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Notable Supreme Court Cases: Fair Trade Law*

1. Supreme Court Decision 2013Du16951 Decided July 24, 2014 [Claim for Cancellation of Correction Order and Surcharge Payment Order][1)]

【FACTS】

From 2001 to 2006, Plaintiff (life insurance company) regularly exchanged non-public information on assumed interest rates, etc., with 15 other life insurance companies. It was found that Plaintiff and the other life insurance companies, while taking the exchanged information into consideration, individually set their respective interest rates based on various factors, including the standard and market interest rates at the time, the own respective asset management returns, customer awareness, liability amount, and sales competitiveness. Defendant (Korea Fair Trade Commission) did not contest the fact that there was a lack of a clear pattern of external conformity between the life insurance companies regarding assumed interest rates, among other things.[2)]

* In this section, several notable recent Korean Supreme Court cases are excerpted with commentary. For the current issue, Professor Yong Lim prepared the comments, edited the excerpts, and supervised the work of student editors. These cases were initially translated by the Supreme Court Library of Korea, and the Journal's student editors further modified and edited the excerpted translations. Full texts of the cases are *available at* https://library.scourt.go.kr/Eng/main.jsp. Used with the permission of the Supreme Court Library.

1) The translation of the entire decision is *available at* http://eng.scourt.go.kr/eng/crtdcsns/NewDecisionsView.work?seq=894&currentPage=0&mode=6&searchWord=2013Du16951.

2) Factual summary based on lower court decision (Seoul High Court Decision 2012Nu2346, July 17, 2013).

【Main Issues】

[1] In a case where rival enterprisers exchange information on major elements of competition, the method for determining whether there exists an "agreement to engage in an act unduly restricting competition" prohibited under Article 19(1) of the Monopoly Regulation & Fair Trade Act (hereinafter "MRFTA").

…

【Reasoning】

1. On the Formation of an Undue Collaborative Act

A. An 'undue collaborative act' prohibited under Article 19(1) of the MRFTA is an "agreement to jointly engage in an act that unduly restricts competition." While the 'agreement' here includes not only explicit, but also implicit, agreements (see Supreme Court Decision 2001Du1239, Feb. 28, 2003, etc.), the intrinsic attribute of such an agreement is the communication of intent between two or more enterprisers. Hence, the mere fact that there exists an external appearance corresponding to one of the enumerated 'undue collaborative acts' under the above provision, does not necessarily imply the existence of an agreement. Rather there needs to be proof of circumstances, which supports a finding of a mutual connection of intent between the enterprisers. And the burden of proof rests with the Defendant, which issues correction orders, etc., on grounds of the existence of such an agreement (see Supreme Court Decision 2012Du1117421, Nov. 28, 2013, etc.).

Furthermore, in a case where rival enterprisers exchange information on major elements of competition, such as price, the exchange of information can provide a compelling basis for recognizing a mutual connection of intent between the enterprisers, since it can serve as a means to ease or facilitate collusion by removing the uncertainty in decision-making on price, etc. Even so, the information exchange, by and of itself, does not summarily lead to the conclusion that there was an agreement to engage in acts unduly restricting competition. Rather, whether there was an "agreement to engage in an act unduly restricting competition" prohibited under Article 19(1) of the MRFTA should be determined by comprehensively considering the totality of circumstances, including the structure and characteristics of the relevant market; the nature and content of the information exchanged; the parties, timing, and method of the exchange;

the purpose and intent of the exchange; the external conformity or the degree of divergence between enterprisers, in terms of price and output, as well as the process and substance of the relevant decision-making following the information exchange; and the impact of the information exchange on the market.

