[15] Price Fixing Cartel by Three Sugar Manufacturers

KFTC Decision NO. 2007-408

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Between 1991 and September 2005, 3 major sugar producers in Korea, CJ Cheiljedang Corp., Samyang Corp. and TS Corporation, conspired to fix the quantity of supply and price in relation to sugar in violation of Article 19 of the MRFTA (Prohibition on Improper Collaborative Acts).

Major issues in this case included ① examining cartel activities associated with administrative guidance, ② determining the number of violations for cartels that have extended histories and ③ deciding the point of termination for the collusion and calculating the relevant turnover. Along with these main issues, there was a question of whether prosecution could bring a criminal indictment on violations of competition law, even without a charge brought by the KFTC, by applying the principle of "indivisibility of a complaint". Moreover, this case is expected to serve as a meaningful milestone for future cartel cases in that victims of the cartel were able to file civil damages suits following a recent ruling by the Supreme Court.

The most significant aspect of this case is that it is the first case in the enforcement history of the KFTC in which the KFTC successfully utilized the "Informant Reward System", a system installed to detect and enforce against violations of law. This case opened up the possibility for the Informant Reward Program to develop into an effective monitoring tool, going beyond its original function of merely detecting violations of law.

Ⅰ. Case Overview

1. Market conditions

The sugar market of Korea is particularly prone to the formation of a cartel for the following structural reasons;
① as the sugar production industry requires high up-front costs and has already entered a stage of maturity, new companies have difficulty entering the market. This has led to a long-standing oligopolistic structure in the market, ② there is no significant difference in product quality among companies, and the products are standardized in terms of type and production requirements, ③ as sugar is a daily necessity, its prices respond sensitively to changes in supply as opposed to demand and ④ the sugar market is a buyer's market where supply exceeds demand. For example, sugar production in Korea was 1.32 million tons in 2005, but its domestic sales that year stood at 0.88 million tons.

Moreover, import of sugar is virtually impossible due to high tariff rates, and consequently, the respondents dominate the market for sugar supply. For instance, the profit margin on sugar sales for the 3 respondents has been approximately 40~48% over the last 4 years, much higher (almost twice) than that of other manufacturers or similar industries.

2. Findings

CJ Cheiljedang Corp., Samyang Corp. and TS Corporation (hereinafter "CJ", "Samyang" and "TS", and collectively referred to as the "respondents"), producers and sellers of sugar in Korea, engaged in cartel activities regarding quantity of supply and factory prices in relation to sugar, between 1991 and September 2005, in violation of Article 19 (Prohibition on Improper Collaborative Acts) of the MRFTA.

1) Collusion to fix prices and supply quantity

In late 1990, the respondents held a meeting of sales executives and general managers, and agreed that commencing in 1991, each company’s domestic sugar supply would be maintained at the same level as each company's share of raw sugar imports - 48.1%(CJ), 32.4%(Samyang), 19.5%(TS).

The details of the agreement finalized in the meetings were as follows;
① Each Company's respective market share of raw sugar import will determine its share of supply in the domestic market;
② The three companies will decide the quantity of supply on a monthly/yearly basis, and exchange information on payment of special excise tax in order to monitor compliance with the agreed-upon supply restrictions; and
③ The three companies will enforce the agreement on a monthly basis, and, when there is a shortfall to the annual agreed-upon quantity, meet the target quantity by adjusting differences at the end of the year.

Between 1991 and 2005, the respondents implemented such supply restriction agreements by: reaching an agreement on a rough plan of annual supply quantity through meetings of general managers, sales executives or sales directors at the beginning of the year; drawing up supply plans on a monthly basis; and revising the monthly plans, whenever the occasion arose to accommodate increases or decrease in the demand for sugar.

Moreover, the respondents monitored compliance with the agreed-upon supply restrictions and ratios through meetings of sales executives or sales directors. Particularly, until November 1999, they monitored compliance through the Korea Sugar Association by exchanging data on sugar supply and payment of special excise tax. When there was a difference between the agreed-upon quantity and the actual quantity of supply during a year, companies made adjustments in quantity at the end of the year to attain compliance.

In fact, after the special excise tax on sugar was abolished in December 1999, and Samyang and TS breached the agreement by supplying sugar in excess of the agreed-upon restrictions - each supplying 30,600 tons and 4,200 tons, respectively in 2000, and 12,800 tons and 5,100 tons, respectively in 2001 - CJ demanded that Samyang make an adjustment for the excess quantity. Based on the assumption that profits would fall if the sugar market were open to free competition, Samyang agreed to deduct 11,000 tons from the 2002 supply quantity and devise measures to prevent any further violations of the agreement.

2) Collusion to fix sugar prices

Until February 1994 when ex-post pricing reports were discontinued, sugar price-fixing by the respondents was carried out as detailed in the following sections.

When price-changing factors like cost changes arose, respondents first coordinated their opinions on the scope and timing of a price adjustment in a meeting of sales executives or directors. Then CJ, the No.1 sugar producer in terms of market share, would persuade price regulation authorities to agree to a plan to raise prices on behalf of other producers and the authorities would request adjustment of such a price-hike (often orally among working-level staff). After such unofficial discussions with authorities were concluded, the respondents would hold another sales executives or directors meeting to hammer out detailed plans on the timing and scope of price changes by product type and supply channel.

After the ex-post reporting system was abolished in February 1994, the respondents continued to fix benchmark prices of sugar (by product type and supply channel) through executive-level meetings.

Respondents conspired to fix prices at agreed-upon levels in these executive-level meetings at each point of price change by ① delivering a notice of price change for each supply channel (but making prices slightly different to avoid suspicions of a cartel) and ② for a buyer or new supply channel with great purchasing power, CJ would propose the agreed-upon price and then the other companies would set prices at a same or higher level.

