

Practical Issues in the Enforcement of Leniency Program in Korea

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Abstract

Since its introduction in 1997, the leniency program has played an important role in Korea in detecting cartel activities that have the clandestine nature. Recently, however, its operation by the Korea Fair Trade Commission (hereinafter KFTC) gave rise to criticism among companies and practitioners, ranging from doubts over the leniency regime's reliability or transparency to the fundamental skepticism over whether or why the leniency program itself should exist. Such criticism got intensified as statements submitted by leniency applicants have been dismissed in a number of recent cartel cases.

Nevertheless, it is difficult to deny the efficacy of the leniency program, not only in detecting existing cartels but also in deterring future cartel activities. For this reason, the leniency program is indispensable for the KFTC to facilitate its investigation of cartels, which are by nature secretive. Therefore, the KFTC should continue its effort to beef up the leniency program by actively addressing practical issues that have been raised during the implementation and operation of the current leniency program.

Against this backdrop, this article analyzes some practical key issues raised by the companies, the academia, and practitioners in the course of the KFTC's implementation of the leniency program, including such issues as the reliability of leniency applicants and the interpretation of key leniency requirements such as degree of necessary evidence, termination of cartel activities, coercion, and the scope of continued and sincere cooperation. It also touches upon issues related to restricting leniency immunity against repeat offenders, joint leniency application and protecting identity of leniency applicants.

KEY WORDS: Cartel, Unfair concerted conduct, Leniency, Leniency program

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I. Introduction

Unfair concerted conduct, also known as cartel, refers to an anticompetitive act where two or more competitors conspire to manipulate competitive factors such as prices, terms and conditions, quantities, counterparties or districts of transactions for their common goods or services in order to restrain competition and maximize their profits. Prohibited in Korea by Article 19 of the Monopoly Regulation and Fair Trade Act (hereinafter **MRFTA**), unfair concerted conduct can be penalized by administrative sanctions such as corrective orders (MRFTA Article 21) and administrative fines (MRFTA Article 22), as well as criminal punishment.¹⁾

The clandestine nature of cartel makes it difficult for competition authorities and the Prosecutor's Office to detect, and even if finally detected, collecting sufficient evidence to prove unlawful wrongdoings becomes a daunting task in practice.²⁾ This explains why competition agencies are increasingly depending on leniency programs to identify cartels.

The leniency program offers a company involved in a cartel an exemption or reduction related to corrective orders or administrative fines if the company cooperates with the authority by, for example, voluntarily reporting its involvement in the cartel and providing evidence (MRFTA Article 22-2). In these days when cartels develop to be more hidden and pervasive, the leniency program intends not only to identify an increasing number of cartel activities but also to effectively cause cartels to collapse and preempt their formation by providing incentives for whistleblowers to self-report and thereby undermining trust among cartel members.³⁾

After several reforms following its introduction in 1997, the leniency

1) Corporates are subject to a criminal fine of up to 200 million Korean won. Individuals are subject to imprisonment of up to three years or a criminal fine up to 200 million Korean won, or both. See MRFTA Article 66, paragraph 1.

2) Kim Hyeong Wook, *Kaleutel Jajinsingo Gammyeonjedoe Gwanhan Yeongu* [A Study on Cartel Leniency Program], 21 HYEONGSABEUBUI SINDONGHYANG [NEW TRENDS IN CRIM. L.] 152, 154 (2009).

