

2<sup>nd</sup> edition

# Competition Inspections in 25 Jurisdictions

## A Practitioner's Guide

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# KOREA

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# Introduction

1. The basic law governing competition issues in Korea is the Monopoly Regulation and Fair Trade Act (the “MRFTA”), and the Korea Fair Trade Commission (the “KFTC”), a central administrative agency under the authority of the prime minister, is primarily responsible for enforcing competition laws including the MRFTA.
2. The KFTC’s authority to investigate business operators is based on the MRFTA and its enforcement decree. Besides the MRFTA, the KFTC has jurisdiction over special laws, such as the Fair Labelling and Advertising Act, the Fair Sub-contract Transactions Act, and the Act on Fair Transactions in Large Retail Business. The laws apply the provisions of the MRFTA with necessary modifications or have the same provisions as the MRFTA.<sup>1</sup> In addition, the KFTC has administrative rules such as the Rules on the KFTC’s Committee Operation and Case Handling Procedure (the “Case Handling Procedure Rules”), the Rules on the KFTC’s Investigation Procedure (the “Investigation Procedure Rules”), and the Rules on Collection, Analysis and Management of Digital Evidence (the “Digital Evidence Rules”), in order to more specifically stipulate the relevant investigation procedures.
3. Article 50(2) MRFTA (Article 81(2) and (3) of the amended MRFTA<sup>2</sup>) grants the KFTC the authority to conduct on-site investigations. This provision stipulates that the KFTC may conduct on-site investigations “when it is deemed necessary for the enforcement of this Act” and gives the KFTC considerably broad discretion regarding whether to conduct on-site investigations and the place of the investigation, among other things. Accordingly, the KFTC may conduct on-site investigations at any time if it considers it necessary to conduct on-site investigations in relation to various types of alleged MRFTA violations. In exceptional cases, if the KFTC deems it necessary for the investigation, it may conduct an on-site investigation not only on the suspected company, but also on any other companies related to the alleged violation of the law (e.g. counterparty to exclusive dealing in violation of the MRFTA).

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<sup>1</sup> Our explanation hereinafter is based on the MRFTA, but such explanation is equally applicable to all on-site investigations conducted according to the special laws of the MRFTA.

<sup>2</sup> The MRFTA was recently amended in its entirety, and the amended MRFTA was implemented starting from 30 December 2021. As such, the amended MRFTA provisions are provided as well.

## Overview of KFTC's On-site Investigations

- ✓ **(KFTC)** The Korea Fair Trade Commission is the only government agency in Korea that is responsible for investigating violations of competition laws
- ✓ **(Initiation of on-site investigation)** The KFTC may conduct on-site investigations if it determines that there is an objective suspicion of the MRFTA violations
- ✓ **(Voluntary Investigation)** The KFTC's on-site investigation is conducted with the consent of a company
- ✓ **(De Facto Binding Force)** If the inspected company refuses, interferes with, or evades investigation, the company and related executives and employees may be subject to criminal punishment
- ✓ **(Objection)** As the KFTC's decision to conduct an on-site investigation and orders made during the on-site investigation can be considered as administrative acts, it is possible to file a cancellation lawsuit and an application for injunctions (preliminary injunction). However, if the on-site investigation is conducted as originally scheduled or orders are implemented as is, there is no practical benefit to objecting to the KFTC's disposition

2

4. The KFTC's on-site investigation is theoretically classified as a voluntary investigation conducted with the consent of an investigated party. However, if the inspected company refuses, interferes with, or evades the investigation, the company and related executives and employees may be subject to criminal punishment. Therefore, it can be said that the KFTC's on-site investigation practically has binding force.
5. On-site investigations are conducted unannounced, without prior notice. The KFTC investigators enter an office or place of business listed as the place where inspection is to be conducted on the basis of an "investigation notice" (which will be further explained below in para 16) to examine data or materials. At the on-site investigation, investigators have the authority to access and copy the inspected company's data and can issue an order to submit said materials ("order to submit materials", i.e. request for information). Access to and copying of data are generally done in accordance with the terms of the investigation notice. In addition to copying the data, the KFTC can issue a separate order to submit certain types of data and store the data temporarily. It can also conduct interviews with executives and employees related to the allegation.
6. During the COVID-19 pandemic, the KFTC has refrained from conducting on-site investigations except in urgent circumstances requiring its actions. However, to resolve the delay in handling cases, the KFTC has resumed conducting on-site investigations since the second quarter of 2021. Considering the recent increase in the COVID-19 vaccination rate in Korea, the KFTC is expected to actively conduct on-site investigations as it did before the COVID-19 outbreak.
7. Data and statements collected through on-site investigations are used as primary evidence in the KFTC's decision. Therefore, it is necessary for a company to

prepare internal guidelines to respond to the on-site investigations after fully understanding the KFTC's investigation authority and limitations thereof. As the KFTC can initiate on-site investigations at any time without prior notice, it is necessary to remain prepared for investigations even if no violation has been actually committed.