Actual sales prices were set to reflect certain discount rates from the agreed-upon prices based on brand power, size of buyer, bargaining power and terms of payment, etc., in relation to a transaction. But since there was no significant difference in the scope of discounts or incentives among the respondents, and the prices were kept practically the same.

3) Effects of cartel

Collusion to fix supply quantity and prices resulted in pre-determined market share and less price competition in the sugar market. The average profit margin of these respondents was maintained at approximately 40~48%,

significantly higher than the average of the manufacturing industry (18~20%) and other similar industries (14~18%), like grain processing, starch production or animal feed industries.

3. KFTC's decision

The KFTC imposed a corrective order and surcharges of KRW 51,133 million against the respondents- KRW 22,763 against CJ, KRW 18,002 million against Samyang and KRW 10,368 against TS. Samyang. TS was also criminally charged, while CJ was exempt from criminal enforcement as the first leniency applicant in line.

4. The Judgment of the court

The respondents filed a revocation suit against the KFTC on the following grounds.[311]

According to CJ, ① price agreements before 1994 were based on the administrative guidance of the regulatory authorities, which was grounded in law, and hence should be considered lawful conduct; ② the collusion terminated in 1999 when Samyang broke the agreement. CJ argued that the agreements should be viewed as having two separate phases, with the first phase lasting until termination and the second phase starting after termination. Accordingly, the Statute of Limitations on the first phase has expired; and ③ the calculation of relevant turnover was legally erroneous. These arguments for revocation of surcharges, however, were all rejected by the court.[312]

Samyang argued that the process of calculating relevant turnover was illegal. Samyang showed that the KFTC had added the sum of sales amount which included sales allowance, rather than adding net sales revenue which excludes sales allowance, in calculating relevant turnover. The High Court agreed with

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[311] CJ and TS brought litigation for revocation of the KFTC decision with regards to surcharges. Samyang filed suit with regards to the corrective order and surcharges.

[312] Seoul High Court Decision 2007Nu24441 delivered on July 16,2008, Supreme Court Decision 2008Du15169 delivered on March 11, 2010.

Samyang.[313] The KFTC appealed the ruling in the Supreme Court, but its claim was dismissed.[314]

TS argued that if two of three companies engaged in a cartel broke the agreement, the remaining one company alone could not be considered to constitute a cartel. Hence, the point of termination should be September 22, 2005, when Samyang broke the agreement, not September 27, 2005 when TS, the sole remaining company, notified its intentions to leave the cartel. While this argument was not accepted by the High Court, the Supreme Court accepted the reasoning and remanded the case to the High Court on this issue.[315]

II. Applicable Provisions and Laws

1. Applicable provisions on improper collaborative acts

「Monopoly Regulation and the Fair Trade Act」[316]

Article 19 (Prohibition on Improper Collaborative Acts)
①No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to engage jointly in any of the following acts or let others engage in such kinds of activities that unfairly restrict competition (hereinafter referred to as "improper collaborative act":
1. Act of fixing, maintaining, or changing prices
3. Act of restricting production, delivery, transportation, or transaction of goods, or transaction of services

Article 21 (Corrective Measures)
Where an enterpriser commits any act in violation of the provisions Article 19, the Fair Trade Commission may order the enterpriser to discontinue the act or to announce the receipt of the corrective order, or take other necessary corrective measures.

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313 Seoul High Court Decision 2007Nu24571 delivered on October 23, 2008.
314 Supreme Court Decision 2008Du21362 delivered on February 25, 2010.
315 Seoul High Court Decision 2007Nu24458 delivered on July 16, 2008, Supreme Court Decision 2008Du15176.
316 Act before amended by Law No.7315 on December 31, 2004, hereinafter the "MRFTA".

Article 22 (Surcharge)
When any act violating the provision of Article 19 occurs, the Fair Trade Commission may impose on the relevant enterprisers a surcharge of not more than 5/100 of the turnover as prescribed by the Presidential Decree. However, in the absence of turnover, etc. a surcharge of not more than KRW1 billion may be imposed.

Article 55-3 (Imposition of Surcharges)
①In imposing surcharges under this Act, the Fair Trade Commission shall take into account each of the following.
1. Nature and extent of the unlawful practice
2. Duration and frequency of the unlawful practice
3. Amount of benefit accrued from the unlawful practice

③The standards for the imposition of surcharges in Paragraph 1 shall be prescribed by the Presidential Decree.

「Enforcement Decree of Monopoly Regulation and Fair Trade Act 」[317]

Article 9 (Computation of Surcharges)
①"Turnover set forth in the Presidential Decree" as per Article 6 (Surcharges), Article 22 (Surcharges), Article 24-2 (Surcharges), Article 28 (Surcharges), Paragraph (2), Article 31-2 (Surcharges), and Article 34-2 (Surcharges) of the Act refers to an enterpriser's average turnover for the past three years (hereinafter referred to as "average turnover"). If the firm is less than three years old at the start of the relevant business year, however, the turnover shall be the annual average turnover adjusted from the total amount of turnover from the first day until the last day of business for the year immediately prior to the relevant business year; in case the firm commenced business during the relevant business year, the turnover shall be the annual average turnover calculated from the total turnover from the first day of operation until the date of violation.

②Other details required for the computation of the average turnover shall be determined by the Fair Trade Commission.