3) KOREA FAIR TRADE COMMISSION, 2014 KOREA FAIR TRADE WHITE PAPER 170-171 (2014).

program has developed into one of the most important and effective measures to identify cartel activities in Korea. From 1999 to 2013, the leniency has been applied in 141 out of 325 cartel cases on which administrative fines are imposed, representing 43.4% of the total cases. Reliance on the leniency program is on the rise, with 55.2% of the cases on which administrative fines are imposed identified through leniency application from 2005 to 2013.⁴⁾

While the effectiveness of leniency program in detecting and deterring cartels, along with its role in improving cartel enforcement, has been well substantiated,⁵⁾ its implementation also gave rise to criticisms among practitioners and the academia over how it should be improved to address several practical issues.⁶⁾ In particular, some skeptics went so far as to threaten the foundation of the leniency program, arguing that it should be significantly redesigned based on the Constitutional principle of due process of law because the current regime does not protect innocent companies from misleading or false leniency application, leaving them exposed to reputational damage and financial loss.⁷⁾

Against this backdrop, this article analyzes primary issues identified in the course of implementing leniency programs by the Korea Fair Trade Commission (hereinafter **KFTC**) and sets forth recommendations for improvement to address them.

4) *Id.*

5) See Kim Hyeon Soo & Nahm Jae Hyun, *Kaleutel Jajinsingojja Gammyeonjedoui Jujo Jaengjeomgwa Hyogwabunseog* [Several Topics in Cartel Leniency Program Implementation], 12(2) EUNGYONGGYEONGJE [APPLIED ECONOMICS] 21 (2010).

6) See Yun Seong Un & Song Joon Hyeon, *Budanghan Gongdonghaengwi Jajinsingojja Gammyeonjedoui Silmu Unyongsang Jemunje* [Practical Issues of the Current Leniency Program], 20 GYEONGJAENGBEOBYEONGU [J. KOR. COMPETITION L.] 263 (2009); Hwang Tae Hee, *Hyeonhaeng Kaleutel Jajinsingojja Gammyeonjedoui Munjejeomgwa Gaeseonbangan* [A Study on the Current Leniency Program in Korea], 16 GYEONGJAENGBEOBYEONGU [J. KOR. COMPETITION L.] 71 (2007); Park Sung Bom, *Hyeonhaeng Budanghan Gongdonghaengwi Jajinsingojja Jedoui Munjejeomgwa Gaeseonbangan* [Problems and Recommendations Regarding Current Cartel Leniency Programs for Unfair Concerted Conduct], 26 GYEONGJAENGBEOBYEONGU [J. KOR. COMPETITION L.] 3 (2012).

7) Seo Jeong, *Jeogbeobjeolcha Wonlie Bichueo Bon Hyeonhaeng Jajinsingojja Gammyeonjedoui Munjejeomgwa Gaeseonbangan* [Incentives to Lie under the Leniency Program and Due Process], 70 SEONJIN SANGSA BEOBLYULYEONGU [ADVANCED COMMERCIAL LAW REVIEW] 75, 78 (2015).

II. Leniency Program in Korea: Requirements and Effects

1. First-in-Line Leniency Application Filed before the Investigation and Cooperation Made after the Investigation

The KFTC grants full immunity to corrective orders and administrative fines for the first-in-line leniency application filed before the start of an investigation if (i) the applicant is the first and sole party to submit evidence to prove the cartel activities (two or more business entities participating in a cartel may be granted a status of the first-in-line applicant by jointly submitting such evidence only if they are either (a) affiliated with each other under substantive control, or (b) parties to divestiture or business transfer if they meet other elements set forth by the KFTC); (ii) the application is made before the KFTC has obtained any information about either the cartel itself or the evidence necessary to prove the cartel activities; (iii) the applicant states full facts regarding the cartel activities at issue and makes continued and sincere cooperation such as submitting relevant information, among others, until the investigation is complete; and (iv) the applicant ceases to engage in the cartel activities.

Once the investigation has started, the KFTC grants full immunity in administrative fines and an exemption or reduction in corrective orders in return for investigation cooperation only if it has obtained neither information about the cartel nor sufficient evidence to prove cartel activities. In principle, the KFTC will not refer the case to the Prosecutor's Office for criminal prosecution if a party involved in the cartel was the first one to apply for a leniency or to cooperate otherwise.

