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Criminalisation of cartels and bid rigging conspiracies – Note by Korea

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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1. Introduction

1. Where a business entity engages in any illegal cartel conduct or requires any other business entity to engage in such conduct, the Korea Fair Trade Commission (hereinafter referred to as the “KFTC”) may take necessary measures such as a cease-and-desist order or imposition of surcharges. The KFTC may also refer the entity or individuals who are engaged in the cartel conduct to the prosecution to have them punished by imprisonment or be imposed a criminal fine. In accordance with the leniency program, those who are granted the status by the KFTC are eligible for exemption from the criminal charge.
2. The Korean Ministry of Justice (hereinafter referred to as the “KMOJ”) oversees prosecution in the Republic of Korea through the law enforcement of the Korean Prosecution Service (hereinafter referred to as the “KPS”). The KPS is in charge of the investigation and prosecution of antitrust cases, and it also operates a special task force for forfeiture regarding bid-rigging in government procurement and cartel cases. The KMOJ has general jurisdiction over antitrust criminal law enforcement, while specific investigation and prosecution of antitrust crimes are handled by the KPS and its regional Prosecutors’ Offices. The KPS may start criminal investigation with information gathered from the KFTC and a receipt of its complaint or leniency program. In practice, even if the KFTC decides not to file a criminal charge, the KPS may request the KFTC to file a criminal complaint against a business entity or an individual whenever it recognizes the need to pursue a criminal charge. In this case, the KFTC reports the case to the Prosecutor General for criminal accusation upon the request.
3. This report reviews legal provisions and procedures related to applying criminal charges against illegal cartel conducts and bid-rigging conspiracies, and introduces cartel cases punished by criminal sanctions in Korea.

2. Sanctions against illegal cartel conduct

2.1. Sanctions against illegal cartel conduct

4. When any illegal cartel conduct of a business entity is recognized, The KFTC may impose a cease-and-desist order and an administrative fine (or surcharge) not exceeding ten percent of the relevant sales and refer the case to the KPS to pursue a criminal charge whenever necessary. Each KPS district office launches investigation on illegal cartel conducts within its jurisdiction. After investigation, the KPS prosecutes cases supported by sufficient evidence and dismisses cases where evidence is insufficient. After the indictment is submitted to the court, the KPS prosecutors attend the criminal trial to maintain the charges and ensure conviction.
5. Under the Monopoly Regulation and Fair Trade Act (hereinafter referred to as the “MRFTA”), those who engage in any kinds of illegal cartel conducts including price fixing, market allocation and bid-rigging may face imprisonment for not more than three years or a fine not exceeding KRW 200 million. Also, corporations as well as the individuals who have committed any cartel offense may be punished under the Article 70 (joint penalty provisions) of the MRFTA. Provision on criminal charges against illegal cartel conduct was introduced in 1981 when the MRFTA first came into effect. In the past, individuals

were rarely punished for violations of the MRFTA, and even if they were, the punishments were limited to imposition of fines. This is in contrast to more recent prosecutorial practices where the individuals are punished more frequently and severely. For example, three executives of the major cartel conspirators were sentenced to six months of imprisonment for rigging a nuclear power cable bid placed by the Korea Hydro and Nuclear Power from 2002 to 2010. In another case, several employees of six cement manufacturers were sentenced to ten months or one year in prison for fixing the price of cement occurred in 2011.

Article 66 (Penalty Provisions)

(1) Any of the following persons shall be punished by imprisonment for no more than three years and/or by a fine not exceeding 200 million won:

(...)

9. Any person who engages in illegal cartel conducts or requires a business entity to engage in illegal cartel conducts in violation of Article 19 (1);

(2) The punishment of imprisonment and fines referred to in the paragraph (1) may be imposed concurrently.

Article 70 (Joint Penalty Provisions)

If the representative of a corporation (including an unincorporated organization; hereafter the same shall apply in this Article) or an agent or employee of, or other persons employed by, the corporation or an individual has committed any violation provided for in Articles 66 through 68 in conducting the business affairs of a corporation or individual, the corporation or individual shall, in addition to the punishment against the violator accordingly, be subject to a fine prescribed in the relevant Article: Provided, the foregoing shall not apply where such corporation or individual has not been negligent in giving due care and supervision to the business affairs to prevent such violation.