Article 61 (Standard for Surcharge Imposition)
①The standards for surcharge imposition as per Article 6 (Surcharges), Article 17 (Surcharges), Article 17-2 (Special Case of Corrective Measures, Etc.), Article 22 (Surcharges), Article 24-2 (Surcharges), Article 28 (Surcharges), Article 31-2 (Surcharges), and Article 34-2 (Surcharges) of the Act are listed by type in Appendix 2.

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[317] Enforcement Decree before amended by Presidential Decree No.18768 on March 31, 2005.

③For the imposition of surcharges, the Fair Trade Commission shall determine and announce detailed imposition standards other than those stipulated in this Decree.

2. Leniency Program

1) Purpose of the Leniency Program

The Leniency Program is a penalty mitigation system for cartel cases by which parties that volunteer information on their own cartel activities before an investigation begins or parties that cooperate with an investigation are provided with mitigation or exemption from corrective measures or surcharges.

The Leniency Program, introduced to Korea in December 1996, has been in use since April 1997. The primary purpose of the program is to weaken ties among companies already participating or planning to participate in a cartel, thereby systematically preventing the formation and maintenance of a cartel. It has proved to be an effective investigative tool for detecting cartel activities which generally occur in confidence.[318]

2) Main Provisions

The MRFTA provides that those who report their involvement with cartels or cooperate with an investigation by offering evidence may obtain exemptions or mitigations from corrective measures (of Article 21) or surcharges (of Article 22-2 Paragraph 1). The lenience program, including the scope of persons qualified for leniency benefits, the standard or degree of leniency, etc., is governed by Presidential Decree (as defined in Article 35 Paragraph (1) of the Presidential Decree) according to Article 22-2 Paragraph 3 (*See Ⅱ. 1. above*).

Moreover, in order to effectively weaken ties among cartel members and encourage leniency applications, the first party to report cartel activities or to offer cooperation in an investigation, may be exempted from or obtain mitigation in surcharges, while those who come forward after the first two members of a cartel cannot be granted any leniency benefits.

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[318] Oh, Haeng Rok, Performance and Task of Antitrust Leniency Program, *Study on Competition Law* (2008), 90.

「Monopoly Regulation and the Fair Trade Act」

Article 22-2 (Mitigations or Waiving of Corrective Measures or Surcharges for Whistleblowers, Etc)
① For any of the following companies, the corrective measures under Article 21 (Corrective Measures) or surcharge under Article 22 (Surcharge) may be mitigated or waived:

1. Companies that have reported improper cartels
2. Companies that have cooperated in the investigations prescribed in Article 50 (Investigation of Violations) by providing evidence, etc.

③ Matters required for the scope of companies subject to mitigation or waiving of corrective measures or surcharges under Paragraph (1) and standard for or extent, etc., of mitigation or waiving shall be prescribed by the Presidential Decree.

「Enforcement Decree of the Monopoly Regulation and Fair Trade Act」

Article 35 (Criteria for the Mitigation of or Exemption of Punishment for Informants, Etc.)
①The criteria for the mitigation of or waiving of corrective measures or surcharges as per Article 22-2 Paragraph (2) of the Act are as follows:

1. Reporting is made when the KFTC either has no knowledge of the improper cartel or lacks the evidence necessary for proving the improper cartel.
2. The company is the first company to provide independently the evidence necessary for proving the improper cartel.
3. Cooperation has been provided until the completion of investigation, e.g., stating all facts regarding the improper cartel and submitting related data.
4. The company did not play a leading role or coerce other companies to participate in the cartel.

② The criteria for mitigating or exempting surcharges as per Article 22-2 Paragraph (2) of the Act are as follows:
1. Any person who meets the requirements of each following shall be granted surcharge mitigation of 75/100 or more according to Article 22 (Surcharge) of the Act
A. Reporting is made when the KFTC either has no knowledge of the improper cartel or lacks the evidence necessary for proving the improper cartel.
B. The person falls under Paragraph (1) Item 2 through 4

2. Any person who meets the requirements of each following shall be granted surcharge mitigation of 50/100 or more according to Article 22 (Surcharge) of the Act:
A. Cooperation is offered when the Korea Fair Trade Commission lacks the evidence for proving the improper cartel
B. The person falls under Paragraph (1) Item 2 through 4
3. Any person who meets the requirements of each following shall be granted surcharge mitigation within the range of 50/100 according to Article 22 (Surcharge) of the Act:
A. The person reports the engagement in a cartel or offers cooperation during an investigation
B. The person offers the evidence necessary for proving improper cartel
C. The person falls under Paragraph (1) Item 3 through 4

The KFTC stipulated the detailed standards and procedures for providing leniency benefits in the 「Notice of Exemption or Mitigation of Corrective Measures under the Leniency Program 」(hereinafter, "Notice of Leniency Program").

3) Leniency Program in Other Jurisdictions

ⅰ) U.S.

A leniency program was first adopted by the U.S. in 1978 and thereupon spread to other jurisdictions. To promote use of the program, the U.S. revised the program in 1993 to grant automatic immunity to those who come forward before an investigation had begun and also to grant leniency to those who report their wrongdoing after an investigation. The program also granted immunity from criminal prosecution not only to cooperating corporations, but also to its corporate directors, officers and employees, significantly expanding the use of corporate amnesty.[319]

The U.S Leniency Program is notable in that the program distinguishes between corporate leniency and individual leniency, and conditions for corporate leniency are different from individual leniency depending on whether a corporation comes forward before or after an investigation has begun.[320]

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[319] Lee, Jae Sung , Hardcore Cartel Regulation, *Commercial Law (2003),* 119.
[320] Oh, Haeng Rok, ibid. 98-99.

Under the corporate leniency policy, the first company to report its cartel activities before an investigation has begun and its employees who admit their involvement in the wrongdoing as part of the corporate admission will receive leniency.