2. Second-in Line Leniency Application Filed before the Investigation and Cooperation Made after the Investigation

The KFTC grants fifty percent reduction in administrative fines and an exemption or reduction in corrective orders for the second-in-line leniency application filed before the start of an investigation if (i) the applicant is the second and sole party to submit evidence to prove the cartel activities (two or more business entities participating in a cartel may be granted a status of

the second-in-line applicant by jointly submitting such evidence only if they are either (a) affiliated with each other under substantive control, or (b) parties to divestiture or business transfer if they meet other elements set forth by the KFTC); (ii) the applicant states full facts regarding the cartel activities at issue and makes continued and sincere cooperation such as submitting relevant information, among others, until the investigation is complete; and (iii) the applicant ceases to engage in the cartel activities.

Once the investigation has started, the KFTC offers a reduction in fines and an exemption or reduction in corrective orders in return for investigation cooperation only if it has neither obtained information about the cartel nor sufficient evidence to prove cartel activities. In principle, the KFTC will not refer the case to the Prosecutor's Office for criminal prosecution if a party involved in the cartel was the second in line to apply for a leniency or to cooperate otherwise.

III. Key Issues Arising from Enforcement of the Leniency Program

1. Reliability of Leniency Applicants

Since several administrative orders that the KFTC had imposed in reliance on leniency have been dismissed by the court recently, critics are voicing various concerns over the current leniency regime, ranging from doubts over the regime's reliability or transparency to the fundamental skepticism over whether or why the leniency program itself should exist. Such criticism got intensified as statements submitted by leniency applicants have been dismissed in a number of recent cases. For instance, the KFTC concluded that there was no unlawful conduct in the packaged *kimchi* cartel case,⁸⁾ the investigation of which was initiated with a leniency application. Similar cases include alleged collusions involving origin of oil

8) In this price-fixing case involving four packaged *kimchi* manufacturers (Daesang FNF, CJ Cheiljedang, Pulmuone, and Dongwon F&B), two companies filed for leniency and conceded their wrongdoings during the proceedings. Nevertheless, the KFTC found no violation of the MRFTA for all the four respondents, including the leniency applicants.

refining,⁹⁾ life insurances for individuals, and beverages.

One critic shed light on a possibility that the leniency program is misused by applicants.¹⁰⁾ For example, a company, after being reported and punished with hefty fine due to the leniency applied by its competitor, may be tempted to self-report another concerted conduct as a means of ‘retaliation’, even though that case does not amount to be a cartel activity, or may take advantage of the leniency program merely to interfere with its competitors’ business.¹¹⁾

In fact, while the KFTC frequently relies on statements from leniency applicants for imposing its sanctions, it is also true that many of such statements are easily adopted without strict validation of their truthfulness. Arguably, such lack of scrutiny is attributable to a number of factors, including the shortsighted, opportunistic behaviors of a leniency applicant eager to secure a marker for immunity, the KFTC’s lack of procedural capacity to screen tainted, self-serving statements of a leniency applicant, as well as lack of neutrality and independence of the KFTC’s proceeding procedures.¹²⁾

In the course of detecting and punishing cartel activities, it is extremely difficult to entirely disregard or neglect the critical roles served by the leniency program or the importance of statements from related persons, considering that they are used as primary evidence for cartel activities. Therefore, a fundamental solution to the above criticism would be to

9) In this case, four oil refineries (SK, GS Caltex, Hyundai Oilbank, and S-Oil) had conspired to manage origins of oil refining by requiring gas stations to obtain the consent from their original oil refineries should they get oil supplies from other sources thereby restraining competition for attracting gas stations among themselves, and to accept to match quantities supplied to a gas station associated with another refinery if any of them attract that gas station without consent. Origin of oil refining is a concept related to the association relationship between a refinery and a gas station where a gas station enters a supply contract with an oil refinery and operates under that oil refinery’s brand. Once the supply contract is expired, the gas station may operate without a brand or under another brand name. For such gas station, the initial relationship with the old refinery becomes the origin of oil refining. The court found no violations of the MRFTA in an administrative action filed by SK, Hyundai Oilbank, and S-Oil, and dismissed the KFTC’s corrective measures and fines.

