



**COUNTRY  
COMPARATIVE  
GUIDES 2023**

# **The Legal 500 Country Comparative Guides**

## **South Korea**

### **CARTELS**

#### **Contributor**

Bae, Kim & Lee LLC



#### **Boyen Kim**

Partner | [boyen.kim@bkl.co.kr](mailto:boyen.kim@bkl.co.kr)

#### **Junyeun Cho**

Partner | [junyeun.cho@bkl.co.kr](mailto:junyeun.cho@bkl.co.kr)

#### **Keewon Shin**

Foreign Attorney | [keewon.shin@bkl.co.kr](mailto:keewon.shin@bkl.co.kr)

This country-specific Q&A provides an overview of cartels laws and regulations applicable in South Korea.

For a full list of jurisdictional Q&As visit [legal500.com/guides](https://legal500.com/guides)

## SOUTH KOREA

### CARTELS



#### 1. What is the relevant legislative framework?

The Monopoly Regulation and Fair Trade Act (**MRFTA**), which was significantly amended on December 29, 2020, and came into effect as of December 30, 2021, contains provisions that generally prohibit anti-competitive arrangements among companies. The MRFTA Article 40 prohibits a company from agreeing to perform any of the following conducts which restrict competition in concert with other companies, or forcing any other company to engage in such conduct under an agreement or in any other manner.

- price-fixing;
- determining transaction terms;
- output restriction;
- market allocation;
- hindering establishment of facilities;
- restricting the types of and standards for goods or services;
- jointly conducting and managing substantial business activities;
- bid-rigging;
- exchanging information on price, production volume, or any other information prescribed under the Presidential Decree of the MRFTA, including the cost price, output volume, inventory volume, sales volume, transaction terms, or payment terms; and
- any other conduct that substantially restricts competition by interfering with or restricting the business activities of other companies.

The Enforcement Decree of the MRFTA contains rules on implementing the MRFTA, as well as the procedural rules. In addition, the Korea Fair Trade Commission (**KFTC**) published guidelines that complement the MRFTA, including Guidelines on Review of Unfair Concerted Conduct Involving Information Exchange between Businesses (**Information Exchange Guideline**), Guidelines for Filing Applications for the Approval of Cartels and Competition-Restrictive Practices; Guidelines for Cartel Review (**Cartel Review**

**Guideline**); Guidelines on Examination of Cartels in Bidding; and Guidelines for Examination of Cartels Involving Administrative Guidance.

Even if a conduct falls under any of the anti-competitive arrangements prescribed in Article 40 of the MRFTA, exemptions apply when such conduct has any of the following purposes and the KFTC's approval is obtained by filing an application in advance. However, in practice, exemptions have been granted only in a limited number of cases.

- Industrial restructuring for recovery from economic recession
- Research and technical development
- Rationalization of transaction terms
- Improvement of competitiveness of small and medium enterprises (**SMEs**)

Meanwhile, the exemption also applies to government-regulated conduct in each of the following cases, although in practice, only a few cases have been granted exemptions.

- In cases where other laws specifically allow a business entity to engage in an act that falls under Article 40 of the MRFTA
- In cases where other laws stipulate that an administrative agency may provide administrative guidance to a business entity to conduct an act falling under Article 40 of the MRFTA: Provided, (i) the purpose, means, contents, and method of such administrative guidance comply with the applicable laws and (ii) the relevant business entity acts within the scope of the administrative guidance.

Other than the MRFTA, the Criminal Act and the Framework Act on the Construction Industry (**Construction Industry Act**) also regulate cartels. Article 315 of the Criminal Act penalizes any interference with the fairness of an auction or a tender through fraudulent means, by the threat of force, or other means, and Article 95 of the Construction Industry Act penalizes 'a person who submits a prearranged bid price

in collusion with other bidders to gain unjust enrichment or interfere with the fair setting of the price.’ Each of the foregoing provisions is interpreted to include bid-rigging as a form of cartel conduct, subject to punishment. Therefore, in bid-rigging cases, a single cartel conduct may constitute several separate crimes in violations of the MRFTA, the Criminal Act, and the Construction Industry Act. However, most cartels are currently regulated under the MRFTA.

## 2. To establish an infringement, does there need to have been an effect on the market?

Yes, an infringement is established only when the concerted conduct between competitors unfairly restricts competition in the relevant market. The MRFTA makes no distinction between hard-core cartels and soft-core cartels, and for any and all types of concerted conduct, the KFTC must prove that such conduct restricts or may restrict competition in the relevant market.

Pursuant to the Cartel Review Guideline, when it is obvious that anti-competitive effect would result due to the nature of the concerted conduct (i.e., in cases of hard-core cartels), the KFTC may conduct a rough analysis of the market structure, transaction type, and the status of competition in connection with the relevant concerted conduct, based on which the KFTC may deem such conduct as illegal cartel conduct without review of the anti-competitiveness. On the other hand, in cases where the anti-competitive effects and the efficiency enhancement effects coexist given the nature of the concerted conduct (i.e., in cases of soft-core cartels), the KFTC must comprehensively review the anti-competitive effects and the efficiency enhancement effects to determine the illegality of such conduct.

Also, the Cartel Review Guideline stipulates that, if the combined market share of the cartel participants does not exceed 20%, the KFTC’s review will conclude with the assumption that the concerted conduct does not have any, or has minimal, anti-competitive effect.

## 3. Does the law apply to conduct that occurs outside the jurisdiction?

Article 3 of the MRFTA stipulates that the MRFTA applies to overseas conduct that affects the Korean market. In this regard, the Korean Supreme Court has held that the foregoing provision applies only in limited cases where the conduct outside of Korea has a direct, significant, and reasonably foreseeable effect on the Korean market. However, the Korean Supreme Court noted that if the

Korean market is the subject of an anti-competitive agreement between foreign companies, then such an agreement would be deemed to affect the Korean market unless special circumstances exist to indicate otherwise.

