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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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Cartels

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Shin & Kim has the largest team of antitrust specialists in Korea, with more than 50 dedicated experts, including a former Korea Fair Trade Commission (KFTC) chairman, officers and committee members, and former prosecutors and judges. The group is complemented by the largest number of KFTC alumni lawyers of any law firm, all of whom have extensive expertise in antitrust law and deep famili-

arity with KFTC enforcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including onsite investigations and hearings, and for representing clients in administrative appeals and relevant damages lawsuits. The group has represented numerous foreign clients in KFTC investigations and litigation.

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1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

In Korea, the statutory basis for challenging cartel behaviour/effects is the Monopoly Regulation and Fair Trade Act ("MRFTA"). Although there are other statutes that regulate cartels, including the Criminal Act and the Framework Act on the Construction Industry, most cartels are regulated under the MRFTA, through Article 19 to Article 22-2, and the Enforcement Decree of the MRFTA details or supplements the MRFTA provisions. In addition, as the enforcement authority of the MRFTA, the Korea Fair Trade Commission ("KFTC") provides the following guidelines for cartels: Guidelines for Filing Applications for the Approval of Cartels and Competition-Restrictive Practices; Guidelines for Cartel Review; Guidelines on Examination of Cartel in Bidding; and Guidelines for Examination of Cartel Involving Administrative Guidance.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The KFTC may impose remedial orders and a surcharge on a company that has taken part in a cartel in violation of the MRFTA, and may file a referral to the prosecutors' office. According to the MRFTA, the KFTC may impose a surcharge of up to 10% of the relevant revenue for cartels. In relation to amendment of the MRFTA, the National Assembly is currently discussing increasing the maximum for the surcharge.

Meanwhile, the MRFTA also has a provision on criminal punishment for cartels. A person that has engaged in a cartel may be subject to imprisonment of up to three years or a fine of up to KRW200 million (about USD168,000), and a fine may also be imposed on a company that has engaged in a cartel. If the company is a corporation, its representative and employees may also be subject to criminal punishment.

1.3 Private Challenges of Cartel Behaviour/Effects

A person who has suffered damages due to a cartel may file a damages lawsuit against the cartel participant. In such a case, standing for plaintiffs in the damages lawsuit is not necessarily limited to the cartel participant's competitor or direct transaction counterparty. Meanwhile, although a private person may report a cartel to the KFTC in order to urge the KFTC to investigate, a private person cannot directly file a lawsuit seeking to impose remedial orders or a surcharge on a cartel participant.

1.4 Definition of 'Cartel Conduct'

Regarding cartels, the MRFTA provides that a company shall neither agree with any other company to do jointly the following acts that unfairly restrict competition, nor require any other company to engage in such illegal cartel conduct under contract, agreement, or arrangement or in any other manner:

- price-fixing;
- determining terms and conditions for transactions;
- output restrictions;
- imposing limitations on the area in which transactions can be done or transaction partners;
- hindering installation of facilities;
- imposing limitations on kinds of, and standards for, goods or services to be produced or traded;
- jointly conducting and managing substantial business activities;
- bid-rigging; and
- any other act substantially restricting competition by means of hindering or imposing limitations on the business of other companies.

Joint conduct between competitors that is not anti-competitive is not prohibited. In this regard, according to the KFTC's Guidelines for Cartel Review, if the combined market share of the companies who participated in the cartel does not exceed 20%, the KFTC will end its review based on the view that anti-competitive effect will not arise due to the joint conduct or that anti-competitive effect is minimal. In addition, a cartel is exceptionally permitted if it has been approved by the KFTC on grounds that its purpose is for industrial rationalisation, research and technology development, overcoming recession, industrial restructuring, trade term rationalisation, and improving the competitiveness of small- and medium-sized businesses.

1.5 Limitation Periods

The KFTC may not impose remedial orders or a surcharge on a cartel if the following limitation period has elapsed:

- if the KFTC has commenced investigation into an MRFTA violation: five years from the investigation commencement date; or

- if the KFTC has not commenced investigation into an MRFTA violation: seven years from the date of termination of the violation.

Therefore, even if seven years have elapsed since the date of the cartel participants' agreement, the KFTC may impose sanctions if the cartel is still in progress. However, if a sanction has been cancelled according to a court's decision and a new sanction has been imposed according to a court's decision, the provision on the limitation period above does not apply.

