

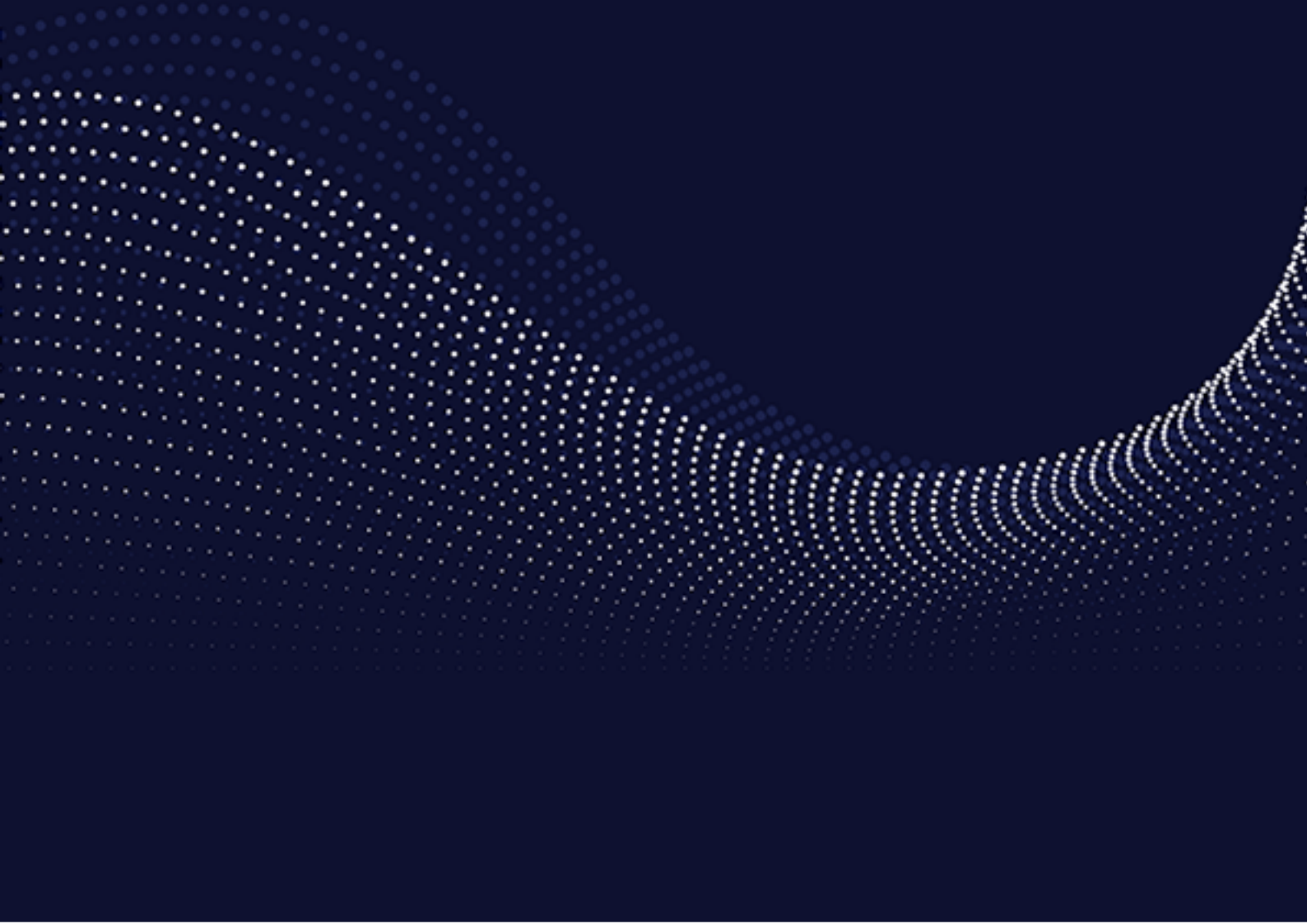
CARTEL REGULATION

South Korea

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Contents

Cartel Regulation

LEGISLATION AND INSTITUTIONS

- Relevant legislation
- Relevant institutions
- Changes
- Substantive law
- Joint ventures and strategic alliances

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

- Application of the law
- Extraterritoriality
- Export cartels
- Industry-specific provisions
- Government-approved conduct

INVESTIGATIONS

- Steps in an investigation
- Investigative powers of the authorities

INTERNATIONAL COOPERATION

- Inter-agency cooperation
- Interplay between jurisdictions

CARTEL PROCEEDINGS

- Decisions
- Burden of proof
- Circumstantial evidence
- Appeal process

SANCTIONS

- Criminal sanctions
- Civil and administrative sanctions
- Guidelines for sanction levels
- Compliance programmes
- Director disqualification
- Debarment
- Parallel proceedings

PRIVATE RIGHTS OF ACTION

- Private damage claims

Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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LEGISLATION AND INSTITUTIONS

Relevant legislation**What is the relevant legislation?**

The legislation that regulates cartels is the [Monopoly Regulation and Fair Trade Act \(MRFTA\)](#). The [Enforcement Decree of the MRFTA](#) details or supplements the MRFTA provisions and the Korea Fair Trade Commission (KFTC), the enforcement authority for the MRFTA, provides the following guidelines regarding cartel regulation:

- the Guidelines for Filing Applications for the Approval of Cartels and Competition-Restrictive Practices;
- the Guidelines for Cartel Review;
- the Guidelines on Examination of Cartels in Bidding;
- KFTC Notice on the Operations of the Leniency Guidelines for Voluntary Disclosure of Unfair Collusive Acts;
- the Guidelines for Examination of Cartels Involving Administrative Guidance; and
- the Guidelines for Review of Cartels Involving Information Exchange between Business Entities.

