

# Cartels

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# Korea

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## Overview of the law and enforcement regime relating to cartels

The foundation of South Korea's cartel enforcement regime is the Monopoly Regulation and Fair Trade Act ("MRFTA"), passed in 1981. The MRFTA broadly prohibits four categories of conduct: (i) unfair collaborative acts; (ii) abuses of dominance; (iii) unfair trade practices; and (iv) mergers and acquisitions that substantially lessen competition in Korea. Recent amendments, which came into force in December 2021, significantly reform the MRFTA, including by (i) expanding the scope of the Korean Fair Trade Commission's (the "KFTC" or the "Commission") merger review, (ii) prohibiting exchanges of information necessary to fix prices, restrict outputs, or allocate market shares, and (iii) creating a cause of action for those allegedly harmed by unfair practices. The KFTC is a ministerial-level organisation that functions as both an administrative and quasi-judicial body to enforce Korean antitrust laws. The KFTC formulates and enforces antitrust policies pursuant to four primary mandates: (i) promoting competition; (ii) strengthening consumers' rights; (iii) creating a competitive environment for small and medium-sized enterprises ("SMEs"); and (iv) restraining concentration of economic power.

The KFTC adjudicates cases of alleged antitrust violations in two phases: examination and deliberation. During the examination phase, the Commission gathers factual information surrounding the alleged violation, including documents, statements from related parties, and consultations with experts. During examination, alleged violators may make statements and arguments in their defence to the KFTC. At the close of this investigation, the Commission issues an "examiner's report", which contains its factual findings, to all involved parties. During the deliberation phase, the Commission reviews the examiner's report alongside arguments from the alleged violators. At the close of deliberation, the KFTC determines whether any antitrust laws were violated. If the KFTC finds that an entity has violated Korean regulations related to competition, then the Commission can both impose administrative sanctions and refer the alleged violators for criminal proceedings. When issuing administrative sanctions, the KFTC may impose a penalty not exceeding 20% of the total revenue generated from sales of goods or services during the violation period, whether these sales were directly or indirectly affected by cartel activity. If the KFTC chooses to refer a case for criminal prosecution, the alleged violator faces punishment by imprisonment not exceeding three years or by a fine not exceeding KRW 200 million.

The KFTC encourages and rewards voluntary reporting of cartel activity. The first applicant to voluntarily self-report illegal cartel conduct through the KFTC's leniency and amnesty programmes may be fully exempted from penalty surcharges and criminal prosecution. Alternatively, the KFTC's "Amnesty Plus" programme is designed to mitigate or revoke sanctions after an admitted cartel participant is already under investigation. To take

advantage of this programme, a cartel participant must provide new evidence relating to different cartel, not yet under investigation.

### Overview of investigative powers in Korea

The KFTC has the power to conduct investigations of individuals and entities for suspected violations of the MRFTA, issue requests for documents and interviews to individuals and entities of interest, mediate disputes about suspected violations, file criminal charges against alleged violators, and issue regulations and regulatory guidance. MRFTA, Arts 4, 72, 80, 81, 129. KFTC investigations are led by examiners from the KFTC's administrative staff and case teams from the KFTC's Anti-Monopoly Bureau. The KFTC may investigate violations on its own initiative from information submitted by private parties.

When conducting an investigation, the KFTC may conduct dawn raids. In the dawn raid process, the investigating official may enter the office of a business entity to examine its business and management, account books, documents, electronic data, voice-recording materials, video materials, and other materials or articles. MRFTA, Art. 81. The KFTC may also request documents and other materials – including both physically and electronically stored data – and obtain statements from individuals associated with both the target of the investigation or any interested parties. *Id.*

To achieve its four main policy goals (*i.e.*, promoting competition, strengthening consumers' rights, creating a competitive environment for businesses, and restraining the concentration of economic power), the KFTC has several enforcement tools at its disposal upon a finding of a violation. It can order parties to cease engaging in an anticompetitive practice, and it can order a company to lower prices. *See* MRFTA, Art. 42 (incorporating by reference corrective measures outlined in Art. 7 for cartel violations). The KFTC can also impose administrative and criminal fines and imprisonment for abuse of dominance and unfair trade practices. *See, e.g.*, MRFTA, Arts 43, 124. Potential criminal cases can be raised by the KFTC or the Public Prosecutors' Office. MRFTA, Art. 129. However, the Prosecutors' Office cannot initiate an investigation before the KFTC files a formal criminal complaint.

