

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS**

-- Korea --

27 October 2015

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*More documents related to this discussion can be found at:  
[www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm](http://www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm)*

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: [despina.pachnou@oecd.org](mailto:despina.pachnou@oecd.org)].

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-- Korea --

**1. Assume that Korea is Country A**

**1.1 What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?**

1. Alpha Corporation and Beta Corporation (hereinafter collectively referred to as “Two Corporations”) are organized under the laws of Korea, and the conduct of the hypothetical case at issue (hereinafter “Case”) took place in Korea. Either by the personal principle or by the territorial principle, the Korea Fair Trade Commission (hereinafter “KFTC”) certainly has jurisdiction over the Case. So, aside from the jurisdictional requirements, the below will discuss what are the legal requirements and factors that the KFTC would consider to bring an enforcement action.

2. First of all, we need to find whether there is a market for Component Xs or for Component X’s alternatives in Korea (Country A). For a conduct to be deemed as an illegal cartel under Article 19 of the Monopoly regulation and fair Trade Act (hereinafter “MRFTA”), what is crucial is whether the conduct has limited competition in the relevant market. So, the relevant market for Component X must exist in Korea. If, for example, there is no market for Component X in Korea (including imported Component Xs) and Korea is only exporting Component X, then the KFTC cannot apply the law against the Case.

*\* Article 19 of the MRFTA ①. No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means, to jointly engage in an act falling under any of the following subparagraph (the rest omitted).*

3. The next thing the KFTC needs to prove is that the cartel of the Case has limited competition in Korea’s Component X market. According to Article 2 (8) 2, the anti-competitiveness of a cartel is only established when it is shown that the cartel caused or threatened to cause impacts on price, quantity, quality, and other terms or conditions of trading. That is, even when the cartel was only about export prices, if it is proven that the cartel caused or threaten to cause impacts on the determination of market price, quantity and other factors of Component X, after taking into account the market capacity of producing Component Xs, domestic distribution structure, and the relationship between export price and domestic price, the anti-competitiveness of the cartel can be established.

*\* Article 2 (8) 2 of the MRFTA: The term “practically suppressing competition” means practices which cause or threaten to cause impacts on the determination of price, quantity, quality or other terms or conditions of trading (the rest omitted)*

**1.2 If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?**

4. When the requirements discussed in Question 1-1 are satisfied, the KFTC may impose remedies and surcharge against the Two Corporations. The remedies will be mainly about ordering the companies to stop the cartel on export prices, and prohibiting future violation of law. The KFTC can order the ceasing of the cartel on export prices to the extent that such a cartel affects the Korean market.

5. Under Article 6 of the MRFTA and the Article 9 of the Enforcement Decree of the MRFTA, the level of surcharge is determined based on the relevant turnover of the product or service at issue in the market whose competition is limited (hereinafter “relevant turnover”). It is not stipulated in law that the scope of relevant turnover is limited to that happened in the Korean market. However, it is reasonable to

limit the scope of relevant turnover to Korea, and also in practice the KFTC has set the boundary of the relevant market to the Korean market.

**1.3 *Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?***

6. As mentioned above, the Case is under the jurisdiction of the KFTC in principle, and when discussing whether to bring enforcement against the cartel, the focus is not on the export market, but on the Korean market. Therefore, there cannot be an issue of jurisdictional overlap, and considering the subjects to which the KFTC apply its law and the values that the law protects, it is certain that it is an exercise of the KFTC's own power, and it is very unlikely in this Case that the KFTC's decisions on law enforcement would be influenced by whether other competition authorities took actions or not.

**2. Assume Korea is country B**

**2.1 *What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?***

7. To Country B, or Korea, the Two Corporations are foreign enterprisers and the conduct at issue took place abroad. So, according to the traditional principles on jurisdiction, the KFTC does not have jurisdiction over the Case. However, in accordance with Article 2-2 (Application to overseas act) of MRFTA, the KFTC may have jurisdiction over this Case, because the provision allows extraterritorial application of law if a conduct took place in a foreign country has an impact on the Korean market.