10) Park Sung Eyup, *Leniency Jedowa Gwanlyeonhan Myeoch Gaji Golyeosahang* [Legal Issues on Leniency Program], 16 GYEONGJAENGBEOBYEONGU [J. KOR. COMPETITION L.] 119, 123 (2007).

11) *Id.*

12) Seo, *supra* note 7, at 89.

improve the reliability and truthfulness of statements obtained through leniency applicants in the course of investigations and administrative proceedings. Accordingly, the KFTC has revised the leniency program by having the Commission confirm the final leniency status, which were previously the responsibility of the Secretary of General, and is now reviewing the introduction of a mandatory hearing procedure to verify the truthfulness of leniency applicants.

2. Interpretation of Leniency Requirements

1) 'Necessary Evidence' to Prove Cartel Activities

The Enforcement Decree of the MRFTA (hereinafter **MRFTA Enforcement Decree**) requires a leniency applicant to provide "evidence necessary to substantiate an unfair concerted conduct" as a key prerequisite for obtaining an immunity (MRFTA Enforcement Decree Article 25, paragraph 1). The KFTC has explained in its Notification on Implementation of Cartel Leniency Program (hereinafter **KFTC Leniency Program Notification**) that the following information constitutes necessary evidence for the purpose of the leniency program (hereinafter **necessary information**).

- (i) Information and/or materials that can directly verify the existence of agreement, such as documents on the agreement or minutes of the meeting, developed by and between companies that have participated in the cartel.
- (ii) Information and/or material describing the facts regarding discussion or implementation of cartel activities detailing who, what, when, where, why, and how, such as a testimony or statement from a company, including its executive or employee that has participated in the cartel.
- (iii) Information such as statements without being accompanied by detailed information that evidences related facts if it sufficiently acknowledges the facts related to the application.

In practice, leniency application is typically filed immediately following the KFTC's dawn raid. As the KFTC may obtain information necessary to prove cartel activities during the dawn raid, the dawn raid serves a tipping

point for a company to determine whether to apply for leniency, and if apply, how much information it should voluntarily offer to the KFTC to meet the 'necessary evidence' test. With the KFTC's cartel enforcement being strengthened, business entities forming a cartel are operating in more concealed, complicated, and organized manners, including the joint management of relevant documents, meeting minutes, and emails in preparation for a possible investigation. In such case, the only remaining evidentiary information that is available to a leniency applicant for submission to the KFTC is a statement or testimony of an executive or employee that has actually involved in the unlawful conduct. If it is not clear whether such statement or testimony alone may be sufficient to constitute necessary evidence, however, a company may hesitate to apply for a leniency at all in the first place.¹³⁾ As a matter of fact, the KFTC generally requests the leniency applicant to provide supplemental information or documents by implying that it may be difficult to confirm the leniency status without additional information.

The Supreme Court of Korea interprets the scope of 'necessary evidence' broadly. In one case, the Supreme Court held that "the 'necessary evidence' under the MRFTA Enforcement Decree means any evidence that can prove unfair concerted conduct either directly or indirectly (MRFTA Enforcement Decree Article 35, paragraph 2, subparagraph 3, item B). Therefore, the necessary evidence here encompasses statements as well as documents." As for the interpretation of 'necessary information' under the KFTC Leniency Program Notification (Article 4, paragraph 1, subparagraph 2), the Supreme Court has acknowledged independent admissibility of a statement for the purpose of confirming a leniency status. The Court held that "just because the Notification requires an applicant to provide additional documents, articles, electronic data, or telecommunication data, if the application submits 'information and/or material describing the facts regarding discussion or implementation of cartel activities detailing who, what, when, where, why, and how, such as statements from a company, including its executive or employee that has participated in the cartel', it does not mean that this provision merits or intends a different interpretation

13) Park, *supra* note 6, at 8.

