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Antitrust Litigation 2025

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South Korea: Law and Practice

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Shin & Kim

SOUTH KOREA

Law and Practice

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Shin & Kim has one of the largest teams of antitrust specialists in South Korea, with more than 70 dedicated experts, including a former Korea Fair Trade Commission (KFTC) chairperson, officers and committee members, and former prosecutors and judges. The group is complemented by the largest number of KFTC alumni lawyers of any law firm, all of whom have extensive expertise in antitrust law and deep familiarity with KFTC enforcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including on-site investigations and hearings, and for representing clients in administrative appeals and relevant damages lawsuits. The group has represented numerous foreign clients in KFTC investigations and litigation.

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1. Introduction

1.1 Current Framework for Private Antitrust Litigation

Three Types of Antitrust Litigation

Antitrust litigation in South Korea can largely be classified into three types. The first occurs when the Korea Fair Trade Commission (KFTC), the agency which regulates violation of the Monopoly Regulation and Fair Trade Act (MRFTA) in South Korea, imposes measures such as remedies or a surcharge on a violator of the MRFTA, in which case the violator may file an administrative lawsuit against the KFTC for cancellation of the measures (Administrative Lawsuit Against the KFTC). The second type of litigation is a civil lawsuit in which a victim of a violation of the MRFTA seeks damages against the violator, who is the perpetrator (Antitrust Damage Lawsuit). The third type is a criminal lawsuit against a violator of the MRFTA after investigation by the investigating agency and filing of charges (Antitrust Criminal Lawsuit).

Most Important or Novel Antitrust Cases

Liner shipping companies case

In February 2024, the Seoul High Court ruled that the KFTC does not have the authority to regulate joint conduct among liner shipping companies concerning freight rates, as this falls under the exclusive purview of the Minister of the Ministry of Oceans and Fisheries (MOF) – pursuant to the Marine Transportation Act (MTA). Although the liner shipping companies failed to adhere to the MTA's procedural requirements, the court determined that even in cases of non-compliance with the MTA, the MOF retains the sole regulatory authority. Against this backdrop, the court overturned the KFTC's decision that had found the liner shipping companies liable for illegal cartel conduct.

However, in April 2025, the Supreme Court overturned the Seoul High Court's ruling. While the court acknowledged the long-standing recognition of the necessity and reasonableness of shipping alliances, it placed particular emphasis on recent developments – the growing view that it is appropriate to regulate the industry based on market competition principles. The court also noted that several foreign jurisdictions are in fact modifying their competition law accordingly.

This decision is significant in that it clearly affirms the principle that the MRFTA should apply to all sectors, and that any exemptions must be recognised only under very limited circumstances.

Google anti-fragmentation agreement case

The KFTC found that Google, through its Mobile Application Distribution Agreements and related contracts with mobile device manufacturers, imposed anti-fragmentation obligations that prohibited manufacturers from pre-installing Android-based fork operating systems (fork OS) and competing app markets developed by Google's rivals on all smart mobile devices they released. The KFTC further concluded that Google also prevented manufacturers from launching devices equipped with their own Android fork OS. On this basis, the KFTC determined that Google had abused its market-dominant position and engaged in unfair trade practices, imposing a fine of approximately

KRW20 billion. Google filed an administrative lawsuit seeking to revoke the KFTC's decision.

In January 2024, the Seoul High Court ruled in favour of the KFTC. The court first found that Google holds a dominant position in the market for licensable smart mobile operating systems and maintains a superior bargaining position vis-à-vis mobile device manufacturers. The court further held that Google had leveraged its dominance in the OS market to compel manufacturers to accept anti-fragmentation obligations, thereby hindering the release of devices using Android fork OS and restricting manufacturers from transacting with Google's rivals – ultimately resulting in anti-competitive effects. Google has appealed the decision, and the case is currently pending before the Supreme Court.

This ruling is important in that the court adopted a structured approach in defining the relevant market, distinguishing between licensable Android OS and non-licensable iOS. The decision also reaffirmed that the KFTC may sanction abusive conduct involving leveraged market dominance – even where the market in which dominance is held differs from the market where competitive harm occurs.

1.2 Recent Developments

Recent Development in Antitrust Litigation

Recently, the MRFTA was wholly amended, which took effect on 30 December 2021. The wholly amended MRFTA presently in effect (the current MRFTA) contains several changes and brought many changes to the three types of antitrust litigation outlined below.

Administrative lawsuit against the KFTC

In relation to the Administrative Lawsuit Against the KFTC, the area often at issue in South Korea is the administrative lawsuit regarding collusion. Under the MRFTA, collusion requires an "agreement", and the previous version of the MRFTA did not include a specific provision regarding information exchange.

The current MRFTA includes information exchange that substantially restricts competition as a type of collusion, and when external conformity of actions, such as joint increase in price and information exchange, is found, an "agreement" is presumed by law.

Due to the change above, the KFTC's burden of proof will be significantly eased. Under the current MRFTA, if an agreement is presumed on the basis of external conformity of actions, of increased prices and information exchange, the KFTC must only prove anti-competitiveness, and the business entity must prove there is no agreement. This provision that presumes collusion when there is an exchange of information applies only to conduct that terminated after the date of the enforcement of the current MRFTA (30 December 2021).

