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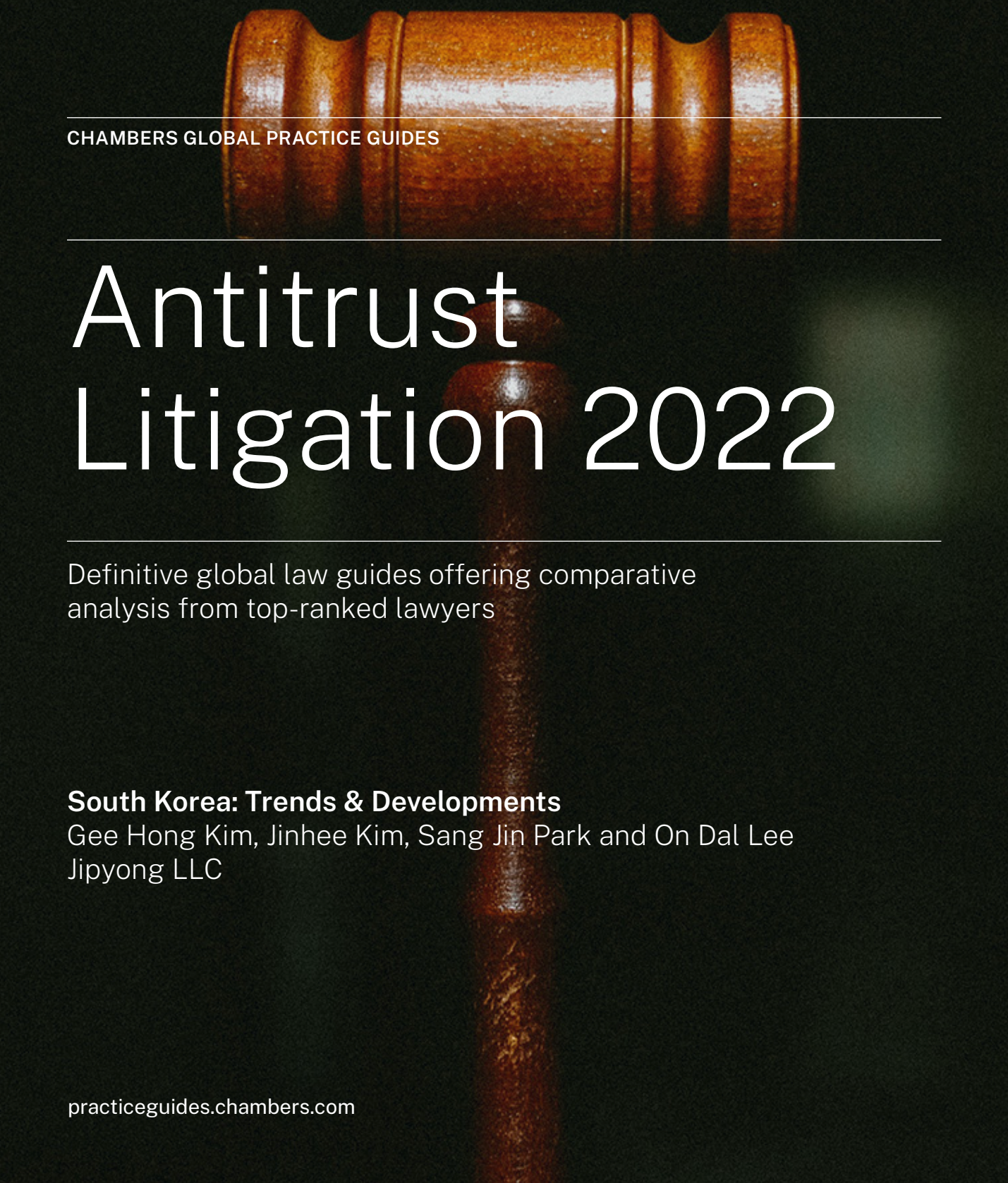

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Antitrust Litigation 2022

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South Korea: Trends & Developments

Gee Hong Kim, Jinhee Kim, Sang Jin Park and On Dal Lee
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Trends and Developments

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Recent Developments in Antitrust Litigation in South Korea

Antitrust disputes related to tech companies

In tandem with the growing size and significance of the information and communications technology (ICT) industry in Korea, regulatory actions against tech companies and follow-on litigations have proliferated. Antitrust disputes related to tech companies may be generally categorised as:

- disputes relating to smart-device manufacturers (such as the so-called Qualcomm II case and the Google Android Fork case); and
- disputes relating to online platforms (such as the Coupang Price Matching System case and the Naver Shopping/Real estate/Video cases).