Another guideline to note is one issued by the Prosecutors' Office titled 'Guidelines for the Reduction of Penalty in Cartel Cases and Investigation Procedures,' which officially implemented a criminal leniency programme for cartel cases.

Relevant institutions**Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?**

The KFTC is the government agency that enforces the MRFTA. A final decision of the KFTC on whether there was a violation of the MRFTA – based on evidence and testimonies gathered during its investigation and deliberations – may be appealed at the Seoul High Court, which has exclusive jurisdiction.

As for criminal prosecution, generally, the Prosecutors' Office is given prosecution authority for cartel matters only when the KFTC refers the matter to the Prosecutors' Office. Cartel matters not referred to the Prosecutors' Office by the KFTC may still be reinvestigated and referred for criminal prosecution at the request of certain other government agencies. For example, the Ministry of Small and Medium-sized Enterprises and Start-ups may refer cartel offenders to the Prosecutors' Office if the KFTC finds that the cartel activity at issue resulted in significant harm to such enterprises. The prosecutor general may also request that the KFTC file a criminal referral with the Prosecutors' Office if the conduct constitutes a serious violation of the MRFTA. For certain bid-rigging conduct that violates the Korean Criminal Code or the Framework Act on the Construction Industry, the KFTC's referral is not necessary for the Prosecutors' Office to prosecute the case.

Changes

Have there been any recent changes, or proposals for change, to the regime?

The MRFTA has recently undergone an overall amendment, which became effective on 30 December 2021. There have been a few notable changes that are relevant to cartels as follows:

- agreements to exchange information that restrain competition are prohibited as a type of illegal cartel;
- if there is an external conformity and information exchange – such as information regarding price, output, and business terms and conditions – that is necessary to create external conformity, an agreement is presumed by law if there is evidence of such an exchange of information;
- a leniency applicant that is later found to have provided false information or submitted discrepant information to the court would face revocation of immunity or leniency status;
- the maximum fine that may be imposed for participating in a cartel has been increased twofold from 10 per cent to 20 per cent of the relevant sales; and
- in cartel damages claims brought by victims of the cartel, the court may order the production of documents necessary to calculate the amount of damages.

Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 40 of the MRFTA prohibits forming an agreement to engage in certain conduct that would unreasonably restrain competition. The types of conduct listed in the provision include:

- price-fixing;
- setting terms and conditions, the price or payment terms for trade of goods or services;
- restricting production, shipment or transportation of goods, or trade of services;
- restricting territory or customers;
- interfering with or restricting the establishment or expansion of facilities or installation of equipment necessary to manufacture products or provide services;
- restricting the type or specification of the product or service being produced or provided;
- jointly conducting or managing, or establishing a corporation to conduct or manage, a key part of the business;
- deciding the successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by the Enforcement Decree of the MRFTA

(the Presidential Decree) – such other matters are defined in the Presidential Decree as:

- ratio of successful bidding or auctioning;
 - methods of design or construction; or
 - other matters that constitute competition factors in bidding or auction; and
- interfering with or restricting the business activities or business contents of others, or exchanging price, output or other information prescribed by the Presidential Decree that, in practice, restrains competition in a certain business area – such other information is defined in the Presidential Decree as:
 - cost of production;
 - output, inventory or sales volume; or
 - trade term or terms of payment of compensation.

The Korean competition law framework does not adopt the concept of per se illegality. Instead, a competitive effects test is used to determine whether an agreement to engage in the conduct above falls under an illegal cartel. Specifically, the conduct must unreasonably restrain competition in the relevant market to constitute a violation. For hardcore cartels, however, the burden of proof of anticompetitive effect (which lies with the KFTC) is eased.

Joint ventures and strategic alliances

To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances that unreasonably restrain competition pursuant to the MRFTA are subject to regulation as cartels. While research and development joint ventures or strategic alliances for the development of new products or technology are likely to be found to have pro-competitive effects, manufacturing joint ventures will more likely be subject to scrutiny as it is much easier for manufacturing joint ventures to engage in anticompetitive conduct such as price-fixing. Factors such as the business purpose, scope and effects of the joint venture or strategic alliance will be considered by the KFTC to determine whether the joint venture or strategic alliance should be regulated.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

Does the law apply to individuals, corporations and other entities?

The Monopoly Regulation and Fair Trade Act (MRFTA) applies to individuals, corporations and other entities. The MRFTA regulates the conduct of business entities (ie, entities that engage in the manufacturing business, service business or any other type of business). Conduct of individuals acting for the benefit of a business entity may be deemed acts of the business entity when certain provisions regulating trade associations (associations of

two or more business entities with common interests) apply. Individuals that engaged in a cartel may be subject to criminal referral according to the MRFTA.

