

# Dominance

The regulation of dominant firm conduct  
in 40 jurisdictions worldwide

# 2010

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# Korea

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## General

### 1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The Monopoly Regulation and Fair Trade Act (MRFTA, last amended 25 March 2009) is the general competition law in Korea, and applies to all competition matters, including abuse of market dominance.

Chapter 2 (which includes articles 3 to 6) of the MRFTA, is especially relevant to the conduct of dominant firms with respect to the prohibition against abuse of market dominance. In particular, article 3-2(1) provides for the types of abusive acts by market-dominant firms that are prohibited. Other provisions of the MRFTA are also relevant and comprehensively considered when assessing the implications of the behaviour of dominant firms. The MRFTA is enforced along with the Enforcement Decree promulgated thereunder, and the guidelines and standards issued by the Korea Fair Trade Commission (KFTC) pursuant thereto.

It should be noted that other relevant regulations tailored to specific industries also exist, such as the Telecommunications Business Act, among others.

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### 2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The provisions of the MRFTA that prohibit abusive behaviours of market-dominant entities regulate abusive practices of entities already holding market-dominant positions. Therefore, the MRFTA chapter 2 provisions do not cover conduct through which a non-dominant company becomes or attempts to become dominant. However, other provisions of the MRFTA, such as restrictions on mergers (article 7) and prohibitions on unfair trade practices (article 23), regulate attempts by entities to achieve market dominance.

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### 3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The object of the MRFTA and its underlying standard is not just an economic one. In addition to the protection and promotion of fair trade and free competition, it also protects other interests, such as preventing a concentration of economic power and promoting a more balanced development of the national economy. Accordingly, there are a number of provisions in the MRFTA, such as provisions for preventing

economic concentration by the large business groups (articles 8-2, 9, 10, etc), to protect other interests for sociopolitical reasons. The objective of the abuse of market dominance provisions and the underlying standard is not a strictly economic one either, as the abuse of market-dominance provisions prohibit market-dominant firms from unfairly taking advantage of their counterparties.

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### 4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Article 23 of the MRFTA regulates the unilateral conduct of nondominant firms. The following are unfair trade practices prohibited under the provision:

- unfair refusal to deal with another entity, or discrimination against a certain counterparty;
- unfair exclusion of competitors;
- unfair inducement of customers of competitors;
- unfair abuse of its superior bargaining position in the relevant line of business in making trades with a counterparty;
- acts unfairly restricting or disrupting business activities of other entities; and
- assisting persons with special interests or other enterprises through the provision of advanced payments, loans, human resources, immovable assets, stocks, bonds or intellectual properties, or otherwise by entering into transactions that contain significantly favourable terms for such persons or enterprises.

Among these categories of unfair trade practices, ‘abuse of (superior) position in the relevant line of business’ is, to some extent, similar to ‘abuse of dominant position’ because it regulates a conduct based on relative dominance (a superior bargaining position) in transacting with a counterparty, as opposed to market dominance. A superior bargaining position in an area of business is determined by, among other findings, the ease in which the counterparty may enter into transactions with other firms and the dependency of the transaction partner on the enterprises with regards to its revenues. The abuse of position in a line of business includes five categories:

- forcing the counterparty to purchase goods or services of the enterprise;
- forcing the counterparty to provide benefits to the enterprise;
- forcing the counterparty to hit certain sales targets of the enterprise;
- causing disadvantages to the counterparty; and
- interfering with the management of the counterparty.

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## 5 Sector-specific control

Is dominance regulated according to sector?

There are certain regulations providing sector-specific control of dominance. A notable example of this is the Telecommunications Business Act, which imposes a stricter standard of conduct on companies whose annual sales revenue exceeds a sector-specific threshold and have at least a 50 per cent market share in the telecommunications market. In particular, these dominant telecommunications companies are required to provide essential telecoms facilities, share information on related technologies, allow for interconnection between the facilities or their joint use, or otherwise give access to essential facilities, including equipment, upon receiving such requests from another company. Should those dominant telecommunications companies fail to abide by the law, the Korean Communication Commission may issue a corrective order or impose a surcharge on the company, as would the KFTC in enforcing the MRFTA.