Antitrust damage lawsuit

Recently, in cases where a violation of the MRFTA has been found, damages lawsuits have been brought more actively.

In an Antitrust Damage Lawsuit, it was difficult for the victims to prove the amount of damages incurred due to the violation of the MRFTA. The current MRFTA introduces a new system of court orders to submit materials. Under this court order system, pursuant to a party's request in an Antitrust Damage Lawsuit, the perpetrator can be ordered to submit materials necessary to prove damage or calculate the amount of damages. This is expected to alleviate some of the burden of proving damages.

Meanwhile, there were recent cases where shareholders of companies that participated in cartel conduct filed shareholder derivative lawsuits and sought compensation from the CEO for damages resulting from their breach of duty of oversight. The Supreme Court ruled, in a case in which a sales employee engaged in cartel conduct, that the CEO was liable for damages equivalent to penalty surcharges paid out by the company for the cartel conduct. The court found that the CEO breached a duty of oversight based on the fact that the collusion took place for an extended period of time without any form of restraint and based on the lack of an adequate internal control system to prevent the breach of law (and the lack of efforts to establish such system).

Antitrust criminal lawsuit

Criminal litigation was previously conducted pursuant to the KFTC's referral of the violator for criminal prosecution after finding a violation of the MRFTA. It

seems that, recently, the number of criminal litigation cases being pursued by investigating agencies, separate from the KFTC's referral, is increasing. Investigating agencies are pursuing violators based on other laws that allow punishment of some violations of the MRFTA without the KFTC's referral, such as the Criminal Act and the Framework Act on the Construction Industry. In cases where the Prosecutor's Office receives a self-report about cartels under the criminal leniency programme, it typically transfers the cases to the KFTC. However, there have been recent instances where the Prosecutor's Office initiated its own investigation and later requested a referral to the KFTC.

In addition, there is a provision in the MRFTA that even if the KFTC determines that the requirements of referral for criminal prosecution have not been met, if there is a request from the chairperson of the Board of Audit and Inspection, a minister of the Ministry of SMEs and Start-Ups (MSS), or an administrator of the Public Procurement Service (PPS) to the KFTC to make a referral, the chairperson of the KFTC must refer the matter for criminal prosecution. In recent years particularly, there have been an increasing number of cases where the minister of the MSS requested criminal referrals. Thus, the provision of the MRFTA limits the KFTC's exercise of the right to refer or not refer a case for criminal prosecution. According to the MOU between the KFTC, MSS, and PPS, the minister of the MSS and the administrator of the PPS are required to request a referral to the KFTC within four months after receiving the relevant decisions from the KFTC.

Regarding the Antitrust Criminal Lawsuit, the current MRFTA removed the criminal punishment provision for certain conduct where there have been no cases of criminal punishment, and such punishment would not be in accordance with the legal system. Such conduct includes that relating to M&A, some unfair trade practices (including refusal to deal, discriminatory treatment, exclusion of competitors, and conditional transactions), and resale price maintenance. As such, these types of MRFTA violations are no longer subject to criminal litigation.

Other Developments

Treble damages

When liability for damages arising from a violation of the MRFTA is at issue, the scope of the liability for damages borne by the perpetrator is generally limited to damage that actually occurred or is presumed to have occurred. However, when the MRFTA amended the relevant regulation in 2018, in the event that a person suffers damage due to collusion or prohibited retaliatory measures in connection with the unfair trade practices among the violations of the MRFTA, a new provision imposed damages liability on the business entity or business entities' organisation (ie, an association formed by two or more businesses for the purpose of promoting common interests) that engaged in such conduct "to the extent that it does not exceed three times the damage incurred by the victim". It also provided that, in the event that the business entity or business entities' organisation can prove that there was no intent or negligence, then it does not bear such liability for damages.

Private person's injunction claim system

The current MRFTA introduces a new system for a private person's claim for an injunction. This system allows the victim of unfair trade practices (except for unfair support) to petition the court directly for prohibition or prevention of infringing conduct without going through the KFTC. Since the current MRFTA recognises a victim's right to injunctive relief, a victim can now request the suspension or prevention of unfair trade practice without having to wait for the KFTC's measures, so that infringement can be stopped promptly or so that damages can be prevented in advance.

Note that the MRFTA's private prohibitory injunction system and provisional disposition effected to protect the right to injunctive relief has only rarely been invoked to date, and thus the court's specific judgment criteria for the application factors have not been clearly established. Hence, when filing a lawsuit for prohibitory injunction in the future, it is essential to take heed of the specific judgment criteria used by the court.

2. Private Antitrust Claims: Basis and Procedure

2.1 Statutory Basis

The legal basis for claiming damages due to violation of the MRFTA is provided in the law. The representative laws are the Civil Act and the MRFTA.

Claiming Under the Civil Act

The Civil Act has a provision on claiming damages for general torts, and the requirements for claiming damages for tort under the Civil Act are as follows:

- there is intent or negligence in the perpetrator's conduct;
- there is damage to the victim;
- the perpetrator's conduct is unlawful; and
- there is a causal relationship between the perpetrator's conduct and the damage to the victim.

Violation of competition law, including violation of the MRFTA, is generally considered a tort, so a victim of the tort can claim damages based on the Civil Act. However, in order for the tort to be established, all four of the requirements above must be met, and the victim must prove the facts meeting the requirements.

