

**2017 ICN Cartel Workshop - Mini-Plenary #9:
SANCTIONS FOR COMPETITION LAW INFRINGEMENTS**

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I. General

1. Can your NCA impose sanctions or does it have to refer the case to a governmental body or to a judicial court?

KFTC(Korean Fair Trade Commission) can itself impose monetary sanctions for contraventions of the Competition law provisions of the “Monopoly Regulation and Fair Trade Act(hereinafter ‘MRFTA’)” without having to refer the case to another body. Potential criminal sanctions and debarment are applied by other bodies.

II. Monetary sanctions on companies:

2. Are monetary sanctions on companies established as a maximum percentage of the company’s turnover or as a maximum lump sum?

KFTC may impose a surcharge within the limits not exceeding the amount equivalent to 10/100 of the related turnover. In cases of an absence of the turnover, a surcharge of not exceeding two billion KRW may be imposed.

3. Is there a standard method for calculating sanctions, and if so, is this method public?

KFTC has a somewhat mathematical method of setting penalty surcharges, and it is open to public.

4. What role is attributed in the determination of the amount of the fine to (a) the value of sales of the company in the market to which the infringement relates; (b) total turnover of the company; (c) the fact that the company belongs to a group (parental liability)?

When we calculate fines, firstly we take into consideration the related turnover which incurred from selling goods or services during the period of violation. The fact that the company belongs to a larger corporate is not taken into account in the process of calculating penalty surcharges.

5. What other factors are taken into account when determining the amount of the fine?

We take some various factors into consideration; gravity and duration of infringements, frequencies of violation, incitement (deliberateness or negligence) of violation, joint market share of the infringing companies, and cooperation with KFTC etc.

6. Are leniency and/or settlement reductions foreseen?

Undertakings which applied for leniency program can be exempted from corrective measures including surcharges or can get maximum 50% reduction if they satisfy the whole requirements prescribed in MRFTA. But settlement is not applicable to Cartel violations.

7. Does the fact that a company has a compliance program affect the level of the sanction?

If the violation is considered to be occurred by unexpected circumstances even if the company paid enough attention in order to prevent such violation, KFTC could mitigate the surcharges in accordance with the Notice on Specific Criteria for the imposition of Penalty surcharge. However, as the Notice being revised in December of 2016, KFTC does not take into account such circumstances any longer.

8. Does your NCA explain in detail how the fines have been calculated in each case?

In the Statement of Objection, KFTC is supposed to explain broadly how KFTC calculates fines. Afterwards, in the final written decision, KFTC explains in detail how the surcharges were calculated.

III. Other types of sanctions on companies:

9. Independently of whether national law defines it properly as a sanction, is there a provision of debarment of companies from public contracts when they infringe competition law?

Based on the provision of 'Act on contracts to which the state is a party', Public agencies can place restrictions on qualification for participation of inappropriate business entities in a tendering procedure for a period not exceeding two years.

Undertakings which participated in bid-rigging cartel are naturally included in the category of inappropriate business entities.

10. In case it does exist, is debarment applicable when the company incurs in any competition law infringement or only in particularly grave infringements (e.g. cartels or bid rigging cases)?

Debarment is only applied in bid-rigging cases. KFTC may notify the ordering agency of the undertakings which participated in bid rigging. Then, the ordering agency can restrict the qualification of participated undertakings.

11. Are there criminal sanctions applicable to companies for competition law infringements (i.e. do legal entities have criminal liability)?

Criminal sanctions are applicable to both companies and individuals. KFTC shall file a complaint to the Prosecutor General for criminal charges, where it deemed that the degree of violations is obvious and serious from an objective point of view.

Apart from being an infringement of competition law, bid rigging may constitute as well a criminal offence under the Korean Criminal Act.

12. Are leniency and/or settlement reductions —in case they exist— also applicable to debarment and/or criminal sanctions?

As noted in question 6, penalty surcharges and corrective measures may be exempted or mitigated according to the leniency program. However, debarment and criminal sanctions are applied by other bodies, so other bodies can sanction the violator even if KFTC does not notify or refer the leniency applicant to them.

IV. Sanctions on individuals:

13. Can employees/managers be sanctioned for competition law infringements committed by their company?

If the representative person or an agent, employees or any other person working for a juristic person or individual shall be punished by fine prescribed in the relevant provisions: however, the same shall not apply where the juristic person or individual has not neglected to exercise due diligence and supervision for the relevant duties in order to prevent such violation.(Art.70)

14. Are sanctions on individuals limited to monetary sanctions or is disqualification foreseen as well (as either an administrative or criminal sanction)? Can individuals be criminally indicted for competition law infringements?

Individuals can be criminally indicted for competition law infringements. KFTC shall file with the Prosecutor General the complaints where it is deemed that such violations may substantially hamper competition.(Art.71) Cartel violator can be sentenced to jail term of ≤ 3 years or fine of ≤ 200million KRW. In a specific business sectors, the violators can be disqualified.

15. In case they are foreseen, are sanctions on individuals limited to certain types of employees/managers?

The representative person or an agent, employees or any other person working for a juristic person or individual shall be punished.

16. Do certain additional requirements have to be met to impose a sanction on an individual (e.g. a particular involvement in the infringement) or is the infringement by the company sufficient for the individual to be sanctioned for it?

see answer to Q.13, 15.

17. Are leniency and/or settlement reductions on sanctions on individuals —in case they exist— also applicable to debarment and/or criminal sanctions?

MRFTA does not clearly stipulate whether leniency applicant can be exempted from debarment or criminal sanctions, but KFTC does not refer the applicant individual to other bodies for punishment.

V. Judicial review:

18. Can the sanctions imposed by the NCA be reviewed by judicial courts?

If a person intends to file a lawsuit against any measure taken by the KFTC, he/she shall do so within 30 days from the date of receiving a notice of disposition.(Art.54)

19. Is the role of the courts limited to reviewing the decision of the NCA or do courts have full jurisdiction, and therefore they can decide the opportune sanction in each case, and even increase the sanction imposed by the NCA.

The Seoul High Court shall have exclusive jurisdiction over any lawsuits and can review whether the measures taken by KFTC are opportune. The Court cannot increase the sanction imposed by KFTC.

20. In practice, how often do courts review the level of the sanction imposed by the NCA.

When looking back for the past 6 years, there are about 12 ~ 20% rates of appeal to the courts.

	2010	2011	2012	2013	2014	2015
Cases with corrective measures(a)	355	458	452	382	348	511
Cases of lawsuits(b)	45	56	60	46	73	91
Rate(=b/a*100)	12.7	12.2	13.3	12.0	21.0	17.8

VI. Damages

21. Are follow-on claims for damages usual in your jurisdiction?

Most of the public ordering agencies file lawsuits for damage in cartel cases. However, in private sectors, damage claim lawsuits are not usual.

22. If so, does the NCA (a) take into account the potential claims when setting the level of the sanctions? (b) Intervene in the process of awarding damages?

KFTC does not take into account the potential damage claims when setting the level of the sanctions, neither intervene in the process of awarding damages. However, there are provisions about 'liability for damages' in MRFTA. So any affected person can claim for damage at the Court relying on either the provision of MRFTA or that of a civil law.

VII. Final

23. Briefly describe any specificity and/or recent development regarding sanctions in your jurisdiction that you consider particularly relevant.

Cartel acts shall be prosecuted by a public action only after a complaint is filed by KFTC. So, there have been live debates over abolishing KFTC's exclusive rights.