6. Meanwhile, under the Guidelines on Examination of Bid-riggings, in cases where business entities having earned more than five penalty points¹ for bid-riggings over the past five years, as specified in the guidelines, will be disqualified for participating in a bidding requested by the KFTC.

2.2. Penalty provisions against bid-rigging in other laws

2.2.1. The Construction Industry Act

7. Under the Framework Act on Construction Industry, any person interfering with tenders for construction works may face imprisonment for no more than five years and/or by a fine not exceeding KRW 200 million, which are more severe than the criminal charges imposed on bid-riggings by the competition law (MRFTA).

Article 95 (Penalty Provisions)

Any person who does any of the following acts in a tender for construction works shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 200 million won:

¹ Penalty Points by Types of KFTC Measures

1. *Tendering at a prearranged price in collusion with other bidders for purposes of making unjust benefit or interfering with fair price-setting;*
2. *Presenting an estimated tender of another constructor;*
3. *Interfering with tenders of other constructors by deceptive means, threat of force or other means.*

2.2.2. The Criminal Act

8. Under the Criminal Act, any person interfering with tenders may be punished by imprisonment for not more than two years or by a fine not exceeding KRW seven million. Therefore, in cases where the KFTC does not file criminal complaints against the cartelist, the KPS can still indict the conspirators for bid-rigging by applying Article 315 of the Criminal Act.

Article 315 (Interference with Auction or Bidding)

A person who interferes with the impartial conduct of an auction or a bid through fraudulent means or by the threat of force or by other means, shall be punished by imprisonment for not more than two years or by a fine not exceeding seven million won.

3. Procedures for pursuing a criminal charge

3.1. KFTC's referral to KPS

9. According to Article 71(1) of the MRFTA, a violation of competition law may be prosecuted only if a criminal complaint is filed by the KFTC. Also, under Article 71(2), the KFTC is required to file a criminal complaint with the Prosecutor General, when it deems a violation as substantially hindering competition since the infringement is objectively obvious and serious.
10. In practice, the KFTC decides whether to report a case to the prosecution and initiate a criminal procedure following its Guidelines on Filing Criminal Complaints. Under the Guidelines, in principle, the KFTC should file a complaint against a cartelist if the violation score, which is calculated after taking the details and severity of the violation into account, reaches or exceeds the reference level specified in the Guidelines.
11. However, under the same guidelines, the KFTC may decide otherwise after considering a broad range of matters including whether corrective actions are taken voluntarily by the violator; whether there are past records of violations; whether there are any effects on lives and safety; and whether the violator is cooperative to investigation, etc.

3.2. Investigation and Prosecution by KPS

12. If the KFTC files criminal complaints along with administrative sanctions, the KPS initiates an independent investigation into the case while referring to the report submitted by the KFTC. The KPS then decides whether to bring a criminal charge against the violating business entities or individuals. The prosecutorial investigation often accompanies data requests or statements of witnesses and suspects. Under the Korean law, the KPS prosecutors have the authority to summon and interrogate suspects and witnesses.

Prosecutors can also launch an investigation by search, seizure and financial account tracking based on the warrant issued by the judge, and in some cases, suspects can be taken into custody by judge's warrant during the pre-prosecutorial investigation phase under strict conditions. Under the Constitution of Korea, only prosecutors can request a warrant to the court. If the KPS files an indictment, the court holds a criminal trial and decides whether and how to impose a criminal punishment.

4. Policies on filing criminal complaints

4.1. Request for the KFTC to file a criminal complaint

13. The KPS may request the KFTC to file a criminal complaint in order to prosecute a violation of the MRFTA. Under the MRFTA, the Prosecutor General may notify the KFTC of the fact that the violation may substantially hinder competition because the infringement is objectively obvious and serious, thus requesting the KFTC to file a criminal complaint. Upon the receipt of such a request, the KFTC chairperson is obliged to file a complaint with the Prosecutor General.
14. In practice, even if the KFTC decides not to file a criminal charge, the KPS may request the KFTC to file a criminal complaint against a business entity or an individual whenever it recognizes the need to pursue a criminal charge. In this case, the KFTC reports the case to the Prosecutor General for criminal accusation upon the request.
15. Meanwhile, in case that the KFTC decides not to accuse criminally on a particular case, the Chairperson of Korea's Audit and Inspection Board, the Minister of SMEs and Startups, and the Administrator of the Public Procurement Service may also request the KFTC to file a criminal complaint on other grounds, such as far-reaching social effects, impacts on the national finance, and grave damages to SMEs.

