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The Supreme Court Rules that the Korea Fair Trade Commission's Notice of Non-confirmation of Leniency Status May be Actionable.

For the first time in Korea, Shin & Kim's Antitrust Practice Group obtained a landmark decision from the Supreme Court, which held that a notice of non-confirmation of leniency status issued by the Korea Fair Trade Commission (the "KFTC") to a leniency applicant involved in unfair collusion (i.e., cartel) would constitute an administrative disposition, and thus, the leniency applicant would be able to immediately appeal such decision of the KFTC through an administrative proceeding.

1. Significance of the Leniency Program

The leniency program was adopted in Korea for the purpose of tackling cartels. Under the current leniency program, the first-ranked leniency applicant is entitled to a full exemption from any administrative fines and immunity from criminal prosecution while the second-ranked leniency applicant is entitled to a 50% reduction on administrative fines and immunity from criminal prosecution. Accordingly, it is critical for leniency applicants to obtain the "confirmation of leniency status" by the KFTC as it provides full immunity from both administrative and criminal liabilities in connection with cartels.

2. Procedures for the Leniency Program

When a cartel participant files an application for leniency, the KFTC is required to provide a notice of confirmation or non-confirmation of leniency status within 15 days after the submission of a leniency application and supplemental materials (which may be extended up to 60 days if the KFTC determines that such extension is necessary and explains the reasons for such extension to the applicant).

Even after such notice of confirmation or non-confirmation of leniency status has been issued, the KFTC's investigation continues. Once the investigation is concluded, the KFTC issues a final

decision with regard to the leniency status and whether to impose administrative fines and corrective measures and/or refer the leniency applicant to the Prosecutor's Office for criminal prosecution based on a resolution of the committee comprised of the KFTC commissioners.

3. Overview of the Case

Immediately after the KFTC commenced an investigation of a cartel, Company A was the first and Company B was the second to apply for leniency. Both Company A and Company B submitted supplemental materials after the submission of their respective leniency applications.

The KFTC subsequently issued a notice of non-confirmation of leniency status to Company A on the ground that Company A failed to submit evidence sufficient to prove the existence of the cartel at issue. On the contrary, the KFTC issued a notice of confirmation of first-ranked status to Company B as the KFTC determined that Company B was actually the first to submit evidence sufficient to prove the existence of the cartel at issue.

Company A then initiated an administrative proceeding against the KFTC seeking to cancel the KFTC's notice of non-confirmation of leniency status issued to Company A.

4. Determination by the Courts

The Seoul High Court dismissed the case holding that the notice and leniency confirmation issued by the KFTC constituted an intermediate, provisional and variable action conducted by the KFTC's Secretary General in the process of preparing the KFTC's final disposition, which by itself would not be considered to have established any rights or obligations of Company A or Company B or caused direct changes in their benefits available under law, and for this reason, such notice and leniency confirmation could not be viewed as having the necessary elements of an administrative disposition which would be subject to appeal. (Seoul High Court Decision No. 2009Nu22470, January 27, 2010)

On appeal, the Supreme Court overturned the Seoul High Court's decision holding that Company A should be allowed to avoid any future harm by challenging the legality of the KFTC's notice of non-confirmation and resolving any legal uncertainties at the time of the issuance of such notice before proceeding to cooperate with the KFTC's investigation. (Supreme Court Decision No. 2010Du3541, September 27, 2012).

5. Implications of the Supreme Court's Decision

Until now, it was not clear whether a notice of non-confirmation of leniency status would be actionable

or could be challenged through administrative proceeding. An applicant that filed an application for leniency but received a notice of non-confirmation of leniency status did not have immediate recourse to challenge the legality or reasonableness of such notice of non-confirmation and was only able to dispute such non-confirmation of leniency status during the deliberation process by the KFTC committee or otherwise dispute such non-confirmation while challenging the legality of the KFTC's final decision on administrative fines and/or corrective measures after the decision was issued.

As a result, an applicant that received a notice of non-confirmation of leniency status was put in an unbalanced position since the applicant would have to continue to make self-incriminating statements throughout the KFTC's investigation and future proceedings to obtain a favorable result with regard to its leniency status while it was still unclear whether there would be any disadvantages resulting from the KFTC's non-confirmation of leniency status. Under such circumstances, there was no particular procedure to provide relief to such applicant.

Noting this issue, Shin & Kim representing Company A in this case filed an administrative proceeding against the KFTC, and after a fierce legal battle, the Supreme Court overturned the Seoul High Court's decision and held that a notice of non-confirmation of leniency status issued by the KFTC would be actionable.

Following the Supreme Court's decision above, there has been an increase in the number of administrative proceedings brought by leniency applicants challenging the KFTC's non-confirmation of their leniency status, and hence, the significance of the Supreme Court's decision is that it made much needed relief available to such leniency applicants.

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