Korea's Recent Enforcement Trends of Cartel Law

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Introduction

Korea's Monopoly Regulation and Fair Trade Act (the "MRFTA") regulates, among others, abuse of market dominance, anticompetitive business combinations of enterprisers, unfair collaborative acts (i.e., cartels), unfair trade practices and resale price maintenance as the main types of violations. Some notable trends in 2015 concerning the Korea Fair Trade Commission (the "KFTC")'s enforcement of the MRFTA include the following: in regard to abuse of market dominance, the KFTC's cautious stance since the 2008 *Posco* decision, which declared stringent requirements for establishing anticompetitiveness, has been maintained, and in regard to business combinations of enterprisers, the KFTC has actively exercised its investigative authority in large-scale global transactions, such as the examination of the merger between *Applied Materials* and *Tokyo Electron* which was concluded due to the withdrawal by the filing party and the case of *Microsoft*'s acquisition of *Nokia*'s mobile handset division, which was the first business combination case to be concluded based on a consent decree order. Further, by amending the Guidelines for Examination of Unfair Trade Practices (the "UTP Guidelines") on December 31, 2015, the KFTC specified the determination standards for anticompetitiveness, focusing on the illegality of an anticompetitive act as a form of unfair trade practice. In particular, the KFTC's explicit adoption of the "market power" concept was a distinctive feature of the amended UTP Guidelines.

Meanwhile, cartels have traditionally been subject to the KFTC's active enforcement of competition laws. Such trend continued in 2015, during which the KFTC sanctioned 88 cartel cases and imposed administrative surcharges amounting to a total of approximately USD 500 million. In recent years, the KFTC has actively exercised its regulatory authority in regard to information exchange as a type of collaborative act. However, important court decisions were rendered in 2015 and early in 2016 which served to hinder such active enforcement by the KFTC. Also, among its recent cartel cases, in particular, the KFTC imposed massive administrative surcharges in bid-rigging cases involving construction companies which participated in large public construction projects and in international cartel cases among multinational auto parts companies.[2] In such cases, a fierce legal dispute ensued between the KFTC and enterprisers, especially regarding the lawfulness of the calculation method for administrative surcharges. Additionally, with respect to price-fixing of Korean bearing prices by Japanese bearing manufacturers which occurred in Japan and was executed through Korean subsidiaries, criminal sanctions (fines) were imposed against a Japanese company for the first time.[3]

Moreover, in 2015, there were significant changes in the KFTC's cartel enforcement regime concerning its investigative procedures. While in principle the KFTC's cartel investigations for MRFTA violations reflect a voluntary process since they are conducted absent a court-issued warrant, as a practical matter, the KFTC's investigations have been criticized for resembling coerced investigations and for failing to sufficiently secure the procedural rights of the investigated enterprisers. However, on October 21, 2015, the KFTC announced a comprehensive reform initiative on investigative procedures which was aimed at safeguarding enterprisers' rights and interests and improving the transparency of the KFTC's investigative procedures (the so-called "Enforcement Process 3.0"). In order to specifically implement

Enforcement Process 3.0, the KFTC has enforced the KFTC Rules on Investigation Procedures ("Investigation Procedures Rules") since February 4, 2016. Further, as a part of Enforcement Process 3.0, the KFTC announced its plans to amend the Notification on Imposition of Corrective Measures and Operation of Leniency System for Leniency Applicants of Unfair Collaborative Acts ("Leniency Notification"). Accordingly, the amended Leniency Notification would require the leniency applicants (i.e., employees who participated in the collaborative act) to appear before the KFTC in order to remedy the detrimental effects of false or exaggerated claims in leniency applications.

With respect to Korea's recent enforcement trends of cartel laws, the following will be discussed in the order presented: (i) trends in relevant court decisions regarding information exchange as a type of collaborative act, (ii) major bid-rigging cases where the calculation of administrative surcharges were intensely debated and (iii) changes in the KFTC's procedural system relating to cartel enforcement, e.g., enactment of the Investigation Procedures Rules.