The former category mainly consists of cases involving global corporations, many of which are undergoing investigation by foreign competition authorities or in the midst of foreign private litigation in regions such as the US and the EU for the same or similar conduct. The latter category usually involves companies operating mostly in Korea, but the importance of cases in this category is not geographically confined. These cases may be influenced by foreign legal principles and jurisprudence in similar cases, and Korean rulings and precedents can also impact the rulings of foreign competition authorities or courts.

Another noteworthy development in recent years is that interested third parties, such as competing businesses or transacting counterparts, are taking an increasingly active role as intervenors in various proceedings.

Qualcomm II case

One of the most significant antitrust cases in recent times is the so-called Qualcomm II case. In this case, the Korea Fair Trade Commission (KFTC) investigated and found that Qualcomm:

- interfered with other businesses' activities by abusing its dominant market position in the global mobile communication standard-essential patent (SEP) licence market and the modem chipset market; and
- imposed unfair conditions on its transacting counterparts by abusing its bargaining power. The KFTC issued a corrective order against Qualcomm and imposed a fine of approximately KRW1 trillion (KFTC Decision N 2017-025 dated 20 January 2017).

Qualcomm's conduct at issue included:

- refusing to grant the licence for Qualcomm's SEP to competing modem chipset manufacturers or granting such licence only on a restricted basis (Conduct 1);
- requiring mobile phone manufacturers to execute modem chipset supply agreements along with patent licence agreements (Conduct 2); and
- requiring mobile phone manufacturers to enter into patent licence agreements that granted a blanket licence on all of Qualcomm's patents (including SEPs outside mobile communication as well as non-SEPs),

collecting a certain percentage of the net selling price of mobile phones as royalties, and imposing a cross-grant condition on mobile phone manufacturers that either granted Qualcomm licences for patents owned by the mobile phone manufacturers or preventing the mobile phone manufacturers from asserting certain patent rights against Qualcomm's customers who purchase Qualcomm's modem chipsets (Conduct 3).

Qualcomm appealed the KFTC's decision. Multiple competing businesses and counter parties, including Samsung Electronics (which withdrew mid-suit), LG Electronics, Apple (which withdrew mid-suit), Intel, MediaTek and Huawei, participated as intervenors siding with the KFTC. The Seoul High Court dismissed most of Qualcomm's claims. Regarding Conduct 1, the Seoul High Court found that, while Qualcomm's mobile communication SEP was consistent with the concept of "essential facility", Qualcomm could not be deemed to have restricted the use of such essential facility considering that competing modem chipset manufacturers continued to engage in the business of producing, supplying and/or selling modem chipsets. As to Conduct 3, the court found that the inclusive licence agreement, setting the percentage of royalties based on cell phone prices, and the cross-grant condition did not disadvantage counter parties or limit competition in relevant markets. Nonetheless, the Seoul High Court found all other decisions by the KFTC regarding the remainder of Conduct 1 and 2 as lawful, and that KFTC's remedies were appropriate, and it affirmed the imposition of a fine of approximately KRW1 trillion (Seoul High Court Decision 2017Nu48 dated 4 December 2019). Qualcomm appealed to the Supreme Court and the case is currently pending.

Similar disputes are expected to continue to arise. In January 2022, the KFTC issued an investigation report finding that Broadcom, a smart-device part manufacturer, coerced Samsung Electronics, a smart-device manufacturer, to enter into a long-term contract, which was deemed an unfair trade practice.