## 4. Which authorities can investigate cartels?

Two investigative authorities, the KFTC and the Prosecutors’ Office, handle cartels in violation of the MRFTA. In general, the KFTC enforces the MRFTA by conducting administrative investigations and issuing administrative orders including the order to cease and desist and the order to pay a fine. As for criminal prosecution of MRFTA violations, the Prosecutors’ Office is given the authority to prosecute cartels only when the KFTC lodges a criminal complaint to the Prosecutors’ Office. However, even before the KFTC lodges a criminal complaint, the Prosecutors’ Office may initiate an investigation on cartels; the Prosecutor General then may request the KFTC to file a criminal complaint if the investigation reveals the violation is objectively clear and serious such that it may substantially hinder competition.

The police has the primary investigative authority with respect to cartels in violation of the Criminal Act and the Construction Industry Act, and the Prosecutors’ Office may engage in the investigation in case the police require a re-investigation or supplementary investigation. As discussed above, bid-riggings may be in violation of the MRFTA, the Criminal Act, and the Construction Industry Act at the same time. As opposed to a violation of the MRFTA which grants to the KFTC the exclusive criminal referral right, a violation of the Criminal Act or the Construction Industry Act may be subject to investigation by the police and prosecution by the Prosecutors’ Office without the KFTC’s criminal referral.

## 5. What are the key steps in a cartel investigation?

### KFTC:

#### [Initiating an Investigation]

The KFTC generally initiates investigations of cartel conduct when either (i) a leniency application is filled or (ii) the KFTC learns of a potential cartel from public sources, such as news, an accusation by third parties, or other government sources. The KFTC will then openly proceed with the following investigative steps.

**[Key Procedural Steps]**

Once the alleged cartel conduct comes to the KFTC's attention, the KFTC proceeds to fact-finding through information requests and dawn raids, making use of its investigative powers.

The KFTC decides on whether there is sufficient evidence of a violation after it reviews the information and documents obtained and, if appropriate, issues an Examiner's Report (equivalent to the Statement of Objection in the EU) against the accused parties. The accused parties may examine the Examiner's Report and the attached materials and are given an opportunity to respond in writing or through an oral hearing. Generally, the parties are to respond to the Examiner's Report in writing within four weeks (this period is shortened to three weeks for cases that would be reviewed by the KFTC's subcommittee, rather than the full committee), but the period may be extended if the case is rather complicated or the parties' parent companies are located overseas. The KFTC then holds a hearing within 30 days of receiving the parties' written response; when the parties fail to submit a response, the 30 day period begins upon the expiration of the submission deadline. The KFTC commissioners reach a final decision at the end of the hearing, and a formal, written decision is generally issued within several weeks, although this may take up to several months depending on the complexity of the case.

The KFTC generally refers to materials and information provided by third parties as evidence to substantiate the alleged cartel conduct in the KFTC proceedings. In such a case, the suspected parties may request access to or a copy of the material. However, the KFTC has been refusing to allow the parties to view such materials, on grounds that some include third parties' trade secrets or other confidential information.

In the past, when the KFTC denies access to the information, the parties had to file a lawsuit for disclosure of the information. However, in December 2020, the KFTC announced the guideline for disclosure of information, which provides a detailed procedure and guarantees the parties' right to request access and a copy of the information. For instance, the parties may request the KFTC to access or copy the information not disclosed in the Examiner's Report. When the parties file such a request, the KFTC decides on whether to grant access, taking into account the opinion of the party that had initially provided the information.

The above guideline also introduced a so-called 'restricted data access room.' The KFTC designates a person who is granted access and chooses the time and place of the restricted access. The designated person

confirms and verifies the existence of the evidence and its details in the restricted data access room and prepares an access report. Only the access report prepared in such a manner may be taken out of the restricted data access room.

**[Investigation Timeline]**

The timeline cannot be generalized as the timeline varies in each case, depending on factors such as the existence of a leniency applicant who assists the KFTC in establishing the case. Notwithstanding, it generally takes at least one year to a few years from the initiation of the investigation to the rendering of the final decision.

Upon the lapse of the following statutes of limitations, the KFTC may not impose remedies or fine on a cartel:

- If the KFTC investigation has commenced, then five years from the date the KFTC initiated the investigation; or
- if the KFTC investigation has not commenced, then seven years from the date the conduct in violation of the MRFTA concluded.

However, the above period does not apply when the court overturns the sanctions that the KFTC had imposed and the KFTC decides to impose a new sanction.

In 2019, the court ruled that when a leniency application is filed with specific details of the cartel conduct and the KFTC conducts an on-site investigation on a later date, the initiating date of the KFTC investigation counts as the date of filing the leniency application, as opposed to the date of the on-site investigation. In line with this decision, the Enforcement Decree of the MRFTA was amended to stipulate that investigation is initiated on the date (i) the KFTC receives the leniency application or third-party report, if the investigation is launched based on such leniency application or a third-party report of the violation, or (ii) the KFTC initiates investigative activities such as an on-site investigation, if the investigation is launched ex officio prior to the leniency application or a third-party report.

**Prosecutors' Office:**

As discussed above, in most criminal cases, a cartel is treated as a violation of the MRFTA, and in such cases, the Prosecutors' Office generally initiates an investigation upon receipt of a criminal referral from the KFTC. However, there are cases where the Prosecutors' Office launches an investigation before receiving such criminal referral and then requests the KFTC to lodge a criminal complaint. As a result, an administrative investigation by the KFTC and a criminal investigation by the Prosecutors' Office may be conducted in parallel for

the same case. On the other hand, as further discussed below, the Prosecutors' Office recently introduced a criminal leniency system, which may trigger the concurrence of the administrative investigation and criminal investigation to be established as a general practice in Korea in the future.

The statute of limitations period for public prosecution of a violation of the MRFTA is five years from the date such violation was committed.