1.6 Extent of Jurisdiction

Cartels outside of Korea may also be regulated by the KFTC under the MRFTA if they affect the Korean market. In this regard, in an appeal of an air cargo case, the Korean Supreme Court held that the MRFTA's scope of application for overseas conduct should be limited to overseas conduct that has a direct, substantial and reasonably foreseeable effect on the domestic market. Meanwhile, the Korean Supreme Court has determined that if the Korean market is included in the subject of an anti-competitive agreement among foreign companies, then it should be considered to affect the Korean market, unless there are special circumstances.

1.7 Principles of Comity

The Korean court has emphasised the importance of comity with respect to competition law. In the air cargo case mentioned in **1.6 Extent of Jurisdiction** above, the Korean Supreme Court expressed its concern that "*excessive extra-territorial application of the MRFTA would give rise to unfair consequences.*"

Likewise, the KFTC has emphasised comity in areas involving competition law. It submitted an amicus brief on 23 May 2014 in *Motorola Mobility LLC v. AU Optronics Corp.*, No 14-8003 (7th Cir. 2014), where extra-territorial application of the US antitrust laws was a key issue. In this amicus brief, the KFTC asked the US court to uphold the comity principle by stating: "*Furthermore, the antitrust regime of a country typically accommodates the country's unique legal tradition and socioeconomic characteristics [...] If this Court disregards such fundamental differences and applies the US antitrust laws to claims arising out of transactions that took place outside the US between non-US entities without any direct effect on the US market, such expansive application of the US antitrust laws is likely to create conflicts with other countries' sovereignty.*"

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

The KFTC may commence an investigation into an alleged cartel case either on its own or by receiving a report of such cartel. According to the annual statistical report issued by

the KFTC, of the KFTC's 257 cartel cases in 2017, 115 were based on reports to the KFTC and 142 cases were commenced by the KFTC on its own.

2.2 Dawn Raids

The KFTC may conduct a dawn raid to investigate whether there has been a violation of the MRFTA by sending investigating officials to the place of business of the company that is suspected of participating in a cartel. In fact, the KFTC frequently conducts dawn raids. The KFTC's dawn raid is conducted with the consent of the company that is subject to the investigation (ie, it is not a compulsory investigation). However, if the company, officer or employee interferes with the KFTC's investigation, criminal punishment may be imposed, depending on the type of interference. Meanwhile, the investigating official and such official's supervisor who receive a report of the investigation plan have an obligation to keep information related to the dawn raid confidential so that it is not leaked outside.

2.3 Restrictions on Dawn Raids

When conducting a dawn raid, the investigating official must first issue a notice of investigation to the officer or employee of the investigated company, stating the period, purpose, subject and method of the investigation. The investigating official must conduct the dawn raid within the scope of the purpose of the investigation stated in the notice of investigation. However, if materials are found during the investigation process that show there is a possibility of law violation that is outside the scope of the purpose of the present investigation but falls under the KFTC's jurisdiction, appropriate measures should be taken by the KFTC, such as sending the relevant materials to the KFTC division in charge. The dawn raid must be conducted only within the place of business stated in the notice of investigation. However, if the place of business stated in the notice of investigation is not a place of business that meets the purpose of the investigation, or if there is a suspicion of law violation that is consistent with the purpose of the investigation at another place of business during the investigation process, an investigation may be conducted after issuing a separate notice of investigation that specifies such place of business. The investigating official must conduct the investigation within the regular working hours of the investigated company. If it becomes necessary to extend the investigation time beyond regular working hours, the investigation must proceed after the necessity of the extension is sufficiently explained to a person in charge at the investigated company, and after discussion with that person in charge. The investigating official must complete the investigation within the investigation period stated in the notice of investigation. However, if an investigation sufficient to achieve its purpose has not been carried out within the investigation period, said period may be extended to the extent that the burden of the investigated company can be minimised.

2.4 Spoliation of Information

If a company, officer or employee interferes with the KFTC's investigation by means such as hiding or destroying materials or objects requested by the KFTC, refusing access or forging or falsifying materials, the KFTC may file a referral to the prosecutors' office regarding the company, officer or employee who interfered with investigation. If the prosecutors' office indicts in connection with this, the court may impose imprisonment of up to two years, or a fine of up to KRW150 million (about USD126,000) on the company or relevant employee.