Extraterritoriality

Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Article 3 of the MRFTA explicitly provides that the MRFTA applies to conduct that takes place outside South Korea, provided that there is a nexus between the conduct and the Korean market. The Supreme Court of Korea held that the MRFTA's scope of application to overseas conduct should be limited to conduct that has a direct, substantial and reasonably foreseeable effect on the Korean market. The Supreme Court of Korea also emphasised the importance of comity with respect to competition law, holding that excessive extraterritorial application of the MRFTA would give rise to unfair consequences. Likewise, the Korea Fair Trade Commission has emphasised comity in areas involving competition law.

Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The law does not explicitly provide exemptions for conduct that only affects customers or other parties outside South Korea. The key to whether overseas conduct will be subject to regulation under the MRFTA is the effect on the Korean market. Overseas conduct that does not involve Korean nationals and has no effect on the Korean market will not be subject to the MRFTA. However, overseas conduct that impacts pricing and output in the Korean market, and agreements formed overseas that include the Korean market as a target, will fall within the reach of the MRFTA.

Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Bid-rigging in a tender for a construction project is punishable with a term of imprisonment of five years or less, or a penalty of 200 million won, pursuant to the Framework Act on the Construction Industry.

Exemptions from the MRFTA are available for cartel activities in industries such as marine and air transportation, insurance, and small and medium-sized enterprises. Agreements among the industry participants on trade terms including pricing are allowed, provided that certain requirements are met, which generally include prior approval of the relevant government authority.

Government-approved conduct

Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Conduct of export companies that was engaged in with the purpose of complying with orders from the Minister of Trade, Industry and Energy to make adjustments to the price, volume, quality, other trade terms or the subject territory with respect to exported goods falls under government-approved activity that is exempt from the application of the MRFTA. The minister may order such adjustments:

- to comply with certain treaties, international law, or the laws of South Korea or the trading country;
- when there is a concern of hindrance to fair competition in the export market; or
- to prevent impairment of national reputation.

INVESTIGATIONS

Steps in an investigation

What are the typical steps in an investigation?

Once the investigation starts, the Korea Fair Trade Commission (KFTC) typically conducts an on-site investigation at the place of business of the suspected offender, seizes or requests documents and interviews the employees. After the KFTC reviews the materials, it issues an examiner's report stating the allegations attached with the relevant evidence. The suspected offenders are provided four weeks (three weeks in cases handled by a subcommittee) to submit a written response to the examiner's report. An extension may be granted when the issues are complex or the respondent's parent company is located overseas. A hearing is held within 30 days from the date of receipt or, if a response is not submitted, the deadline for submission of the response. The case is heard by KFTC commissioners at the hearing and a final decision is made. A written decision is issued within several weeks or sometimes several months after a final decision is made by the KFTC internally.

The statute of limitations for the KFTC to impose remedial orders or administrative fines is seven years from the end date of the alleged violation. However, for illegal cartels into which the KFTC commenced investigation, a limitation period of five years from the date of the initial investigation applies.

By contrast, the statute of limitations for the KFTC to impose remedial orders or administrative fines for violations other than a cartel is seven years from the end date of the alleged violation, regardless of whether the KFTC commenced investigation.

Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The KFTC may initiate an investigation into an alleged cartel on its own or upon receiving a report of suspected cartel activity. Dawn raids are frequently conducted by the KFTC to

investigate whether there has been any illegal activity. 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 materials and hold them in custody. The KFTC may also investigate documents and evidence located in other jurisdictions.

Although the KFTC's investigation procedure is based on the consent of the investigated company, the Monopoly Regulation and Fair Trade Act has certain measures to enforce compliance. For example, interfering with the KFTC's investigation may be criminally punishable and a company that fails to attend an interview without justifiable cause may be subject to a fine of up to 100 million won. For employees or interested persons, the amount of this fine goes up to 10 million won.

Companies generally cooperate with the KFTC's investigation to the extent possible not only to avoid criminal punishment or fines for non-compliance, but also to reduce any surcharge imposed for cartel activity. Active cooperation with the KFTC's investigation may be a factor for the KFTC to consider when calculating the administrative fine imposed on the company.

However, with recent changes to the KFTC's case and investigative procedure rules (effective 14 April 2023), the procedural rights of companies subject to dawn raids have become better protected. For example, the KFTC should specify in its notice of investigation both the duration of the investigation and the particular transaction or conduct subject to the investigation, thereby reducing uncertainty concerning its scope. If the duration needs to be extended, the KFTC should issue an additional notice that specifies the new period and the rationale underlying the extension. Moreover, to better protect the right to counsel provided under the MRFTA, the KFTC will no longer prioritise the legal team or the compliance department of an investigated company as a target of its dawn raid, unless there are reasons to believe that those departments were directly involved in an illegal activity or destruction of evidence. Furthermore, if an investigated company believes that the materials submitted during a dawn raid are irrelevant to the overall investigation, it may request either the return or disposal of such materials within seven days of their submission. If the investigating officials agree (or if, upon their disagreement, a separate review committee within the KFTC agrees), the materials must be processed accordingly.

