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SANCTIONS IN ANTITRUST CASES

Contribution by Korea

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SANCTIONS IN ANTITRUST CASES

-- Korea --

1. Overview

1. Measures against the violation of Korea's Monopoly Regulation and Fair Trade Act (Hereinafter the "MRFTA") are mainly taken in three ways: administrative sanctions, civil remedies and criminal sanctions. First of all, in case of administrative sanctions, there are corrective order on which a certain commission or omission is ordered to the offender (e.g. cease order, stock disposal, disclosure of corrective order), and penalty surcharges. Secondly, civil remedy is the one that the victim is indemnified of any damage or loss arisen from the violation of the MRFTA, which is not yet widely used in Korea. Last measure against the violation of law is criminal sanction, namely imprisonment or fines. This is the most powerful exertion of governmental authority, which can deprive someone of corporal liberty or possessions.

2. Among them, administrative sanctions are currently the main means of enforcing competition law in Korea, and criminal punishment is complementarily used. This is largely due to the uniqueness of the competition cases. When it comes to competition cases, the illegality is not simply determined by the exterior side of the act itself, but is confirmed after going through the market and economic analysis. In other words, principle of legality requires the composition of offence and punishment thereof to be clearly stipulated in the law, but the competition law stipulates the composition of offence as undue effects (anti-competitiveness, restriction of fair trade), which requires economic analysis in addition to the exterior side of the act. For this reason, criminal sanctions are sometimes not suitable to be enforced for the violation of the MRFTA. Thus, the violation of the MRFTA is mostly regulated by administrative sanctions and complementarily by criminal sanctions.

2. Penalty surcharges

2.1 *Concept and types of penalty surcharges*

3. A penalty surcharge is a monetary penalty imposed upon the violator of administrative duties. In Korea, the penalty surcharge system was first introduced with the enactment of the MRFTA to correct the measures in case of non-compliance of the price reduction order as remedies against the abuse of market dominance. After the introduction, through a series of revisions, penalty surcharge policy has been implemented to almost all violations including cartels. Also, penalty surcharge system is being introduced in Acts that are managed by the KFTC other than the MRFTA such as Labelling Act, Subcontracting Act, Franchise Business Act and Distribution Industry Act.¹

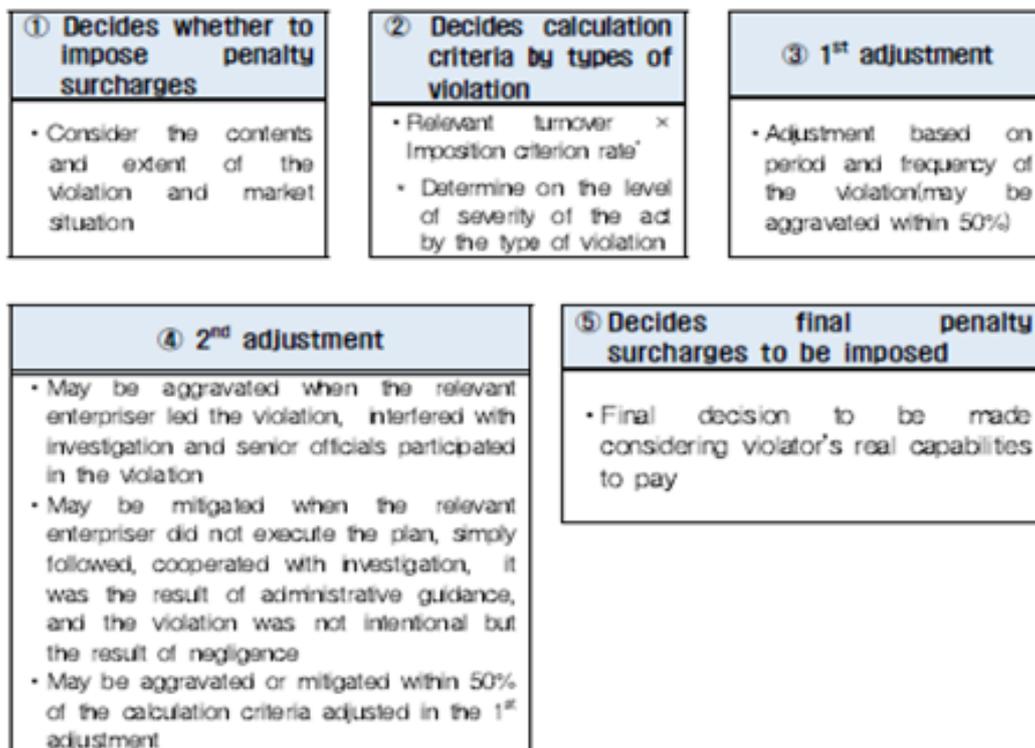
¹ What is described below mostly deals with penalty surcharge system under the MRFTA. However, penalty surcharge system under other Acts managed by the KFTC has a similar structure with that of under the MRFTA.