Article 71 (Criminal Charge)

(1) Any violation prescribed in Articles 66 and 67 may be prosecuted only if a criminal charge is filed by the Fair Trade Commission.

(2) The Fair Trade Commission shall file a criminal charge with the Prosecutor General, where the Commission deems that any violation prescribed in Articles 66 and 67 may substantially hinder competition since the degree of such violation is objectively obvious and serious.

(3) The Prosecutor General may notify the Fair Trade Commission of the existence of facts satisfying the requirements for filing criminal charges provided for in paragraph (2), and may request the Fair Trade Commission to file a criminal charge.

(4) Even if the Fair Trade Commission concludes that a case does not satisfy the requirements for filing criminal charges provided for in paragraph (2), the Chairperson of the Board of Audit and Inspection of Korea, the Minister of SMEs and Startups, and the Administrator of the Public Procurement Service may request the Fair Trade Commission to file a criminal charge on other grounds, such as far-reaching social effects, influence on the national finance, and the degree of damage to small and medium enterprises.

(5) Upon the receipt of a request for filing a criminal charge under paragraph (3) or (4), the chairperson of the Fair Trade Commission shall file a criminal charge with the Prosecutor General.

(6) The Fair Trade Commission may not withdraw a criminal charge after prosecution has commenced.

4.2. Exemption for Leniency Applicants

16. The KFTC has a leniency program as a tool for effectively dissolving and deterring cartels. In accordance with Article 22-2 of the MRFTA, the KFTC grants full or partial exemption from the surcharges and criminal charges to those who voluntarily report the illegal cartel conduct and cooperate with the investigation.
17. The Public Notification on the Leniency Program has a provision that those who are granted the status of a voluntary reporter—including the first and second applicant—may be exempted from prosecution. However, the KFTC may still refer a voluntary reporter to the KPS, if it deems any violation as substantially hindering competition because of an obvious and serious nature of the cartel infringement, or if the Prosecutor General requests the KFTC to file a criminal complaint for the forementioned reason. Meanwhile, the KFTC does not reconsider the criminal exemption in the case that the Chairperson of Audit and Inspection Board, Minister of SMEs and Startups, or Administrator of Public Procurement Service request such criminal filings against a voluntary reporter.

Article 22-2 (Leniency Program, etc.)

(1) Any of the following persons is eligible for the mitigation of the corrective measures provided for in Article 21 or for full or partial exemption from the penalty surcharges provided for in Article 22, or may be exempted from a criminal charge filed under Article 71:

- 1. A person who voluntarily reports the illegal cartel conduct;*
- 2. A person who cooperates with an investigation by, for example, furnishing evidence.*

(...)

(4) Matters with regards to the scope of persons eligible for mitigation or exemption under paragraph (1), criteria for and scope of mitigation or exemption, and further details about prohibition on the provision and divulgence of information and data pursuant to paragraph (3) shall be prescribed by Presidential Decree.

Public Notification on the Implementation of the Leniency Program for Voluntary Reporters of Illegal Cartel Conduct

Article 16 (Criminal Complaints)

The Commission shall not file a criminal complaint with the Prosecutors' Office against a business entity whose status has been granted under this Public notification: Provided, That the foregoing shall not apply where relevant cartel conduct constitute a violation specified in Article 71 (2) (Criminal Charge) of the Act or where the Prosecutor General requests the Commission to file a criminal complaint under Article 71 (3) of the Act.

