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## 2022 FIRST HALF DEVELOPMENTS IN KOREAN COMPETITION LAWS: TREND TOWARDS MORE CRIMINAL ENFORCEMENT AND A LANDMARK KFTC DECISION

With the election of a new president in March 2022, Korea is currently in the midst of significant changes, including in the area of competition law and criminal sanctions. The Korea Fair Trade Commission has also been continuing its active enforcement activities, with a recent landmark decision over an international freight rate cartel by various ocean liners following several years of investigation. We provide further developments and our analysis on both issues below.

### I. Launch of a New Administration in Korea: Era of Stronger Criminal Enforcement of Competition Law

As a result of the election in 2022, South Korea saw a shift in power from the liberal Democratic Party's President Jae-in Moon to the conservative People Power Party's President Seok-yeol Yoon, who was a former Prosecutor General. Accordingly, the new President Yoon is expected to have strong policy goals on the criminal enforcement system. In particular, he has emphasized the importance of the antitrust criminal enforcement in various public discussions during his time as a prosecutor, and we expect that the focus will continue in the new administration.

Traditionally, the Korea Fair Trade Commission (the **KFTC**) played a major role in implementing Korean competition laws through its administrative investigations and sanctions. Furthermore, while criminal sanctions including imprisonment could be imposed for nearly all types of behaviors in violation of Korean competition laws including cartel, abuse of market-dominant position and unfair trade practices, the KFTC also acted as a gatekeeper for a criminal enforcement as it has the exclusive authority to refer serious violations to the Prosecutor's Office for further criminal investigation, without which, the Prosecutor's Office cannot make indictments against those involved.<sup>1</sup>

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<sup>1</sup> This is very exceptional in the context of South Korean criminal justice system, where prosecutors generally have the power and discretion on whether to prosecute persons suspected of crimes. As a result of the KFTC's exclusive referral authority, most violations of the competition law only result in imposition of administrative sanctions by the KFTC, and only a few cases that the KFTC deem as a serious violation deserving criminal

In addition, there have been the following major recent developments in the area of antitrust criminal enforcement:

- A. Implementation of the Criminal Leniency System by the Prosecutor's Office.** Recently, there have been several discussions about abolishing the KFTC's exclusive referral authority. While an amended bill to such effect was put on table at the National Assembly, the KFTC's exclusive referral authority survived at the last minute. However, the Prosecutor's Office nonetheless enacted its own 'Guidelines on Criminal Leniency and Investigation Procedures for Cartel Cases,' which took effect from December 2020. Accordingly, an independent leniency program that is distinct from the leniency program operated by the KFTC is now operated by the prosecution. Therefore, companies considering to apply for leniency regarding an alleged cartel violations should apply for the leniency program not only by the KFTC but also by the prosecution at the same time.
- B. Expansion of Prosecution's Investigative Division for Competition Law Violations.** In March 2022, the Fair Trade Investigation Division of the Seoul Central District Prosecutors' Office, which is in charge of prosecuting competition law violations, was expanded to three teams from two, thereby increasing the manpower in anticipation of increasing enforcement cases.
- C. The Emergence of the President Yoon's Administration and its Announcements on State Policies.** During his time as the Prosecutor General, President Yoon stated that "criminal law enforcement capabilities should be concentrated in order to establish a fair competition order." In the new administration, he has continued to emphasize the importance of monitoring and strictly enforcing the law on monopoly, abuse of dominance, and collusion cases.
- D. Amendments to the Criminal Procedure Act and the Prosecutors' Office Act that include limiting the scope of the prosecution's authorities to initiate direct investigations.** On May 3, 2022, a bill to amend the law to drastically reduce the scope of the prosecution's investigative authorities was passed by the National Assembly. However, even under the amended law, prosecutors still retain its investigative authorities over competition law violations.

Key takeaways for companies doing business in Korea considering the clear trends seen above are:

1. the criminal enforcement of competition law, which merely functioned as a supplementary means in the past, is continually being enhanced; and
2. the role and position of the prosecution as a competition law authority is gradually growing.