## **6. What are the key investigative powers that are available to the relevant authorities?**

### **KFTC:**

The KFTC has broad administrative investigative powers, which are essentially based on the voluntary cooperation of the investigated parties (including the suspected parties and any third parties) subject to the procedural principles in the MRFTA and the Enforcement Decree of the MRFTA. Its investigative powers under the relevant regulation are as follows:

#### **[Information Requests]**

The KFTC may, if deemed necessary to enforce the MRFTA, order a business entity or trade association or its executive officers and employees to submit materials or articles necessary for the investigation, or may temporarily take the submitted materials or articles in custody. The order for submission of materials should be issued in writing by stating the name of the case, date and time of submission, and the report or materials to be submitted. However, such an order may be made orally for a party present at the meeting held by the KFTC. The recipients of information requests are not limited to the suspected parties and information requests may also be addressed to third parties, such as competitors and customers of the suspected parties. Such information requests are subject to the voluntary cooperation of the recipient. However, a person who refuses to submit materials requested in compliance with the information requests, or a person who submits a false report or information may be punishable by imprisonment for not more than two years or by a fine not exceeding KRW 150 million.

#### **[Dawn Raids]**

The KFTC may, if deemed necessary to enforce the MRFTA, require public officials under its control (i) to enter the office or place of business of a business entity or trade association to investigate its business and management, account books, documents, electronic

data, voice-recordings, videos, and other materials or articles, and (ii) to take statements from the investigated parties, interested parties, or witnesses at the site. The KFTC in fact frequently conducts dawn raids. The KFTC's dawn raid is conducted with the consent of the company under the investigation. However, criminal punishment may be imposed if the company or its employees interfere with the KFTC's investigation. A person who refuses, interferes with, or evades an investigation through verbal abuse, assault, or intentionally blocking or delaying access to the site at the time of dawn raids, may be punishable by imprisonment for not more than three years or by a fine not exceeding KRW 200 million and a person who rejects, interferes with, or evades an investigation by concealing, discarding, or refusing access to materials, or by forging or falsifying materials during an investigation conducted may be punishable by imprisonment for not more than two years or by a fine not exceeding KRW 150 million.

#### **[Authority to Take Statements]**

The KFTC may, if deemed necessary to enforce the MRFTA, order the appearance of the accused parties, interested parties, or witnesses, and hear their opinions. In addition, the KFTC may request the public official under its control to take statements from the accused parties, interested parties, or witnesses at the place designated by the request for appearance issued by the KFTC. Such process of soliciting opinions is also subject to the voluntary cooperation of the involved parties. However, if a business entity or trade association fails to appear without just cause in violation of the attendance order, it may be punishable by an administrative fine of not more than KRW 100 million, and in the case of its executive officer, employee, or other interested party, by an administrative fine not more than KRW 10 million.

#### **[Designate Expert Witnesses]**

The KFTC may, if deemed necessary to enforce the MRFTA, designate an expert witness and seek his or her opinions.

### **Prosecutors' Office:**

The investigative powers of the Prosecutors' Office include arrest or search and seizure as in other criminal cases. However, court-issued warrants are required for the Prosecutors' Office to exercise its authority for an arrest or search and seizure.

## **7. On what grounds can legal privilege be invoked to withhold the production of**

### certain documents in the context of a request by the relevant authorities?

In Korea, there is no attorney-client privilege. Legal advice provided by in-house counsel and/or lawyers qualified outside the jurisdiction is not protected by the rules of privilege.

Furthermore, in the KFTC's investigation, investigated parties are not granted the privilege against self-incrimination/refuse to testify. However, such privilege is granted in the criminal proceeding initiated by the Prosecutors' Office.

### 8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

#### KFTC:

The KFTC operates a cartel leniency programme that applies to its administrative proceeding. The first applicant to file for leniency may receive full immunity, including being exempted from the KFTC's remedies and fines, as well as the KFTC's criminal referral to the Prosecutors' Office. In this regard, leniency application to the KFTC also serves as immunity to criminal charges because the Prosecutors' Office cannot indict the suspected parties for violation of the MRFTA without the criminal referral of the KFTC.

The following conditions must be satisfied for a leniency applicant to be granted full immunity:

- The applicant must be the first to independently provide the evidence necessary to substantiate the existence of a cartel.
- The applicant must voluntarily submit the evidence before the KFTC comes into possession of any or enough information to substantiate the existence of a cartel.
- The applicant must fully cooperate with the KFTC until the completion of the investigation; cooperation entails stating all facts and submitting materials relevant to the cartel.
- The applicant must immediately cease its cartel participation upon filing for leniency.
- The applicant must not have coerced others to participate in the cartel or to not cease their cartel participation.
- The applicant must not have repeatedly participated in cartels within five years of having the remedies or fines reduced for a

cartel violation.

In principle, the leniency application must be in writing, and the application may be submitted through an in-person visit to the KFTC, email, or fax. An oral submission of the application may at times be allowed, although it cannot be made over the phone; a public official audio/video records the applicant's statement, and responses to the questions asked. All evidence required in the application must be included in the oral statement as well. The application must include a summary of the cartel when filed, but may be supplemented within a certain period to satisfy the above requirements (See Section 10 for information on supplement).

#### Prosecutors' Office:

The Prosecutors' Office introduced a cartel leniency programme in December 2020. According to Prosecutors' Office's Guidelines on Leniency Programme, (i) the leniency programme applies to hard-core cartels in violation of the Criminal Act (Article 315), the Construction Industry Act (Article 95), or the MRFTA (Article 40 (1)), and (ii) the first applicant is exempted from indictment. (iii) In principle, the leniency applicant would be exempted from forced investigations, such as seizure, search, arrest, and detention. However, in exceptional cases, if a forced investigation is deemed necessary, the prosecutor should undergo a prior consultation with the Supreme Prosecutors' Office. (iv) A separate investigation for a crime irrelevant to the cartel is prohibited, but if the need to investigate into a separate crime arises in the course of the cartel investigation, the prosecutor should undergo prior consultation with the Supreme Prosecutors' Office.

The following conditions must be satisfied for the leniency applicant to be granted full immunity:

- The applicant must be the first to independently provide the evidence necessary to substantiate a cartel.
- The applicant must voluntarily submit the evidence before the Prosecutors' Office comes into possession of any or enough information to substantiate a cartel.
- The applicant must fully cooperate with the Prosecutors' Office until the conclusion of the investigation and the criminal trial; cooperation entails stating all facts and submitting materials relevant to the cartel.
- The applicant must immediately cease its cartel participation upon filing for leniency. The applicant must not have coerced others to participate in the cartel or to not cease their cartel participation.