8. Meanwhile, in cases where multiple companies are involved, the KFTC conducts on-site investigations of the relevant companies simultaneously to prevent information sharing regarding the investigation. In particular, in cartel cases, it is important to note that the KFTC organises multiple teams to conduct simultaneous on-site investigations, all at once, on the same day.

## **1. Nature and Scope of Competition Inspections**

### **1.1. Enforcement and Investigation Powers**

9. In Korea, the MRFTA gives the KFTC the authority to decide whether to conduct an on-site investigation. The KFTC is a consensus-based administrative agency composed of nine commissioners. While deliberation and resolution on MRFTA violations are made by a majority vote of the commission, the KFTC chairperson has the authority to decide whether to commence on-site investigations. Once the chairperson makes the decision to conduct the on-site investigation, an "investigation notice" is subsequently prepared. Meanwhile, the KFTC's on-site investigations do not require court warrants or equivalent approval from other government agencies.
10. On-site investigations are theoretically voluntary – in other words, they require the consent of the inspected company. Therefore, if the inspected company refuses to proceed with the on-site investigation, the KFTC cannot enter the business premises using physical force or conduct investigations coercively. Nonetheless, if the inspected company refuses or interferes with the KFTC's on-site investigation, the company and related executives and employees may be subject to criminal punishment pursuant to the MRFTA, making it distinguishable from purely voluntary investigations. Accordingly, it is practically difficult for the company under investigation to refuse the KFTC's on-site investigations.
11. In addition to the on-site investigation, the KFTC may also (i) conduct interviews by having parties, interested parties, or witnesses visit a designated place (mainly the KFTC office), or (ii) issue an RFI (request for information, i.e. order to submit materials)<sup>3</sup> to report relevant data or submit necessary materials, which the KFTC can temporarily keep if necessary.<sup>4</sup>

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<sup>3</sup> RFIs are presumed voluntary, but if a person or a company fails to submit necessary documents or materials requested in the RFI or submits false reports or materials, they may be punished by imprisonment of not more than two years or by a fine not exceeding KRW 150 million.

<sup>4</sup> Article 50(1) MRFTA; Article 81(1) amended MRFTA.

## 1.2. Competent Authorities and Agents

12. The KFTC is the only government agency in Korea that is responsible for investigating MRFTA violations. In general, the KFTC investigation team (the “investigation team”) that conducts on-site investigations is composed of public officials of the KFTC (case handlers in charge of the case, digital forensic analysts, etc.). The size of the investigation team is subject to change depending on the scale and complexity of the case, but it usually consists of about five to ten officials.
13. In general, government agencies other than the KFTC do not directly investigate alleged MRFTA violations, even if they discover potential violations first. Instead, they notify the KFTC of related facts so that the KFTC can initiate investigations. In exceptional cases, the prosecution may initiate an investigation if it finds out the MRFTA violations before the KFTC in the course of investigating other crimes. However, according to the MRFTA, the prosecution can only initiate an investigation into the alleged MRFTA violation; it cannot prosecute the suspected company without the KFTC’s referral (the KFTC’s exclusive complaint right).

## 1.3. Nature of Inspection Powers

14. The KFTC’s investigations are pursuant to the MRFTA and its enforcement decree, administrative rules such as the Investigation Procedure Rules and Digital Evidence Rules established under the MRFTA.
15. The KFTC may conduct on-site investigations if deemed necessary for the enforcement of the MRFTA.<sup>5</sup> The KFTC may initiate on-site investigations if, based on certain underlying facts, it can objectively suspect that MRFTA violations are occurring. Also, the KFTC has broad discretion on whether to initiate on-site investigations. The on-site investigations can be initiated by a report from a third party or a leniency application and can be based on the KFTC’s *ex officio* recognition. However, the investigators can only conduct investigations within the minimum range necessary for the enforcement of the MRFTA and cannot abuse their investigative authority.<sup>6</sup>
16. Investigators who conduct on-site investigations in accordance with the MRFTA and the Investigation Procedure Rules must provide a document to executives and employees of an inspected company before the inspection begins (the “Investigation Notice”).<sup>7</sup> The Investigation Notice stipulates the duration, purpose, methods and place of investigation, and contains the following information: (i) an inspected company or a person shall be punished if they refuse, interfere with, or evade an investigation; (ii) the inspected company can refuse the investigation if it is conducted outside the scope of the investigation; and (iii) the inspected company can present or state opinions related to the inspection during the procedure. However, the stipulation and explanation of alleged violations may be omitted for an investigation of cartels.

