

# Korea



Hyun Ah Kim



John Hyouk Choi

Shin & Kim

## 1 General

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

The Korea Fair Trade Commission (the “KFTC”), which is the competition authority in Korea, may bring administrative proceedings against any company for alleged violations of the Monopoly Regulations and Fair Trade Act (“MRFTA”). The proceeding may be initiated by the KFTC on its own initiative or based on a complaint filed with the KFTC. Once the complaint is filed, the KFTC has the discretion to determine whether or not the allegation warrants an investigation.

If a violation is found, the KFTC can order the violator to cease and desist from the violation, to pay a surcharge, and also to notify the public of the corrective order. Moreover, for certain serious violations, the KFTC can refer the case to the Prosecutor’s Office for criminal prosecution. This power is exclusively vested in the KFTC. In this connection, under the revised law which became effective from 17 January 2014, upon request by certain other authority (such as the prosecutor, the board of audit and inspection, etc.) the KFTC will be required to refer the case to the Prosecutor’s Office for criminal prosecution.

In addition to the administrative proceedings by the KFTC, a person injured by an antitrust violation may also file a lawsuit in a civil court to seek injunctive relief and/or money damages. This proceeding is the same as any civil litigation.

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

The MRFTA is the legal basis on which the KFTC issues corrective measures. On the other hand, the MRFTA, the Civil Act, the Civil Procedure Act, and the Civil Execution Act are the bases on which civil courts can award injunctive relief and money damages.

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

The MRFTA is a national law.

### 1.4 Are there specialist courts in Korea to which competition law cases are assigned?

Administrative hearings for violations of the MRFTA are conducted by the KFTC. The decision by the KFTC may be appealed to the

Seoul High Court (an appellate level court), instead of the first level administrative court. As such, the KFTC may be viewed as possessing quasi-judiciary authority.

There are no specialist courts in Korea created solely for hearing the appeals from the KFTC decision. However, all antitrust appeals cases for challenging the KFTC decisions are filed with special administrative divisions (Administrative Divisions 2, 6 and 7) within the Seoul High Court.

Civil cases for injunctive relief and/or civil damages arising out of antitrust violations are filed with district courts (i.e., trial courts).

### 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

In the appeals cases challenging the KFTC decision, standing is conferred only upon the party against whom the KFTC decision was issued. For instance, competitors do not have the necessary standing, although they may qualify as supplementary intervenors. The courts will often allow competitors to participate as supplementary intervenors when neither party to the case objects to such intervention. However, in a recent Seoul High Court case involving a MRFTA violation where the plaintiff objected to the intervention by a competitor (who was also a complainant during the KFTC proceedings), the court ruled that such party does not qualify as a supplementary intervenor. Under the Consumer Basic Law, consumer organisations may bring class actions; however, this mechanism has rarely been used.

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

Jurisdictional factors in antitrust law cases are the same as those in civil, administrative, and criminal cases. Jurisdiction in civil cases for injunctive relief and/or money damages, is determined on the basis of where the conduct is perpetrated and the parties’ addresses, among others. An appeals case for challenging the KFTC decision is subject to the exclusive jurisdiction of the Seoul High Court.

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

Although Korea has a highly developed antitrust law, Korea does not appear to attract claimants.

### 1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial, regardless of whether the process is on injunctive relief, civil damages, nullification of a KFTC decision, or a criminal prosecution. The judges can examine the parties and their witnesses.

## 2 Interim Remedies

### 2.1 Are interim remedies available in competition law cases?

Interim remedies are unavailable during the KFTC proceeding. However, during a court proceeding, interim remedies are available.

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

*Administrative (appeals) proceeding:* In an appeals case before the Seoul High Court for challenging a KFTC decision, the plaintiff (i.e., the defendant during the previous KFTC proceeding) may file an application for staying the KFTC decision. The plaintiff must prove (among other matters) the urgent necessity to prevent an irreparable harm from the KFTC decision. Although these applications are rarely granted on the surcharge portion of KFTC decisions (due to the difficulty of showing an ‘irreparable harm’ from having to pay the fine), there have been cases where the Seoul High Court granted them after the applicants showed that the amount of the fine would have a significant negative effect on their financial condition or business.

*Civil Court:* After raising a civil damages claim, the plaintiff may also apply for an injunctive relief. This application requires showing: (i) the existence of the right to be preserved (similar to likelihood of success); and (ii) the necessity of preserving the right. Here, the ‘right to be preserved’ means the ‘obligatory right’ and/or ‘real right’ that the applicant has against the opposing party, and its existence will be decided by whether the applicant will likely prevail on the merits of its claim. ‘Necessity of preserving the right’ requires showing that without the injunctive relief, it will be impossible or impracticable for the applicant to exercise its right.

