

Korea

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Overview of the law and enforcement regime relating to cartels

Sanctions regarding cartels are divided into administrative and criminal sanctions. The Fair Trade Commission (the “**FTC**”) is the main administrative agency responsible for cartel-related issues in Korea. It creates and manages policies, conducts investigations, and imposes corrective measures. Typical corrective measures imposed are fines and corrective orders. Although the Prosecution Service has the right of criminal indictment in Korea, the Monopoly Regulation and Fair Trade Act (the “**Fair Trade Act**”) stipulates that indictment related to the Fair Trade Act can only be filed after the FTC files a charge (i.e. the FTC has the exclusive right to charge). However, the FTC is obligated to file a charge upon a request by the Prosecutor General, so the significance of the exclusive right to charge is unsubstantial in practice. In other words, the prosecution can also file a criminal indictment by independently investigating violations of the Fair Trade Act and then requesting the FTC to make the charge.

Overview of investigative powers in Korea

The FTC conducts investigations largely through on-site inspections and testimonial interviews. These investigative methods require consent of business owners under Korean law and cannot be forced once they refuse to cooperate. To balance such disadvantages in investigation, the FTC can impose criminal sanctions to business owners who provide false information to satisfy their administrative requirements. The FTC imposes criminal sanctions by filing charges to the Prosecution Service so that it can file for criminal indictment. Investigations on contents of electronic devices, such as mobile phones, are a crucial means of uncovering cartel activities. Although they are an essential part of investigations, investigations on electronic devices are conducted in a cautious manner because of the consensual nature and the need to protect civil liberty of business owners and employees. Accordingly, paths of investigations are under the discretion of investigating officers at large. The FTC has excellent personnel and equipment for digital forensic investigations, and they are deployed in almost all investigations.

Overview of cartel enforcement activity during the last 12 months

Cartels are one of the most common types of cases handled by the FTC, and according to FTC statistics, a total of 69 actions were taken in 2021, including 14 charges, 44 corrective orders, 53 fines (charges and fines and corrective orders and fines usually overlap), seven warnings, and four voluntary corrective actions. Among the largest fines imposed in 2021, KRW 300 billion (approximately USD 250,000,000) was imposed on seven steelmakers

involved in price-fixing on scrap iron. Another fine amounted to KRW 250 billion (approximately USD 208,000,000) on 11 steelmakers involved in bid-rigging on annual rebar supply contracts from the Public Procurement Service.

Key issues in relation to enforcement policy

The Fair Trade Act is unique in that it covers unfair trade practices in its antitrust section, and stipulates that the FTC, as an antitrust authority, has jurisdiction over consumer protection cases. As a result, the FTC handles a relatively wide range of cases, including civil litigation cases that consume a considerable amount of time. As a result, the FTC devotes significant efforts to handling civil complaints.

There is no statute stipulating the scope of the FTC's task (i.e. whether to handle all incoming tasks or to concentrate on certain tasks), and it is generally understood that investigations are conducted to a certain extent for all cases received, even for the sake of preparing audits typical to administrative agencies, unless there is a specific reason not to investigate. There is criticism, however, that investigations or tasks should be prioritised, accounting for the objective of maintaining the antitrust order in the market, the core purpose of the FTC, and the shortage of FTC personnel, among other factors.

Key issues in relation to investigation and decision-making procedures

Recently, ensuring procedural rights related to disposition by the FTC has been one of the most important issues within the FTC. Since the FTC's investigation is consensual under Korean law, there are no special regulations governing the investigation. This paradoxically leads business owners to feel that protective measures are not provided through procedural law. For this reason, the FTC has implemented numerous procedural laws to guarantee procedural rights of business owners through completely revising the Fair Trade Act in recent years. For example, when a disposition is imposed based on information from another company's trade secret, there is no way for the penalised business owner to verify the credibility of the information. In response, the FTC has introduced a procedure in which only attorneys can view the information used for the disposition in a specific data room located inside the FTC facility by taking only memos.

Leniency or amnesty regime

The leniency programme is one of the FTC's most important investigative tools for detecting cartel activity. Although there is no specific statistical data, it is inferred that the most important cases in practice involved the leniency programme. In fact, investigators at the FTC actively inform and recommend the leniency programme during cartel investigations. In Korea's leniency programme, primary voluntary reporters are granted full exemption from fines and immunity from charges by the FTC. Secondary voluntary reporters are granted 50% exemption from fines, and tertiary voluntary reporters are granted nothing. To be recognised as a voluntary reporter, he or she must immediately cease and provide sufficient information on cartel activities. In addition, if the voluntary reporter was a business owner who pressured another business owner to undertake the cartel activity, or if the voluntary reporter repeated the cartel activity after receiving benefits from the leniency programme, they may not receive any benefits. So, business owners scrutinise the type of disposition, the amount of fines, the possibility of charge and other factors when considering voluntary reporting.

Administrative settlement of cases

Summary proceedings can be concluded by settlement with the parties without the review of the FTC. However, this is not so for cartel cases. There is a consent resolution system in which parties can submit voluntary correction plans without admitting to cartel activity, but this also does not apply to cartel cases. Ultimately, the leniency programme is practically the only administrative means to reduce penalties, with immunity and full exemption from fines for primary voluntary reporters and a 50% exemption from fines for secondary voluntary reporters.

In Korea, there is no mediation or other similar procedure during litigation of the FTC's disposition and the Prosecution Service's criminal sanctions on cartel activity. However, mediation is occasionally utilised for civil cases regarding damages resulting from cartel activities, adjusting the compensation amount considering the circumstances of parties.

