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# Cartels

South Korea  
Law & Practice  
and  
Trends & Developments

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2021

# SOUTH KOREA

## Law and Practice

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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 Cartels in Bidding; and
- Guidelines for Examination of Cartels Involving Administrative Guidance.

Meanwhile, a bill for full amendment of the MRFTA passed the National Assembly on 9 December 2020 and was promulgated on 29 December 2020. The fully amended MRFTA (the “Amendment”) contains several changes, and a number of changes have been made regarding cartels as well, as discussed below. The Amendment will take effect one year after promulgation, on 30 December 2021.

### **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.

Meanwhile, in the Amendment, the surcharge maximum for cartels has been doubled to 20% of the relevant revenue. However, for conduct that occurred before the effective date of the Amendment (30 December 2021), the increased surcharge maximum does not apply, and the previous provision applies.

The MRFTA also has a provision on criminal punishment for cartels. A person that has engaged in a cartel may be subject to imprisonment for up to three years or a fine of up to KRW200 million and a company that has engaged in a cartel may also be subject to a fine. 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.

Actual damages was the limit in a damages lawsuit for a cartel previously, but this has been changed with the adoption of punitive damages. The punitive damages provision regarding cartels applies to violations that occur for the first time from September 2019. Accordingly, a cartel participant is liable for damages not exceeding three times the actual damages to the injured party.

The court, when deciding the amount of damages not exceeding three times the actual damages, considers the cartel participant's intention, degree of harm, economic benefit gained by the cartel participant, fine and surcharge for the violation, duration and number of violation, the cartel participant's financial situation, degree of effort made to provide relief for harm, etc. However, if a cartel participant filed for leniency and has been granted leniency status, the cartel participant is liable only within the scope of actual damages.

## 1.4 Definition of “Cartel Conduct”

Regarding cartels, the MRFTA provides that a company shall neither agree with any other company to jointly perform 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 conducted or transaction partners;
- hindering installation of facilities;
- imposing limitations on the 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.

Meanwhile, the Amendment includes information exchange as a type of cartel. In other words, the conduct of substantially restricting competition in certain areas of transaction by exchanging

price, production volume and other information prescribed by presidential decree was added as a type of cartel.

The presidential decree of the MRFTA has not yet been amended, and the KFTC is preparing to amend it. The KFTC's draft of the presidential decree of the MRFTA includes, among other information:

- the cost of goods or services, delivery, inventory, or sales volume; and
- the transaction terms and price or consideration payment terms of goods or services.

Previously, Korean courts determined that information exchange itself was not a cartel, but information exchange was added as a type of cartel through the Amendment. However, the Amendment's provision that regards information exchange as a type of cartel does not apply to conduct that has been terminated before the effective date of the Amendment (30 December 2021).

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 that participated in the cartel does not exceed 20%, the KFTC will end its review based on the view that an anti-competitive effect will not arise due to the joint conduct or that the anti-competitive effect is minimal. In addition, a cartel is exceptionally permitted if it has been approved by the KFTC on the 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. In the Amendment, industrial rationalisation was excluded from a purpose that the KFTC can approve among the grounds above.

### 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 an investigation into an MRFTA violation – five years from the investigation commencement date; or
- if the KFTC has not commenced an investigation into an MRFTA violation – seven years from the date of termination of the violation.

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. If an applicant filed for leniency by specifying the details of the cartel and the KFTC conducted an on-site investigation afterwards, the date the KFTC commenced its investigation is not the date of the on-site investigation but the date of the leniency filing.

### 1.6 Extent of Jurisdiction

Cartels outside 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**, the Korean Supreme Court expressed its concern that "excessive extraterritorial 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 extraterritorial 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."

### 1.8 COVID-19

To comply with social distancing due to COVID-19, the KFTC is refraining from conducting on-site investigations, except in cases where it is inevitable.

