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## INTRODUCTION OF THE ENFORCEMENT OF THE ACT ON SPECIAL MEASURES FOR REINFORCEMENT AND PROTECTION OF COMPETITIVENESS OF NATIONAL ADVANCED STRATEGIC INDUSTRY

The Act on Special Measures for Reinforcement and Protection of Competitiveness of National Advanced Strategic Industries (the “**Strategic Industry Act**” or the “**Act**”), as promulgated on February 3, 2022 and scheduled to become effective in August of this year, newly defines the “national advanced strategic industry” and “national advanced strategic technology” in aiming to develop and protect the relevant industries. In this article, we will examine the legislative history and key details of the Act.

### Jihyun KIM

Attorney

T 82.2.3404.0180

E jihyun.kim@bkl.co.kr

### Hankil D. KANG

Senior Foreign Attorney

T 82.2.3404.0244

E hankil.kang@bkl.co.kr

### Sungjo YUN

Attorney

T 82.2.3404.0196

E sungjo.yun@bkl.co.kr

### Mok H. KIM

Attorney

T 82.2.3404.0460

E mokhong.kim@bkl.co.kr

### Jaeyoub LEE

Attorney

T 82.2.3404.6574

E jaeyoub.lee@bkl.co.kr

### Sodam KWEON

Attorney

T 82.2.3404.7651

E sodam.kweon@bkl.co.kr

### I. Legislative History and the Purpose of the Enactment

#### A. Legislative History

As the global competition between countries over securing advanced industrial technologies and achieving the leading position in the market for high-tech, such as semiconductor business, intensifies, the government and members of the political parties have formed a consensus that an extensive support to enhance investment and R&D personnel in the strategic industries has become imperative. Reflecting the consensus, the members of the National Assembly (“**Members**”) including Byung-cheol Soh, Eui-dong Yoo and Young-gil Song promoted the legislation of a special law and the aforementioned Members subsequently proposed bills for the distinct need<sup>1</sup>. Upon a review by the Patent Sub-committee under the Ministry of Trade, Industry and Energy (the “**MOTIE**”), on December 1, 2021, the lawmakers decided to integrate the three proposed bills based on the bill proposed by the Member Young-gil Song. On January 11, 2022, an alternative bill proposed by the Patent Sub-committee passed the National Assembly and also the Cabinet meeting after two weeks, on January 25, 2022.

The MOTIE further gathered opinions related to the announced decree until

1 “The Special Act on Advancing Competitiveness of National Core Strategic Industries” proposed by Byung-cheol Soh on August 25, 2021; “The Special Act on Support for National Advanced Industries” proposed by Eui-dong Yoo on October 8, 2021; and “The Act on Special Measures for Advancing and Protection of Competitiveness of National Advanced Strategic Industries” proposed by Young-gil Song on October 22, 2021.

May 2, 2022, and public meetings to discuss and explain how a strategic industry is designated<sup>2</sup> and to explain details of the support and protective measures therefor has taken place during the first half of the year.<sup>3</sup>

## B. Purpose of the Enactment

There are two comparable laws enacted and in effect in Korea for the protection of industries, but the Strategic Industry Act aims to protect and support technologies in a different scope and is drafted to achieve an objective distinguished from the existing laws. As an outline of the difference, first of the two laws, the Act on Prevention of Divulgence of Industrial Technology (the “**Industry Technology Protection Act**”), aims to protect designated (i) *industry technologies*, such as technology information necessary for development, production or use of products or services, or (ii) *national core technologies* of high technological and economic values from leaking to abroad to prevent a material adverse effect on national security or economy. The second law, the Foreign Trade Act, is limited to *strategic materials*, which require export permission in compliance with the international export control system.

The Strategic Industry Act, on the other hand, specifically applies to *strategic technologies*, which is defined as the technologies with significant effect on national and economic securities (e.g., stabilization of supply network) as well as national exports and employment, which result in extensive ripple effects on relevant industries. In this manner, the scope of technology subject to the Act as well as the purpose and effect thereof are distinguished from the two comparable laws.

## II. Key Details of the Strategic Industry Act

### A. Key Provisions

The following states the key provisions that are introduced in the Strategic Industry Act:

1. A National Advanced Strategic Industry committee shall be organized under the Office of the Prime Minister, and a master plan to reinforce and protect the strategic industries shall be established every 5 years. (Articles 5 and 9)
2. The strategic technology shall be designated, changed, or de-designated in consideration of the effect of the technology on the national/economic security. (Article 11)
3. Professional personnel shall be designated at the request of companies, and measures to support the execution of agreements with confidentiality and/or non-compete restrictions shall be provided. Also, in the case of export of technology or M&A transactions involving the companies with the designated strategic technology, strengthened protective measures shall apply by requiring the company approval from the MOTIE, regardless of the company having received government subsidies<sup>4</sup>. (Articles 12

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<sup>2</sup> Enacting a separate law supporting a certain industry (especially if the government subsidy is involved) may raise a concern with a potential violation of the WTO subsidy agreement, so authorities hold public meetings to confirm the process of determining a strategic industry. See Review Report of the SME Committee of the MOTIE of the National Assembly, p. 24.

<sup>3</sup> The MOTIE press release dated January 25, 2022, p.3.