Conditions that a corporation must satisfy for leniency are as follows:
① the authorities must be unaware of the illegal activities and possess no information regarding the illegal activities (from any source) at the point the corporation comes forward;
② the corporation, upon its report of the illegal activity, must promptly terminate its involvement;
③ the corporation must report its wrongdoing with complete honesty and full disclosure, and must provide full, continuous and complete cooperation throughout the investigation;
④ The confession of wrongdoing must be a corporate action, as apposed to isolated confessions of individual executives or officials;
⑤ If possible, the corporation must make restitution to injured parties; and
⑥ The corporation did not coerce any other party to participate in the illegal activity and it is evident that the corporation was not the leader or originator of the cartel.

For full immunity to be granted to a corporation coming forward after an investigation has been launched, the corporation needs to satisfy an additional condition of no unfairness to others, considering the nature of the illegal activity, the cooperating corporation's role in it and the point at which the corporation comes forward. In such cases, corporate executives and employees will be granted leniency if they satisfy the conditions of the individual leniency policy in the following section, rather than being granted automatic leniency.

Individuals (excluding those who are granted automatic immunity as part of the leniency benefits provided to first-in-line cooperating companies) will be granted leniency, if the following conditions are met:
① At the time the individual comes forward to report the illegal activity, the authorities have not begun an investigation (regardless of the order of the individuals in reporting);
② At the time the individual comes forward, the authorities have not received any information about the illegal activity being reported;

③ The individual reports the wrongdoing with complete honesty and provides full and continuous cooperation;
④ The individual did not coerce any other parties to participate in the cartel and was not the leader or originator of the activities.

ii) EU

The EU adopted its Leniency Program in July 1996. In contrast to the US system, the EU does not limit the number of leniency applicants and sets separate standards for full exemption and mitigation of surcharges.[321]

The EU revised the Leniency Program in 2002 and 2006, and the main revisions include the following provisions.

The Leniency Program was revised to grant automatic exemption for the first applicant to come forward before an investigation has begun, in place of the 75~100% surcharge reduction implemented prior to 2002, as long as certain requirements are met. In the second revision in 2006, the EU abolished leniency requirements that were open to discretionary interpretation by the competition authority, such as conditions regarding provision of decisive evidence or leading roles in a cartel, while specifying an applicant's obligation for continuous cooperation in an investigation.

iii) Japan

The Leniency Program of Japan, introduced in April 2005, has been in operation since January 2006. Noteworthy is that the degree of leniency is significantly different depending on whether an application is filed before or after an investigation has begun.[322]

Prior to an investigation, the first applicant gets a full exemption of surcharges, the second applicant a fifty-percent (50%) reduction and the third a thirty-percent (30%) reduction, as long as they meet the following requirements: ① the applicant terminates its involvement in the cartel immediately after the investigation begins; ② the applicant reports its illegal

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[321] Hwang, Tae Hi, Legal Review of Cartel Leniency Policy under Monopoly Regulation and Fair Trade Act, *Human Rights and Justice* (2007), 185
[322] Oh, Haeng Rok, ibid. at 102.

activities in a continuous manner at the request of JFTC both at the point of and after filing for leniency, and the applicant's reports should not include any falsification; and ③ the applicant should not have forced any other parties to participate in the cartel or have obstructed any other members' efforts to terminate their involvement in the cartel.

After an investigation has begun, applicants who the first three (3) leniency applicants to file for leniency are granted a thirty-percent (30%) reduction in surcharges if the aforementioned requirements ① through ③ are satisfied.

Furthermore, before an investigation begins, the first leniency applicant gets exemption from criminal charges, while exemption of criminal charges for latter applicants is determined on a case-by-case basis.

3. Informant Reward System

1) Purpose

The Leniency Program has limitations in that cartel members are reluctant to come forward to report their wrongdoings when the expected penalty is low or there is no certainty of leniency benefits. In order to overcome such limitations, Korea introduced an Informant Reward Program that recognized complaints filed by third parties (mostly outsiders, but sometimes employees of violating companies) to maximize the public benefits of detecting illegal cartels as a worldwide first in July 2002.

2) Main Provisions

There is no limitation on the scope of informants eligible to receive monetary rewards for reporting cartel schemes to the KFTC- even employees of violating companies may receive rewards. Nevertheless, rewards will not be given if the informants are the individuals or corporations directly involved in the cartel, or public officials or employees of government agencies who obtain the information in the course of performing their duties.

Article 64-2 (Payment of Reward)
①The Fair Trade Commission may pay rewards within its budgetary limit to any person reporting any violation of this Act to the Korea Fair Trade Commission and providing proof of such violation.

②The detailed certification of any practice in violation of this Act and qualification of whistleblowers eligible for rewards as well as the scope of and procedure for paying compensation as per the provision of Paragraph 1 shall be set by the Presidential Decree.

Article 64-5 (Payment of Reward)
①Informants reporting any of the following violations shall be eligible for reward in accordance with Article 64-2 of the Act:

1. Improper collaborative acts falling under any item of Article 19-1 Paragraph (1) of the Act
2. Unfair trade practice in the newspaper business (i.e., a business publishing or selling newspapers as prescribed by Article 2 Item 2 Subitems 1, 2, 4 and 5 of the Registration, Etc., of Periodicals Act) falling under Article 23 Paragraph (1) Items 1~5 of the Act
3. Unfair trade practice among those described in Article 23 Paragraph (1) Item 4 of the Act in the large retail store business (i.e., a business retailing various kinds of products used by consumers in daily life and catering to general customers in a store whose total area exceeds a specific scale set by the Fair Trade Commission)
4. Unfair trade practice as per Article23 Paragraph (1) Item 7 of the Act
5. Prohibited act of enterprisers' organization as per Article 26 Paragraph (1) Items 1 ~3 of the Act

②Informants eligible for reward as per Article 64-2 of the Act shall be persons informing the Korea Fair Trade Commission of the violations falling under any of the items of Paragraph (1) and providing evidence of such violations, excluding

enterprisers engaging in the violation.