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<sup>5</sup> Article 50(2) MRFTA; Article 81(2) and (3) amended MRFTA.

<sup>6</sup> Article 50-2 MRFTA; Article 84 amended MRFTA.

<sup>7</sup> Article 50(4) MRFTA, Article 81(9) amended MRFTA.

17. Nonetheless, in practice, the purpose of the investigation is fairly abstract and briefly stated in the notice. On many occasions, the Investigation Notice only contains relevant MRFTA provisions and abstract legal provisions related to the alleged violation, such as “Investigation for violation of Article 23, paragraph 1, subparagraph 5 of the MRFTA: act of transacting with the counterparty on the condition that the counterparty does not transact with a competitor”. Accordingly, it is difficult for the investigated party to raise an objection as to whether specific investigation activities fall within the permissible scope specified in the Investigation Notice. However, in response to the criticism that the Investigation Notice does not clearly define the scope of the investigation, in April 2023, the KFTC amended the Investigation Procedure Rules. The amendment requires that the Investigation Notice clearly state (i) the time period subject to the investigation (e.g. from 2020 to 2022); (ii) areas of business (e.g. semiconductor business); and (iii) types of conduct subject to investigation (e.g. imposing limitations on transaction partners). Since inspection of materials unrelated to the matters specified in the Investigation Notice is regarded as not being subject to the “minimum necessary range” prescribed under the MRFTA, the inspected company can object to the investigation.

#### **1.4. Areas of Competition Enforcement Concerned**

18. The KFTC may conduct on-site investigations on MRFTA violations and practices that violate the competition laws mandated by the KFTC.<sup>8</sup> The KFTC generally conducts on-site investigations on cartels, abuses of market dominance, and unfair trade practices. In particular, in cartel cases, on-site investigations are conducted at the early stages of the investigation. In the case of mergers, if it is deemed necessary to conduct an on-site investigation, such as when it is necessary to verify the data submitted by the parties, the on-site investigation may be conducted in connection with the review of merger transactions.
19. For reference, although the KFTC’s investigations are not focused on a specific field, the largest portion of the investigations involve violations of the MRFTA and FSTA. As of 2020, the KFTC has imposed measures more severe than a warning (remedial orders, administrative fines, surcharges, criminal referral, etc.) for 1,298 cases, of which 245 are MRFTA violations (about 19%) and 538 (about 41%) are FSTA violations, accounting for more than half of all KFTC cases.

## **2. The Legal Basis for the Inspection**

20. As explained earlier, the MRFTA grants the KFTC the authority to conduct on-site investigations if necessary for the enforcement of the MRFTA, and the KFTC chairperson decides whether to initiate an on-site investigation. No separate on-site investigation decision is made, and when the chairperson decides to conduct the

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<sup>8</sup> Competition laws governed by the KFTC include the MRFTA, Fair Labelling and Advertising Act (FLAA), Fair Subcontract Transactions Act (FSTA), Regulation of Adhesion Contracts Act (RACA), Door-to-Door Sales, etc. Act (DSA), Act on Consumer Protection in Electronic Commerce, etc. (ACPEC), Fair Franchise Transactions Act (FFTA), Instalment Transactions Act (ITA), Act on Fair Transactions in Large Retail Business (AFTLRB), and Fair Agency Transactions Act (FATA).



on-site investigation, investigators prepare the Investigation Notice, which will be issued to the inspected company immediately before the officials enter the business premises for inspection.

21. At the on-site investigation, the KFTC officials may enter an office or place of business listed as the place of investigation in the Investigation Notice and examine (access, copy, verify, order to report and submit materials, etc.) data or materials necessary for the investigation. The KFTC can also summon the parties, interested parties, or witnesses to seek their opinions at the site.

### 3. The Start of the Inspection

#### 3.1. The Arrival of Inspectors and Notification of the Decision

22. The KFTC’s on-site investigation is conducted unexpectedly, without prior notice. In general, the investigation team visits the company between 9 a.m. and 10 a.m., when the company being investigated begins its workday, and conducts the investigation for two to four days (five to ten days if the investigation scale is large). Nonetheless, if the investigation has not progressed sufficiently within the initially notified period, the investigators may extend the investigation period with the aim of minimising the burden on the inspected company.