## 2. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – INITIAL STEPS

### 2.1 Initial Investigatory Steps

The KFTC may commence an investigation into an alleged cartel case on its own or by receiv-

ing a report of such cartel. According to the annual statistical report issued by the KFTC, of the KFTC's 184 cartel cases in 2019, 73 were based on reports to the KFTC and 111 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, an officer or an 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 present a public official identification card and 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 a 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 a 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 is impossible to achieve the purpose of the investigation by investigating within regular working hours due to concern of destruction of evidence, etc, the investigation may be conducted even outside regular working hours after the necessity of the extension is sufficiently explained to a person in charge at the investigated company, and after discussion with such 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, an officer or an 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 the investigation. If the prosecutors' office indicts in connection with this, the court may

impose imprisonment for up to two years or a fine of up to KRW150 million on the company or relevant employee.

## **2.5 Procedure of Dawn Raids**

Before investigating the desks, drawers, cabinets or work notebooks, among other items, of the investigated company, the investigating official should seek co-operation from the 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 after explaining the necessity of keeping them in custody, preparing a record of custody, and issuing such record to the employee of the investigated company.

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, 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. If it is recognised that the materials or articles subject to custody are not related to the investigation or are unnecessary to keep

due to achievement of the investigation purpose, they must be returned immediately.

In the dawn raid process, the investigating official may conduct interviews of parties, interested persons, or persons for reference and may request 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 for the investigated company and up to KRW10 million 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 taking statements and confirmation documents). In addition, the investigating official must take receipt of a power of attorney clearly indicating the scope of the right of representation that has been delegated and the counsel, in order to confirm whether the counsel has been appointed as the legal representative of the company being investigated. 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 about 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 the exclusion from the submission of materials that are unrelated to the subject of the investigation 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 the 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 3/1,000 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-cooperation 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 event of interference with the KFTC's investigation, there is a possibility of criminal punishment, and in the event 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 2020, the leniency programme was used in 54.5% of the cartel cases in which a surcharge was imposed from 1999 to 2019; from 2005 to 2018, in particular, the percentage was 60.0%.

### Applied Standards for Leniency

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

- the applicant must be the first person to exclusively provide evidence necessary to prove existence of collusion;
- at the time of the 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 not have 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 the 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 exclusively provide evidence necessary to prove the 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 the surcharge payment while it is not required, but may decide 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 email 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.

At this time, if material is submitted regarding a collusion separate from the collusion in the leniency application, the submission is not supplementation but a new leniency application for the separate collusion.

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. Nevertheless, if the case handler finds it necessary, he or she may give more

than 60 days for the additional period. However, a leniency application filed by one company can be supplemented to a joint leniency application only within the first 75 day-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 the requirements to be granted 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 the leniency application review and a hearing for the main collusion case on the same day. Once the hearing(s) for the leniency application review are concluded, the Commission renders a decision on leniency status.

### **Amnesty Plus**

If a party subject to sanctions due to cartel conduct (Conduct A) obtains first-priority leniency status for another cartel conduct (Conduct B) in which the party is also involved, the KFTC may reduce or exempt from the surcharge and reduce remedial orders for Conduct A. The party must file the leniency application for Conduct B either after the investigation commencement date or leniency application date for Conduct A - whichever is earlier - and before the KFTC deliberation date 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**.

### **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**.

### **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 such 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 post.

### **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 case as well, the KFTC chairman must file the referral to the prosecutors' office.

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 enquiry or request for a document.

### 3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

#### Procedure for Imposing Administrative Measures

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 surcharges 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 a decision for the case. Parties, interested persons and witnesses may submit opinions or make statements at the investigation stage.

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 KFTC may conduct an investigation of evidence ex officio or at a party's request if necessary after the deliberation process has commenced. The MRFTA amended in May 2020 in principle prohibits

public officials in charge of investigation from conducting on-site investigations or listening to statements from parties at the stage when the deliberation process has commenced after introduction of the examiner's report. However, this is allowed as an exception when deemed necessary by the plenary session or subcommittee meeting.

The Commission will listen to the opinions of the parties and interested persons, examine the evidence, deliberate whether there has been a violation of law, and impose measures through a "decision". Regardless of whether the KFTC imposes or does not impose measures after investigation, the MRFTA requires the KFTC to give written notice to the parties of the details, bases and reasons for such.

