

Dominance

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little



2017

GETTING THE
DEAL THROUGH

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Dominance 2017

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Article 3-2(1) of the Monopoly Regulation and Fair Trade Act (MRFTA) proscribes the following acts as the abuse of a market-dominant position:

- conduct that unreasonably determines, maintains or changes the price of goods or services;
- conduct that unreasonably controls the output of goods or services;
- conduct that unreasonably interferes with business practices of other entities;
- conduct that unreasonably impedes or forecloses market entry; and
- conduct that unfairly excludes competitors or significantly harms consumer interests.

According to MRFTA's delegation under article 3-2(1), the Korea Fair Trade Commission's (KFTC) Guidelines for the Review of Abuse of Market-Dominant Position (Guidelines) and article 5 of the MRFTA Enforcement Decree specifically provide the standards of review for a relevant market ('a certain line of trade') and market-dominant position as well as the list of the abusive acts set forth above.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

A dominant firm refers to any firm, by itself or with other firms, that can determine, maintain, or change price, quantity or quality of goods or services as a supplier or customer in a particular market (article 2(7) of the MRFTA). Criteria for dominance include:

- market share;
- barriers to entry;
- relative size of competitors;
- possibility of collusion among competitors;
- existence of similar products or adjacent markets;
- possibility of market foreclosure; and
- financial resources (section III of the Guidelines).

Among the criteria for dominance, in practice, the KFTC views market share as the most important indicator of dominance, and case law generally follows suit.

The MRFTA does not recognise different types of dominance such as 'relative dominance'. However, abusive acts by a non-dominant firm with a superior trading position against its business counterpart can still be sanctioned as an unfair trade practice (article 23 of the MRFTA).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the MRFTA is to promote fair and free competition, encourage creative business activities, protect consumers, and strive for balanced development of the national economy (article 1 of the MRFTA).

Thus, regulation of dominance under the MRFTA is not strictly economic but considers policy implications of the regulation, such as consumer protection, small businesses and the national economy.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Other than the MRFTA, the Telecommunications Business Act (TBA) could be an example of sector-specific provisions. According to the TBA, an operator that provides key telecommunications services, as in telecommunications services for transmitting or receiving sound, data, images, etc (common telecommunications services), determined and publicly announced by the Minister of Science, ICT and Future Planning in consideration of the market size, the number of users, the conditions of competition, etc, from among telecommunications services provided by a common telecommunications business operator who has the largest market share based on the turnover of the preceding year in a unit market demarcated after considering substitutability of demand or substitutability of supply of services and the geographical range for providing services, must determine service charges and the terms and conditions of use for each service type, and report thereon (including cases of reporting modified matters) to the Minister of Science, ICT and Future Planning (article 28(2) of the TBA). Also, a common telecommunications business operator that possesses equipment and facilities indispensable to other telecommunications business operators for providing telecommunications services must provide equipment and facilities to telecommunications business operators (article 35(2) of the TBA), and such common telecommunications business operator whose market share based on the turnover of the preceding year exceeds 50 per cent in a unit market demarcated after considering the above-mentioned criteria, must permit access to or joint use of the telecommunications equipment or facilities (article 41(3) of the TBA). Where a telecommunications business operator is subject to a measure or a penalty surcharge on the grounds of committing prohibited acts, the telecommunications business operator shall not be subject to a corrective measure or penalty surcharge under the MRFTA on the same grounds (article 54 of the TBA). However, unless there is a clear provision that rules out the application of MRFTA in other laws, MRFTA would still apply to all sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to any dominant firms. Both suppliers and customers are subject to the rules as well as the public entities. The dominance rules also apply to foreign firms abroad when their business activities affect the domestic market (article 2-2 of the MRFTA).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The MRFTA only provides for the behaviour of firms that are already dominant. The conduct of a non-dominant firm seeking market

dominance is not subject to the legislation, but in some cases, it may be sanctioned as an unfair trade practice under article 23(1) of the MRFTA. Furthermore, the provision on business combination provides a structural remedy to prevent beforehand the emergence of a dominant firm with a potential to inflict anticompetitive effect in a relevant market. (article 7 of the MRFTA).

