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Information Exchange as a Type of Agreement?

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Abstract

Article 19(1) of the Monopoly Regulation and Fair Trade Act prescribes that an anticompetitive "agreement" among enterprisers exists as a requirement for establishing an unreasonable collaborative act. The requirements and standards that are necessary for finding the existence of an "agreement" based on information exchange as evidentiary grounds when there is an information exchange without any explicit agreement or direct evidence has become a critical legal issue in Korea

While lower courts previously provided legal standards in regard to such issue, in July 2014, for the first time the Korean Supreme Court rendered a landmark decision regarding the requirements and determination standards for finding information exchange among competitors as an agreement in the case concerning information exchange by sixteen life insurance companies.

In the above case, the Korean Supreme Court held that (i) under the MRFTA the existence of an unreasonable collaborative act was not directly established based solely on the existence of information exchange, although information exchange can be used as compelling evidence in finding reciprocity in meeting of the minds among enterprisers and (ii) in such case, the existence of an agreement has to be established by comprehensively considering the totality of circumstances, such as the structure and special characteristics of the relevant market and the nature and details of the exchanged information, etc.

In sum, it may be viewed that courts in Korea continue to develop an autonomous theory of interpretation in order to regulate information exchange as an unreasonable collaborative act, while not damaging the significance of the existence of an "agreement" under the current MRFTA regime.

KEY WORDS: Information exchange, Cartel, Agreement, Unreasonable collaborative acts, Concerted practices, Life Insurer Case, External conformity and presumption of an agreement

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I. Introduction

As surveillance and sanctions for cartel activities by competition authorities worldwide are intensified, the structure of cartels formed by corporations are becoming more artful and concealed. In this connection, in large-scale cartel cases that were recently exposed, it is difficult to find explicit agreements or direct evidence in regard to the existence of agreements (*e.g.*, "written agreements" or other such evidence). Rather, cases with only tacit understandings based on information exchange among competitors are gradually becoming more prevalent.

However, since "information exchange" itself simultaneously possesses both pro-competitive and anti-competitive effects,[1] it is not easy to determine the illegality of such act. Therefore, competition authorities, including those in the U.S. and the EU, have developed legal theories in connection with the determination of illegality in information exchange and have made efforts to regulate such suspected exchanges. The courts in Korea and the Korea Fair Trade Commission (*Gongjeonggeorae Wiewonhui*; hereinafter **KFTC**) have also developed legal theories to regulate information exchange among competitors involving important management or sales information such as prices, sales conditions and production plans as "unreasonable collaborative acts" in circumstances where explicit agreements among enterprisers are absent or lacking.

In particular, the Korean courts will find the existence of unreasonable collaborative acts only in circumstances where an "agreement" as defined under Article 19(1) (hereinafter **Article 19(1) Agreement**) of the Monopoly Regulation and Fair Trade Act (*Dokjeom Gyuje Mit Gongjeonggeoraeye*

1) Information exchange has pro-competitive effects of promoting competition by enhancing market transparency and of increasing benefits to consumers by reducing the information search cost incurred by the consumers. At the same time, however, information exchange can cause anticompetitive effects of aiding in cartel behaviors by facilitating the establishment of joint strategies among corporations and reducing the cost of monitoring withdrawals from the cartel agreements, and of impeding new entries into the market by creating a barrier to entry against those corporations that cannot share information. *See* Rhee Sangkyu, *Saoebjagan Jeongbogyohwanhaengwieeui Gyeongjejeog Hyogwa Mit Gyuje Gijun* [*Economic Effect of and Regulatory Standards for Information Exchange between Enterprisers*], 176 Gyeongjaengjournal [Journal of Competition] 88-89 (Sept. 2014).

Gwanhan Beobryul; hereinafter **MRFTA**) can be established and when a certain type of agreement is discovered. However, since information exchange is not included in the certain type of agreement which constitutes an unreasonable collaborative act under Article 19(1), how the "agreement" can be discovered may become a critical issue in establishing the existence of collaborative acts in circumstances where only information exchange is present without any evidence of explicit agreements. In connection with the foregoing, in July 2014, the Korean Supreme Court rendered an important decision regarding the requirements and determination standards for finding information exchange among competitors as an agreement in the case concerning information exchange by sixteen life insurance companies (hereinafter **Life Insurer Case**).[2)]

In the following sections, this article will (1) first examine the requirements for establishing "unreasonable collaborative acts" under the MRFTA and (2) then introduce exemplary cases where "information exchange" was examined as the main issue (*i.e.*, court precedents and KFTC decisions). (3) Finally, this article will examine the essential points of the decision by the Korean Supreme Court in the Life Insurer Case and the significance of such decision.

II. An "Agreement" as a Requirement for Establishing Unreasonable Collaborative Acts

1. Statutory Provision and the Significance of an "Agreement" as a Requirement for Establishing Illegality

Article 19(1) of the MRFTA prescribes that an *anticompetitive "agreement" among enterprisers is a requirement for establishing an unreasonable collaborative act*. The courts broadly interpret the term "agreement" to include, "not only explicit agreements, but also mutual recognition or understanding for the existence of a meeting of the minds, tacit understanding or an implied agreement."[3)] Therefore, even when explicit agreements are absent, so long

2) *See* Supreme Court [S. Ct.], 2013Do16951, July 24, 2014 (S. Kor.).

