

Korean Supreme Court Hands Down a Seminal Judgment on Conditional Rebates

Korea's Supreme Court handed down a seminal judgment in the field of competition law on January 31, 2019 (the "Judgment") essentially endorsing the Korean Fair Trade Commission's groundbreaking decision in December 2009 penalizing Qualcomm for discriminatory SEP (standard essential patent) licensing and conditional modem chip rebates (the "First Qualcomm Dispute"). For the KFTC, this was a landslide victory after 10 years of legal battle among the nation's top antitrust practitioners. In the First Qualcomm Dispute, KFTC was represented by Gee Hong Kim of Jipyong LLC. Another KFTC decision against Qualcomm is currently pending before the Seoul High Court (Case No. 2017Nu48, the "Second Qualcomm Dispute").

Case Background

Between 2002 and 2008, Qualcomm was a dominant player in the mobile communications industry with majority of SEPs in the CDMA2000 technology. It also dominated the mobile components market, supplying nearly 100% of modem chips and RF chips that go into handsets. The KFTC saw that Qualcomm maintained market dominance by (1) imposing higher royalties for CDMA2000 SEPs when licensing to Korean handset manufacturers such as Samsung and LG Electronics if they used modem chips made by Qualcomm's competitors ("Discriminatory Royalties"); and (2) providing huge rebates if the handset manufacturers purchased Qualcomm's modem chips beyond certain quantities or percentages ("Conditional Rebates").

The KFTC concluded that Qualcomm's practices effectively restrained competition and imposed a fine of roughly USD 240 million, which was then the largest fine in the KFTC history. It was also a pioneering decision among the world's competition authorities penalizing Qualcomm's abuse of market power. Qualcomm appealed the KFTC decision to the Seoul High Court, but to no avail. The Supreme Court, too, decided Qualcomm violated Korea's competition law and confirmed the KFTC's decision for the most part.

Supreme Court Judgment

The Supreme Court affirmed that Qualcomm abused its market dominant position through: discriminatory SEP licensing practices; and (2) conditional rebates to the effect of stifling market entry and competition. The Supreme Court did not agree, however, with the KFTC's finding of illegality for a certain rebate period for RF chips – which is not material to the ultimate outcome of the First Qualcomm Dispute.

Implications of the Judgment

The Judgment is very significant for at least two following reasons. One, it is Korea's first-ever Supreme Court decision discussing the anticompetitive nature of conditional rebates and instructing what standards to be used by future courts. The Supreme Court held that Qualcomm's Conditional Rebates constituted the prohibited act of "exclusive dealing" regulated under Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act. Rejecting Qualcomm's argument that there is no exclusive dealing if transaction with competitors is not prohibited, the Supreme Court ruled that exclusive dealings exist even where transacting with competitors would come with disadvantages. The Court reasoned that determining the unlawfulness of conditional rebates does not necessarily require proving that "the price imposed by the market dominant actor is lower than the price imposed by an equally efficient competitor" from an accounting/economic perspective.

"It is difficult to presume that an act of offering conditional rebates in and of itself is unlawful as rebates may benefit the counterparty in the short term, and the resulting reduction in cost may benefit the consumers. ... Where rebates are offered retroactively after fulfillment of a condition, however, the more steeply the benefit accumulates in relation to increases in the quantities purchased, the effect of limiting/preventing any change in the purchase becomes stronger. ... Such rebate structure is completely different from predatory pricing in the way anticompetitive effects arise, and as such the test for whether predatory pricing is unlawful cannot be applied to conditional rebates."

In so ruling, the Korean Supreme Court adopted a similar reasoning of the European Court of Justice in *Michelin II*, *British Airways*, and *Tomra*. However, by allowing that businesses "may, using economic analysis, impeach the KFTC's proof regarding the effective binding force created by conditional rebates" the Korean Supreme Court left open a doorway for ACE Test (As-Efficient Competitor Test) used by U.S. authorities and courts.

Second, the Judgment represents the first time the Korean Supreme Court considered the issue of FRAND violations by a SEP holder. However, in this instance, the Supreme Court refrained from directly opining on the issue, finding a way to uphold the KFTC's decision without referencing FRAND requirements, presumably mindful of on-going legal proceedings in other countries on the issue of FRAND violations.

If you have any questions or desire further details regarding this seminal decision by Korea's Supreme Court, please contact:

Antitrust & Competition Practice Group



Gee Hong KIM
Partner
Tel: +82-2-6200-1720
Email: ghkim@jipyong.com



Han Sa SONG
Partner
Tel: +82-2-6200-1734
Email: hssong@jipyong.com



Byung Joo LEE
Partner
Tel: +82-2-6200-1765
Email: bjlee@jipyong.com



Poom JANG
Partner
Tel: +82-2-6200-1766
Email: pjang@jipyong.com