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 also may attend the hearing and give testimony.

### **Access to Material**

According to the current MRFTA, a party or interested person could make a request to the KFTC to access or copy material related to measures imposed under the MRFTA, and the KFTC was required to respond to such request if there was consent of the submitter of material or if it was deemed necessary in terms of public interest. In this regard, there were opinions that the scope of material that can be accessed or copied should be expanded in the law. Under the MRFTA amended in May 2020 (effective 20 May 2021), in principle, access and copying of material are permitted, except for trade secret material, leniency material and confidential material according to other laws.

Meanwhile, the KFTC established the Guidelines for Access and Copying of Materials in December 2020. Under these guidelines, the respondent may request access and copying of the materials not disclosed in an examiner's report. The KFTC must allow access or copying, except for trade secret material, leniency material and confidential material according to other laws. In the case of trade secret or leniency materials, access or copying is permitted with the consent of the submitter. In addition, in the case of trade secret material, the respondent can access the material through a limited method (the data room system discussed below) pursuant to the decision of the KFTC, even without the consent of the submitter.

The KFTC introduced the data room system when establishing the relevant guidelines above. A person granted access by the KFTC is limited to the respondent's external lawyer. The lawyer can access confidential information (trade secrets) by entering the data room located in the KFTC's office. A person granted such access views the material through a PC that is blocked from communicating with the outside. A person granted access by the KFTC can verify the existence and content of the evidence, the relevance between the evidence and the conduct, and the accuracy of the quantitative analysis by the examiner, and the person may prepare a brief containing such results. The lawyer who used the data room is prohibited from expressly writing down the confidential information.

The brief prepared by the lawyer in the process of using the data room must be approved by the commissioner in charge. After the brief has been approved by the commissioner, the KFTC will send the brief to the respondent. The respondent's external lawyer who used the data room shall not disclose the confidential information to anyone, including the respondent. In addition, the respondent cannot be provided with or

demand the provision of trade secrets from the lawyer who accessed the material.

### **3.8 Enforcement against Multiple Parties**

In general, the KFTC deliberates and makes a decision concurrently with respect to all the companies involved in a 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 the companies that participated in the cartel, as co-defendants. Absent 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. However, if there is matching appearance of a cartel between business entities (ie, two or more business entities engage in conduct falling under a type of cartel), and there is considerable probability that the business entities acted jointly, an agreement is presumed by law. If an agreement is presumed by law, the KFTC only needs to prove anti-competitive effect, and the business entity must prove the absence of the agreement.

Meanwhile, the Amendment added a provision that if there is an external conformity of business entities' conduct and information necessary for such conduct is exchanged, an agreement is presumed by law. In other words, even if there is no circumstantial fact that shows joint conduct, an agreement is presumed by law in the case of an external conformity and information exchange. However, the rules for presuming an agreement for information exchange apply only

to conduct that is terminated after the effective date of the Amendment (30 December 2021).

Meanwhile, 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 a 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**.

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

### **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 2019 in 22% 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.

As for the punitive damages provision that has been in effect since September 2019, please see

**1.3 Private Challenges of Cartel Behaviour/ Effects.**

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.

Meanwhile, the Korean government is preparing a class action bill and plans to submit it to the National Assembly. Class action law is expected to be applied to damages lawsuits generally, so class action will also apply to damages lawsuits due to cartels.

## **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 cartels 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.

Meanwhile, according to the Amendment, in a damages lawsuit filed for cartels, the court, at the request of a party, may order the other party to submit material needed to prove damages or calculate the amount of damages (leniency-

related material is excluded). The party receiving this order cannot refuse to submit the material unless there is good cause. The Amendment states that if the material is necessary for proof of damage or for calculating the amount of damages, even if it is a trade secret, good cause is not found. If the party receiving the order does not comply with the order without good cause, the court may find that the other party's argument regarding the content in the material – ie, the other party's argument that the material contains certain details – is true.

