Korea


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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Under the Monopoly Regulation and Fair Trade Act (the "**MRFTA**"), the scope of private claims that may be brought to court in Korea for breach of competition law is as follows: (i) a claim for damages for breach of competition law; and (ii) a claim for injunctive relief, seeking suspension or prevention of unfair trade practices (except for unfair support) without going through the Korea Fair Trade Commission ("**KFTC**") (*Articles 108 and 109 of the MRFTA*).

In addition, any party who is dissatisfied with a decision of the KFTC may file an appeal with the Seoul High Court (*Article 99 of the MRFTA*).

1.2 What is the legal basis for bringing an action for breach of competition law?

Damages claims can be brought for breach of competition law based on *Article 109 of the MRFTA*. A violating party can be held liable for damages up to three times the actual damages sustained (*Articles 48, 51, and 109(2) of the MRFTA*). However, treble damages are available for only certain types of MRFTA violations, such as cartels. Damages claims can also be made in accordance with the general principles of tort under the Civil Act (the "**CA**") (*Article 750 of the CA*). Claims for injunctive relief can be brought for breach of competition law (*Article 108 of the MRFTA*).

Any party who intends to appeal the KFTC's decision may file an appeal with the Seoul High Court within 30 days from the date of service of the decision (*Article 99(1) of the MRFTA*).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is mainly derived from Korean law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

The Seoul High Court has exclusive jurisdiction over appeals from KFTC decisions (*Article 100 of the MRFTA*).

As for antitrust damages lawsuits, jurisdiction over such claims will be determined in accordance with the general principles of the Civil Procedure Act (the "**CPA**").

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Any party who suffers direct damages from another's violation of the MRFTA has standing to bring an action for breach of competition law. Also, those who indirectly suffered damages (e.g., indirect purchasers) generally have standing to bring an action.

Meanwhile, collective claims or class actions are not available in Korea, except in certain cases permitted by special laws (e.g., Security-Related Class Action Act). However, in the case of damages claims, people with common interests may bring a joint action by appointing one or more people to act on their behalf (*Article 53 of the CPA*). This is similar to "opting in", as only persons who are made parties to the joint action are bound by the judgment of such action.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Seoul High Court has exclusive jurisdiction over appeals from the KFTC decisions. For private antitrust actions, jurisdiction is determined pursuant to the place of domicile, the place of performance of obligations, the place where the breach of competition law was committed, or the place where the damage was sustained (*Articles 5, 8 and 18 of the CPA*).

In the case of private actions with foreign factors, the court will have international jurisdiction so long as the party or the case in dispute is substantively related to Korea. In determining the existence of substantive relations, the court shall follow reasonable principles that are compatible with the spirit of the allocation of international jurisdiction (*Article 2 of the Act on Private International Law*).

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

In general, Korea has not been known for attracting claimants bringing competition law claims because: (i) collective claims or

class actions are not available; and (ii) the lack of the common law rule of discovery in Korea makes it difficult for claimants to access and gather defendants' internal documents that are potentially helpful to the claimants' case.

With that said, there are several factors within the Korean legal system that could attract claimants for competition law cases, including the following: (i) treble damages are available in certain cases (*Article 109(2) of the MRFTA*); (ii) in the case of follow-on damages claims, defendants have the burden to prove, by a preponderance of the evidence, the absence of intent or negligence in committing such violation (*Article 109(1) of the MRFTA*); and (iii) the court has the discretion to determine the reasonable amount of damages based on the gist of the pleadings and evidence in cases where it is clear that a violation resulted in damages to claimants but it is extremely difficult, by its nature, to prove the facts necessary to substantiate the amount of damages (*Article 115 of the MRFTA*).

1.8 Is the judicial process adversarial or inquisitorial?

While the court retains rights to ask questions to the parties to litigation (*Article 136 of the CPA*), the Korean judicial system is in principle based on adversarial systems.