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## 6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

Sector-specific regulation on abuse of market dominance is a special law and provisions of the MRFTA are general law. Therefore, it can be said that sector-specific provisions are likely to take precedence over the provisions of the MRFTA.

However, it is not clear whether one abusive act by a market-dominant enterprise could be punished by both the sector-specific regulator and the competition authority. In order to avoid double punishment, for instance, the Telecommunications Business Act provides that, where a corrective measure is taken against, or a penalty surcharge is imposed on, a company under the Telecommunications Business Act for abusing its market-dominant position, corrective measures including an imposition of a surcharge based on the same grounds as those taken under the Telecommunications Business Act should not be taken against the company under the MRFTA.

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## 7 Enforcement record

How frequently is the legislation used in practice?

Between the period of 1980, when the MRFTA was first enacted, and 2008, the KFTC has disposed of 175 cases regarding abusive behaviours of market-dominant entities. This limited number of cases may be attributed to the relatively strict standards for finding market-dominant enterprises. Accordingly, the KFTC has extensively invoked the MRFTA's alternative provision (article 23) that proscribes unfair trade practices of non-dominant enterprises. Under Article 23 of the MRFTA, the KFTC need not prove an alleged violator to be a market-dominant enterprise. In fact, most acts that constitute abusive behaviours of market-dominant entities also fall under those that constitute unfair trade practices. Therefore, the above-mentioned relatively small number of cases does not necessarily indicate that the KFTC has failed to regulate the abusive acts of market-dominant entities – particularly so in light of the fact that it has aggressively enforced the provision on unfair trade practices, which would fall under the ambit of abusive acts of a market-dominant entity. Furthermore, beginning in 2006, in efforts to deter the abusive business activities of market-dominant entities, the KFTC has been more aggressively invoking the MRFTA's provision that proscribes abusive behaviours of market-dominant entities – more so than

the provision proscribing unfair trade practices, which had been the more relied-upon provision of the two.

One of the most prominent cases involving market dominance concerns Microsoft's abuse of its dominant position in the PC and server-operating systems markets through the unlawful tying of Windows Media Server, Windows Media Player and its Instant Messenger program. In this case, the KFTC ordered Microsoft and its Korean subsidiary to do two things: to offer two versions of the Windows PC operating system, one without Windows Media Player and the Instant Messenger program, and one with 'Media Player Center' and 'Messenger Center' that contain links to webpages allowing consumers to download competing media players and instant messenger programs; and to unbundle Windows Media Service from its dominant Windows server-operating system. In addition to these corrective measures, the KFTC imposed a surcharge of approximately US\$31 million on Microsoft and its Korean subsidiary.

A more recent case occurred in 2006 and involved SK Telecom's abuse of its dominant position in the mobile telecommunications market in Korea. In that case, at issue was the fact that SK Telecom operated an online music service site ([www.melon.com](http://www.melon.com)) through which it sold MP3 music files while it installed its own DRM technology in its MP3 phones. As a result, among those subscribing to the company's telecommunications services, members using SK Telecom's MP3 phones could play only those MP3 music files downloaded from the company's music site, not those purchased from other music sites. The KFTC found the arrangement to constitute an abuse of market dominance and ordered SK Telecom to cease and desist the unlawful conduct and to pay a surcharge of 330 million Korean won.