Claiming Under the MRFTA

Meanwhile, the MRFTA has a provision for claiming damages caused by violations of the MRFTA, separate from the Civil Act. The requirements for claiming damages under the MRFTA are as follows:

- the perpetrator (business entity or business entities' organisation under the MRFTA) violates a provision of the MRFTA;
- there is damage to the victim;
- there is a causal relationship between the perpetrator's violation of the MRFTA and the damage to the victim; and
- there is intent or negligence in the perpetrator's conduct.

There is no significant difference between the requirements under the MRFTA and those under the Civil Act. However, in contrast to the need for the victim to prove the intent or negligence of the perpetrator in the case of a claim for damages under the Civil Act, the MRFTA provides that the perpetrator needs to prove that there is no intent or negligence.

2.2 Courts

The Administrative Lawsuit Against the KFTC falls under the exclusive jurisdiction of the Seoul High Court, as prescribed by the MRFTA. Unlike ordinary litigation, which proceeds through a three-tiered court system of district courts, high courts and the Supreme Court, a case of an Administrative Lawsuit Against the KFTC goes through a two-tiered court system of the Seoul High Court and the Supreme Court.

Among the several judicial panels within the Seoul High Court, there are some dedicated to the Administrative Lawsuit Against the KFTC. The Administrative Lawsuit Against the KFTC is assigned to one of these judicial panels. Even if the case is reallocated, it will be reassigned to one of the remaining judicial panels dedicated to the Administrative Lawsuit Against the KFTC. Since the Seoul High Court is prescribed as having exclusive jurisdiction over the Administrative Lawsuit Against the KFTC, an Administrative Lawsuit Against the KFTC received by the Seoul High Court will not be transferred.

However, since the Seoul High Court does not have exclusive jurisdiction over the Antitrust Damage Lawsuits and Antitrust Criminal Lawsuits, these go through a three-tiered court system, as is generally the case.

2.3 Impact of Competition Authorities

The national competition authority in South Korea is the KFTC. The KFTC's decisions are not binding on the court, which can review the validity of the KFTC's decisions in full, find different facts from those found by the KFTC, and make different legal determinations.

In the case of an Antitrust Damage Lawsuit, the victim proceeds by filing a lawsuit against the perpetrator, and there is no statutory basis for the KFTC to impose damages measures directly on the perpetrator or intervene in the damages process carried out by the victim. The MRFTA provides that the court in charge of an Antitrust Damage Lawsuit may make a request to the KFTC to send records related to the violation of the MRFTA. While factual findings by foreign NCAs can serve as persuasive evidence in civil

antitrust litigation, the court may ultimately disregard them if other evidence presented in the same case undermines their probative value.

2.4 Proof

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KTFC, the KFTC bears the burden of claiming and proving that there has been a violation of the MRFT and that the measures imposed by the KFTC are appropriate. The party subject to the measures bears the burden of claiming and proving that there is justification for the violation of the MRFTA. The court determines whether the KFTC has deviated from or abused its discretion by reviewing whether there are errors in the findings of fact that were the bases for the measures and whether the general principles of administrative laws, such as the principles of proportionality and impartiality, have been followed.

For example, in the case of the KFTC's surcharge imposition, the court considers that the KFTC has discretion to determine whether to impose a surcharge and the amount of that surcharge. The court believes that the "Notice on Standard for Imposing Surcharge" (Surcharge Notice) is only an internal standard within the KFTC and the KFTC's measures are not immediately unlawful simply because the Surcharge Notice was not followed. However, if the KFTC has repeatedly imposed measures pursuant to the Surcharge Notice so that it has become an administrative practice, then the court has determined that measures contrary to such administrative practice are unlawful. The fact that such administrative practice has been established must also be claimed and proved by the party subject to the measures.

Regarding the degree of proof, the Supreme Court has determined that even if the proof of facts in an Administrative Lawsuit Against the KFTC and an Antitrust Damage Lawsuit does not mean proof of the sort required by the natural sciences, where there is no shred of doubt, it does mean proof of high probability that a certain fact existed after comprehensive review of all the evidence in light of empirical rules – unless there are special circumstances – so that an ordinary person should have no doubt.

Antitrust Damage Lawsuit

In the case of an Antitrust Damage Lawsuit, if the victim has filed a damages lawsuit based on the provisions of the MRFTA, the victim bears the burden of asserting and proving that they incurred damage and the extent of the damage (amount of damages). The perpetrator bears the burden of asserting and proving that there was no intent or negligence regarding the violation of the MRFTA and that there are circumstances under which the victim's claimed amount of damages should be limited. That is, a perpetrator whose conduct violates the MRFTA is presumed to have acted intentionally or negligently. On the other hand, if the victim has filed a damages lawsuit based on a provision of the Civil Act, the victim must prove the perpetrator's intent or negligence.

The victim must also prove the specific amount of damages. The most problematic issue in this regard is calculating the amount of damages caused by collusion. The court deducts the estimated price that the victim would have borne had there been no collusion (hypothetical competitive price) from the actual price where there was collusion. In order to calculate the hypothetical competitive price, special appraisal methods such as an econometrics analysis are used. Appraisal according to the econometrics analysis method is usually carried out by academic experts. The court generally accepts the amount of damages calculated from the appraisal result as long as there is no clear error. Accordingly, the victim usually proves the amount of damages from collusion by making a request to the court for such an appraisal and reviewing the result.