3) *See* Supreme Court [S. Ct.], 2001Do1239, Feb. 28, 2003 (S. Kor.); *See also*, Supreme Court

as the KFTC successfully establishes the existence of a "tacit agreement" or "implied agreement" using indirect or circumstantial evidence such as information exchange or information provision, collaborative acts may be found to exist in such circumstances.

> MRFTA, Article 19 (Prohibition of Unreasonable Collaborative Acts)
> (1) No enterpriser shall engage in an *agreement* with other enterprisers by contract, arrangement, resolution or any other means to jointly engage in any of the following acts,[4] which unreasonably restrains competition (hereinafter referred to as "unreasonable collaborative act"), or allow any other enterpriser to commit such unreasonable collaborative act (*emphasis added*).

Meanwhile, Article 19(5)[5] of the MRFTA stipulates that an agreement to

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[S. Ct.], 2002Do4648, May 27, 2003 (S. Kor.).

4) Article 19(1) of the MRFTA enumerates the following nine types of acts as subjects of agreements that unreasonably restrain competition:

1. Fixing, maintaining or changing prices;
2. Determining terms and conditions for the transaction of goods or services, the prices or the conditions of payment thereof;
3. Restricting production, delivery, transportation or transaction of goods or restricting transaction of services;
4. Restricting the area in which a transaction arises or the transacting counterparty;
5. Preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services;
6. Restricting the types and standards of goods or services when producing or trading such goods or services;
7. Jointly performing or managing the main parts of business or establishing a company, etc. to jointly perform or manage the business;
8. Deciding successful bidder, successful auctioneer, bidding price, winning bid price or contract price and other matters prescribed by the Presidential Decree; and
9. Substantially restricting competition in a particular business area by means of interfering or restricting the activities or contents of business of other enterprisers (including the enterpriser who has conducted the activity), which is distinct from the acts referred to in subparagraphs 1 through 8.

5) The current version of Article 19(5) of the MRFTA, which was amended in August 2007, is as follows:

"Where two or more enterprisers commit an act falling under any subparagraph of paragraph (1), it shall be presumed that the enterprisers have agreed to commit an act in association falling under any subparagraph of paragraph (1) when it is highly probable to deem that they committed the act in a collaborative manner when considering the totality

commit any of the acts described in each of the subparagraphs of Article 19(1) of the MRFTA may be "presumed" so long as certain requirements are satisfied, even in the absence of an explicit agreement. This statutory provision which grants a legal presumption for the existence of an "agreement", which is an essential requirement to find the existence of a collaborative act once certain requirements are satisfied is a unique provision that is not found in legislative examples in any other jurisdiction.

However, as examined above, due to the courts' broad interpretation of the scope of an Article 19(1) Agreement, there is no real difference between establishing the existence of such agreement based on combining several indirect or circumstantial evidence when no direct evidence is available, or applying the presumption provision of Article 19(5) of the MRFTA. Accordingly, the KFTC directly applies Article 19(1) of the MRFTA to a majority of the cases that it examines, while the presumption provision of Article 19(5) of the MRFTA is rarely utilized in actual practice. Therefore, the following discussion will focus on the applicability of Article 19(1) of the MRFTA.

2. *The Relationship between Information Exchange and Unreasonable Collaborative Acts*

If the suspected enterprisers are found to have explicitly engaged in a cartel perpetrated by information exchange, an agreement would not be difficult to find. However, if the only available fact is that the competitors exchanged price and/or other information (*e.g.* information exchange) without any evidence establishing the existence of specific agreements, the following issues may become important in discussing whether unreasonable collaborative acts can be established in a given case involving information exchange: (i) *whether information exchange itself or an agreement to engage in such exchange can be sanctioned as an "unreasonable collaborative act"* and/or (ii) *what requirements and standards are necessary for finding an "agreement" (to increase price, reduce output etc.) based on information exchange*

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of the circumstances, including the characteristic of the relevant goods or services, economic reasons and ripple effects of the relevant activity, and frequency and mode of contact among enterprisers, etc."

as evidentiary grounds.

First, the EU regulates illegal collaborative acts by applying Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter **TFEU**), which currently bans "concerted practices", which do not require an agreement as an element. Therefore, under the current regulatory regime in the EU, information exchange itself may be found to be illegal if it constitutes a "concerted practice." Moreover, in the U.S., an agreement to engage in information exchange may be found to be illegal if such agreement restrains trade or commerce since Article 1 of the Sherman Antitrust Act does not specifically enumerate the types of agreements that may be deemed to be illegal.

Contrastingly, according to the statutory interpretation of Article 19(1) of the MRFTA, the Korean competition law regime does not deem "information exchange" or "agreement to participate in information exchange" to independently constitute an unreasonable collaborative act (*e.g.* cartel). The basis of the foregoing interpretation is that, although Article 19(1) of the MRFTA prohibits any "agreement" to commit acts included in subparagraphs 1 through 9 of the same provision,[6] information exchange is not included in such prohibited acts. Therefore, while information exchange may be utilized as indirect or circumstantial evidence in establishing the existence of an agreement to commit the enumerated acts in Article 19(1) of the MRFTA, the actual participation in information exchange or an agreement to participate in such exchange alone cannot be found to violate Article 19(1) of the MRFTA.