Although there are no express provisions for a party to challenge the KFTC's conduct during an investigation, the MRFTA provides that any party who is dissatisfied with measures taken by the KFTC may file an appeal stating the reasons thereof with the KFTC within 30 days from the receipt of notification of the KFTC's decision. MRFTA, Art. 96. Thereafter, the KFTC will adjudicate that appeal, which may be challenged in the Seoul Appellate Court. MRFTA, Art. 100. There is no indication that the KFTC's conduct during a dawn raid or a KFTC request for a party's statement has ever been challenged in court.

In the case of a party's failure to cooperate with an investigation without justifiable cause, including failure to provide data or statements, the KFTC may impose an administrative fine of up to KRW 200 million (around \$167,000) for companies and up to KRW 150 million (around \$125,000) for individuals. MRFTA, Arts 124–125. There is no evidence that such sanctions have ever been imposed.

### Overview of cartel enforcement activity during the last 12 months

Total cartel fines imposed by the KFTC in 2021 amounted to approximately KRW 1.02 trillion (around \$850 million). This constitutes a dramatic increase from the total cartel fines imposed by the KFTC in 2020 (KRW 222 billion, or around \$185 million, based on 29 investigations) and the total fines imposed in 2019 (KRW 91.9 billion, or around \$77 million, based on 25 investigations). There are no data on the number of cartel investigations conducted in 2021 or on the number of ongoing investigations.

Significant investigations and resulting administrative sanctions from 2021 include:

- KRW 300 billion (around \$250 million) imposed on seven steelmakers engaged in bid-rigging and exchanging sensitive information;
- KRW 102 billion (around \$85 million) imposed on 24 concrete pile manufacturers for price-fixing;
- KRW 82 billion (around \$68 million) imposed on four auto parts manufacturers for bid-rigging; and
- KRW 25.1 billion (\$21 million) imposed on seven chicken producers for price-fixing.

There were five criminal referrals for cartel activity in 2020. In 2019, there were 19. Courts in most cases imposed fines and not imprisonment, although imprisonment has been imposed in some cases. Additionally, the KFTC conducted several high-profile dawn raids in 2021, including in matters involving digital advertisements and crypto trading platforms, although there are no data on the total number of dawn raids in 2021.

### **Key issues in relation to enforcement policy**

On 4 January 2022, the KFTC announced its 2022 Work Plans, which include the following goals: ensuring fair competition in the digital economy (with specific reference to concerns over self-preference and the prevention of multi-homing in application markets, online intellectual property rights, and the adequacy of terms and conditions for consumers in new digital content such as non-fungible tokens and the metaverse); establishing basic guidelines for the digital economy (*e.g.*, by clarifying market definitions and criteria for market dominance); promoting innovation (*e.g.*, by updating and promulgating regulations for starting new businesses); and advancing consumers' rights (*e.g.*, by revising standard terms and conditions for online shopping and games in order to protect consumers' personal information). In addition, the KFTC has stated that it aims to strengthen the bargaining power of SMEs (*e.g.*, by updating the rules and regulations for opening franchises and increasing scrutiny on the business practices of franchisors with their franchisees); improve the fairness of corporate structures (*e.g.*, by heightening enforcement of insider trading laws); work with non-governmental economic organisations to help businesses understand and comply with new antitrust laws; closely monitor businesses that will likely see increased demand in the post-COVID-19 world (*e.g.*, hotel and travel); and improve regulatory enforcement and response to unfair practices (*e.g.*, by establishing task forces to streamline investigation procedures). Other recent enforcement trends include a focus on bid-rigging in public projects, digital marketplaces, big data, public safety and health, and international cartels. The KFTC has also voiced concern over "killer acquisitions" (acquisitions whereby an incumbent allegedly buys out a newcomer in order to stifle competition).

The Korean National Assembly's 2020 amendments to the MRFTA became effective in late 2021. These amendments prohibit certain information exchanges among competitors and increase total available fines for cartel activity.