However, a victim who has difficulty bearing the cost of the appraisal or who wants to end the lawsuit quickly may instead prove the amount of damages without undergoing the appraisal method described, such as by using the amount of damages calculated in similar cases. In this situation, the court alleviates the burden on the victim of proving the amount of damages by recognising the amount, based on the provision that eases the burden of proving damages under the MRFTA.

Provision that eases the burden of proving damages

The MRFTA provides that where it is recognised that the victim incurred damage due to the violation of the MRFTA, but it is extremely difficult to prove the precise amount of damages due to the nature of the facts, the court may recognise a reasonable amount of damages based on the gist of the overall arguments and the results of evidence examination. As such, the burden on victims to prove a specific amount of damages has been alleviated, and the court has been granted discretion in calculating the amount of damages.

If the fact that damage was incurred due to tort is recognised, the court must encourage proof by vigorously exercising its right to seek clarification, even if a party's argument and proof of the amount of damages is lacking, and, in some cases, determine the amount of damages based on its authority.

The Supreme Court has determined that the method of calculating damage from collusion is not limited to an econometrics model, and as long as they are reasonable and objective, various methods may be considered to calculate the amount of damages, such as:

- statistical data on excess prices due to collusion;
- the amount of damages found in similar cases;
- the size of profits gained by a business entity from the violation;
- comparing the supply price of business entities that participated in the collusion during the collusion period with those of the entities that did not; and
- making certain adjustments to the result of one party's calculation of the amount of damages.

Antitrust Criminal Lawsuit

In the case of an Antitrust Criminal Lawsuit, the prosecutor bears the burden of proving the facts necessary for maintaining the charges, such as the fact that the defendant has violated the MRFTA and should be subject to criminal punishment accordingly.

With regard to the degree of proof in an Antitrust Criminal Lawsuit, the Supreme Court has determined that for guilt to be found in a criminal trial, it must be based on evidence that has the power to prove that the charges are true beyond reasonable doubt on the part of the judge. The Supreme Court also determines that reasonable doubt does not include all doubts and distrust but rather means a rational question about the probability of facts. It is considered that conceptual suspicion or suspicion based on abstract possibility is not included in reasonable doubt.

Meanwhile, although factual findings by the KFTC can serve as persuasive evidence in both antitrust damages and antitrust criminal lawsuits, the court may ultimately disregard them if other evidence presented in the same case undermines their probative value.

2.5 Pass-On Defence

With regard to the passing-on defence, the perpetrator may assert and prove that the amount of damages claimed by the victim should be limited because the victim passed the damage from the violation of the MRFTA (eg, through collusion) on to consumers. However, the Supreme Court does not take the view, even if the court accepts the passing-on defence, that there is a causal relationship in which the victim's harm is immediately reduced or in which the victim immediately recovers from it. Rather, its view is that the perpetrator's liability for damages can be limited by taking into account the circumstances of passing-on the victim's damages when determining the amount of damages.

3. Limitation Periods and the Duration of Litigation

3.1 Statute of Limitations

Administrative Lawsuit Against the KFTC

A company must file a lawsuit with the Seoul High Court against the disposition of the KFTC within 30 days from the date the company was notified of the KFTC's disposition. If the company has filed an objection to the disposition by the KFTC, the company must also file a lawsuit with the Seoul High Court within 30 days from the date of receipt of the original copy of the KFTC's decision regarding the objection. An Administrative Lawsuit Against the KFTC will be dismissed after the 30-day period.

Antitrust Damage Lawsuit

There is no time limit for the victim to comply with, other than the statute of limitations in accordance with the characteristics of the victim's right to claim damages. The victim's right to claim damages for a violation of the MRFTA corresponds to the right to claim damages resulting from tort in the Civil Act. Under the Civil Act, the statute of limitations for claiming damages resulting from tort is three years from the date on which the victim (or their legal representative) became aware of the damage and the perpetrator, or ten years from the day the perpetrator committed the tort. The statute of limitations is complete when one of the above two periods lapses. Victims of MRFTA violations must, in principle, file a lawsuit with the court within the above period, unless a ground for suspension of the statute of limitations provided by the Civil Act is recognised.

Under the Civil Act, reasons for suspension of the statute of limitations include demand by way of judicial proceedings, provisional attachment or disposition, etc. The KFTC's decision, however, is not included among the reasons.

3.2 Typical Length of Private Antitrust Litigation

Administrative Lawsuit Against the KFTC

In general, it takes about six months for the first hearing to be held after a complaint is filed, but the time it takes for the court to announce its judgment after the first hearing varies from case to case. At the Seoul High Court level, it usually ends within two years, but at the Supreme Court level, it can take as little as four months and as long as several years.

An Administrative Lawsuit Against the KFTC is only possible after the KFTC's investigation has been completed and measures have been imposed, so it is not possible for the court proceeding to be suspended or postponed according to the KFTC's investigation.