Despite the above, the KFTC has invited criticisms for contradicting the existing precedents and statutory interpretations by taking the position of considering "information exchange itself" as a prohibited unreasonable collaborative act under Article 19(1) of the MRFTA in certain cases where the legality of information exchange was at issue.[7][8] The decision in the Life

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6) *Id.*

7) Examples of such cases are (i) the case concerning unreasonable collaborative acts by five cheese industry enterprisers and (ii) the case concerning unreasonable collaborative acts by four ramen noodle industry enterprisers. The above two cases will be introduced in Section III. 1. of this article.

8) *See also* Han Seung Hyuck, *Jeongbogyohwanhaengwiewa Gongdonghaengwieeui Gwangye* [*The Relationship between Information Exchange and Collaborative Acts*], 170 GYEONGJAENGJOURNAL

Insurer Case, which this article will examine in detail, is significant because it offered a response to the above issue.

Moreover, since the discussions in Korea have developed with a focus on the value of information exchange as circumstantial evidence in presuming the existence of an agreement, the precedents that developed the legal theories regarding the requirements and determination standards for finding the existence of an agreement through "information exchange" as well as the cases that dealt with information exchange as the main issue will be examined below in order to review the trend in the courts' and the KFTC's jurisprudence regarding information exchange.

III. Precedents and Decisions Regarding Information Exchange and Establishing Unreasonable Collaborative Acts

1. Cases which found Establishment of Unreasonable Collaborative Acts through Information Exchange

1) Case Concerning Unreasonable Collaborative Acts by Five Beverage Manufacturers and Sellers

In 2008 and 2009, five beverage manufacturers and sellers agreed to jointly increase prices of their beverage products on three separate occasions. They also continuously held meetings composed of CEO-level, sales director-level and market research director-level employees and executives and exchanged information regarding monthly sales targets and performance data, contents of promotions, release of new products (including the sales prices), sales strategies and price increase plans. The KFTC viewed such information exchange as a basis for establishing the existence of an "agreement" and imposed administrative surcharges on the

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[Journal of Competition] 95 (Sept. 2013); Ahn Chang Heon, *Budanghan Gongdonghaengwieeui Silmusang Jaengjeomye Daehan Geomto* [*Review on Practical Issues of Unreasonable Collaborative Acts*], 43 Byeonhosa [Lawyer] 406-407 (2013); Ahn Byung Hoon, *Jeongbogyohwanhaengwiewa Habeuieui Chujeong* [Information Exchange and Presumption of Agreement], 178 GyeongjaengJournal [Journal of Competition] 47 (Jan. 2013).

offending enterprisers by applying Article 19(1) of the MRFTA.[9]

The five enterprisers subsequently filed separate administrative lawsuits with the Seoul High Court objecting to the KFTC decision.[10] In the ensuing litigation, the Seoul High Court presented a determination standard for the establishment of collaborative acts through information exchange for the first time.

In the foregoing case, the Seoul High Court held:

> "Information exchange may serve as *compelling evidence in establishing the existence of an agreement* depending on the structure and characteristics of the relevant market, the subject of the information, the nature and contents of the information, the timing of the information exchange and the subject and method of information exchange. In connection with the foregoing, the exchange of information regarding the price and production among competitors may serve as means to promote cartel activities or to facilitate the execution of cartel agreements by increasing transparency in the market (*emphasis added*)."

More specifically, the Seoul High Court opined:

> "The closer [the information exchange at issue] constitutes the following circumstances, the more *such information exchange threatens free and fair competition in the market and may serve as compelling evidence in establishing collaborative acts among enterprisers*: (i) when information exchange among competitors occurs in a market which is relatively more oligopolistic and concentrated than other markets or in a market with high homogeneity in product specifications, qualities or other features so that such information exchange would make the relevant market more transparent (*structure and character of the market*); (ii) when the exchanged information is not statistical data

9) *See* KFTC Decision, 2009-249, Nov. 9, 2009 (S. Kor.).

10) *See* MRFTA, Article 55 (The Seoul High Court shall have exclusive jurisdiction over any first-instance trial of administrative lawsuits filed in objection to the decision of the KFTC).

> such as demand or production volume, but, rather, information that is generally deemed to be trade secrets and a core element in competition such as price increase plans or details of price increases (*subject of information*); (iii) when the item, price increase rate (range) and other relevant characteristics of a product, which are the subjects of the information exchanged, are more specific and segmented (*content of information*); (iv) when the timing of information exchange occurs before other competitors' decisions to increase prices or before the disclosure and dissemination of such information in the market, and when such information exchange is carried out continuously or repeatedly (*timing and method of information exchange*); and (v) when information exchange is carried out furtively and exclusively among a few related enterprisers with the exclusion of consumers, and the parties involved are employees and officers with actual influence on the pricing decision of their respective companies as opposed to those employed in branch offices engaged in sales activities (*perpetrator of information exchange*) (*emphasis added*)."[11)12)13)]

After the foregoing decision by the Seoul High Court, the new legal

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11) *See* Seoul High Court [Seoul High Ct.], 2009Nu38406 & 2009Nu38390, Nov. 25, 2010 (S. Kor.).

12) The standard for determining illegality of information exchange offered in the foregoing decision is arguably very similar to the standard presented by the EU. *See* Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11).