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## Initiation of On-site Investigation

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**When**

- Unexpectedly and without a prior notice
- In general, an on-site investigation lasts for 2 to 4 days, within regular working hours of an inspected company
- Period of the investigation may be extended

**Where**

- Any place where business activity of a company takes place (office, factory, etc.)
- Investigation at a place not listed in the Investigation Notice is not permitted
- If needed, investigators may issue a separate Investigation Notice stating additional places for investigation

- ✓ Contact the legal department or outside counsel as soon as possible to respond to the investigation
- ✓ **Carefully review the Investigation Notice** presented by the investigators (duration, purpose, and place of investigation)
- ✓ Do not create unnecessary conflicts, maintaining cooperative attitude toward the investigators
  - A company and its executives / employees who obstruct the investigation may be subject to **criminal punishment**

3

23. Investigators shall conduct an investigation within the regular working hours of the inspected company. However, if it is practically impossible to achieve the purpose of the investigation within working hours, after explaining the need for the extension and conferring with the inspected company, the investigators may

- continue their investigation after working hours. In practice, unless necessary, the KFTC conducts investigations during the regular working hours of the inspected company, while they can also have the option to issue RFIs and conduct additional investigations to obtain the required information.
24. The investigation team that arrives at the inspected company must present public official ID cards as proof of identity and issue the Investigation Notice, which stipulates the investigation's duration, purpose, and place. When the investigation team presents the Investigation Notice, the inspected company's employees shall promptly contact the legal department, an executive, or an employee in charge of responding to the KFTC investigation (the "investigation response employee") to inform that the KFTC investigation team has arrived.
  25. When the investigation response employee meets the investigation team for the first time, they should carefully check the duration, purpose, and place of the investigation stated in the Investigation Notice, and receive business cards from the investigators. The inspected company can anticipate the intensity and methods of the on-site investigation and decide how to respond based on the departments and titles written on the business cards of the investigators.
  26. Thereafter, the investigation response employee enters the business premises with the investigation team to accompany them to the relevant departments. The investigation response employee shall cooperate with the investigation team by providing an area (conference rooms in general) and office equipment (such as printers) dedicated to the investigation. At this time, in order to prevent the investigators from entering a department or facility that is not related to the purpose of the investigation, it is recommended that the company provide the investigation team with a conference room located close to the department being investigated.
  27. The investigation response employee shall quickly form an investigation response team centred on legal personnel or outside counsel and those with experience with on-site investigations. In general, the KFTC investigation team simultaneously analyses relevant data and conducts interviews during the inspection, and thus, it would be helpful if the investigation response team were larger than the KFTC investigation team to respond to all inquiries effectively.
  28. At the request of the inspected company, the investigators should, in principle, allow the company's outside or in-house counsel to participate in the entire investigation process. However, exceptionally in cartel cases requiring a prompt investigation due to possible destruction of evidence, an investigator may initiate an investigation regardless of the company's request for attorney presence. Therefore, even if the KFTC investigation team initiates the investigation before the counsel arrives, the inspected company should not obstruct the investigation but should respond co-operatively. Nevertheless, the investigation response employee should ask the investigation team to proceed with interviews and data submissions that require the presence or review by the attorneys after they arrive at the site.
  29. In general, before starting an investigation, the investigation team must issue a "request for preservation of digital and physical data" (Form 14 of the Investigation Procedure Rules) and receive the signature of the investigation response employee.

Accordingly, the inspected company must manage the data so that it is preserved in its current state, and if the data are deleted or concealed after receiving the request, the inspected company or the executives and employees may be subject to criminal punishment for obstruction of the investigation. In particular, digital data require special attention in that investigators can use forensic tools to check whether and when a certain document has been deleted. As such, the investigation response team should fully explain to the relevant employees that they should not delete or conceal data related to the purpose of the investigation.

### **3.2. Obligations Imposed on the Inspected Undertaking and Penalties Incurred for Obstruction or Lack of Cooperation**

30. If the inspected company and its executives and employees obstruct the investigation, such as by refusing to comply with the investigator's legitimate request or deleting data, the company and the relevant executives and employees who have engaged in the following activities may be subject to criminal punishment: (i) any person who refuses, interferes with, or evades an on-site investigation through verbal abuse, assault, or intentionally blocking or delaying access to the site shall be punished by imprisonment for not more than three years or by a fine not exceeding KRW 200 million (Article 66(1), subparagraph 11 MRFTA) and (ii) any person who rejects, interferes with, or evades an investigation by concealing, discarding, or refusing access to, materials, or by forging, falsifying, etc., materials during an on-site investigation shall be punished by imprisonment for not more than two years or by a fine not exceeding KRW 150 million (Article 67(10) MRFTA).
31. Moreover, if the inspected company fails to comply with an order to submit and report materials necessary for the investigation, the KFTC may issue a second order, and may impose on the company or a person who fails to comply with the second order an enforcement fine not exceeding 0.3% of the average daily sales revenue per day (Article 50-4 MRFTA).
32. The KFTC and Korean courts found that the following acts constitute "obstruction of investigation": (i) replacing the hard disk of a work laptop even though an investigator notified that the investigation would continue on the next day;<sup>9</sup> (ii) deleting data related to products subject to investigation after the on-site investigation started;<sup>10</sup> and (iii) deleting data from the web storage and hiding business laptop during the on-site investigation.<sup>11</sup> Recently, in 2021, the KFTC found that the inspected company's act of blocking the network during the on-site investigation and the executive's act of physically blocking the investigators from entering the site for about thirty minutes constitute obstruction of investigation.<sup>12</sup>
33. On the other hand, the court found that the investigator's request for unlimited and comprehensive access to the personal storage or the server of the inspected

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<sup>9</sup> Seoul High Court Decision No 2014Nu46326 of 7 September 2016.

