement of the MRFTA for cartel activities.

In addition, with the amendment to the MRFTA in March 2012, cartel enforcement has become easier. Specifically, the statutory provision governing the statute of limitations that discouraged the KFTC from investigating and taking measures against violations was amended. Before this amendment, the statute-of-limitations period was five years starting from the last day of the violation at issue. With the amendment, the statute-of-limitations period has been extended to five years from the first day of the investigation in the event that the KFTC has already commenced an investigation. On the other hand, the statute-of-limitations period is seven years from the last day of the violation if the KFTC has not commenced an investigation into the violation at issue.

In August 2014, the Korean Supreme Court vacated sanctions imposed by the KFTC on Korean life insurance companies for alleged price fixing. In December 2011, the KFTC imposed various corrective measures and 53.8 billion won in total administrative fines on 16 Korean life insurance companies. The KFTC found that:

a from 1998 to 2000, the life insurance companies 'directly agreed' to fix the discount rate for fixed-rate individual life insurance products and the reference rate for variable-rate individual life insurance products;

b from 2001 to 2006, they 'exchanged non-public information' on future discount rates and reference rates and then used such information to decide their own respective rates, thereby indirectly but nonetheless jointly fixing the rates; and

c these two periods constituted a single continuing conspiracy.

On appeal to the Seoul High Court, the insurance companies argued that, while the companies exchanged the insurance rates at issue, they did not agree to fix the rates. The Seoul High Court noted the markedly changed nature and type of conduct in the second period as a clear break from whatever might have happened in the earlier period and, in turn, dismissed the first period as falling outside the statute of limitations. Regarding the alleged indirect price fixing via information exchanges in the second period, the Seoul High Court held that the law requires not just an exchange of price information but an 'agreement' to fix, maintain or change prices. The Court also noted that the life insurance companies used not just the exchanged information to determine their own

rates but also comprehensively used numerous other critically relevant factors, such as the prime rate, going rates in the marketplace, their own return on assets ratio, level of customer recognition of each brand, their own competitive position, etc. The Court also noted that there was no genuine dispute as to the absence of uniformity or matching patterns in the competitors' actual discount rates. Finally, the Court intimated that it was inherently inconsistent and irreconcilable for the KFTC to acknowledge that the insurance companies 'individually decided their own rates' after exchanging certain sensitive information with others but also to allege that they had 'jointly decided' the rates. Therefore, the Court, in separate opinions, vacated the KFTC's sanctions on the insurance companies in their entirety, including the administrative fines.

On further appeal, the Korean Supreme Court affirmed the Seoul High Court's decisions. These decisions are noteworthy because they clarify both the Korean antitrust principle that information exchange, in and of itself, does not amount to an illegal cartel agreement, and the heavy burden of proof that the KFTC must satisfy to show a 'meeting of minds' (i.e., an agreement), which is one of the essential elements of collusion under Korean antitrust law.

Appendix 1

ABOUT THE AUTHORS

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Mr Yun, a founding partner of Yulchon, is the managing partner of the firm. Mr Yun practises primarily in the areas of corporate (with an emphasis on M&A), antitrust, tax and governmental relations. Before founding Yulchon, Mr Yun was a prosecutor with the Pusan District Prosecutor's Office, an associate with the law firms Lee & Ko and Baker & McKenzie (Chicago and New York), and a partner at Yoon & Partners.

Mr Yun has written many articles for various publications, including 'Regulation of Business Combinations under the Antimonopoly and Fair Trade Act with Emphasis on Case Law', *Journal of Korean Law* (2002), 'Tax Aspects of Derivative Financial Instruments' for the 49th Congress of the International Fiscal Association (1995) and 'Transfer Pricing for South Korea', published in CCH International Transfer Pricing Laws (1994).

Mr Yun has given lectures at both the Judicial Research and Training Institute and Seoul National University Law School. He has served as outside legal adviser to various government agencies such as the Korea Fair Trade Commission (KFTC) and the Ministry of Trade, Industry, and Energy, and was a member of the Competition Policy Advisory Board for the KFTC. Mr Yun has also served on the Legal Advisory Committee of the Korean Broadcasting Commission, and was a Technical Adviser for the Tax Policy Review Council for the then Ministry of Finance and Economy.

