

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

INVESTIGATIVE POWER IN PRACTICE - Contribution from Korea

- Session IV -

30 November 2018

This contribution is submitted by Korea under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03439940

Investigative Powers in Practice

- Contribution from Korea -

1. Overview of the KFTC's investigation powers

1. The Korea Fair Trade Commission (hereinafter the 'KFTC')'s general investigation powers and procedure are stipulated in the "Monopoly Regulation and Fair Trade Act" (hereinafter the 'MRFTA'), "MRFTA Enforcement Decree", "Rules on the KFTC's Committee Operation and Case Handling Procedure, etc." (hereinafter the 'Case Handling Procedure'), "Rules on the KFTC's Investigation Procedure". And the procedure of digital forensic investigation is detailed in the "Rules on Collection, Analysis and Management, etc. of Digital Evidence" and three guidelines¹ (hereinafter the 'Forensic Related Public Notices').
2. The KFTC has the following powers in the investigation stage:
3. First, the power to order the parties concerned or interested parties to appear in a hearing and seek their opinions²;
4. Second, the power to designate expert appraisers and procure their opinions³;
5. Third, the power to order an enterprise, an association of enterprises, an executive or employee thereof to submit reports on the cost and conditions of business operation or other necessary materials or things, or retain the submitted materials or things⁴;
6. Fourth, the power to have affiliated public officials enter the premises of enterprises or their associations in order to examine conditions of business operation, account books, documents, electronic materials, voice-recording materials, video materials and other materials or things, and hear statements from the relevant parties or interested parties at a designated place⁵;

¹ ① 'Rules on the management of digital documents collected from the investigated enterprise'

② 'Guidelines for handling work between digital investigation analysis team and case handling team'

③ 'Rules on the acquisition and management of digital investigation analysis devices'

² The Article 50 (1) 1 of the MRFTA

³ The Article 50 (1) 2 of the MRFTA

⁴ The Article 50 (1) 3 of the MRFTA

⁵ The Article 50 (2) of the MRFTA

7. Sixth, the power to order enterprises or their associations or executives and employees thereof to submit materials or things necessary for such investigation, or retain the materials or things submitted⁶.

2. Characteristics of the KFTC's investigation and related rules on sanctions

8. The KFTC's investigation is an administrative and non-compulsory procedure that is basically conducted with the consent of the investigated party.⁷ Therefore, in case when the party does not cooperate with the investigators, compulsory investigation such as arrest, detention, seizure or search of the premises is not allowed. Instead, failure to comply with the KFTC's investigation may result in administrative penalty or criminal charges.

9. To be specific, the KFTC may impose administrative penalty when a person disobeys the KFTC's order to attend a hearing without justifiable reasons,⁸ or a person shall be punished by imprisonment for up to two years, or by a fine not exceeding 150 million won in case he/she refuses to submit any materials or documents, or refuses, interferes with or evades an investigation through hiding, destroying, refusing to give access to, forging or altering documents.⁹ Furthermore, anyone shall be punished by imprisonment for up to three years, or by a fine not exceeding 200 million won when he/she refuses, interferes with or evades an investigation through verbal abuse, assault, deliberate attempt to block or delay entry to the premises.¹⁰

3. Order to submit documents

10. As described above, the KFTC has the power to order an enterprise, an association of enterprises, an executive or employee thereof to submit reports on the cost and conditions of business operation or other necessary materials or things.¹¹ Any order to produce documents shall be issued in writing with the subject of case, date and time limit of submission, materials to be reported or submitted and penalties for non-compliance.¹²

11. Moreover, public officials who carry out an investigation may enter the premises of enterprises or their associations and order enterprises or their associations or executives

⁶ The Article 50 (3) of the MRFTA

⁷ The KFTC basically does not possess the judicial police power, and thus has no so-called compulsory investigation power that other investigative agencies have. (Constitutional Court ruling 10.27.2005., 2004Heonma800)

⁸ The Article 69-2 (1) 5 of the MRFTA

⁹ The Article 67 subparagraph 9 & 10 of the MRFTA

¹⁰ The Article 66 (1) 11 of the MRFTA

¹¹ The Article 50 (1) 3 of the MRFTA

¹² The Article 55 (3) of the Enforcement Decree of the MRFTA

and employees thereof to submit materials or things necessary for such investigation.¹³ However, the order to submit documents during on-site inspection is limited to cases where there is a concern for destroying evidence.

12. When an enterprise or an association of enterprises fails to comply with the KFTC's order to report or submit materials or things, the KFTC may re-order the production of the documents or things, if the KFTC deems such documents or things are needed to prove a violation of the MRFTA. If the order is not followed, the KFTC may impose a charge for compelling the compliance on a daily basis not exceeding the amount equivalent to 3/1000 of the average daily turnover¹⁴.¹⁵ Note, however, that when there is no turnover or it is difficult to calculate turnover, the KFTC may impose a charge up to two million won per day.

4. Due Process

13. When enforcing competition law, the procedural fairness is very critical in enhancing the trust in the competition enforcement. In particular, as competition cases that transcend borders increase, a higher level of procedural fairness from the standpoint of global enterprises is required.