In response to these developments, companies need to pay close attention to policy and legislative changes in the criminal enforcement system of competition law in the future and prepare to respond to the KFTC's investigation as well as the prosecution's investigation in relation to competition law cases, especially in relation to cartel matters.

## **II. The KFTC imposes sanctions on the international cartel over ocean freight rates among Korean and foreign overseas container liners in Korea-South East Asia route, Korea-Japan**

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sanctions are referred to the Prosecutor's Office for further prosecution at the KFTC's sole discretion.

### route, and Korea-China route

At its plenary hearings held in January and May 2022, the KFTC ruled that Korean and foreign container liners did in fact engage in ocean freight rate cartels in the Korea-South East Asia route, Korea-Japan route, and Korea-China route, and imposed administrative fines in the amount of approximately KRW 176.2 billion (approximately USD 136 million) in total, in addition to corrective orders.

For each route, the KFTC determined that the liners entered into agreements on matters such as the minimum level of base rate, whether to raise the base rate, introducing and raising various incidental rates, and the bidding rate in relation to large customers. In this landmark cartel matter involving multiple Korean and international companies, the liners mainly raised and contested the following legal points:

- A. the agreements on the ocean freight rates should be exempt from the application of the competition law since the Article 29 of the Marine Transportation Act (the **MTA**) permits the freight rate agreements among liners and the International Convention on a Code of Conduct for Liner Conferences, to which Korea is a member, also allows agreements on the freight rates and monitoring them amongst liners;
- B. the Ministry of Oceans and Fisheries (the **MOF**) issued a policy interpretation that the liners met the proper reporting requirements regarding these matters under the MTA; and
- C. the agreements were essential to the survival of small and mid-sized liners which is absolutely necessary for the shippers, ports, logistics, and the national economy in the container liner ocean marine transportation market, which is a key national industry.

Although the KFTC recognized some merits to the above points, it ended up imposing sanctions on the liners considering that the freight rate cartel of the liners failed to specifically comply with the procedural requirements as stipulated in the MTA. While the MTA requires the liners to report each of the individual agreements to the MOF and consult with the shippers' association in regards to the agreed-upon terms and conditions of the transportation, the facts revealed that the liners only reported the master agreement to the MOF. Because of such failure to comply with the procedural requirements under the MTA, the KFTC did not accept the liners' argument that their conduct should be exempt from the application of the competition law.

The sanctions imposed by the KFTC are summarized in the table below.

< Summary of KFTC's Sanctions >

Route	Entities Sanctioned	Administrative Fines	Corrective Order
Korea-South East Asia route	23 liners (12 Korean liners, 11 foreign liners) and Committee of Shipowners for Asian Liner Service	Approximately KRW 96.2 billion	Cease and desist order

Korea-Japan route	15 liners (14 Korean liners, 1 foreign liner) and Korea Offshore Transport Association	Approximately KRW 80 billion	Cease and desist order
Korea-China route	27 liners (16 Korean liners, 11 foreign liners) and Yellow Sea Liner Committee	0	Cease and desist order

The amount of an administrative fine imposed on the liners in Korean-South East Asia route and Korea-Japan route was 2% of the amount of sales generated from the export routes during the cartel period. In the case of Korea-China route, the administrative fines were exempted and only corrective orders were imposed considering that the anti-competitive effect caused by the cartel was minimal since the two governments have designated the Korea-China route as a specially managed route and have strictly controlled route opening, ship input, and freight rates in the Korea-China route.

In this shipping cartel case where the issue of exemption from the application of competition law was hotly debated, while the KFTC did not grant the exemption mainly because of the liners' failure to comply with the specific procedural requirements under the MTA, it drastically reduced the fine amount compared to the amount originally recommended by the case handlers, in consideration of the purpose and necessity of agreements among liners. Nonetheless, the sanctioned liners are expected to file an administrative lawsuit against the KFTC to obtain further court review on the legal issues.