- The applicant must not have repeatedly participated in cartels over a certain period.

In principle, the applicant may be granted immunity from criminal punishment when the above requirements under the Prosecutors' Office's leniency programme are satisfied even if the applicant does not win the race to the KFTC's leniency program.

### 9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

#### KFTC:

The second applicant to file for leniency may receive a 50% reduction in the administrative fine if it obtains a second-priority leniency status. The KFTC may also exempt the second leniency applicant from remedies and criminal referral to the Prosecutors' Office. The conditions to the first leniency status under the KFTC's leniency programme described under Section 8 above apply for the second leniency status as well, except that the applicant must be the second applicant to provide evidence, as opposed to the first.

On a separate note, if the cartel involved only two participants, the second applicant to file for leniency cannot obtain the second-priority leniency status.

#### Prosecutors' Office:

According to the Prosecutors' Office's Guidelines on Leniency Programme, unlike the first leniency applicant who is not prosecuted, the second leniency applicant would be prosecuted, but the prosecutor would make the request that the sentence be reduced in half during the criminal trial. However, since the judges only take such request into consideration but are not bound by it, there is no guarantee that the final sentence rendered by the court will be reduced by 50%. Other benefits, including exemption from the forced investigation, are the same as those applied to the first leniency applicant. The conditions to the first leniency status under the Prosecutors' Office's leniency programme described under Section 8 above apply for the second leniency status as well, except that the applicant must be the second applicant to provide evidence, as opposed to the first.

Again, for the cartel involving only two participants, the second applicant to file for leniency cannot obtain the second-priority leniency status.

### 10. Are markers available and, if so, in what circumstances?

#### KFTC:

Upon receiving a leniency application, the KFTC official makes a note of the date and time of the submission. A signed application with a rank/marker is then provided to the applicant. Generally, the application should be submitted with all evidentiary material at the time of the submission; however, when obtaining the evidentiary material requires more time or under exceptional circumstances, the application may be first submitted and supplemented later within a designated supplementary period. The initial supplementary period granted is 15 days, but the KFTC may extend this period up to 60 additional days. In exceptional cases, such as in the case of international cartels, the extension may go beyond the 60 days, provided that the extension is necessary to gather the evidence. However, the applicant should note that there are certain limitations to supplementing the application, in terms of the time frame and its content. For instance, supplementing the leniency application to add a new entity (such as an affiliate of the original applicant) as an applicant must be done within a 75-day window. On the other hand, providing materials relating to a separate count of cartel conduct, which exceeds the scope of cartel conduct included in the original leniency application, is considered a separate leniency application rather than a supplement to the existing leniency application. Once the application is sufficiently supplemented, meaning the leniency requirements are met and confirmed by the KFTC, the application would be considered to have been filed on the date it was submitted.

#### Prosecutors' Office:

Unlike the KFTC, the Prosecutors' Office does not provide a leniency application with rank or marker. However, an application may first be submitted then supplemented later. The supplementary period of 30 days is granted with the consent from the Anti-Corruption and Organized Crimes Department within the Supreme Prosecutors' Office, but additional extensions may be granted for inevitable reasons such as the necessity for international cooperation in an international cartel case.

### 11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

#### KFTC:

In order to receive an exemption from or a reduction of

remedies and/or fines, a leniency applicant must cooperate in good faith with the KFTC's investigation until the conclusion of the investigation. The cooperation entails submitting relevant evidentiary materials and making statements that substantiate the cartel. Here, the 'conclusion of the investigation' refers to 'until the KFTC's deliberation ends.' Whether the applicant's cooperation is sufficient is determined in consideration of the following:

- Whether the applicant timely provided all cartel-related facts in its knowledge in the statement; Whether the applicant promptly submitted all cartel-related materials in its possession, or it could obtain;
- Whether the applicant cooperatively and promptly responded to the KFTC's inquiries for confirmation of facts;
- Whether the applicants' employees (including previous employees, if possible) made the best efforts to truthfully cooperate throughout the KFTC's investigation;
- Whether the applicant destroyed or concealed any cartel-related evidence; and
- Whether the applicant informed the third party about the leniency application or the cartel conduct without obtaining the KFTC's consent.

Even if a leniency applicant satisfies all of the foregoing and receives an exemption from or a reduction of remedies and/or fines, the KFTC may revoke the exemption or reduction in any of the following cases:

- When the applicant in part or in whole denies at the administrative appeal (an appeal disputing the KFTC's decision) the statements it had made or materials it had submitted in the course of the KFTC's investigation.
- When it is proven at the administrative appeal that the statements made or materials submitted by the applicant during the KFTC's investigation were false.
- When the applicant refuses to make a statement on the cartel conduct at the administrative appeal without reasonable grounds.
- When the applicant does not attend the administrative appeal without reasonable grounds.
- When the applicant files a lawsuit denying the cartel conduct for which it had filed a leniency application.

#### **Prosecutors' Office:**

The obligations for continued cooperation under the

Prosecutors' Office's Guidelines on Leniency Programme is similar to those under the KFTC's leniency programme, but there are a few differences. First, while the KFTC leniency applicant has the obligation to cooperate until the conclusion of the KFTC investigation, the Prosecutors' Office leniency applicant has to cooperate in good faith until the end of the criminal trial, beyond the investigation by the Prosecutors' Office. Second, the KFTC leniency applicant is deemed to not have cooperated in good faith if it reveals to a third party any facts related to its leniency application before the end of KFTC's deliberations, while the Prosecutors' Office leniency applicant is deemed to not have cooperated in good faith if it reveals to a third party any facts related to its leniency application without obtaining the prosecutor's consent, before the judgment of the relevant criminal trial becomes final.

## **12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

#### **KFTC:**

The KFTC's cartel leniency programme acknowledges only "business entities" as eligible applicants for leniency, and current/former employees and directors of the business entities are not entitled to file for leniency.