Another recent case involving market dominance concerns Intel's abuse of its market dominant position in the market for x86 CPUs (the 'CPU Market'), which are directly sold to Korean original equipment manufacturers (OEMs). In June 2008, the KFTC found that Intel attempted to exclude its competitor, Advanced Micro Devices (AMD), from the CPU Market by providing various rebates to local OEMs, contingent upon them not purchasing CPUs from AMD. The KFTC ordered Intel to cease all conduct consisting of the provision of various rebates to local OEMs in exchange for not purchasing CPUs from its competing enterprise or maintaining its market segment share above a certain level, and imposed a surcharge of approximately 26 billion Korean won.

The latest high-profile market dominance case with international significance is the *Qualcomm* case. For more details, see question 38.

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## 8 Economics

What is the role of economics in the application of the dominance provisions? To what extent are economic expert witnesses used in proceedings before the competition authorities and courts?

Until early-2000, there have not been many cases where economic analysis had been conducted in the investigation of antitrust cases or KFTC proceedings, including cases involving the abuse of market-dominant positions. Recently, however, economic analysis has increasingly been used and presented during the KFTC proceedings in important cases, especially in market-dominance cases. For example, in the *Microsoft* case, very sophisticated economic analyses determining the scope of market definition and the effect of tying practice on competition were presented during the KFTC proceedings. The latest reorganisation of the KFTC has also brought the Division for Economic Analysis within the KFTC.

**9 Scope of application of dominance provisions**

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The dominance provision may apply to any entity determined to have dominance in the relevant market, including public entities. As the MRFTA does not exempt public entities, the KFTC, in its enforcement practices, has applied the legislation to major public entities such as the Korea Electrical & Communications Public Corp, Korea Tobacco Public Corp and Korea Energy Public Corp.

Moreover, the dominance provision under the MRFTA may apply equally to market-dominant foreign entities whose activities take place in foreign jurisdiction, to the extent that such activities affect the Korean market. In fact, the amendment to the MRFTA in December 2004 has explicitly adopted the 'effects doctrine' and the KFTC has applied the dominance provision to Microsoft Corporation, a corporation headquartered in the United States.

**10 Definition of dominance**

How is dominance defined?

The MRFTA defines a 'market-dominant enterprise' as 'a supplier or buyer in a particular area of business, with the market power to, either individually or jointly with other entities, determine, maintain, or change prices, quantity or quality of the goods or services or other terms and conditions of a transaction'.

In particular, in determining whether an entity is dominant in the relevant market, factors such as its market share, the existence of any entry barriers, the extent to which the barriers have been entrenched, and the relative size of its competitors in the relevant market are considered as a whole.

**11 Market definition**

What is the test for market definition? Does it differ from that for merger control purposes?

The MRFTA defines 'relevant market' as an area in which any competitive relation exists or may exist. The KFTC has promulgated the Investigative Guidelines on Abusive Behaviour of Market Dominance (the Abuse of Market Dominance Guidelines) and, separately, the Investigative Guidelines on Business Combination or Merger & Acquisition (the Merger & Acquisition Guidelines). These guidelines have almost identical provisions on the definition of the relevant market, which involves considering the relevant product market and the relevant geographical market.

First, in determining the relevant product market, factors such as demand-side product substitutability and supply-side product substitutability, considering similarities in function and price and usage of the products, are taken into consideration.

Second, in determining the relevant geographical market, the following factors are taken into consideration:

- characteristics of a product, supplier's production capacity, and the scope of the sales network;
- perceived availability to purchasers of alternative geographical areas that provide the product;
- perceived possibility to suppliers of buyers switching to other geographical areas for the product; and
- other considerations, such as the ease of switching to other geographical areas in terms of the time required.

**12 Market-share threshold**

Is there a market-share threshold above which a company will be presumed to be dominant?

Under the MRFTA, an entity whose share in the relevant market meets either of the following criteria is presumed to be dominant, provided that any enterprise with annual turnover of 4 billion Korean won or less is exempt from such definition:

- the market share of the enterprise is 50 per cent or more; or
- the collective market share of three or fewer enterprises is 75 percent or more, provided that any entity with market share of less than 10 per cent is excluded from such definition.