The Court's Stance in Cartel Cases regarding Information Exchange

From 2015 to early 2016, significant court decisions were rendered which could impact the trend of the KFTC's active cartel regulation, and such decisions relate to information exchange among enterprisers. The MRFTA prohibits collaborative "agreements" among enterprisers on, among others, the price, but does not prohibit the information exchange itself. Regardless, the KFTC has regulated cases where external conformity in prices, etc. existed based on the information exchange among enterprisers as cartels. This also suggests that the KFTC may have considered the relevant laws in the European Union ("EU") regarding concerted practices and the trend of actively regulating information exchanges at the EU. However, the Supreme Court and the Seoul High Court recently annulled the KFTC's corrective orders and administrative surcharges in their entirety in the cases of price fixing of ramen noodles and commercial freight vehicles, which had been regulated by the KFTC on the grounds of enterprisers' price-fixing and information exchange. These cases illustrate the courts' efforts to deter the KFTC's active enforcement of cartel laws to a certain extent by challenging the KFTC's regulation of information exchange as a cartel despite lacking any evidence of a collaborative agreement. Considering the above, these court decisions can be deemed to be significant for potentially impacting the future direction of the KFTC's cartel enforcement regime.

(1) Price Fixing Case among Ramen Manufacturers

In this case, the KFTC determined that, after the four Korean ramen manufacturers exchanged information on price increases amongst each other, when the market leading manufacturer increased its price, the remaining manufacturers sequentially increased their prices. Following such determination, the KFTC issued a corrective order and imposed administrative surcharges on the four Korean ramen manufacturers. The KFTC deemed that such information exchange constituted an illegal cartel based on the consideration of various circumstantial evidence, such as, among others, the type and frequency of information exchanged, method for implementing a price increase, and similar price increases. In

particular, the determinative evidence among such factors was the statement of an individual "B," who allegedly heard about the price increase discussion from an individual "A" who allegedly participated in the discussion among the ramen manufacturers on whether to increase prices.[4]

Even though the ramen manufacturers requested the Seoul High Court to annul the KFTC's disposition on the grounds that (i) objective evidence was absent aside from the above noted hearsay statement of "B," (ii) enterprisers independently increased prices, (iii) there was no external conformity in conduct regarding the increase levels and (iv) the price increase of enterprisers which assumed a subordinate role in the market was merely conscious parallelism, the Seoul High Court refused to heed such request (Seoul High Court, Decision No. 2012*Nu*24353 rendered on November 8, 2013). Nevertheless, the Supreme Court based its decision on the premise that information exchange alone fails to establish an unfair collaborative act even if it may serve as reliable information for establishing the meeting of the minds among enterprisers and reversed and remanded the Seoul High Court's decision on the following grounds: (i) B's admission, as a hearsay statement on the contents of the enterprisers' meeting, is not accurate, (ii) the enterprisers' behavior appears incompatible with the notion of an agreement, (iii) it is unclear whether external conformity of conduct exists and (iv) the evidence offered by the KFTC alone does not establish the meeting of the minds among enterprisers (Supreme Court, Decision No. 2013*Du*26309 rendered on January 14, 2016).

(2) Price Fixing Case among Commercial Freight Vehicles

The KFTC found that seven large commercial freight vehicle manufacturers continuously exchanged business information such as, among others, the sales price and price increase plan, through face-to-face and non-face-to-face contacts and communications, and that these manufacturers used such exchanged information to decide whether to increase prices and the scope of price increases. Accordingly, the KFTC determined that the enterprisers increased prices at similar periods within a similar range. Based on such findings, the KFTC found that the acts of the seven freight vehicle manufacturers constitute an unfair collaborative act (i.e., an illegal cartel) and thereby issued a corrective order and imposed administrative surcharges on these manufacturers, while also referring the case to the Prosecutor's Office.

