China - Korea IP & Competition Law Annual Report 2017

Volume I

Edited by

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ACKNOWLEDGEMENTS

The China-Korea Market & Regulation Law Center (MRLC) has published the fourth edition of the China-Korea IP & Competition Law Annual Report (the “Annual Report”). The Annual Report was started with the goal of providing the most authoritative source of legal information in the fields of IP and competition law through analysis of legal trends in China and Korea by expert academics and practitioners. IP and competition laws, the most significant legal elements in support of economic development, are rapidly developing in the two countries. In the meantime, China and Korea are emerging as leading players in global economic development while being complementary in many aspects. Hence, it is very important for us to accelerate our progress and achieve synergies between our two countries. It would be even more meaningful if we could share our achievements globally and act as a catalyst for symbiosis and prosperity.

The global economy is in a transition period seeking a new economic development paradigm that promotes balanced development of the economy and quality of life in place of neoliberalism that has exposed many defects in the wake of the 2008 global financial crisis. Finding a new way to sustain growth theoretically or practically while enabling enjoyment of the fruits of such growth in the so-called age of polarization is not easy. In 2017, both in China and Korea, many major events occurred inside and outside the country in the fields of both IP and competition law. Above all, many new issues have emerged due to trade pressures from the new US administration, and there has been a significant change in the law enforcement systems of both countries.

MRLC believes that it is necessary to pursue globalization through reform and openness while utilizing intellectual property rights and market competition as key tools. In addition, we believe it would be very meaningful if China and Korea could renew the ‘wisdom of the East’ accumulated through their long histories to contribute to solving the challenges of the global economy. For example, although the fairness doctrine has been recently discussed as an alternative to healing deficiencies in efficiency-centered neoliberalism, its substance is unclear. We are constantly researching ways to incorporate self-reflection based on Eastern wisdom and community consciousness into the fields of IP and competition law.

The MRLC has made various efforts to promote the development of IP and competition law through comparative and interdisciplinary research and this Annual Report is one such

effort. Next year, we hope to make the content and analysis of the cases discussed in the report more helpful to researchers and accelerate the publication date to enhance its timeliness.

The publication of the Annual Report is the result of contributions by many experts. We would like to thank Professor LIU Chun Tian for initiating the idea of the Annual Report and providing outstanding leadership. We thank the continued support of Professor SHI Ji Chun and Professor KIM Yeon Tae, the Representative Commissioners of MRLC. Foremost, the scholars and practitioners who delivered the research, writing and translation for the publication of the Annual Report must be commended for their great efforts and acknowledged as its principals.

The MRLC Annual Report is the accomplishment of the MRLC and its sister institutes, the Innovation, Competition and Regulation Law Center of Korea University (ICR Law Center) and Economic Law Research center of Renmin University in China. We would like to thank Professor KIM Sun Hyung who has taken responsibility for overseeing the entire publication process of the Annual Report every year. Without Professor KIM’s efforts, the Annual Report would not have seen light. We also thank Researcher CHOI Ji Pil and Doctor PAK Yun Seok of the ICR Law Center, and WANG Jia Jia, LIN Qiaoqiao and LIU Xinyue of Renmin University Law School who reviewed the drafts and provided invaluable help for this Annual Report. Lastly, we are grateful to Ms. HONG Ji Seon for her outstanding performance in supporting this project.

Editors-in-Chief
MENG Yanbei and LEE Hwang

PREFACE

2017 is an extraordinary year. Lots of variables have appeared in the international community, and just as what I pointed out in the preface of “Chinese and Korean Intellectual Property and Competition Laws Development Report” in 2016, the world has come to a new intersection, and we are facing a new choice. The USA has entered into a new era. The new American government has changed its previous diplomatic maneuvers. It firstly criticized the globalization, criticized WTO in veiled words, advocated “America First”, and then took a serious of actions, including, exiting the TPP that will take shape, putting aside the multilateral trade mechanism of WTO, criticizing many countries from Asia, EU and North America for their unfair trade to America, and carrying out the a series of action like“301 investigation” based on American laws to the Chinese government, expecting through a bilateral or other way that is more beneficial to the interest of the America instead of multilateral trading mechanism established and operated by the America for years. Britain’s act of exiting from the EU has kept simmering. China has announced that the construction of socialism with Chinese characteristics entered into a “new era” aiming to deepen the reform and expand the opening-up. These variables above will bright about lasting and far-reaching influences, and will certainly cause the relations of China and the world, especially, China-US relations, to enter into a new stage. China-US relations will influence the domestic affairs of two countries, and also deeply influence China’s relations with the world and the future of China.