In addition, if the party receiving the order does not comply with the order without good cause, and it is notably difficult for the party requesting the order to argue specifically regarding the content in the material, and if it is difficult to prove the fact to be proved through the material with other evidence, the court may find the other party's argument as to what the material contains is true.

The order to submit material under the Amendment applies to damages claims filed after the effective date of the Amendment (30 December 2021).

## **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. Dur-

ing 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 do not mean actual compensation paid to attorneys but refer 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**.

## 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 2020, the rate of appeal to the appellate court for civil cases in 2019 was around 35%, 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 the 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 enquiry 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

The Monopoly Regulation and Fair Trade Act ([English translation](#)) is available.

However, please note that the English translation in the link above was published by the Korean government for the MRFTA promulgated on 29 March 2016, and there is no version published by the Korean government for the currently applied MRFTA.

The Enforcement Decree of the Monopoly Regulation and Fair Trade Act ([English translation](#)) is available.

# SOUTH KOREA LAW AND PRACTICE

Contributed by: John H. Choi, JY (Jooyoung) Park and Changhun Lee, **Shin & Kim**

**Shin & Kim** has the largest team of antitrust specialists in Korea, with more than 70 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 familiarity with KFTC en-

forcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including on-site 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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## Trends and Developments

### *Contributed by:*

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Shin & Kim see p.28*

In Korea, the statutory basis for challenging cartel behaviour/effects is the Monopoly Regulation and Fair Trade Act (MRFTA). As the enforcement authority of the MRFTA, the Korea Fair Trade Commission (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. If the KFTC imposes remedial orders and a surcharge on a cartel participant, the violator may file an administrative lawsuit against the KFTC for cancellation of the measures.

Meanwhile, a bill for full amendment of the MRFTA passed the National Assembly on 9 December 2020 and was promulgated on 29 December 2020. The fully amended MRFTA (the "Amendment") will take effect one year after promulgation, on 30 December 2021. The Amendment contains several changes related to cartels. Among them, the inclusion of information exchange as a type of cartel is the most important. Below, the KFTC's recent cases of regulation will be looked at and then information exchange and cartels in connection with the Amendment will be explained.

### **The KFTC's Recent Regulation of Cartels**

The KFTC, like other foreign competition authorities, is actively regulating cartels. According to the KFTC's statistics, in 2019, the KFTC handled a total of 76 cartel cases. Of the 76 cases, bid-rigging cases were the highest in number, with 55 cases, and there were 14 price-fixing cases. Meanwhile, the KFTC imposed a surcharge in 49 out of all cartel cases and filed a referral to the prosecutors' office in 19 out of all cases.

The major recent cartel cases of the KFTC are as follows.

In January 2021, the KFTC imposed remedial orders on seven steel companies that colluded to fix the purchase price of steel scrap (the raw material of steel products). The KFTC imposed a total surcharge of KRW300 billion on the steel companies and filed a referral to the prosecutors' office against four companies. In normal circumstances, each steel company would set its own standard purchase price for steel scrap. If a certain steel company raised its standard purchase price for steel scrap, the market price of steel scrap could also increase. Accordingly, the steel companies exchanged important information on the standard purchase price for steel scrap and jointly determined the range and timing of the change in the standard price. The KFTC issued remedial orders prohibiting the cartel conduct and the exchange of information among the companies that affects the determination of the standard price.

In March 2021, the KFTC imposed remedial orders on four auto parts makers for colluding to fix bidding prices in the auto parts purchase bidding conducted by domestic auto makers and imposed a total surcharge of approximately KRW82.4 billion. Four parts makers that manufacture specific parts agreed on bidding prices (and the successful bidder) in advance and implemented this in a number of parts purchase biddings conducted by auto makers for about 12 years. The KFTC announced that it will strengthen cartel surveillance in the intermediate goods market, such as the parts market.