B. The lower court found that the Defendant's correction order and imposition of surcharges, premised on Plaintiff's engagement in an undue collaborative act with 15 other life insurance companies, were illegal … on the following grounds: (1) unless it was determined that the 16 life insurance companies, including Plaintiff, had reached an agreement to jointly engage in an act to decide, maintain, or modify prices from 2001 to 2006, the mere fact that the 16 life insurance companies, including Plaintiff, exchanged information on assumed and publicly announced interest rates, does not necessarily imply that they had engaged in an undue collaborative act; and (2) the mere fact that the 16 life insurance companies, including Plaintiff, had set their own interest rates based on the information exchange from 2001 to 2006 does not provide sufficient proof of an agreement to 'jointly decide on the assumed rate of interest' among the companies … the lower court's determination above is justified …

【Comments】

This Supreme Court decision is the subject of Yun, Kim & Kim's article on information exchange in the current issue of the journal, and its implications are discussed at length therein. We add another point to the article's thoughtful commentary for further reflection. When it comes to the issue of exchange of competitively sensitive information (e.g., pricing or related data), there had been hints of a tendency in prior lower courts decisions to conflate two major requirements for finding cartel liability under the MRFTA: (i) the existence of an agreement, and (ii) the anticompetitiveness of such an agreement. The legal standard set forth in the Supreme Court's judgment would seem to endorse this approach, or at a minimum allow lower courts to continue on that path.[3] Unfortunately for

3) For example, the structural characteristics of the market, one of the main factors for finding an agreement in such cases according to the Supreme Court, is at least as closely related to the potential anticompetitive effects of information exchanges as it is to the question

the Supreme Court, allowing future courts to conflate the two requirements may have unintended consequences, opposite of what the court had initially set out to achieve – the deterioration of analytical clarity as to when and how to find an agreement in cases involving exchanges of information. The Supreme Court decision does not elaborate on how and when each listed factor could influence the determination of the existence of an agreement, much less the general direction of the influence. Furthermore, there is no guidance on how one should weight the different factors during the analysis. While one appreciates the need to provide some discretion for the lower courts in future cases, too much flexibility could be unsettling for both the courts and the market. And the conflation of the two legal requirements above might tip the balance by unnecessarily complicating the analysis and compounding the uncertainty involved.[4] One thing as much is clear – the lower courts have their work cut out for them.[5]

2. Supreme Court Decision 2012Du13665 Decided May 16, 2014 [Claim for Cancellation of Corrective Order, *etc.*][6]

[FACTS]

… Representatives of airlines including Plaintiff (hereinafter "Airlines")

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of whether an agreement exists in the first place. The Supreme Court also lists the market impact of the information exchange as a factor for consideration.

4) One can easily imagine a situation where a factor would point in opposite directions for determining liability depending on whether the inquiry is the existence of an agreement or its effects on market competition. Going back to the market structure example above, an oligopolistic market structure could imply a higher risk of anticompetitive effects resulting from the exchange of information, while at the same time plausibly support the mere occurrence of interdependent, and entirely legal, oligopolistic pricing (*i.e.*, lack of agreement).

5) For an initial but informative attempt at clarifying the hierarchy and relationship between the different factors enumerated by the Supreme Court, *see* Hong Dae Sik, *Habei Jeungmyung Yeosoroseoei Saupjagan Eisayeonguelei Sanghosung – Jungbogyohwaneul Joongshimero –* [*Reciprocity of Connection of Wills Among Enterprises as an Element for Proving an Agreement - Focused on Information Exchange -*] 30 GYEONGJAENGBEOBYEONGU [J. KOR. COMPETITION L.] 156-163 (2014).

6) The translation of the entire decision is *available at* http://eng.scourt.go.kr/eng/crtdcsns/NewDecisionsView.work?seq=936&currentPage=0&mode=6&searchWord=2012Du13665.

met around Sep. 2002 and exchanged opinions as to their respective situations and plans for introducing fuel surcharges. Around that time, Plaintiff introduced fuel surcharges at a similar time with other airlines. Thereafter, the employees of the Airlines held multiple meetings or had individual contacts and exchanged opinions on when to increase fuel surcharge, etc. Plaintiff increased its fuel surcharge at the similar time and at an identical rate with other airlines …

【Main Issues】

…

[2] The meaning of "where it affects the domestic market" under Article 2-2 of the MRFTA, and the standard for its determination; and whether Article 19(1) of the MRFTA can be applied in a case where the scope of the agreement restricting competition, which was executed outside of the country among the enterprisers, includes the domestic market.