<sup>10</sup> Seoul High Court Decision No 2011Nu39372 of 11 December 2013.

<sup>11</sup> Seoul High Court Decision No 2016Nu59302 of 26 January 2017.

<sup>12</sup> KFTC Decision No 2021-011 of 30 March 2021.

company does not fall within the “minimum necessary range”. Hence, the investigation response team shall explicitly explain that the account with comprehensive access to the personal device or server of the company cannot be provided.

34. Even if a certain act does not constitute obstruction of the investigation, if the inspected company does not cooperate with the investigation, it is possible that such conduct could negatively influence the KFTC’s final resolution on the violation of the MRFTA or the level of sanctions imposed.<sup>13</sup> Therefore, the inspected company must be careful not to create unnecessary conflicts while maintaining a cooperative attitude toward the investigators to the extent possible.

### **3.3. The Premises Subject to the Inspection**

35. The MRFTA specifies the site of investigation as “office or place of business of a business entity or trade association” (any place where the business activity of the enterprise takes place, such as factory, warehouse, and exhibition hall),<sup>14</sup> and the Investigation Procedure Rules stipulate that “investigations shall be conducted only on the location of the office or place of business stipulated in the Investigation Notice”. Therefore, investigators may not conduct investigations at an employee’s home, place other than an office or place of business, or at an office or business premises not listed in the Investigation Notice.
36. However, if the location of the office or place of business subject to inspection stipulated in the Investigation Notice does not meet the purpose of the investigation, or if the violation of the law stated on the notice is identified at another place, the KFTC official may conduct the investigation after issuing a separate Investigation Notice specific to that office or place of business. Therefore, as long as the purpose of the investigation is met, investigators may conduct an investigation of an office or place of business of a parent company or subsidiary after additionally issuing the Investigation Notice specific to the relevant office or place of business.

## **4. The Search, Review and Copy of Relevant Information**

### **4.1. Searches and Copies of Documents and Data**

37. The KFTC investigators may access, copy, verify, and issue an order to report and submit materials (e.g. account books, documents, electronic data, voice-recording materials, and video materials) to identify the alleged violation of the law stipulated in the Investigation Notice.<sup>15</sup> In practice, the KFTC investigators search physical and digital data stored in the place of investigation, and collect copies

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<sup>13</sup> Previously, the KFTC’s Notification on Detailed Standards for Imposition of Administrative Fines (the “Administrative Fine Notification”) stipulated that administrative fines may be aggravated by more than 10% but within 30–40% if a company refuses, interferes with, or evades the KFTC investigation. However, such aggravation provision has been abolished in the amended Administrative Fine Notification implemented on 30 December 2016. However, the KFTC has discretion in determining the level of administrative fines, and failure to cooperate with the investigation may negatively affect the level of sanctions.

<sup>14</sup> Article 50(2) MRFTA; Article 81(2) and (3) amended MRFTA.

<sup>15</sup> Article 50(2) and (3) MRFTA; Article 81(2) and (6) amended MRFTA.

of materials deemed related to the purpose of investigation. The investigators may collect copies of materials necessary for investigation by way of voluntary submission – that is, with the consent of the inspected company. If the inspected company does not consent to such collection, the official obtains a confirmation statement to such intention, which can later be used as evidence of refusal or obstruction of investigation.

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## Documents and Data

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What

- Physical and digital data stored in the place of investigation (account books, documents, electronic data)
- Emails and document files stored in digital devices are the main target

How

- Search, copy, review, and temporarily store data
- Investigators may use various forensic tools (Nuix, EnCase, etc.)
- Investigators may issue "Data Submission Order" to obtain certain materials

Limits

- Within the scope of investigation stated in the Investigation Notice and within the **minimum necessary range**
- In practice, the KFTC refrains from examining personal devices because it may raise issues of infringement of personal data

- ✓ If the investigation team reviews data that fall outside the **scope of investigation** stated in the Investigation Notice, the investigation team must immediately raise an objection
- ✓ Refusing the inspection without an objective reason may constitute "**obstruction of investigation**," which may result in **criminal punishment**
- ✓ Attorney-client-privilege (ACP) is not recognised under Korean law