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

There is some ambiguity as to whether the MRFTA explicitly covers the concept of collective dominance or shared monopoly.

Regarding collective dominance, the appellate court has ruled that a dominant firm refers to an 'individual and separate' business entity that dominates a relevant market in the form of a monopoly or oligopoly but not collective dominance of multiple business entities forming a monopoly over a relevant market under article 2(7) of the MRFTA (Seoul High Court Decision in Case No. 2001Nu15193, rendered on 27 May 2003). On appeal, the Korean Supreme Court did not rule on the issue of collective dominance and dismissed the KFTC's appeal, affirming the High Court's ruling (Supreme Court Decision in Case No. 2003Du6283, rendered on 9 December 2005).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Both suppliers and purchasers may qualify as market-dominant entities under the MRFTA. There is no difference in the legal applicability between suppliers and purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

A relevant market refers to a market in which any competitive relation exists or may exist by the subject, stage or geographical area (article 2(8) of the MRFTA). The approach of the agencies or courts is no different from their approach to a definition of the relevant market in merger control cases.

A relevant 'goods or services market' is defined by taking into account: (i) similarity of functions and uses of relevant goods or services; (ii) perception of buyers on substitutability and related business behaviour; (iii) perception of sellers on substitutability and related business behaviour; and (iv) the Korea Standard Industrial Classification promulgated by Statistics Korea (section II.1. of the Guidelines). In addition, a relevant 'geographical market' means the geographical area in which ordinary buyers or sellers may divert their purchase or sale when there is a small but significant and non-transitory increase or decrease in price only within the geographical area (section II.2. of the Guidelines).

A unique aspect of the MRFTA is the rebuttable presumption of market-share based dominance. Under article 4, market dominance is presumed if (i) the market share of one business entity is 50 per cent or more, or (ii) the combined market share of three or less business entities is 75 per cent or more, excluding a business entity with market share of 10 per cent or less. However, market dominance is not presumed for a business entity whose annual sales or purchases are less than 4 billion won. The presumption can be rebutted if a firm proves that it does not have dominant power to set a market price or output.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The legislation and case law follow an effects-based rule of reason approach, and no conduct is subject to a per se prohibition. To constitute the abuse of market-dominant position, there must be intent or purpose to restrict competition in a relevant market, thereby artificially

influencing the free market system, and the existence of potentially abusive acts raising competitive concerns must also be objectively proven (Supreme Court Decision in Case No. 2002Du8626, rendered on 22 November 2007, the *Posco* case). This case, based on an effects-based approach, provides crucial guidance for the KFTC and courts in assessing the abuse of market-dominant position.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The abuse of market dominance under the MRFTA includes both exploitative abuse and exclusive abuse. Under article 3-2(1), the exploitative abuse includes abusive practices of pricing, output control, and reduction of consumer welfare, while the exclusive abuse includes practices of interfering with other businesses, interfering with new competitors' entry to the relevant market and excluding competitors. However, the KFTC focuses more on the exclusionary abuse than the exploitative abuse in its regulation of dominance.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

A causal relationship is required between dominance and abuse.

In addition, the KFTC and Supreme Court acknowledge the concept of leverage. The Supreme Court held that if a dominant firm of a relevant market unfairly interferes with the business activities of other firms in an adjacent market by leveraging its dominance in the relevant market, such abusive interference can constitute the abuse of market-dominant position in the adjacent market (Supreme Court Decision in Case No. 2008Dui832, rendered on 13 October 2011).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Pursuant to the Supreme Courts' assessment on unreasonableness in the *Posco* case, the accused firm can raise a defence that it did not have intent or purpose to maintain or enhance monopoly power in a relevant market – the subjective element – or the concerned act does not raise competitive concerns – the objective element.

Even though exclusionary intent was shown, the firm can still raise the defences such as the unlikelihood or non-existence of anticompetitive effect based on the efficiency gains theory. In many cases, an economic research report analysing potential anticompetitive effect in a relevant market by an economist is used to provide an empirical basis.

