Chapter XX

KOREA

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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 anticompetitive mergers and acquisitions. The Enforcement Decree of the MRFTA (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 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;

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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.

Among the notifications issued by the KFTC 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 the Article 19(5) legal presumption to challenge parallel conduct. After suffering several setbacks in court, however, the KFTC has shied away from relying on this provision. Instead, the KFTC has recently treated parallel conduct and exchange of sensitive information (i.e., price) 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 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 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, the EU, Japan, Russia and China. Notably, in 2009, Korea entered into an agreement concerning cooperation on anticompetitive activities with the EU, the first of its kind between Korea and a foreign country. In September 2015, Korea entered into a memorandum of understanding (MOU) with US Department of Justice and Federal Trade Commission, raising the total number of MOUs with foreign countries to 15.

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(3) 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(3) 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 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

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.

extradition of only those offenders who have been found guilty, are under investigation or are 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]

A participant in an overseas cartel may advance an affirmative defence that the relevant overseas 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 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]

Under Article 19(2) of the MRFTA, certain types of anticompetitive 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 activities conducted pursuant to laws or those conducted pursuant to orders issued pursuant to laws are exempt from sanctions otherwise provided for under the MRFTA. In response to some cartel participants' assertion

3 KFTC Case No. 2002-077, decided 4 April 2002.

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

5 Korean Supreme Court Case No. 2004Du11275, decided 24 March 2006 (*Graphite Electrodes* case) and Seoul High Court Case No. 2003Nu9000, decided 24 November 2004 (*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.

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

that their conduct followed 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 under Korean laws governing administrative organisation, the KFTC does not grant exemptions under Article 58. Such interpretation of Article 58 tends to be supported by the case law.

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 22-2(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 (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: 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; the applicant reports the cartel activity and fully cooperates with the KFTC by submitting relevant information throughout the investigation; and 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 and fully cooperate with the KFTC's investigation will be granted an exemption from administrative fines and referral to the Prosecutor's Office as well as exemption from corrective orders. 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]

However, the foregoing benefits are subject to the following restrictions under Article 35(1)(6) of the Enforcement Decree: 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, once two years have passed since a

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.

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]

Moreover, to prevent leniency applicants from abusing the leniency programme and to deter repeated violations, Article 22-2(2) was enacted on 29 March 2016 and came into effect on 30 September 2016. Under this provision, if a leniency applicant, whose corrective measure or administrative fine was reduced or exempted, engaged in a new unfair collaborative act, the applicant cannot receive any benefits from the leniency programme within five years from the date of the reduction or exemption.

The revised Leniency Notification, which took effect on 15 April 2016, imposes a duty to cooperate on a leniency applicant, including an appearance of the applicant's officers or employees in the KFTC hearing. The Notification also provides that the KFTC shall take the performance of the applicant's duty to cooperate, such as the attendance of the applicant's officers or employees in the KFTC hearing into consideration for deciding whether to grant benefits of the leniency programme. Furthermore, according to the Notification, the applicant will not be eligible for leniency if the applicant, without the KFTC's prior consent, discloses the fact of its leniency application or its cartel activities to a third party before the completion of the KFTC's review process in violation of its duty to cooperate. However, there are two exceptions to the non-disclosure obligation for a leniency applicant (1) whose disclosure of the fact is required under relevant laws or regulations or (2) who must inform a foreign government of its leniency application to the KFTC (e.g., when the applicant is also applying for leniency in a foreign country).

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 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 it may be eligible for in connection with the first cartel. On the other hand, under Article 13 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, 50 or even 100 per cent reduction of administrative fine for the first cartel.[9] Regarding the amnesty plus programme, the revised Leniency Notification that took effect on 30 September 2016 provides that in assessing the magnitude of the first cartel (the cartel already being investigated by the KFTC) and the second cartel (the cartel that was voluntarily reported through the amnesty plus) if there are multiple cartels within the first and second cartel, then aggregated magnitude of the multiple cartels shall be compared in deciding the level of reduction. The level of reduction will be uniformly applied to all the cartels. 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

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

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

forced another party to participate in, or to continue to participate in, the cartel activity, or if such party has been a repeat offender of Article 19(1) of the MRFTA within the past five years.[10]

Under the original Leniency Notification, if a prior applicant withdraws its leniency application or the prior applicant's leniency status is not recognised, a later applicant will succeed the prior applicant in the order of acceptance. However, to prevent a possible free ride by the later applicant who made no additional contribution to the exposure of collusion, the revised Leniency Notification of 30 September 2016 stipulates that the later applicant's succession will be recognised by the KFTC only if the later applicant satisfies the requirements of the prior applicant's leniency status.