[3] Where the pertinent route's designated airlines, in the course of entering into an agreement regarding air freight fare, etc., pursuant to Article 117(1) of the former Aviation Act (hereinafter "AA") and the Aviation Service Agreement between the Governments of Republic of Korea and Japan (hereinafter "ASA"), agree to restrict discounts on certain items in addition to changes related to the flight fare system, whether such conduct can be deemed as a "legitimate act carried out pursuant to the law or decrees under the law" under Article 58 of the MRFTA.

[4] Whether the fact that a foreign enterpriser's conduct, which has an effect on the domestic market, is permissible under foreign law, etc., by and of itself, should bar the application of the MRFTA …

【Reasoning】

… The circumstances support a finding of a mutual connection of intent between the Airlines regarding the introduction and change of fuel surcharges enterprisers. It is therefore appropriate to acknowledge that the existence of the parties' agreement on the introduction and change of fuel surcharges has been proven …

2. Regarding the Application of the MRFTA against Undue Collaborate Acts occurring Overseas

A. Articles 19(1), 21, and 22 of the MRFTA prohibit enterprisers from entering into an agreement to jointly undertake activities such as price fixing, etc., which unduly restrict competition, and allows for the issuance of corrective orders to cease the conduct, etc., and imposition of administrative surcharges. Article 2-2 of the MRFTA stipulates that the MRFTA shall be applicable to conduct overseas where it affects the domestic market.

As noted, Article 2-2 of the MRFTA stipulates "where it affects the domestic market" as a requirement to apply the MRFTA to overseas conduct. In modern society, where trade actively occurs among countries, overseas conduct should have at least some effect on the domestic market as long as there was direct · indirect trade with the country in which the conduct occurred. Thus, if one were to interpret the law so that the domestic MRFTA were to apply to all such overseas conduct on the basis that such conduct had an effect on the domestic market, this would excessively expand the applicable scope of the MRFTA in an unreasonable manner. As such, "where it affects domestic market" under Article 2-2 of the MRFTA should be interpreted as being limited to conduct that has a direct, substantial, and reasonably foreseeable effect on the domestic market. And whether or not the said conduct falls within this interpretation should be determined on a specific and individual basis by comprehensively taking into account the specifics of the conduct and its intent, the characteristics of the relevant goods or services, the structure of the transaction and the context and extent of the conduct's effect on the domestic market. However, where the object of the agreement restricting competition, which was executed outside of the country among the enterprisers, includes the domestic market, such agreement can be said to have an effect on the domestic market, barring special circumstances, and Article 19(1) of the MRFTA shall be applicable to the conduct (see Supreme Court Decision 2004Du11275, March 24, 2006, etc.).

B. … The freight forwarder located at the place of departure enters into the air freight transport contract (hereinafter "Contract") with the airline and also pays the freight fare. However, since the forwarder enters into the contract upon the request of the consignor or consignee who owns the

freight and merely receives fees therefrom, the consignor or consignee are actually responsible for the fare. When there is an international transaction for shipping goods, etc., from Japan into the country, responsibility for the freight fare is determined pursuant to a contract between the Japanese consignor and the domestic consignee. In cases of payable at departure transactions the Japanese consignor is responsible for the transport contract and fare, while in cases of payable at destination transactions the domestic consignee is responsible for the contract and fare. Based on the forgoing facts, the following circumstances show that there exists a relevant domestic market for air freight transactions from Japan to Korea not only in cases of payable at destination transactions but also payable at departure transactions: ① even when Contracts for freight transports from Japan to the country are executed in Japan, i.e., point of departure, between the freight forwarder and the airline, the consignee has merely executed the Contact upon the behest of the freight owner, and as such the party responsible for the freight fare under the Contract is the owner, i.e., the Japanese consignor or the domestic consignee, and such responsibility for the freight fare is determined through contract between the consignee and the consignor, ② it is merely a matter of choice for the domestic consignee between being directly responsible for the air freight fare through a payable at destination transaction, or being responsible for the fare transferred from the consignor through a payable at departure transaction, thus the domestic consignee can be viewed as the air freight transport purchaser even for payable at departure transactions, ③ the transport of air freight from Japan into the country is comprised of a series of services from the point of departure in Japan to the point of arrival domestically, and part of the services are carried out domestically where the freight arrives, such as unloading and tracking, etc.

