

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

**Cancels & replaces the same document of 9 May 2018**

**Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by  
Korea**

**5 June 2018**

This document reproduces a written contribution from Korea submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm](http://www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm)

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**JT03432148**

## Korea

### *Abstract*

*Since the introduction in 1997, leniency program has gone through several changes to enhance the predictability and transparency and prevent it from being abused. Currently, the leniency program has taken root as the most crucial and effective device for detecting cartels. The first applicant is eligible for the full immunity, being granted an exemption from administrative fines as well as referral to the Prosecutor's Office. The second applicant can receive a partial leniency with a 50% reduction in administrative fines along with waiver from criminal referral. Also, the KFTC has introduced treble damages trying to deter cartels through stronger private enforcement. However, to prevent companies from being discouraged to apply for leniency, the KFTC came up with a countermeasure where leniency recipients will only be responsible for the actual damage.*

### 1. Overview of leniency policy for cartels in Korea

1. The leniency program was first introduced in 1997 and has been amended several times under the Monopoly Regulation and Fair Trade Act (hereinafter the 'MRFTA'). The leniency program is regulated by Article 22-2 of the MRFTA and additional details are set out in the Korea Fair Trade Commission's (hereinafter the 'KFTC') Public Notification on the Implementation of the Leniency Program including Corrective Measures for Voluntary Reporters, etc. of Illegal Cartel Conduct (hereinafter the 'Leniency Notification').

2. Under the current leniency program, the KFTC grants leniency benefits to the first and second applicants whether the investigation has been commenced or not. The first applicant is eligible for the full immunity, being granted an exemption from administrative fines as well as referral to the Prosecutor's Office. As for the second-applicant, it can receive a partial leniency with a 50% reduction in administrative fines along with waiver from criminal referral.<sup>1</sup> The specific requirements and benefits of leniency are shown in the table below.

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<sup>1</sup> "Exclusive request for prosecution" is provided under the MRFTA. Thus, the Prosecutor cannot file criminal complaints unless the KFTC refers the case to prosecution.

**Table 1. Requirements and Benefits of Leniency**

	First in	Second in
	First Applicant	Second Applicant
<b>Requirements</b>	To apply for leniency when the KFTC has not obtained sufficient evidence to prove a cartel	-
	To fully cooperate with the KFTC by providing all the relevant information	Same
	To cease its involvement in the cartel	Same
<b>Benefits</b>	Administrative fines and request for prosecution waived	A 50% reduction of administrative fines and request for prosecution waived

3. However, even when undertakings satisfy all the criteria above, it will not be eligible for leniency benefits if 1) it coerced other undertakings to participate, or not to stop the cartel activity, or 2) it has been a recidivist that was slapped with the sanction within the past five years, or that received leniency benefits within the past five year, or 3) it meets the requirements as the second applicant, but only two undertakings participated in the collusion, or 4) it filed for leniency two years from the date when the first undertaking had filed the leniency application with the KFTC.

4. The KFTC also operates ‘amnesty plus’. If an undertaking under a cartel investigation applies for leniency and receives full immunity for another cartel, it can receive additional benefits for the cartel that is under the investigation. This additional benefit is only available for the first applicant of another cartel. The degree of additional benefit is determined by the difference in the size of relevant turnover between the current cartel under the investigation and new cartels.

## 2. The history and developments of leniency policy in Korea

5. Based on trials and errors while operating the Leniency Notification, the KFTC had gone through several amendments to enhance predictability and transparency as well as to prevent abuse of the program. Currently, leniency program is the most important and effective means in detecting cartels. The three big changes made to the policy are as follows.

6. First, to encourage more undertakings to apply for leniency, the Leniency Notification had been revised to make the process of granting leniency benefits more predictable and transparent, and to give more benefits to the applicants.