2.5 Procedure of Dawn Raids

Before investigating the desk, drawer, cabinet or work notebook, among other items, of the investigated company, the investigating official should seek co-operation from a person in charge of the division that is subject to the investigation at the investigated company or an officer or employee of equivalent position. If there is a concern regarding the destruction of evidence, the investigating official may keep such materials or objects in custody. When investigating data in the information processing system of the investigated company, the data should be accessed or copied with the co-operation or in the presence of the person concerned at the investigated company. At this time, the investigating official may collect digital data by deciding the scope of the data and printing it or using the imaging method at the investigation site. However, if it is difficult to decide the scope of the data and to image it at the investigation site, the digital storage media can be held in custody or the entire digital data may be imaged, and in which case data is selected later at the KFTC office with the attendance of the investigated company's counsel. If an officer or employee of the investigated company requests a copy of the data collected by the investigating official, the investigating official must comply with the request. The investigated company may request a copy of the imaging file collected by the KFTC, and the investigating official must comply with the request, unless there is a justifiable reason not to do so.

In the dawn raid process, the investigating official may conduct interviews of officers or employees of the investigated company, and may request to take statements or confirmation documents. However, if there are inevitable circumstances that make it difficult for the officer or employee to comply with such a request, then the interviews are carried out later after discussing the schedule and place of the investigation. If an officer or employee of the investigated company requests a copy of the statement or confirmation document prepared with regard to themselves, then the investigating official must comply with the request, unless there is considerable concern of interference with the investigation, such as the destruction of evidence or the leaking of confidential investigation information. Meanwhile, if an officer or employee refuses to co-operate with an interview, an administrative fine of up to KRW100 million (about USD84,000) for the

investigated company and up to KRW10 million (about USD 8,400) for the officer or employee may be imposed.

2.6 Role of Counsel

In principle, if there is a request by the investigated company, the investigating official must allow counsel (including in-house counsel of the investigated company) appointed by the investigated company to participate in the entire investigation process (including the process of the KFTC's taking statements and confirmation documents). However, if one of the following applies, then counsel may be prevented from participating:

- if the investigated company's request for counsel participation is deemed to delay or interfere with the commencement and proceeding of the investigation;
- if counsel intervenes in the interrogation without approval by the investigating official, or engages in offensive speech or conduct;
- if counsel responds on behalf of the investigated company or induces a specific answer or alteration of a given statement;
- if counsel films, tapes or records the content of the interrogation (excluding taking simple notes to help recollect memory for the purpose of providing legal advice); and
- if this makes it clearly difficult to achieve the purpose of the investigation in any other way.

In addition, in relation to cartel investigations that require urgent investigation due to concerns such as the destruction of evidence, investigations may be commenced regardless of whether the request for counsel participation is granted.

2.7 Requirement to Obtain Separate Counsel

Officers and employees of an investigated company that is subject to the KFTC's investigation do not need to appoint counsel other than the counsel appointed by the investigated company, unless there is a conflict of interest. Of course, officers or employees may appoint separate counsel based on their own judgement.

2.8 Initial Steps Taken by Defence Counsel

At the initial phase of the investigation, defence counsel should focus on reducing the scope of the charge against the investigated company. For example, it may be necessary to identify and analyse issues of which the KFTC might be suspicious in the statements made by an investigated company or in the contents of the materials in custody, establish defence logic against them, and actively explain to the KFTC from the initial phase of the investigation. Defence counsel may request to exclude materials that are unrelated to the subject of the investigation from the submission through discussion with the KFTC.

It should be noted that, from the initial phase of the investigation, the KFTC should not be given the unnecessary

impression that the investigated company is being uncooperative with the investigation. Even if the investigated company does not accept the charge, giving the impression of fully co-operating with basic requests from the KFTC can facilitate smooth communication with the KFTC in the future, and this can bring about a more positive result.

2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

When necessary for the investigation, the KFTC's investigating official may obtain statements from the investigated company, interested persons and reference persons, and may order the submission of necessary materials and hold them in custody. Although the KFTC's investigation procedure is based on the consent of the investigated company, the MRFTA does have certain measures in place for enforcement. For example, in case of failure to attend an interview without justifiable cause, an administrative fine of up to KRW100 million for companies and up to KRW10 million for employees or interested persons may be imposed. In addition, those who refuse to submit materials without justifiable cause may be subject to an enforcement fine not exceeding three one-thousandths of the average daily sales revenue for each day of delay.