The freight vehicle manufacturers requested the Seoul High Court to annual the KFTC's disposition. The Seoul High Court held that, while information exchange served as evidence to support the finding of an unfair collaborative act, the evidentiary materials presented by the KFTC to establish the unfair collaborative act failed to establish the case based on the following grounds: (i) the KFTC's evidentiary materials merely reflected some enterprisers' subjective predictions, (ii) employees who participated in the foregoing meeting actually lacked the authority to decide prices, (iii) external conformity in conduct among the enterprisers could not be established based solely on the trend of continuous price increases, (iv) some materials support the fact that enterprisers independently determined prices and

(v) contrary to the commonly observed trend in the market with cartels, the enterprisers' market shares steadily fluctuated (Seoul High Court, Decision No. 2014*Nu*41246 rendered on December 10, 2015).[5]

Prior to the above decisions, in the price fixing case among life insurance companies, the Supreme Court held that the MRFTA does not prescribe any provisions for prohibiting information exchange unlike the EU, which regulates "concerted practices" such as information exchange as a type of illegal collaborative act under Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU"). Therefore, the Supreme Court found that in order to establish an unfair collaborative act, an agreement among enterprisers regarding a collective decision on prices, etc. needs to be substantiated (Supreme Court, Decision No. 2013*Du*16951 rendered on July 24, 2014). Subsequent to the Supreme Court's decision in the price fixing case among life insurance companies, the above court decisions on the price fixing of ramen and freight vehicles suggest that the court is leaning towards adopting a stricter stance in potentially establishing information exchange as a cartel. The court decisions appear to impact the KFTC's law enforcement policy which, like the EU, attempted to regulate information exchange as a type of cartel with respect to the tacit agreements covertly made among the enterprisers through information exchange. It can also be predicted that the foregoing decisions would prompt various discussions on the method of regulating information exchange as a type of cartel.

Bid-Rigging Cases in which the Calculation Method of Administrative Surcharges was at Issue

Just during the year of 2015, bolstered by leniency applications of enterprisers, the KFTC actively investigated the cartels of enterprisers belonging to various business sectors and imposed administrative surcharges of approximately USD 500 million with respect to a total of 88 cartel cases. It is noteworthy that in the following cases, the KFTC and the enterprisers initially conflicted on what type of cartel was at issue and how to calculate the relevant sales which are the basis for calculating administrative surcharges due to the enterprisers' collusion method, distinct characteristics of the bidding system, etc. Specifically, such cases concern (i) the bid-rigging case involving the public institutions' construction tenders where construction companies allocated the construction supply amongst themselves and agreed upon the successful bidder in advance and (ii) the price fixing case involving Korean automobile manufacturers' tenders for auto parts whereby multinational auto parts companies fixed supply prices of auto parts such as ignition coils, windshield wiper systems and igniter plugs.

(1) The MRFTA's Provisions on Types of Cartels and Calculation of Administrative Surcharges

Section 19(1) of the MRFTA prescribes nine acts as types of unfair collaborative acts, and among these, the specific types of acts which are applicable to bid-rigging cases are as follows: (enterprisers collaboratively)

(i) fixing, maintaining or altering prices (MRFTA, Section 19 (1)(i)),

(ii) restricting production, delivery, transportation or transaction of goods or services (MRFTA, Section 19(1)(iii)), or

(iii) deciding the successful bidder, successful auctioneer, bidding price, winning bid price or contract price (MRFTA, Section 19(1) (viii)).

Meanwhile, the MRFTA provides that administrative surcharges shall be imposed within the limit of ten percent of the enterpriser's sales of relevant products or services sold or corresponding thereof within the specified territory of trade during the period of the enterpriser's violation of the MRFTA (the "relevant sales"). The methods for calculating the relevant sales of the cartel at issue are different between the case where such cartel constitutes acts under the Section 19(1) (i), (iii) of the MRFTA and the case where it constitutes the act under the Section 19(1)(viii) of the MRFTA ("bid-rigging" may be narrowly understood to refer exclusively to the violation of Section 19(1)(viii) of the MRFTA). The major difference is that in the former case (violations of Section 19(1)(i) or (iii) of the MRFTA), only the actual sales by the participant of the collaborative act is included in the relevant sales, whereas in the case of violation of Section 19(1)(viii) of the MRFTA (i.e., narrow meaning of bid-rigging), in principle, the successful bidder's "contract amount" is deemed to be the relevant sales of the successful bidder itself, but also the relevant sales of the sham bidders. Therefore, in regard to a violation of Section 19(1)(viii) of the MRFTA, for example, assuming company A should become a successful bidder in a certain construction project ("successful project") while the same company should participate in the bidding of another construction project as a sham bidder ("sham project"), in calculating the administrative surcharges for company A, not only the contract amount in the successful project but also the contract amount in the sham project will be considered as the relevant sales which is used as a base to calculate the administrative surcharge. As a consequence, if the cartel at issue constitutes a violation of Section 19(1)(viii) of the MRFTA in the bidding process, compared to the cases where the cartel constitutes violations of Section 19(1)(i) or (iii) of the MRFTA only, it is highly likely that the cartel may be subject to considerably increased surcharges.