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 2014, the KFTC awarded a total of approximately 1 billion won to whistle-blowers in 45 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. Under Article 7 and Article 10 of the revised Leniency Notification, in principle, a leniency application must be filed by visiting the Cartel Policy Division of the KFTC, or by fax or email dedicated exclusively for submission of leniency applications. For oral submission of a leniency application, an order of acceptance is determined at the time of voice recording or video recording. 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

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

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.

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 insignificant role in the cartel (e.g., participation in the cartel as a result of another's suggestion or deception);

c full cooperation with the KFTC investigation into the cartel;

d remedial measures voluntarily undertaken; and

e 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.

Under the amended MRFTA that came into effect on 17 January 2014, 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 effective

date of the amended MRFTA, the KFTC has displayed a tendency to utilise the criminal referral authority more aggressively against individuals as well as businesses as the Chair of the Public Procurement Service and the Chair of the Small and Medium-Sized Business Administration have started to exercise their newly gained powers. In 2015, Japanese small bearing manufacturers and retailers agreed to fix prices for small bearings supplied to major Korean electronics companies and executed the agreement through their Korean branches. The KFTC referred both the Japanese head office and its Korean branch to the Prosecutor's Office, and the Prosecutor's Office indicted these offices. This was the first case by the Prosecutor's Office to investigate and indict a foreign corporation that participated in an international cartel.

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. 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.

On 21 October 2015, the KFTC announced a major overhaul of its enforcement process, aptly named the Enforcement Process 3.0 Reform Initiative, as befitting the digital age. To enhance the transparency of the KFTC's investigative procedures and ensure due process for the investigation, the KFTC formulated and implemented 'Rules on KFTC Investigation Procedures' on 4 February 2016, as part of the Enforcement Process 3.0 Reform Initiative. The major provisions are as follows:

a the requirement, aimed at avoiding fishing expeditions, to specify and explain the purpose (i.e., investigator's allegation and relevant provision regarding such allegation) and scope of the inquiry, the name of the investigation target and place as well as the right to refuse to comply with an investigation exceeding the expressly stated scope of the inquiry, except in certain investigations including cartel investigations;

b the right to request and have legal counsel present throughout the entire investigative process, including during dawn raids and witness examinations, except in urgent cartel investigations; and

c the right to receive a copy of an inventory of materials collected by the investigators during dawn raids, except in cases with obstruction concerns such as destruction of evidence or disclosure of confidential information.

In addition, as of 4 February 2016, the 'Rules on the KFTC's Committee Operations and Case Handling Procedures' were also amended and implemented. According to the Rules, for a cartel case, the KFTC investigator must prepare an examination report and either refer the case to the Committee or close it within 13 months – excluding the time spent on document submission – after initiation of the investigation. If unavoidable circumstances arise, then the investigator may extend the period by setting an extension period and getting an approval from the Secretary General.

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 for a period not exceeding 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, a violator of the MRFTA 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 seek damages. When seeking 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 under the MRFTA is a safeguard for victims of MRFTA violations, and also serves as an indirect deterrent to MRFTA violations.

Even then, 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. In recent years, a number of improvements to the private enforcement regime have led to an increasing number of actions seeking damages for MRFTA violations.

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 2014, it identified 76 cartels and imposed approximately 364.7 billion won in administrative fines.

Recently, the KFTC has suffered a number of high-profile courtroom losses where large administrative fines were vacated because of procedural or evidentiary deficiencies reflecting deficient investigative procedures.

For example, in December 2015, the Supreme Court reversed the lower court's finding of improper concerted conduct by ramen makers regarding the ramen price and remanded the case.[11] After the case was remanded for further proceedings, the KFTC withdrew from the lawsuit and the administrative fine of 108 billion won imposed on the plaintiff was refunded to the companies. In this case, ramen makers participated in a representative conference among ramen makers held in either late December 2000 or early January 2001, and allegedly agreed among themselves that when the leading ramen maker raises prices, the other ramen makers would jointly increase their prices as well. According to this agreement, each of these ramen makers increased their prices during the period of May 2001 to July 2001 (the initial price increase). Subsequently, on five different occasions during the period of October 2002 to February 2010, the ramen makers increased prices to a level similar to the other companies' increased prices whenever the leading ramen maker prepared a price increase plan and informed the other companies of the details of the price increase and the proper timing to do so (the subsequent price increases). For the initial price increase, which involved an alleged express agreement according to the KFTC, the Supreme Court held that not only was the content of the agreement unclear, but also that it was difficult to determine that such an