2.10 Procedure for Obtaining Other Types of Information

As explained above, the KFTC may access or copy materials in the information processing system with the co-operation or in the presence of the person concerned. At this time, the investigating official can decide the scope of the digital data and collect it by printing it or using the imaging method. Depending on the circumstances, digital storage media can be held in custody, or all the digital data can be imaged, in which case the data will be selected later at the KFTC office in the presence of the investigated company's counsel.

2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

The KFTC may conduct investigations into documents and evidence located in other jurisdictions with the consent of the investigated company. For example, if the materials are available to the investigated company, their submission may be requested even if they are located in a foreign country or stored on a foreign server, including the cloud. Statements from officers and employees of an investigated company located abroad may also be requested. However, the Korean prosecutors' office may not conduct search and seizure by force with respect to materials or objects located in the jurisdiction of another country.

2.12 Attorney-client Privilege

Korean law does not recognise the principle of attorney-client privilege.

2.13 Other Relevant Privileges

The privilege against self-incrimination is not recognised in the KFTC investigation process. However, if the prosecutor indicts with respect to the cartel conduct and a criminal proceeding is commenced, the privilege is recognised.

2.14 Non-co-operation with Enforcement Agencies

It is common for the investigated company to co-operate with the KFTC's investigation, to the extent possible, taking into account both the legal and practical aspects. As mentioned earlier, in the case of interference with the KFTC's investigation, there is a possibility of criminal punishment, and in the case of failure to attend an interview or failure to comply with an order to submit materials, an administrative fine or enforcement fine may be imposed. In addition, any surcharge imposed for the cartel may be reduced according to the degree of co-operation with the investigation. From a practical aspect, giving the KFTC the impression of co-operating fully with the investigation will help to bring about a positive result through smooth communication with the KFTC.

2.15 Protection of Confidential/Proprietary Information

The investigated company cannot refuse to submit materials requested by the KFTC solely on grounds that such materials are confidential or proprietary information. Instead, KFTC officials have an obligation to keep information of a company that they have discovered as a result of their position confidential, and must not use such information for purposes other than enforcement of the MRFTA.

If materials requested by the KFTC include information protected by the Personal Information Protection Act, such as resident registration number and address, the investigated company may submit materials after excluding the parts containing such personal information.

2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

There is no separate provision on procedure for defence counsel to defend the investigated company in response to a KFTC investigation. In the course of the KFTC's investigation and review, defence counsel may present opinions regarding the facts and legal interpretation to the KFTC in the form of a statement or written submission, in order to defend the investigated company and persuade the KFTC.

2.17 Leniency, Immunity and/or Amnesty Regime

The MRFTA provides for a leniency programme. For those who have filed a leniency application for a cartel, the KFTC may exempt from or grant a reduction regarding the remedial orders and surcharge. The KFTC may also exempt the leniency applicant from referral to the prosecutors' office.

According to the antitrust and competition white paper issued by the KFTC in 2018, the leniency programme was used in 55.8% of the cartel cases where a surcharge was imposed from 1999 to 2017; from 2005 to 2017 in particular, the percentage was 64.2%.

Applied Standards for Leniency

To obtain first-priority leniency status, an applicant must satisfy all of the following requirements:

- the applicant must be the first person to provide exclusively evidence necessary to prove existence of collusion;
- at the time of leniency filing, the KFTC has not obtained information about the collusion, or not enough evidence to prove existence of the collusion;
- the applicant must co-operate in good faith until the end of the KFTC review process by stating all facts related to the collusion and submitting related information;
- the applicant must stop its participation in the collusion; and
- the applicant must have not coerced another enterprise to participate in collusion, nor committed collusion in violation of the MRFTA repeatedly over a certain period.

The KFTC is required to give the applicant with the first-priority leniency status full immunity from surcharge payment and remedial measures while it is not required, but may decide at its discretion to give full immunity from criminal referral. In practice, the KFTC provides full immunity from criminal referral as well.

To obtain second-priority leniency status, an applicant must satisfy conditions c), d), and e) above, and the applicant must be the second person to provide exclusively evidence necessary to prove existence of collusion, provided that the leniency application is filed within two years of the date of the first applicant's leniency filing. If there are only two companies that participated in the cartel, it is not possible for a company to obtain second-priority leniency status. The KFTC is required to give the applicant with the second-priority leniency status a 50% reduction of surcharge payment while it is not required, but may decide at its discretion to give full immunity from remedial measures and immunity from criminal referral. In practice, the KFTC provides full immunity from criminal referral as well.