### **Key issues in relation to investigation and decision-making procedures**

The KFTC has been criticised for a perceived lack of due process in how the agency carries out its investigations, including by the Office of the United States Trade Representative.

Several U.S. firms have similarly raised concerns that the KFTC targets foreign companies with aggressive enforcement. Complaints include failure to disclose to respondents evidence against them, use of documents reflecting attorneys' legal advice as evidence in antitrust cases, and use of ambiguous terms to describe the purposes of dawn raids so as to maximise the scope of investigations.

In response, as noted above, a series of amendments to the MRFTA were passed in 2020, which include enhancements to procedural fairness and due process during KFTC investigations. Key provisions include:

- a uniform statute of limitations of seven years from the discontinuation of the violation, except for cartel cases which, given their complexity, remain subject to the two-track statute of limitations convention (five years from the commencement of the KFTC investigation or, in the case that no KFTC investigation has been commenced, seven years from the date the violation is discontinued, which allows for the possibility of a total limitations period of 12 years);
- express recognition of the respondents' and interested parties' right to be heard and testify during an investigation; and
- expansion of the respondents' right to inspection and reproduction of documents relating to a decision by the KFTC, and creating a requirement that the KFTC comply with document requests by parties, unless the materials requested contain trade secrets, relate to leniency applications, or are otherwise prohibited from production by another statute.

Given that these amendments only recently came into force, it has yet to be seen how they will impact the agency's investigation of cartels.

The KFTC has also been criticised in the past for the manner in which it carried out dawn raids, which respondents claim deprived them of certain basic rights. The 2021 amendments to the MRFTA include provisions increasing respondents' rights when subjected to dawn raids, such as:

- an obligation that the KFTC provide targets of dawn raids with documents explaining the scope, purpose, duration, and methods of the on-site searches; and
- a limitation on dawn raids and interviews after an examiner's report is issued, except upon filing of a formal application to re-investigate by the KFTC case team and approval by the Commissioners of the KFTC.

Another key issue frequently raised by subjects of cartel investigations is that Korean law does not recognise the attorney-client privilege. While Art. 315 of the Civil Procedure Act offers some protection for attorneys to refuse to testify about confidential information obtained during the course of providing legal services, it provides a lower level of protection for attorney-client communications than is recognised in other jurisdictions.

### **Leniency/amnesty regime**

Both the KFTC and the Supreme Prosecutors' Office ("SPO") have leniency programmes available to cartel participants after a violation has occurred. Whereas the KFTC's leniency programme provides relief from administrative fines and corrective measures, the SPO's programme can provide relief from indictment, compulsory investigation, search and seizure, arrest, and detention. Because the SPO only recently adopted its leniency programme, it has yet to be seen whether leniency applicants favour the SPO programme in practice. However, given that the SPO leniency programme affords broader relief and that an increase in leniency applications to the SPO will likely invigorate criminal investigations of cartels in the future, cartel participants will have an incentive to prioritise the SPO leniency programme.

In the past two decades, the number of cartel cases involving leniency applications has increased dramatically in Korea. A total of 682 cartels were fined from 1999 to 2019, 54.5% of which were identified through the KFTC's leniency programme. In 2018 and 2019, the KFTC ranked among the top three agencies internationally for total leniency

applications received: 137 applications in 2018 and 94 applications in 2019. However, leniency applications decreased significantly in 2020, with only 30 leniency applications filed.

The KFTC's leniency programme is described in Art. 44(1) of the MRFTA and further details about the programme are set out in Art. 51 of the MRFTA Enforcement Decree as well as the KFTC's Notice on Implementation of a Leniency Programme for Corrective Measures against Confessors.

Leniency applications must be made to the KFTC's Cartel Regulation Policy Division and can proceed in one of two tracks: by official application or by simplified application. The official application requires the applicant to provide an overview of the cartel, documentary evidence of the conduct, evidence of the applicant having ceased activity in the cartel, and a promise to fully cooperate with the KFTC. The simplified process allows for applicants to submit only their identity and an overview of the cartel, after which they have a 15-day period (which can be extended) to provide supplemental submissions. The KFTC does not provide an applicant with a confirmation of leniency status before its final decision.