③Except in case of special reasons, the Fair Trade Commission shall pay the reward within 3 months of deciding that the informed act is a violation (in case of an appeal, the date of adjudication with respect to the appeal).

④No investigating officials involved in the payment of reward shall disclose or provide to other persons matters regarding the report, e.g., identity of informants.

⑤Specific standards for reward by type of violation shall be determined and announced by the Fair Trade Commission after considering the degree of seriousness of violations and quality of evidence.

⑥The reward deliberation committee (hereinafter referred to as "deliberation committee") may be established within the Fair Trade Commission for the purpose of deliberating on matters regarding the payment of reward.

⑦Matters regarding the establishment and operation of the deliberation committee and other matters deemed necessary for reward payment shall be determined and announced by the Fair Trade Commission.

3) Expected Benefits

The KFTC's investigations into cartels are being intensified in response to the recent increase in the number of cartel reports by informants. As such, the informant system helps the KFTC detect a cartel scheme with less effort and costs.

The reward program is also expected to go beyond its current function of facilitating detection of cartels and serve as an effective social monitoring network.

III. Main Issues

1. Improper collaborative acts based on administrative guidance

1) Overview

In this case, all three (3) respondents argued that their cartel activities occurred in compliance with administrative guidance, and thus were not illegal. In fact, the government was directly involved in price control of sugar until February 1994, prior to the termination of the ex-post price report system.

As such, when a company conducts activities based on non-binding administrative actions, such as cases where an administrative agency receives reports on price changes by companies and is involved with the approval or adjustment of such price change, whether the conduct is in violation of Article 19 of the MRFTA is difficult to determine.

2) Assessment on illegality of cartel associated with administrative guidance

ⅰ) Discussion in the academia

Some scholars argue that cartels associated with administrative guidance are illegal in principle[323], since justifying such illegal activities assumes that the discretionary powers of an administrative agency trumps law.

On the other hand, some hold that while illegality in such cases should not be excluded, there should be special consideration of the circumstances.[324] Alternatively, some argue that such behavior should be exempt from the MRFTA, if the administrative action has specific legal grounds, in accordance with Article 58 of the MRFTA[325].

ⅱ) The KFTC's Position

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[323] Lee, Dong Kyu, *Legal Review on Monopoly Regulation and Fair Trade* (1997).

[324] Sonn, Ju Chan, "Legal Control of Restraint of Competition in Business", *Journal of Legal Studies* (1983), 304

[325] Lee, Nam Kee, *Economic Law* (1999).

The basic approach of the KFTC is that a company's cartel activities based on indirect administrative guidance not grounded in law constitutes a violation of the MRFTA in principle, while a cartel induced by administrative guidance grounded in law should not be considered illegal under Article 58 of the MRFTA.[326]

iii) The Court's Position

The court's position on a cartel formed in compliance with administrative guidance has not been consistent.

According to the Seoul High Court Decision 91Gu2030 delivered on January 29, 1992, the court took a general approach for determining illegality. It held that the respondents should have made their own judgment on whether or not their behavior would violate the MRFTA, because the administrative guidance constituted a non-binding authoritative action, and complying with such guidance was not mandatory.[327]

② In some cases, the court based its decision on the existence of an "agreement" to determine illegality. Especially in the Supreme Court Decision 2001Du939 delivered on March 14, 2003, the court noted that the Ministry of Finance and Economy and National Tax Service had intervened in a beer companies' price increases even though it had no legal grounds to do so. The court further determined that the presumption of a collusive agreement among respondents was invalid, since price increases were identical only because the government agencies allowed price hikes far below the level the respondents demanded, forcing the respondents to adopt the maximum prices approved (Supreme Court Decision 2001Du939 delivered on March 14, 2003).

③ In some other cases, the courts assessed whether a cartel could be exempted as an exception according to Article 58 of the MRFTA. In the Seoul High

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[326] KFTC press release "KFTC Basic Stance on Cartels Based on Adminstrative Guidance" (2002).

[327] On the contrary, in a case where the Korea Agricultural & Marine Products Corp. Association decided to charge importers green groceries commissions for consigned sales following administrative guidance of the Ministry of Food, Agriculture, Forestry and Fisheries, the Seoul High Court determined that even though the Association's decision constituted improper cartel in violation of Article 19 of the MRFTA on the surface, it was lawful behavior intended to achieve the ultimate objective of the MRFTA, on the grounds that such decision was made in accordance with administrative guidance which aimed to minimize adverse economic impact of excessive import of foreign farm products and stabilize the domestic prices.

Court Decision 2003Nu5817 delivered on May 12, 2004, the court held that even when an agreement by wholesale market corporations to fix rates for supply incentives, sales incentives or commissions for consigned sales was based on administrative guidance, it could not be exempted from the MRFTA, since the administrative guidance in this case did not have any legal grounds.[328]

3) Review of administrative guidance in the sugar cartel case

As discussed above, the three (3) respondents argued that their price agreements were lawful acts in accordance with administrative guidance that was based on valid legal ground. Those claims were consequently dismissed by both the KFTC and the court.