7. In this context, out of all amendments of the Leniency Notification, the amendment in 2005 especially has a very important meaning. Prior to that amendment, the KFTC had the discretion to decide whether to grant leniency benefits and the extent of the benefits. Therefore, the cartel participants avoided applying for leniency since they were not sure whether they would be eligible to obtain benefits. As the discretion whether to grant benefits or the extent of them had been greatly diminished, the undertakings are able to guess whether or not they are qualified for leniency and how much benefit they are eligible for.

8. Also, there was a provision which specified that benefits were not to be granted to the leader of an activity. However, due to the collective nature of cartels where participants collude for shared benefits, it is difficult to clearly define the concept of the leader and exactly determine who the leader is. In particular, the undertakings were

hesitant to come forward to the KFTC because they feared the risk of not receiving benefits if the KFTC decided ex post that they were the leaders. Consequently, the provision was deleted to make the policy more predictable and encourage undertakings to apply for leniency.

9. Prior to the amendment, the first-in applicant received more than a 75% reduction of administrative fines if it had reported before the investigation, and more than a 50% reduction if it had reported after the investigation. On the other hand, however, the applicants who first filed for leniency either before or after the investigation are now qualified for a 100% reduction of administrative fines.

10. Secondly, as undertakings are becoming more globalized and the number of international cartel cases which require coordination with foreign authorities increases, it is widely recognized that the leniency program needs to be more convergent across the borders. Accordingly, the KFTC decided to revise the Leniency Notification in a direction where it is more harmonized with international criteria.

11. First of all, the oral application was introduced in 2006, so that the whole process of leniency filing can be done without documentation. The reason for adopting such a system was because at the follow-on civil suit, the court could order the applicant to produce the documents that had been submitted during the application process, and that put the concerned undertakings in a more disadvantageous position than the undertakings which did not cooperate with the investigation.

12. Also, in 2009, amendments were made so that when multiple undertakings are in parent-subsidiary relationships, joint application of leniency could be allowed to encourage more applications. In fact, joint application had been prohibited in the past to prevent all the related undertakings from receiving leniency benefits. However, major antitrust enforcers around the world were allowing it. Also, while handling international cartel cases, the KFTC got to realize that it was necessary to deem the head office and its branch offices of one global undertaking as a single economic entity.

13. Third, there was a problem in Korea that undertakings were divulging information about leniency and later strategically taking advantage of it. Thus, leniency policy had gone through several changes to prevent such abuse.

14. For example, the KFTC has revised the Leniency Notification in April 2016, introducing the provision that the undertakings which have disclosed the leniency application and the relevant facts to a third party will not be granted leniency benefits.<sup>2</sup>

15. Also, the leniency program went through another change which rendered the leniency not available to the second applicant where the cartel consists of only two undertakings, or the second applicant came forward to the KFTC two years from the date when the first undertaking had made a report or commenced cooperation with the KFTC.<sup>3</sup>

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<sup>2</sup> Even before the revision, a undertaking may not have been granted leniency benefits when it disclosed the leniency to a third party, regarding it the violation of ‘full cooperation’. However, it was not stipulated in the law, and the decision differed depending on how ‘full cooperation’ was interpreted. So, after comprehensively considering various elements of ‘full cooperation’, whether to grant benefits or not was determined. With the revision, however, a undertaking loses its eligibility just by disclosing the fact.

<sup>3</sup> Article 35 (1) 6 of the Enforcement Decree of the MRFTA

After the amendment, there was a case where an undertaking filed for leniency two years after the first applicant had come forward to the KFTC and reported the cartel. During the two years, the undertaking had been assessing the possibility of being caught of the cartel activity. When the application was denied, the undertaking filed a petition for adjudication on unconstitutionality of that provision, but the Constitutional Court ruled it as constitutional.<sup>4</sup>