1.9 Please described the approach of the courts in your jurisdictions to hearing stand-alone infringement cases, including in respect of secret cartels, competition restrictions contained in contractual arrangements or allegations of abuse of market power.

Korean courts regularly refer to the KFTC administrative rules (e.g., KFTC review guidelines) when they hear stand-alone infringement cases. Although the KFTC administrative rules, in principle, govern internal affairs of the KFTC and are not binding on courts (Supreme Court, 2001*Du*6364), Korean courts often take these rules into account when they review stand-alone infringement cases. Korean courts also consider the KFTC's past decisions as important factors in their review. In the same vein, plaintiffs and defendants refer to the KFTC's decisions and findings to support their arguments as well.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

A person who suffers or is likely to suffer damage due to unfair trade practices prohibited by the MRFTA may request the cessation or prevention of such act against the business entity or trade association that has committed or is likely to commit the MRFTA violation (*Article 108(1) of the MRFTA*). A violation of the MRFTA is typically a tortious act, and claimants may seek interim remedies under the Civil Execution Act with the right to request the cessation or prevention.

On the other hand, in a case where it is necessary to prevent imminent and irreparable harm, the court may decide to delay or stay, in whole or in part, the enforcement of the remedial measures imposed by the KFTC upon request by a party or *ex officio* in administrative actions under the Administrative Litigation Act (the "**ALA**") (*Article 23 of the ALA*).

2.2 What interim remedies are available and under what conditions will a court grant them?

With respect to the regulation of private claims for injunctive relief, a person who suffers or is likely to suffer damages due to unfair trade practices may directly request the prohibition or prevention of the relevant act to the court without going through the KFTC (*Article 108 of the MRFTA*). However, the specific criterion for the judgment of the court with regard to the application requirements has not been established.

In administrative lawsuits, the court may decide to delay or stay the enforcement of the KFTC decision if an action to cancel the KFTC decision is instituted and it is deemed necessary to prevent imminent and irreparable harm from being incurred by a disposition or the continuation of the procedures (*Article 23 of the ALA*).

3 Final Remedies

3.1 Please identify the final remedies that may be available and describe in each case the tests that a court will apply in deciding whether to grant such a remedy.

The final remedy in private actions for damages claims is compensation for damages. To this end, the claimant must prove: (i) the illegal act of the defendant; (ii) the harm; (iii) the causal relationship between the harm and the act; and (iv) the defendant's intent or negligence. As for damages claims under the MRFTA, the illegality of the act will be recognised by itself as long as the claimant proves the defendant's violation of the MRFTA; then, the defendant has the burden of proof by a preponderance of the evidence that the conduct was neither intentional nor negligent (*Article 109(2) of the MRFTA*).

In the case of private actions for a violation of the MRFTA, if the motion for injunctive relief is filed, the court may order the prohibition or prevention of the relevant act. The claimant must prove: (i) the defendant's unfair trade practices; and (ii) the actual or threatened harm.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases that are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

The amount of damages will, in principle, be determined based on the actual damage suffered by claimants. In principle, the claimant has the burden of proving the causal relationship between the actual damage and the defendant's MRFTA violation. However, in cases where damages were caused by a violation of the MRFTA, but it is extremely difficult to prove the essential fact to determine the amount of such damages, the court may determine the reasonable amount of damages based on the gist of the entire pleadings and the evidence (*Article 115 of the MRFTA*). On many occasions, the claimants frequently submit damage assessments by economists or industry experts as evidence.

Meanwhile, in a private damages action based on price fixing (Supreme Court, *2010Da93790*), the Supreme Court held that damages are measured by the difference between the prices actually paid by the plaintiff purchasers and the prices they would have paid in the absence of such collusion. Also, in a private damages action based on bid-rigging (Supreme Court, *2010Da18850*), the Supreme Court held that damages are measured by the difference between the successful bid price formed by such collusion and the price that could have been formed in the absence of such collusion. Lastly, it may be notable that *Article 109(2) of the MRFTA* stipulates the regulation of treble damages.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The court does not take into account any previous administrative surcharges imposed by the KFTC or criminal penalties imposed by courts when calculating damages award. Also, any other redress scheme is not considered when setting damages. However, if there is already the amount of damages paid to the claimants by the defendants, this will be taken into account in determining the final damages award.