In the lawsuits brought by CJ and TS to revoke imposition of surcharges, the High Court ruled that administrative guidance issued by the pricing authorities did not constitute "other Act or any of its decrees" as provided in Article 58 of the MRFTA. In its ruling, the court quoted from the Supreme Court Decision 2004Du8323 which stated that " lawful behavior committed in accordance with other Act or any of its decrees means the minimum level of conduct within the scope of the Act or any of its decrees which prescribe in detail exceptions to free market competition in cases where restriction of competition is seen as reasonable due to the unique nature of the business or where monopoly status is guaranteed by a licensing system but intensive regulation is still necessary for benefit of the public".

Accordingly, in the lawsuit brought by Samyang, the High Court dismissed the company's argument on grounds that the cartel agreements to fix supply volume and prices were reached based on its own judgment, separate from the administrative guidance from the Ministry of Commerce (that concerned recommended ratios for raw sugar import), and further acknowledged that such collusion helped them maintain high profits.

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[328] Lee, Min Ho, *Cartel and Administrative Guidance*, (2007), Korean Competition Law Association, 160~167.

2. Duration of the Cartel and Point of Termination

1) Overview

Determining a cartel's duration and point of termination is an important issue, because the Statute of Limitations for surcharge imposition runs five (5) years and three (3) years for enforcement actions,[329] while cartels generally exist for extended periods.

In this case, the three (3) respondent companies argued that their collusion could be divided into two (2) phases based on the point special excise taxes were terminated in late 1999. Hence, they argued that the Statute of Limitations for the first phase of collusion had expired when they terminated activities in late 1999 as Samyang breached the agreement by exceeding the agreed-upon supply level.

2) Duration of the Cartel

The mere existence of a collusive agreement establishes a violation of law under Article 19 Paragraph (1) of the MRFTA. Therefore, it is obvious that the illegal cartel by the three companies commenced at the point they reached a collusive agreement.

3) Number of violations

Illegal cartel behavior generally takes place over an extended period, sometimes from a minimum of several months to other times more than a decade, and there are usually additional agreements made on prices or trade terms throughout its duration. This raises an important issue of how to account for the number of violations, i.e., whether cartel activities are considered a one-count violation as a whole, or whether each collusive agreement shall constitute a separate violation.

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[329] Improper collaborative act carries a maximum penalty of a three-year imprisonment or surcharge of KRW 200 million. At the time of this case, Article 249 Paragraph 1 of the Criminal Procedure Act provided that"the Statute of Limitations will be three (3) years for offenses eligible for a maximum of 5 years of imprisonment or confinement", but the it has been extended to 5 years with the amendment as of December 21, 2007. (The amended Act No.8730 comes into effect on the date of proclamation provided that the offenses before the effective date of the amendment are subject to the previous regulation).

There has been no particular discussion on this issue in the academia. But there is a court ruling which held that "in cases where cartel members reach multiple agreements throughout an extended period, if those agreements are implemented without any discontinuance and are based on a single understanding, the cartel activities should be taken as a whole and be considered a one-count violation even if there may be changes in detailed provisions of the agreements or cartel members. If not, each agreement of the cartel can be counted as a separate conspiracy."[330]

In this case, in line with such legal precedent, the court rejected the respondents' claim that the five-year Statute of Limitation had expired for the first phase of collusion. The court determined that the series of cartel activities by the respondents should be taken as one-count violation on the following grounds[331]:
① The respondents established a basic principle on supply volume and ratio in the first-phase agreements; ② the respondents continuously to limited supply volume by drawing up a monthly supply plans through meetings of various levels and revising plans based on changes in demand; ③ while the respondents implemented such agreed-upon plans, there was no declaration of termination of the collusion; ④ the second-phase of collusion appears to be based on the presumption that the agreement of the first-phase are valid and aims to continue the implementation of such agreement; ⑤ there is no fundamental difference in the establishment and implementation of the agreements of either phase; and ⑥ the respondents continued meetings to reach agreements on price-setting standards during 2000 and 2001 while they argue that the 1st phase of collusion was terminated.[332]

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[330] Supreme Court Decision 2004Du11275 delivered on March 24, 2006 concerning the graphite price cartel.

[331] In the detergent cartel case detected at a similar point of time to the sugar cartel, ① the original court considered each of the agreements of the four (4) participating companies as separate conspiracies (given that each agreement- price raise on Mar. 10, 2004 and Feb. 7, 2005 and suspension of promotion gifts and other trade terms on Dec. 27, 2005- was reached after the previous one was abolished), but ② the Supreme Court overturned the original decision, holding that, even if there was no agreement on basic principle of a cartel, if a cartel lasted without discontinuance for a single purpose based on a single understanding, there cartel may be considered a one-count conspiracy (Supreme Court Decision 2008Du17097 delivered on June 25, 2009).

[332] Seoul High Court Decision 2007Nu24441 delivered on July 16, 2008; Supreme Court Decision 2008Du15168 delivered on March 11, 2010.

4) Point of termination

Determining the point of termination is one of major issues in a cartel case based on collusive agreements.

Some argue that, under the law, an improper collaborative act is the act of reaching a collusive "agreement" in a practical sense and that an agreement does not require continuity by nature. Thus, an agreement is consummated the moment the agreement is reached.[333] In the graphite cartel case, however, the court saw agreement as a concept that requires the continuity, deciding that the illegal activity was terminated at the point the agreement became invalid. According to the court ruling, "cartel conduct is deemed to be terminated 'on the day the agreement no longer exists', i.e., when cartel members leave the cartel, breach the agreement or it is otherwise difficult to presume that there is an agreement as cartel members act in clear violation of the agreement".