5. Investigation and Prosecution Practice

5.1. General Proceeding and Guideline

18. Under the general guidance of the KMOJ, each KPS office investigates and prosecutes cartel cases within its jurisdiction. In 2015, Antitrust Division was installed in the Seoul Central Prosecutors' Office to expedite enforcement of antitrust cases including international cartel cases.
19. In general, the KPS prosecutors interrogate suspects and witnesses and gather evidence upon the data request or search and seizure warrant. Digital forensic skills are always used in antitrust cases such as analyzing computer files, emails or mobile records. In 2007, National Digital Forensic Center was established in KPS to catch up with increasing significance of digital evidence in criminal law enforcement. The KPS prosecutor can arrest suspects or take them into custody when strict conditions are met to prevent destruction of evidence and escape of suspects.
20. The KPS makes best efforts to conclude antitrust law investigation and enforcement within a reasonable time frame. The prosecutor investigates independently in accordance with the law. When the KPS prosecutor decides that the proof of an antitrust case is beyond a 'reasonable doubt' supported by evidence, the case is prosecuted. When the case is indicted, the KPS prosecutors participate in the criminal trial as lawyers representing the public.
21. Most of the KPS antitrust cases are triggered by a complaint of the KTFC or its leniency program. However, in some cases, the KPS would open antitrust investigations upon different complaints or other source of information. In this case, the KPS requests the KTFC to file a complaint in order to contribute to the legislative purpose of the exclusive complaint system under the MRFTA.
22. The KPS established the principle of intolerance for corporate employees who actively participated in forming cartels. In the past, the KPS had faced a vicious cycle in which cartels could not be eradicated due to the practice that did not properly implement criminal sanctions against the responsible employees, and also because the profits from forming cartels were bigger than disadvantages from corporate punishment. So, the KPS has recently endeavored to impose criminal punishment not only on the company but also on the individual employees who led illegal collective actions.
23. For example, in 2016, Antitrust Department in the Seoul Central District Prosecutors' Office investigated Pyeongchang Winter Olympics Railroad Bid-rigging case and bid-rigging on purchase of pre-stressed high-strength concrete pile by Korea Core Power Concrete Industry Cooperative and its members, and took nine employees of four large Korean construction companies into custody.

5.2. MLA and Extradition

24. As a central authority responsible for extradition of offenders, mutual legal assistance (hereinafter referred to as the "MLA") in criminal matters (including antitrust cases) and transfer of inmates, the KMOJ established an effective legal and operational framework for seeking and providing MLA and extradition. The KMOJ makes best efforts to provide assistance of good quality promptly. In addition, the KMOJ continues to pursue international co-operation. While co-operation can be provided on the basis of either a treaty or reciprocity, co-operation is generally stronger and more timely with treaty partners. Korea has 74 MLA treaties and 77 extradition treaties.

25. The KMOJ assesses whether the MLA requests meet the statutory or treaty requirements. If so, the KMOJ sends the request to the KPS's International Co-operation Centre which forwards it to the relevant agency for execution. Close co-operation and communication between authorities streamline this process. Officers in KMOJ's International Criminal Affairs Division monitor requests through the case management system and liaise with the KPS through a secure, online messaging service to ensure prompt execution of requests.
26. On the other hand, to facilitate the execution of Korea's MLA requests, the KMOJ utilizes its regular conferences and meetings with key partners to discuss cases and exchange information. For countries dealing with Korea on a regular basis, the KMOJ has a contact point in the counterpart agency which can be used to follow up on outstanding requests. Contact points are decided based on the level of co-operation with the foreign counterpart.
27. The KMOJ assesses extradition requests and the KPS executes them by seeking the arrest warrant and representing Korea in the court proceedings to decide on extradition. Meanwhile, to facilitate extradition, MLA and promote positive international co-operation, the KMOJ has established to streamline extradition and MLA with active use of ad hoc bilateral meetings, conference calls and video conferences.

6. Cases of criminal sanctions on Cartels

6.1. Records of Cartel Enforcements (2015 - 2019)

28. The KFTC has referred around 26.8% of the illegal cartel cases to the KPS for criminal accusation in addition to imposing its own administrative sanction over the past five years (2015-2019).