**13 Market-share threshold**

Is there a market-share threshold above which a company will be presumed to be dominant?

Yes, collective dominance is covered by legislation. The definition of a market dominant enterprise includes those with the power to 'jointly' raise prices as follows: 'a supplier or buyer in a particular area of business, with the market power to, either individually or jointly with other entities, determine, maintain, or change prices, quantity or quality of the goods or services or other terms and conditions of a transaction' (article 2, provision 7 of the MRFTA). Nevertheless, such collective dominance cases are rare due to the difficulty in establishing collective dominance.

For example, in one case involving a number of credit card companies, the KFTC considered 12 member banks along with their representing credit card company (BC Card) to be one entity for the purposes of determining market share and decided they abused their collective market dominance. However, the decision was overturned by the Supreme Court in 2005. The Supreme Court disagreed with the KFTC's approach of a single entity as the member banks has conducted business independently according to their respective operations. The concept of collective dominance was fully accepted by the Supreme Court, however, when it considered the respective market shares of each entity to determine whether their aggregate market share sufficed to presume collective market dominance, which requires a collective 75 per cent or more of the relevant market excluding that of any entity with less than 10 per cent (see question 12).

**14 Dominant purchasers**

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Yes, the MRFTA applies to dominant purchasers:

*any enterprise that can determine, maintain, or change the prices, quantity or quality of the commodities that are the subject of a deal, services or other terms and conditions of business, as a supplier or customer in a particular area of business, individually or jointly with other enterprises.*

Here, the definition of a 'customer' is interpreted as including purchasers. The words 'as a supplier or customer' were added in the 1999 amendment to the MRFTA. Before 1999, the then-effective MRFTA regulated only suppliers (sellers) of a product or service. However, with the amendment, the law came to be applicable to the purchasers of a product or services. Nevertheless, there has not yet been a single case in which the legislation was applied to dominant purchasers.

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**Abuse in general**


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**15 Definition**

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

In order to be characterised as an abuse of market dominance, the conduct would have to be one of certain categories of abusive acts as determined by the MRFTA. The MRFTA is not applicable to anticompetitive acts of market-dominant enterprises if such conduct does not fall under these categories. Article 3-2(1) of the MRFTA defines the following five types of acts as abuse of market dominance and more detailed types and criteria thereof are provided in the Enforcement Decree and accompanying Abuse of Market Dominance Guidelines:

Article 3-2(1) of the MRFTA defines abuse as follows:

- acts unreasonably determining, maintaining or changing the price of goods or services;
- acts unreasonably controlling the sale of goods or provision of services;
- acts unreasonably interfering with the business activities of other entities;
- acts unreasonably impeding the participation of new competitors; and
- acts unfairly excluding competitive enterprises, or that may significantly harm the interests of consumers.

It should be noted that the last category of acts that may significantly harm consumer interests has a fairly broad scope and includes conduct that either restrains competition in the market or while not restraining market competition, threatens to harm the interests of consumers. One such application was regarding the tying practices of Microsoft – although tying is not explicitly provided for as conduct abusing market dominance, the KFTC nevertheless deemed Microsoft's tying practices an abuse of its market dominance as the practices caused considerable harm to the interest of consumers.

**16 Exploitative and exclusionary practices**

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse pursuant to the MRFTA includes both exploitative and exclusionary practices. Although most anti-competitive behaviour has both exploitative and exclusionary aspects, the types of abusive behaviour enumerated in the MRFTA may be categorized as either exploitative or exclusionary.

Acts unreasonably determining, maintaining or changing the price of goods or services, and acts unreasonably controlling the sale of goods or provision of services may be considered exploitative since these as such do not target competitors.

In contrast, acts unreasonably interfering with the business activities of other enterprises, unreasonably impeding the participation of new competitors and unfairly excluding competitive enterprises may be classified as exclusionary.