This report mainly discusses Sino-Korea problems related to intellectual property and competitive system, however, Sino-Korea problems are closely linked with international community, and departmental legal problems are also vitally interrelated to the entire legal system as well as different economic and social aspects. These problems include fundamental and derivative ones, but they are frequently of reciprocal causation, and they are mutually stipulated and mutually restrained. As to China, it is complicated, however, China has at least two points that should be answered and thought of. Firstly, the task at the present, that is, how to know and treat the America’s “301 investigation”, to indicate China’s standpoint to “301 investigation”, and how to state the facts to the international community, to tell it a genuine China in terms of intellectual property; secondly, the long-term task, and China shall face its current situation directly and think seriously. After 40 years of reform, what are the fundamental problems that will eventually influence the development of China in the “new era”? Which are problems put forward by the Chinese government and needing deep reform? What are the problems that needs a reform? What is the direction to follow in reform? What is the standard of reform, and how to reform? What are the problems influencing and even hindering our modernization and how to reform?

I. How to know and treat America's "301 investigation"

It is well-known that, the governing law applicable to "301 investigation" is the domestic law of America in 1974. Since the implementation of this law, American government has taken it as means to investigate related countries and regions again and again, to force the investigated pasty to make concession in trade issues. According to the rules of World Trade Organization, in case of violation of multilateral trade principles between the countries in terms of intellectual property law, a ruling shall be given via the dispute settlement mechanism of WTO, and it shall not be settled in bilateral way. The US government's continued application of domestic law standards to judge the laws of other members, including China, is contrary to the principles of the World Trade Organization. Therefore, Chinese government rejects it. In addition, the behavior of American government has caused the concern of Chinese's legal circles. A nationwide academic body in the intellectual property law field as well as a civil trade association of China, China Council For The Promotion of International Trade has responded to "301 investigation" with a responsible attitude.

China Intellectual Property Law Association and China Council For The Promotion of International Trade respectively submitted an objective and rational report of "comments" to "301 Investigation Committee", and appointed personnel to attend the hearing held in Washington on October 10th, 2017, to state their own legal opinions to the hearings. Through "comments" and statements in the hearing, China's intellectual property law circles have made a practical, objective and objective presentation of China's intellectual property law environment construction. As everyone knows, China, as a developing country, has been a backward agricultural country for a long term, with stagnant economy. Because of the reform and opening-up, China's economy has been integrated with the world, and China has obtained the achievements today. In terms of intellectual property, Chinese government and people are sincere. China is more difficult than the traditional market economy countries, for the soil that China's intellectual property system is rooted in is planned economy rather than market-oriented economy. China has transformed the "soil" and also established the intellectual property system in the transformation from planned economy to market-oriented economy. In general, influenced by original system and "Cultural Revolution", China is still far inferior to USA in scientific and technological level on the whole. Compared with developed countries, China lacks the historical experience of market-oriented economy. Under the planned economy conditions, the environment of public ownership, and the long-term influence of idea “large in size and collective in nature”, we once definitely thought for a long term that, the new knowledge and new technology should belong to all human beings for the reason that they were completed on the basis of existed scientific and technological achievements of predecessors without exception. For a long time, in China of socialism, it has been thought in the national idea that, it is a matter of course that scientific and technological achievements will “benefit the whole country once they are developed by one body”. In the deep-rooted values of Chinese people, the idea of private ownership of knowledge and technology is not acceptable and also it is a great sin. For long-term seal-off, we are not familiar with the market, and we have never heard of the term “intellectual property”, so we are a clean slate in system, experience and consciousness. The change of concept is the key of all changes. Chinese government was determined to give up the planned economy in 1992 and started the construction of socialist market economy. Until now, it has been only short 25 years. Facing such quick, fierce and intensive change, the Chinese people are dazzled and overwhelmed. The mental suffering, concept repetition, economic friction and interests parting suffered in the transformation cannot be understood in any other traditional market countries. Intellectual property system has developed from nothing, and the awareness of intellectual property has become enhanced from weak. Also, China has integrated into the international market without hesitation, changed our ideas with international rules, to force the reform reversely, therefore, becoming an important member of international market economy and international rule system. Today, what showed to the world by China is an intellectual property law system kept consistent with the mainstream of world. Through up-to-date modification of each single law regarding intellectual property, resolute intellectual property court construction, and increasing judicial execution and public trust, intellectual property has obtained increasingly effective protection in China. Therefore, China has formed an intellectual property law environment that can serve the national innovation system construction of China and also serve the innovation and operation in different countries throughout the world. These changes and progresses are apparent.

