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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The legislation in Korea applying specifically to the behaviour of dominant firms is the Monopoly Regulation and Fair Trade Act (the MRFTA).

The MRFTA is Korea's main competition law statute, and is enforced in accordance with an Enforcement Decree promulgated thereunder (the Enforcement Decree) and relevant guidelines and standards issued by the Korea Fair Trade Commission (KFTC), Korea's main competition law enforcement body.

The chapter 2 provisions (ie, articles 3 to 6) of the MRFTA are the specific provisions applying to the behaviour of dominant firms, and article 3-2(1) of the MRFTA prohibits the following types of abusive conduct by a dominant firm:

- unreasonably determining, maintaining or changing the prices of goods or services;
- unreasonably controlling the sale of goods or provision of services;
- unreasonably interfering with the business activities of other enterprises;
- unreasonably impeding the participation of new competitors; or
- unfairly excluding competitive enterprises or significantly harming consumers' interests.

In addition, more detailed provisions on the types of abuse of market dominance and the criteria for determining abuse of market dominance are provided in the Enforcement Decree and in the KFTC's Guidelines on Abuse of Market Dominance (the Abuse of Dominance Guidelines).

There are also provisions of sector-specific laws that apply to the behaviour of dominant firms (see also questions 5 and 6).

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The chapter 2 provisions of the MRFTA apply to the conduct of already dominant firms. The MRFTA covers conduct through which a non-dominant company becomes (or attempts to become) dominant, by means of regulating mergers and acquisitions transactions (article 7) and prohibiting unfair trade practices (article 23).

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The object and underlying standard of the MRFTA is not a strictly economic one. Article 1 of the MRFTA states that its direct object is to promote free and fair competition, and its ultimate goals are the facilitation of creative business practices, the protection of consumers and the balanced growth of the national economy. As such, the MRFTA contains many provisions that do not fall within the strict purview of competition law.

However, the Supreme Court of Korea did accept in the landmark *POSCO* case (Supreme Court Decision No. 2002Du8626, dated 22 November 2007) that, at least as far as issues of abuse of market dominance are concerned, the underlying standard is a strictly economic one.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Article 23 of the MRFTA applies to the unilateral conduct of non-dominant firms.

Article 23 regulates the unilateral conduct of non-dominant firms by prohibiting the following types of unfair trade practices:

- unfair refusal to deal with, or discrimination with respect to, a specified counterparty;
- unfair exclusion of competitors;
- unfair inducement of customers of competitors;
- unfair abuse of its superior bargaining position in transacting with a counterparty;
- acts unfairly restricting or disrupting the business activities of other enterprises; and
- assisting specially interested parties or other enterprises through the provision of advanced payments, loans, human resources, immoveable assets, stocks, bonds or intellectual property, or otherwise by entering into transactions with such parties that contain significantly favourable terms for such parties.

It is noted that item 4 above (ie, unfair abuse of a superior bargaining position in transacting with a counterparty) recognises that an abuse of superior bargaining position does not require the existence of market dominance; relative bargaining power in relation to the counterparty is sufficient.

5 Sector-specific control

Is dominance regulated according to sector?

In addition to the MRFTA, dominance is regulated according to certain sector-specific legislation.

For example, the Telecommunications Business Act (the TBA) imposes stricter controls on the conduct of dominant firms in the telecommunications sector. Basically, telecommunication network providers with annual sales revenue above a specific threshold amount and at least a 50 per cent market share in a specific telecommunications market are required to provide essential telecoms facilities, share information on related technologies, or permit interconnection or joint use of facilities, if requested to do so by another firm.

In the case of any violation of the TBA, the Korean Communications Commission may issue remedial orders or impose administrative fines, just as the KFTC would do in case of violations of the MRFTA.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

In principle, the relationship between sector-specific provisions and the general abuse of dominance provisions of the MRFTA tends to be complementary. However, since the sector-specific provisions form a part of special laws enacted for sector-specific legislative purposes, they may supersede the more general MRFTA provisions if they are intended to pre-empt the MRFTA provisions.

For example, under the TBA, if a company is subject to remedial orders or administrative fines for prohibited conduct under the TBA, it cannot also be subject to enforcement under the MRFTA on the same grounds.

7 Enforcement record

How frequently is the legislation used in practice?