As for criminal investigations by the Prosecutors' Office, as in other criminal cases, the Prosecutors' Office has broad powers to investigate, such as arrest or search and seizure. For prosecutors to conduct investigations, including an arrest and search and seizure, a warrant must first be issued by the court.

INTERNATIONAL COOPERATION

Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Korea Fair Trade Commission (KFTC) actively cooperates with foreign enforcement agencies in investigations of international cartels. The degree of cooperation may vary from case to case, but the KFTC communicates with foreign enforcement agencies through various channels. South Korea has executed memoranda of understanding and cooperation agreements with other jurisdictions – such as the European Union, Brazil, China, Japan and

the United States – to exchange information and cooperate with investigations. South Korea is also an active member of the Organisation of Economic Co-operation and Development's Competition Committee and the International Competition Network, and has attended the East Asia Top-level Officials' Meeting on Competition Policy every year since 2005.

Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Investigations of international cartels by the competition authorities of the European Union and the United States will likely lead to an investigation in South Korea. The KFTC keeps a close watch on foreign competition authorities and how cases are penalised overseas. In some cases, the KFTC exchanges information on suspected violations and coordinates dawn raids with foreign competition authorities.

CARTEL PROCEEDINGS

Decisions

How is a cartel proceeding adjudicated or determined?

Once the Korea Fair Trade Commission (KFTC) examiner finishes investigating the case, an examiner's report will be issued stating the examiner's findings of fact, finding of a violation, grounds and proposed measures. The KFTC, which is composed of nine members including the chair and vice-chair, will review the examiner's report and hold hearings to listen to the opinions of the parties and interested persons. After examining the evidence, the KFTC will deliberate whether there has been a violation of the law and impose measures through a written decision.

Recently, in an effort to allow for more comprehensive deliberation for cases with a significant market-wide impact, the KFTC amended its case and investigative procedure rules (effective 14 April 2023) such that parties, upon request, can secure a deliberation period of at least two days, so long as the case they are implicated in: (1) has five or more respondents who are business operators (or 15 or more in a cartel case); or (2) involves an estimated maximum amount of fine of at least 100 billion won (or at least 500 billion won in a cartel case).

Burden of proof

Which party has the burden of proof? What is the level of proof required?

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 Monopoly Regulation and Fair Trade Act (MRFTA) and anticompetitive effect. However, if there is circumstantial evidence of a cartel between business entities (ie, two or more business entities engaging in conduct that falls

under a type of cartel), and there is a 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 anticompetitive effect and the business entity must prove the absence of an agreement.

With the recent amendment of the MRFTA, the KFTC's burden of proof has been eased – an agreement is presumed to have been formed based only on the external conformity of increased prices and information exchange, meaning that the KFTC will be required to prove anticompetitive effect only. This provision in the amendment is not applicable to conduct that concluded before 30 December 2021.

Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

An illegal cartel is established when an anticompetitive agreement exists. The existence of an agreement may be established by circumstantial evidence of the agreement when there is a substantial probability that the companies engaged in illegal cartel activity. If there is a matching appearance of a cartel between business entities and there is a considerable probability that the business entities acted jointly, an agreement is presumed by law. In such an event, the KFTC only needs to prove anticompetitive effect.

Examples of circumstantial evidence used to establish such a legal presumption of an agreement include:

- evidence of direct or indirect communication or exchange of information;
- difficulty of conforming conduct without an agreement due to the relevant industry structure;
- impossibility of explaining conformity of conduct as a consequence of the market status; and
- joint action as the sole mechanism that would serve the interests of the relevant companies.

Appeal process

What is the appeal process?

A company sanctioned by the KFTC for participating in a cartel may appeal the decision by filing a lawsuit to cancel the KFTC's decision with the Seoul High Court within 30 days of the date of notification of the KFTC decision. After the KFTC submits an answer to the complaint, the court holds a series of hearings to examine the evidence. Hearings are set one or two months apart. Once the court determines that it has gathered enough evidence to find the facts, the court concludes the hearing and schedules a date to announce its decision. The parties are free to submit as many briefs and additional evidence as they wish until the conclusion of the hearing, unless otherwise instructed by the court. New arguments and evidence that were not presented or submitted at the KFTC stage may be presented at court.

An appeal of the Seoul High Court's decision may be filed with the Supreme Court within two weeks of receipt of the written decision. The Supreme Court only makes legal determinations and does not review the facts.

SANCTIONS

Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The Monopoly Regulation and Fair Trade Act (MRFTA) provides that a person that engaged in cartel activity may be subject to a term of imprisonment of up to three years or a penalty of up to 200 million won, or both. Companies that engaged in cartel activity may also be subject to a penalty of up to 200 million won. If the company is a corporation, its representative and employees may be subject to criminal punishment.

A person that engages in bid-rigging prohibited under the Korean Criminal Code may be punished by a term of imprisonment of two years or less, or a penalty of up to 7 million won. A person that engages in bid-rigging prohibited under the Framework Act on the Construction Industry may be punished by a term of imprisonment of five years or less, or by a penalty of up to 200 million won. The sentences imposed by the court vary depending on the details of the case.

While courts tended to impose criminal punishment only on corporations that participated in illegal cartels in the past, recently there has been an increase in the number of cases where the employees or executives directly involved in the cartel were subject to criminal punishment.

Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Companies that participated in cartel activity may be subject to sanctions such as remedial orders and fines. In most cases, the Korea Fair Trade Commission (KFTC) imposes both a remedial order and a fine. The administrative fine may be up to 20 per cent of the relevant revenue and, if no revenue has been generated, a fine not exceeding 4 billion won. However, for conduct that ended before 30 December 2021, a fine not exceeding 10 per cent of the relevant revenue and, if no revenue has been generated, a fine not exceeding 2 billion won may be imposed.

Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Notification on Detailed Standards Regarding Imposition of Administrative Fines is a guideline that is binding on the KFTC. The administrative fine for illegal cartels is basically

calculated by multiplying the imposition rate (ranging between 0.5 per cent and 20 per cent – the higher the rate, the more serious the violation) by the total revenue generated in relation to the product or service directly or indirectly affected by the cartel during the period of violation (ie, relevant sales).

Aggravating factors, which may result in an increase in the administrative fine, include the imposition of sanctions by the KFTC in the immediately preceding five years for the same conduct, the extensive period of the violation and retaliation against other companies that did not participate in the cartel. Mitigating factors, which may result in a reduction of the fine, include non-implementation of the cartel agreement, cooperation with the KFTC's investigation and voluntary correction of the violation that involves affirmative removal of any effect caused by the violation, not just simply discontinuing the violation.

The KFTC also has in place the Criminal Referral Guidelines that guide the KFTC in its determination of whether to refer a case to the Prosecutors' Office. Under these guidelines, penalty points are given to violations depending on the severity. The severity of the violation is determined based on factors such as the total market share of cartel participants, the geographic scope of the area affected by the cartel, the size of force imposed on companies to participate in the cartel and the period of the cartel. The KFTC is required to refer the offender for criminal prosecution if the total penalty points amount to 1.8 or greater.

Compliance programmes

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

According to the Rules on Operation of Fair Trade Compliance Programs, Offering of Incentives, Etc, an organisation that has a compliance programme in place and received a certain grade or higher from an agency designated by the Korea Fair Trade Mediation Agency or the KFTC may be exempt from the duty to officially announce the fact that it was ordered by the KFTC to remedy certain practices or such duties may be relaxed for such organisations.

Director disqualification

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Individuals involved in cartel activity are not subject to orders prohibiting them from serving as corporate directors or officers. However, those who have been subject to criminal punishment for participating in cartel conduct will be disqualified from service as corporate directors or officers of companies such as financial institutions and public companies, the operation and establishment of which are strictly supervised.

Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

According to the Act on Contracts to Which the State is a Party, a company that led a cartel in relation to government procurement and that was the successful bidder may be restricted from participating in a tender held by the government or public institution for a period of up to two years. A company that led the cartel but was not the successful bidder may be restricted from participation for a period of one year and a company that simply participated in a cartel may be restricted from participation in government tenders for six months. The head of the relevant government agency or public institution has the authority to enforce such a rule.

Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Criminal and administrative sanctions may be pursued in respect of the same conduct. However, criminal prosecution can be initiated only when the KFTC refers the case to the Prosecutors' Office upon finding that the conduct so obviously and seriously violates the MRFTA so as to greatly restrain competition. The prosecutor general may also request the KFTC to file a criminal referral with the Prosecutors' Office if the conduct constitutes a serious violation of the MRFTA. For certain bid-rigging conduct that violates the Korean Criminal Code or the Framework Act on the Construction Industry, the KFTC's referral is not necessary for the Prosecutors' Office to prosecute the case.

PRIVATE RIGHTS OF ACTION

Private damage claims

Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Indirect purchasers and purchasers that acquired the affected product from non-cartel members may file private damage claims. However, indirect purchasers may have difficulty establishing causation and the amount of damages. A plaintiff in a tort action must successfully prove unlawful conduct based on the intent or negligence of the offender, the damages suffered by the plaintiff, and causation between the unlawful conduct and the damages suffered. If the private damage claim is brought after the decision of the Korea Fair Trade Commission (KFTC) that the conduct at issue constitutes an illegal cartel, the first element will be deemed satisfied and the plaintiff will only need to show damages and causation.

When the amount of damages is difficult to prove with concrete evidence, the court may award an amount estimated based on the overall evidence presented throughout the proceeding. The Monopoly Regulation and Fair Trade Act also provides that a court may order defendants to submit certain materials that would help prove damage and the amount of damages. Defendants are required to comply with such an order and submit the materials even if they contain trade secrets. A cartel member may be held liable for up to treble the actual damages. However, a leniency applicant may be liable for only up to the actual damages.

While the pass-on defence will not be accepted, courts may take into account any passing-on that may have actually occurred when calculating the amount of damages awarded to the plaintiff. In a cartel case involving flour purchasers' claim for damages against eight flour manufacturers that fixed the price of flour, the Supreme Court denied the defendants' argument that the plaintiffs transferred all or part of the increased price of flour to the final consumers. However, the passing-on that may have actually occurred was reflected when the Supreme Court calculated the final amount of damages, based on the principle of fairness.