13) Based on the foregoing standard, the Seoul High Court rendered separate decisions for each individual enterpriser regarding the inquiry of whether the act at issue constitutes an unreasonable collaborative act. In other words, for "Haetae Beverage Co., Ltd.", the court held that there was an agreement, while holding, for "Woongjin Foods Co., Ltd." that there was no agreement in the first price increase (the court found agreements in the second and third price increases). However, the Korean Supreme Court reversed and remanded the original decision from the Seoul High Court on the ground that it contained illegal judicial review arising from "[the lower court's] misunderstanding of the legal theory regarding the definition of relevant market", *See* Supreme Court [S. Ct.], 2010Do28939, Feb. 13, 2013 (S. Kor.); Supreme Court [S. Ct.], 2011Do204, Feb. 14, 2013 (S. Kor.). The individual decisions are still being reviewed in the Seoul High Court. *See* Seoul High Court [Seoul High Ct.], Case No. 2013Nu8020, Seoul High Court [Seoul High Ct.], Case No. 2013Nu8037.

theory of potentially using information exchange as compelling evidence in establishing the existence of an agreement was widely cited in various cases involving unreasonable collaborative acts perpetrated by information exchange. The representative cases are as follows:

2) Case Concerning Unreasonable Collaborative Acts by Twelve Dairy Products Enterprisers[14)]

The KFTC imposed sanctions on twelve dairy products enterprisers suspected of engaging in unreasonable collaborative acts based on a finding of the following facts: (i) the suspected enterprisers, which manufacture and sell dairy products, formed groups called "*Yumaekhui*" and "*Wubanghui*" and held regular meetings early every month from January 1984 at which time they mutually exchanged their respective sales data, new product information, promotion plans and product price information and (ii) the enterprisers "agreed" to gradually increase prices by exchanging price increase proposals for each product between 2008 and 2009. In response to such sanctions, the corresponding enterprisers contended that unreasonable collaborative acts cannot be established in the foregoing case by offering the following countervailing evidence: (a) the exchanged information was either non-price information or information that has already been disclosed in the market and (b) the price alignment circumstances alleged by the KFTC can occur in the relevant market without agreements due to the characteristics of the dairy products market. However, the Seoul High Court directly cited the determination standard presented in the beverage cartel case explained above and held:

> "In the oligopolistic sales market for market milk and fermented milk, the twelve enterprisers' act of adjusting the range and timing of the price increase by exchanging specific product prices, price

14) *See* KFTC Decision, 2011-051, May 2, 2011 (S. Kor.); *see also*, Seoul High Court [Seoul High Ct.], 2011Nu18467, Jan. 12, 2012 (S. Kor.) (Plaintiff Binggrae lost in the Seoul High Court and the appeal was denied); Seoul High Court [Seoul High Ct.], 2011Nu27584, Apr. 12, 2012. (S. Kor.) (Plaintiff Namyang Dairy Products Co., Ltd. lost in the Seoul High Court and the appeal was dismissed in the Supreme Court. *See* Supreme Court [S. Ct.], 2012Do10093, Aug. 30, 2012 (S. Kor.)); Seoul High Court [Seoul High Ct.], 2011Nu18719, Mar. 21, 2012 (S. Kor.) (Plaintiff Korea Yakult Co., Ltd. lost in the Seoul High Court).

> increase plans and other relevant price information, which are core elements of competition, is not a simple [manifestation of] conscious parallelism, but rather constitutes a concerted practice. Therefore, such act by the enterprisers establishes an unreasonable collaborative act because an 'agreement' for a collaborative act can be presumed in the present case."

3) Case Concerning Unreasonable Collaborative Acts by Five Cheese Manufacturers and Sellers[15)]

The KFTC imposed sanctions on five cheese manufacturers and sellers suspected of engaging in unreasonable collaborative acts on the following grounds: (i) the five cheese manufacturers and sellers exchanged company sales data, new product information, promotion plans and price information through a group called the "Cheese Distribution Information Conference" from 1992 to November 2009 and (ii) the foregoing enterprisers agreed to increase prices based on the above information exchange between 2007 and 2011. The Korean Supreme Court also affirmed the finding that collaborative acts were established by holding that "the five enterprisers shared information on price increases at the meetings and agreed to implement price increases based on the exchanged information and on each company's respective circumstances."

However, in determining the existence of an "agreement", the KFTC opined that "The so-called 'information exchange' among competitors may serve a compelling evidence in establishing the existence of an agreement depending on the character or content of the information, the timing and scope of the exchange and the perpetrator or method of the exchange. In connection with the foregoing, *the exchange of price and production information among competitors is also deemed to be a type of explicit cartel based on the facts that such exchange either aids in the formation of a cartel or facilitates the execution of a cartel* (*emphasis added*)." The KFTC also characterized "information exchange as anticompetitive", thereby taking a position

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15) *See* KFTC Decision, 2011-143, Aug. 9, 2011 (S. Kor.); *see also*, Seoul High Court [Seoul High Ct.], 2011Nu32739, Aug. 30, 2012. (S. Kor.) (Plaintiff Namyang Dairy Products Co., Ltd. lost in the Seoul High Court and the appeal was dismissed in the Korean Supreme Court [S. Ct.], 2011Do21413, Feb. 15, 2013. (S. Kor.)).

similar to those assumed by the competition authorities in the EU and the U.S., where "information exchange" itself is deemed to be a type of unreasonable collaborative act.[16] As previously noted, such position has been met with criticisms that it did not conform to the text of the MRFTA.[17]

4) Case Concerning Unreasonable Collaborative Acts by Four Ramen Noodle Enterprisers[18]

The KFTC uncovered that the ramen noodle manufacturers continuously and systematically exchanged information on price increase plans, increase details, production date of the products subject to the price increases, shipment dates, sales performance data and targets, new product launch dates, promotion plans and other relevant information in an oligopolistic market, to be used as an essential means to execute a cartel agreement. The KFTC subsequently imposed sanctions on the enterprisers for jointly increasing prices of ramen noodle products in six separate occasions between May 2001 and February 2010 through participating in information exchange.[19] In its review of the foregoing decision, the Seoul High Court held that the KFTC's disposition was lawful by *inferring an implied agreement* among enterprisers to jointly fix prices based on the following grounds: (i) there was an explicit agreement regarding the first price increase and (ii)

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16) *See* KFTC Decision, 2011-143, Aug. 9, 2011 (S. Kor.) (at 71-75).