Antitrust Damage Lawsuit

An Antitrust Damage Lawsuit basically proceeds irrespective of the investigation by the KFTC but, in practice, a victim often waits for the result of the KFTC's investigation and files the lawsuit according to its results. Even if the victim files a lawsuit before the KFTC's investigation results are released, the court may postpone or suspend the court proceeding until the KFTC's investigation results are available. If an Administrative Lawsuit Against the KFTC is filed regarding a violation of the MRFTA, whether there was a violation of the MRFTA is a preliminary question in the damages lawsuit, so in many cases, the court in charge of the damages lawsuit proceeds at full pace with the case after the results of the administrative lawsuit have been confirmed.

The parties may ask the court to postpone or suspend the court proceeding until the results of the KFTC's investigation or related administrative lawsuit are available. However, a legal right to proceed as above is not recognised, and the court may decide whether to proceed with the court proceeding regardless of the views of the parties.

Accordingly, in the case of an Antitrust Damage Lawsuit, much time is spent waiting for the result of the related administrative lawsuit. In order to calculate the amount of damages, an additional six months to one year is required during the appraisal process.

4. Class and Collective Actions

4.1 Statutory Basis

There is no system that allows class or collective actions in antitrust litigation in South Korea.

However, in the case of an Antitrust Damage Lawsuit, victims can file a lawsuit as joint plaintiffs. While the result of the damages lawsuit filed by some of the victims is not legally binding on the rest of the victims, it does have an impact on them. Thus, the victims who have not filed a lawsuit can proceed more easily by filing a separate damages lawsuit based on the result of the initial lawsuit.

4.2 Opting In or Out

There is no system in South Korea that allows class/collective action in antitrust litigation. See **4.1 Statutory Basis**.

4.3 Direct/Indirect Purchasers

Both direct purchasers who purchased a product directly from the business entity that colluded or otherwise violated the MRFTA, and indirect purchasers who purchased the product from that direct purchaser or a product using such products as raw materials, may, in principle, file a damages lawsuit against the business entity.

Although it is not specified in the Civil Act and the MRFTA whether an indirect purchaser may file a damages lawsuit against the business entity, the Supreme Court generally takes the view that violation of the MRFTA constitutes a tort under the Civil Act so that pursuant to general legal principles of tort under the Civil Act, if there is a substantial causal relationship between the business entity's violation of the MRFTA and an indirect purchaser's damages, the indirect purchaser may also claim damages.

4.4 Class Certification

There is no system in South Korea that allows class/collective action in antitrust litigation. See **4.1 Statutory Basis**.

5. Choice of Jurisdiction

5.1 Rules on Jurisdiction and Applicable Law

Jurisdiction

In the case of an Administrative Lawsuit Against the KFTC, the MRFTA specially provides that the Seoul High Court has exclusive jurisdiction of the first instance, and accordingly, an Administrative Lawsuit Against the KFTC goes through a two-tiered court system of the Seoul High Court and the Supreme Court.

An Antitrust Damages Lawsuit is a civil lawsuit, and jurisdiction is determined according to the provisions of the Civil Procedure Act. Under the Civil Procedure Act, the court in charge of the following has jurisdiction over the case:

- if the defendant is a person, the place of domicile (if the person has no domicile in South Korea or the person's domicile is unknown, then the person's place of residence, and if the place of residence is unfixed or unknown, then the place of the last domicile); and
- if the defendant is a corporation or other association or foundation, the place of principal office or place of business (if there is no such office or place of business, then the domicile of the main person in charge).

If jurisdiction is recognised for multiple courts in different regions for a single case, a plaintiff may file a lawsuit with any of them. Furthermore, even if a plaintiff files a lawsuit in a court that does not have jurisdiction, jurisdiction is recognised if there is an agreement between the plaintiff and the defendant, or if the defendant responds to the pleading without an objection.

In the case of an Antitrust Criminal Lawsuit, jurisdiction is determined according to the provisions of the Criminal Procedure Act. The Criminal Procedure Act basically provides that the court with jurisdiction is the court in charge in the place where the offence took place, the place of the defendant's domicile, the place of the defendant's residence, or the defendant's present location.

Applicable Law

In an Administrative Lawsuit Against the KFTC, since the issue is whether the KFTC's measures based on the MRFTA are lawful, the MRFTA applies in terms of substance. In terms of procedure, the MRFTA, the Administrative Litigation Act, and the Civil Procedure Act apply, among other pieces of legislation.

In an Antitrust Damage Lawsuit, in terms of substance, the Civil Act and the MRFTA apply, and the victim may choose the law that is the basis for the claim in filing the lawsuit. In terms of procedure, the Civil Procedure Act applies.

In an Antitrust Criminal Lawsuit, various laws such as the Criminal Act and MRFTA can be applied, and procedurally, the Criminal Procedure Act is applicable.

6. Disclosure/Discovery

6.1 Disclosure/Discovery Procedure

In South Korean law, there is no "discovery" system as in common law. However, the current MRFTA introduces court orders that can compel the opposing party to submit materials essential for proving damages or calculating the amount of damages.

In addition, in the course of proceeding with a lawsuit, the parties to the lawsuit may follow the procedure for getting the opponent or a third party to submit documents via court in accordance with the Civil Procedure Act. Based on the MRFTA, a court in charge of a damages lawsuit can ask the KFTC to send records related to the MRFTA violations.

A party to a lawsuit that wants an opponent or third party to submit documents may ask the court to request that the opponent or third party submit the document voluntarily. Where the opponent or third party does not submit the document voluntarily, the party can petition the court to order the opponent or third party to submit the document, by means of a "document submission order petition".