During the period from 1981 to 2010, the KFTC reviewed 224 cases under the abuse of market dominance provisions of the MRFTA, and issued warnings or orders for remedial action in 71 of these cases; in 2009, the KFTC issued orders for remedial action and imposed administrative fines in three cases.

This modest enforcement record can be explained by the partial overlap between the unfair trade practice provisions (article 23) and the abuse of dominance provisions (article 3-2) under the MRFTA. In practice, the KFTC applies article 23 regardless of market dominance. Accordingly, there are certain unfair trade practice cases that, in actual substance, are cases involving abuses of a market dominant position. If such types of unfair trade practice cases are also taken into account, there are more cases of abuse of market dominance than the above KFTC enforcement record would indicate.

8 Economics

What is the role of economics in the application of the dominance provisions?

Economics plays an important role in the application of the dominance provisions of the MRFTA. There are several abuse of market dominance cases in which economic analyses are submitted as evidence. For example, in the *Microsoft* and *Intel* cases, both landmark cases on abuse of market dominance, the defendants relied heavily on economic analyses in arguing their cases before the KFTC, and the KFTC reviewed such analyses in rendering its decisions.

In July 2010 the KFTC issued its Guidelines on Submission of Evidentiary Economic Analyses to provide more specific and definitive guidance on the use of economic analyses for evidentiary purposes. Such guidelines provide that economic analyses have evidentiary value to the extent of appropriateness and adequacy of the underlying theories, the accuracy and objectivity of the data on which they are based, the validity of the analytical methods employed and their overall credibility.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The dominance provisions of chapter 2 (ie, articles 3 to 6) of the MRFTA apply to any enterprise having dominance in a relevant market, including public entities.

In addition, these dominance provisions may apply to market-dominant foreign enterprises whose activities are conducted outside Korea, to the extent that such foreign business activities affect the Korean market. In this regard, as a result of amendments in 2004, the MRFTA explicitly adopts the 'effects doctrine' for jurisdiction.

10 Definition of dominance

How is dominance defined?

The MRFTA defines a 'market dominant enterprise' as 'a supplier or purchaser in a particular business sector that possesses sufficient market power to, individually or with other enterprises, determine, maintain or change the prices, quantity or quality or other terms and conditions of goods or services'.

In making the determination of whether an enterprise in a relevant market falls within the above definition, factors such as its market share, the existence of any market entry barriers, the extent to which any such entry barriers have been entrenched and the relative size of its competitors, among others, are taken into account.

11 Market definition

What is the test for market definition?

The KFTC has separate guidelines for abuse of market dominance and for mergers and acquisitions: the Abuse of Dominance Guidelines and the KFTC's Guidelines on Mergers & Acquisitions (M&A Guidelines). These guidelines contain almost identical provisions on the definition of relevant market. The definition is based on the SSNIP (ie, small but significant and non-transitory increase in price) test.

The Supreme Court of Korea, in its decision in the *Samick Instruments* case (Supreme Court Decision No. 2006Du6659, dated 29 May 2008) regarding mergers and acquisitions, applied the same test it applied in its landmark *POSCO* decision (Supreme Court Decision No. 2002Du8626, dated 22 November 2007) on abuse of market dominance; it is almost identical to the market definitions found in both the Abuse of Dominance Guidelines and the M&A Guidelines.

However, commentators take the view that the demarcations of the market definition may need to be different where a change in the future of a market is anticipated, noting that abuse of market dominance cases involve assessments of the past and present effects of any abuse of market dominance, whereas mergers and acquisitions cases involve assessments on the potential future effects on the market.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

Unless it is a company with annual turnover of less than 4 billion Korean won, a company will be presumed to be dominant under the MRFTA if it meets the following criteria:

- its market share is 50 per cent or more of the relevant market; or
- it is among three or fewer enterprises having an aggregated market share of 75 per cent or more of the relevant market (excluding for the purpose of this calculation any enterprise with a market share of less than 10 per cent).

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

It is unclear whether the concept of collective dominance is covered by the MRFTA.

The MRFTA defines a 'market dominant enterprise' as 'a supplier or purchaser in a particular business sector that possesses sufficient market power to, individually or *with other enterprises*, determine, maintain or change the prices, quantity or quality or other terms and conditions of goods or services' (emphasis added).