4. A penalty surcharge can be categorized into three types according to its characteristics: first, the penalty surcharge that deprives the offender of the profits he/she gained through violating the duties, so as to secure fulfilment of obligations (retrieval of undue profits), and furthermore that sanctions (administrative sanction) such conducts; secondly, a surcharge imposed on the offender instead of suspending the business (substituting the business suspension), when a person who runs a business which a majority of the people use or has a grave influence on the nation or society violates administrative rules; third, fines that are not actually called as surcharge in the law but that can actually be considered similar with surcharge based on the purpose and nature such as dues for permitting emission. Of the three, imposing surcharge based on the MRFTA shares the characteristics of administrative sanctions and retrieval of undue profits². Depending on different situations, sometimes either administrative sanctions or retrieval of undue profits is more emphasized.

2.2 Structure of imposing penalty surcharges based on the MRFTA

5. Penalty surcharges according to the MRFTA are imposed on enterpriser or enterprisers' organization. The process the KFTC goes through to determine the penalty surcharges to be imposed is as follows. First, the KFTC decides whether to impose penalty surcharges; second, the KFTC decides calculation criterion by types of violation; third, it makes first adjustment and second adjustment; and finally decides the amount of penalty surcharges to be imposed. When calculating the amount of penalty surcharges, 1) contents and extent of the violation, 2) period and frequency of the violation, and 3) the scale of profits gained by the violation should all be taken into consideration. (Act article 55-3 paragraph 1).

How to impose penalty surcharges



² The Constitutional Court also maintains its position that penalty surcharges based on the MRFTA are administrative sanctions in nature, but also have element of retrieving undue profits (Court ruling 2003.7.24. 2001HeonGa25)

2.3 *Decision to impose penalty surcharges*

6. When deciding whether to impose penalty surcharges, contents and extent of the violation should first be taken into account and market situation should be comprehensively considered. Also, 1) when the violation largely undermines free and fair competition, 2) when it has a serious influence on consumers, 3) when undue profits have been generated due to the violation, and 4) when the violation akin to but not exactly conforms to (1) to (3) falls under the provisions of notification set forth by the KFTC, penalty surcharges shall be imposed in principle.

2.4 *Calculation criterion by types of violation*

7. Calculation criterion categorizes the violation into “violation with low-severity”, “violation with severity”, and “violation with high-severity” based on the contents and extent of the violation. After categorizing, imposition criterion rate or imposition criterion amount is applied that has been determined based on the level of severity per violation type. Calculating relevant turnover is the first step of determining the calculation criterion. Relevant turnover refers to the total sales of relevant products or services in a particular trade sector generated by an offender during the violation period. Relevant turnover is decided by considering the scope of relevant products, amount of turnover, the period of violation, etc., and each scope shall be determined individually per violation type in detail.

2.5 *1st and 2nd adjustments*

8. After calculation criterion by type of violation has been determined, the first adjustment is made within 50% increase of the calculation criterion by considering the period and frequency of the violation (adjustment based on violation element). Specific criterion abides by the KFTC Notification on imposition of penalty surcharges.

9. The amount adjusted in the 1st adjustment phase is once again adjusted within 50% of that amount, taking into account whether the offender violated intentionally or by mistake, the characteristic and circumstances of the violation (aggravated or mitigated based on the violator elements). In case the offender led the violation, interfered with the investigation, repeated the violation, or the violation was participated by senior officials, then the surcharges may increase. When it is apparent that the offender simply followed, sincerely cooperated with the investigation, or made commitments on a voluntary basis, then the surcharges may be reduced. In the past, surcharges were reduced for those who design and manage the Compliance Program in an exemplary manner, but it had been abolished since Aug. 2014 after giving considerations to the original purpose of the CP, which is to prevent the law violation in the first place ³.

2.6 *Decision of the amount of penalty surcharges to be imposed*

10. When it is recognized that the calculation criteria adjusted in the second phase is too strict, which does not properly reflect the elements such as the ability to pay of the violator, the effects the violation has on the market, and other market or economic conditions or the scale of profits gained by the violation, then, the surcharges may be mitigated within 50% of the second adjusted criterion. In particular, when the violator significantly lacks the ability to pay, for example, when the impaired capital rate of the violator exceeds 50%, more than 50% of the adjusted surcharges in the 2nd phase can be reduced. Moreover, if it is recognized that the violator lacks the ability to pay surcharges such as when the violator is in the process of reorganization, then surcharges may be exempted. As such, the KFTC sufficiently considers the ability to pay of the violator.