Requirements and Procedure for Court Orders to Submit Materials

Under the system for court orders to submit materials introduced in the current MRFTA, in lawsuits for damages due to collusion, unfair trade practices (excluding unfair support), and collusion by business entities' organisations, a party may ask the court to issue an order to submit materials necessary for proof of damage or calculation of the amount of damages. Upon a party's request, the court can order the other party to submit the relevant materials (except for material related to leniency). The system requires a party's request, and the target of the court's order to submit materials is the other party. This is distinct from a document submission order under the Civil Procedure Act, which can also be issued to a third party in possession of the document.

Even if a party asks the court to order submission of materials, if the holder of the materials has justifiable grounds for refusing to submit the materials, the court cannot order submission of the materials. If the holder of the materials claims there is a justifiable ground for refusing to submit the materials, the court can order presentation of the materials in order to determine whether the claim is appropriate. In this case, the court should not allow others to view the materials. However, even if the materials to be submitted pursuant to the court order are business secrets, the current MRFTA does not consider this as a justifiable ground for refusing to submit if that submission is necessary for proof of damage or calculation of the amount of damages. In this case, the court must designate the scope or persons who can access the materials within the purpose of the court order.

If the other party fails to comply with the court order to submit materials without justifiable grounds, the court may recognise the party's assertion as to the content in the materials to be true.

Requirements and Procedure for a Document Submission Order Petition

If the court orders the opposing party or a third party to submit a document, the person who is in possession of the document bears the duty of submitting the document unless there is a ground for denial, as provided in the Civil Procedure Act. In this regard, the Civil Procedure Act stipulates that a person who is in possession of a document cannot refuse to submit it in the following cases.

- When a party is in possession of documents cited in a lawsuit.
- When a petitioner has a private legal right to request that the person who is in possession of the document hand it over or show it.
- When a document has been written for the benefit of the petitioner or prepared with regard to the legal relationship between the petitioner and the person in possession of the document; however, this is not applicable to any of the following cases:
  - (a) documents that contain matters related to occupational secrets of a current or former public official, if the consent of the relevant public official or related organisations has not been obtained;
  - (b) documents that contain matters related to information that may lead to the prosecution or conviction of, or the disgrace of, the person

who is in possession of the document, their relative (or a person who used to be one), their legal guardian, or ward; or

(c) documents that contain matters concerning secrets of professional duties or skills or occupational secrets of a person who is obliged to keep secrets under laws and regulations, and that are not exempted from the obligation to keep secrets.

- When documents other than "documents that a public official or a person who used to be one holds or is in possession of, for their public duty" are not within the scope of either b) or c) for the exceptions above, or documents that exist solely for the utility of their owners.

When a party petitions for a document submission order, the court first hears the opinions of the respondent regarding their possession of the document, and whether they have a reason to object to the document submission. If the court determines that the document submission order petition is appropriate, the court will order the respondent to submit the document.

Consequences of Refusal to Submit

If a respondent refuses to submit a document without giving any of the reasons mentioned above, or if a respondent destroys or discards a document that they are required to submit, or renders it unusable for the purpose of hampering the petitioner's use of it, the court may recognise the petitioner's claims about the contents of the document as true. However, the court may not determine that the fact the petitioner intended to prove with the document has been instantly proved. For example, if a petitioner petitions for a document submission order to prove that a sales contract has been made, and the respondent refuses to submit a copy of the contract without any grounds, despite the court's order for the document submission, the court may acknowledge that there was a copy of the contract with the written content alleged by the petitioner, but beyond that, it may not immediately acknowledge that the sales contract alleged by the petitioner has been made.

6.2 Legal Professional Privilege

Privileges such as attorney-client privilege are not recognised under South Korean law.

6.3 Leniency and Settlement Agreements

In principle, the MRFTA stipulates that the KFTC and its officials may not provide information or data regarding leniency applicants to others unrelated to the handling of the case. However, should the leniency applicant consent, or if it is necessary in order to file or carry out a lawsuit related to the case, such information or data can be provided to others.

Meanwhile, in accordance with the MRFTA, the court has the authority to compel the opposing party to provide evidence regarding damages, but leniency-related materials are exempt from this requirement.

7. Witness and Expert Opinions

7.1 Witness Procedure

A court can admit facts based on a witness statement. A witness statement can be made both orally and in writing. In principle, a witness statement is subject to cross-examination, but cross-examination is not conducted in exceptional cases where a witness submits a written affidavit. A court sometimes only requires a written affidavit from a witness when the case does not concern factual grounds that need to be verified through cross-examination. It is sufficient for a witness to make a statement, and they do not bear the burden of providing evidence to support the authenticity of the statement.

7.2 Expert Witness Role and Procedure

Expert witnesses are often utilised where one of the issues in a lawsuit requires special learning and experience. The procedure for the expert witness statement is the same as for the general witness statement. The expert witness statement can be made both orally and in writing, and is subject to cross-examination in principle.

A party does not need to obtain court approval to submit expert statements in writing, but they must obtain court approval if they conduct an interrogation of the expert in court or if they request an expert's appraisal. Courts do not require experts to produce joint statements in advance of a trial indicating the areas in which they agree or disagree.

In addition to receiving expert opinions or questioning experts as witnesses to investigate expert evidence, courts can also adopt other measures such as requesting experts to appraise the issues of the trial, or follow the process of simultaneously seeking opinions from multiple experts.