(2) Bid-Rigging among Korean Construction Companies in the Construction Tender Held by Public Institutions

In executing large-scale national projects, Korean public institutions simultaneously or sequentially place an order for various construction projects. In the case where these institutions sequentially place an order, it was possible to approximately estimate the number of construction projects to be ordered and the time when such order would be placed. In order to secure the order volume, the enterprisers agreed on which construction project would receive the successful bid and in implementing the above, the enterprisers collusively agreed on the bidding price in advance as well as which enterprisers would participate as sham bidders in construction projects for which they would not be successful bidders. As such, a situation arose where the enterprisers' acts could constitute both violations of Section 19(1) (iii)[6] and (viii) of the MRFTA at the same time.

In connection with the above, the enterprisers argued that their acts only established a violation of Section 19(1) (iii) the MRFTA and not a separate violation of Section 19(1)(viii) the MRFTA on the ground that acts, such as an agreement on the bidding price and sham participation in bids, are merely a means to engage in a violation of Section 19(1)(iii) of the MRFTA which can viewed as a type of market allocation. However, the KFTC did not accept the enterprisers' argument and determined that the above acts of the enterprisers constituted both violations of Section 19(1)(iii) and (viii) of the MRFTA. The reason why the enterprisers made the above argument in the KFTC's deliberation process was because there would be a significant difference in the administrative surcharge amount. Thus, a situation emerged where an amount of approximately 10 times the enterpriser's actual sales from such collusion was counted as the relevant sales.[7]

Enterprisers have repeatedly argued in construction bid-rigging cases that the applicable cartel only established a violation of Section 19(1)(iii) of the MRFTA. However, the KFTC consistently rejected such argument of enterprisers. Meanwhile, in the case concerning the bid-rigging of the Honam High Speed Railway construction project, the Seoul High Court held that it was not a violation by the KFTC to apply Section 19(1)(iii) and (viii) of the MRFTA to construction company A and to view the contract amount of the construction project that construction company A participated in as a sham bidder as the amount to calculate the relevant sales (Seoul High Court Decision No. 2014*Nu*65969 rendered on January 13, 2016). However, aside from construction company A above, the appeals of the other construction companies are still pending at the Seoul High Court, and, the lawsuit by construction company A is also currently pending at the Supreme Court. Therefore, it is still premature to conclusive view the direction of the precedents on this issue.

(3) Price Fixing of Auto Part Prices among Multinational Auto Parts Manufacturers

The bid-rigging cases where Korean automobile manufacturers held tenders to purchase auto parts presents another interesting issue aside from the above issues discussed in the construction bid-rigging cases. This issue stems from the distinct characteristics of the tenders to purchase auto parts held by the automobile manufacturers.

In the relevant tenders to purchase auto parts, the automobile manufacturers first issued a request for quotation, which stated the expected volume of the relevant auto parts to auto parts manufacturers and such auto parts manufacturers submitted a price quote which listed the relevant parts' unit prices. The automobile manufacturers then decided that the auto part manufacturer that submitted the lowest unit price would be the successful bidder. In other words, the foregoing tender differed from general tenders since it was a tender that was decided on the relevant auto part's unit price rather than the contract price. Therefore, after the bids were executed, the contract price of the successful bidder was decided based on the mass production volume ordered by the automobile manufacturers multiplied by the unit price of the successful bid.