Leniency will be granted to only the first or second applicants to the KFTC that meet the following conditions:

- the KFTC has not already obtained information about the cartel or sufficient evidence to prove the cartel's existence;
- the applicant provides evidence necessary to prove a cartel's existence;
- the applicant fully cooperates with the KFTC throughout the investigation by stating all facts concerning the cartel and submitting relevant documents;
- the applicant ends their cartel involvement immediately after filing an application for leniency;
- the applicant abstains from being involved in cartels within five years from the date the corrective measures or administrative fines are reduced or waived; and
- the applicant was not involved in any acts that coerced other entities to participate or not to cease participating in the cartel.

The second applicant may qualify for leniency by satisfying all but the first condition above, if the cartel involves more than two participants and if the applicant makes a report or cooperates with the KFTC's investigation within two years from the date when the first applicant began cooperation. Should the first leniency applicant lose leniency status, the second applicant will not automatically assume the first applicant's status.

The KFTC's leniency programme provides immunity from or reductions to administrative fines. The first applicant will be granted full immunity from administrative fines and corrective measures, which may include orders to discontinue the act, publish the fact that the enterprise was ordered to correct the relevant conduct, or other corrective measures as deemed necessary by the KFTC. The second applicant will be granted a 50% reduction in administrative fines and possible mitigation of corrective measures. The leniency programme applies to corporate applicants only and is not available to individuals.

The leniency programme under the MRFTA does not explicitly provide immunity from criminal prosecution. However, the KFTC's current policy is not to refer to the Prosecutors' Office any corporate applicants that have qualified for leniency or executives or employees of those applicants except in circumstances where the violation is so objectively obvious and serious as to greatly restrain competition. The KFTC's leniency programme is not guaranteed to prevent the KFTC from fulfilling a prosecutor's request for a criminal referral after the prosecutor completed its own investigation.

The KFTC also provides an Amnesty Plus programme, which allows an applicant to receive leniency in connection with a cartel already under investigation if the applicant is the first to report a different cartel, not yet under investigation. The degree of additional leniency granted under this programme ranges from 20–100% and depends on the relative scope of the existing cartel compared to the new cartel.

The recent amendment to the Enforcement Decree to the MRFTA provides that leniency applicants' benefits can be revoked if the applicant later makes statements before the court which differ from those made during the KFTC's investigation. For example, if the applicant later denies material statements, made false statements or omitted information, or fails to appear at trial, leniency status may be revoked.

As described above, the SPO established and implemented its own criminal leniency guidelines in December 2020 to provide opportunities for leniency applications in cases involving certain cartel activity, such as price-fixing, output restrictions, market division, and bid-rigging. Unlike the KFTC's leniency programme, the SPO's programme is available to both companies and individuals.

In order to qualify for leniency, applicants must provide the investigating Prosecutors' Office with evidence that can prove the cartel activities and must cooperate with the investigation and criminal proceeding. Similar to the KFTC leniency programme, the criminal leniency guidelines rank applicants upon receipt, offering the first-in-line reporter exemption from indictment. The guidelines also provide for mitigation of the recommended penalties by 50% for second-in-line reporters. Qualified self-reporters will be exempted from compulsory investigation, including search and seizure, arrest, and detention.

### **Administrative settlement of cases**

There is no plea bargaining or settlement system for a cartel case in Korea.

### **Third-party complaints**

In addition to commencing investigations *ex officio*, the KFTC may investigate alleged antitrust violations brought to their attention by third-party complaints. *See* MRFTA, Art. 80(2), (3). The KFTC has an online reporting system on its website. Should the KFTC elect not to commence an investigation, it will provide the reporter written notification of its decision.

The KFTC also has a reward system for whistle-blowers of MRFTA violations. Over the last few years, the largest whistle-blower payments were awarded in cartel matters. In January 2021, the KFTC paid the largest whistle-blower award to date – KRW 1.75 billion (around \$1.5 million) – for information regarding a steel manufacturing cartel.

### **Administrative penalties and sanctions**

MRFTA violators can face both administrative and criminal sanctions. The KFTC and the Prosecutors' Office may pursue administrative and criminal sanctions simultaneously for the same conduct. Administrative penalties are more common than criminal penalties, but criminal prosecution shall occur where a violation is objectively clear, serious, and significantly impairs competition. *See* MRFTA, Art. 129(2).