*\* Article 2-2: in cases where any act that performs even abroad affects the domestic market, this Act (the MRFTA) shall apply to such act.*

8. The Supreme Court of Korea has been careful with the interpretation of this provision to prevent jurisdictional outreach. This provision has been applied only in cases where there are little concerns over the conflict of jurisdictions and where an international consensus has been reached on the impact of the conduct at issue. For example, it is when the market which was subjected to a cartel agreement includes the Korean market, or when the conduct has a direct, significant, and reasonably predictable impact on the Korean market. When it comes to this Case, it is clear that the cartel of the Two Corporations has targeted the Korean market for imported Component Xs, therefore, the KFTC may exercise jurisdiction over this Case.

**2.2 *Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Korea?***

9. If the Two Corporations colluded in Korea, the KFTC has, in principle, jurisdiction over the Case. But, with regard to whether to bring an enforcement action or the level of sanction, the cartel's impact on the Korean market shall be considered. The fact that the price-fixing meetings were held in Korea does not immediately prove the cartel's impact on the Korean market. The impact on the Korean market should be proven, as mentioned above in Question 1-1.

**2.3 *If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?***

10. It seems appropriate that the KFTC imposes remedies and surcharge against the Two Corporations. The remedies would be mainly about ceasing the price fixing on export products and future violation of law. The relevant turnover, which is the basis for the setting of surcharge, is the revenues that the Two Corporations have gained through exporting Component Xs to Korea.

**2.4 Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?**

11. The cartel at issue has targeted the Korean market, and the remedies and surcharge are imposed only against the cartel on the Korean market. Taking such countermeasures against a cartel on the Korean market is a rightful exercise of the KFTC's authority. Therefore, whether to take an enforcement action or not is decided by the KFTC independently of other jurisdictions' measures.

12. Of course, Country B's decisions shall be given priority, but if Country A and Country C take their own actions, Country B may partly reflect their measures in its enforcement decisions to deal with the conflict of jurisdiction.

*For your information, the KFTC has had the jurisdictional overlap issue in the 2010 international cartel case on air cargo. The issue was resolved as each authority cut their surcharges by 50%. However, this 2010 case is different from the Case in that the airlines' cartel posed an equal impact on both jurisdictions, whereas in this Case, the impact varies from country to country.*

**3. Assume Korea is country C**

**3.1 What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action against Alpha and Beta?**

13. The jurisdiction over this Case, in which the cartel was done by a foreign enterpriser in a foreign country (Country A), shall be determined under Article 2-2 that stipulates the extraterritorial jurisdiction. As the cartel agreement did not include the Korean market, the KFTC shall examine whether there was a direct, significant, and reasonably predictable impact on the Korean market to determine whether to bring an enforcement action.

*\* Supreme Court ruling on March 24, 2006, 2004-du-11275, Supreme Court ruling on May 16, 2014, 2012-du-5466, etc.*

14. As for this Case, the anti-competitive overcharge was entirely passed on to the market for finished products in Korea, and the Two Corporations knew that finished goods are imported to Korea, and even traced the importation. Therefore, the "direct, significant, and predictable" requirements appear to be satisfied. Regarding the question of whether the impact was direct or not, the U.S. the EU and Japan do not always reject the directness of the impact just because it was an indirect sale, which refers to a situation where the cartelized products are assembled in other country and then imported to the domestic market as a finished product. So, it seems that the KFTC would make an exception and recognize the directness of the impact, if the conduct's characteristics and the structure of the Component X and finished good markets demand such recognition.

*\* Supreme Court ruling on Mar. 24, 2006, 2004-du-11275 and etc.: Whether the impact on the domestic market was direct, significant and reasonably predictable shall be established on a case-by-case basis by comprehensively taking into account various factors in detail such as what was the act at issue, what was its intention, the characteristics of the product or service at issue, the structure of the transaction and how much impact or what kinds of impact was posed on the domestic market.*

**3.2 *Is your analysis any different if the cartel took place in Korea?***

15. If the cartel took place in Korea, the KFTC can exercise its jurisdiction over the Case without a need to apply Article 2-2 of the MRFTA on extraterritorial jurisdiction. But, the decisions on whether to bring an enforcement action or not and the level of sanction should take into consideration the cartel's impact on the Korean market. So, there will be not much of a difference in the analysis (if the KFTC finds that the impact is not established, the procedure of closing the case could be different). Meanwhile, the fact that the cartel took place in Korea will serve as a convincing evidence to show the direct and reasonably predictable impact of the cartel on the Korean market.