Class actions

Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The Korean legal system does not allow class or collective actions in antitrust litigation. However, victims can jointly file a private lawsuit for antitrust damages. The outcome of the damages lawsuit will only be legally binding on the plaintiffs, although courts will take into account the outcome of a previous lawsuit based on the same facts in subsequent damages lawsuits filed by other victims of the same conduct.

Recently, there have been discussions on the introduction of class actions. A legislative bill to allow class actions was announced by the Ministry of Justice in September 2020. However, the Ministry of Government Legislation stopped reviewing the bill in September 2021.

COOPERATING PARTIES

Immunity

Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Monopoly Regulation and Fair Trade Act (MRFTA) provides for a leniency programme. A first-priority leniency applicant is granted full immunity from the administrative fine and remedial orders, but the Korea Fair Trade Commission (KFTC) has discretion to decide whether to grant full immunity from criminal referral. In practice, however, first-priority applicants are generally granted immunity from criminal referral as well. To obtain first-priority leniency status, an applicant must satisfy all of the following requirements:

- the applicant must be the first person to exclusively provide evidence necessary to prove the existence of a cartel;

- at the time of the leniency application, the KFTC must not have obtained information about the cartel or have obtained insufficient evidence to prove the existence of the cartel;
- the applicant must cooperate in good faith until the end of the KFTC review process by stating all facts related to the cartel and submitting related information;
- the applicant must stop its participation in the cartel; and
- the applicant must not have coerced another enterprise to participate in the cartel, nor committed illegal cartel conduct during a certain period.

There is also the amnesty plus programme under which a first-priority leniency applicant (Cartel A) may be subject to immunity from the administrative fine or remedial order or reduction of the fine for other cartel conduct (Cartel B). The amount of reduction is determined by comparing the size of Cartel B with Cartel A. If Cartel B is smaller than, or of the same size as, Cartel A, a reduction of up to 20 per cent may be granted. If the size of Cartel B is at least four times greater than that of Cartel A, the entire amount of the fine is waived.

In addition to the leniency programme administered by the KFTC (the KFTC Leniency Programme), there is one administered by the Prosecutors' Office (the Criminal Leniency Programme), first introduced on 10 December 2020 via issuance of the Guidelines for the Reduction of Penalty in Cartel Cases and Investigation Procedures.

The requirements and criteria for recognition under the Criminal Leniency Programme largely overlap with those under the KFTC Leniency Programme (first to provide evidence, cooperating in good faith, stopping cartel activities, etc). However, the scope of the Criminal Leniency Programme is different from that of the KFTC's programme, as the former applies only to hardcore cartels, as defined under the MRFTA (eg, price fixing, output restrictions, and market allocation), and certain bid-rigging conducts. Moreover, unlike the KFTC Leniency Programme, which allows only businesses to file for criminal leniency, the Criminal Leniency Programme allows both individuals (including former officers and employees) and businesses to do so.

Under the Criminal Leniency Programme, first-priority leniency applicants are eligible for exemption from indictment. Moreover, applicants, regardless of their priority status, are shielded from search and seizure, arrest, detention, and other compulsory investigations, unless circumstances dictate otherwise. Furthermore, the Prosecutors' Office, like the KFTC, offers an amnesty plus programme in which it reduces the penalty for leniency applicants that enjoy first-priority leniency status with another cartel case.

At this point, it remains unclear how exactly the Criminal Leniency Programme will operate in conjunction with the KFTC Leniency Programme. For example, discrepancies can easily arise between the KFTC's and the Prosecutors' Office's criminal leniency rankings when companies file leniency applications with both the KFTC and the Prosecutors' Office for the same conduct but in a different order, or when individuals file applications with the Prosecutors' Office but not with the KFTC (as they are barred from doing so with the latter); in such situations, the Prosecutors' Office would determine its own leniency ranking independently of the KFTC. However, currently there are no guidelines or regulations that address how the differences between the rankings should be reconciled, if at all. Therefore, until the law is further developed, companies should carefully consider whether it would

be in their best interests to simultaneously apply for leniency with both the KFTC and the Prosecutors' Office.

Subsequent cooperating parties

Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Under the KFTC Leniency Programme, a second-priority leniency applicant is afforded partial leniency. To obtain second-priority leniency status, an applicant must satisfy the following:

- the applicant must cooperate in good faith until the end of the KFTC review process by stating all facts related to the cartel and submitting related information;
- the applicant must stop its participation in the cartel;
- the applicant must not have coerced another enterprise to participate in the cartel or committed illegal cartel conduct during a certain period; and
- the applicant must be the second applicant to exclusively provide evidence necessary to prove the existence of the cartel, provided that the application is filed within two years of the date of the first applicant's leniency filing.

The KFTC is required to grant the second-priority applicant a 50 per cent reduction of the administrative fine, and may or may not decide to grant full immunity from remedial measures and immunity from criminal referral. However, in practice, the KFTC generally provides full immunity from criminal referral to second-priority leniency applicants.

If there are only two companies that participated in the cartel, it is not possible for a company to obtain second-priority leniency status.

Under the Criminal Leniency Programme, second-priority leniency applicants, unlike their first-priority counterparts, are not exempt from indictment. Nonetheless, for these applicants, the Prosecutors' Office will recommend to the court a 50 per cent reduction in penalty, although the court is not bound by such request.