Leniency Application Process

In principle, a leniency application must be in writing, and it may be submitted by visiting the KFTC or via e-mail or fax. A leniency application must include an overview of the collusion at issue at the time of filing. The application may be supplemented to meet the legal requirements within a certain period. As a rule, the application supplement period cannot exceed 15 days, and an additional 60-day period may be granted at the KFTC case handler's discretion. Neverthe-

less, if the case handler finds it necessary, he or she may give more than 60 days for the additional period.

Recognition of Leniency Status

Priority for a leniency applicant is determined by the time of receipt of the leniency application. However, if an officer or employee of the leniency applicant provided the necessary evidence to prove the cartel in the form of a confirmation document or statement prior to the leniency application, then the leniency application is deemed to have been submitted at the time of submission of such evidence.

The KFTC case team eventually issues an Examiner's Report as to whether the applicant has satisfied all requirements to be granted a leniency status, and submits the report to the Commission. In the Commission's review process, it generally holds hearing(s), which are in practice separate from hearings for the main collusion case. The Commission typically holds a (closed) hearing for leniency application review and a hearing for the main collusion case on the same day. Once the hearing(s) for leniency application review are concluded, the Commission renders a decision on a leniency status.

Amnesty Plus

If a party subject to sanctions due to cartel conduct (Conduct A) obtains 1st priority leniency status for another cartel conduct (Conduct B) in which the party is also involved, the KFTC may reduce or exempt from surcharge and reduce remedial orders for Conduct A.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly from Employees

The KFTC can directly acquire information by investigating the officers and employees of the investigated company. Please see **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, above.

3.2 Obtaining Documentary Information from Target Company

The KFTC can seek documentary information directly from the investigated company. Please see **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, above.

3.3 Obtaining Information from Entities Located Outside this Jurisdiction

The KFTC can seek information directly from companies or individuals located outside the jurisdiction by issuing requests for information. In this case, the KFTC will usually require the relevant entity to designate a representative in Korea to receive the request for information, and then send

the request for information to that representative. However, if the entity does not designate a representative in Korea, then the KFTC will use a method in accordance with the Administrative Procedure Act, such as delivery by postal mail.

3.4 Inter-Agency Co-operation/Co-ordination

When deemed necessary for enforcement of the MRFTA, the KFTC may ask the head of the relevant administrative agency or other institution or organisation to conduct the necessary investigation or to share necessary information. In practice, however, this is not common.

3.5 Co-operation with Foreign Enforcement Agencies

The KFTC is actively co-operating with foreign enforcement agencies in the investigation of international cartel cases. Of course, the degree of co-operation may vary from case to case, but the KFTC is communicating with foreign enforcement agencies through various channels. However, as far as is known, there are few cases in which the KFTC has handed over relevant information that was obtained by foreign enforcement agencies, or vice versa.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

As mentioned earlier, the MRFTA has a provision on criminal punishment for cartels, which happens through indictment by the prosecutors' office. In principle, the prosecutors' office can indict for violations of the MRFTA, including cartels, only when the KFTC files a referral to the prosecutors' office. However, according to the MRFTA, if the degree of the violation is objectively clear and serious so that it clearly hinders competition, the KFTC must file a referral to the prosecutors' office; in this case, the Prosecutor General may first ask the KFTC to file the referral to the prosecutors' office. When there is such a request for referral by the Prosecutor General, the KFTC Chairman must file the referral to the prosecutors' office. In addition, even where the KFTC has determined that the requirements for filing the referral have not been met, the Chairman of the Board of Audit and Inspection, the Minister of the Ministry of SMEs and Startups, and the Administrator of the Public Procurement Service may request that the KFTC files the referral to the prosecutors' office based on social impact, the effect on national finance, and harm to small- and medium-sized businesses. In such a case the KFTC Chairman must also file the referral to the prosecutors' office. The MRFTA amendment bill currently being discussed at the National Assembly allows the prosecutors' office to indict right away, even without the KFTC's referral for cartels where the violation is clear and serious, such as for a price-fixing cartel, supply restriction cartel, market allocation cartel, and bid-rigging cartel.

