

Overview

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Established in 1981, the Korea Fair Trade Commission (the KFTC) is the agency in charge of enforcing the antitrust law and policy of Korea. The KFTC consists of the Secretariat, which conducts investigations into charges of violation of the laws and regulations relating to antitrust and fair trade; and the Commission (on which nine members sit in total), which, based on review of the Secretariat's investigations, determines, inter alia, any violation of the relevant laws and the level of sanctions to be imposed.

The primary antitrust law that the KFTC is in charge of enforcing is the Monopoly Regulation and Fair Trade Act (the MRFTA), which regulates cartels, abuse of market dominance, anticompetitive mergers and unfair trade practices. The KFTC is also in charge of enforcing various other laws relating to fair trade, such as:

- the Act on Fair Labelling and Advertising;
- the Act on the Consumer Protection in Electronic Commerce;
- the Act on the Regulation of Terms and Conditions;
- the Fair Transactions in Subcontracting Act; and
- the Act on Fair Transactions in Large Franchise and Retail Business, etc.

The KFTC has the power to make criminal referrals to the Prosecutor's Office against criminal offences that violate the MRFTA and other fair-trade related laws. The Prosecutor's Office cannot commence any criminal procedures for antitrust violations without such criminal referral from the KFTC (other than crimes, such as interference with bidding, for which the Criminal Code or certain special laws provide for criminal punishment). In the past, only the KFTC had the right to make such criminal referral (with one exception of serious antitrust violations at the request of the Prosecutor General). The amendment of the MRFTA in 2013, however, requires the KFTC to make criminal referrals if it receives a request therefor from the chairman of the board of audit and inspection, the administrator of the public procurement service, or the administrator of the small and medium business administration.

Overview of the KFTC's review process and recent developments on investigation procedure

The KFTC can conduct investigations into charges of antitrust violation discovered through a third-party complaint or ex officio. KFTC investigations may entail on-site investigations, questioning of employees of the defendant firms and issuing information submission orders as part of its fact-finding investigation. If an investigation clearly establishes the charge brought, the case examiner prepares an examiner's report (which is comparable to a statement of objection in Europe) and the KFTC's deliberation stage begins. The examiner's report is sent to the defendants, who are, in turn, given two to three weeks (which can be extended at the request of the defendants, particularly foreign defendants) to submit written responses. Within approximately 30 days after the submission of the written responses, the KFTC holds a hearing, which is an adversarial proceeding between the case examiner and the defendants. Generally, on the day of the hearing, the KFTC commissioners reach an agreement on the sanctions to impose, and subsequently a KFTC decision is prepared and sent to the defendants within one or two months thereafter. The KFTC's decision may be appealed to the High Court (an appellate level court) on a de novo basis.

Recently, the KFTC streamlined its systems in order to ensure speedier case handling, transparency of investigation procedures, and the defendants' right of defense. In particular, in September 2015, the KFTC amended its Rules on Case Handling Procedures to provide that: with respect to leniency cases (other than international cartel cases), an investigation shall be commenced within three months of the date on which the complaint is filed; and a written decision shall be prepared even with respect to cases ending in warning.

In addition, in February 2016, the KFTC adopted the Guidelines on Investigation Procedure regarding on-site investigation procedures and legal counsel's right to participation in order to ensure transparency of investigation procedures and defendants' right of defense. At the same time, the KFTC amended the Rules on Case Handling Procedures, which limits, in principle, the time to complete an investigation to six

months starting from the investigation commencement date (nine months for abuse of market dominance or unfair support cases; and 13 months for cartel cases).

Recent developments in Korean antitrust enforcement

Consent decision

Consent decision, adopted in December 2011, is a system which allows a case to be quickly closed without the determination of illegality, if the enterpriser in question voluntarily proposes reasonable remedial measures (such as restoration to original state and damage relief for consumers) and the KFTC recognises the reasonableness thereof based on the opinions of the interested parties.

The procedure for consent decision is as follows:

- the enterpriser in question applies for a consent decision after commencement of the investigation or deliberation, but prior to the Commission hearing;
- the Commission decides whether to commence the consent decision procedure;
- the interested parties' opinions are collected based on a provisional draft consent decision prepared by the applicant; and, finally
- the draft consent decision is finalised.