The issue of determining point of termination proved to be particularly contentious in the surcharge revocation suit brought by TS. The specific question was when a cartel is comprised of three (3) participating companies, whether it is deemed to have terminated on the day ① the last remaining company declared the termination of its involvement or ② when the two other companies consecutively decide to cancel the agreement, leaving a sole party in the cartel, i.e., the point at which a second party cancels the agreement.

On this issue, the Seoul High Court decided that “the cartel at issue was terminated on September 27, 2005 when the plaintiff (TS) officially terminated its involvement in the cartel by declaring its intention to cancel the agreement".[334] The Supreme Court, however, overturned the original ruling and determined that “where two of the three cartel members withdraw from the cartel with only one remaining, the cartel should be deemed to have terminated as it does not meet the requirement for establishing a cartel - a meeting of the minds by two or more enterprisers.[335]

3. The legitimacy of surcharge imposition

[333] Lim, Young Chul, *Interpretation of MRFTA and Relevant Issues* (2007).
[334] Seoul High Court Decision 2007Nu24458 delivered on July 16, 2008.
[335] Supreme Court Decision 2007Nu24571 delivered on October 23, 2008.

1) Overview

Whether the surcharge imposed by the KFTC was legitimate was another matter that provoked fierce debate in this case. Particularly, the respondents raised question regarding scope of relevant turnover, used in calculating surcharges to be imposed, and the legitimacy of the surcharge imposition rate.

2) Scope of Relevant Turnover

In the lawsuit filed in the High Court[336], Samyang argued that ① the surcharge imposed by the KFTC was not legitimate since the relevant turnover applied for surcharge calculation was based on an amount including sales allowance instead of the net sales (which excludes sales allowance) and that ② the sales of 2000 and 2001 (when the company breached the agreed-upon supply volume) should have been excluded from the relevant turnover.

The High Court upheld the company's first argument and determined that the surcharge imposed was illegitimate. The court held that "relevant turnover should be the sales of relevant goods during the violation period with sales allowance, returns and discounts deducted from revenue pursuant to No.4 Paragraph (7) of the Korea Financial Accounting Standards. Hence, in agreement with the plaintiff (Samyang), relevant turnover should be based on net sales excluding any sales allowance".

Regarding the second argument, however, the court ruled against the plaintiff, holding that the sales generated during 2000 and 2001 should be included in the relevant turnover as the company's involvement in the cartel continued during that period.
The High Court's rulings were subsequently upheld in the Supreme Court.[337]

3) Retroactive application of surcharge imposition rates

The identical argument raised by all three (3) respondents was the following: "although surcharge rates prescribed under the MRFTA was on a gradual

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[337] Supreme Court Decision 2008Du21362 delivered on February 25, 2010

increase, from one-percent (1%) of the relevant turnover in 1995 to five-percent (5 %) by 2004, the violations that occurred prior to the increase were uniformly subject to the highest rate constituting a retroactive application of a strengthened rule, and in violation of the Constitution".

Regarding this issue, the Supreme Court determined that applying a 3.5% surcharge rate to all acts in the cartel period was not against constitutional prohibitions on retroactive application nor against principles of proportionality, and cited its previous ruling (Decision 2001Du274 delivered on October 12, 2001) which held that:
"When a law on which administrative measures are based is amended, the amended law and rules effective at the time of enforcement shall apply, unless otherwise provided by previous laws. Even if the amended law has disadvantageous legal effects compared to previous laws, as long as the legal relationship at issue was not terminated before the amended law became effective, it is not deemed as retroactive application prohibited under the Constitution."

IV. Significance

1. First Case to use the Informant Reward Program

The sugar cartel case holds significant meaning in the enforcement history of the KFTC in that it was the first case the Informant Reward Program was used to detect illegal cartel conduct. In fact, detailed information on a hiding place for evidence was provided by an employee of CJ, a cartel participant, and this information contributed to obtaining important evidence on the cartel including agreements on monthly supply volume (during KFTC's investigation in August 2005, the employee informed the KFTC that evidence was hidden in the basement parking lot of one of the respondents).

In December 2007, the KFTC provided the informant with a monetary reward of KRW 210 million, the biggest reward ever given by the KFTC to an individual informant.

A cartel is not easy for outsiders to detect, as it is implemented in a clandestine and continuous manner. In this respect, this case is expected to serve as a great gateway to promote illegal cartel reporting.

2. Discussion on issues and necessary improvements for the Leniency Program

This case raised a need to make improvements in the Leniency Program in that some companies applying for leniency exploited the system to their advantage. In fact, CJ, which sought leniency in this case, had also played a leading role in the flour and washing powder cartels (the so-called " new three-powder cartel", including the sugar cartel) that were detected at similar points, and its employees were fined for obstructing the KFTC's investigation. The following is a brief overview of the issues and necessary improvements for the Leniency Program.

1) Leniency Benefits for a Cartel Leader

At the time this case was decided by the KFTC, there were no provisions in the Enforcement Decree of the MRFTA or Notice of Leniency Benefits that prohibited companies who coerced other parties' participation in a cartel or led a cartel, from being granted leniency benefits. Therefore, even a party that led or coerced cartel activities could be granted exemption from corrective measures (including surcharge impositions and criminal charges) as long as its leniency status was valid under the Notice.

In fact, CJ, the No. 1 sugar producer with a 50% market share, was the party that derived the biggest gains from the cartel. There was considerable debate as leniency benefits were granted to a company that had also played a leading role in the detergent and flour cartels. Apart from this case, in the 2007 polypropylene cartel case, the leading manufacturer and leader of the cartel was also exempted from surcharges and criminal charges based on leniency.