Specific forms of abuse

14 Rebate schemes

Unreasonable rebate schemes can be viewed as exclusion of competitors if transacting business with a dominant firm is conditioned upon a business counterpart's refusal to deal with the dominant firm's competitors (article 3-2(5) of the MRFTA; article 5(5) of the MRFTA Enforcement Decree). The MRFTA does not distinguish between retroactive and incremental rebates and decides on the issue of legality on a case-by-case basis. Analysis of anticompetitive effects from rebate schemes comprehensively considers an increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' operating cost (section IV.6. of the Guidelines).

In the *Qualcomm I* case, the company offered retroactive rebates to Korean mobile handset manufacturers to which Qualcomm provided its modem chipsets, seeking foreclosure of Qualcomm's competitors. The KFTC viewed the retroactive rebate as the abuse of market-dominant position by Qualcomm and imposed a corrective measure and an administrative fine of approximately 273.2 billion won. (KFTC Decision 2009-281, 30 December 2009; 2013Dui4726 case pending in Supreme Court).

Also in the *Intel* case, the company provided retroactive rebates to Korean PC makers, contingent upon their not purchasing CPUs from Intel's competitors. The KFTC also viewed the Intel's retroactive rebates as the abuse of a market-dominant position and imposed a corrective measure and an administrative fine of approximately 26.6 billion won (KFTC Decision 2008-295, 5 November 2008).

15 Tying and bundling

Tying may constitute the act of unreasonably interfering with business activities or doing considerable harm to the interests of consumers. The analysis of anticompetitive effects from tying comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and a rise in competitors' costs (section IV.6. of the Guidelines).

In the *Microsoft* case, Microsoft tied its Windows server and Windows Media Service, and its Windows PC operating system and Windows media player. The KFTC acknowledged such conduct by Microsoft as an act of unreasonably interfering with business activities or doing considerable harm to the interests of consumers and, thus, imposed a corrective measure and an administrative fine of approximately 3.25 billion won (KFTC Decision 2006-042, 24 February 2006, affirmed).

In addition, in another case, the KFTC initiated its investigation of Oracle on grounds that it allegedly abused its market dominance and superior trading position by providing its tied products – Data Base Management System (DBMS) support service and next DBMS version – and forcing its customers to purchase unnecessary DBMS support service for all licensed products. However, in April 2016, following full hearings before the KFTC, it found that Oracle had not violated the MRFTA on the grounds that, among others, Oracle's policy is a legitimate exercise of its IP right, and there is no anticompetitive effect, such as foreclosure, resulting from the Oracle's support policy.

16 Exclusive dealing

Exclusive dealing can be sanctioned for unfair interference with competitors' market entry and exclusion of competitors (article 3-2(4), (5) of the MRFTA; article 5(4), (5) of the MRFTA Enforcement Rules). The analysis of anticompetitive effects from exclusive dealing comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and a rise in competitors' cost (section IV.6. of the Guidelines).

In the *Nong-hyup* case, where the National Agricultural Cooperative Federation's demand on fertiliser producers for exclusive dealing of fertiliser for food crops was at issue, the KFTC acknowledged the demand for exclusive dealing as 'engaging in business to unfairly exclude competitors'. The Supreme Court also upheld the KFTC's conclusion (Supreme Court Case in Case No. 2007Du2078, rendered on 9 July 2009).

17 Predatory pricing

Supplying goods or services at a lower price than the comparable price in the ordinary course of business can raise competitive concerns for competitor exclusion, and it can be sanctioned as an unfair practice that excludes competitors under article 3-2(1)5 of the MRFTA. To determine 'unfairly low price,' the difference between the normal trading price, quantity and period of supply or purchase, characteristics, demand and supply status of the goods and services is considered (section IV. 5 of the Guidelines). Recoupment is not required.