However, once a business entity applies for leniency and satisfies the leniency requirements, it is the KFTC's policy not to refer its current or former employees and directors to the Prosecutors' Office for criminal prosecution. Consequently, when the business entity files for leniency, the current/former employees and directors also come to benefit in terms of the immunity from criminal prosecution. However, as discussed above, bid-rigging may be in violation of the MRFTA, the Criminal Act, and the Construction Industry Act, all at the same time. Since the violation of the Criminal Act or the Construction Industry Act may be subject to an investigation by the police and prosecution by the Prosecutors' Office without the KFTC's criminal referral, as opposed to the violation of the MRFTA which grants to the KFTC the exclusive criminal referral right, even though a business entity applies for leniency, its current/former employees and directors may be punished for violations of the Criminal Act and the Construction Industry Act.

#### **Prosecutors' Office:**

Contrary to the KFTC's cartel leniency programme, the cartel leniency programme by the Prosecutors' Office



allows not only 'business entities', but also 'individuals' to apply for leniency. Meanwhile, the Prosecutors' Office's Guidelines on Leniency Programme stipulates that when a business entity applies for leniency, it must provide 'the names, addresses, resident registration numbers, and contact information of the current executive officers and employees who wish to receive the leniency, together with the relevant applicant' on the application form. In conclusion, (i) when a business entity becomes the first-priority leniency applicant, the current employees and directors listed in the application form may enjoy the benefits of the immunity from criminal prosecution, along with the business entity. However, if (ii) former employees and directors desire to enjoy such immunity, they should file an application on their own and become the first-priority leniency applicant, ahead of the relevant business entity.

The Prosecutors' Office's leniency programme applies to hard-core cartels under the Criminal Act (Article 315), the Construction Industry Act (Article 95), or the MRFTA (Article 40 (1)). Therefore, an individual who has enjoyed the immunity from criminal prosecution under the cartel leniency programme of the Prosecutors' Office would not be punished for a violation of the Criminal Act or the Construction Industry Act, as well as for the violation of the MRFTA.

### 13. Is there an 'amnesty plus' programme?

#### KFTC:

The KFTC has an 'amnesty plus' programme.

If a business entity is a cartel participant for the first cartel and a first leniency applicant for the second cartel and this business entity filed a leniency application for the second cartel after the date of KFTC's investigation into the first cartel, but before the KFTC's hearing for the first cartel, the business entity may receive additional leniency for the cartel for which it is not the first leniency applicant. The size of both cartels is considered in determining the degree of additional leniency. Here, the 'size' is based on the sum of the relevant turnovers of all cartel participants, except in the case of bid-rigging where only the contract price of those participants who have won the bids, and not the turnovers of dummy bidders, are considered in computing the sum of the relevant turnovers.

The applicant may receive the following leniency for the first cartel:

- When the second cartel is the same or smaller than the first cartel, then 20% reduction in fines.

- When the second cartel is bigger than the first cartel, but by less than double, then 30% reduction in fine.
- When the second cartel is bigger than the first cartel by twice, but less than four times, then 50% reduction in fine.
- When the second cartel is bigger than the first cartel by four times or more, then 100% reduction in fine.

#### Prosecutors' Office:

The Prosecutor's Office also has an 'amnesty plus' programme.

If a person, who is subject to a criminal penalty due to his or her participation in a cartel, meets each of the requirements as a first-priority leniency applicant in regard to any cartel other than the cartel at issue, the sentence for such person may be mitigated for the cartel at issue.

### 14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

In 2011, a consent decree system was implemented into the MRFTA, thereby allowing respondents to undertake a settlement process in lieu of a formal KFTC's investigation process.

However, consent decrees do not apply to cartels, and there is no separate settlement procedure for cartels. Furthermore, Korean criminal system does not have plea bargaining or other settlement procedures in place.

### 15. What are the key pros and cons for a party that is considering entering into settlement?

N/A (There are no settlement procedures applicable to cartels)

### 16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

#### [Inter-agency Cooperation in Korea]

With respect to tenders issued by the national, local governments, or government-owned corporations, the

MRFTA prescribes that the KFTC may request tender-related materials and cooperation from relevant government agencies or public institutions to investigate cartels. In practice, the KFTC operates a 'Bid-Rigging Indicator Analysis System (**BRIAS**)' referred to as the tender status board, which receives information related to tenders issued by public institutions such as the Public Procurement Service (**PPS**) from the relevant institutions and automatically analyses the signs of bid-rigging on a quantitative basis, based on factors such as rate of tender success and the number of tender participants.

More specifically, since establishing BRIAS in 2006, the KFTC has continuously been expanding the list of associated institutions and made further upgrades in 2018. Using the BRIAS, the KFTC receives via online tender information of 16 public institutions, including the PPS, and quantitatively analyses the indicators of bid-rigging. The KFTC then searches through and compares the tender information collected and uses the results in the investigation processes. The KFTC comprehensively uses factors such as the winning bid rate, the difference in the bid rate and the number of tender participants in analysing the indicators for bid-rigging, and initiates an ex officio investigation for tenders showing a high indication of bid-rigging. As a recent example, the KFTC used BRIAS in initiating an investigation into bid-riggings in the tender for an automated security system issued by Korean electric power corporation; the KFTC imposed corrective order and fine against the participants in the bid-rigging in February 2022.

There has been continued discussions on the abolition of the so-called 'exclusive criminal referral right,' based on which a criminal penalty for violation of the MRFTA may only be imposed when the KFTC lodges a criminal complaint, and on January 22, 2019, the KFTC entered into an agreement with the Ministry of Justice on 'the criteria for screening cases for priority investigation by the KFTC and the Prosecutors' Office.' However, the KFTC's criminal referral right remained after the amendment to the MRFTA in 2021, and as such, it is unlikely at this time that the foregoing agreement will be implemented. Yet, as the debate on the need to abolish the exclusive criminal referral right continues, there remains room for the above agreement to be implemented in the future.

#### **[Cooperation with Foreign Competition Authorities]**

The KFTC cooperates regularly with foreign competition authorities, including the Federal Trade Commission (**FTC**) and Department of Justice (**DOJ**) in the U.S., the Directorate-General for Competition (**DG Comp**) of the EU, and the competition authorities of Japan and Russia,

through various channels such as the International Competition Network (**ICN**) and Seoul International Competition Forum, and is continuously consulting with other competition authorities over international cartel cases. For major cases, the KFTC at times exchanges information on the suspected charges and the investigation status with the DG Comp or DOJ and conducts onsite investigations in parallel with other competition authorities across the world, if necessary. However, even in such situations of cross-border interagency cooperation, the competition authorities are not known to directly exchange evidence obtained from the subjects of the investigation.