To address such controversies, Article 6-2 was newly introduced into the Notice (amended on December 27, 2007) to exclude a coercing party from any

leniency benefits.[338] Yet whether to continue to grant leniency to a leader of a cartel still remains at dispute.

2) The Leniency Policy and Exclusive Criminal Accusation System

Under the exclusive criminal accusation system, prosecution may initiate a criminal suit in violation of Articles 66 and 67, only if there is a charge brought by the KFTC pursuant to Article 71 of the MRFTA.

Yet, as leniency benefits provide for exemption from criminal charges, the exclusive accusation authority of the KFTC naturally conflicts with the "principle of indivisibility of a complaint"[339] as provided in Article 233 of the Criminal Procedures Act. That is, if it is deemed that the principle of indivisibility of complaint can be applied to a case in which the KFTC has the exclusive rights to charge a criminal prosecution, if the KFTC charges only certain non-exempt participants of a cartel, prosecution should be able to press charges against the exempt participants without a charge brought by the KFTC.

According to the Supreme Court rulings, however, as the exclusive criminal accusation system pursuant to the MRFTA preemptively restricts the prosecution's authority to institute a public action. Prosecution may not bring an indictment without an accusation brought by the KFTC even if a law violation is admitted, and if the prosecution brings an indictment, the indictment shall be turned down by the court under Article 327 Item 2 of the Criminal Procedures Act for failure to meet indictment requirements.[340]

Regarding this issue, exempting a cartel leader from criminal charges just because it is the first-in-line leniency applicant also sparks debate.

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[338] Article 6-2 (Determining on coercer) ① Whether or not Article 35 Paragraph (1) Item 5 of the Enforcement Decree of the MRFTA may be applied shall be determined in consideration of each of the following:

1. whether the person made a threat or inflicted violence on others to coerce them to participate in a cartel or prohibit them from leaving a cartel against their will; and
2. whether the person imposed pressure or sanctions against others to coerce them to participate in a cartel or prohibit them from leaving a cartel against their will.

[339] Under the principle of indivisibility of complaint provided in the Criminal Procedures Act, if a complaint is filed against a person who committed an offense that is punishable only with the filing of a complaint, the complaint will take effect against all co-conspirators of the act. The Criminal Procedure Act prescribes this principle for "complaint", but not "accusation".

[340] Supreme Court Decision 2008Do4762 delivered on September 30, 2010.

Considering the legislative intent and policy concerns of the Leniency Program, however, the public benefit of breaking ties among cartel participants and thereby promoting fair competition in the market far outweighs such concerns.

Nevertheless, there is a need to explore reasonable ways to impose a restriction on granting leniency to leaders or coercers of cartel activities or those who have repetitively engaged in cartels.

3. Social Implications

Sugar had already become the target of cartel schemes along with flour and cement in the so-called "three-powder profiteering case" of the early 1960s, causing serious social ramifications which jump-started the enactment of the MRFTA.

The sugar cartel at issue was detected following the flour and detergent cartels, detected in March 2005 and October 2005. Such enforcement was a result of the KFTC's continuous efforts to unveil cartels related to daily necessities since 2004, when KFTC vowed to realize total eradication of cartels.

4. Other issues

1) Criminal Indictment Impossible without KFTC Prosecution

The KFTC brought charges against Samyang and TS, while exempting CJ, the first leniency applicant, from criminal enforcement. The prosecution, however, brought an indictment against CJ and an executive of CJ, both excluded from the KFTC's criminal accusation to the prosecution, based on the assumption that the principle of indivisibility of complaint should also apply to antitrust cases, thus trumping the KFTC’s exclusive authority to initiate criminal enforcement.

The Seoul District Court sentenced Samyang and TS to monetary surcharges of KRW 150 million and 100 million, respectively, but rejected the

criminal indictment against CJ and its employee that was excluded from the KFTC's filing of an criminal complaint to the prosecution.

Regarding the principle of indivisibility of complaint claimed by the prosecution, the court held that "it cannot be deemed that an accuser has the intention for public prosecution against those who are explicitly excluded from the accusation". In other words, in cases where an administrative agency brings a charge against part of violators under the exclusive criminal accusation system, it is deemed that the agency does not have an intention to pursue indictment against those excluded from the filing of the charge.

The court also added that "the Criminal Procedures Act does not provide that the principle of indivisibility of complaint'apply to criminal accusations, and its application by inference to 'standards for actions directly related to punishment' such as circumstances of exclusive criminal accusation, requires a cautious approach and if deemed necessary, should be resolved through the legislative means".

2) Compensation claims by cartel victims

In July 2010, bakery companies including Shani brought a suit against Samyang and TS to claim damages they incurred from unlawful price hikes of sugar caused by their price fixing schemes (pending in the Seoul High Court 2010GaHab71696).

Similarly, bakery companies also brought damages claims against four flour producers to seek restitution for their losses from unlawfully high flour prices caused by the respondents'cartel activities of five years since 2001. In this litigation, the court partially upheld the claims of the bakery companies and ordered the flour producers to pay compensation. [341]

Since 2000, there have been a growing number of cases where victims of cartels file damages suits. This is a desirable change in that ⅰ) victims can effectively recover their losses through civil remedies and ⅱ) damages claims can deter companies from cartel behavior as losses from damages suit can be greater than the illicit gains from cartel.

[341] Supreme Court Decision 2008Do1762 delivered on September 30, 2010.

Damages suits, however, raise various issues particularly in relation to ① the scope of persons who can become a plaintiff, ② method of estimating losses and the extent to which losses can be recognized and ③ proof of causation. Therefore, to establish valid standards for damages suits in relation to MRFTA violations, active research and accumulation of judicial precedents are necessary.