17) *See supra* notes 8-9.

18) *See* KFTC Decision, 2012-107, July 12, 2012 (S. Kor.); *see also*, Seoul High Court [Seoul High Ct.], 2012Nu24223, Nov. 8, 2013 (S. Kor.) (Plaintiff Nongshim Co., Ltd. lost in the Seoul High Court and the appeal is currently in progress in the Korean Supreme Court. Supreme Court [S. Ct.], Case No. 2013Do25924 (S. Kor.)).

19) Also in the ramen noodle cartel case, the KFTC rendered a decision similar to that of the cheese cartel case and held that "the exchange of price and production information among competitors could be deemed to be a type of explicit collaborative act" (KFTC Decision, 2012-107, July 12, 2012 (S. Kor.) at 112), thereby resuming its position of hinting at a possible conclusion that information exchange itself may be found to constitute an unreasonable collaborative act. In its review of the KFTC decision, the Seoul High Court took a different position from the KFTC in holding that "information exchange alone cannot *per se* show that there was an agreement for unreasonable collaborative acts", *see* Seoul High Court [Seoul High Ct.], 2012Nu24223, Nov. 8, 2013 (S. Kor.). However, the court nonetheless held that, in light of the various indirect facts other than information exchange in the ramen noodle case, an implicit agreement may be found among the enterprisers and consequently affirmed the legality of the KFTC's disposition in its conclusion.

there was a continuous exchange of key information such as price information among the enterprisers even after the first price increase and there was external conformity in price increases after the exchange.

2. *A Case that Rejected the Existence of an Agreement Despite Evidence of Information Exchange*

In a case where an employee of the largest enterpriser (market share of 55.8%) among four packaged kimchi manufacturers and sellers shared its price increase plans to the employees of the second and third largest enterprisers (market shares of 7.1% and 6.2%, respectively), the KFTC deemed that it was difficult to find the existence of an "agreement" despite the existence of information exchange after considering the structure of the packaged kimchi market, the timing and method of information exchange and the perpetrator of information exchange.[20)]

The KFTC found it difficult to establish the existence of an "Article 19(1) Agreement", despite the existence of the act of providing the price increase plans to the competitors, after comprehensively considering the following facts: (i) the personnel that exchanged information were merely salespersons or manager-level employees; (ii) the timing of the employee's sharing of the price increase plan was after such plan had been internally decided and notified to the vendors; (iii) the sharing of price increase plans only occurred two or three times; (iv) the increase plans were merely divulged passively in response to the requests from the second and third largest enterprisers and the employee of the largest enterpriser did not first divulge the information to its counterparts; (v) the largest enterpriser never inquired about the price increase plans of the second and third largest enterprisers; (vi) the packaged kimchi products are highly diversified and the gap in brand recognition between the largest enterpriser and its competitors was significant, and the price gap also amounted to 20%; and (vii) the price increase alignment by other enterprisers, based on the previous price increase structure of the largest enterpriser, was not

20) Kim Hak-Hyun, *Wiebeobhan Damhapyi Doeneun Ilbangjeok Jeongbojegong* [Unilateral Information Exchange Constituting Illegal Cartel], 161 Gyeongjaeng Journal [Journal of Competition] 32-33 (Apr. 2012).

specifically important as a considered factor in the largest enterpriser's decision to increase prices, rather the main consideration involved the successful outcomes of negotiations with the large vendors.[21)]

IV. Decision in the Life Insurer Case

1. Summary

1) Decision by the KFTC

On December 15, 2011, the KFTC issued a corrective order and order to cease the exchange of information and imposed administrative surcharges pursuant to Article 19(1) of the MRFTA against sixteen life insurance companies based on its finding that "the enterprisers engaged in the following unreasonable collaborative acts in the personal life insurance market in connection with estimated interest rates of fixed-interest products and nominal interest rates of floating-interest products (hereinafter **Estimated Interest Rates, Etc.**), which are respectively considered as the product prices for specific insurance products.[22)23)]

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21) In regard to cases where, based on the results of the KFTC's investigation a decision was made that there was no violation of the MRFTA, the KFTC does not publically disclose such decision through a non-violation decision, etc. Therefore, aside from the case introduced above, more cases may exist where the KFTC found that there was no unreasonable collaborative act despite the existence of information exchange.

22) *See* KFTC Decision, 2011-284, Dec. 15, 2011 (S. Kor.).