of the 'necessary evidence.'¹⁴ Furthermore, the Court took a more flexible approach than the KFTC in connection with the probative value of the statements by holding that "the probative value of the statements should be acknowledged not only when it reveals new facts that had not been identified by the KFTC by the time the submission is made, but if the information provided by the statements contributes to improving the probative value of previous information or verifying the veracity of facts and circumstances identified through the investigation. So far as the statements serves such functions, it should not be treated differently just because the KFTC has already obtained the information provided by such statements from other sources."¹⁵

2) *Termination of Cartel Activities*

The MRFTA Enforcement Decree requires the leniency applicant to "cease the unfair concerted conduct" in order to obtain a leniency status (MRFTA Enforcement Decree Article 35, paragraph 1). The KFTC Leniency Program Notification provides, "whether the said unfair concerted conduct has been ceased shall be determined by whether the agreement for the cartel has continued (Article 6, paragraph 1)," and that "the said concerted conduct shall be ceased immediately upon the filing of the leniency application, provided that the conduct shall be ceased immediately after the grace period if the KFTC's case examiner designates such period for the purpose of facilitating the investigation (Article 6, paragraph 2)."

To satisfy this requirement in practice, a leniency applicant should immediately cease the concerted conduct at issue expressly, by conducting a certain action that objectively demonstrates that the concerted conduct has been actually discontinued. For example, a leniency applicant for a price-fixing case may consider replacing a previously agreed price with a new one and notifying this new price to its distributors. However, such abrupt price change may signal to the market that this cartel participant has

14) Supreme Court [S.Ct.], 2012Du26449, June 13, 2013 (S. Kor.).

15) See Seoul High Court [Seoul High Ct.], 2011Nu26239, Mar. 21, 2011 (S. Kor.); The KFTC accommodated this ruling by amending the Leniency Program Notification (KFTC Notification No 2014-19, amended on January 2, 2015) accordingly. Nevertheless, at least in practice at the working level, it seems that requiring extra objective evidence in addition to statements is still not uncommon.

applied for a leniency, thereby making it difficult for the KFTC to implement follow-up investigations. Therefore, in certain circumstances, the KFTC may specifically request the leniency applicant to refrain from conducting external actions such as a price change for a certain period.

As for the interpretation of the termination of the concerted conduct, the Supreme Court held that “for certain companies engaging in a cartel activities to cease the conduct, they should take an action that contradicts the agreement, such as expressing their intention to disengage to other cartel members, either expressly or by implication, and lowering through independent pricing decision the prices to a level that would have been reached in the absence of the agreement. In order to determine whether the unfair concerted conduct has been ceased among all the cartel members, the entire business entities participating in the cartel should each engage in a conduct against the agreement by, for example, expressly terminating the agreement and lowering through independent pricing decisions the prices to a level that would have been reached in the absence of the agreement. Instead, there may exist a circumstance that is sufficient to demonstrate that the agreement has been *de facto* terminated, such as repeated price competition among cartel members.”¹⁶⁾

The Supreme Court’s stance for termination of the concerted conduct is more difficult for the cartel participant to accept or implement, because in many cases, it is difficult, if not impossible, for a leniency applicant to restore the prices or quantities to the pre-cartel level even after it has ceased to engage in the cartel activities. Therefore, determining whether the concerted conduct has been ceased by whether the effect of the cartel continues, regardless of whether the actual conduct has been terminated, is not feasible in practice, and may have draconian implications to cartel participants.¹⁷⁾

16) See Supreme Court [S.Ct.], 2007Du12774, Oct. 23, 2008 (S. Kor.); Supreme Court [S.Ct.], 2007Du12712, Nov. 27, 2008 (S. Kor.).

17) Chung Jong Chae, *Dogjeomgyuje Mich Gongjeonggeolae Gwanhan Beoblyulsang Jajinsingo Deung Gammyeonui Yogeon* [Requirements of Cartel Leniency under the Monopoly Regulation and Fair Trade Act], 166 GYEONGJAENGJEONEOL [J. COMPETITION] 38, 53 (2013).