4 Evidence

4.1 What is the standard of proof?

In civil and administrative actions, the proof of facts is sufficient to prove a high degree of the probability to admit that certain facts exist when all the evidence is comprehensively examined in the light of empirical rules (Supreme Court, *2008Da6755*).

On the other hand, in antitrust criminal lawsuits, the burden of proof is elevated to a higher standard. That is, facts should be proven so that there is a strong probability of guilt beyond a reasonable doubt (Supreme Court, *91Do1385*).

4.2 Who bears the evidential burden of proof?

In general damages claims under the CA, plaintiffs have the burden of proving: (i) damage; (ii) amount of damage; (iii) intent; and (iv) negligence (*Article 750 of the CA*). However, in cases of follow-on damages claims for a violation of the MRFTA, defendants have the burden to prove, by a preponderance of the evidence, the absence of intent or negligence (*Article 109(1) of the MRFTA*).

In antitrust administrative lawsuits, the KFTC must prove that: (i) there was a violation of the MRFTA; and (ii) the measures taken by the KFTC for the violation are appropriate. Parties subject to the KFTC measures must assert and prove that there was no MRFTA violation.

In antitrust criminal cases, the burden of proof is on the prosecution, and the standard of proof is beyond a reasonable doubt.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

In general damages lawsuits under the CA, a plaintiff has the burden of proving that the defendant's conduct was intentional or negligent. However, as far as MRFTA violations are concerned, defendants have the burden of proof to show the absence of intent or negligence. (*Article 109(1) of the MRFTA*).

In principle, the plaintiff must prove the amount of damages. However, where it is established that damage has occurred and if it is considerably difficult to prove the specific amount of damages due to the nature of the case, the court may fix the amount of damages to the amount that is deemed reasonable (*Article 202-2 of the CPA*; *Article 115 of the MRFTA*).

4.4 Are there limitations on the forms of evidence that may be put forward by either side? Is expert evidence accepted by the courts?

Numerous types of evidence are admissible by the court, including documentary evidence, recordings, witness statements, and testimony by expert witnesses. Expert evidence is used to assist the court when the case before it involves matters on which it does not have the requisite technical or specialist knowledge. The procedure is the same as for general witness statements.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

There is no common law rule of discovery in Korea. However, *Article 375 of the CPA* sets forth the rule similar to the rule of discovery, as follows: "[W]hen deemed that unless an examination of evidence is conducted in advance, there exist the situations which cause any use of the relevant evidence to be difficult, the court may, upon motion of the parties, examine the evidence".

A party may request the court for an order to make the other party or a third party disclose relevant evidence and materials during the trial (*Article 375 of the CPA*). However, the regulations on court orders to produce documents under the CPA are limited to "documents", and the other party may refuse to disclose on the ground that such document contains a "trade secret". On the other hand, the party may request "discovery" in accordance with the recently introduced regulation of court orders to produce documents under the MRFTA. This regulation is not limited to "documents", and it will not be regarded as a justifiable reason for refusing to disclose evidence that falls under "trade secrets" if it is necessary to prove and calculate the amount of damages (*Article 111(3) of the MRFTA*).

As for follow-on damages claims for the violation of the MRFTA, the court may request the KFTC to transmit the KFTC case records to the court (*Article 110 of the MRFTA*).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses may be forced to appear before the court under the CPA. When a witness fails to appear without any justifiable reason, the court may order the witness to bear litigation costs incurred and impose monetary penalties on the witness. Furthermore, when a witness again fails to appear without any justifiable reason even after receiving a judgment of monetary penalties, the court may punish the witness with detention for not more than seven days (*Article 311 of the CPA*). In principle, witnesses are subject to cross-examination (*Article 327(1) of the CPA*).