Third party complaints

According to Article 80 of the Fair Trade Act, anyone can report suspected cartel violations to the FTC. In Korea, there needs to be evidence of communication between colluding parties to initiate investigations. Third-party reports, however, often lack concrete evidence, so do not usually entail investigation in practice. On the contrary, when a reporting party is a government agency, the FTC tends to give more weight to the report compared to that of a third party. Regardless, once a report is made, the FTC has an obligation to respond to the reporter, so anyone can check the progress of the investigation. Since there is no obligation to initiate investigations upon reports, third parties often supplement their evidence and report again to the FTC. Even in this case, the FTC reviews the report in the same way as any other report, without any requirement to re-examine or consider previously reviewed matter. On a separate note, if a case is reported again after a disposition is made, it must go through the FTC's Re-report Review Committee, and a decision of acquittal is not subject to administrative litigation and can be contested through constitutional petition.

Civil penalties and sanctions

Imposing fines is a major means of enforcement, and fines are imposed on a maximum of 20% of related cartel sales during the relevant period, taking into account the illegality of the cartel activity and the extent of each cartel participant's unjust enrichment, among other factors. In particular, for facilitators in cases of bid-rigging, the entire bid amount is calculated as cartel-related sales, and fines are imposed after reduction, considering the facilitation factor. This is so even for facilitators who did not win the bid. In case of a cartel participant's merger, split, or transfer of business, the Fair Trade Act stipulates that any entity can be subject to the imposition of fines, so there is no void in the process of imposing fines. There is a tendency to impose fines on any entity that continues to operate in the business sector in which the cartel activity occurred.

Right of appeal against civil liability and penalties

Disputes regarding fines are brought before administrative courts. It is rare for the FTC's disposition to be completely overturned on the basis that cartel activities are not recognised. Usually, fines are only cancelled if they are deemed excessive compared to the degree of illegality or unjust enrichment gained by individual colluders, or if such fines are unfairly allocated among colluders. Of the FTC's dispositions that are unrelated to cartel fines,

around 20% are overturned in litigations. Prior to the amendment of the Fair Trade Act in 2021, the maximum fine limit was 10% of cartel sales. With the amendment, the maximum limit increased to 20%, so litigations related to fines are also expected to increase as well.

Criminal sanctions

As mentioned earlier, the Fair Trade Act grants the FTC the exclusive authority to make charges on cartels. When charges, along with the FTC's records of investigations, are filed to the Prosecution Service, the prosecution does not use the FTC's testimonial records *verbatim* due to issues regarding admissibility of evidence. Instead, the Prosecution Service creates new testimonial statements with the same details. Since the FTC's charge does not automatically trigger prosecution, other investigative authorities may independently investigate violations of the Fair Trade Act and request the FTC to file a charge to the Prosecution Service afterwards. However, other investigative authorities do not actively investigate cartel cases due to their limits on capacity and potential conflicts with the FTC. For cases of significant importance, however, other investigative authorities may have a willingness to investigate, so the FTC and the Prosecution Service maintain a cooperative relationship by entering into a working agreement. There is an issue of jurisdiction between the FTC and investigative authorities, especially with the Prosecution Service, concerning the leniency programme. The FTC seeks to keep information obtained from the leniency programme confidential, but there are disputes between the two authorities regarding the use of information when the case is received by the Prosecution Service. Accordingly, the Prosecution Service recently implemented rules granting penalty reductions for voluntary reporters. Additionally, there have been persistent calls to implement a system of special judicial police to address problems with the FTC's investigative methods.

Cooperation with other antitrust agencies

The FTC cooperates with competition counterparts of other countries to investigate international cartel cases. The International Cartel Division is in charge of this work. In addition, the FTC maintains cooperative relationships with competition counterparts by regularly attending international conferences, holding seminars and sharing expertise.

Cross-border issues

According to the Fair Trade Act, the FTC can impose disposition on cartel activities occurring outside of Korea if anticompetitive practices affect the domestic market of Korea. However, it is impossible to conduct direct investigations overseas in practice due to lack of personnel and jurisdictional issues. Instead, investigations are mainly conducted through written inquiries.

Developments of private enforcement in antitrust laws

Compensation for damages is the most representative form of civil remedy, and there have been many cases of compensation related to cartels in recent years. In particular, large-scale cartel cases were uncovered in the early to mid-2010s and relevant administrative lawsuits are now concluded. Compensation cases in which the dates of argument were postponed until the verdict of administrative lawsuits are now being trialled. Accordingly, there are active discussions among economists in academia on methods for assessing the amount of damages in bid-rigging cases by calculating the would-be prices had the cartel activities not occurred.

The introduction of the right to request prohibition is one of the most important characteristics of civil remedy. Opinions were divided over the right to request prohibition based on rights under the Fair Trade Act because there were no explicit provisions in the Fair Trade Act. Provisions were added to allow the request of prohibition for unfair trade practices in the amendment of the Fair Trade Act in 2021. The new provisions, however, do not apply to cartel cases. The amendment is expected to increase civil lawsuit cases utilising the right to request prohibition.

Reform Proposals

As of April 14, 2023, the FTC is reorganising its structure as a reform, separating its investigative and policy divisions. Also, the FTC is exploring measures to strengthen the independence of its adjudicative division. The fact that a single division is responsible for both investigation and adjudication has been subject to ongoing concerns about fairness. There have also been concerns for a single division responsible for both investigation and policy, since it may result in investigation delays or issues on independence. With the separation of policy and investigative divisions through the reform, the next direction of reform will depend on how this reform plays out.

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