If the prosecutors' office indicts pursuant to the KFTC's referral, a criminal trial will proceed in court. A defendant

in a criminal case involving a cartel is guaranteed the right to counsel, as in criminal cases in general. If the prosecutor submits materials from the KFTC as evidence, the defendant may access and copy such evidence. In addition, the defendant may attempt to obtain materials in the KFTC's possession that the prosecutor has not submitted as evidence by means such as sending a fact inquiry or request for document.

3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

Unlike the legislation of countries where the competition authority brings a civil action, as a regulatory authority the KFTC may directly impose administrative sanctions such as remedial orders and surcharge on companies that violate the MRFTA by participating in cartels. The KFTC handles a case through examination, deliberation and decision. The KFTC's "examination" refers to a series of investigation processes by the KFTC after it has received information about an MRFTA violation until it determines the need for deliberation and decision for the case. If the KFTC examiner determines that an MRFTA violation is established after the examination and submits an Examiner's Report to the Commission (composed of nine members including the Chairman and the Vice Chairman), the "deliberation" process commences. The Commission will listen to the opinions of the parties and interested persons, examine the evidence, deliberate as to whether there has been a violation of law, and impose measures through a "decision". Meanwhile, after a respondent is provided with the Examiner's Report above and attached materials, the respondent not only has the opportunity to submit opinions and explanatory materials but may also attend the hearing and give testimony.

3.8 Enforcement Against Multiple Parties

In general, the KFTC deliberates and makes a decision concurrently with respect to all of the companies involved in a single cartel. However, as explained above, the Commission's review for recognition of leniency status usually takes place at a separate closed hearing.

When the prosecutors' office indicts, it is common for the indictment to be with respect to all of the companies that participated in the cartel, as co-defendants. In the absence of special circumstances, the criminal case against the co-defendants will proceed in a single proceeding.

3.9 Burden of Proof

The KFTC bears the burden of proof for all the elements for establishing a cartel, such as the existence of an agreement prohibited by the MRFTA and an anti-competitive effect. In a criminal proceeding for a cartel as well, the prosecutor has the burden of proving that the cartel constitutes a crime.

3.10 Finders of Fact

The Commission is the finder of fact in the KFTC deliberation process, and also interprets and applies the law based on facts that it has found.

3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

Evidence obtained in one proceeding can be used in other proceedings; evidence from another jurisdiction may also be used. This is because there is no provision prohibiting their use. However, evidence offered by an applicant for leniency may be used only to handle the case for which the leniency application was filed.

3.12 Rules of Evidence

There are no special rules of evidence related to KFTC procedure. However, in a criminal proceeding for a cartel, the admissibility of evidence may be limited through application of the exclusionary rule for illegally obtained evidence, the rule of corroborating evidence for confessions, and the hearsay rule.

3.13 Role of Experts

During the KFTC's investigation and deliberation process, the KFTC examiner or the investigated company may receive help from experts. There are cases where expert opinions are submitted during the KFTC procedure, or where experts attend the KFTC hearing directly to present their opinions. However, expert involvement is not common for a cartel case in a KFTC proceeding. On the other hand, unlike for a KFTC proceeding, in a civil damages lawsuit for a cartel it is common for experts such as economists to be involved as appraisers in order to prove damages.

3.14 Recognition of Privileges

There is no special privilege that is recognised in the KFTC procedure. As explained above, attorney-client privilege is not recognised in Korea.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

In cases where multiple cartel conducts are at issue based on the same or related facts, the KFTC may, at its discretion, handle them separately or in a simultaneous process. In these cases, however, it is common for the KFTC to handle it through a simultaneous process.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

The KFTC may impose remedial orders and surcharge directly on a company involved in a cartel in violation of the MRFTA. Please see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, above.

4.2 Procedure for Plea Bargaining or Settlement

There is no plea bargaining or settlement system for a cartel case in Korea.

4.3 Collateral Effects of Establishing Liability/Responsibility

If the KFTC finds an illegal cartel and imposes sanctions, it tends to be easily recognised in court in a related damages lawsuit that there was illegal cartel conduct. Of course, the court is not bound by the KFTC's determination.

If the KFTC imposes sanctions for cartel conduct, it may ask an administrative agency to limit the eligibility of a company that participated in the cartel to participate in bidding processes. The head of the administrative agency that receives the KFTC's request may limit such company's eligibility to participate in bidding processes for a certain period of time.

4.4 Sanctions and Penalties Available in Criminal Proceedings

Please see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**, above. The type and amount of penalties imposed in a criminal proceeding on a company that participated in a cartel are determined by the court. The prosecutor asks the court to impose certain penalties. At this time, the KFTC does not present any opinions.