Google Android Fork case

The KFTC imposed a fine of approximately KRW22.5 billion and a corrective order on Google, finding that it harmed innovation and interfered with market entry of competing operating systems (OS) by preventing device manufacturers such as Samsung Electronics from manufacturing devices with Android Fork OS installed (KFTC Decision N 2021-329 dated 30 December 2021).

The conduct at issue was Google requiring device manufacturers to sign an anti-fragmentation agreement (AFA) as a condition precedent to entering into a play store licence agreement and a licence agreement for advance access to new Android source codes. According to the AFA, device manufacturers were prohibited from installing Fork OS in any of their launching devices, and they could not develop Fork OS themselves. The KFTC found that Google's act was an exclusionary practice with the effect of limiting competition in the mobile OS and other OS markets for smart devices. Thus, the KFTC concluded that the act constituted an abuse of dominant market position and unfair trade practice.

Google appealed the KFTC's decision, and the suit is currently pending before the Seoul High Court.

Coupang's lowest price matching system case
Coupang, an e-commerce retailer headquartered in the US, has active operations in Korea. Coupang operated a "lowest price matching system" (the "System"), which immediately lowers the selling price of products listed on Coupang to match the lowest price available online whenever a competing online shopping mall lowers its selling price. The KFTC found that Coupang demanded its suppliers to raise the prices of products sold on rivalling e-commerce platforms to minimise its loss of margin resulting from the System and that this constituted an act of unfair interference with business activities by abusing a stronger bargaining position. As such, the KFTC imposed a corrective order as well as a fine of approximately KRW3.3 billion (KFTC Decision N 2021-237 dated 23 September 2021).

Coupang appealed the KFTC's decision, and the suit is currently pending before the Seoul High Court.

Naver's shopping, real estate and video cases
Naver is an internet portal operator and e-commerce platform operating mainly in Korea. In January 2021, the KFTC imposed three different sanctions against Naver. Naver appealed in all three cases.

The first case involved Naver's online real estate information platform. Naver provided a "verified offerings" service confirming the authenticity of real estate sale information. In doing so, it included a provision in its partnership contracts with real estate information providers preventing them from sharing information regarding verified offerings to third-party online real estate information platforms. The KFTC imposed a corrective order and a fine of approximately KRW1 billion, finding that Naver's conduct was an abuse of dominant market position and unfair trade practice (KFTC Decision N. 2021-019 dated 20 January 2021).

The second case related to Naver's video search services. Naver, while operating its own video service "Naver TV", offered videos provided by third parties to users through its search service. In 2017, Naver revised its video search algorithm and, as a result, increased the types of property information that could affect the exposure ranking, increasing the importance of certain property information such as "keywords" in the exposure ranking. The KFTC found that Naver's failure to inform other video providers of the revised algorithm increased exposure to Naver TV videos compared to others and that this constituted unfair trade practice by unfairly influencing customers. As such, the KFTC imposed a corrective order and a fine of approximately KRW300 million (KFTC Decision N 2021-021 dated 25 January 2021).

Lastly, the third and largest case concerned Naver's online shopping services. The KFTC concluded that, while exposing products from other shopping malls through its "Naver Shopping" service, Naver's alteration of the Naver Shopping search algorithm increased the exposure of products from shopping malls using its Smart Store and decreased the exposure of products from competing open markets (commerce platforms). The KFTC found that this act constituted discriminatory treatment of trading conditions with respect to counter parties, representing an abuse of dominant market position and unfair trade practice. Thus, the KFTC imposed a corrective order and a fine of approximately KRW26.6 billion.

Margin squeeze
Whether the practice of so-called "margin squeeze", which is subject to regulation under

the Monopoly Regulation and Fair Trade Act of Korea (MRFTA), has long been a topic of debate. This is because although the MRFTA does not expressly prohibit margin squeeze as an anti-trust violation, the MRFTA's prohibition against abuse of a dominant market position is similar in nature and purpose to Article 102 of the Treaty on the Functioning of the European Union.

In this regard a recent Supreme Court holding is noteworthy. Korea's Supreme Court held, in a recent case involving messaging services for corporate use, that margin squeeze can be illegal as an act of abuse of a dominant market position.