16. Furthermore, there are some instances where leniency applicants which had admitted its wrongdoing during the KFTC's deliberation process suddenly changed its testimony at the court. Such conduct is attributable to the undertaking's scheme of assisting the other implicated undertakings in winning the case in court or preventing follow-on damages suits, etc. To avoid such a problem, the KFTC amended the Leniency Notification in 2016 requiring the undertakings' full cooperation such as mandatory presence of the concerned executives or employees at the hearing and their testimony of all the relevant facts therein. In this way, the KFTC was able to secure credibility of undertakings' statements and prevent the undertakings from changing its testimony.<sup>5</sup>

### 3. Effects of Leniency Program

17. Due to the secretive nature of cartels, detection of collusion is inherently not easy. In fact, cartels, especially these days, are carried out in a cleverer manner with no evidences left by the undertakings. Thus, it is getting more and more difficult to collect evidence through investigations. Hence, leniency policy, which allows undertakings themselves to reveal the whole story, is a very useful tool in effectively detecting cartels.

18. Before 2005, the average number of cartel cases that the KFTC detected through leniency was just one per annum. However, after the Leniency Notification was revised to enhance predictability and transparency in 2005, the number has been on the rise. The number amounted to 44 cases in 2014, 48 cases in 2015 and 27 cases in 2016. The number of cartel cases with administrative fines between 1999 and 2016 is 488. Of these, 260 cases were detected through leniency, which accounted for 53.3%. In particular, if we look at the cartel cases from 2005 to 2016, which was the period where the number of leniency applicants started to skyrocket, the number of cartel cases with administrative fines is 411, and of these, the number of cases detected through leniency is a whopping 256, accounting for 62.2%.

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<sup>4</sup> Ruling in Oct 26, 2017 Constitutional Court, 2017Heonba58

<sup>5</sup> Article 5 (1) 4 of Leniency Notification

**Table 2. No. of cartel cases detected through leniency (Unit: 1 case)**

Year	No. of cases with administrative fines (A)	No. of cases with leniency (No. of cases with administrative fines, B)	Ratio (% B/A)
1999	15	1(1)	6.7
2000	15	1(1)	6.7
2001	8	-	-
2002	14	2(1)	7.1
2003	11	1(1)	9.1
2004	14	2(0)	0
2005	21	7(6)	28.6
2006	27	7(6)	22.2
2007	24	10(10)	41.7
2008	43	21(20)	46.5
2009	21	17(13)	61.9
2010	26	18(18)	69.2
2011	34	32(29)	85.2
2012	24	13(12)	50.0
2013	28	23(23)	82.1
2014	56	44(44)	78.6
2015	63	48(48)	76.1
2016	44	27(27)	56.3
<b>Sum</b>	<b>488</b>	<b>274(260)</b>	<b>53.3</b>

#### 4. Challenges ahead

19. In August 2017, in order to establish the optimal enforcement system through comprehensively reviewing civil, administrative and criminal measures related to the competition law, the KFTC launched a ‘T/F on reforming law enforcement system’ comprised of experts in and out of the KFTC and officials from relevant ministries. The T/F came up with the ways for improvement after more than a dozen in-depth discussions. In particular, it decided to adopt an opt-out model of class action and punitive damages to encourage more private enforcement against cartels. However, there are adverse effects to this. For example, whereas private enforcement can play a role of deterring cartels through additional fiscal pressure on cartel undertakings, it can, on the other hand, discourage undertakings from filing for leniency. In particular, if treble damages are introduced, it becomes more likely for undertakings to get caught up in a large-scale damage suit after the detection by the competition authority. Therefore, the KFTC came up with a countermeasure where leniency recipients will be only responsible for the actual damages. Also, the KFTC is proposing the measure for not submitting leniency-related materials if the court requests the KFTC to submit case-related information.

20. Since the introduction in 1997, the leniency program has taken root as the most crucial device for detecting cartels. Up until now, the KFTC had been focusing on raising its predictability, transparency and preventing the abuse of the program. Now it may be the time for more sophisticated systems so that private enforcement would not deter leniency application. More importantly, the KFTC should make each system operate with its own purpose, thereby making undertakings feel the overall burden of expenses of getting involved in cartels higher.