4.5 Sanctions and Penalties Available in Civil Proceedings

Please see sections **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **3.7 Procedure for Issuing Complaints/Indictments in Civil Cases**, above.

4.6 Relevance of 'Effective Compliance Programmes'

A company's effective compliance programme is not considered as a factor in imposing sanctions in a cartel case.

4.7 Mandatory Consumer Redress

The KFTC does not have the authority to require a company involved in a cartel to compensate those who have suffered damages due to the cartel. Such claimants may be compensated for damages through civil lawsuits. That is, there is no mandatory consumer redress system.

4.8 Available Forms of Judicial Review or Appeal

A company that has been sanctioned by the KFTC for participating in a cartel may file a lawsuit to cancel the KFTC's decision by submitting a complaint to the Seoul High Court against the KFTC within 30 days of the date of notification of the KFTC decision. The KFTC submits an answer to the complaint submitted by the plaintiff. Once the answer is submitted, the court usually sets a hearing to organise the

issues. When the court determines that the issues have been organised to a certain degree, the court will set a hearing for examination of the evidence, such as witness examination. Hearings are usually set one to two months apart. After the hearings, when the court determines that the facts have been settled to the extent that it can announce a decision, the court will end the hearings and schedule announcement of its decision. The parties may freely submit briefs and evidence without limit until hearings have ended, unless the court sets a limit. Commencement of the cancellation lawsuit above does not mean that the KFTC's case record is transferred to the Seoul High Court. The KFTC must submit materials that were the bases for its decision as evidence at the litigation stage. At the litigation stage, the plaintiff may present new arguments and evidence that were not presented or submitted at the KFTC stage. A party that seeks to object to the Seoul High Court's decision may file an appeal to the Supreme Court within two weeks of receiving a written copy of the Seoul High Court's decision. Mostly, however, the Supreme Court makes a decision with respect to the law only and not the facts. According to the KFTC's annual statistical report, the KFTC's decision was challenged in court in 2018 in 23% of cases (including cases other than cartel cases).

5. Private Civil Litigation Involving Alleged Cartels**5.1 Private Right of Action**

Private firms or individuals who have suffered damages due to a cartel may file a damages lawsuit against companies that participated in the cartel. In this case, a plaintiff usually claims tort as the basis for the claim. In Korea, in order for a tort to be established, the plaintiff must prove the following:

- unlawful conduct based on the intent or negligence of the perpetrator;
- victim's damages; and
- causation between the unlawful conduct and the damages.

If it is found that there has been illegal cartel conduct, often the first element above will be seen as being met. The plaintiff may file a damages lawsuit against a company that participated in a cartel even before the KFTC makes a decision regarding a cartel. However, if a damages lawsuit is filed before the KFTC makes a decision, the plaintiff's burden of proof for establishing the existence of a cartel (the first element above) increases. Therefore, it is common for the plaintiff to file a damages lawsuit after the KFTC makes a decision – ie, after the burden of proof has been reduced for establishing a cartel. In this case, the main issues for the damages lawsuit are damages and causation – ie, the second and third elements above.

In relation to the damages lawsuit above, the court with jurisdiction over the case is the court with jurisdiction over the defendant's principal office and the plaintiff's address; the court with jurisdiction over the place where the cartel conduct occurred also has jurisdiction over the case.

5.2 Collective Action

Cartel victims can file a damages lawsuit as co-plaintiffs. However, the so-called class action system does not apply to a damages lawsuit for cartel conduct.

5.3 Indirect Purchasers and 'Passing-on' Defences

Korean courts have not expressly recognised the passing-on defence. However, by taking into account the portion of damages that were passed on when deciding the damages amount, Korean courts in fact recognise the passing-on defence in part.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

Evidence from governmental investigations or proceedings may be used as evidence in a damages lawsuit for cartel as well. The plaintiff in the damages lawsuit may try to obtain evidence held by the KFTC through means such as a request for documents.

5.5 Frequency of Completion of Litigation

If a damages lawsuit is filed in connection with cartel conduct, the dispute usually comes to an end through the court's decision. It is not common for a dispute to be resolved based on settlement in the middle of the damages lawsuit.