Going in second

How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

If the KFTC revokes leniency status from a first-ranking leniency applicant, the second-ranking applicant must meet the requirements for first-priority leniency status to succeed with first-priority leniency status. For instance, if the first-ranking applicant is revoked of its first-priority status and the KFTC had already secured sufficient evidence at the time on which the second-ranking applicant was able to move up to first-priority leniency status, the second-ranking applicant will not be able to succeed the status because it would not be able to satisfy all of the requirements for first-priority leniency status.

Under the Criminal Leniency Programme, the fact that the Prosecutors' Office revokes leniency status of a first- or second-ranking applicant has no impact on that of any subsequent applicants.

Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Under the KFTC Leniency Programme, there is no statutory deadline for initiating or completing an application for immunity, but a second-priority leniency applicant must submit its application within two years of the KFTC's receipt of the application from the first-ranking leniency applicant or the date when the first-ranking applicant started cooperating with the KFTC. In practice, applications submitted after the issuance of the examiner's report are not accepted by the KFTC.

Markers (ie, simplified applications) are available. An applicant that submits its identity and a brief overview of the cartel will be deemed to have filed its application on that date. The applicant is initially provided a 15-day period to supplement its application and an extra 60 days may be provided if a valid reason for extension is presented. An extension by more than 60 days may be granted if the KFTC finds that additional time would be needed to collect relevant evidence and obtain statements (eg, international cartel cases). A full application is expected to be submitted by the end of the period for supplementation.

The Criminal Leniency Programme is similarly characterised by both the absence of a statutory deadline and the availability of markers. As under the KFTC Leniency Programme, a second-priority applicant must submit its application within two years of the Prosecutors' Office's receipt of application from the first-priority applicant. However, when it comes to supplementation of a marker, an applicant will be provided with a 30-day (rather than a 15-day) period, which may be extended upon the finding by the Prosecutors' Office of its necessity, such as where an international cartel is concerned.

Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Under the KFTC's Leniency Programme, leniency applicants and subsequent cooperating parties are required to cooperate in good faith with the KFTC until the investigation is concluded to be granted first- or second-priority status. This is determined by the KFTC by taking into consideration, comprehensively:

- whether the applicant provided related information to the best of their knowledge without delay;
- whether all related materials in possession of the applicant or that the applicant could obtain were submitted promptly;

- whether the applicant promptly responded to the KFTC's requests for information and cooperated with its requests;
- whether the applicant used its best efforts to have its employees cooperate with the KFTC's investigation in good faith; and
- whether there was any evidence that was destroyed, damaged, forged or concealed by the applicant.

A leniency applicant that discloses the fact that it applied for leniency to third parties, including participants of the cartel, before the conclusion of the KFTC's deliberation and without the KFTC's approval, will be deemed to have failed to meet the good-faith cooperation requirement. Also, a leniency applicant that later provides a statement at court that is different from that provided to the KFTC during the investigation process, or provides false information, will have its leniency status revoked.

The standards under the Criminal Leniency Programme are largely identical.

Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The MRFTA prescribes that the identity of a leniency applicant or subsequent cooperating parties must not be revealed by the KFTC to third parties. The identity of a leniency applicant is kept confidential throughout the investigation, the hearings and the KFTC decision. Information revealing the identity of the applicant must be redacted in the evidence used by the KFTC to find that there was illegal cartel activity before sending it out to other cartel participants together with the examiner's report. The same degree of confidentiality protection is applicable to subsequent leniency applicants.

An exception to the KFTC's duty of confidentiality applies when the KFTC is ordered by the court to submit documents that may contain information revealing the applicant's identity or when the applicant consents to disclosure of its identity. In an administrative lawsuit or a civil lawsuit for compensation of damages, the court may order the submission of materials related to the leniency application. In such a case, the KFTC must disclose the relevant information.

Similarly, the Prosecutors' Office must not provide or divulge information and materials pertaining to the leniency application (identity of the applicant, substance of the reported information, etc) to any unrelated third party, except with the consent of the applicant.

Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to

resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Plea bargains, settlements or other binding resolutions with a party to resolve liability and penalty for alleged cartel activity are not available for cartels. The consent decree procedure is also unavailable to participants of cartels.

Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When leniency is granted to a corporate defendant by the KFTC, its current and former employees as well as the corporate defendant will not be referred to the Prosecutors' Office for criminal prosecution.

Under the Criminal Leniency Programme, a corporate defendant is required to provide in its application a list of current officers and employees who should be granted leniency along with the corporation itself. Former officers and employees, however, are not protected under this arrangement, thereby heightening their incentives to individually file for criminal leniency.

Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Given that under the KFTC's Leniency Programme full or partial immunity is granted to first- and second-ranking applicants only, submitting the application to the enforcement agency as soon as possible is critical. Applications may be submitted in writing or orally to the Cartel Regulation Policy Division of the KFTC by a company, its executives or employees with the right of representation, or an attorney. After the application is submitted, applicants must continue to cooperate with the KFTC's investigation by promptly submitting requested information or providing as much relevant information as possible until the KFTC concludes the investigation. Only at the final hearing, after the KFTC's deliberations, will the KFTC decide the applicant's leniency rank and the details of how leniency will be granted.