Meanwhile, on November 18, 2020, the Prosecutors' Office signed an MOU with the DOJ to strengthen cooperation in the criminal enforcement against serious international competition law violations, such as international cartel cases.

### **17. What are the potential civil and criminal sanctions if cartel activity is established?**

#### **[Administrative Sanctions]**

The KFTC may impose corrective actions (suspension of the conduct, public disclosure of the corrective order, or any other necessary corrective measures) and fines against a company that engaged in illegal cartel conduct. Under the amended MRFTA which came into effect as of December 30, 2021, the KFTC may impose a fine in the amount of up to 20% of the relevant sales. Please note, however, that the KFTC may impose a fine in the amount of up to 10% of sales generated through the illegal cartel conducts for conduct that ended before December 30, 2021, for which the pre-amendment version of the MRFTA would apply.

#### **[Criminal Sanctions]**

A person who engages in cartel conduct may be punished by imprisonment not more than three years or by a fine not exceeding KRW 200 million, and for a corporation that engages in such conduct, a fine may be imposed. In cases where a corporation is being held criminally liable for a violation of competition laws, criminal penalties may also be imposed on the representatives of such corporation as well as the individuals concerned.

Criminal sanction may only occur after the KFTC lodges a criminal complaint to the Prosecutors' Office. However, the heads of the Prosecutors' Office, the Board of Audit and Inspection, the Ministry of SMEs and Startups, and the PPS may also request the KFTC to file a criminal

complaint, in which case the KFTC is obligated to file such complaint. In practice, the Ministry of SMEs and Startups and the PPS actively exercise their right to request criminal complaints based on the foregoing obligation.

### 18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

In imposing a fine, the KFTC calculates the amount by taking into account factors such as the details and severity of the violation, the duration and frequency of the violation, the size of the profits obtained by committing the violation, whether the collusion was carried out, cooperation with the investigation, whether the problematic conduct was voluntarily corrected, the defendant business entity's practical ability to pay the fine, the market or economic conditions, and the effect of the violation on the market. The detailed standard is as follows:

Categorization	Calculation of the Fine
Standard for Calculation	0.5-20% standard rate of fine is multiplied by the relevant sales turnover, depending on the severity of the violation.
First Adjustment (adjusted within 100% of the initially calculated standard amount)	Adjustment based on the period of violation: if the period of violation had not been taken into account, the amount added within 10-80% range of the standard rate, depending on the period of violation.
	Adjustment based on the number of violations: amount added within 10-80% range of the standard rate, depending on the number of violations within the past five years.
Second Adjustment (adjusted within 50% of the First Adjustment amount)	Retaliatory measure: amount added within 10-30% range for taking, or causing others to take, retaliatory measures against companies not cooperating with the conduct in violation.
	Entering into an agreement for concerted conduct but not carrying out the activities as planned: amount reduced within 50% range.
	Cooperation in the KFTC's investigation: amount reduced within 10% range.
	Cooperation in the KFTC's hearing and admitting to wrongdoing: amount reduced within 10% range.
	Accepting the result of the simplified hearing through a chamber session: amount reduced within 10% range.
	Taking self-corrective measures to the violation: amount reduced within 10-30% range.
	Violation based on minor negligence: amount reduced within 10% range.
Decision on Fine Imposed	Adjustment based on the company's practical ability to pay the fine: amount reduced within 30-50% range of the Second Adjustment amount.
	Adjustment based on the violation's impact on the market, worsened conditions in the market/industry, and the scope of unfair profits: amount reduced within 30% range.

In practice, the KFTC considers various factors in determining the rate of increase/decrease for the fine. The KFTC recently imposed a fine in the following cases, but the cases below were fined applying the standard based on the pre-amendment MRFTA.

Concrete pile collusion case involving Korean business entities

In May 2020, The KFTC imposed a fine in the amount of KRW 47.269 billion on 17 business entities that colluded in 1,768 public tenders for the purchase of concrete piles issued by the PPS and the Korea Land & Housing Corporation.

In this case, 17 business entities that engage in concrete pile sales agreed in advance on the winning bidder, dummy bidders, and the bid rate in 1,768 tenders issued by public institutions from April 2010 to May 2016.

Standard rate of fine: the KFTC set the rate of fine at 5%, considering the following factors:

- As bid-riggings generally have anti-competitive effects, it constitutes a 'significant violation' for which the rate of 7-8.5% rate of fine applies.
- However, the KFTC applied a 5% rate of fine considering that (i) the unit price for ready-mix concrete for the government is relatively lower compared to that for the non-governmental use, (ii) the price is greatly affected by other external factors such as the business conditions for the construction industry and changes in the prices of raw material, (iii) the competition would be geographically limited due to ready-mix concrete's short shelf-life, (iv) the volume of actual orders placed not matching the volume won during the tender, and (v) competitive bidding was limited to 20% of the estimated demand for the metropolitan area, for stable supply and demand for ready-mix concrete.

Added fine: among the 17 business entities, the KFTC increased the fine by 50% for the entities that had previously violated the law more than four times.

Reduced fine: the KFTC then reduced the fine by 20% for 17 business entities' cooperation in the investigation.

Auto parts collusion case involving foreign business entities

In August 2019, the KFTC imposed KRW 8.2 billion fine on three global auto parts manufacturers for allocating customers in selling engine-alternators to Korean

automobile manufacturers. Such conduct continued from 2004 to 2014, over a span of a decade.

Standard rate of fine: the KFTC set the rate of fine at 7%, considering the conduct a significant violation under its sentencing guidelines.

Reduced fine for dummy bidders: the KFTC then reduced the fine by 50% for dummy bidders and by 10% for business entities that did not make any profit from the collusion.

Reduced fine: the KFTC also reduced the fine by 10-20%, depending on the business entities' degree of cooperation in the investigation.