**3.3 *Is your analysis any different if the Two Corporations have had contacts with finished product purchasers in Korea, regarding Component X fixing?***

16. If the cartel had negotiation regarding the price of the cartelized product with an undertaking that is located in Korea, this fact alone does not immediately establish the directness of the cartel's impact on Korea. However, it can serve as an evidence to show that the Two Corporations knew or could know about the passing of the overcharge. If it is shown that the purchaser of the finished products in Korea has made the payment for the finished product while discussing the price of Component X, the "bill to" requirement will be satisfied and the directness of the impact can be established.

**3.4 *Is your analysis any different if the finished products are sold around the world and the Two Corporations are unaware or indifferent to whether the finished products are sold in Korea?***

17. First of all, in terms of the significance of the impact, there will be not much of a difference in our analysis. When it comes to the predictability, even when the Two Corporations did not know or were indifferent to Country C's purchasing of the finished goods, if it is established that the Two Corporations knew that the product is sold all around the world, it can be said that the Two Corporations can reasonably predict that the finished goods are sold to Country C. Lastly, with regard to whether the impact was direct or not, it seems that the Two Corporations could not know that the overcharge would be passed on to the market of Country C, because they did not know, or were indifferent to Country C's purchasing of the finished goods. Nonetheless, whether the impact was direct or not should be determined by an objective analysis on the market structure and market characteristics, and depending on the result of such analysis, the directness may be recognized.

**3.5 *Is your analysis any different if the integrators are wholly-owned subsidiaries of the finished product purchasers in Country C?***

18. It could serve as an evidence to convince that the Two Corporations knew or could know about the passing of the overcharge. For example, if the subsidiary at issue has a policy of fully reflecting any increase in the price for the parts to the price of finished goods when selling them to its mother company (intra-group transactions between affiliates) and if it is proven that the Two Corporations knew or were able to know about such a policy, then the directness of the impact can be established.

**3.6 *If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?***

19. Under the premise that the cartel's impact on the Korean market for finished goods is established, the KFTC may impose remedies and surcharge. Remedies would include the order to cease the cartel behavior and future violation of law. The KFTC cannot know how much amount of Component Xs have exported to the Korean market in the form of finished goods. Therefore, it seems appropriate that the total export of Component X is the subject of the remedies.

20. In terms of the surcharge, it is based on the relevant turnover, which is, in principle, limited to the Two Corporations' revenues of Component Xs that entered into the Korean territory in the form of the finished good. First of all, the relevant market of this Case is the Component X market in Country B. The market for finished goods in Korea was not the subject of the cartel and was outside the reasonable scope to which the relevant market can reach, so this market is not included in the relevant market. Moreover, Article 2-2 of the MRFTA stipulates that the law is applicable only to cases where the cartel has had a direct impact on the Korean market. And as was mentioned above, the direct impact occurred when the overcharge of Component X was passed onto the price of the finished goods sold in the Korean market. Therefore, the law would only be applied to Component Xs that were imported to Korea as a part of the finished goods.

**3.7 *Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?***

21. When the legal requirements for jurisdiction are satisfied, the KFTC may exercise jurisdiction over the Case. Therefore, in principle, the decision on whether to bring an enforcement action or not shall be done independently of other competition authorities' decisions. But, when it comes to specific decisions such as the calculation of surcharge, the KFTC has discretion to reflect the decisions of other competition authorities. If the problem of jurisdictional overlap arises in the process of calculating the surcharge, as was mentioned above in Question 2-4, Country B will have the priority, and Korea will reflect sanctions imposed by Country B on the amount of Component Xs imported to Korea as a part of the finished goods. The KFTC may adjust the level of surcharge to the extent necessary to fulfill the purpose of the sanction.

22. Precedent: "Any act (omitted) that affects the domestic market" in Article 2-2 of the MRFTA shall be limitedly interpreted as an act that took place abroad and has a direct, significant and reasonably predictable impact on the domestic market. And this shall be established on a case-by-case basis by comprehensively taking into account various factors in detail such as what was the act at issue, what was its intention, the characteristics of the product or service at issue, the structure of the transaction and how much impact or what kinds of impact was posed on the domestic market. However, if the subject of the anti-competitive agreement that took place abroad includes the Korean market, that agreement surely affects the Korean market unless there are special circumstances, so Article 19 (1) shall be applied to such an act. (Korea Supreme Court ruling on Mar. 24, 2006, 2004-du-11275, etc.)