23) However, in calculating the administrative surcharges, the KFTC viewed the commencement date of the violation period subject to the imposition of administrative surcharges to be the earlier date of "when the estimated interested rate first changed" or "when the new product applying the new nominal interest rate was first launched", which were both after June 2000, upon considering the following facts: (i) the estimated and nominal interest rates were identical or similar until early 2000 due to the industry custom of joint product development; (ii) the KFTC notified the insurance companies in June 2000 that it would impose strict sanctions on any unreasonable collaborative acts executed in connection with the joint development and sale of insurance products; and (iii) the products which applied the old nominal interest rates were developed to react to the extraordinary circumstances triggered by the foreign exchange crisis. Consequently, those product subject to an agreement in the First Conduct of fixing Estimated Interest Rates, Etc. were excluded from the imposition of administrative surcharges (*i.e.*, excluded from the relevant products).

- First Conduct: The sixteen life insurance companies agreed to fix the Estimated Interest Rates, Etc. at specific levels or to jointly reduce such interest rates on multiple occasions from 1998 to 2000.
- Second Conduct: The sixteen life insurance companies mutually shared information on the future Estimated Interest Rates, Etc. that was not publicly disclosed and decided to reflect such information on their respective interest rates from 2001 to December 31, 2006.

2) Arguments by the Life Insurance Companies

The life insurance companies, during the KFTC proceeding, argued that the post-2001 violations (the Second Conduct) alleged by the KFTC was merely a "simple information exchange" and should not be deemed an agreement of unreasonable collaborative acts as prescribed under the MRFTA. After the life insurance companies' argument above had been rejected by the KFTC, the companies filed an administrative appeal with the court by contending that the KFTC's disposition was unlawful on the grounds that the life insurance companies had independently set their respective interest rates without any agreements among them and that the external appearance of each company's estimated and nominal interest rates did not actually conform to each other.

2. Decision by the Seoul High Court

The Seoul High Court held that the KFTC's disposition in the Life Insurer Case was unlawful based on the grounds that information exchange (the Second Conduct) alone was insufficient to constitute an "unreasonable collaborative act."[24)]

When the key grounds for the decision of each court is examined, first, the Seoul High Court, Administrative Department No. 6 held:

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24) The departments in charge of presiding in administrative lawsuits filed on appeal from KFTC decisions in the Seoul High Court are Administrative Department Nos. 2, 6 and 7, which form the bench that specializes in antitrust matters, and each department independently makes decisions on each case. In the Life Insurer Case, the Seoul High Court, Administrative Department Nos. 6 and 7 were designated as the jurisdictional benches and each bench subsequently rendered several rulings on the objections filed by the life insurance companies.

> "Unlike foreign legal regimes which regulate 'concerted practices' such as information exchanges among enterprisers as a type of cartel, the MRFTA deems the fact that [the enterprisers] mutually exchanged information insufficient and requires the existence of a meeting of the minds to 'jointly determine prices' in order to constitute a prohibited collaborative act. However, in the present matter, it is difficult to conclude that there was an agreement to 'jointly determine', since the sixteen life insurance companies 'determined their respective interest rates independently' while participating in the information exchange."[25)]

Additionally, the Seoul High Court, Administrative Department No. 7 held:

> "Since an act's external conformity is not one of the requirements for establishing unreasonable collaborative acts, absence of such external conformity does not definitively indicate that there was no agreement present. However, without direct evidence for the existence of an Article 19(1) Agreement, the absence of external conformity may serve as compelling evidence that impedes the inference of the existence of an agreement, if such external nonconformity is substantial and the period of nonconformity extends for a substantial amount of time, and when it cannot be reasonably explained."

Moreover, the same administrative bench added:

> "Agreements which condone a 'substantial gap in interest rates' based on each company's individual circumstances without

25) *See* Seoul High Court [Seoul High Ct.], 2012Nu2346, July 17, 2013 (S. Kor.); *see also*, Seoul High Court [Seoul High Ct.], 2012Nu2209, July 13, 2013 (S. Kor.); Seoul High Court [Seoul High Ct.], 2012Nu2186, July 17, 2013 (S. Kor.); Seoul High Court [Seoul High Ct.], 2012Nu2339, July 17, 2013 (S. Kor.); Seoul High Court [Seoul High Ct.], 2012Nu2315, July 17, 2013 (S. Kor.).

> providing a consistent standard in connection with the range of interest rates (price range) presupposes a price competition based on the substantial gap in interest rates and, as such, these types of agreements do not conform to the characteristics of the agreements that unreasonably restrain competition as prescribed by the MRFTA."[26]

3. Decision by the Korean Supreme Court[27]

1) Determination Standard for the Existence of Agreements in Cases Where Information Exchange is at Issue

In the present case, the Korean Supreme Court offered a standard for determining the existence of "agreements to commit acts which unreasonably restrain competition" that are prohibited by Article 19(1) of the MRFTA in cases where "competitors exchanged information regarding important competitive elements such as prices".

First, the Korean Supreme Court held:

> "The 'unreasonable collaborative acts' prohibited by Article 19(1) of the MRFTA is defined as an 'agreement with respect to acts which unreasonably restrain competition', and an '*agreement*' *in such case includes not only explicit agreements, but also implied agreement. See* Supreme Court [S. Ct.], 2001Do1239, Feb. 28, 2003 (S. Kor.). However, since an agreement essentially requires communication of intentions among two or more enterprisers, only having an external appearance that coincides with the occurrence of 'unreasonable collaborative acts' enumerated in each of the subparagraphs in the foregoing provision cannot definitively establish the existence of an agreement. Rather, *circumstances that warrant the finding of reciprocity in meeting of the minds among enterprisers have to be established* and the

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26) *See* Seoul High Court [Seoul High Ct.], 2012Nu2308, Jan. 23, 2014 (S. Kor.); *see also*, Seoul High Court [Seoul High Ct.], 2012Nu2193, Jan. 23, 2014 (S. Kor.); Seoul High Court [Seoul High Ct.], 2012Nu2216, Jan. 23, 2014 (S. Kor.); and Seoul High Court [Seoul High Ct.], 2012Nu2322, Jan. 23, 2014 (S. Kor.).