The time period until announcement of the first instance court's decision in the damages lawsuit above is usually at least two years, although this may differ depending on the complexity of the case; some cases may take many years. The main reason for a prolonged time period is related to the damages assessment process and related administrative lawsuit process. During the lawsuit, a hearing will not be set for some time in order to wait for the result of assessment of the damages amount, which generally takes six months to one year. In addition, if the damages lawsuit is filed while the Seoul High Court's administrative lawsuit is in progress, there is a possibility that the court handling the damages lawsuit will not set a hearing for a prolonged period of time after proceeding with basic procedures in order to observe the result of the administration lawsuit. However, it is also possible for the court handling the damages lawsuit to proceed independently without waiting for the outcome of the administrative lawsuit.

5.6 Compensation of Legal Representatives

When announcing its decision, the court also announces with respect to the litigation cost burden (including attorney fees). In general, the losing party is ordered to bear the litigation costs. If only a part of the plaintiff's claims have been

accepted by the court, it is common for the defendant to bear the costs according to the ratio of the plaintiff's claims that have been accepted, and for the plaintiff to bear the rest. However, the attorney fees included in the litigation costs above does not mean actual compensation paid to attorneys but refers to the amount set by the Supreme Court's rules in accordance with certain standards. Therefore, in most cases, the prevailing party may receive an amount that is substantially less than the actual compensation amount paid to attorneys.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Please see 5.6 Compensation of Legal Representatives, above.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

The losing party at the first-instance court may file an appeal within two weeks of the date of receipt of the first instance court's decision. If the first-instance court orders a defendant to pay damages, the defendant may apply to stay provisional execution of the first-instance court's decision. In such a case, the court usually accepts the stay application on the condition that cash corresponding to the judgment amount is deposited.

At the appellate court, parties may submit new evidence that was not submitted at the first instance court, and may make new arguments regarding the facts and law. It usually takes around one year for the appellate court to announce its decision. If the appellate court finds it necessary, a reassessment process for the damages amount may also take place. Even if the appellate court decides that damages should be paid, it is possible to stay provisional execution using the same method as that used for the first instance court's decision above.

The losing party at the appellate court may file an appeal to the Supreme Court within two weeks of the date of receipt of the appellate court's decision. At the Supreme Court, only law is reviewed, not facts. It is difficult to predict how long it will take for the Supreme Court to announce its decision.

Although not limited to damages lawsuits for cartels, according to statistics announced by the court in 2018, the rate of appeal to the appellate court for civil cases in 2017 was around 40%, and the rate of appeal to the Supreme Court was around 30%.

6. Supplementary Information

6.1 Other Pertinent Information

The trend towards filing damages lawsuits is increasing in Korea. In this regard, the assessment of damages amount and the statute of limitations are explained below.

Assessment of Damages Amount

In a damages lawsuit for violation of the MRFTA, when the issues have been organised to a certain degree, it is common for the plaintiff to apply for assessment of the damages amount. It is also possible for the defendant to apply for assessment of the damages amount. If the party requesting the assessment recommends appraiser candidates, the other party usually submits its opinion regarding whether the candidates are appropriate or inappropriate. In order to avoid challenges about fairness, the court tries to select the candidate mutually agreed upon by the parties; if the parties cannot reach an agreement, the court appoints the candidate that it considers appropriate as appraiser. In such a case, a third party not discussed as an appraiser candidate may be designated as the appraiser. If the appraiser designated by the court submits an assessment report on the damages amount, both parties can point out problems in the assessment or request supplementation of the assessment through an application for fact inquiry or an application for supplementation of assessment. Depending on the circumstances, the parties point out problems in the assessment report and impeach the reliability of the assessment report through their appointed experts.

Statute of Limitations

The statute of limitations for a tort runs out if the victim fails to bring the claim within three years of the date they became aware of the damages and the identity of the perpetrator, or within ten years of the date of the tort.

6.2 Guides Published by Governmental Authorities

- Monopoly Regulation and Fair Trade Act (English translation): http://www.ftc.go.kr/solution/skin/doc.html?fn=abe6ebfcffcd366c32a8cb91035bdbee5ad625cdf007b29f88891153490137d1&rs=/fileupload/data/result/BBSMSTR_00000002411/
- Enforcement Decree of the Monopoly Regulation and Fair Trade Act (English translation): http://www.ftc.go.kr/solution/skin/doc.html?fn=ef53eb4ac8648c796804d427e0fe8155a51630d00a0fe7edbf599d6b939f362c&rs=/fileupload/data/result/BBSMSTR_00000002411/

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