## 3 Final Remedies

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

A. Corrective Order: The KFTC can issue corrective orders on the MRFTA violators. This corrective order encompasses orders against the violator to cease and desist from continuing the violation, to take certain actions, and also to make a public notice of the corrective order.

B. Surcharge: The KFTC can impose a surcharge on an MRFTA violator. The matters related to the surcharge (including the calculation method) are set out in a guideline issued by the KFTC. The amount of the surcharge is determined by considering the revenues from sales of the products and/or services associated with the violation, the duration and gravity of the violation, among others. The foregoing may be disputed during the appellate proceeding, and the Seoul High Court is not bound by the KFTC’s guideline on the surcharge.

C. Civil damages: The requirements for awarding civil damages for an MRFTA violation are the same as damages in any civil litigation – i.e., the illegality of the conduct at issue, the occurrence of

damages, the causal connection between the violation and the damages, and the negligence or wilfulness of the violator. In a case presenting difficulty for demonstrating the precise amount of damages suffered, Article 57 of the MRFTA confers the power upon the courts to find an appropriate amount for the damages.

### 3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

As noted above, civil damages are awarded by courts after the requirements of civil damages are shown. Punitive and exemplary damages are not recognised or awarded under the Korean legal system. However, a draft amendment bill for punitive damages is currently pending at the National Assembly.

### 3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

Neither the administrative nor the criminal fines are considered by the courts in awarding the civil damages.

## 4 Evidence

### 4.1 What is the standard of proof?

In a criminal proceeding in connection with an MRFTA violation, a ‘beyond reasonable doubt’ standard of proof will apply. On the other hand, during the appeals proceeding (for challenging a KFTC decision) or civil proceeding (for injunction and/or damages), a more relaxed standard of proof will apply. In the civil cases, the party with the burden of proof must prove that the alleged claim is substantially more likely.

### 4.2 Who bears the evidential burden of proof?

During the KFTC proceeding, the case examiner bears the burden of proof to show that an MRFTA violation has occurred. Even in the subsequent appellate proceeding where the KFTC decision is contested, the KFTC must still prove the lawfulness of its decision.

In civil court proceedings, as is the case in any civil tort cases, the plaintiff alleging an injury from an MRFTA violation must bear the burden of proof to demonstrate: (i) the illegality of the defendant’s conduct; (ii) damages; (iii) a causal connection between the damages and the violation; and (iv) that negligence or wilfulness caused the violation.

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

In both the appeals cases for challenging the KFTC decisions as well as civil damages cases, there are no particular limitations on the forms of evidence. Courts also accept expert evidence.

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

During the KFTC proceeding, the KFTC has the power to request all relevant documents from the alleged violator. This power can be

invoked without a warrant issued by a court. During the court proceeding, pre-trial disclosure is available; however, there is no broad discovery process, which is similar to that of the common law system. For one party litigant to obtain relevant documents from the other, an application should be filed with the court in accordance with the civil procedure rules to have an order issued by the court against the other party for document production or for factual inquiries. These applications may be filed during the pre-trial and trial stages.

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

During the KFTC proceeding, there is no process by which witnesses may be forced to appear. While the court, on the other hand, has such power, the penalties for failing or refusing to appear are not severe. Cross-examination of witnesses is possible; in fact, even the judges may examine the witnesses.

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

No. In practice, however, the facts noted in the KFTC decisions tend to impact the findings of fact by the court in the subsequent proceedings. Likewise, the violation decisions by foreign authorities, while not given probative value, in practice tend to have some influence on later proceedings.

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

The courts can conduct any part of a trial involving commercial confidentiality on a confidential basis. The KFTC can also have any part of its proceedings that involve commercial confidentiality conducted on a confidential basis. KFTC officials are under the obligation not to disclose any confidential business information.

#### 4.8 Is there provision for the national competition authority in Korea to express its views or analysis in relation to the case? If so, how common is it for the competition authority to do so?

There is no provision requesting the KFTC to express its views or analysis in relation to a specific case. The KFTC usually refrains from expressing its views on a specific case before reaching the final decision, in order to maintain a neutral position. However, it is the KFTC's practice that, soon after reaching its final decision for a case after the hearing, it issues a press release summarising the relevant facts, its analysis and the final decision for the case before providing the full written decision to the defendant(s) and posting the same on its website.

## 5 Justification / Defences

### 5.1 Is a defence of justification/public interest available?

Abuse of market dominance and unfair trade practices may, in most instances, be justified based on reasonable business or market reasons. Also, cartels pursued for any of the following purposes,

upon the KFTC approval, may be justified: (i) industry rationalisation; (ii) research and technology development; (iii) overcoming economic depression; (iv) industry structural adjustment; or (v) improving the competitiveness of small- to medium-size firms.