Many commentators interpret the phrase 'with other enterprises' to mean that the concept of dominance also encompasses the concept of collective dominance. However, the Seoul High Court of Korea observed in its decision in the *BC Card* case (Seoul High Court Decision No. 2001Nu15193, dated 27 May 2003) that the phrase refers merely to 'individual enterprise(s) which have dominance in a particular market by means of either monopoly or oligopoly, and not to enterprises which collectively have monopolistic or oligopolistic power in a market through collusion'; its decision implied a refusal to recognise the concept of collective dominance in the legislation.

The *BC Card* case was appealed to the Supreme Court of Korea (Supreme Court Decision No. 2003Du6283, dated 9 December 2005), where the Supreme Court upheld the Seoul High Court's decision on its merits without further remarking on the Seoul High Court's remarks on collective dominance.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The MRFTA applies equally to both dominant suppliers and dominant purchasers, since article 2(7) of the MRFTA defines a 'market dominant enterprise' as 'a supplier *or purchaser* in a particular business sector that possesses sufficient market power [...]' (emphasis added).

In this regard, in a recent case involving exclusive dealing contracts entered into by the National Agricultural Cooperative Federation of Korea (NACF) with 13 chemical fertilizer companies for the supply of chemical fertilizers for food crops (Supreme Court Decision No. 2007Du22078, dated 9 July 2009), the Supreme Court of Korea recognised the NACF's market dominant position as a monopsony in the distribution market for chemical fertilisers for food crops.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

Please refer to question 1 for the types of abusive conduct by a dominant firm prohibited under article 3-2(1) of the MRFTA.

Due to lack of sufficient argument on the issue, it is still unclear whether enforcement of the MRFTA follows a strictly effects-based approach. If regard is had to the *POSCO* case, which proposes consideration of (i) an intent or purpose to restrict competition and (ii) the threat of restriction on competition in determining whether the impugned conduct was abusive, it is likely that an effects-based approach to enforcement has been adopted; however, if regard is had to the grounds on which the KFTC held conditional rebates in the *Qualcomm* case to be abusive, it appears that the KFTC took more of a form-based approach in the case. Accordingly, we must continue to monitor the attitude of the courts and the KFTC toward enforcement.

There are no per se prohibitions of certain conduct in abuse of market dominance.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The MRFTA covers both exploitative and exclusionary practices. In this regard, commentators generally interpret that:

- the following conduct would constitute 'exploitative practices':
  - unreasonably determining, maintaining or changing the price of goods or services (item 1 in question 1);
  - unreasonably controlling the sale of goods or provision of services (item 2); and
  - significantly harming consumers' interests (the latter part of item 5); and
- the following conduct would constitute 'exclusionary practices':
  - unreasonably interfering with the business activities of other enterprises (item 3);
  - unreasonably impeding the participation of new competitors (item 4); and
  - unfairly excluding competitive enterprises (the first part of item 5).

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Generally speaking, although a causal link between market dominance and abuse must be shown, the market in which an enterprise has dominance and the market in which the enterprise engages in abusive conduct need not be the same. As such, conduct by a dominant firm may be abusive even if it occurs in a different market from the dominated market.

In this regard, the Supreme Court of Korea recognised in the *Tbroad-I* case (Supreme Court Decision No. 2007Du25183, dated 11 December 2008) that it is possible for a market dominant enterprise to leverage its dominance in one market to engage in abusive conduct in another market in which it is not dominant. However, based on the facts of that case, it was held that there was insufficient evidence of leveraging by Tbroad GSD.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Since 'unreasonableness' is a requirement for abuse of market dominance under the MRFTA, a broad range of defences may be invoked if they can justify the impugned conduct, including the existence of efficiency gains or a legitimate business justification. However, according to the leading case for abuse of market dominance in Korea (the *POSCO* decision), the basic defences would be lack of anti-competitive intent or anti-competitive effect.

Specific forms of abuse

19 Price and non-price discrimination

Unreasonable discrimination on pricing and other transaction terms is an abuse of market dominance, as it interferes with another enterprise's business activities (see item 3 of article 3-2(1) of the MRFTA).