3) *Coercer Provision*

The MRFTA Enforcement Decree denies an exemption or reduction of benefit to a leniency applicant if such applicant has coerced another company to join the unfair concerted conduct against its will, or forcibly prevent it from ceasing such conduct (MRFTA Enforcement Decree Article 35, paragraph 1, subparagraph 5, first part). According to the KFTC Leniency Program Notification, in determining whether there was a coercion, the KFTC shall comprehensively consider either (i) whether any violence or threat was exerted to force other companies to participate in unfair concerted conduct or prevent them from discontinuing their participation, or (ii) whether pressure was exerted or restriction was imposed to other companies to the extent to disable their normal operation in the market to force them to participate in unfair concerted conduct or prevent them from discontinuing their participation.

While the intent of these provisions to deprive the benefit of leniency from coercers remains valid in that allowing leniency benefit to coercers will frustrate the purpose of the leniency program, the vagueness of several concepts such as ‘pressure’ or ‘restriction’ may constrain the application of the coercer provisions to limited types of coercive conducts. In this regard, it may be necessary to introduce such concept as *de facto* coercion or broaden the definition of coercion to include intentional exercise of dominant market position to create a cartel structure. For example, if the market is comprised with one large enterprise and one small-to-medium enterprise, the large enterprise would be able to adopt a predatory pricing based on its superior financing capability, which would materially undermine the competitive position of the small-to-medium enterprise if its primary sales are generated from this market. Under this scenario, the small-to-medium enterprise cannot help initiating discussion over prices or quantities with the competing large enterprise to sustain in the market.¹⁸⁾

4) *Continued and Sincere Cooperation*

The MRFTA Enforcement Decree requires the leniency applicant to “continuously make sincere cooperation with the investigation until the

18) See also Park, *supra* note 6, at 15-16.

investigation is complete by, for example fully stating all the facts in connection with the unfair concerted conduct and providing related information (MRFTA Enforcement Decree Article 35, paragraph 1).” According to the KFTC Leniency Program Notification, the investigation is complete when the deliberation by the KFTC is consummated, and whether the cooperation was sincere shall be determined by considering in its entirety: (i) whether the leniency applicant has stated without delay all the facts related to the unfair concerted conduct within its knowledge; (ii) whether all information and materials that the leniency applicant possessed or could collect have been promptly submitted; (iii) whether the leniency applicant has promptly responded to and cooperated with the KFTC’s requests necessary to verify facts; (iv) whether the executives and employees (including all former executives and employees, if applicable) have made their best effort to ensure continued and sincere cooperation through the interviews and investigations, among others, with the KFTC; (v) whether any evidence or information related to the unfair concerted act is destroyed, manipulated, damaged, or concealed by the leniency applicant; and (vi) whether the leniency applicant has revealed without the KFTC’s consent to a third party its involvement in the cartel or its application for leniency before the release of the Examiner’s Report (i.e., Statement of Objections) (KFTC Leniency Program Notification Article 5).

With regard to the first element, that the leniency applicant should state all the facts related to the cartel promptly, the issue is whether the facts to be stated should include both the facts related to the leniency applicant’s involvement in the concerted conduct and the acknowledgement by the leniency applicant that such conduct was illegal. The general approach by the KFTC requires both. Under this circumstance, presenting a legal interpretation or analysis differing from the KFTC’s case examiner could possibly expose the leniency applicant to a risk because such interpretation or analysis may be viewed as non-acknowledgment of its wrongdoings, thereby giving rise to an argument that the leniency applicant has not satisfied the cooperation requirement for leniency.