For violations of the MRFTA, the KFTC has the authority to impose both administrative corrective actions and administrative fines. Corrective actions can include both prohibitory and mandatory injunctions: for example, cease-and-desist orders and orders requiring a



company to reduce prices. *See* MRFTA, Art. 42 (incorporating by reference corrective measures outlined in Art. 7 for cartel violations).

Administrative fines are discretionary and subject to limitations under the MRFTA. The amendments to the MRFTA that went into effect in December 2021 doubled both the maximum penalty rates and the maximum fixed penalty amounts for administrative fines. To calculate an administrative fine, the KFTC multiplies the sales of the relevant product for the duration of the violation by an appropriate penalty rate. *See* MRFTA, Art. 43. The penalty rate may not exceed 20% for cartel violations. *Id.* If relevant sales cannot be determined, the KFTC may impose a fixed-rate fine, which may not exceed KRW 4 billion (around \$3.3 million) for cartel violations. *Id.*

Since the MRFTA went into effect in 1981, cartel cases have been a top priority for the KFTC. *See* KFTC, 2020 Annual Report at 70. As of 2019, cartel cases accounted for 24.4% of the total cases in which KFTC imposed fines. *Id.* Fines imposed in cartel cases totalled KRW 59.23 billion (around \$49 million) and constituted 71.6% of the total amount of KFTC-imposed fines. *Id.* More recently, in January 2021, the KFTC issued administrative fines totalling KRW 300 billion (around \$250 million) against seven participants in a steel manufacturing cartel—the fourth largest fine for a single case in the KFTC’s history.

### **Right of appeal against administrative liability and penalties**

After the KFTC sanctions an MRFTA violator, the alleged violator has two options for appeal: (1) lodge an objection to the decision with the KFTC itself; or (2) file an administrative lawsuit against the KFTC in court. The violator must submit a formal objection or file an administrative lawsuit in court within 30 days of receiving the KFTC’s decision. *See* MRFTA, Arts 96, 99. The violator need not exhaust its appeal through the KFTC before bringing its case in court.

The MRFTA treats administrative cases against the KFTC as appeals in the first instance and provides that the Seoul High Court, rather than district-level courts, has exclusive jurisdiction over such cases. MRFTA, Art. 100. Certain judicial panels within the Seoul High Court specialise in administrative lawsuits against the KFTC and are assigned all such lawsuits. There is no opportunity for transfer, and any appeal of the Seoul High Court’s decision goes before the Supreme Court.

In an administrative lawsuit, the burden is on the KFTC to prove both that (a) the alleged MRFTA violation occurred, and (b) the penalties imposed were appropriate. The standard of proof is that the facts have a “high probability” of being true—a standard resting between “preponderance of the evidence” and “beyond a reasonable doubt”.

Courts do sometimes overturn KFTC’s competition decisions. For example, in 2019, the Supreme Court affirmed the Seoul High Court’s decision to reverse corrective actions and administrative fines of KRW 89.8 billion (around \$748 million) imposed by the KFTC on a Korean steelmaker for alleged participation in a zinc cartel. The Supreme Court agreed that the KFTC abused its discretionary power in applying the same penalty rate to the plaintiff as it had applied to other participants who had greater involvement in the cartel.

### **Criminal sanctions**

The MRFTA provides for court-imposed criminal punishment for grave and apparent cartel violations of up to three years’ imprisonment for natural persons and criminal fines not exceeding KRW 200 million (around \$167,000) for natural persons and corporate entities.

MRFTA, Art. 124. In order for the criminal process to begin, the KFTC must file a complaint with the Prosecutor General. MRFTA, Art. 129(1). The Prosecutor General then brings the case to court. The burden is on the prosecutor to prove beyond a reasonable doubt that a violation of the MRFTA occurred.

