

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Korea --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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-- Korea --

1. Overview of private enforcement in Korea

1. Korea's competition law is enforced mainly by public bodies against infringements of law and most of the time the measures taken are administrative sanctions, such as fines and remedies. In Korea, private enforcement is not fully utilized compared to public enforcement.

2. Korea's private enforcement of competition law can be divided into two: seeking damages and requesting injunctive relief.

3. First of all, damage caused by a competition law violation can be compensated under current competition law separately from civil law¹. To facilitate the use of damages actions, Korea's competition law prescribes that the burden of proof is on the infringer to prove that he/she or it violated the provision without any deliberation or any negligence (Article 56 of the Monopoly Regulation and Fair Trade Act (hereinafter MRFTA)). The law also stipulates that in situations where it is extremely difficult to determine the amount of damages, the court may recognize reasonable amount of damages based on the gist of entire arguments and the results of investigation (Article 57 of the MRFTA).

4. The second is injunctive relief. In Korea, the right to seek injunctive relief in the court has been recognized under Patent Act, etc. But as for competition law, injunctive relief against the violation of competition law has yet to be recognized. But, an amendment bill to competition law has been submitted and is now pending in the National Assembly to allow victims to request injunction in court.

5. The ultimate goal of public and private enforcement of competition law is restoring market order and thereby increasing consumer welfare. Private enforcement, in particular, aims at detecting and compensating unlawful conducts which fall outside the scope of public enforcement, preventing as well as deterring any further violations of competition law.

2. Tools to encourage private enforcement

6. Claims for damages incurred by the violation of competition law can be brought pursuant to the provisions governing unlawful conducts either under civil law or under competition law.

7. The provision that allows victims of competition law violations to bring a damages action was prescribed from the very beginning of Korea's competition law when it was legislated in 1980. However, after recognizing the need to further encourage private enforcement, the competition law, the provision about damages in particular, was amended in 2004. The provision of the so-called "remedy-prepositive principle" that requires damages claims to be brought only after the KFTC takes remedies against the violation concerned was scrapped. In addition, a three year statute of limitations on damages claims was eliminated.

8. When it comes to the amount of damages, which is a precondition to any damages action, Korea's norms and case decisions determine the amount by calculating the monetary difference between anticipated profit that could have been gained if there had been no violation and the actual profit resulted from the wrongdoing to the disadvantage of the victim.

¹ Under Korea's civil law, which governs liability for damages, victims bear the burden of proof to prove the defendant's intent, negligence and specific damages amount

9. Damages amount is required to have a significant causal relationship with the unlawful conduct in accordance with the general principle of civil law. Korean court has ruled that not only direct buyers but also indirect buyers are entitled to bring a claim for damages. Under Korea's competition law, enterpriser or enterprisers' organizations bear the liability for damages to compensate the victim of the violation of law. Therefore, any victim has the right of standing to bring damages claims against infringing enterprisers or enterprisers' organization.

10. The U.S. has the discovery procedure which allows consumers better access to evidence in order to make bringing a damages claim easier. Korea does not have such provision. Instead, the provisions on the obligation to submit document under Article 344 and 349 of Korean Civil Procedure Act could play a similar role. This policies of law is for a party who is willing to submit a written document but unable to do so directly, because the opposing party or the third party possesses the document. Therefore with the help of the policies, the party can ask the court to order the submission of the document concerned.

11. In Korea, damages claims against the violation of competition law shall comply with Article 56 of the MRFTA. Provided that, there is a significant causal relationship between the damages and the violation of law, the liability for the damages is established and the burden of proof is on the plaintiff to prove such causal relationship and damages amount.

12. Korea's competition law has not adopted punitive damages yet. Instead, Korea's Fair Transaction in Subcontracting Act, which is a special act derived from competition law for the purpose of clarification, started allowing the award of treble damages in 2013 against an unfair appropriation of technology, unfair drop in unit prices, and unfair cancellation of orders.