20 Exploitative prices or terms of supply

Exploitative prices or terms of supply fall within the scope of item 1 (ie, unreasonably determining, maintaining or changing the prices of goods or services) and the latter part of item 5 (ie, significantly harming consumers' interests) of article 3-2(1) of the MRFTA. In this regard, the KFTC ruled (KFTC Resolution No. 92-3, dated 15 January 1992) that a market dominant enterprise in the cookie industry engaged in 'excessive pricing' when it decreased the volume of its cookie products while keeping their retail prices the same.

In the *TBroad-II* case, it was found that TBroad affiliates (TBroad II) had unilaterally changed the terms of their cable subscription agreements with residents of various multi-unit residential buildings by (i) terminating or refusing to renew the collective agreements and (ii) inducing the residents to individually subscribe to a basic package with a higher subscription fee. The KFTC found that TBroad II's conduct significantly harmed consumers' interests, but the Supreme Court of Korea recently overturned the KFTC decision because it was unclear whether there was significant harm to consumers' interests caused by TBroad II's conduct (Supreme Court Decision No. 2009Du1983, dated 27 May 2010).

21 Rebate schemes

The KFTC ruled in the *Intel* and *Qualcomm* cases that their conditional rebates constituted unfair exclusion of competitive enterprises under the first part of item 5 of article 3-2(1) of the MRFTA, because the rebates were offered on the condition that their customers do not transact with Intel's and Qualcomm's respective competitors. Both cases are currently on appeal in the Seoul High Court. The KFTC also ruled in the Korean Airlines case in 2010, that *Korean Airlines'* volume incentives (conditional rebates) constitute unfair exclusion of competitive enterprises.

22 Predatory pricing

Predatory pricing constitutes the unfair exclusion of competitive enterprises under the first part of item 5 of article 3-2(1) of the MRFTA and is deemed as posing a threat of exclusion of competitive enterprises by means of offering goods or services at prices unreasonably below ordinary transaction prices under item 1 of article 5-5 of the Enforcement Decree, which provides a concrete measure for assessing the abusive nature of the conduct impugned in the first part of item 5 of article 3-2(1) of the MRFTA.

23 Price squeezes

There are as yet no case precedents regarding price squeezes. Price squeezes would be likely to fall within the scope of unreasonably interfering with the business activities of other enterprises under item 3 of article 3-2(1) of the MRFTA or be deemed to fall within the scope of predatory pricing. It is not clear, however, whether the KFTC or Korean courts would apply the same strict standards that were applied by the US Supreme Court in *Pacific Bell Telephone Co et al v Linkline Communs Inc et al*, 129 S Ct 1109 (2009).

24 Refusals to deal and access to essential facilities

Refusals to deal and provide access to essential facilities would constitute unreasonably interfering with the business activities of other enterprises under item 3 of article 3-2(1) of the MRFTA.

In the *POSCO* case (Supreme Court Decision No. 2002Du8626, dated 22 November 2007), the Supreme Court overturned the KFTC's ruling that POSCO, as a market dominant enterprise in the market for hot-rolled coils, used its dominance to expand its dominance in the cold steel plates market by refusing to supply hot-rolled coils to Hysco, causing business difficulties to Hysco and thereby restricting competition in the cold steel plates market. The Supreme Court noted, in this regard, that there was insufficient evidence that POSCO's refusal to deal caused restrictions to competition such as decreases in production volumes or price increases.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions and single branding would constitute unreasonably impeding the participation of new competitors and unfairly excluding competitive enterprises under item 4 and the first part of item 5 of article 3-2(1) of the MRFTA.

In this regard, the Supreme Court of Korea held that the NACF's forcing of 13 chemical fertiliser manufacturers to supply their products only to NACF constituted exclusive dealing (Supreme Court Decision No. 2007Du22078, dated 9 July 2009). However, in a recent case involving an online auction and shopping mall website called G-Market, an enterprise dominant in the internet open market, the Supreme Court of Korea reversed the lower court's decision that G-Market's granting of prominent product display space on its website homepage to only those sellers that deal exclusively with G-Market constituted exclusive dealing. In reversing the lower court judgment, the Supreme Court of Korea noted that although G-Market's conduct did meet the conduct criteria for a finding of exclusive dealing, there was nonetheless insufficient evidence to show the likelihood of an anti-competitive effect on the internet open market (Supreme Court Decision No. 2008Du16322, dated 10 June 2011).