The same applies to antitrust administrative lawsuits and criminal trials (*Article 8(2) of the ALA*; *Articles 151(1)-(2) and 161-2(1) of the Criminal Procedure Act*).

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Just as with decisions by competition authorities from other countries, the KFTC's decisions are not legally binding on the courts. The court can independently determine whether there is a violation regardless of the KFTC's decisions and make different decisions. However, in administrative actions, the court tends to respect the KFTC's decision, unless the KFTC's decision was overturned on an administrative appeal.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

In damages claims for an MRFTA violation, if a party that disclosed trade secrets during the litigation requests the court for protection of the trade secrets, the court may order the other party not to use the trade secrets for other purposes or to disclose them to any other third party. However, the party that requested protection must show that all legal requirements for such production are met (e.g., risk of significant damage to business if disclosed) (*Article 112(1) of the MRFTA*).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Since KFTC hearings and decisions are made public (*Article 65 of the MRFTA*), the KFTC's views can be expressed through those. In addition, in most cases, the KFTC distributes press releases in relation to its decisions.

4.10 Please describe whether the courts in your jurisdiction have a track record of taking findings produced by EU or domestic *ex-ante* sectoral regulators into account when determining competition law allegations and whether evidential weight (non-binding or otherwise) is likely to be given to such findings.

In general, Korean courts refer to the decisions of the Korean *ex-ante* sectoral regulators when assessing competition law allegations. The courts especially take into account the findings produced by *ex-ante* sectoral regulators in determining the illegality (unfairness/anti-competitiveness) of a certain conduct. However, since the courts make independent decisions based on the evidence submitted by parties, they are not bound by such findings. Moreover, when there are related findings by the EC or other foreign regulators and parties submit such findings to the courts, the courts refer to them although the courts are not bound by such findings (Seoul High Court, 2017*Nu*48).

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

A defence of justification/public interest is available in relation to damages claims. A party may assert that the violation of the MRFTA has adversely affected the public interest, such as with regard to consumer welfare. In addition, the defence can be asserted by proving that there were justifiable reasons for the violation of the MRFTA. However, the Supreme Court applies relatively strict standards to the grounds for justification (Supreme Court, *89DaKa29075*).

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The Seoul Central District Court has limited the scope of damages in accordance with the passing-on defence (Seoul Central District Court, *2017GaHap536468)*. Although there have been no cases in which the Supreme Court has explicitly recognised the passing-on defence, there is a view that the Supreme Court has in substance done so (Supreme Court, *2010Da93790*).

Also, indirect purchasers may also file a claim for damages to the extent that a causal relationship between the violation and the damage is recognised (Supreme Court, *2013Da215843*).

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Defendants are not allowed to bring in a third party as a co-defendant, while plaintiffs may do so under certain conditions. Nevertheless, the interested cartel participants may intervene in the pending lawsuit before the court to assist the defendants (*Article 71 of the CPA*; *Article 8(2) of the ALA*).

Also, if there is any third party whose rights and interests are likely to be infringed by the outcome of the lawsuit, the court may, upon request by defendants or *ex officio*, decide to allow the third person to intervene in the lawsuit (*Article 16(1) of the ALA*).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to the statute of limitations under the CA, the right to claim for damages lapses if: (i) the right is not exercised within three years commencing from the date on which the injured party or his agent by law becomes aware of such damage; or (ii) 10 years have elapsed from the time when the unlawful act was committed (*Article 766 of the CA*).

Any respondents may file an appeal from the KFTC decision within 30 days from the date of service of the decision or the date on which the authentic copy of the decision on his objection has been served (*Article 99(1) of the MRFTA*).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

In damages claims, given the complexity of each case, it is difficult to estimate how long the litigation will last. However, if a defendant disputes the illegality of an antitrust act, the litigation will take at least around one year.