Interestingly, the MRFTA provisions that regulate the abuse of market dominance contain a catch-all provision, regulating 'acts that may significantly harm the interests of consumers'.

**17 Link between dominance and abuse**

What link must be shown between dominance and abuse?

The existence of market dominance is a condition for chapter 2

of the MRFTA to apply. However, the KFTC does not take the position that the market for which the entity has dominance and the market on which abusive behaviour is targeted need be identical markets.

Thus, in the *SK Telecom* case, the KFTC found an enterprise with market dominance in the mobile telecommunications market to have abused its market dominance when the effect of this abuse was in the MP3 file download market.

**18 Defences**

What defences may be raised to allegations of abuse of dominance?

Is it possible to invoke efficiency gains?

An alleged violator of the MRFTA may defend its action, which would otherwise constitute an abuse of a market-dominating enterprise, if it can show that its alleged abusive action was in fact based on a justifiable corporate decision. For example, the Supreme Court concluded that an alleged violator of the MRFTA was justified in reducing its product supply level as the reduction was in response to a severe shortage in its own supply level, and, as such, it was determined to have been a reasonable management decision. The MRFTA does not expressly provide the efficiency gains as a defence to allegations of abuse of dominance but it may be possible to frame the efficiency gains as a part of a justifiable corporate decision claim.

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**Specific forms of abuse**


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**19 Price and non-price discrimination**

The type of abusive 'acts unreasonably interfering with the business activities of other enterprises' proscribed under article 3-2 of the MRFTA, encompasses abusive acts of discriminating against other entities based on price or otherwise under the Abuse of Market Dominance Guidelines. The Abuse of Market Dominance Guidelines prohibit unfair discrimination in light of the normal industry practices or customs by market-dominant enterprises with respect to the terms or conditions of a transaction. For example, KBS (the national broadcasting company) was found to have abused its market dominance when it discriminated against other enterprises with regards to payments of certain fees in favour of its affiliated advertisement companies.

**20 Exploitative prices or terms of supply**

Article 3-2 of the MRFTA prohibits 'unreasonably determining, maintaining, or changing the price of goods or service' by market-dominant enterprises, which encompasses abusive acts of dominant entities setting 'exploitative prices, terms or conditions of supply'. More specifically, according to the Enforcement Decree, the act of a market-dominant entity 'sharply increasing or insufficiently decreasing, the price of goods or services, relative to the changes in the cost of production, without justification', is prohibited.

Although a price increase does not strictly satisfy all of the conditions discussed above, if it is deemed that the interests of consumers are considerably harmed by such a price increase, then it may constitute an act that causes considerable harm to the interests of consumers. The KFTC determined the actions of automobile companies to increase the price of truck, of

which there was no viable competition, while omitting to increase the price of passenger vehicles as an abuse of market dominance and applied the provision of harming the interests of consumers in lieu of the provision on exploitative prices.

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#### 21 Rebate schemes

There is no specific provision in the MRFTA that captures rebate schemes. However, rebates schemes may be captured by various provisions of the MRFTA depending on their impact on the relevant market. For instance, the selective offers of rebates (awarding fidelity) might constitute an unreasonable interference with the business activities of other enterprises by a market-dominating enterprise – specifically unfair discrimination by a market-dominant enterprise; or such offer might constitute transacting with a view toward unfairly eliminating its competitors. The abuse of market dominance cases described in questions 7 and 38 (*Intel* and *Qualcomm*) are examples of the KFTC applying the provisions of the MRFTA to regard the particular rebate scheme of Intel and Qualcomm respectively as exclusionary.

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#### 22 Predatory pricing

Predatory pricing schemes are also covered by the MRFTA, as it prevents a market-dominant entity from engaging in an unreasonable transaction to eliminate its competitors. For example, the KFTC found an elevator manufacturing company with a dominant market share in the industry to have abused its position when it entered into an agreement to sell its product to another company at a price that was lower than the manufacturing cost in order to induce that company to nullify a similar agreement previously entered into with the competitor of the dominant company.

