



## CARTELS

# Rewards of leniency

Recent changes have brought more certainty and convenience to the cartel leniency programme



Daeyong Baek (top) is a partner and Jeannie Jeong is a senior foreign attorney at Shin & Kim

The main antitrust laws in Korea are the Monopoly Regulation and Fair Trade Act (MRFTA), the Enforcement Decree of the MRFTA and the Notifications issued by the Korea Fair Trade Commission (KFTC) pursuant to the relevant enabling clauses in the Enforcement Decree.

Similar to antitrust laws in other jurisdictions, Korean antitrust laws regulate traditional anti-competitive behaviours such as abuse of market dominance, cartels and anti-competitive business combinations, with the KFTC acting as the sole agency in charge of developing competition policy and enforcing the MRFTA.

The discussion below focuses on developments to the cartel leniency programme in recent years.

### Leniency

The KFTC has a history of aggressively targeting cartels. Not surprisingly, such a level of activism has resulted in massive administrative surcharges and frequent case referrals by the KFTC to the prosecutors' office for criminal prosecution. According to the KFTC white paper published in September 2013 there were 41 cartel cases filed with the KFTC 2012 alone. Of these, 30 ended in condemnation and the total surcharges imposed amounted to some KRW399bn (\$371m).

Many jurisdictions use leniency programmes whereby cartel participants receive reduced penalties for admitting wrongdoing as a way of detecting and deterring cartels. In the case of Korea, from 1999 to 2012 39.7% (118 cases) of 297 cartel cases where surcharges were imposed were detected by leniency applications. The proportion of cases detected using the leniency programme each year from 2008 to 2012 was: 46.5% in 2008, 61.9% in 2009, 69.2% in 2010, 85.2% in 2011 and 50% in 2012. This shows it has been an important tool to regulate cartels.

Under the current programme a cartel participant that is the first to apply for leniency can receive full immunity from administrative surcharges and/or corrective measures as well as criminal prosecution, and the second can receive a 50% reduction in administrative surcharges and immunity from prosecution. In addition, under the 'amnesty-plus' system a participant that reports its involvement in a second, separate cartel may receive an additional reduction in surcharges for the first cartel, the degree depending on the size of the second cartel.

### Amendments to the KFTC's Notification on Implementation of Cartel Leniency Programme

The KFTC's 'Notification on Implementation of Cartel Leniency Program' sets out procedural and

substantive elements of the leniency application process and the benefits of leniency, among other matters. So far, there have been two important amendments to this Notification, as follows.

#### ● *First amendment (July, 2011)*

First, the KFTC can revoke a leniency applicant's status even after an applicant qualifies for such status. Prior to the amendment, the confirmation by the KFTC's secretary-general of an applicant's status could not be revoked by the KFTC. This amendment has empowered the KFTC to revoke the confirmation given by the secretary-general.

Second, the scope of evidentiary material that can be submitted as part of a leniency application has been broadened to include any evidentiary material "that can evidence the unreasonable concerted act in question when viewed comprehensively in light of the relevant facts". To the extent there were companies that opted against leniency filings because of lack of evidentiary material, this is expected to create an incentive to apply for leniency.

Third, an applicant can submit evidentiary material even after the 75-day supplementary period following the filing of its application. This amendment stemmed from criticism of the inadequacy of the 75-day period in the cases of international cartels and others where the process of collecting, translating and/or submitting massive amounts of documents is overly time-consuming.

#### ● *Second amendment (January 2012)*

The Notification was revised to prohibit repeat offenders who previously engaged in cartels from receiving additional leniency benefits within a specified period. The amendment provides that a leniency applicant will not be eligible for leniency:

- if, within five years of the imposition of corrective measures and surcharges, it violates such corrective measures; or
- if, after having been granted leniency for previous participation, it engages in another cartel within five years.

Prior to this amendment a cartel participant had "unlimited" opportunities to obtain a reduction in or exemption from surcharges through the programme. Now, a repeat offender cannot obtain additional leniency benefits within five years from the date of its initial application. Thus, it has become more important for companies to strengthen their compliance procedures to prevent and avoid cartel activities well in advance.

# SHIN & KIM

**Shin & Kim**  
**State Tower Namsan, 100 Toegye-ro,**  
**Jung-gu, Seoul 100-02, Korea**  
**Tel: +82 2 316 1606**  
**Fax: +82 2 756 6226**  
**Email: yjjeong@shinkim.com**  
**Web: www.shinkim.com**