The KFTC held that LG U-Plus and KT, both of which are key mobile network providers with a market-dominant position, excessively lowered the prices of their corporate messaging services below the normal trading price, thereby forcing out smaller competitors without their own mobile networks, and the KFTC issued a corrective measure and an administrative fine of approximately 6.5 billion won. (KFTC Decision 2015-49, 50, 23 February 2015). The normal trading price is presumed to be higher than the production cost of corporate messaging service providers without their own mobile networks – which is the addition of the messaging service fee which they pay to mobile network providers, labour costs, sales management costs and other related expenses for provision of the service. KT appealed the KFTC's disposition and filed a suit in the Seoul High Court, where the case is currently pending.

18 Price or margin squeezes

Price or margin squeeze can also be sanctioned as an unfair practice to exclude competitors under article 3-2(1)5 of the MRFTA. The case explained in question 17 also included an issue of margin squeeze. The KFTC viewed that it is commercially reasonable to presume that the normal trading price be set at a higher level than the production cost of the corporate messaging service providers.

19 Refusals to deal and denied access to essential facilities

Unfairly denying, interrupting or limiting access to the use of elements indispensable for other business entities to produce, supply and market their goods or services without justifiable grounds will be prohibited as 'an unfair practice to obstruct business activities of other business entities' (article 3-2(1)3 of the MRFTA; article 5(3)3, 4 of the MRFTA Enforcement Decree).

The MRFTA uses the term 'essential element' instead of 'essential facility' in the context of refusal to deal. The 'essential element' refers to both tangible and non-tangible elements, such as networks and key facilities, that are indispensable for business entities to produce, supply, and market their goods and services. The analysis for assessing anticompetitive effect comprehensively considers an increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

In *Posco*, the company's refusal to deal with Hyundai Hysco was at issue. Despite repeated requests made by Hyundai Hysco from August 1997 to February 2001 for supplying hot-rolled coils for cold-rolled plate, Posco rejected such requests for shortage of supply. The KFTC determined that such refusal by Posco constituted abuse of a market-dominant position and imposed a corrective measure and an administrative fine. Posco appealed and, the Supreme Court invalidated the KFTC's disposition, holding that there is no competitive concern arising from the refusal to deal by Posco (Supreme Court Case in Case No. 2002Du826, rendered on 22 November 2007).

20 Predatory product design or a failure to disclose new technology

Predatory product design or a failure to disclose new technology can be regarded as unfair interference with new market entries of competitors or refusal to deal and denial of access to essential elements (article 3-2(1)3, 4 of the MRFTA). The analysis of anticompetitive effect from predatory pricing comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

21 Price discrimination

The MRFTA provides that conduct that 'hinders operations of other businesses by providing conditions deemed unreasonable compared with normal business practices or providing discriminating price or transactional conditions' is abusive (article 3-2(1)3 of the MRFTA). The analysis of anticompetitive effect from price discrimination comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

In the *Qualcomm 1* case, the KFTC imposed a corrective measure and an administrative fine based on its decision that Qualcomm unreasonably hindered the business operation of other companies by imposing a discriminatory royalty (KFTC Decision 2009-281, 30 December 2009; a case pending in the Supreme Court).

22 Exploitative prices or terms of supply

A significant increase or slight decrease in price of goods or services relative to change in supply and demand or change in the costs of supply without any justifiable reason is considered as unfairly determining, maintaining, or changing the price of goods or services and thus prohibited (article 3-2(1)1 of the MRFTA). Unreasonable control over an output is also prohibited (article 3-2(1)2 of the MRFTA). The standard of review for assessing anticompetitive effect comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

In the *Shindongbang* case, a soybean oil producer, Shindongbang, announced a price increase of oil following a hike in the exchange rate and reduced its production a few days before the announced price increase. The KFTC found that the producer did not have a sound business reason for the reduction in output, and the turnover greatly increased, suggesting unreasonable output control. The Supreme Court agreed with the KFTC's interpretation (Supreme Court in Case No. 99Du10964 rendered on 3 November 1999).