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#### 23 Price squeezes

The MRFTA does not have a specific provision that covers acts constituting price squeezes. However, price squeezes in some circumstances may constitute an act unreasonably determining, maintaining or changing the price of commodities or services, or an act unfairly excluding competitive enterprises under the MRFTA. Price squeezes would constitute ‘an act unreasonably determining, maintaining, or changing the price of commodities or services’ in the primary market where an enterprise holds a market-dominant position. At the same time, a low pricing in the secondary market might constitute ‘an act unfairly excluding competitive enterprises’ under the MRFTA.

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#### 24 Refusals to deal and access to essential facilities

An act of ‘unreasonably interfering with the business activities of other entities’ prohibited by the MRFTA covers refusals to deal and denials of access to essential facilities. The Enforcement Decree thereunder explains in detail that ‘refusing, discontinuing or limiting, without justifiable reason, the use of or the access to essential facilities for the manufacturing, providing or selling of the products or services of other enterprises’ is proscribed. As an example, one company that manufactured, imported and sold agricultural chemical products was found to have violated the MRFTA for refusing to supply methyl bromide, essential for manufacturing agricultural chemicals, to other companies.

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#### 25 Exclusive dealing, non-compete provisions and single branding

‘Acts unreasonably impeding the participation of new competitors’, and ‘acts unfairly excluding competitive enterprises’ prohibited by the MRFTA cover exclusive dealing, non-compete provisions and single branding. The Enforcement Decree thereunder provides in more detail that a market-dominant entity is prohibited from ‘entering into, without justifiable reason, an exclusive distributorship contract with a counterparty’ and ‘unreasonably transacting with a counterparty under the condition that the counterparty does not transact with a competing enterpriser’. As an example, the KFTC determined that a telecommunications company with a dominant market share had abused its position when it successfully prevented its business partners from providing their cables and telephone lines to its competitors. In another example, an airline holding a market-dominant position was found to have abused its dominant position by forcing travel agencies to cancel their agency agreements entered into with its competitor airlines, so that it might enter into an exclusive agreement with the travel agencies.

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#### 26 Tying and leveraging

The provision of the MRFTA that prohibits market-dominant entities from interfering with business activities of other enterprises or from considerably harming consumer interests, also covers tying and leveraging. The KFTC determined in the *Microsoft* case that tying by a market-dominant entity could constitute an act interfering with business activities and harming the interests of consumers.

The Abuse of Market Dominance Guidelines provide that unfair trade practices, which include tying, when conducted by a dominant company, may constitute abuse of market dominance.

The KFTC’s case against POSCO involved leveraging in the hot coil market to affect the cold coil market. In that case, an enterprise holding a dominant position in the hot coil market was found to have abused its position for refusing to provide the product to a company newly entering the cold coil market. Because hot coil is necessary for producing a cold coil, the dominant company was found to have leveraged its position in the hot coil market to interfere with the business activities of another company in the cold coil market in violation of the MRFTA. While the case was remanded in the Supreme Court, the case shows that tying and leveraging by market-dominant entities could be found as abuse of market dominance.

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#### 27 Limiting production, markets or technical development

An act of ‘unreasonably interfering with the business activities of other entities’ prohibited by the MRFTA covers limiting production, markets or technical development. The Abuse of Market Dominance Guidelines prohibit market-dominant enterprises from unreasonably refusing to enter into transactions with certain enterprises, considerably restricting the quantity or quality of the commodities or services that are the subject of a deal and creating difficulty for the business activities of other enterprises. If the market-dominant enterprise imposes transaction conditions restricting production, markets or technical development with respect to counterparty, such act may be classified as an act impeding the business activities of such counterparty.