However, even after the automobile manufacturers selected the successful bidder, because they cancelled the mass production of the relevant auto part or produced an amount which

far exceeded the expected volume, a significant difference resulted between the expected sales at the time of bidding (unit price multiplied by expected volume) and the actual sales (unit price multiplied by actual volume). As such, the issue of which of the two foregoing sales should be viewed as the relevant sales became an essential point for the KFTC at the deliberation stage.

In regard to the above, the enterprisers involved in the bid-rigging of windshield wiper systems argued that the actual sales should be deemed to be the relevant sales on the grounds that if the expected sales were deemed to be the relevant sales, the KFTC would be unfairly imposing administrative surcharges even on the cancelled mass production. On the other hand, for such matter, the KFTC deemed the expected sales as the relevant sales on the ground that the auto parts manufacturers, at the time of executing the bid, perceived the expected sales to be their own sales. However, subsequent to the foregoing windshield wiper systems case, in the ensuing igniter plug case the KFTC displayed an inconsistent stance by recognizing the actual sales as the relevant sales and calculating the surcharges accordingly. With respect to the bid-rigging case of windshield wiper systems, the Seoul High Court held that, in the case where a successful bid was made and the relevant contract was executed, the price of the actually executed contract, not the expected sales, should be deemed to be the relevant sales. Accordingly, the Seoul High Court annulled the KFTC's disposition imposing the administrative surcharges (Seoul High Court Decision No. 2014*Nu*43525 rendered on June 25, 2015). The KFTC appealed this decision and such proceeding is currently pending. Thus, it appears that the Supreme Court's future decision on this matter would resolve the issue of how to calculate the relevant sales in the case where the bid-rigging only fixed the unit prices, not the sales revenue.

Enactment of the Relevant Rules on the Investigative Procedure regarding Cartels

In Korea, there is a general consensus inside the competition law community that the KFTC possesses the nature of a quasi-judicial institution which actually handles the functions of the court of first instance. However, the KFTC has been widely criticized on its case management process (i.e., investigation and enforcement procedures), such as in regard to the KFTC's defeats in cases involving imposition of large surcharges (majority of cases where massive administrative surcharges were imposed are cartel cases),[8] delay in case management, and unreasonable practices in regard to on-site inspections. Following such criticisms, a discussion ensued that the KFTC procedure should be changed so that the enterpriser's appeal against the KFTC's disposition would proceed through a three-tiered judicial review system, which is similar to other administrative litigations, rather than the two-tiered system currently in place.[9]

In order to dispel such discussions, in October 21, 2015, the KFTC announced "Enforcement Process 3.0," which indicated that (i) it would promulgate Investigation Procedures Rules regulating the investigative method/procedure in order to safeguard the investigated enterprises' rights and interests and to improve the transparency of the KFTC's investigative procedures and that (ii) it would amend the KFTC Deliberation Management and Case

Handling Procedures Rules ("Case Handling Procedures Rules") in order to strengthen internal control of case management infrastructure. Accordingly, the Investigation Procedures Rules has been newly enacted and the Case Handling Procedures Rules has been revised and is effective as of February 4, 2016. The key points include the following:

- To preempt excessive investigations in advance, the KFTC will be required to explicitly state the specific legal offense in the investigation notice and to specifically name the investigation target.
- In principle, the right to request and have legal counsel present throughout the entire investigative process, including on-site inspections and witness examinations, will be guaranteed.
- The case management deadline (i.e., the term during which the KFTC investigators would be required to forward matters to the KFTC for deliberation) for cartel cases would be 13 months from the commencement date of the investigation (but 6 months for other cases). However, owing to unavoidable reasons, if the KFTC investigators need to extend such case management term, they could receive an extension upon selecting the extension period and receiving approval thereof.
- To prevent false and exaggerated claims in leniency applications, the KFTC will require the cartel participants to appear before the KFTC so that the KFTC may verify the credibility and contents of the leniency applications.[10]

It is anticipated that, based on the enforcement of "Enforcement Process 3.0," the investigated enterpriser's defense rights will be strengthened in the future and the investigated enterpriser, which had an insecure position due to an unclear investigation deadline for the relevant violation, would have increased foreseeability. Moreover, if the KFTC secured the credibility of the leniency applicant's admissions by requiring the appearance of such leniency applicant before the KFTC, this would contribute to enhancing the validity and credibility of its regulation regime.[11] Despite the foregoing, it appears that, with respect to such requirement to appear for cartel participants, specific methods have not been sufficiently discussed in order to protect the confidentiality of the fact that the applicant applied for leniency and to protect the leniency applicant who made admissions. Thus, practical concerns remain that such systemic changes may severely undermine the leniency program.