Meanwhile, the KFTC is also actively regulating international cartel cases. In August 2019, the KFTC imposed a total surcharge of KRW9.2 billion in the international cartel case of four global auto parts makers and referred two companies to the prosecutors' office. The four global auto parts makers, in selling alternators and ignition coils, allocated customers (auto makers) in advance or agreed to respect the established business transaction of a parts maker if the parts maker already did business with an auto maker. These global parts makers were also subject to regulation in the United States, the EU, Japan and Canada for international cartel activity for their parts. Since 2013, the KFTC has been regulating global auto parts makers through cooperation with foreign competition authorities in several international cartel cases related to various parts. The KFTC announced that it will continue to strictly regulate international cartel cases through co-operation with foreign competition authorities.

### Regulation of Cartels through Information Exchange

As competition authorities' law enforcement against cartels has become stricter, business entities have become involved in collusion in more covert ways through information exchange. Information exchange can be a means of facilitating or promoting collusion by removing uncertainty in making decisions about price, etc. Hence, there has been the view that regulation is required for the exchange of competitively sensitive information, such as future price, by business entities. However, the current MRFTA, in regulating cartel conduct, required an agreement between business entities and listed the limited types subject to agreement as deciding price, deciding transaction conditions, bid rigging, etc. There were no separate regulations for information exchange. Below, rulings by the Supreme Court of Korea in relation to cartels through information exchange will be

introduced, and the change to regulate cartel conduct through information exchange through the Amendment will be explained.

### *Existing Supreme Court rulings on information exchange*

Under the current MRFTA, the Supreme Court considers that information exchange is strong evidence for finding the mutuality of communication between business entities but it cannot be regarded that there was an agreement such as price fixing based on the information exchange itself alone.

First, in a case in which life insurers exchanged information about future interest rates that have not been disclosed in the market and decided their interest rates by reflecting this information ("Case of Collusion by Life Insurance Companies"), the Supreme Court stated that it cannot be regarded that there was illegal cartel conduct based only on the fact of information exchange and determined there was insufficient evidence to find an agreement between the business entities to jointly decide the interest rate based only on the circumstance that the business entities decided each of their interest rates by exchanging information (Supreme Court Decision No 2013Du16951 on 24 July 2014).

The Supreme Court presented the following standard that "when competitors have exchanged information on key competition factors, such as price, the exchange of information removes uncertainty in decision-making to promote or facilitate collusion. This can be a strong indication of a meeting of the minds between business entities. However, even so, it cannot be concluded that there is an agreement on unfairly restricting competition based only on the fact that information was exchanged. Whether there was such an agreement must be determined by comprehensively considering all the circum-

stances.” The Supreme Court then listed the following as examples of the circumstances:

- structure and characteristics of the relevant market;
- nature and content of the information exchanged;
- subject, timing and method of the information exchange;
- purpose and intent behind the information exchange;
- degree of similarity or difference in appearance of price and output after the information exchange;
- decision-making process and content; and
- impact of the information exchange on the market.

In addition, in a case in which ramen manufacturers continuously exchanged key information such as the date of a price increase and the details of the price increase (“Case of Ramen Collusion”), the Supreme Court presented the standard for determining information exchange mentioned in the Case of Collusion by Life Insurance Companies and determined that there was insufficient evidence to prove the mutuality of each communication regarding the agreement between the business entities in this case. In addition, the Supreme Court determined that exchanging various information such as price information and reflecting it in decision-making can be seen as having anti-competitive effects, but even so, the conduct of exchanging information itself cannot be viewed as an agreement on price (Supreme Court Decision No 2013Du25924 on 24 December 2015). As a result, the KFTC had difficulty in proving whether agreement exists between business entities in the case of information exchange.

## *Content of the Amendment related to cartels through information exchange*

The Amendment, amended in December 2020, includes information exchange as a type of cartel. In other words, the conduct of substantially restricting competition in certain areas of transaction by exchanging price, production volume and other information prescribed by presidential decree was added as a type of cartel. The presidential decree of the MRFTA has not yet been amended, and the KFTC is preparing to amend it. The KFTC’s draft of the presidential decree of the MRFTA includes, among other information:

- the cost of goods or services, delivery, inventory, or sales volume; and
- the transaction terms and price or consideration payment terms of goods or services.

If business entities agree to exchange information such as price and such information exchange substantially restricts competition in certain areas of transaction, the conduct of exchanging information itself may constitute a cartel.