23 Abuse of administrative or government process

Abusing a patent infringement action, patent invalidation action, and other related judicial or administrative procedures are perceived as the abuse of market-dominant position and thus prohibited (article 3-2(1)3 of the MRFTA). The IP Guidelines prescribe that the enforcement of patent rights through a lawsuit is highly likely to be determined as an abusive act in the following cases:

- filing a patent infringement lawsuit based on a patent deceptively obtained despite the awareness that the relevant patent has been obtained in a deceptive manner;
- filing a patent infringement lawsuit despite awareness of the patent holder that patent infringement will not be established (because the relevant patent has been nullified, etc); or
- filing a patent infringement lawsuit despite that the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect (in terms of social norms or customary practices in a relevant market) success on the merits.

24 Mergers and acquisitions as exclusionary practices

The KFTC has never applied article 3-2 of the MRFTA to any merger or acquisition.

25 Other abuses

Other types of abuse, as long as they fall under the category of acts prescribed in article 3-2 of the MRFTA and article 5 of the Enforcement Decree of the MRFTA, can also be prohibited as abusive acts. In particular, the act of 'doing considerable harm to the interests of consumers' provided under article 3-2(1)5 can be interpreted to encompass a wide range of acts.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The KFTC is responsible for enforcement against abusive acts. For such enforcement purposes, article 50 of the MRFTA stipulates that the KFTC may take the following measures:

- a summons to a hearing of the relevant parties, interested parties or witnesses to seek their opinions;
- the designation of an appraiser and entrustment of the appraisal;
- an issuance of an order to an enterpriser, an enterprisers' organisation or an executive or employee thereof for a report on the cost and business situation, for the presentation of other necessary materials or objects, or detention of presented materials or objects; or
- access to the office or place of business of the dominant firm or its organisations for an on-site investigation.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

When it has found that an act violates article 3-2, the KFTC may order the dominant firm to discontinue the act of violation, publish the fact that it is ordered to make correction thereof and take other measures necessary for correction (article 5 of the MRFTA); impose upon such firm a surcharge not exceeding an amount equivalent to 3 per cent. In this case, however, the KFTC's finding of a violation would not be a prerequisite to a private plaintiff's damages action. Of course, in that case, the private plaintiff itself will have to prove first that the accused abused its dominant position. When no turnover exists or when it is difficult to calculate the turnover, a penalty surcharge may be imposed by up to 1

Update and trends

No significant changes in the legislation or other measures are expected in the near future.

Under the MRFTA, the KFTC has exclusive authority to file a criminal complaint to the Prosecutor's Office in addition to issuing a remedial order and an administrative fine (articles 66 and 71 of the MRFTA). Currently, in practice, the KFTC does not file criminal complaints even for the serious abuse of market-dominant position. However, the issue of abolishing the KFTC's exclusive authority to file a criminal complaint is being actively discussed in the National Assembly. If the KFTC's exclusive authority to file a criminal complaint is abolished, then the abuse of market-dominant position can be subject to criminal prosecution even when the Prosecutor's Office initiates an independent criminal investigation or an injured party files a criminal a complaint against a dominant firm for the abuse of market-dominant position, all without the KFTC's criminal referral.

Also, the KFTC recently set up the Intellectual Property Monitoring Division, which will closely monitor (i) SEP abuse such as an injunction or patent ambush in violation of the FRAND commitment in the ICT sector; (ii) monopolistic behaviour in the aftermarket (secondary market such as components or spare parts for repair and maintenance, after-sales service), using intellectual property including patent or design rights; and (iii) any competition-restraining behaviour in new growth industries including IoT, big data and biotechnology.

billion won (article 6 of the MRFTA). The KFTC may seek to impose imprisonment for not more than three years or a fine not exceeding 200 million won by filing a complaint with the prosecution (article 71(1) and 66(1)(1) of the MRFTA).

There are no structural remedies available for the KFTC against abusive acts.

The highest fine ever imposed by the KFTC to date for abuse of dominance is 1.03 trillion won in the *Qualcomm* case of January 2017 (*Qualcomm II*) – a case pending before the Seoul High Court (see question 29).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The KFTC can impose sanctions directly without having to petition a court or other authority.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

According to the KFTC's 2015 Annual Statistics, the most recent year for which such official statistics are available, there have been five abuse of market-dominant position cases, where at least a KFTC warning was given. Since the implementation of the MRFTA on 1 April 1981, there were 93 issuances of KFTC corrective measures. In particular, of the 93 issuances, 43 corrective measures – 46 per cent of the total issuances – were issued for unfair interference with business activities of other companies pursuant to article 3-2(1)3 of the MRFTA (2015 KFTC Annual Statistics, page 5, 6, 48).