However, a more proper stance would be that, once the leniency applicant has fully stated all the facts related to the unfair concerted conduct within its knowledge, the cooperation requirement shall not be deemed unsatisfied even though the applicant presents legal arguments or

views that deviate from that of the KFTC case examiner's. This approach is also supported by textual reading of the statute that the statement shall be made with regard to 'facts in connection with the unfair concerted conduct'. The determination on whether the stated facts amount to an illegal conduct prohibited under the MRFTA should be solely left to the decision of the KFTC.¹⁹⁾

3. Restriction on Granting Leniency Immunity to Repeat Offenders

On December 31, 2011, the MRFTA Enforcement Decree was revised to deny immunity to a repeat offender that has repeatedly engaged in an unfair concerted conduct in violation of MRFTA Article 19, paragraph 1, during a certain period (MRFTA Enforcement Decree Article 35, paragraph 1, subparagraph 1, the latter part). The KFTC Leniency Program Notification provides that one has repeatedly engaged in an unfair concerted conduct in violation of MRFTA Article 19, paragraph 1, during a certain period if either (i) one commits the unfair concerted conduct in violation of a corrective measure within five years from the date that corrective measures and/or fines are imposed on it for violation of MRFTA Article 19, paragraph 1, or (ii) one newly commits unfair concerted conduct in violation of MRFTA Article 19, paragraph 1, within five years from the date the exemption or reduction in corrective measures and/or fines for violation of MRFTA Article 19, paragraph 1 were granted to it pursuant to MRFTA Article 22-2 (KFTC Leniency Program Notification Article 6-3).

The above requirement effectively deprives an incentive for a company to voluntarily report any new concerted conduct it has participated regardless of whether it had applied for leniency for previous cartel activities, so long as it has a history of being sanctioned for engaging in unfair concerted conduct within last five years. The legislative intent to eliminate cartel activities by preventing repeat offenders from taking advantage of the leniency program has merit in some way. Nevertheless, its

19) For a similar opinion, see Chung Jong Chae, *Dogjeomgyuje Mich Gongjeonggeolae Gwanhan Beoblyulsang Jajinsingo Jedoui Jaengjeomdeul (2)* [Issues from Cartel Leniency under the Monopoly Regulation and Fair Trade Act (2)], 167 GYEONGJAENGJEONEOL [J. COMPETITION] 24, 39 (2013).

consequence of discouraging cartel members from cooperating with the KFTC by leniency applications for the sole reason that they have repeatedly engaged in cartel activities within a certain period may be sufficient to question its effectiveness from the perspective of cartel enforcement. Moreover, whether this anti-repeat offender provision has an effect of preventing multiple commitment of cartel activities is not yet substantiated. To the contrary, some critics argue, this provision may help sustain cartel activities by making their nature more clandestine.²⁰⁾

4. Joint Leniency Application

Generally, leniency application for unfair concerted conduct is filed by a single entity. However, the joint leniency application was introduced with the revision of the MRFTA on May 13, 2009. The joint leniency application is permitted for business entities of two or more for exceptional cases where the business entities are either (a) affiliated with each other under substantive control, or (b) parties to divestiture or business transfer, if they meet other elements set forth by the KFTC (MRFTA Enforcement Decree Article 35, paragraph 1, subparagraph A). This provision reflects the KFTC's intention to allow the leniency status for a single applicant as a default principle, while conditionally granting the identical immunity to multiple parties when certain circumstances make it necessary to treat their joint application same with that by a single party.

Whereas the interpretation of divestiture or business transfer for the purpose of joint leniency is relatively clear, what it means for business entities 'to be affiliated with each other under substantive control' is disputable. The KFTC Leniency Program Notification states that substantive control exists (i) where a business entity owns the entire shares of stocks of another business entity (including shares owned by the same person or persons related to the same person; hereinafter the same shall apply); or (ii) where a business entity does not own the entire shares of stock of another business entity but has *de facto* control over another business, and thus they are not deemed to be independent of each other,

20) Park, *supra* note 6, at 15.

when such factors as the ratio of shareholdings, the business entities' understanding, whether there are interlocking officers between the business entities, whether their accountings are consolidated, whether the controlling entity makes management instructions routinely, whether a business can independently determine terms and conditions of sales, and (iii) other circumstances are considered in its entirety along with the specific nature of each case. However, business entities are not under substantive control if they are deemed competitors when such factors as current conditions of the related market, the competitors' understanding, and the businesses' activities are considered (KFTC Leniency Program Notification Article 4-2).