In civil cases, a defendant could argue a defence on the grounds that its conduct complied with the law, that it was merely pursuing its business or that it did not run afoul of any accepted social rules.

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

Recently, in a private damages action by a bread manufacturer (a direct purchaser of flour) against flour manufacturers that fixed prices and set production quotas, the Korean Supreme Court rejected the flour manufacturers' passing-on defence. However, in determining the amount of the damages, the court, based on the equity principle, reduced the damage by a portion of the amount the bread manufacturer was able to pass on to the customers.

Another major case on the passing on defence is currently pending at the Korean Supreme Court: indirect purchasers claimed damages against credit card companies and VAN companies that colluded on credit card fees. The Seoul High Court has recognised the indirect purchasers' legal standing to sue and the sufficient causal nexus between the defendants' actions and the damages to the indirect purchasers.

## 6 Timing

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

Civil damages claims should be instituted within: (i) 10 years from the date on which the alleged violation first occurred; or (ii) 3 years from the date the plaintiff first became aware of the alleged violation (whichever period may elapse earlier).

Under the latest amendment that took effect in 2012, the limitation period is 5 years from the start of the investigation or, if no investigation is launched, 7 years from the end of the violation. However, in cases involving multiple conducts respectively spanning different time periods, such conducts will be viewed as comprising a single continuing conduct, in which case the violation will be deemed to have ceased on the date the last of such conducts stopped (the 7-year limitation period starts from that date).

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

During the KFTC proceeding, it normally takes somewhat less than 1 year until the case is submitted for review and decision by the Commissioners. A case of rare complexity, however, may take several years before it is submitted to the Commissioners. An appeal to the Seoul High Court usually takes 1-2 years from the filing of the complaint to the judgment. A subsequent appeal to the Supreme Court may take from 4 months up to several years.

Civil cases for injunctive relief are generally decided within 6 months, while the cases for civil damages ordinarily take 1 to 2 years (for each the trial and appellate proceedings). A subsequent appeal to the Supreme Court can last from 4 months up to several years. The duration of any given court proceeding can change,

depending on the need to seek appraisal by expert appraisers and the number of reports needed to be made.

## 7 Settlement

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

Parties can freely choose to discontinue their claims, regardless of whether the claim is for challenging the KFTC decision or for injunctions or damages; however, the party wishing to discontinue its claim must obtain the consent of the other party, if the other party has already submitted its brief or made an oral argument in the court.

## 8 Costs

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

Even if a KFTC proceeding results in a non-violation decision, no recovery is allowed for the defendant on its legal costs. On the other hand, although the prevailing party in a civil case proceeding can recover its legal costs from the non-prevailing party, there is a legal limit on the maximum amount of recovery for attorneys' fees.

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

Yes, they are.

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

Yes. There are no express provisions of law that prohibit such funding. However, such option has been rarely used.

## 9 Appeal

### 9.1 Can decisions of the court be appealed?

A KFTC decision can be appealed before the Seoul High Court within 30 days of receiving the decision. The defendant can also contest the decision once again before the KFTC, by filing an application of objection with the KFTC. If the outcome of this contest is unsatisfactory, the defendant can then file an appeal with the Seoul High Court (within 30 days of receiving the KFTC decision on the application of objection). Further, the judgment from the Seoul High Court can also be appealed before the Korean Supreme Court.

Civil and criminal proceedings on antitrust law claims proceed through trial, appellate, and Supreme Court stages, in the same way as any other civil or criminal cases. The KFTC and the Prosecutors' Office may also institute the appellate and Supreme Court proceedings.

## 10 Leniency

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

With respect to cartel activity, the first party to voluntarily report its participation may enjoy 100 per cent immunity on both the remedial order and the surcharge, and the second party to so report will enjoy a 50 per cent reduction in the surcharge and the remedial order. Exemption from criminal prosecution will likewise apply to both the first and the second parties to qualify for leniency. The order in which the report is made, however, does not automatically guarantee leniency, because, depending on the level of cooperation shown (providing the material relevant to demonstrate the violation), leniency may be denied to the first party to report, while even the second to report may qualify for leniency. Recently, the KFTC has been applying a strict standard in offering leniency and there have been a number of cases in which leniency granted has been revoked later. Furthermore, leniency does not immunise its recipient from civil lawsuits.

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

No. Evidence disclosed to obtain leniency cannot be withheld in subsequent court proceedings. The courts can request from the KFTC the relevant documents submitted by the parties during the KFTC proceedings.