Table 1. Number of cartel cases by the types of KFTC measures

Year	Accusation		Corrective Order		Warning	Total
		Penalty Surcharge		Penalty Surcharge		
2015	9	9	61	54	18	88
2016	22	21	27	22	15	64
2017	27	27	27	25	15	69
2018	44	39	91	55	22	157
2019	19	19	32	30	22	73
Total	121	115	238	186	92	451
	(26.8%)		(52.8%)		(20.4%)	(100%)

Note: (unit: case)

6.2. Cases of Criminal Sanctions

6.2.1. Bid-rigging by four waterproof dike constructors

29. Four constructors rigged a bid for the construction of a waterproof dike in Saemangeum, placed by the Korea Rural Community Corporation in December 2009. Constructor A conspired with two other collaborators to fix the bidding rate in order to avoid competition over prices, and had another collaborator submit an ill-prepared construction plan as a cover bidding.

30. In 2015, The KFTC imposed a total of KRW 8.6 billion (approximately USD 6M) of surcharges upon the four cartel collaborators, but did not refer the case to the prosecution. After looking into the KFTC decision, the Prosecutor General requested the KFTC to file a complaint for criminal investigation against the leader, constructor A. Hence, the KFTC referred constructor A to the Prosecutor General in accordance with Article 71(5) of the MRFTA.
31. The Seoul Central District Prosecutors' Office indicted Constructor A on charge of leading the bid-rigging cartel. The Office also prosecuted seven executives of the four constructors without arrest for colluding in the bid-rigging, in violation of the Framework Act on the Construction Industry, which stipulates heavier criminal penalties than the MRFTA, the competition law.
32. In the end, the Seoul Central District Court sentenced Constructor A to a fine of KRW 80 million, and each of the seven executives of collaborators to a fine ranging from KRW 4 to 20 million.

6.2.2. Bid-rigging of LNG storage tank constructors

33. Thirteen constructors rigged bids for the construction of LNG storage tanks placed by the Korea Gas Corporation from 2005 to 2012. The cartel conspirators had designated on successful bidders and set the bidding prices for each bid, allocating the winning projects among themselves.
34. In 2016, the KFTC imposed a total of KRW 35 billion (approximately USD 28M) of surcharges upon the thirteen cartelists, while referring eleven cartelists—except one with the status of voluntary reporter—to the KPS. The KPS then filed a criminal charge of violating the MRFTA and the Framework Act on the Construction Industry against ten cartel constructors—except one whose charge was dismissed due to a merger which rendered the cartel list ineligible for prosecution—and 20 executives of them.
35. In 2018, Seoul High Court sentenced each of the four leading cartelists to a fine of KRW 160 million, and the rest six collaborators to a fine ranging from KRW 20 to 140 million. Also, the court sentenced each of the three executives who led the cartel to 10 months of imprisonment, while sentencing 17 other executives to a fine ranging KRW 5 to 30 million. In 2019, the rulings were upheld by the Supreme Court.

6.2.3. Bid-rigging by eight maritime car carriers

36. Eight car shipping companies colluded in the market for deep sea transport of vehicles between October 2006 and September 2012 by agreeing to allocate customers and routes (including a route from Korea to the United States). To coordinate such anticompetitive behavior, they met at each other's offices, and were in contact over phone and e-mails. In particular, they executed by quoting artificially high prices or not quoting at all in tenders issued by car manufacturers.
37. In August 2017, the KFTC imposed a total of KRW 43 billion (approximately USD 38M) of surcharges upon the cartelists, while referring five, non-exempt companies to the KPS. After the criminal complaint was filed by the KFTC, the Seoul Central Prosecutors' Office exerted all its efforts to reveal the wrongdoings of the cartel and seek justice. Between August 18, 2017 and September 4, 2017, the prosecutors summoned and interrogated 21 company officials, including the CEO of Company A. During the investigation, the high-ranking officials of Company A admitted its charges and vowed to prevent recurrence.
38. The KPS ended up filing a criminal charge of violating Article 19(1), paragraph 4 of the MRFTA against two of the cartelists. In the end, the Seoul Central District Court sentenced

Company A to a fine of KRW 60 million, and Company B to a fine of KRW 120 million. The prosecution filed an appeal with regard to Company B's charges, but the Seoul High Court eventually upheld the lower court's decision.