Companies offering messaging services for corporate use, such as Infobank, provided a service sending consumers text messages related to financial transactions by contracting with mobile carriers. As the corporate messaging service market expanded, however, mobile carriers started their own messaging services for corporate use. The issue was that the price of text messaging services for corporate use offered by mobile carriers to companies providing messaging services for corporate use was higher than the price of those sold directly to their clients, including financial institutions.

The KFTC found that the conduct by the mobile carriers constituted an abuse of a dominant market position and imposed sanctions (KFTC Decision N 2015-050 dated 23 February 2015). However, the Seoul High Court repealed the KFTC's decision ruling that, as the price of the corporate messaging services being offered by mobile carriers was set higher than the carriers' cost of supplying such services, it cannot be considered as conduct "supplying [services] at a lower price than the normal transaction price" (Seoul High Court Decision 2015Nu38278 dated 31 January 2018; Seoul High Court Decision 2015Nu38131 dated Jan. 31, 2018).

However, the Supreme Court reversed the lower court's ruling, finding that, under Article 9 Section 5(1) of the Enforcement Decree of the Act, "normal transaction price" is distinguishable from costs. The Court also found that the "normal transaction price" can be used to determine whether there were any abusive exclusionary acts related to the price of a market-dominant business that could manifest as predatory pricing or margin squeeze. The Supreme Court remanded the case to the lower court, holding that if a market-dominant business in a vertically integrated upstream market is likely to exclude competitors by unfairly supplying goods or services at a lower price than the normal transaction price and engaging in margin-squeezing activities by way of lowering the retail price of finished products in the downstream market, such an act may constitute abuse of market-dominant position (Supreme Court Decision 2018Du37700 dated June 30, 2021; Supreme Court Decision 2018Du37960 dated 30 June 2021).

Criminal litigation

Increasing requests for criminal charges by the Ministry of SMEs and Startups

The MRFTA provides that the prosecutors' office (PO) can only prosecute violations of the MRFTA upon the filing of a criminal charge by the KFTC. However, the Minister of SMEs and Startups may request for such criminal charges to be filed if the Minister determines that violation of the MRFTA has harmed small businesses.

Although the Minister's right to request the filing of a criminal charge has only been exercised in exceptional cases, the number of such requests has recently been increasing. Out of all the cases in relation to which the KFTC decided not to file

criminal charges during the three-year period from 2019 to 2021, 60 were evaluated by the Ministry of SMEs and Startups, and about ten out of those 60 cases were determined to have had significant impact on SMEs and resulted in criminal charges. A representative case is that of the food delivery platform Yogiyo, which was prosecuted for its impact on SMEs by forcing restaurants using the platform to agree to a most favoured nation (MFN) clause in November 2020. In other words, the possibility still remains for individuals or companies to be criminally charged even if no decision to file a charge was initially made by the KFTC if their conduct is deemed to have had an impact on SMEs.

Criminalisation of investigation interference

The MRFTA prohibits interfering with KFTC investigations by exercising physical force, concealing or disposing of materials, etc. While such acts of investigation interference were only subject to administrative fines in the past, they became criminally actionable following the MRFTA's amendments in 2012 and 2017. As such, the number of criminal cases related to investigation interferences has recently been rising.

For the first time after the amendment, the KFTC filed a criminal charge against an executive of Apple Korea for interfering with a KFTC investigation in an incident where that executive blocked the entry of investigators to the site. However, in April 2022, the PO declined to indict the executive on the ground that the investigator had failed to present a public official ID and notify the executive that he was performing official duties.

In February 2022, in a case where a steel company employee shredded work notebooks and diaries as well as concealing relevant documents while the KFTC was conducting a site investigation, the employee was convicted of the offence of interfering with an investigation for the first time since the amendments.

Introduction of criminal leniency programme

In December 2020, the PO implemented a criminal leniency programme separate from the KFTC's leniency programme. The KFTC programme currently exempts leniency applicants from criminal charges. On the other hand, the criminal leniency programme exempts parties from indictment or reduces sentences if the applicant voluntarily reports cartel conduct to the PO.