However, the consent decision is unavailable: for cartels in general; for objectively clear and severe violations that satisfy the conditions for a criminal referral; or the applicant withdraws its application prior to reaching the final consent decision.

The following are major consent decision cases, including the first case of violation of Act on Fair Labeling and Advertisement, for which the consent decision process was adopted in December 2015.

Abuse of trading position by SAP Korea

The KFTC investigated SAP Korea on the charge of unfair trade practice (abuse of trading position) based on contractual provisions which prohibited partial termination by software purchasers, while allowing discretionary termination by SAP Korea. In the course of the investigation, SAP Korea applied for a consent decision in November 2013, and the case was closed when the terms of the consent decision (revision of the contractual provisions in question and monetary support through a non-profit organisation in an amount of 19 billion won to promote cooperation with contractors and enhance the welfare of the software users, etc) were finalised in October 2014.

Abuse of market dominance by Naver and Daum

The KFTC investigated Naver and Daum, portal service providers, on the charge of abuse of market dominance based on their failure to distinguish, on their portal sites, general search results with charged services and keyword advertisements. In November 2013, the companies applied for consent decision, and the terms of the consent decision (clear distinction between search result and paid advertisement and monetary support in an amount of 104 billion won to establish a non-profit organisation and to raise funds to pay for consumer damage, etc) were finalised in March 2014, closing the cases.

Microsoft and Nokia merger

Based on Microsoft's merger filing in November 2013, the KFTC reviewed possible anticompetitive effects of the proposed acquisition by Microsoft of Nokia's mobile handset business division. In August 2014, Microsoft applied for consent decision, and the case was closed when the terms of the consent decision – for standard essential patents (SEP), commitment to comply with FRAND obligation and not to seek an injunction for infringement against domestic manufacturers, and for non-SEP, commitment to maintain royalty rate at or lower than the current rate, not to transfer the non-SEP for five years and not to seek an injunction for infringement against domestic manufacturers, etc – were finalised in August 2015.

Cartel and leniency programme

In 2014, the KFTC imposed a total of 769.4 billion won in surcharges in 76 cartel cases, and 500 billion won in 88 cartel cases in 2015. The largest surcharge imposed on a single enterpriser was in a cartel case involving industrial gunpowder companies. In it, a surcharge of 51.9 billion won was imposed on Hanwha, which colluded on the price of domestic industrial gunpowder and allocated market shares from 2005 to 2012.

Meanwhile, the largest surcharge imposed in a single case involved a bid-rigging case for Korea Gas Corporation's main pipes for natural gas. In addition to corrective measures, the KFTC imposed a total of 169 billion won in surcharges against 22 construction companies which rigged the bids for 27 tenders for main pipes and management office for natural gas.

The KFTC has also been actively regulating international cartels. To effectively detect and sanction international cartels, the KFTC maintains a close cooperation system with foreign competition authorities, which includes the frequent sharing of information regarding investigation process through phone calls or email.

Major international cartel cases in which the KFTC imposed sanctions include:

- cargo (2010, 194 billion won in surcharge);
- LCD panels (2011, 119.5 billion won in surcharge);
- CRTs (2011, 54.5 billion won in surcharge);
- CDTs (2011, 26.2 billion won in surcharge);
- truck companies (2013, 116 billion won in surcharge);
- auto parts, including auto meters, wipers, hardener and engine parts (2014-2015, 129.5 billion won in surcharge); and
- bearings (2015, 85.6 billion won in surcharge).

Currently under investigation are an exchange rate cartel and a capacitor cartel, among others.

Under the MRFTA, the first leniency applicant are exempted from surcharge, corrective measures and criminal referral, while the second leniency applicant receives a 50 per cent reduction in surcharge, exemption from criminal referral and discretionary mitigation of corrective measures. However, under the Enforcement Decree of the MRFTA, as amended in June 2012, the recognition of the second leniency applicant status is limited when: the leniency applicant is one of the members of a two-member cartel; or the second leniency application is filed two years after the first leniency applicant filed its application or began cooperating with the investigation.