## 11 Anticipated Reforms

### 11.1 Highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that may be required.

The EU Directive is not expected to have any direct impact in Korea. Parties to Antitrust Damages Actions are expected to use the EU Directive as reference material in proceedings, but the courts are not likely to immediately start relying on such reference material or using the EU Directive as the standard for antitrust damage calculation.

### 11.2 Are there any other proposed reforms in Korea relating to competition litigation?

Currently pending at the National Assembly are the various draft amendment bills, listed below, but none of them has reached the plenary session stage.

- (a) punitive damages that are three or ten times the actual damage amounts in cartel, abuse of dominance, unfair trade practices, and resale price maintenance (for all or some of these conducts);
- (b) class actions for cartels, abuse of dominance, unfair trade practices, and resale price maintenance (currently, class actions are permitted for securities litigations only); and
- (c) injunctive reliefs for the MRFTA violations (currently, injunctive reliefs are only partially permitted under the civil procedure rules).

**Hyun Ah Kim**

Shin & Kim  
8th Floor, State Tower Namsan  
100 Toegye-ro, Jung-ku  
Seoul 100-052  
Korea

Tel: +82 2 316 4008  
Fax: +82 2 316 0342  
Email: [hakim@shinkim.com](mailto:hakim@shinkim.com)  
URL: [www.shinkim.com](http://www.shinkim.com)

Ms. Hyun Ah Kim is a partner at Shin & Kim. She primarily concentrates on antitrust cases. As a member of the Antitrust Practice Group of Shin & Kim, her practice encompasses cartels, merger control, abuse of market dominance, unfair trade practices, intersection of IP and antitrust and antitrust litigation. She has focused on antitrust cases with international implications representing many multinational corporations such as Qualcomm, Japan Airlines and AU Optronics. She taught "Intellectual Property Law and Competition Law" at Korea University as an adjunct professor. She co-authored the Korea chapter of the International Comparative Legal Guide to Competition Litigation of Global Legal Group from 2010 to 2013 and the Korea chapter of Getting the Deal Through (Dominance) of Global Competition Review in 2012. She is currently serving as a vice chair of the competition law committee of the IPBA. She graduated from NYU School of Law (LLM) and Seoul National University (LLB) and she is a member of the Korean Bar Association and the New York Bar Association.

**John H. Choi**

Shin & Kim  
8th Floor, State Tower Namsan  
100 Toegye-ro, Jung-ku  
Seoul 100-052  
Korea

Tel: +82 2 316 4232  
Fax: +82 2 756 6226  
Email: [jhchoi@shinkim.com](mailto:jhchoi@shinkim.com)  
URL: [www.shinkim.com](http://www.shinkim.com)

Mr. John H. Choi is a senior foreign attorney at Shin & Kim. Mr. Choi's practice focuses on antitrust matters, including administrative and civil litigations. Mr. Choi has handled clients in diverse industries, including electronics, high-tech, manufacturing, energy, etc. Mr. Choi is a current NGA of ICN. Mr. Choi was also an adjunct professor of law at Seoul National University's College of Law, Korea's top undergraduate school of law. Mr. Choi has co-authored the Korean chapters of *Korean Antitrust Regime: Key Trends and Developments: Competition & Antitrust Review 2013*; Korean chapters of *The Public Competition Enforcement Review 2009*; *The International Comparative Legal Guide to: Competition Litigation 2010*; and *Representing the Asian Client 2010*. Mr. Choi has been a speaker in various seminars including the KFTC's session in a cartel education conference for Korean companies. Mr. Choi is a *magna cum laude* graduate of, and also holds a J.D. from, UCLA.

# SHIN&KIM

With approximately 400 professionals, including Korean attorneys, foreign lawyers, patent and trademark attorneys, tax attorneys and accountants, Shin & Kim is one of the most prominent law firms in Korea. Shin & Kim is widely recognised for its excellence in the areas of M&A, antitrust, banking and finance, capital markets, corporate restructuring, cross-border investment, tax, labour and employment, real estate and intellectual property, and has earned a reputation for providing superior representation to clients in litigation and other complex legal disputes. Our clients include Fortune 100 companies, Korean conglomerates, foreign and domestic companies, individuals and governmental entities. In recent years, Shin & Kim has consistently received "Asia Deal of the Year" awards from the International Financial Law Review, and has been named as the Korean Law Firm of the Year, the top firm for securitisation and structured finance and the top firm for investment banking by various leading publications. Through our network of relationships with leading law firms around the world, we are able to provide our clients with the highest standard of legal services for even the most complex cross-border transactions. With the establishment of our office in China as well as our experience in working with other firms, we are able to provide more effective and efficient legal advice to meet the demands of burgeoning relationships between businesses in Korea as well as in other countries.