Conclusion

The recent enforcement trends of cartel laws in Korea discussed above shows that the KFTC had to deal with difficult challenges such as, among others, (i) finding a method to prove a rather new trend of cartel which involves information exchange, (ii) tackling legal challenges raised in regard to the KFTC's method of calculation of administrative surcharges which are the Korean competition watchdog's main weapon to discourage bid-riggings, which eventually harms tax payers and consumers, and (iii) keeping up with the public call for procedural fairness which the KFTC should take heed of in order to preserve its status as a quasi-judicial

institution. It may be fair to note that the challenges are still there and the KFTC has some work to do.

At times, the KFTC has aggressively enforced competition laws to restrict cartels to the extent that it was disparaged for excessive legal enforcement. This may arguably have led to an increased number of losses by the KFTC in administrative litigations regarding its decisions. However, considering the role and status of the KFTC as an enforcer and defender of Korean competition laws and competitive order, it is expected that the KFTC would persist in its active efforts to restrict illegal cartels in 2016 and the near future.

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[1] Among the authors, Sinsung (Sean) Yun and Kenneth T. Kim are partners at the law firm of Yoon & Yang, LLC, and Yang Jin Park is an associate at the same law firm. This article represents the opinions of the authors and does not represent the view of Yoon & Yang, LLC or its clients.

[2] During the period in 2014-2015, the KFTC imposed total administrative surcharges of about USD 790 million in 6 bid-rigging cases (involving 96 companies in total) of construction tenders held by public institutions, and, the KFTC imposed total administrative surcharges of about USD 130 million in 5 bid-rigging cases (involving 14 companies in total) of multinational auto parts companies.

[3] Prior to this case, while the KFTC previously issued corrective orders and imposed administrative surcharges against foreign companies for cartels that occurred abroad based on extraterritorial application of the MRFTA, this case is the first time that criminal sanctions were imposed against a foreign company based on referral to the Prosecutor's Office by the KFTC.

[4] "A" cannot testify since he passed away, and "B" is an employee of an enterpriser which applied for leniency.

[5] The Prosecutor's Office acquitted the freight vehicle manufacturers in 2014. Meanwhile, the KFTC appealed the Seoul High Court's decision and the appellate proceeding is currently pending.

[6] Section 19(1)(iii) of the MRFTA is generally invoked when the relevant type of cartel conduct is considered to be market allocation, and the cartel conducts in those cases were considered to be a way of allocating public construction projects among the participating construction companies.

[7] The KFTC considered that the case where administrative surcharges were excessively imposed relative to the enterprisers' profits may violate the principle of proportionality and substantially reduced the administrative surcharge at its discretion after contemplating the enterprisers' financial conditions and their profit scale.

[8] In 2014, the total administrative surcharges imposed by the KFTC were about USD 800 million, and, surcharges imposed in cartel cases accounted for 96% of such surcharges.

[9] For regular administrative litigation cases, the district court is the court of first instance and if there is an appeal, the case would undergo a three-tiered system by proceeding to the high court and then the Supreme Court. On the contrary, appeals against the KFTC decision are handled exclusively by the Seoul High Court as the court of first instance, and if there is an appeal against the Seoul High Court's decision, the case would proceed directly to the Supreme Court.

[10] It is expected that there will soon be an amendment to the Leniency Notification which would prescribe that the cartel participant of the enterpriser which applied for leniency is required to appear before the KFTC.

[11] Recently, in a case where insurance companies engaged in a cartel regarding insurance commissions, leniency applicants changed/altered the statements made during the KFTC's witness statements during the investigation by the Prosecutor's Office or during the court hearings.