In addition, the Amendment has also amended the statutory presumption provisions for a cartel. Under the MRFTA, 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. However, if there is matching appearance of a cartel between business entities (ie, two or more business entities engage in conduct falling under a type of cartel), and there is considerable probability that the business entities acted jointly, an agreement is presumed by law. If an agreement is presumed by law, the KFTC only needs to prove anti-competitive effects, and the business entity must prove the absence of the agreement.

In addition to these presumption provisions, the Amendment added a provision that if there is an external conformity of business entities' conduct that falls under a type of cartel and information necessary for such conduct is exchanged, an agreement is presumed by law. In other words, even if there is no circumstantial fact that shows joint conduct, an agreement is presumed by law in the case of an external conformity and information exchange.

The Amendment's provision that regards information exchange as a type of cartel and the rules for presuming an agreement for information exchange do not apply to conduct that has been terminated before the effective date of the Amendment (30 December 2021).

#### *Impact the Amendment can have on information exchange*

When the Amendment is implemented, it is expected that it will have a significant impact on the existing business methods of companies. As discussed, in the past, it was not possible to conclude that there was an agreement based on information exchange alone, and, as a result, it was considered difficult for the KFTC to regulate collusion by proving that there was an agreement between business entities. The Amendment (i) newly defines information exchange as a type of cartel conduct, and (ii) if matching appearance of a cartel between business entities exists, it is presumed by law that an agreement exists when information necessary for such conduct is exchanged.

The Amendment is expected to serve as a legal basis for the KFTC to effectively regulate information exchange that may restrict competition. On the other hand, from the perspective of companies, the scope of collusion is expected to be expanded compared to the past, which can be a burden for companies. While information exchange has a negative aspect of facilitating

or promoting collusion, it can also have a positive aspect of promoting competition by increasing market transparency through information exchange and an efficiency enhancement effect. However, the Amendment may result in a reduction of information exchange that has a relatively greater effect of promoting competition. There is a concern that the Amendment may reduce the company's legitimate business activities.

In addition, since the Amendment stipulates that an agreement is presumed if there is a matching appearance of a cartel and exchange of information, the business entity must prove that there was no agreement. In other words, if an agreement is presumed in connection with information exchange, the KFTC does not prove the existence of the agreement, but the company must prove the absence of the agreement. Hence, it is expected that the burden of proof will shift to the business entity.

In addition, indirect information exchange through third parties such as suppliers, distributors, business entities' organisations, market research organisations and the media, without exchanging information directly between companies, may be raised as an issue. Of course, if there was agreement with another company to exchange information through a third party, it would be cartel conduct under the Amendment, but if information is exchanged indirectly through a third party without such agreement, whether or not this is a cartel may be an issue. When information is exchanged through suppliers, distributors and business entities' organisations that are closely related to the business entity, it is likely that concerns about restricting competition may arise, compared to information exchange through independent third parties such as market research institutions. If information exchange through a third party occurs frequently and matching appearance of a cartel is found, the possibility that the KFTC may also

# SOUTH KOREA TRENDS AND DEVELOPMENTS

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*Contributed by: John H. Choi, JY (Jooyoung) Park and Changhun Lee, **Shin & Kim***

regulate indirect information exchange through a third party cannot be ruled out.

As the Amendment increases the likelihood that information exchange will be regulated as a cartel, companies need to review existing business practices and manage legal risks related to information exchange. In Korea, there are many oligopolistic markets where a small number of business entities dominate the market, and it is relatively easy to exchange information between competitors at the business site, so

collusion through information exchange is likely to be an issue. Hence, companies need to prohibit employees from communicating or making contact with competitors' employees for the purpose of understanding industry trends, and it is necessary to check situations in advance where information can be exchanged, such as meetings with competitors' employees (including formal and informal meetings). In addition, it appears necessary to reinforce compliance training for employees and inspect the system to prevent collusion through information exchange.

**Shin & Kim** has the largest team of antitrust specialists in Korea, with more than 70 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 familiarity with KFTC en-

forcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including on-site 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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