The length of proceedings may vary depending on cases.

The most recent high-profile dominance case is *Qualcomm II*. In January 2017, the KFTC imposed a corrective measure and an administrative fine of 1.03 trillion won for Qualcomm's alleged abuse of a market-dominant position and unfair trade practice in the modem chipset and Standard Essential Patents (SEP) licensing for mobile communication markets. The KFTC found that Qualcomm refused or limited licensing of its SEP to competing modem chipset makers and coerced mobile handset makers into unfair licensing agreements. Qualcomm appealed the KFTC administrative decision to the Seoul High Court seeking independent judicial review, where the case is currently pending.

30 Contractual consequences**Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?**

Even if an act by a dominant company constitutes an abusive act of market-dominant position, the clause will not automatically be void or invalidated. The Seoul High Court has held that the validity of the clause must not be judged in an abstract manner based on uniform standards. Instead, the issues including purposes and nature of the applicable laws, the prohibited acts, the extent of violation and the possible confusion in case of invalidation of the clause must first be taken into account, reflecting the concept of justice, fairness or principle of good faith (Seoul High Court Decision in Case No. 94Ra186, rendered on 12 January 1995).

31 Private enforcement**To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?**

A private plaintiff cannot seek an injunctive relief but may only seek monetary damages under the MRFTA. With respect to private enforcement, any person that suffers damages arising out of an abusive act by a dominant firm may be entitled to claim damages pursuant to article 56 of the MRFTA. In this case, however, the KFTC's finding of a violation would not be a prerequisite to a private plaintiff's damages action. Of course, in that case, the private plaintiff itself will have to prove first that the accused abused its dominant position.

32 Damages**Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?**

According to article 56 of the MRFTA, for harm caused by antitrust violations including abuse of market dominance, the violator will be responsible for damages. As a general rule, an injured party bears the burden of proof regarding the existence and scope of the damage it allegedly suffered. Where it is extremely difficult for the party injured by antitrust violations to provide sufficient evidence on the amount of damages to be awarded, the court may determine the appropriate amount under its discretion (article 57 of the MRFTA).

In 2013, three civil actions were filed against Microsoft after the KFTC found that Microsoft had engaged in illegally tying. The allegedly injured party, the plaintiff, argued that illegal tying of Microsoft's operating system and instant messenger effectively shut down the plaintiff's instant messenger business. However, the Supreme Court dismissed the suit for failure to prove a causal relation between the tying and the alleged injury (Supreme Court Decision in Case No. 2012Da79446, rendered on 13 February 2013).

33 Appeals**To what court may authority decisions finding an abuse be appealed?**

The Seoul High Court has jurisdiction over challenges to the KFTC's administrative decisions (article 55 of the MRFTA). It reviews both the facts and the law. The Supreme Court has jurisdiction to hear appeals of decisions of the Seoul High Court.

Unilateral conduct**34 Unilateral conduct by non-dominant firms****Are there any rules applying to the unilateral conduct of non-dominant firms?**

Article 23(1) of the MRFTA prohibits unfair trade practices. A non-dominant company can also be sanctioned for an unfair trade practice. Proscribed unfair trade practices are as follows:

- unfairly refusing any transaction or discriminating against a certain business counterpart;
- unfairly coercing or inducing customers of competitors to deal with oneself;
- trading with a business counterpart by unfairly taking advantage of his or her position in trade; and
- trading under the terms and conditions that unfairly restrict business activities of a business counterpart or disrupting business activities of other companies.

According to KFTC practice, in many cases where a particular act constituted both the abuse of a market-dominant position and the unfair trade practice, all of the relevant regulations on both issues will be used in the review of legality. However, for issuance of corrective measures such as an administrative fine, regulations on the abuse of a market-dominant position will be applied.



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