³ However, the law separately stipulates that the surcharges shall be reduced within 10% when the violation occurred due to the inscrutable reasons despite the efforts to voluntarily comply with the law.

2.7 *Leniency Program*

11. Leniency Program was adopted in December 30, 1996 in order to enhance the effectiveness of the regulations against cartels by inducing cooperation of the insiders in regards to cartels. In Korea, the leniency program had not been widely used until the early 2000s. However, after it had been revised in 2005 so that the first leniency applicant can be totally and automatically exempted of surcharges and criminal prosecution, the number of leniency applications have skyrocketed and program has taken roots as the most important and effective method of detecting cartels.

12. In essence, the leniency policy offers companies involved in a cartel, which self-report and hand over evidence, either total immunity from or reduction of remedies and penalty surcharges, and exemption of criminal prosecution. (MRFTA Article 22-2) Certain requirements (MRFTA Enforcement decree Article 35) should be met in order to benefit from leniency program⁴. The KFTC's committee decides whether to grant leniency to applicants, and when an applicant applies for leniency, the examiner separately drafts an examination report to acknowledge the leniency applicant, and submits it to the committee. Committee then does deliberation and resolution in regards to the reduction.

13. Of all the applicants who were acknowledged to have met the conditions as a result of the committee's deliberation, the first applicant shall totally be immune from surcharges, and second applicant will be imposed of 50% reduced surcharges. As mentioned above, the deliberation and resolution process regarding the acknowledgement of the applicants are separately conducted with the original case. First, the committee decides the amount of penalty surcharges against the applicant of the original case. Afterwards, through the deliberation and resolution procedure on the separate leniency case, penalty surcharges of the relevant enterpriser shall be cancelled partially or entirely.

3. **Surcharges imposition status and objection**

14. In Korea, the competition authority enforces competition law mostly based on administrative sanctions such as corrective order and penalty surcharges just as many other countries. Accordingly, imposing surcharges against the violation of competition law is widely used. Below is the penalty surcharges imposed per type of violation over the last five years.

⁴ 1st applicant: 1) the first person to provide necessary evidence required to prove a cartel, 2) applied for leniency while the KFTC has not obtained information regarding a cartel, or demonstrated necessary evidence sufficiently to prove a cartel, 3) sincerely cooperate until the end of the investigation by disclosing relevant facts and submitting relevant documents, 4) promptly terminated its part in the activity.
2nd applicant: 1) the second person to provide necessary evidence to prove a cartel, the same applies as above.

Surcharges imposed per violation type over the past five years

| Violation type | | 2011 | 2012 | 2013 | 2014 | 2015 |
|-----------------------|---|-------------|-------------|-------------|-------------|-------------|
| Total amount | | 608,483 | 510,633 | 418,429 | 804,387 | 588,959 |
| | Total | 604,252 | 495,944 | 389,958 | 785,234 | 545,663 |
| MRFTA | Abuse of market dominance | - | 424 | - | - | 12,538 |
| | Concentration of economic power | 5,900 | 3 | 5,909 | 1,899 | 2,166 |
| | Cartels | 577,902 | 398,866 | 364,731 | 769,428 | 504,919 |
| | Violation of the enterprisers' organization | 240 | 836 | 714 | 1,193 | 1,745 |
| | Unfair trade activities | 20,210 | 95,815 | 18,604 | 12,714 | 24,295 |
| Others* | Total | 4,231 | 14,689 | 28,471 | 19,153 | 43,296 |

(Unit: 1 million won)

* Consumer Protection related Act, Subcontracting Act, Franchise Business Act, Distribution Industry Act

15. Enterpriser may appeal to paying penalty surcharge by filing an objection and administrative suit (incl. suspension of execution). Enterpriser shall file an objection within 30 days from the day it received the notification of the decision, and the KFTC shall conduct a re-hearing against the objection within 60 days. Like other administrative decisions, the execution of the KFTC's decision should not be suspended in principle even if a dispute has been raised. Therefore, when filing an administrative suit against the penalty surcharges imposition order, they usually file for suspension of execution as well. If 'damage beyond redemption' is recognized so that the application which filed for the suspension of execution is accepted, the execution may be ceased.

16. If the KFTC partially loses as a result of filing for cancellation of the penalty surcharges to the court, the court cancels the imposition order itself, and the KFTC recalculates surcharges based on the court ruling and reorders the enterpriser to pay adjusted surcharges.