<sup>4</sup> Under the Industry Technology Protection Act, only the national core technology receiving government subsidies for R&D is subject to the requirement of obtaining an approval from the MOTIE, and a report is sufficient for the other technologies. (Art. 11 of the Industry Technology Protection Act)

through 15)

4. A specialized complex for national strategic industries shall be promoted through expeditious approval process, in support of the operation (e.g., financial support and tax support, reduction of charges, and expedited handling of related civil affairs to the occupants of the specialized complex). (Articles 19 through 23)
5. Businesses supporting the specialized complex or technology development may be designated as a business subject to the preliminary feasibility study and become, if necessary, exempted from such preliminary feasibility study requirement for national/economic security and for securing stable industrial supply network. (Article 27)
6. A joint cooperation model<sup>5</sup> shall be identified and selected to actively support the joint technology development business. Any selected joint cooperation model shall be deemed to be approved by the Korea Fair Trade Commission (the "**KFTC**") under Article 40(2) of the Monopoly Regulation and Fair Trade Act for matters agreed between KFTC and the MOTIE to stimulate the ecosystem of the strategic industries. (Articles 42 through 44)

## **B. Comparison with the Industry Technology Protection Act**

The Strategic Industry Act, in principle, prevails over other laws in terms of the advancement of the strategic industries, and the Act further provides that, unless otherwise prescribed in the Act, the protective measures for the strategic technologies shall be governed by the Industry Technology Protection Act as having a status of a special law in respect of the Industry Technology Protection Act.

The Strategic Industry Act also applies a stronger protective measure and heavier penalties for any violation thereof, compared to the Industry Technology Protection Act. For instance, the Strategic Industry Act prescribes that any technology designated or approved for export as a strategic technology shall be deemed as given the equivalent status of the national core technology with respect to the designation or approval for export. In light of the above, it is expected that the "strategic technology" under the Strategic Industry Act will cover a narrower or more focused scope of the important technology compared to the "national core technology" under the Industry Technology Protection Act and will take precedence over other laws in designating and managing the strategic technology<sup>6</sup>.

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5 The term "joint cooperation model" means a cooperative system built by two or more companies, institutions or organizations relating to the strategic industries to vitalize the markets and industrial competitiveness (Art. 2.4 of the Strategic Industry Act).

6 For example, it is considered that the distinction between the "national core strategic technology" against the "national core technology" as opined by the SME Committee of the MOTIE in its review report as below calls for the need to keep monitoring the direction and trends of the strategic technologies.

① National core technology: a technology (i) that is commercialized; and (ii) that should be protected from the overseas divulgence for the preservation of national security under the Industry Technology Protection Act (e.g., foundry technology for 30nm or less → commercialized fine processing for semi-conductors).

② National core strategic technology: a technology (i) that is a core technology or core technology in supply network among the commercialized technologies; and (ii) that is subject to protection and promotion simultaneously under the Act (e.g., foundry technology for 14~28nm or less → the most widely used fine processing technology among the commercialized technologies).

### III. Implications

- Several Upcoming Undertakings to Follow. There are several anticipated undertakings under the Act for the support of the strategic industry and strategic technologies, including the organization of a new committee under the Office of the Prime Minister to implement the national policies for the promotion and protection of the strategic industries and strategic technologies and the establishment of extensive support for the growth of companies in all respects such as investment, technology innovation and personnel. As such, the relevant industries should keep track of how the Strategic Industry Act applies and develops.
- Government-driven Stabilization of Supply and Demand in Emergency. The possibility of the government taking an action under the Act to adjust the supply and demand for stabilization of the market and the industrial network in the event of an emergency such as natural disaster or abrupt changes in the global market is also a new implication under the Act. However, the relevant provisions in the Act or the relevant Presidential Decree are still subject to further specifications as they are general and abstract, and thus, it is necessary to monitor the progress of legislation of the enforcement decree and how the provisions are actually adopted, as well as how the measures designed to stabilize supply and demand are implemented.
- Potential Conflict with Designated Professional Personnel. As examined, in an effort to prevent any leakage of the strategic technologies of a strategic technology holder, the Act introduces a system providing "designation of professional personnel." However, there are several potential conflicts remain as to the system such as non-compete/confidentiality provisions that restrict the professional's transfer within the same industry and the strategic technology holder's right to request the MOTIE to provide the immigration information of the relevant personnel if there exists sufficient cause to suspect that there is a breach of the aforementioned contractual non-compete/confidentiality provisions. These measures may raise an issue among the government, companies, and professional personnel with respect to personal information protection and freedom of employment. Thus, industries will need to monitor how the specific requirement will be recognized.
- Procedures for Technology Export or Overseas M&A. The strategic technology, by definition, is expected to be narrower in scope compared to the national core technology, and the threshold to meet to be approved for export or overseas M&A has become higher under the Strategic Industry Act. Thus, any company holding a technology to be designated as a strategic technology should be prepared to comply with the relevant procedures under the Act for the export or overseas M&A.
- Primary Application of the Act on Export Approval. Since the Strategic Industry Act prescribes that the export approval process under the Act may prevail over the export approval process prescribed for the national core technologies or export permit for the strategic materials under the Foreign Trade Act, a company holding the strategic technologies needs to be prepared to prioritize and comply with the procedures under the Act.