In recent years, Mr Yun has been selected as one of the world's leading M&A lawyers by the *International Financial Law Review*, as a Practical Law Company cross-border mergers and acquisitions leading lawyer, as a *Chambers Global* leading banking and finance/corporate lawyer, as a *Global Competition Review* leading (competition) lawyer and as one of Asia's leading (competition) lawyers by AsiaLaw. He has been selected by Who's Who Legal as a leading competition lawyer every year since 2004. Additionally, Mr Yun has received a Prime Minister's Award for antitrust administration and a Deputy

Prime Minister's Award for tax administration. Mr Yun has also been chosen as a leading lawyer of 2009 by the *International Financial Law Review 1000*.

Mr Yun has successfully represented numerous major corporations, including AMD, Bridgestone Corporation, the Carlyle Group, Citigroup, Daum Communications, GE, Goldman Sachs, Hyundai Capital, Hyundai Merchant Marine, Hyundai Motors, LG Philips LCD, Lotte Shopping, LVMH, RealNetworks, Samsung Electronics, Samsung Life Insurance, SK Corporation and SK Telecom.

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, New York, Illinois and Washington, DC.

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Mr Cecil Saehoon Chung is senior foreign counsel at Yulchon. As co-vice chair of the antitrust practice group and head of the international antitrust team, Mr Chung handles all aspects of antitrust, consumer protection and trade regulation litigation and counselling matters covering diverse industries, with a particular emphasis on international antitrust. Mr Chung has the rare distinction of being ranked as both a US antitrust law expert based abroad (in Seoul) and a foreign (US-licensed) expert on Korean antitrust law by *Chambers Global 2013*.

Mr Chung has practised law for 25 years, primarily focusing on antitrust, trade regulation, consumer protection and intellectual property. In his antitrust practice, Mr Chung has handled numerous criminal grand jury investigations, civil class action cases, regulatory merger and non-merger investigation and litigation matters, and consumer protection matters. Mr Chung also has extensive experience in handling intellectual property issues, both straightforward patent infringement litigation and licensing matters, and also in the context of the antitrust and IP interface.

Before joining Yulchon in 2012, Mr Chung was an antitrust partner at two global law firms (Pillsbury Winthrop and Greenberg Traurig) in Washington, DC, where he handled numerous multibillion-dollar merger transactions, 'bet-the-company' litigation matters, and various counselling matters involving antitrust, trade regulation, consumer protection, intellectual property and other legal issues in diverse industries.

From 1988 to 1995, Mr Chung was a litigation attorney in the Bureau of Competition at the US Federal Trade Commission (FTC), where he investigated and challenged numerous merger transactions and non-merger antitrust violations in the energy, chemical, food, telecommunications and IT industries. In addition, Mr Chung was a principal member of the FTC's trial team that successfully challenged BAT's acquisition of American Tobacco in the federal district court.

Mr Chung has written and lectured extensively on various antitrust, consumer protection and other legal issues. He regularly provides antitrust compliance counselling and training to clients in various industries. Furthermore, since 1997, Mr Chung has advised and assisted the Korea Fair Trade Commission in modernising its antitrust and consumer protection enforcement programme. Mr Chung's recent articles include 'Korea Amends Privacy Law and Limits Use of Residents Registration Numbers,' ABA Section of International Law, Vol. 47, *The International Lawyer Year In Review* 99 (2013);

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Mr Chung has served in various bar association and international organisation leadership and contributing roles, including as vice chair of the ABA Section of International Law's Privacy, E-Commerce, Data Security Committee; as a member of the Steering Group for the International Antitrust Law Committee and for the Asia/Pacific Committee of the ABA's Section of International Law; as a contributor for Asia for the *International Antitrust Bulletin* of the ABA's Section of Antitrust; and as a member of the International Chamber of Commerce (ICC) Task Force on Premerger Control Regimes. In addition, he served on the ICC Compliance Task Force that published the ICC Antitrust Compliance Toolkit in April 2013.

Mr Chung received his BS in economics from the Wharton School, University of Pennsylvania in 1985 and JD from Cornell Law School in 1988. He is a member of the California and District of Columbia Bars.

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