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**28 Abuse of intellectual property rights**

The MRFTA and the Enforcement Decree prohibits a market-dominant entity from refusing, suspending or restricting the use of or access to the essential elements to the production, supply and sale of the commodities or services of other enterprises without reasonable cause. According to the Abuse of Market Dominance Guidelines, ‘the essential elements’ cover both tangible and intangible commodities, and might encompass the intellectual property rights.

Moreover, according to the recently amended Abuse of Market Dominance Guidelines, the following cases are regarded as a type of abuse ‘unreasonably interfering with the business activities of other entities’, prohibited under article 3-2(1) of the MRFTA: unreasonably using IPR-related measures, such as the lawsuit for alleged breach of IPR, lawsuit seeking cancellation of IPR and other legal and administrative procedures; and unreasonably interfering with the entry of new competitors to the relevant market using the said IPR-related measures.

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**29 Abuse of government process**

‘Acts unreasonably interfering with the business activities of other entities’ and ‘acts unreasonably impeding the participation of new competitors’ prohibited under article 3-2(1) of the MRFTA cover abuse of government process.

The Abuse of Market Dominance Guidelines prohibit acts of interfering with or hampering certain processes necessary for the continued business activity of another company or for the entry of a new company into the relevant market. The Guidelines also prohibit acts of filing patent infringement proceedings against other entities in order to interfere with the competition capability of such entities if it is aware that such entities do not in fact infringe upon the patents in question.

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**30 ‘Structural abuses’ – mergers and acquisitions as exclusionary practices**

According to the Merger Acquisition Guidelines, if, as a result of a vertical combination, either of the criteria for determining presumed dominance (see question 12) is met, and the merged company provides certain essential products to its competitor, or vice versa, the merged company may be considered to be restraining competition.

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**31 Other types of abuse**

There is a catch-all provision that proscribes the abusive acts of a dominant company that harm the interests of consumers, which is not tested but flexible enough to encompass a variety of abusive acts committed by an undertaking in a market-dominant position.

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**Enforcement proceedings**


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**32 Prohibition of abusive practices**

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The relevant provisions of the MRFTA directly prohibit abusive practices of market-dominant entities as well as

empowering the KFTC to take remedial actions against companies abusing dominant positions.

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**33 Enforcement authorities**

Which authorities are responsible for enforcement and what powers of investigation do they have?

The enforcement of the MRFTA rests with the KFTC, the competition authority. The KFTC is an independent organisation under the authority of the prime minister and is empowered with specific investigatory authority under the MRFTA, as it may, inter alia, order production of and examine relevant documents, take statements from relevant parties, consult experts and conduct legal reviews, etc.

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**34 Sanctions and remedies**

What sanctions and remedies may they impose?

Where a market-dominant entity engages in an abusive act in violation of the MRFTA, the KFTC is empowered by law to order the dominant entity to reduce its prices, to cease and desist the unlawful act, to publicly announce the receipt of a corrective order from the KFTC or to take other measures necessary for correction.

In accordance with article 6 of the MRFTA, the KFTC may also impose a surcharge in an amount equivalent to, but not exceeding, 3 per cent of the relevant turnover, provided that where there is no turnover, or where it is difficult to compute the turnover, surcharges may be imposed up to, but not exceeding, 1 billion Korean won.

The surcharge of 260 billion Korean won imposed on Qualcomm is the largest amount the KFTC has imposed on a company in violation of the dominance control provision in the MRFTA. For more details on the *Qualcomm* case, see question 38.

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**35 Impact on contracts**

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Under the general provision of the MRFTA, which authorises the KFTC to take any necessary corrective measures against a violator of the law, the KFTC may order that a contract be nullified. However, such order by the KFTC does not automatically invalidate the said contract from the perspective of contract or tort law; instead, if the contract runs contrary to the generally accepted customs and rules of society or is a contract of adhesion, then a court may separately declare the invalidity of the contract.