8. Damages

8.1 Damages: Assessment, Passing On and Interest

Assessment of Damages

In an Antitrust Damage Lawsuit, the amount of damages is calculated based on the actual amount of injury or estimated amount of injury sustained by the victim. Regarding some violations, such as collusive acts, a provision established in 2018 renders a perpetrator liable for compensation of damages for an amount not exceeding three times the damages incurred by the victims. Compensation for damages in accordance with this provision are regarded as punitive damages.

When the court determines the amount of compensation in accordance with the provision above, certain factors should be taken into account, including:

- intent or degree of recognition of the concern that damage will arise;
- the extent of damage caused by the violation;
- the economic gain the perpetrator has acquired from the violation;
- the fines and surcharge for the violation;
- the duration and frequency of the violation;
- the financial condition of the business entity; and
- the extent of efforts the business entity or business entities' organisation has made to remedy the damages.

"Passing-On" Defences

The perpetrator can claim and prove that the victim has not been harmed by a collusive act that violates the MRFTA by passing on the victim's damages to consumers. When the court accepts the passing-on defence, it is also considered as a factor that limits the scope of the perpetrator's liability.

Interest

Interest and damages for delay are distinguished from one another by law, and while compensation does not accrue interest, damages for delay do. The court views that in the case of liability for damages arising from tort, in principle, the damages for delay accrue from the time the liability is established. In the case of a violation of the MRFTA, which is a form of tort, the damages for delay, in principle, also accrue from the time the liability is established. Accordingly, the victim can claim damages for delay incurred during the period from the time the liability for damages arising from the MRFTA violation is established until the actual payment of all damages, including before and after the trial, unless extraordinary circumstances exist.

Damages for delay are generally calculated by applying an interest rate of 5% per year, which is the statutory interest rate under the Civil Act, to the compensation for damages. However, depending on the result of a damages lawsuit, the rate of 12% per year stipulated in the Act on Special Cases Concerning Expedition of Legal Proceedings can be applied. In short, the damages for delay are calculated at a rate of 5% per year from the time the liability is incurred, and are calculated at an annual rate of 12% at some point after the victim files the lawsuit for damages.

9. Liability and Contribution

9.1 Joint and Several Liability

In a case where several people commit a violation of the MRFTA and thereby inflict damage on a victim, the violators become jointly liable for the damages to the victim. The South Korean Civil Act stipulates that in a case where multiple people inflict damage on others in a joint tort, they are jointly liable for the compensation for damages (quasi-joint debt). An MRFTA violation is a tort under the Civil Act, and when multiple people commit a tort together, it constitutes a joint tort. Accordingly, the MRFTA violators become jointly liable for a victim's damages. As a result, the violators are obliged to compensate the victims for all the damages until the victims' damages are compensated in full, and whether all or only some of the violators compensate the victims for damages, they all become exempt from the liability to pay further damages to the victim.

On the other hand, even if some of the violators have obtained mitigations of, or exemptions from, the KFTC's dispositions or criminal prosecution procedures, for reasons such as leniency or co-operation with the investigation, this does not reduce or exempt them from liability for damages to the victim.

9.2 Contribution

Where a victim prevails in a damages lawsuit against multiple violators, the violator who has compensated the damages suffered by the victim can file a civil lawsuit against the other violators, claiming compensation for the portion of the damages paid beyond their liability. In this case, with respect to the criteria for determining whether the violator has paid compensation beyond their liability to the victim, the Supreme Court suggests using "the degree of wrongdoing of the joint tortfeasor in the joint illegal acts" as a criterion.

10. Other Remedies

10.1 Injunctions

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the business entity may petition for suspension of the enforcement of a disposition on the ground that there is a risk of irreparable damage due to the disposition of the KFTC, while claiming cancellation of the disposition on the ground that the disposition is unlawful. The court may decide to suspend the enforcement of the disposition before its judgment on the case on the merits on petition by that business entity or on its own official authority.

Antitrust Damage Lawsuit

In the case of an Antitrust Damage Lawsuit, the court's role becomes limited to the extent of ordering the perpetrator to monetarily compensate for the damages, and deciding whether it will accept the victim's request for provisional seizure for effective recovery of damages.

In order for the victim to request seizure by rendering the right to claim damages arising from the MRFTA violation as a right to preservation, there must be a serious concern that it may not be possible to enforce the award without the seizure, even if the victim prevails in the damages lawsuit. The fact that there is a concern that it will be very difficult or impossible to enforce the award will be acknowledged depending on whether the level of situation that provides for the court's presumption of certainty, if not its confidence, has been shown.

When the victim requests the seizure, the court usually decides whether to accept the request without notifying the perpetrator. There are no additional steps that the victim must take in order to have the court decide to accept the request without notifying the perpetrator. The court's decision can be made within one month from the time the request is made.

On the other hand, if the victim has obtained a decision approving the seizure but lost in the main case, the perpetrator can request the cancellation of the seizure on the grounds that they have prevailed in the main case, and the victim could be liable for damages if they have inflicted damages on the perpetrator by the decision that approved the seizure.