In the case of administrative lawsuits against the KFTC, it takes an average of approximately three months from the date of filing of the complaint to the court. However, the time taken to reach final judgment varies from case to case.

There are no separate expedited proceedings in Korea regarding antitrust damages claims and administrative lawsuits against the KFTC.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

In damages claims under the CA, plaintiffs may withdraw all or part of their claims before the final decision is made. In this case, the court's permission is not required. However, any lawsuits can be withdrawn only upon consent of the other party,

if the other party has already (i) submitted preparatory documents on the merits of the case, or (ii) made any statement or pleading during the preparatory date for pleading (*Article 266(1)(2) of the CPA*).

A party may also reach a settlement (e.g., a settlement in court or a pre-trial settlement). In the case of the settlement in court, the lawsuit can be settled through a statement by the parties on the court date; thus, court permission is not required.

However, in the case of pre-trial settlement (which is the settlement before filing a lawsuit with the court), the permission of the court is required for the parties' application for the settlement (*Article 385 of the CPA*).

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As discussed above, class actions for antitrust damages are not available in Korea, although large groups of persons having a common interest may bring a joint action (see question 1.5 above). Collective settlement/settlement by the representative body on behalf of the claimants is also not available.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Claimants/defendants can recover their litigation costs from the unsuccessful party (*Article 98 of the CPA*). With that said, in case of a partial defeat, the amount of litigation costs to be borne by each party is determined by the court depending on the circumstances (*Article 101 of the CPA*).

8.2 Are lawyers permitted to act on a contingency fee basis?

In general, lawyers are permitted to act on a contingency fee basis. However, the Supreme Court held that any agreement of contingency fees in criminal cases is contrary to good morals and other public interests (Supreme Court, *2015Da200111*); the Court prohibited attorneys from acting on a contingency fee basis in criminal cases.

8.3 Is third-party funding of competition law claims permitted? If so, has this option been used in many cases to date?

The matters related to third-party funding of competition law are not explicitly regulated in Korea.

9 Appeal

9.1 Can decisions of the court be appealed?

Administrative lawsuits against the KFTC are structured in a two-tiered system and, thus, the KFTC proceeding serves as a *de facto* first trial. The Seoul High Court has exclusive jurisdiction over the appeals filed against the measures taken by the KFTC (*Article 100 of the MRFTA*). The Supreme Court has the final appellate jurisdiction over the judgments or rulings rendered by the Seoul High Court.

However, the three-tiered system is applied to civil and criminal cases (district court- high court or collegiate panel of a district court – Supreme Court).

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Article *44 of the MRFTA* sets forth leniency programmes, and the KFTC's measures may be mitigated or exempted when a person or entity that participated in the illegal cartel conduct voluntarily reports about the conduct and files for leniency. However, neither a successful nor an unsuccessful applicant for leniency is given immunity from civil claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Even if the KFTC grants leniency, information related to leniency applications is not disclosed in subsequent court proceedings. However, information related to leniency applications may be disclosed if: (i) such information is necessary to handle the case; (ii) the applicant for leniency has consented to the disclosure of the information; or (iii) such information is necessary to initiate a lawsuit in relation to the case or handle such lawsuit (*Article 44(4) of the MRFTA*). Therefore, disclosure may be possible in administrative litigations that examine the illegality of the KFTC's disposition.

In the meantime, courts can order a submission of documents necessary for proof of damages in damages actions. However, the courts cannot order the production of the information related to leniency applications in follow-on damages lawsuits (*Article 111(1) of the MRFTA*).

11 Anticipated Reforms

11.1 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

We do not anticipate the Directive to have any direct impact on or to be applied in antitrust damages actions in Korea.

11.2 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

This is not applicable.

11.3 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

There has been no notable reform since the amendment of the MRFTA on November 30, 2021.

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