However, corporations often find it confusing that there are two different leniency programmes run by different organisations. Since the newly introduced criminal leniency programme is a completely separate programme from the existing KFTC leniency programme, the two organisations may differ in how leniency applications are ranked in the same case. For now, businesses wishing to apply for leniency are advised to apply to both authorities at the same time. Especially in the case of bid rigging, criminal leniency is crucial as the PO can investigate and indict parties without the KFTC filing a criminal charge.

Lawsuits related to requests to inspect information

In December 2018, the Supreme Court held that a KFTC decision rejecting an examinee's request to inspect attachments to the KFTC investigation report without valid reason is illegal and must be revoked (Supreme Court Decision 2015Du44028 dated 27 December 2017). Following the holding, lawsuits requesting inspection of information during the KFTC's investigations and seeking to revoke the KFTC's decisions rejecting such requests are on the rise.

The KFTC investigation of the Harim Group, a food product company, was even delayed for approximately two years due to the Harim Group's two lawsuits appealing the KFTC's rejection of its request to inspect documents. The Harim Group prevailed in the lawsuit requesting inspection of certain attachments to the KFTC investigation report that were classified as confidential by the KFTC (Seoul High Court Decision 2019Nu30500 dated 16 May 2019). Harim filed a second lawsuit when the KFTC again refused to disclose some of the materials and partially prevailed (Seoul High Court Decision 2020Nu31035 dated 13 January 2021).

Recently, Google, currently being investigated on charges that it forced gaming companies to release applications only on Google's own app market, the Play Store, filed a lawsuit appealing the KFTC's decision which rejected Google's request to inspect attachments to the KFTC investigation report. In this lawsuit, the KFTC's current practice of a "restricted access system", which was introduced in December 2020, is also being challenged. This system only allows access to a very small number of people including attorneys in the "data room" when the inspection concerns confidential information that includes other companies' trade secrets. Whether excessively limiting the number of persons that can access the "data room" infringes on an examinee's right to defend is a key issue in this case.

Director liability regarding cartel activities

In November 2021, the Supreme Court found that the CEO of a company was liable for damages to the company for failing to monitor/supervise cartel activities (Supreme Court Decision 2017Da222368 dated 11 November 2021). In this case, even though the CEO had not directly participated in cartel activities and was not aware of them, the Supreme Court found that the CEO was liable for damages for his neglect in violation of his duty to monitor when there were reasons to suspect that the conduct of another director was illegal. The Supreme Court held in particular that the duty to monitor cannot be avoided just because the company is a large corporation with specialised division of labour and that duties to monitor/supervise must be carried out by building a reasonable reporting system as well as an internal control system.

This is the first case that found a director who did not participate in the cartel activity liable for damages, and it is expected that there will be many more similar claims for damages in the future. The criteria for determining whether the monitoring and supervision obligations are fulfilled are yet to be developed and established.

Vitalisation of civil litigation

Most of the lawsuits related to the MRFTA to date have been administrative proceedings appealing the KFTC's decisions, and private litigation was rare. However, recent amendments to the MRFTA provided a number of ways that could help private entities resolve issues relating to violation of the MRFTA via civil litigation. It is expected that private lawsuits related to fair trade issues will increase in the coming years for the following reasons.

First, it is now possible to demand treble damages for illegal cartel activities or retaliatory actions through the punitive damages system introduced and implemented in September 2019. While it had previously been impossible to seek more than the actual damages incurred under special provisions under the Act, the amendment allows for punitive damages in consideration of the seriousness of illegal cartel activities and retaliatory actions.

For damage claims, it is now also possible to request that the opposing party produce materials necessary to prove or estimate the amount of damages. If the party in possession of such materials refuses to follow a production order without justifiable grounds, the requesting party's related claim may be accepted as true. As such, it is now easier for aggrieved parties to prove damages against a corporation.

It is now also possible to seek injunctive relief requesting prohibition of unfair transactions. In the past, a damaged party could only pursue a claim for damages, while prohibition against the infringing conduct could only be achieved by filing a report to the KFTC for a cease-and-desist order. Now, the damaged party can directly request such an order through the court.

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