Therefore, the said agreement on the introduction and change of fuel surcharges regarding air freight transport services from Japan into the country includes the domestic market, and the agreement thus constitutes a case where the agreement affects the domestic market, making Article 19(1) of the MRFTA applicable …

3. Regarding the Application of Article 58 of the MRFTA

A. A "legitimate act carried out pursuant to the law or decrees under

the law" under Article 58 of the MRFTA refers to necessary and least restrictive activities within the scope of the law or orders under the law, that specifically allow for exceptions to free competition in businesses, etc., where the special characteristics of the business make it reasonable to restrict competition or confer enterprisers with a monopolistic position through approval, while at the same time demand significant public regulation from the perspective of public interest (see Supreme Court Decision 2009Du7912, April 14, 2011, etc.).

… In light of the former AA's content and purpose, the stipulation under Article 117(1) of the former AA and the ASA that the air freight fare shall be determined by agreement among the designated airlines for the pertinent route subject to approval from the aviation agencies should not be construed as excluding price competition itself, but rather assuming price competition within a non-excessive range considering the approved fare. Thus, if the pertinent route's designated airlines agree to restrict discounts on certain items in addition to and above changes related to the flight fare system, such an agreement falls outside the permitted boundaries of the AA and the ASA, and cannot be deemed as whether such conduct can be deemed as a "legitimate act carried out pursuant to the law or decrees under the law" agreement not only changes the flight fare system but also restricts discount as to a certain item, such agreement exceeds the range permitted by the former AA and the aviation agreement, and does not constitute a "necessary and least restrictive act pursuant to the law or decrees under the law which specifically allow for an exception to free competition" …

4. Regarding the Non-application of the MRFTA to Acts permissible under Japanese Law

A. Article 2-2 of the MRFTA shall be satisfied if a foreign enterpriser's conduct affects the domestic market. Accordingly, even if foreign law or foreign government policy pertinent to the conduct differs from domestic law and thus allows such conduct, such circumstance, in and by itself, does not preclude the application of the MRFTA. However, if the conflict between domestic law and foreign law regarding identical conduct creates a situation where the enterpriser cannot choose a lawful action, it would be

inappropriate to simply force application of only the domestic law. Therefore, if the need to respect the foreign law is significantly greater than the need for regulation by application of the MRFTA to the said conduct, application of the MRFTA may be restricted. Whether or not this is the case shall be determined by comprehensively considering the conduct's effect on the domestic market; the foreign government's degree of involvement in the conduct; the degree of conflict between domestic and foreign law; the disadvantages that the foreign enterpriser would suffer and the harm to legitimate interests of the foreign government, if domestic law were to be applied to the said conduct, etc.

… The pertinent agreement in this case does not demand barring the application of the MRFTA based on the following circumstances: ① it cannot be said that the effects on the domestic market caused by the pertinent agreement which consisted of changes to the Japan–Korea air freight fare system and discount restrictions on major parts of the fare, ② the Japanese government merely approved the results of the pertinent agreement per request from the Airlines, and thus the degree of its involvement is not significant, ③ while Article 110 of the Japanese Aviation Act does exclude the application of Japanese Anti-Monopoly Law to fare agreements that have been approved by the Japanese Ministry of Land & Transportation (hereinafter "MLT"), it also provides and exception in cases where competition is meaningfully restricted in a particular area of trade, and thus it is difficult to take the view that Japanese law conflicts with domestic law and further that it is impossible for Plaintiff to comply with both laws at the same time …

【Comments】

This Supreme Court decision showcases Korean competition law's interaction with international commerce. It is the Supreme Court's first decision that specifically relies on Article 2-2 of the MRFTA to expand the reach of Korean competition law to anticompetitive conduct overseas.[7)]

7) The Supreme Court had already allowed for the extraterritorial application of the MRFTA through legal interpretation in the graphite electrodes cartel case (Supreme Court Decision 2004Du11275, Mar. 24, 2006). While the Supreme Court ruled on the case after Article 2-2 had been enacted, the case had involved cartel activities prior to the MRFTA's