26 Tying and leveraging

KFTC determined in the *Microsoft* case that tying by a market-dominant enterprise could constitute unreasonable interference with the business activities of competitors under item 3 of article 3-2(1) of the MRFTA. In this case, the KFTC concluded that Microsoft's practices of tying Windows Media Player or instant messaging programs to the Windows PC OS are in violation of the MRFTA.

In addition, the Supreme Court of Korea recognised the possibility of leveraging in the *Tbroad-I* case (Supreme Court Decision No. 2007Du25183, dated 11 December 2008). Please refer to question 17 for more details.

27 Limiting production, markets or technical development

Limiting production, markets or technical development would fall within the scope of unreasonably controlling the sale of goods or provision of services or unreasonably interfering with the business activities of other enterprises under items 2 and 3 of article 3-2(1) of the MRFTA.

28 Abuse of intellectual property rights

Article 3-2 of the MRFTA would also apply to the abuse of intellectual property rights if the relevant abuse of intellectual property rights involves an abuse of market dominance; in particular, the KFTC's Guidelines on Unfair Exercise of Intellectual Property Rights provide specific and detailed guidelines on the regulation of abuses of intellectual property rights. These Guidelines were substantially revised with effect from 31 March 2010 to deal with anti-competitive acts committed in relation to patent pools, patents incorporated into technology standards and unreasonable patent settlement pacts, among other recently emerging IP issues.

29 Abuse of government process

Abuses of government process would constitute unreasonable interference with the business activities of other enterprises and unreasonable impediment to the participation of new competitors under items 3 and 4 of article 3-2(1) of the MRFTA. In addition, the KFTC's Guidelines on Unfair Exercise of Intellectual Property Rights prohibit the abuse of patent infringement proceedings. For example, the filing of patent lawsuits against other enterprises with the knowledge that such competing enterprises have not in fact infringed the patents in question is highly likely to constitute an abuse of patent infringement proceedings.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Since the enactment of the MRFTA in 1981, article 7 of the MRFTA has prohibited mergers and acquisitions that would restrict competition in a relevant market. As such, unlike in the European Union, article 7 of the MRFTA has from its inception regulated mergers and acquisitions, and there are no cases where the abuse of dominance provisions of article 3-2(1) of the MRFTA have been applied to mergers and acquisitions.

31 Other types of abuse

The Supreme Court of Korea held that Hyundai Motor Company's discriminatory practices of delaying or refusing approvals of independent dealers' proposals for relocation of their showrooms and registration of sales personnel constituted unreasonable interference with the business activities of other enterprises under item 3 of article 3-2(1) of the MRFTA (Supreme Court Decision No. 2008Du7465, dated 25 March 2010). However, in a case involving a similar allegation against another major Korean automobile maker (ie, KIA) that it delayed or refused to grant approvals on requests from independent dealers to relocate their showrooms, the Supreme Court of Korea did not find an abuse of dominance on the grounds that there was insufficient evidence of either anti-competitive intent or anti-competitive effect (Supreme Court Decision No. 2008Du17707, dated 8 April 2010).

In addition, the latter part of item 5 of article 3-2(1) of the MRFTA prohibits unreasonable acts of market dominant enterprises that significantly harm consumers' interests.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The MRFTA directly prohibits abusive practices by market dominant enterprises and empowers the KFTC to order remedial actions and impose administrative fines against such market dominant enterprises that abuse their dominance.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The KFTC is the main competition law enforcement body in Korea, and is empowered with specific investigatory authority under the MRFTA, including the power to order production of, and examine all relevant documentation, take statements from relevant parties and their witnesses and consult experts for their views.

34 Sanctions and remedies

What sanctions and remedies may they impose?

The KFTC may impose sanctions and remedies such as ordering a dominant enterprise to reduce its prices, cease and desist from the unlawful conduct, publicly announce that it is subject to a remedial order of the KFTC and such other sanctions or remedies deemed necessary to remedy the anti-competitive effects of the violation.

Also, under article 6 of the MRFTA, the KFTC may impose an administrative fine in an amount up to 3 per cent of the relevant turnover of the violator; provided, that where there is no turnover or it is difficult to calculate the turnover, the maximum amount of the administrative fine may not exceed 1 billion Korean won.