4

38. The KFTC investigators may, in parallel with collecting materials by examining and copying them, issue a data submission order to obtain certain materials required for the investigation and temporarily store them. In this case, the investigator shall explain the necessity of storing to the executives and employees of the inspected company in advance and provide a confirmation letter that records stored data. Investigators shall immediately return the materials to the owner or submitter when storing them is no longer necessary.
39. The inspected company can be present during the investigators' data collection process, and the KFTC must provide a copy of the data collected if requested by the company.<sup>16</sup> Therefore, the inspected company should request a copy of the data finally selected and collected. After the on-site investigation is completed, the inspected company can use the copy of the materials collected by the KFTC to internally assess and analyse specific details of the alleged violation investigated by the KFTC. They can also be used as preliminary data to respond to the subsequent KFTC investigations.

<sup>16</sup> Article 14 of the Investigation Procedure Rules and Article 13 of the Digital Evidence Rules.

40. Investigators often conduct investigations on several employees simultaneously in different places. In such cases, the investigation response team shall promptly designate each employee or lawyer to participate in the procedure to respond to each investigator. Each employee in charge or attorney shall accompany each investigator, monitor the investigation, and ensure that the subject of the investigation does not exceed the scope of the investigation. During that process, if an investigator is reviewing data that fall outside the scope of the investigation described in the Investigation Notice, the investigation response team must immediately raise an objection and confer the scope of the investigation.
41. In the case of digital data, investigators use various forensic tools, including NuiX and EnCase, to search from executives' and employees' computers and collect files that meet the purpose of the investigation. Digital data subject to investigation are mainly emails saved in email clients (Outlook, etc.) and documents saved in work folders (Word, Excel, PowerPoint, PDF, etc.). In practice, investigators enter keywords in a forensic tool or email client to search for relevant materials and then review the searched materials to determine which data should be collected.
42. In theory, the MRFTA and Investigation Procedure Rules stipulate that the investigation scope is limited to "data or materials necessary for investigation", but personal devices can also be subject to the investigation. In practice, the KFTC refrains from examining personal cell phones because it may give rise to issues of infringement of personal data. However, depending on the investigator's style, it is often the case that they try to perform digital forensics on personal devices (cell phones, tablets, etc.) of the executives and employees. As such, when an investigator requests comprehensive and unrestricted access to personal devices, it is necessary to decline the request, explaining that such access is beyond the scope of the investigation. Nevertheless, when an investigator presents clear grounds that materials necessary for the investigation are stored on a personal device, refusing the entire inspection of the personal device may constitute "obstruction of investigation". In such case, it is advisable to provide a copy of the materials by specifying the necessary parts.
43. In Korea, the legalisation of the attorney-client privilege ("ACP") regarding communications between a lawyer and a client is currently being deliberated, but it is not yet recognised under the law. Therefore, the KFTC reserves the right to investigate materials that would be protected by ACP in other jurisdictions; the KFTC will reject the inspected company's objection to the collection of such data. However, with the amendment to the Investigation Procedure Rules in April 2023, raids targeting in priority compliance departments are now prohibited. Although, exceptionally, strict searches will be conducted if necessary, such as when a compliance department is directly involved in the alleged violation of law or destruction of evidence. The inspected company should be aware of the fact that documents of communications with lawyers may be subject to the KFTC's investigations.
44. Meanwhile, in accordance with the MRFTA, the investigators are legally obligated not to disclose secrets of the inspected company that they learned in

the course of their duties or use them for any purpose other than the investigation.<sup>17</sup> Hence, if the investigation team takes a strong stance on the need to collect data, it is difficult for the inspected company to refuse to provide them on the grounds that it is a trade secret or personal data. In that case, the investigation response team shall explain to the investigator that the relevant data are trade secrets or personal data of the inspected company, and ask whether it is absolutely necessary to provide the said data. Also, they should discuss whether it is possible to submit data redacted to remove confidential information.

45. If an investigator discovers any material related to an MRFTA violation apart from the purpose of the investigation specified in the Investigation Notice, they may take necessary measures such as handing over the material to the MRFTA department in charge of such matter. In other words, it is a legitimate investigation activity for an investigator to “accidentally” discover and collect information about illegal activities that do not conform to the investigation’s purpose.
46. While all materials unrelated to the investigation must be immediately returned to the investigated company once the data collection is completed, previously, there was no formal process in place regarding the return of materials collected during the on-site investigation. However, the KFTC amended the Case Handling Procedure Rules in April 2023 and introduced a procedure that allows the investigated company to review whether materials submitted during the on-site investigation fall within the investigation scope specified in the official Investigation Notice. Also, if the materials fall outside the scope, the investigated company can formally request the return and destruction of such materials.<sup>18</sup>

## 4.2. Questions and Interviews

47. Investigators may conduct an interview with executives and employees of the inspected company at their office or place of business.<sup>19</sup> At this time, an attorney representing the company may attend the interview. An attorney present at the interview is not permitted to film, record, or transcribe the interview, and cannot respond to questions on the interviewee’s behalf or induce the interviewee to answer in a specific way or change their statement. It is possible for the lawyer to take brief notes of the interview using pens and notebooks for the purpose of refreshing the memory to provide advice.