27) *See* Supreme Court [S. Ct.], 2013Do16951, July 24, 2014 (S. Kor.); *see also*, Supreme Court [S. Ct.], 2014Do3853, July 24, 2014 (S. Kor.).

> burden of proof for the foregoing lies with the Defendant [i.e., the KFTC] which imposed the corrective orders and other dispositions based on the existence of such agreement (*emphasis added*)." Supreme Court [S. Ct.], 2012Do17421, Nov. 28, 2013 (S. Kor.).

In other words, while the Korean Supreme Court reaffirmed the position it took in previous cases, which embraced the broad scope of the term "agreement", it accentuated the fact that, at minimum, the KFTC has the burden of establishing the "existence of an agreement", *i.e.*, the reciprocity in meeting of the minds among enterprisers, as a requirement for establishing unreasonable collaborative acts.

The Korean Supreme Court further noted:

> "If competitors exchanged information on important competitive elements such as prices, such information exchange removes the uncertainty in decision-making, *i.e.*, pricing decisions, thereby acting as a means to facilitate or promote the formation of a cartel. Therefore, although [information exchange] can *be used as compelling evidence in finding reciprocity in meeting of the minds* among enterprisers, despite such role, *the existence of information exchange alone cannot definitively infer the existence of an agreement to commit acts which unreasonably restrain competition*. Rather, *the existence of an agreement has to be established by comprehensively considering the totality of circumstances including the structure and characteristics of the relevant market, the nature and content of the exchanged information, the perpetrator, timing and method of information exchange, the intent and purpose of information exchange, the existence of external conformity among the enterprisers in prices or outputs after participating in information exchange or the extent of the gap in prices or outputs, the process and content of the decision-making in connection with the external conformity and other impacts that information exchange has on the market* (*emphasis added*)."

In sum, the Korean Supreme Court, for the first time, presented a specific standard for determining the existence of unlawful "agreements" in a case involving information exchange as stated above.

2) Whether Information Exchange among the Life Insurance Companies Constitutes an "Agreement" under the MRFTA

The Seoul High Court found the issuance of corrective order and imposition of administrative surcharge by the Defendant (the KFTC) to be unlawful based on the fact that the basis of such disposition was the Plaintiff's engagement in unreasonable collaborative acts with fifteen other life insurance companies. The Seoul High Court arrived at the foregoing conclusion without even reviewing other arguments forwarded by the Defendant based on the following grounds: (i) unless the fact that sixteen insurance companies including the Plaintiff agreed to jointly fix, maintain or modify prices from 2001 to 2006 can be established, the evidence of such enterprisers' participating in information exchange in connection with the future estimated interest rates and nominal interest rates alone is insufficient to definitely infer the existence of an unreasonable collaborative act and (ii) the fact that the sixteen life insurance companies including the Plaintiff had set their respective interest rates by participating in the information exchange from 2001 to 2006 alone is insufficient evidence to establish the existence of an agreement to "jointly set the Estimated Interest Rates, Etc." The Korean Supreme Court subsequently affirmed the decision of the Seoul High Court.

V. Implications of the Decision in the Life Insurer Case

1. Existence of the Article 19(1) Agreement is Unable to Establish Based Solely on the Existence of Information Exchange

In the foregoing Life Insurer Decision, the Korean Supreme Court held that it was unable to establish the existence of an agreement based solely on the existence of information exchange and that such exchange alone may only be employed as compelling evidence in establishing the reciprocity in meeting of the minds. In other words, the decision in the Life Insurer Case is meaningful as a precedent because it clearly stipulated that information exchange alone is insufficient evidence in establishing the existence of unreasonable collaborative acts under the MRFTA and that separate evidence for the "existence of an agreement" is necessary.

2. *External Conformity as a Requirement for the Presumption of an Agreement*

In circumstances where the existence of an agreement is uncertain despite the finding of information exchange, the KFTC has the burden of establishing the existence of reciprocity in the meeting of the minds among the enterprisers. However, in fulfilling the foregoing burden of proof, the inquiry on *whether external conformity is absolutely necessary* in establishing the existence of an agreement may become an issue. The Korean Supreme Court addressed the above issue in its decision for the Life Insurer Case by classifying "the external conformity among enterprisers with respect to prices and outputs after participating in the information exchange" as one of several elements to be considered in determining the existence of an agreement. Therefore, it may be understood that the Korean Supreme Court views "external conformity" as one of the plus factors to be considered rather than an essential element for inferring the existence of an Article 19(1) Agreement.[28] Consequently, however, since it is difficult to presume the existence of an agreement when external nonconformity is substantial despite the existence of information exchange, external conformity may be deemed as the most important element in inferring the existence of an agreement in actual practice, particularly when indirect or circumstantial evidence sufficient to infer the existence of agreements other than information exchange is weak.

28) This is similar to the legal theory developed in the U.S., which views information exchange as one of the various plus factors considered in addition to conscious parallelism that could presume the existence of an agreement.