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**36 Private enforcement**

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

The MRFTA provides for a private damages claim against antitrust violations. There is a specific provision for damages claims arising out of violation of the MRFTA. Also, in accordance with the general contract or tort law, a private claim may be made.

However, since a provision for injunctive relief does not exist in the MRFTA, courts generally do not acknowledge the availability of injunctive relief.

**37 Availability of damages**

Do companies harmed by abusive practices have a claim for damages?

Yes, according to the MRFTA, if an entity is found to have violated the provisions and causes harm to other parties, that entity would be liable for compensating the injured party. Furthermore, with the amendment to the MRFTA, which took effect on 1 April 2005, should it be difficult for the injured party to provide a court with any necessary supporting facts to establish the amount of damages to be awarded, the court may determine the appropriate amount of damages to be awarded to the injured party. However, to date, there have been few precedents in which damages have been granted.

**38 Recent enforcement action**

What is the most recent high-profile dominance case?

In KFTC's case against POSCO, POSCO, as the country's only hot coil manufacturer, had refused to supply its hot coils to Hyundai HYSCO, a new cold coil entrant. The KFTC found that POSCO abused its market dominant position in refusing to deal with HYSCO. However, the Supreme Court remanded the decision stating that effects of restraint on competition, through price increase, quantity decrease or other form, must be shown for a refusal to deal to qualify as an abuse of market dominance.

The Supreme Court's reasoning was that the 'unjust' standard required to prove refusal to deal as an unfair trade practice of article 23 was different from that required to prove refusal to deal as abuse of market dominance of article 3-2(1) of the MRFTA and thus, effects of restraint on competition was needed to find for abuse of market dominance. The case has been remanded and sent back to the Seoul High Court.

The *Intel* abuse of market dominance case described in question 7 is another high-profile dominance case handled by the KFTC.

Moreover, on 23 July 2009, the KFTC issued a decision to impose corrective orders and a surcharge of approximately 260 billion Korean won against Qualcomm Inc for abuse of market dominance in the forms of royalty discriminations, conditional rebates and others.

The KFTC found that Qualcomm, as the monopolist in the CDMA mobile telecommunication technology market and the CDMA modem chip market, engaged in the following anti-competitive conduct:

- imposition of higher royalties and, as a result, discrimination against mobile phone manufacturers that used competing modem chips when licensing CDMA mobile communication technology (which constitutes abuse of market dominance in the form of unreasonably interfering with the business activities of other entities under article 3-2(1) paragraph 3 of the MRFTA and an unfair trade practice in the form of unreasonable discrimination among contracting parties under article 23.1.1 of the MRFTA);
- provision of rebates to mobile phone manufacturers on the condition that they fulfil most of their demands in CDMA modem chips and RF chips through Qualcomm (which constitutes an abuse of market dominance in the form of acts unfairly excluding competitive enterprises under article 3-2(1) paragraph 5 of the MRFTA); and
- entering into agreements that obligated the payment of 50 per cent of the previous royalties after the expiration or invalidation of the relevant patents by mobile phone manufacturers when licensing CDMA mobile telecommunication technology (which constitutes an unfair trade practice in the form of unreasonable use of contractually dominating position under article 23.1.4 of the MRFTA).

The surcharge of 260 billion Korean won is the second-largest surcharge ever to be imposed by the KFTC in a single antitrust case and the largest surcharge ever to be imposed on a single defendant.

The KFTC also imposed the following corrective orders against Qualcomm:

- prohibition against charging different royalties based on whether or not modem chips of competitors have been used;
- prohibition against providing rebates conditional upon purchase of Qualcomm modem chips or RF chips at levels that exclude competitors; and
- prohibition against unreasonably obligating continued payment of royalties after the expiration or invalidation of patents.

As for Qualcomm's exclusionary conduct in the multimedia software market for alleged tying and restriction of access to essential facilities practices, the case-team is expected to supplement its investigation and re-issue the examiner's report soon.

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