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<sup>17</sup> Article 62 MRFTA; Article 119 amended MRFTA.

<sup>18</sup> Article 15(2) of the Case Handling Procedure Rules.

<sup>19</sup> Article 50(2) MRFTA; Article 81(2) and (3) amended MRFTA.

## Questions and Interviews

### How

- Interview executives and employees of the inspected company at their place of business
  - In addition to official interviews, investigators may ask questions during the on-site investigation
- Attorney representing the inspected company may attend the interview
  - Not permitted to film, record, or transcribe the interview
  - Taking brief notes of the interview using pens and notebooks is allowed

### Notes for Interviewee

- Be aware that your statement can be used as decisive evidence
  - Answer to the extent of your knowledge, not speculation
  - If there is any document presented by the investigator, answer after examining its content
  - Carefully check the accuracy of a written statement with a lawyer
- ✓ Investigators may refuse to provide a copy of written statement, where confidentiality is essential
- ✓ An interviewee may refuse to sign and seal a written statement, but such refusal may act adversely to the inspected company

5

48. Executives and employees subject to interview (the “interviewee”) must be aware that their statements can be used as decisive evidence or a clue for investigation. Therefore, the interviewee should make a statement as concisely as possible to the extent of their knowledge, and be careful not to speculate on something they do not know. In the meantime, as the interviewee has the right to refuse to make a statement, they may not make a statement against their interest. Also, the investigators are not allowed to force the interviewee to make certain statements or confirm something in the process of preparing a written statement or confirmation statement.<sup>20</sup>
49. If there is any material presented by an investigator during the interview, there is a high chance that the data will be the information essential to the alleged competition law violation. Therefore, the interviewee should answer the investigator’s questions after thoroughly examining the content of the data, and ask to show the data again if necessary. Likewise, the attorney present at the interview should identify the material as accurately as possible and share it with the investigation response team.

<sup>20</sup> Article 19(4) of the Investigation Procedure Rules.



50. At the end of the interview, the investigator prints out a written statement summarising the interview details and has the interviewee sign and seal it after confirmation. At this time, the interviewee must carefully check the content of the document with the lawyer, and if statements therein are not consistent with their actual statements or intention, they should request that the relevant sentences be amended.
51. Once the interviewee has signed and sealed the written statement after reviewing the draft, the interview procedure is completed. The interviewee may refuse to sign or seal on the grounds that the statements in the document are different from their actual statements, whereas the investigator may indicate in the “confirmation regarding investigation process” the fact that the interviewee refused to sign and seal. The fact that the interviewee refused to sign and seal the written statement may act adversely to the company depending on the result of the subsequent investigation.
52. The inspected company may request a copy of the confirmation statement during the interview process, and in principle, the investigator must comply with the request. However, the investigators may refuse to provide copies if there is a significant risk of obstruction of investigation, such as destruction of evidence or leakage of investigation secrets. In general, in cases where confidentiality of investigation is essential, such as cartel cases, investigators tend not to provide a copy of the written statement.
53. In addition to interviews, investigators may ask questions to employees who are in possession of the documents while examining the data. In that case, it is desirable for the employee to answer concisely only about the facts they know firsthand. The investigators do not record these questions and answers in documents, but if there is something to be left as evidence, it is highly likely that they will request a formal interview to draft a confirmation statement.

### **4.3. Seals**

54. In the early stages of an investigation, the investigation team attaches security stickers to employees’ desk drawers, filing cabinets, etc., when it is necessary to preserve materials in their current state. In addition, when the scheduled investigation is completed each day, the investigation team closes the investigation room in order to preserve data and IT devices collected up to that time, and attaches a security sticker to the boundary of the door.

SHIN & KIM

## Seals

### When & How

- To preserve materials in the current state in the early stages of investigation
- To preserve data and IT devices collected up to that time when the investigation is completed
- Investigation team attaches a security sticker to the boundary of office door, desk drawers, cabinet, etc.

### Notes

- Pay attention to keep the sticker in its current state
  - When the security sticker is removed or repositioned, it leaves traces
  - Post a notice not to remove the attached sticker
- Take a picture of the security sticker to prevent potential disagreements with the KFTC
- A person or company removing the sticker could face obstruction of investigation charge

✓ DO NOT touch the security sticker

✓ There is no separate procedure for attaching or removing the security sticker

✓ If necessary, the investigator may remove the sticker and proceed with the investigation

8

55. When the KFTC's security sticker is removed or repositioned, it will leave tracers (please see the picture below), and thus, the inspected company must pay close attention to keep the sticker in its current state. If any traces of sticker residue are found, the person who removed the sticker could face an obstruction of investigation charge. To prevent this, the investigation response team should post a notice not to remove the attached sticker, and it is necessary to prohibit external and internal employees from entering the site.