The Prosecutor General may request that the KFTC file a complaint with their office by notifying the KFTC of the existence of facts that satisfy Art. 129(2). MRFTA, Art. 129(3). Alternatively, the Chairperson of the Board of Audit and Inspection, the Minister of Small and Medium Enterprises and Start-ups, or the Commissioner of the Public Procurement Service may request that the KFTC file a complaint on other grounds, including the effect on the public, the effect on national finance, and the degree of damage caused to SMEs. MRFTA, Art. 129(4). Commencement of criminal proceedings by the KFTC is mandatory when the request comes from any of these parties. MRFTA, Art. 129(5).

In the latest MRFTA amendment, the KFTC sought to create a procedure whereby the Prosecutors' Office could initiate its own indictments in particularly grave cartel cases (*e.g.*, price-fixing, output restriction, and market allocation). The proposal was rejected by the Legislature, in part due to concerns that it would invite an influx of third-party complaints to the Prosecutors' Office and could result in instances of simultaneous investigation by the KFTC and Prosecutors' Office.

### **Cooperation with other antitrust agencies**

The KFTC cooperates with the Prosecutors' Office for the referral of criminal antitrust cases. The KFTC also coordinates with other Korean agencies like the Korea Consumer Agency for certain activities, including compliance monitoring. And the KFTC may issue opinions to other industry-specific Korean regulatory authorities on issues of market dominance and unfair trade practices.

### **Cross-border issues**

The MRFTA was amended in 2004 to expressly apply to acts committed abroad that affect the domestic market. MRFTA, Art. 3. For example, the MRFTA's merger control provisions apply to foreign mergers when certain nexus requirements are met. In the cartel context, the KFTC has applied the MRFTA to foreign companies and international cartels since 2002, when it applied the MRFTA and imposed a fine against foreign manufacturers of graphite electrodes for price-fixing. The KFTC has recently imposed significant sanctions on participants in international cartels, including a KRW 9.2 billion (around \$7.7 million) fine against international auto parts manufacturers in 2019. Many of those auto parts makers also faced enforcement actions in other jurisdictions, including the United States, European Union, Canada, and Japan.

In April 2019, the KFTC participated in meetings with the U.S. Department of Justice ("DOJ") focused on increasing cooperation in international antitrust enforcement. And on 18 November 2020, the Korea Prosecution Service signed a memorandum of understanding ("MOU") with the DOJ that promotes cooperation in criminal antitrust enforcement, including global cartel cases. The MOU reflects a commitment to shared enforcement objectives; a commitment to exchange technical assistance and conduct joint trainings; and confidentiality obligations regarding information provided by either agency. The DOJ signed a similar MOU with the KFTC in 2015.

## Developments in private enforcement of antitrust laws

Private litigants can file lawsuits to recover damages for losses suffered from anticompetitive agreements. *See* MRFTA, Art. 109. Any party who alleges damages caused by another party's antitrust violation has standing to initiate a lawsuit. Because a defendant can refuse to produce documents under Korean rules of civil procedure, it is challenging for private plaintiffs to discover the evidence necessary to prove damages. As a result, private litigations following disclosure of a government investigation are more common than actions initiated in the first instance by private parties.

Recent amendments to the MRFTA include several updates affecting private enforcement actions. First, private litigants, including parties actually harmed by anticompetitive conduct and potential victims, can now seek injunctive relief to remedy antitrust infringements. Second, plaintiffs in cartel cases can seek documents from defendants that would previously have been protected from production on the grounds they constituted trade secrets. Third, in 2018, the MRFTA was amended to provide for punitive damages – capped at treble damages – in private litigations alleging cartel violations.

If passed, a 2020 legislative proposal would provide for class actions in antitrust cases. Currently, class actions in Korea are available only in securities litigation.

## Reform proposals

The 2021 amendments to the MRFTA, explained in detail above, are the most significant reform to Korean antitrust law in recent years. Other significant reforms and policy proposals include eight sets of cartel enforcement guidelines the KFTC finalised in December 2021, which suggest a continued focus on cartel violations moving forward. In 2022 and beyond, the KFTC is promoting an era of cooperation through engagement with foreign competition authorities about enforcement priorities. The KFTC has stated that it will focus on education, cooperation with local economic organisations, and a new joint committee with related agencies like the Ministry of SMEs and Financial Supervisory Service. The KFTC further indicated it will continue to engage with experts, SMEs, and local governments to share resources and enforcement responsibilities.

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