Meanwhile, under the Guidelines for Leniency Program, as amended in January of 2015, the Secretary General's provisional confirmation of leniency status was abolished and the Commission now determines whether the leniency applicant's status should be recognised, thereby requiring the applicant's continuous cooperation until the Commission's decision. Further, as part of strengthening of the leniency applicants' obligation to provide continuous cooperation, the Guidelines for Leniency Programme, as recently amended, now requires the leniency applicants' officers and employees to attend hearings and imposes stricter confidentiality obligations.

Merger review

In 2014, the KFTC examined a total of 571 merger cases, 120 of which involved foreign entities, accounting for approximately 21 per cent of all merger cases. The KFTC imposed corrective measures in only two of the total 571 cases as being anticompetitive. Meanwhile, in 2015, according to the KFTC's press release, corrective

measures were imposed in a total of six cases (other than the *Microsoft/Nokia* case, which was closed by a consent decision). Of these, the following two merger cases involved foreign entities:

- With respect to a business transfer of four general drugs from MSD Korea to Bayer Korea, the KFTC issued a corrective measure ordering Bayer Korea to sell the oral contraceptive division acquired from MSD Korea on the ground that it is likely to substantially restrict competition in the domestic oral contraceptive market.
- As regards a proposed acquisition by NXP Semiconductor, a global semiconductor company, of shares of Free Scale Semiconductor, the KFTC issued a corrective measure ordering NXP Semiconductor to sell the entire RF power transistor division to a third party on the ground that it is likely to substantially restrict competition in the RF power transistor market.

Others

To promote consumer rights, the KFTC monitors and corrects unfair trade practices defrauding consumers or infringing their justifiable rights, such as false or exaggerated advertisements or unfair standardised contract terms. As part of such efforts, the KFTC detected, and imposed sanctions in, 181 cases of false or exaggerated advertisements and 285 cases of unfair standardised contract terms. Especially with respect to ever increasing direct purchases from overseas sources, the KFTC is actively providing support for damage relief for consumers by delivering domestic consumer complaints to foreign enterprisers through overseas consumer agencies that have entered into memoranda of understanding with the Korea Consumer Agency.

Also, to remedy unfair trade practices between large corporations and small and medium-sized companies, the KFTC is making concerted efforts to monitor and correct unfair trade practices in the areas of subcontracting, distribution and franchising. The KFTC, focusing on industries where non-payment for goods and services provided is prevalent, took measures to ensure that 495.2 billion won in outstanding subcontract prices shall be paid. In the area of large-scale distribution business, the KFTC found TV home shopping companies passing sales promotion expenses on to suppliers and imposed surcharges in the total amount of approximately 14.3 billion won against six TV home shopping companies.



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HyunAh Kim is a partner at Shin & Kim and a member of antitrust practice group of the firm. Her practice includes cartel, merger control, abuse of market dominance, unfair trade practices, antitrust compliance, and antitrust litigations with international implications. She has represented both domestic and multinational corporations in various antitrust matters and handled many international cartel cases in particular. She has been active as vice chair of the competition law committee of Inter-Pacific Bar Association (IPBA).

She co-authored the Korea chapter of the *International Comparative Legal Guide to Competition Litigation* from 2010-2013 and the Korea chapter of *Getting the Deal Through: Dominance* in 2012. She graduated from Seoul National University (LLB, 1994) and NYU School of Law (LLM, 2005). She is a member of Korean Bar Association and New York Bar Association.



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He co-authored the Korea Chapter of IFLR's *The Guide to Competition & Antitrust* in 2011. He graduated from Yonsei University (LLB, 2001, LLM, 2006) and Georgetown Law Center (LLM, 2010). He is a member of Korean Bar Association and New York Bar Association.

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Established in 1981, Shin & Kim is a leading law firm in Korea with more than 300 Korean and foreign attorneys. The firm provides legal services in a broad range of practice areas such as antitrust, mergers and acquisitions, finance, litigation, arbitration, taxation, intellectual property and labour, to a diverse clientele ranging from domestic and multinational corporations and financial institutions to state-owned corporations and governments.

Shin & Kim counsels and represents many of the world's leading businesses from all industry sectors on the full range of antitrust matters, and our clients have benefited from our decades-long experience and in-depth knowledge. In particular, the firm is highly experienced in the full-line of work needed in global-scale matters involving cartel, merger control, abuse of market dominance and unfair trade practices.



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