So far, the largest administrative fine that has ever been imposed by the KFTC for abuse of dominance is the 273 billion Korean won that was imposed against Qualcomm.

In addition, any person(s) who violates the provisions of article 3-2(1) of the MRFTA may be subject to punishment of up to three years' imprisonment or up to 200 million Korean won of criminal fines.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

The MRFTA does not expressly provide for the legal effect of a violation of the MRFTA from the private law perspective, except to state that an agreement violating the MRFTA's prohibition on cartels shall be null and void under article 19(4) of the MRFTA. A Seoul High Court decision held that the determination of whether an act violating the MRFTA is legally valid or invalid must be made on a case-by-case basis, having regard to factors such as the content of the relevant violated provisions, the extent of illegality of the impugned acts and to what extent nullifying such acts would cause confusion in the relevant parties' legal relationships. However, there are no Supreme Court precedents on this issue. Further, the views of Korean commentators on the legal effects of a violation of the MRFTA span a spectrum of arguments both for and against legal validity.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Private enforcement of violations of the MRFTA is possible. The MRFTA provides specific provision for damage claims arising out of violations of the MRFTA under article 56. In addition, general private law claims for tort are also possible.

However, as the MRFTA makes no provision for injunctive relief, courts do not recognise the availability of injunctive relief for MRFTA violations.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Companies harmed by abusive practices do have claims for damages under article 56 of the MRFTA. Further, in accordance with amendments to the MRFTA that took effect on 1 April 2005, the court is empowered to determine the appropriate amount of damages to be awarded to an injured party, should it be difficult for the injured party to provide sufficient evidence of the specific amount of its damages. In addition, claims for damages under tort in accordance with article 750 of the Civil Code are also possible.

38 Recent enforcement action

What is the most recent high-profile dominance case?

SK Telecom (SKT), a wireless carrier and a dominant enterprise in the market for mobile communication services using MP3 handsets as devices, installed DRM (digital rights management) in its MP3 handsets so that only music files purchased from SKT's website, 'Melon', could be played on SKT's MP3 handsets. This conduct was impugned by the KFTC as constituting both an 'unreasonable interference with the business activities of other enterprises' (exclusionary abuse) and a 'likelihood of significant harm to consumer welfare' (exploitative abuse) in the market defined by the KFTC as the 'MP3 file download' market. In October 2011, the Supreme Court of Korea upheld the Seoul High Court's decision to cancel the KFTC's decision on both alleged abuses, on the grounds that: (i) with regard to exclusionary abuse, unreasonableness could not be found because the conduct could be justified by the need to protect copyrights and prevent unauthorised downloads, and although there may have been some degree of anti-competitive effect, an anti-competitive intent could not be inferred in light of the necessity of having DRM in place and the reasons behind how DRM came to be developed; and (ii) with regard to exploitative abuse, despite that some end users may have had to pay double for the same music files as a result of having to download and pay for the music files from SKT's 'Melon' website to be able to listen to them on SKT's MP3 handsets, this was not sufficient for a finding of significant harm to consumer welfare (Supreme Court Decision No. 2008Du1832, dated 13 October 2011).

In addition, as explained in question 25, in the *G-Market* case, the Supreme Court of Korea reversed the lower court's decision that G-Market's granting of prominent product display space on its website homepage to only those sellers that deal exclusively with G-Market constituted exclusive dealing. In reversing the lower court judgment, the Supreme Court of Korea noted that, although G-Market's conduct did meet the conduct criteria for a finding of exclusive dealing, there was nonetheless insufficient evidence to show the likelihood of an anti-competitive effect in the internet open market (Supreme Court Decision No. 2008Du16322, dated 10 June 2011).

Both of these Supreme Court rulings echo the holding in the landmark *POSCO* case, which is that, to successfully allege and prove an exclusionary abuse against a dominant enterprise, the plaintiff must demonstrate the requisite elements of anti-competitive intent and anti-competitive effect.

Update and trends

There have been no changes to the legislation or other measures that would change the current practice of enforcement of market dominance in 2011.

2011 saw more aggressive enforcement of market dominance in the pharmaceutical industry sector, and in line with the KFTC's announced intent to more aggressively monitor abuses of market dominance in the IT and knowledge industry sectors, enforcement continues to be strengthened in these sectors too.

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