14. The KFTC has continuously been pursuing to improve not only the aspect of substantive law but also procedural law. The KFTC has especially made efforts to establish due process in the investigation stage. Public officials in charge of the investigation shall conduct their investigations within the minimum required limit for the MRFTA enforcement and they are prohibited from exercising their investigative powers for purposes other than enforcing the MRFTA.¹⁶ Public officials who conduct an investigation shall present a certificate indicating his/her authority to an interested person of the investigated enterprise.¹⁷ Such certificate should be an ID card, official documents bearing the duration of investigation, name of the investigated enterprise, legal basis for investigation, and legal measures for failure to cooperate with the investigation.

15. In 2016, the KFTC has come up with intensive measures to improve investigative procedure in a way to enhance transparency and fairness. In particular, the KFTC adopted the "*Rules on the KFTC's Investigation Procedure*" that specify methods and procedures of on-site inspection and matters related to other investigations. That way, the KFTC tried to obtain the trust for law enforcement and secure due process across all stages of the investigation by enhancing transparency of the investigation procedure and strengthening management and monitoring during the investigation process.

16. In accordance with the "*Rules on the KFTC's Investigation Procedure*", the KFTC now has to issue the official investigation notice stipulating the purpose of investigation as

¹³ The Article 50 (3) of the MRFTA

¹⁴ Calculation of average daily turnover is prescribed in the Enforcement Decree of the MRFTA

¹⁵ The Article 50-4 (1) of the MRFTA

¹⁶ The Article 50-2

¹⁷ The Article 50 (4)

well as the legal basis for investigation. In regard to the purpose of the investigation, the allegations should be indicated in addition to the relevant legal provisions. Also, the location along with the name of the enterprise should appear.¹⁸ The “*Rules on the KFTC’s Investigation Procedure*” clearly indicate that in principle, an attorney can be present throughout all process of the KFTC’s investigation including on-site inspection and interview.¹⁹

17. In addition, the KFTC has to draft ‘confirmation of the investigation process’ and the ‘list of collected or submitted materials’ that includes the time of arrival at the place of investigation, start and end time of the investigation, etc. and issue them to the investigated enterprise. In that way, it is expected the KFTC will be able to improve the transparency of the investigation procedure and secure the right to defend of the investigated enterprise.

5. Investigation methods in digital era

18. Generally speaking, ‘digital forensic’ is a type of scientific evidence collecting and analytic technique that applies to crime investigation, and refers to an investigative technique that secures evidence related to the crime by gathering information such as various digital data, call records, email log-on records, etc. It encompasses a whole process from collecting, storing and analyzing evidence to presenting them to the court as evidence.

19. In the digital era, enterprises no longer store important documents deep inside the cabinet like in the past, but stock them as a form of electronic file onto the computer server, etc. Therefore, it became more challenging to detect law infringements through outdated methods such as finding evidence from documents or papers like in the old days. In particular, enterprises often intentionally delete, modify and/or hide documents saved in the PC in order to fight the KFTC’s on-site inspection. Consequently, the KFTC faces challenges in gathering evidence without utilizing digital forensic technologies.

20. In particular, compared to merger or abuse of dominance, in the case of cartel, it is more important to obtain evidence which can directly prove a violation rather than economic analysis. Therefore, digital forensic technology is growing in its significance.

21. Accordingly, the KFTC set up a ‘digital forensic task force’ under Cartel Investigation Bureau in 2010 in order to respond to the changing investigation environment in the digital age. As the TF comes up with remarkable results in restoring deleted evidence through forensic technology in grave cartel cases, people started to recognize the necessity and importance of digital forensic. As a result, in September 2017, the team had officially been elevated to a division that consists of 22 forensic experts.

22. As illustrated above, the KFTC’s investigation procedure of digital forensic is explicitly stipulated in the Forensic Related Public Notices, which also contain contents such as protecting the rights of the investigated enterprise to build the trust in the KFTC’s forensic investigation.

¹⁸ Note, however, allegations for law violation and their description may not be included for cartel investigation.

¹⁹ Note, however, there can be restrictions for attorney presence for cartel investigation or situations where the investigation is significantly hindered.

23. First, in accordance with the Forensic Related Public Notices, collecting digital evidence should be conducted by an expert through credible devices and methods such as printing or imaging with the set scope. Also, a confirmation letter should be drafted that records collected data, time and date, hash value, etc. Since the registration date²⁰, the data can be stored for five years, and after that the digital data must be discarded²¹ in principle pursuant to *Public Records Management Act*. Upon the request by the investigated enterprise, a confirmation letter that ensures data has been discarded should be issued.

24. In the process of collecting, registering and discarding digital data, the investigated enterprise can request to be present, to select data, and to be given with a copy of data. Also, the investigated enterprise can participate in imaging and selecting data and request to be given with a copy of data for the image file that has been collected. Unless there are any justifiable grounds, the KFTC should allow such request.

25. Furthermore, the investigated enterprise can request protection for personal information and trade secrets, etc. that is included on the digital data used as evidence. The KFTC should sincerely cooperate with the investigated enterprise in regards to how to protect such information.

26. There is a mechanism to block misuse and abuse of data. After registering collected data into digital forensic system, data saved in devices that are used for collection, and all other data that are left in the system after evidence analysis is completed should be deleted. In that way, the KFTC prevents the possibility of data leakage. If anyone wants to have access to or use stored data, he/she has to indicate justifiable grounds. The relevant matters such as reason for access and time and date should be recorded and managed.

²⁰ Registration means storing the collected and transported data in digital forensic system right after the on-site inspection.

²¹ Exceptions when there are justifiable reasons such as when there is litigation proceeding, etc.