11 Korean Supreme Court Case No. 2013du25924, decided 24 December 2015 (*Ramen* cartel case).

agreement with long-term effects on competition had been made. Furthermore, regarding the subsequent price increases, which allegedly involved an implied agreement according to the KFTC, the Supreme Court held that the fact that (1) the leading ramen maker and other companies exchanged various information, including price information, for a long period, and that (2) they reflected the exchanged information in their decision-making process, can be viewed as having some anticompetitive effects. However, the Supreme Court further held that considering the government's custom of being involved in the price determination, and other facts inconsistent with the alleged agreement, it is difficult to determine that a mere information exchange, in and of itself, constitutes an agreement to fix and maintain prices.

This decision, coming after the Supreme Court's similar holdings in the *Life Insurance* case in 2014 and the *Oil* cartel case in 2015,[12] is noteworthy because it again affirmed and clarified 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 the minds' (i.e., an agreement), which is a critical element of collusion under Korean antitrust law. In response, the KFTC has proposed an amendment to the law that an exchange of sensitive information, in and of itself, carries a strong presumption that there was a resulting agreement, and the burden is on the respondents to rebut this presumption. It remains to be seen whether this or any similar revisions will be adopted.

SAI REE YUN

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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

12 Korean Supreme Court Case No. 2013Du19387, decided 12 February 2015 (*Oil* cartel case).

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 was also 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 a senior foreign counsel at Yulchon. As 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. He is also individually ranked as a leading antitrust lawyer by numerous publications such as *GCR*, Euromoney's *Expert Guides* and *Chambers Asia*.

Mr Chung has practised law for well over 25 years. Before joining Yulchon in 2012, he was an antitrust partner at two global law firms (Pillsbury Winthrop and Greenberg Traurig) in Washington, DC. 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 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, he has advised and assisted the Korea Fair Trade Commission in modernising its antitrust and consumer protection enforcement programme. Mr Chung's recent articles include the chapter on Korea in the *Competition Law in Asia Pacific – A Practical Guide*, Wolters Kluwer (2015); the chapter on Korea in *The Cartels and Leniency Review*, second to fifth editions, Law Business Research (2014–2017); 'Korea's Aggressive Antitrust Enforcement in Financial Product Markets', *Asian-Mena Counsel*, Volume 12 Issue 5 (2014–15); 'Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet', *Competition Policy International Antitrust Chronicle* (October 2014); the chapter on Korea in *The Merger Control Review*, Law Business Research, third to seventh editions (2012–2016); 'Ballooning Definition of Cartel and Information Exchange in Korea,' *Competition Policy International Antitrust Chronicle* (December 2013); 'Recent Korean Supreme Court Decisions on *Per Se* Illegality and Noerr-Pennington in Korea', ABA Section of Antitrust Law, *Cartel & Criminal Practice*

Committee Newsletter (Fall 2012); and 'Revamped Korean Leniency Regime: No More Cheap Way Out for Repeat Cartelists and Second-in-Line Confessors', ABA Section of Antitrust Law, International Committee, *International Antitrust Bulletin*, Vol. 3 (October 2012).

Mr Chung has served in various bar association and international organisation leadership and contributing roles. He is currently co-chair of the ABA Section of International Law's Privacy, E-Commerce and Data Security Committee, and vice-chair of the International Antitrust Law Committee and of the International Committee of the ABA's Section of Antitrust Law. He is also a member of the International Chamber of Commerce (ICC) Task Force on Premerger Control Regimes, and 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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Kyoung Yeon Kim is a partner at Yulchon. Ms Kim's main area of practice covers antitrust matters, as well as M&A, general corporate and other regulatory matters including compliance, internal investigation and data privacy. Ms Kim's articles (both solo and co-authored) include the chapter on Korea in the *Competition Law in Asia Pacific – A Practical Guide*, Wolters Kluwer (2015); the chapter on Korea in *The Cartels and Leniency Review*, third and fifth editions, Law Business Research (2015, 2017); 'Korea's Aggressive Antitrust Enforcement in Financial Product Markets', *Asian-Mena Counsel*, Volume 12 Issue 5 (2014–15); 'Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet', *Competition Policy International Antitrust Chronicle* (October 2014); and the chapter on Korea in *The Merger Control Review*, Law Business Research (2010–2016).

Ms Kim served as counsel for the Korean Ministry of Environment from 2010 to 2013, and for the Ministry of Justice from 2011 to the present day.

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