DEFENDING A CASE

Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

All information and evidence included in or attached to the Korea Fair Trade Commission (KFTC) examiner's report are disclosed to a defendant with the exception of information containing trade secrets, personal information, materials related to a leniency application and materials protected as confidential information pursuant to other statutes.

Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Unless there is a conflict of interest, counsel may represent both employees and the corporation that employs them.

Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Representing multiple corporate defendants, whether or not they are affiliated, is not recommended and may sometimes be impossible due to issues such as conflicts of interest that may arise in relation to the leniency programme.

Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Corporations are prohibited from paying the legal penalties imposed on their employees for participating in cartels and their legal costs. Paying the fine or legal fees on behalf of an employee may subject a corporation to criminal punishment.

Taxes

Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Administrative fines and private damages payments are not tax-deductible.

International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Generally, penalties imposed in other jurisdictions are not taken into account by the KFTC when imposing sanctions on corporations or individuals and overlapping liability for damages in other jurisdictions are not taken into account in private damage claims. With respect to criminal proceedings, however, when criminal sanctions have been imposed on a corporation or individual in another jurisdiction, criminal sanctions for the same conduct may not be imposed or reduced in South Korea, pursuant to the Korean Criminal Code.

Getting the fine down

What is the optimal way in which to get the fine down?

Being the first to apply for leniency and cooperating with the KFTC's investigation will exempt companies from administrative and criminal sanctions. Non-lenieny applicants may reduce fines by cooperating in good faith throughout the KFTC's investigation process by promptly providing the requested information.

UPDATE AND TRENDS

Recent cases

What were the key cases, judgments and other developments of the past year?

In July 2023, the Korea Fair Trade Commission (KFTC) announced that it decided to impose a total surcharge of approximately 2.6 billion won (tentative) with remedial orders on the operators of South Korea's two largest job search platforms for colluding to suppress competition in the part-time job search market, where the two companies hold dominance as a duopoly. According to the KFTC's press release, the two operators, between May 2018 and March 2019, allegedly colluded to adopt policies that reduced the availability of free services, steered customers toward paid services, and increased the prices charged for the latter. In particular, both operators curtailed the number, types, and duration of free job postings on their respective platforms. The KFTC found that the collusion was prompted by a competitive concern that a unilateral move would result in a loss of users to the rival operator.

This case is the first instance in which the KFTC has taken action against online platform operators for colluding to modify the terms and conditions that apply to free services. It has set the precedent that the KFTC is willing to sanction collusions that could occur in the process of limiting the availability of free services while inducing customers to purchase the paid counterparts.

In August 2022, the Supreme Court of South Korea (the Supreme Court) rendered an important decision regarding determination of when the conduct ended in an international cartel case for purposes of the statute of limitations. The facts and procedural history of the case are as follows:

Three non-Korean automotive component suppliers allegedly colluded to rig bids after having reached an understanding on which of them would supply auto parts to which carmakers. The KFTC imposed remedial orders and a surcharge on the companies in August 2019. One of the cartel participants, supplier A, appealed the KFTC's decision to the Seoul High Court. Supplier A filed for leniency with the KFTC in December 2014. The other cartel participants, suppliers B and C, filed for leniency with the European Commission (EC) in February 2011 and July 2011, respectively. In August 2020, the Seoul High Court invalidated the KFTC's decision, on the grounds that it was issued after the statute of limitations on the authority's action had already expired. The court reasoned that under the pre-2012 amendment of the MRFTA, the statute of limitations was five years from the end date of the alleged violation. Given that the cartel ended in July 2011, after both suppliers B and C

had filed for leniency with the EC, thereby breaking the trust necessary for sustaining the collusion, the KFTC's decision, issued in August 2019, was issued more than five years later.

The Supreme Court, however, reversed and remanded the Seoul High Court's decision, on the grounds that contrary to the Seoul High Court's views, the filing of a leniency application with a foreign competition authority cannot unambiguously signal that the participant completely ceased the collusive conduct. The Supreme Court's rationale is as follows: 1) the requirements and criteria for recognition of leniency status vary across the leniency regimes, which leaves open the possibility that a cartel participant may continue its illegal conduct in Korea even after having filed for leniency with a foreign authority; 2) the KFTC may be unaware of the fact that a cartel participant has filed a leniency application with a foreign authority, and even if the KFTC were aware of such fact, that alone does not provide the authority with a sufficient evidentiary basis to render an informed decision; and 3) the cartel participants could have filed a leniency application with the KFTC as well.

Regime reviews and modifications

Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 26 January 2023, the KFTC announced its enforcement plan for the year under the slogan 'Fair Market Economy with Upright Principles', expressing its commitment to establishing a clear, reasonable, and trustworthy regulatory framework under which innovation and creativity can be fostered through free and fair competition – in line with President Yoon Suk-Yeol and KFTC Chairperson Han Ki-Jeong's economic philosophy. The KFTC pointed out that it has a particular interest in addressing cartel-related issues, especially where consumer goods (energy, household goods, communication equipment, apartment maintenance and repair, etc), intermediate goods (construction-related raw materials, industrial parts, materials, equipment, etc) and service platforms are concerned.