3. Concerted Practices and the Issue of Establishing Unreasonable Collaborative Acts

The section that warrants particular attention in the decision for the Life Insurer Case is the section that clarified the legal principle requiring courts to make decisions pursuant to the text of the MRFTA and warning them not to cite directly to the EU's legal theories regarding "concerted practices" in determining illegality of information exchanges.

In the "beverage cartel decision" introduced above, the Seoul High Court held to the effect that "agreements to commit collaborative acts may be inferred if concerted practices rather than simple conscious parallelism is present."[29] However, the KFTC also contended in the Life Insurer Case that the second information exchange carried out by the sixteen life insurance companies including the Plaintiff constituted a prohibited collaborative act under the MRFTA as a so-called "concerted practice."

However, the Seoul High Court, Administrative Department No. 6, clearly held:

> "*Unlike the foreign legal regimes which regulate 'concerted practices' such as information exchange as a type of a cartel* in addition to the agreements among enterprisers, the MRFTA deems enterprisers mutual exchange of information regarding prices insufficient to establish unreasonable collaborative acts and further requires a meeting of the minds to 'jointly fix prices' to be present (*emphasis added*)."

The Korean Supreme Court also affirmed the foregoing decision on the ground that there was no illegality in the lower court's decision because the Seoul High Court did not misinterpret the legal theories governing the relationship between information exchanges and unreasonable collaborative acts and between concerted practices and unreasonable

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29) The foregoing decision has been criticized for being inconsistent with the statutory interpretation of the Korean law, which did not stipulate "concerted practice" itself as a separate type of cartel. *See* Ahn Chang Heon, *supra* note 8, at 404-07.

collaborative acts.

In other words, the Korean Supreme Court took the position that "information exchange" is not a type of unreasonable collaborative act or a type of agreement under the statutory interpretation of the MRFTA. However, the Court noted that information exchange may be viewed as compelling evidence to establish the existence of an agreement, *i.e.*, the reciprocity in meeting of the minds.

Such decision by the Korean Supreme Court may be contrasted with the decision rendered by the Court of Justice of European Union (CJEU) in the banana importers case decided on March 19, 2015. In such case, the CJEU held that the act of exchanging diverse market information that could potentially impact prices prior to pricing decisions of competitors was a violation of Article 101(1) of the TFEU as a "concerted practice with an anticompetitive purpose."[30] According to the CJEU, for concerted practices under Article 101(1) of the TFEU, *illegality may be found even when the practice does not reach the level of an "agreement" to jointly decide competitive elements* and, so long as the information exchange continues to be carried out and the relevant enterprisers remain active in the market, the exchanged information will be presumed to be reflected on the pricing decisions of the relevant enterprisers.[31]

VI. Conclusion

The decision in the Life Insurer Case can be assessed as a landmark case that accurately prescribed the significance and the meaning of information exchange among competitors in establishing unreasonable collaborative acts, while not damaging the significance of the existence of an agreement under the current MRFTA regime.

In other words, it may be viewed that, while the Korean courts

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30) *See* Case C-286/13P, Dole Food and Dole Fresh Fruit Europe v. Commission (Mar. 19, 2015), *available at* http://curia.europa.eu/juris/liste.jsf?language=en&num=C-286/13%20P.

31) Jeong Se-Hoon & Choi In-Sun, *Europesabeobjaepansoeui Banana Suyibeobja Sageoneui Pangyeolgwa Sisajeom* [The Court of Justice of European Union Decision on the Banana Importer Case and Its Implications], 180 Gyeongjaeng Journal [Competition Journal] 93 (May 2015).

sympathize with the need for regulating furtive cartel activities perpetrated through information exchange in line with the recent trends in competition law enforcement in the U.S. and EU, at the same time, the Korean courts attempt to develop an independent system that is consistent with the Korean laws by remaining faithful to the interpretation of the provisions of the MRFTA.

Some commentators have recently raised opinions which call for effective regulation of cartel activities which are executed through information exchange by means of legislative amendments to prohibit information exchange itself, as is the case in the EU, since regulating the above cartel activities under the MRFTA has become more difficult.[32)]

Obviously, it is difficult to view that the above noted precedents and case laws alone resolved all of the questions in regard to the required degree of proof that the KFTC has to provide in order to establish the existence of an agreement or the permitted extent of information exchange for the enterprisers in individual and specific cases. It is also true that certain issues still need to be resolved, such as whether information exchange should be regulated as unreasonable collaborative acts in the case where (i) a certain level of information exchange may be necessary to develop products in certain industries (i.e., the insurance industry) due to the inherent characteristics of the business or (ii) information exchange was carried out under administrative guidance of a supervisory authority such as the Financial Supervisory Service.

However, based on the fact that information exchange between competing enterprisers, together with other circumstantial evidence, remains compelling evidence to find the existence of an agreement, it is difficult to conclude that a false negative would likely result with respect to information exchange which has a harmful effect on competition, even if no legislative changes are implemented in the near future. Even without any legislative changes, the effectiveness of regulating information exchange could be secured based on accumulation of enforcement examples from

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32) Kang Jiwon & Kim Ae-Jin, *Jeongbogyohwaneul tonghan damhaphangwieeui hyogwajeokin gyujerul wiehan gaeseonbangan* [*Improvement Proposal for Effective Regulation of Cartel Perpetrated by Information Exchange*] 58 (Gughoeibbeobjosacheo [National Assembly Research Service], Working Paper No. 277, Dec. 2015).

precedents from the KFTC and case laws from courts.