### **19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

There is no system in place which holds the parent company liable for the administrative, civil, or criminal charges arising from any of its subsidiaries' cartel conducts.

### **20. Are private actions and/or class actions available for infringement of the cartel rules?**

A person who suffers damage from the illegal cartel conduct may file a lawsuit to claim damages against those who engaged in such practice.

Class action for cartels has not yet been implemented under the current statutes. However, the Ministry of Justice is pushing for enactment of an amendment bill to the Class Action Act, which stipulates that the class action system, the enforceability of which had been limited to the securities-related fields, is fully and generally allowed for damage claims involving 50 or more persons. In the case of hard-core cartels that cause damage to a large number of victims may be entitled to a class action lawsuit should the National Assembly pass the above amendment bill.

### **21. What type of damages can be recovered by claimants and how are they quantified?**

Previously, the compensation for damages was limited to the actual damages suffered by the claimant.

However, a punitive damage provision was newly introduced through the recent amendment to the

MRFTA, which allows treble-damages for damages caused by cartel conducts committed on or after March 19, 2019. As a result, the victims of cartel conducts are more likely to file punitive damage claims, and court decisions awarding damage in such cases are expected to increase. For reference, it appears that punitive damage has never been applied in cartel cases to this date (as not much time has passed since the amendment to the MRFTA), but there has been a case where punitive damages were granted for violation of the Fair Transactions in Subcontracting Act, a law under the jurisdiction of the KFTC.

The court regards the damage arising from cartel conduct as equivalent to the difference between the price formed by the cartel and the price that otherwise would have been formed in the absence of such cartel (hereinafter referred to as 'hypothetical competitive price'). The hypothetical competitive price should be calculated by excluding only the price increase caused by the cartel while maintaining other pricing factors in the market in which the cartel takes place. Since such price is a hypothetical price that does not exist in reality, in order to estimate the said price, the most objective and rational method should be adopted, among various economic analysis methods such as a method of comparing prices before and after the cartel (before & after method), a method of comparing the price under the cartel with the price formed in a standard market (yardstick method), or other methods of econometrics, by considering the type of the cartel conduct in the relevant case, the market status, and the range of data that can be collected. In practice, when a lawsuit is filed for damages due to a cartel, most damages are calculated through econometric analysis by experts.

### **22. On what grounds can a decision of the relevant authority be appealed?**

If the alleged violator considers that the KFTC's administrative decision has a factual or legal error, he/she may raise an objection and file an administrative lawsuit with the Seoul High Court.

In order to appeal to the Supreme Court in objection to the judgment of the Seoul High Court, the alleged violator should assert and prove that there is a legal error (any violation of the constitution, laws, orders, or rules affecting the judgment) in the judgment of the Seoul High Court.

### **23. What is the process for filing an appeal?**

#### **[Administrative Sanctions]**

In the case where the KFTC imposes a corrective order or fine for cartel conduct, within 30 days of receiving the KFTC's decision, (i) an objection may be filed with the KFTC, and (ii) an administrative lawsuit may be filed with the Seoul High Court. A business may go through either of the procedures in items (i) and (ii) at its discretion, but may only choose one of the two procedures to proceed.

### [Criminal Sanctions]

If the Prosecutors' Office files a criminal charge for the violation of the MRFTA, the proceedings follow the generally standard criminal procedures in Korea.

The accused may go through three stages of trials (district court, high court, and Supreme Court) after the indictment by the Prosecutors' Office, and if the accused objects to the judgment of the court, he or she may appeal on the grounds of a factual or legal error. For reference, in criminal cases, as opposed to administrative cases, there are no restrictions on the reasons for filing an appeal.

## 24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

- a. The KFTC's enforcement against collusion in 2022In 2022, the KFTC focused primarily on cases of collusion that occurred within Korea, specifically in the areas of daily necessities such as food and safety, as well as intermediate goods.

As for collusions in the food industry, the KFTC issued sanctions the following products: (i) fresh duck meat (9 companies, total fine of approximately KRW 6 billion), (ii) fresh chicken meat (16 companies, total fine of approximately KRW 175.8 billion), and (iii) ice cream (5 companies, total fine of approximately KRW 135 billion).

For intermediate goods, the KFTC imposed sanctions for collusion involving (i) sewage tunnel access doors (5 companies, total fine of approximately KRW 2 billion), and (ii) ready-mixed concrete (9 companies, total fine of approximately KRW 13.1 billion).

- b. Sanctions against Korean and foreign container liner shipping companies for colluding to fix cargo rates in the Korea-South East Asia route, Korea-Japan route, and Korea-China routeThe KFTC ruled that Korean and

foreign container liners did in fact engage in ocean freight rate cartels in the Korea-South East Asia route, Korea-Japan route, and Korea-China route, and imposed administrative fines in the amount of approximately KRW 176.2 billion (approximately USD 136 million) in total in addition to corrective orders.

Korea's Marine Transportation Act Article 29 does allow shipping companies to enter into an agreement and act in concert with one another, but under limited circumstances, when certain requirements are met in terms of the content of the agreement and procedure. The KFTC determined that the exception under the Marine Transportation Act does not apply to the agreement among the shipping companies in this case since they failed to meet the requirement of reporting to the Minister of Oceans and Fisheries and sufficiently exchanging information with the shippers' association. The shipping companies are expected to file an administrative appeal, claiming that the conduct subject to the KFTC falls within the scope of agreement permitted under the Marine Transportation Act.

- c. Sanctions against collusion in the oil supply market for US Forces in Korea (USFK)In January 2021, the KFTC issued a corrective order and order for compliance training on the oil refinery companies in the oil supply market for the USFK who allocated the volume and delivery areas (where the oil is supplied within the USFK camp) and agreed on the bid prices and the winning bidder in five tenders.

The tender at issue was a periodic tender issued by the Defense Logistics Agency (DLA) under the U.S. Department of Defense, and the oil refinery companies signed a contract with DLA. The DOJ investigated the bid-rigging case and then reached a settlement on civil and criminal issues with the Korean oil refinery companies in light of the fact that the US government was the victim of the bid-rigging.