Through interpretation of Article 2-2, the Supreme Court limited the MRFTA's extraterritorial application to cases where the pertinent conduct has a "direct, substantial, and reasonably foreseeable" effect on the domestic Korean market.[8] At the same time, it has staked out the position that if the domestic market is covered by the cartel agreement (i.e., included in the scope of the agreement between the parties), such agreement will in principle be deemed to have such an effect. In the above case, there was a question whether 'payable at departure' air freight transactions in Japan between the cartelists and Japanese forwarders were within the reach of the MRFTA. The Supreme Court primarily relied on the findings that (i) Korean consignees would ultimately be responsible for the freight fare (which would be reflected in the overall transaction price) and thus could be deemed as purchasers of the relevant freight transport services, and (ii) part of the services affected were carried out after the freight had entered Korea to determine that the cartel agreement included the domestic market within its scope. The Supreme Court also showed a willingness to consider the argument that a conflict with foreign law, which permitted the allegedly illegal conduct, could limit the MRFTA's extraterritorial reach. However, the fact that the Supreme Court proceeded to rule that there was no such conflict in this case, notwithstanding the Japanese MLT's position that the conduct was indeed exempt from Japanese competition law pursuant to the Japanese Aviation Act, implies that companies will likely face an uphill battle in persuading the court to curb the extraterritorial application of the MRFTA on such grounds.

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amendment which added Article 2-2.

8) Readers will recognize that the Supreme Court's standard above seemingly tracks the requirement set forth under the U.S. Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a(1)). This, however, should not be understood as implying that the Korean courts will simply follow or be influenced by U.S. precedents regarding the FTAIA notwithstanding the linguistic affinities.

3. Supreme Court Decision 2012Du24498 Decided Feb. 27, 2014【Claim for Cancellation of Corrective Order, *etc.*】

【FACTS】

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(1) Plaintiffs registered a manufacturing method patent for 'ondansetron,' an anti-emetic agent, and manufactured and sold the anti-emetic medication under the brand name of 'Zofran.' Dong-A Pharmaceutical Co., Ltd. (hereinafter "Dong-A") developed and began selling the anti-emetic medication branded 'Ondaron,' which included ondansetron, claiming that it had independently developed the ondansetron using a different method from Plaintiffs. Plaintiffs filed an injunction for patent infringement against Dong-A, and Dong-A requested a declaratory judgment on the scope of the patent to the Korean Intellectual Property Office.

(2) Plaintiffs and Dong-A later entered into said agreement which included a settlement agreement on April 17, 2000, according to which Dong-A would cease production and sales of 'Ondaron' and drop all related claims and lawsuits, and a supply agreement, under which Plaintiffs would provide Dong-A with exclusive distribution rights for 'Zofran' in national and public hospitals and exclusive distribution rights for 'Valtrex.'

(3) The said agreement's initial term was set until April 16, 2005, which was after Jan. 25, 2005 on which Plaintiffs' patent expired. In addition, the supply agreement was subsequently renewed multiple times, resulting in the agreement remaining valid at the time of this case's hearing on Oct. 19, 2011.

(4) Plaintiffs, through the said agreement, even prohibited Dong-A from manufacturing 'ondansetron' through methods different from the patent procured by the Plaintiffs, and also prohibited the research, development, manufacture, and sales of products that differed from, but might compete with, 'ondansetron.'

(5) While Plaintiffs claimed that Dong-A had infringed on their patent, they nevertheless agreed to provide Dong-A with joint distribution rights for 'Zofran' and exclusive distribution rights for 'Valtrex' through the said agreement. The marketing rights for new drugs, in and of itself, constitutes

a significant economic benefit, and the performance incentives that Plaintiffs agreed to provide to Dong-A exceeded conventional levels by providing incentives as long as 80% of the sales target had been reached in the case of 'Zofran,' and paying Dong-A 100 million Won on an annual basis for 5 years regardless of sales volume in the case of 'Valtrex.'

(6) It is difficult to conclude that Plaintiffs had expended significantly more costs for the patent dispute with Dong-A compared to other general patent lawsuits, while the economic benefits provided by Plaintiffs to Dong-A based on the said agreement greatly exceed the Plaintiffs' average patent litigation costs.