13. When class action is recognized by the court, individual victims can share the litigation cost. Therefore, numerous victims with small expected outcomes of the lawsuit have incentives to join in class action lawsuits. In Korea, class actions are recognized only in securities-related cases under Securities-Related Class Action Act.

14. And it is quite recent that Korea began discussing in earnest the adoption of class action procedure in competition law. Since 2012, there have been four amendment bills submitted to the National Assembly which make the case for the introduction of class action proceedings to competition law. These bills differ in terms of how far class action is allowed to be brought: can it be brought in the M&A cases?; how about cartels or other anti-competitive behaviors? But when it comes to other requirements for class action litigation or whether to apply statutory obligation to be represented by a lawyer, these bills apply mutatis mutandis to the provisions of Securities-Related Class Action Act enacted in 2005.

3. Balance between public and private enforcement

15. As mentioned above, in civil lawsuits, courts can ask the KFTC for the submission of document and evidence related to cartels, and when such a request is made, the KFTC shall comply. The problem is whether the court is entitled to request the information the KFTC obtained from leniency applicants. Under current law, it is understood that the submission of information obtained from the leniency program shall be made only when the court is pursuing an administrative lawsuit. However, not much attention has been paid to the conflict between civil lawsuits and leniency program in Korea, so this has not been an issue. The reason behind this is that Korea does not impose punitive damages on competition law infringements, so the upper limit of the amount of damages is the actual loss incurred as a result of the cartel at issue and it seems that the victims of cartels in Korea are not so active in claiming suits for damages.

16. Interested parties have the right to read and copy the materials related to the measures taken by the KFTC under the MRFTA. When damages claims are brought, the court is entitled to ask the KFTC to submit the case materials. However, as Korea strictly protects confidential information, the plaintiff does not have direct access to the evidence of the KFTC including information obtained from leniency program, and this applies regardless of whether the investigation is completed or not. Under Article 22 (2) of the MRFTA, information and materials related to leniency application and reports such as the identity of leniency applicants or those who cooperated with the KFTC, the content of the report, etc shall not be provided nor leaked to persons not related to the case.

17. Fines and orders to cease violation imposed by public parties are not directly related to private enforcement. For your information, the fines imposed under Korea's competition law have two main roles; administrative deterrence and restitution of unfairly gained profits. The type and content of the wrongdoing at issue determine which role to be weighed heavier.

18. As mentioned earlier, private enforcement complements what public enforcement cannot cover, so the two enforcement mechanisms are mutually complementary. Therefore, the spread and development of private enforcement can affect substantive enforcement of public antitrust enforcement. However, various arguments exist regarding the role of private enforcement; some argue that private enforcement does complement public enforcement, while others argue the role of private enforcement is limited and it even increases social costs.

4. Public enforcement's role in encouraging private enforcement

19. From 1981 when the MRFTA was legislated to 2012, there were 10 cases where damages claims were brought against unfair concerted actions. All 10 damages were claimed based on the measures imposed by the KFTC against the infringing conducts. This proves that even though the remedy-prepositive principle was abolished, public enforcers still play a key role in private enforcement. But Korea does not operate any policy in private lawsuits that can be called US-style *amicus curiae*.

20. Korean law does not stipulate how much in detail an administrative/legal decision or settlement shall state with respect to damages claims. Instead, current competition law sets forth that if victims have extreme difficulty determining the amount of damages, the court may step in and recognize reasonable amount of damages based on the gist of entire arguments and the results of investigation (Article 57 of the MRFTA).

21. In civil courts, the court is not subject to the decisions and findings of the KFTC when dealing with the damages claims against the anti-competitive behaviors sanctioned by the KFTC. Even so, the KFTC's decisions and findings still have significance in that the court takes into account them as an important basis. Furthermore, as the remedy-prepositive principle is abolished as a result of the 2004 amendment to the MRFTA, private parties can bring lawsuits regardless of whether public enforcement is opened to the public or not, so there is no problem concerning when the public enforcers' decision is announced to the public.