4. Measures other than surcharges

4.1 Criminal sanction

17. The MRFTA stipulates criminal sanctions against almost all types of violations including cartels, unfair trade practices as well as anti-competitive business combinations (MRFTA Article 66, 67), and compared to competition authorities in other countries, the KFTC is more active in utilizing criminal punishments. Moreover, criminal punishment provisions are stipulated in Acts other than the MRFTA such as Labelling Act, Subcontracting Act, Franchise Business Act and Distribution Industry Act.

Complaints filed by the KFTC for the past 5 years

| Year | No. of prosecuted cases | Measure by the prosecutor | | |
|------|-------------------------|---------------------------|----------------|---------------------|
| | | Prosecuted | Non-prosecuted | Under investigation |
| 2011 | 38 | 23 | 15 | 0 |
| 2012 | 44 | 34 | 10 | 0 |
| 2013 | 63 | 48 | 13 | 2 |
| 2014 | 65 | 36 | 5 | 24 |
| 2015 | 56 | 21 | 2 | 33 |

(Criterion: No. of cases)

Complaints filed by the *right to request charge* not included. Based on the measures taken as of Feb. 2016

18. In particular, not only an enterpriser, but an individual who violated the law shall be subject to criminal punishment. For instance, an individual who participated in the decision making process of a cartel or actively practiced a cartel activity can be the subject of criminal sanctions for the infringement of the law. In many cases for individuals, just like enterprisers, they are mostly punished with surcharges, but there are also some cases where they receive prison sentences. Especially in case of bid rigging, not only the MRFTA but also Criminal Law or the provision of bidding interference of Framework Act on the Construction Industry is applied, which increase the number of cases where complaints are filed against individuals.

19. Also, as for infringement of the MRFTA, etc., *request charge system* was introduced and is currently under operation. Initially, *exclusive complaint system*, which does not allow prosecution of the violation without the KFTC filing complaints to the Prosecutors' Office, had been operating. However, with the revision in 2014, the Board of Audit and Inspection, Public Procurement Service and Small and Medium Business Administration were granted of the *right to request charge*, and the current system has been implemented where although the KFTC does not file complaints of the law violation, if these institutions request the KFTC to charge, the KFTC has an obligation to file complaints to the Prosecutors' Office. After the introduction of the system, the rate of filing complaints of violations of the MRFTA, etc. has relatively increased⁵.

4.2 Damage compensation under civil law

20. An enterpriser or enterprisers' organization shall be liable for any damages caused to a person by violating the law (MRFTA Article 56). The person who has been affected by the damage of the violation may bring an action for damage regardless of whether or not the violation had already been administratively sanctioned by the KFTC. Compensation system under the MRFTA is meaningful in that it allows a victim who has suffered a loss due to the violation to be compensated. Moreover, it is also meaningful in that it is a measure to enhance the effectiveness of the competition policy by deterring the violation of the law. The same applies under the Labelling Act, Subcontracting Act, Franchise Business Act, and Distribution Industry Act as well as the MRFTA, and especially the Subcontracting Act adopts *treble damages* as punitive damages for some types of violation.

21. Despite the long-lived efforts to make the widespread use of civil remedies, the use of damage compensation is still very low. Regarding the strengthening consumer rights, implementation of class action and punitive damages is under discussion.

⁵ Rate of complaints filed compared to average remedies in 2009~2013 (before request charge system was introduced): 9.8% → Rate of complaints filed compared to average remedies in 2014~Jan. 2016 (After the introduction): 14.1%

4.3 *Other sanctions*

22. In regards to bid rigging cases, there is *bidding eligibility limit system* that is different from other cartel cases. The *bidding eligibility limit system* prevents a bidder who violated the law in the past from participating in the bid for a certain period of time. The KFTC can request for *bidding eligibility limit* other than administrative sanctions if necessary to the violator (Act on Contracts to Which the State is a Party Article 27, the Enforcement Decree of the same Act Article 76). The KFTC will consider the extent and frequency of the violation when deciding whether to request for such limit.

23. Other alternative remedies include consent decree system, through which the case can be handled promptly without confirming the illegality when the relevant enterpriser itself suggests corrective measures such as restitution and consumer damage redress. In Korea, the consent decree system was adopted in the 2011 MRFTA, and in Fair Labelling and Advertising Act in 2014. However, this system does not apply to all types of violations. If it is a cartel, and the extent of violation is apparent and grave so that it significantly harms the competition (MRFTA Article 71 paragraph 2), the consent decree shall not apply. Since its implementation, the decree system has been applied to five cases against business combination, abuse of market dominance and unfair labelling and advertising.