(7) The price of 'Zofran' had decreased following the release of Dong-A's competitive product 'Ondaron.' Under the current regime where the standard price for insured drugs are largely set by the National Health Insurance Service, even pharmaceutical companies that hold patents on drugs are unable to independently set drug prices. However, because the price for not only new drugs but previously listed generic drugs will decrease when the overall number of registered generic drugs increase according to the pricing determination standards for insured drugs, it is highly likely that medicine prices will drop as the number of generics increase.

【Main Issues】

[1] The meaning of and standard for an 'act, which is not deemed a justifiable exercise of a patent right' under Article 59 of the MRFTA; the method and standard for determining whether or not an agreement constitutes an 'act, which is not deemed a justifiable exercise of a patent right' in cases where a medicine patent right holder reaches an agreement to settle a patent dispute with a party who contests the scope and validity of such patent by providing certain economic benefits in return.

…

【Reasoning】

…

2.A. Article 59 of the MRFTA stipulates, "the Act shall not apply to any act, which is deemed a justifiable exercise of a right under the Copyright

Act, the Patent Act, the Utility Model Act, the Design Protection Act or the Trademark Act." Accordingly, the MRFTA applies to an 'act, which is not deemed a justifiable exercise of a patent right.' This is also the case under Article 59 of the MRFTA, prior to its amendment on Aug. 3, 2007 (Act No. 8631), when it did not include the word 'justifiable.' An 'act, which is not deemed a justifiable exercise of a patent right' refers to cases, where an act has the external appearance of being an exercise of a patent right, while it actually deviates from the patent system's purpose and contradicts its essential goals. In determining whether this indeed is the case, one should consider the totality of the circumstances, including the goals and purpose of the Patent Act, the content of the said patent right, and the effect the conduct has on fair and free competition, etc.

Accordingly, when a medicine patent right holder reaches an agreement to settle a patent dispute with a party, who attempts to manufacture and sell a drug that may infringe upon such patent, and thereby contests the scope and validity of such patent, by providing certain economic benefits in return for ceasing or delaying such an attempt, whether or not this constitutes an 'act, which is not deemed a justifiable exercise of a patent right' must be determined on an individual basis, depending on whether the patent holder has maintained its monopolistic position and affected fair and free competition by providing part of its monopoly profits to the other settling party. For this purpose, one should comprehensively consider the process and details of the agreement; the length of the settlement period; the size of the economic benefits to be provided in return for the settlement; the expected costs and profits from the patent dispute; and the existence of other circumstances that may justify the consideration provided through the settlement, etc.

…

2.C. Under the said agreement, Plaintiffs provided economic benefits, greatly exceeding the patent related litigation costs, to Dong-A, which had disputed the Plaintiffs' patent and had released a competing product, in return for Dong-A withdrawing its competing product from the market and restricting its release, etc., for a period exceeding the patent period. Thus, the said agreement constitutes an 'act, which is not deemed a justifiable exercise of a patent right' and thereby subject to scrutiny under

the MRFTA, since the Plaintiffs, as the holders of patent rights, provided part of their monopoly profits to Dong-A in order to maintain their monopoly power, thereby affecting fair and free competition.

【COMMENTS】

This decision marks the Supreme Court's first foray into the issue of pay-for-delay transactions and their potential anticompetitive concerns. The decision makes it clear that such reverse payment settlements will not be relegated to per se treatment (either legal or illegal) under Korean competition law, but will be subject to scrutiny more akin to a rule of reason approach. Furthermore, in interpreting what would constitute a justifiable exercise of intellectual property rights and thus attain exemptions from competition law under Article 59 of the MRFTA, the decision indicates that the court will consider both together whether the patent holder's exercise of its rights exceeds the scope of the patent, and whether the payment under the settlement is excessive so as to indicate an attempt or actual harm to competition and unduly maintain the patent holder's monopoly power in the relevant market. While the court did note that the total economic benefits paid to the alleged patent infringer under the settlement greatly exceeded the litigation costs in this case, the fact that the non-compete provisions in the distribution agreements ostensibly went beyond the exclusionary scope of the relevant patent seems to have been an important factor in determining the outcome of the case. With the recent introduction of a new approval-patent linkage system under the Pharmaceutical Affairs Law, we can expect the courts to see more action, not only in the realm of reverse payment settlements, but also other life-cycle management strategies by pharmaceutical companies, going ahead.

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