56. In practice, there is no separate procedure for attaching or removing the security sticker, and if necessary, the investigator may remove the sticker and proceed with the investigation. Meanwhile, the investigation response team should take a picture of the security sticker immediately after it is attached in order to prevent potential disagreements with the investigation team about how the sticker is affixed.

#### 4.4. Minutes

57. When the on-site investigation is practically completed, the investigation team will deliver a copy of “a list of collected and submitted materials” listing documents collected by the investigation team or submitted by the inspected company and provide copies of the materials to the inspected company. If the volume of data collected by the KFTC is large, the process may take several hours. After that, the investigation team prepares an “investigation process confirmation statement” and issues it to the inspected company, which marks the completion of the entire on-site investigation.
58. The investigation process confirmation statement includes objections or opinions raised by the inspected company and must be signed by the inspected company and the investigators. It is important to note that if the objection raised during the investigation is not accepted, and there is a possibility that the issue can evolve into a legal issue, the inspected company shall ask the investigator to specify the issue in the investigation process confirmation statement so that the objection is documented in writing.
59. The investigation team issues an “order to submit and report” if there are matters that are not confirmed by the last day of the on-site investigation. In such a case, the inspected company must confirm and submit the matters stated in the order by the designated date. If the inspected company fails to comply with the order to report and submit without justifiable reasons or submit false data, it may be subject to imprisonment of up to two years or a fine of not more than KRW 150 million.<sup>21</sup>

#### 4.5. Continued Inspections

60. Data that the investigators can take to the KFTC office and store temporarily are “data recognised as necessary for the enforcement of the MRFTA”.<sup>22</sup> Hence, without the inspected company’s consent, it is not possible for the investigators to take the entire set of data with an undefined scope. Accordingly, the investigation response team should request investigators to review and select data at the site of the on-site investigation if possible. In practice, with respect to physical data, the KFTC tends to examine the data at the site and temporarily store only the data related to the allegation. On the other hand, with respect to digital data that take substantially more time to screen, investigators may take the storage device itself or data to the KFTC office without screening. Thereafter, the KFTC can select and screen data at the KFTC office on a designated date.

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<sup>21</sup> Article 67, subpara 9 MRFTA; Article 125, subpara 6 amended MRFTA.

<sup>22</sup> Article 50(1) MRFTA; Article 81(1) amended MRFTA.

61. There is no limit on the number of on-site investigations by the KFTC. Thus, if the KFTC determines that sufficient data have not been obtained through the first on-site investigation, there is a possibility that it may conduct a follow-up on-site investigation. Therefore, the inspected company should take extra precautions about storing documents summarising the investigation process or details of the investigation after the first on-site investigation. However, the KFTC's Case Handling Rules prohibit investigators from conducting on-site investigations or listening to the parties' statements when the deliberation and resolution procedures are in progress.

## **5. Judicial Review**

62. According to the MRFTA, a party may file an objection to the KFTC's disposition (enforcement of specific facts carried out by the administrative agency), and a lawsuit can be filed within thirty days from the date of receipt of the notice of disposition.<sup>23</sup> As the KFTC's decision to conduct an on-site investigation and orders made during the on-site investigation can also be considered administrative acts, it is possible to file a cancellation lawsuit and application for injunctions (preliminary injunction). However, if the on-site investigation is conducted as originally scheduled or if individual orders from the KFTC are implemented as is, there is no practical benefit to objecting to the KFTC's decision to conduct the on-site investigation or orders made during the on-site investigation. For reference, refusal to comply with the KFTC's on-site investigation itself or individual orders made during such investigation could adversely influence the KFTC's final decision or level of sanctions. In light of this, there have been very few cancellation lawsuits in Korea against the KFTC's on-site investigation decisions or orders made during such investigations.
63. In general, when the KFTC makes a criminal referral against the inspected company for obstruction of investigation, an issue as to whether the investigator's act was pertinent could be contested in the KFTC's deliberation process or criminal procedure following the referral.
64. Also, unfairness of investigation may be invoked in the KFTC deliberation procedure for the alleged violation or cancellation lawsuit against the KFTC's final decision (remedial order, surcharges, etc.).

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<sup>23</sup> Article 53 MRFTA; Article 96 amended MRFTA.

2<sup>nd</sup> edition

# Competition Inspections in 25 Jurisdictions

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Nathalie Jalabert-Doury

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