The KFTC also conducted an investigation of the same conduct, in which the accused actively made assertions that sanctions had already been imposed in the U.S. Taking into account that the agreement in question and the execution thereof took place in Korea, and the oil for the USFK, which was the target of the collusion, was supplied and consumed



within Korea, the KFTC issued a separate corrective order, notwithstanding the DOJ's previous sanctions. However, the KFTC considered the fact that the involved companies had already paid a substantial amount of civil compensation and criminal fines to the DOJ and did not impose any penalties or file a criminal complaint with the Prosecutors' Office.

- d. Sanctions against purchase price fixing over steel scrap by seven steelmakers Over the period of nearly eight years from 2010 to 2018, seven steelmakers agreed on fixing the variance in the base purchase price of steel scrap (scrap iron), a raw material for steel products such as rebar, and the timing of such variance, and carried out the agreement.

The KFTC decided to impose a fine in the amount of KRW 300.083 billion in total, along with corrective orders (an order to prohibit such violations in the future, an order to prohibit information exchange, and an educational order) upon the seven steelmakers that had colluded to fix the base price for purchasing steel scrap.

## **25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?**

Recently, the Prosecutors' Office initiated an independent bid-rigging investigation against the Korean and overseas pharmaceutical companies based on the data provided by the PPS (even though there was no indictment by the Prosecutors' Office or a cartel investigation by the KFTC). The Prosecutors' Office ultimately prosecuted the corporations at issue, as well as the relevant CEO, executives, and employees (on the charge of violating the MRFTA and interfering with the tender process). This is a representative case where the Korean Prosecutors' Office pre-emptively investigated and prosecuted the cartel conduct without the KFTC's preceding investigation into the cartel; rather, the Prosecutor General exercised its right to request the KFTC to file a criminal charge against the corporation for the violation of the MRFTA. For reference, upon receipt of the request to file a criminal charge from the Prosecutors' Office, the chairperson of the KFTC is obliged to file a criminal charge against the relevant business entity.

In addition, as mentioned under Section 16, the Prosecutors' Office signed an MOU with the DOJ to strengthen cooperation in criminal enforcement against grave unfair trade practice violations that occur cross-border, such as in the case of international cartels.

In this regard, it is expected that the Prosecutors' Office will continue to make efforts in taking the initiative to conduct cartel investigations by investigating cartels between Korean companies as well as international cartels involving foreign companies, in a proactive and pre-emptive manner.

## **26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**

One of the key expected developments is greater criminal penalties for individuals who participate in collusion. In Korea, only fines were generally imposed on companies that participated in collusion, and criminal sanctions were rarely imposed on individuals (executives and employees of the companies) who participated in collusion. However, recently, the Prosecutors' Office established a policy of actively pursuing criminal prosecution against not only corporations, but also individuals involved in collusions. In accordance with such policy, the Prosecutors' Office has actively undertaking its enforcement tasks, including by conducting a search and seizure at the offices of steel companies involved in collusion as per the criminal complaint lodged against them by the KFTC and, upon identifying evidence of senior employees' involvement in collusion beyond those already reported by the KFTC, requesting the KFTC to file additional criminal complaints.

In addition, it is expected that the monitoring of collusion based on information exchange will continue as the amended MRFTA came into effect. Among the recent amendments to the MRFTA, the key amendments on cartel are as follows:

1. Information exchange (e.g. information on price) between competitors resulting in restriction of competition in the market has been added as a form of collusion.
2. Legal ground has been established for the presumption of collusion when there are identical or similar changes in competitive variables such as price – meaning, when (1) there exists external conformity in the behaviours of competitors and (2) the



information necessary for such conformity has been exchanged, collusion for the relevant competitive variable may be presumed.

3. Among the six original grounds for exemptions to collusion (Industrial rationalization, research and technical development, recovery from economic recession, industrial restructuring, rationalization of transaction terms, and improvement of competitiveness of SMEs), three (industrial rationalization, recovery from economic recession, and industrial restructuring), have been integrated into "industrial restructuring for recovery from economic recession."

In accordance with the above amendments to the MRFTA, the KFTC amended the Cartel Review Guideline and enacted the Information Exchange Guideline. As such, there is a need for companies to be more cautious in exchanging information with competitors.

The details of the regulation on information exchange are as follows:

#### **[Concept of Information Exchange]**

A company directly or indirectly "informing" its competitor of the price or production volume constitutes information exchange, regardless of how such information is transferred (e.g. verbal exchange, post mail, phone, etc.), including communication through an intermediary such as business associations.

However, information exchange is not established when a business association collects certain information from

its member businesses but does not transfer the information to the member businesses. Further, disclosing or publicizing the information on a medium accessible to anyone (e.g. daily newspaper) is not considered information exchange subject to the regulation.

#### **[Scope of Unlawful Information Exchange]**

For information exchange to be found unlawful, there must be (i) an "agreement" between competitors to exchange "competitively sensitive information," (ii) resulting in unlawful restriction on competition in the market, (iii) without efficiency enhancement effect that exceeds the anti-competitiveness of the information exchange.

Not all information exchange is prohibited; only when information relating to price, production volume, cost price, output, inventory, and sales volume, and transaction or payment terms, as prescribed under the regulation, is exchanged in accordance with the agreement among competitors, resulting in restriction on competition in the market, such exchange is considered unlawful.

#### **[Presumption of Information Exchange Agreement]**

A collusive agreement is presumed (i) when there is external conformity of competitive variables (e.g. price) among competitors, and (ii) "exchange of information necessary" to cause such external conformity. However, the company presumed to have engaged in such a collusive agreement may negate the presumption by proving that the external conformity is not a result of an agreement.

## **Contributors**

**Boyen Kim**  
Partner

[boyen.kim@bkl.co.kr](mailto:boyen.kim@bkl.co.kr)



**Junyeun Cho**  
Partner

[junyeun.cho@bkl.co.kr](mailto:junyeun.cho@bkl.co.kr)



**Keewon Shin**  
Foreign Attorney

[keewon.shin@bkl.co.kr](mailto:keewon.shin@bkl.co.kr)