10.2 Alternative Dispute Resolution

In the case of an Antitrust Damage Lawsuit, the parties can resolve the case in accordance with alternative dispute resolution procedures by going through procedures such as reconciliation and mediation both inside and outside the lawsuit. Particularly for a case regarding damages caused by collusion, it takes a considerable amount of time and money to calculate the appropriate amount of damages. Resolving the case through alternative dispute resolution procedures can be effective for all the parties concerned. However, to do so is not mandated.

11. Funding and Costs

11.1 Litigation Funding

There is no regulation in South Korea that limits or guarantees litigation funding in relation to litigation procedures.

11.2 Costs

Dividing Litigation Costs

In filing a suit, the plaintiff pays a certain amount of the litigation costs in accordance with the relevant laws and regulations. When the court makes a decision, it rules on which party should ultimately bear the litigation costs incurred in the course of the trial and the ratio of litigation costs the respective parties must bear. Litigation costs are, in principle, to be borne by the losing party, and in the case of partial victory, the ratio of the litigation costs is usually determined according to the percentage of victory between the parties. The specific amount of litigation costs to be borne by the parties will be determined through a separate trial process known as the procedure for confirming litigation costs, and the parties will go through the process of paying the confirmed litigation costs to the other party afterwards.

Attorneys' Fees

Attorneys' fees are also a type of litigation cost, but the full amount of attorneys' fees is not included in the litigation costs the parties will actually pay. The Supreme Court rules about calculating and including attorneys' fees in litigation costs stipulate that the lesser of the amounts calculated, based on a certain standard prepared according to the value of the litigation and the actual amount of attorneys' compensation paid, is included in the litigation costs to be borne by the parties. In most cases, the prevailing party receives a refund that is less than the amount the party actually spent on attorneys' fees.

Collateral

According to the Civil Procedure Act, if the court finds that the provision of collateral for litigation costs is necessary, as the plaintiff does not have an address, office, or a place of business in South Korea, or when it is obvious that the plaintiff's claim is unreasonable, upon request of the defendant, the court may order the plaintiff to provide collateral for litigation costs.

12. Appeals

12.1 Basis of Appeal

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the losing party can file a final appeal with the Supreme Court within two weeks after they receive the service of the Seoul High Court's decision. Unlike general cases, the Seoul High Court becomes the court of first instance for an Administrative Lawsuit Against the KFTC, and thus, the Administrative Lawsuit Against the KFTC actually operates as a two-tiered court system. In order to appeal to the Supreme Court, the appellant must file a petition of final appeal with the Seoul High Court, which may or may not state the grounds for appeal. If the appellant submits the petition without stating the grounds for the final appeal, the appellant must submit the grounds for appeal to the Supreme Court within 20 days from the date of receiving notice that the Supreme Court has received the record of the lawsuit from the Seoul High Court. If the appellant does not submit the grounds for appeal within that period, the Supreme Court will dismiss the final appeal.

Since the Supreme Court operates as a court that addresses questions of law, grounds for appeal that can be claimed are limited, in principle, to grounds that the judgment of the Seoul High Court is incorrect from a legal perspective. A statement that the Seoul High Court has incorrectly admitted the facts cannot be provided as grounds for appeal.

The Supreme Court will dismiss the final appeal if it determines that the grounds for appeal cannot be admitted. If it determines that the grounds for appeal can be admitted, the Supreme Court will reverse the ruling of the Seoul High Court and, in principle, remand the case to the Seoul High Court to reconsider the case.

Antitrust Damage Lawsuit

In the case of an Antitrust Damage Lawsuit, the district court becomes the court of first instance, and the party that loses in the first instance trial can appeal by filing a petition of appeal with the court of first instance, while the party that loses in the appeal can file a petition of final appeal with the Court of Appeal.

A petition of appeal and final appeal must be filed within two weeks from receiving the original copy of the decision from the court.

However, even where a petition of appeal is filed with the court, an appellant who had failed to state the grounds for the appeal in the petition of appeal must submit a brief stating the grounds for appeal within 40 days (with a one-time opportunity to request a one-month extension) of receiving the notice of receipt of the record of appeal. If the brief stating the grounds for appeal is not submitted within this period, the appellate court must dismiss the appeal.

The Court of Appeal will dismiss the appeal if it decides that the judgment of the first instance court is valid. If it decides that the judgment of the first instance court is wrong, it will reverse the judgment and rule on the case on its own.

The procedure for final appeal at the third-instance court follows the same procedures.

Antitrust Criminal Lawsuit

In the case of an Antitrust Criminal Lawsuit, a party that objects to the judgment of the first instance court or the Court of Appeal must file a petition of appeal or final appeal within seven days from when the court gives the decision, and must submit the grounds for appeal within 20 days from when the party received the notice from the Court of Appeal or final appeal that the record of the lawsuit had been sent.

13. Looking Forward

13.1 Legislative Trends and Other Developments

In the field of competition law, the National Assembly of South Korea is once again deliberating the introduction of a class action system. Although past efforts to enact class action legislation have repeatedly failed, the issue has re-emerged as a matter of public interest in the wake of recent incidents involving large-scale consumer harm – such as a major hacking incident affecting a leading telecommunications provider's cellular network.

If enacted, the new system is expected to trigger a sharp rise in competition-related damages lawsuits. Consumers would gain a more effective means of redress. Conversely, businesses would face increased pressure to manage not only KFTC enforcement risks, but also the growing threat of class actions.

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