Regarding the interpretation of substantive control, the Supreme Court recently held, "in consideration of the statute and the purpose of the joint leniency application, the meaning of substantive control should be narrowly construed to be applicable to a situation where one controlling entity solely exercises *de facto* control over the other business entities, leaving them without independence and freedom in relation to their decision-making processes and each business of such other entities not independently operated. In determining *de facto* control, various factors such as ratio of shareholdings, the controlling entity's level of influence in decision-making processes, methods of participating in decision-making processes, whether the controlling entity makes management instructions routinely, whether there are interlocking officers between the business entities, how the entities perceive their relationship with each other, whether their accountings are consolidated, whether each business entity can independently determine its business areas or strategies, how the entities behave in the market, and how they came to file joint application should be comprehensively considered."²¹⁾

This ruling also held that it should be possible to establish substantive control among business entities that are competitors in appearance if they can be considered as one entity in substance. This ruling is notable because it overturned Seoul High Court's ruling²²⁾ that business entities are affiliated with each other under substantive control only if they are either a single

21) Supreme Court [S.Ct.], 2012Du13962, Sept. 24, 2015 (S. Kor.).

22) Seoul High Court [Seoul High Ct.], 2010Nu32091, May 24, 2012 (S. Kor.).

business entity in substance or can be treated as a single business entity for the reason that they do not compete with each other.

5. *Protecting Identity of Leniency Applicants*

Protecting an applicant's identity is essential to vitalize the cartel leniency and improve detecting cartel activities. If the fact that a leniency application has been filed or the identity of a leniency applicant is easily released, this will not only impair the foundation of the cartel leniency program, which is based on confidentiality, but also will become a disincentive against future leniency application. The KFTC Leniency Program Notification require the KFTC officials in charge of the case to keep confidential the identity of and information obtained from a leniency applicant as well as evidentiary information and materials, and the KFTC to exercise due care in preventing the identity of leniency beneficiaries from being released by or to the press or otherwise.

Protecting the identity of a leniency applicant may conflict with rights to defense of other non-leniency respondents and their due process. Some argue that the current protection for leniency applicants until the KFTC plenary session is excessive in light of its adverse effect on the other respondents' defense rights under due process, considering that the identity of leniency applicants will be made public at the court proceedings in any event and that there is no reason to help maintain credibility among cartel members by protecting the leniency applicant's identity.²³⁾ However, disclosure of the identity of leniency applicants during the KFTC proceedings would cause unnecessary disputes over whether the applicant has satisfied all the requirements for leniency immunity. Also, considering that information contained in the leniency application is currently made available to respondents by the Examiner's Report, disclosing the leniency applicant's identity is not necessary to protect other respondent's right to defense under the due process.²⁴⁾

23) Park, *supra* note 10, at 124.

24) Park, *supra* note 6, at 18.

IV. Conclusion

The KFTC is increasingly relying on the leniency program for its anti-cartel enforcement. This trend is understandable on the back of current developments where cartel members are adopting more complicated and diversified methods for communication, and detecting evidence for cartel activities becomes even more challenging as a consequence. However, as have been confirmed by recent cases mentioned earlier, such reliance on the leniency program may create unintended incentives for cartel members to take advantage of it by securing the immunity through opportunistic behaviors or abusing the leniency program as a means of retaliation against one's competitors.

Notwithstanding such side effects, it is difficult to deny the efficacy of the leniency program, not only in detecting existing cartels but also in deterring future cartel activities. The leniency program is indispensable to the KFTC's detection and investigation of cartel activities, which are by nature secretive. Therefore, the KFTC should continue its effort to beef up the leniency program by actively addressing practical issues that have been raised during the implementation and operation of the current leniency program. Additionally, it is also important that the KFTC officials in charge of the case should always be mindful of the truthfulness and reliability of statements from leniency applicants in the course of investigations in order to avoid undue reliance on them.