According to principle of rule of law, intellectual property is a private right, and its subject is an enterprise or individual. The technology transfer issue pointed out by the USA is not a behavior of government, but a transaction between enterprises, and it is a legal issue between subjects of civil and commercial affairs. The cooperation of enterprises from two countries is on the basis of equality and mutual benefit, in which each party develops its strong points and takes what it needs, and this is a process of autonomous negotiation and decision by two parties. American enterprises’ technology transfer to China is a normal commercial behavior, and it is the result of two-way selection and independent decision-making by enterprises. Normal commercial transactions between Chinese and foreign enterprises are not government procurements. In fact, even the government procurements among the countries internationally are also on the basis of equality and free will, and no country can forcibly purchase the technology of government or enterprise from other countries. The value of technology lies in that the technology is used rather than "hidden". Benefit maximization is the highest pursuit of technology owner, and the technology needs to realize its value via market allocation. The technology transactions between Chinese and American enterprises are on the basis of exchange of needed goods, in which, each side takes what it needs and the two parties are on the basis of equality and mutual benefit, and both parties are trade beneficiaries. As everyone knows, America is a strong country of high technology, and also it is proficient in market economy, and also an expert in technology transaction, so it will not fail before an enterprise from China, a developing country in difficult transformation from planned economy to market economy. So the fact is. American enterprises, through cooperating with Chinese enterprises, setting enterprises in China to work on production operation or handing their products to Chinese enterprises for manufacture, have made lots of money and returned satisfactorily. "Nothing forcibly done is going to be agreeable". Till now, we have not seen an example that American enterprises' high technologies were transferred to Chinese enterprises forcibly.

America is a recognized powerful nation of science and technology. In many fields, American enterprises are actually advanced in technology. For historical reasons, the traces of planned economy have been left in different aspects of Chinese society. For example, the first *Patent Law* published in 1984 once stipulated the "planning permission" system to China's state-owned enterprises and took this as a characteristic of socialism. Therefore, in the initial stage of reform and opening-up, Chinese enterprises urgently expected to obtain the advanced technologies of enterprises from developed countries through cooperation, and further digest and absorb these technologies, and get newer technologies via deep research and development, so as to enhance their own power of further development, and this was a constant occurrence in human relationships. However, with the progress of China, these systems not in line with market economy will be abolished. Both China and western countries have followed this law. America is not advanced naturally, and its intellectual property system has not been always advanced. We are clear about that, the "print terms" in America's *Copyright Law* were abolished very lately until the last century. In short, each country has progressed continuously via its own efforts and mutual learning. It is a matter of course that the transferee of technology transferred continues to research and develop the technology and seek for technological improvement, in order to obtain new competitive advantages. Any enterprise is entitled to develop the technology obtained legally and get legitimate rights and interests from this only when its behavior is rightful and proper.

In recent years, China's intellectual property law construction has been improved continuously, and protection has realized the "qualitative change" from passive to active. After joining the WTO, China has actively improved the intellectual property law system, modified the *Patent Law*, *Trademark Act*, and *Law against Unfair Competition* in succession, and now it is catching up on the modification of *Copyright Law*. To improve the judicial level, China has established three intellectual property courts in Beijing, Shanghai and Guangzhou in short several months resolutely; after three years of practice, lots of intellectual property cases have been dealt with, also, 15 intellectual property tribunals have been established throughout the country in succession, therefore, effectively improving the judicial level of intellectual property in China. In addition, China has carried out national intellectual property strategy, to improve the national consciousness of intellectual property remarkably. In 2017, China possessed more than 1.3 invention patent applications, higher than the sum of America, EU, Japan, and the South Korea. Trademark registration has increased greatly. These are all very reliable measures, and also they are more basic, more fundamental, and have a more lasting effectiveness, aiming to establish a complete intellectual property protection system. From a scholar's perspective, frankly, as far as I know, there is no country like China that has made great efforts in intellectual property protection, with a remarkable effect. I believe that, the colleagues knowing about the Chinese situation from America's intellectual property circles will recognize my opinion. Intellectual property is a property, and also a means of enterprise competition. In the Internet era, technical progress develops crosswise, and overlap and conflict cannot be avoided. More and more intellectual property disputes have occurred to the enterprises in the countries like America. The intellectual property disputes are more frequent to occur in the more developed countries. This is a prominent manifestation of significant contribution of technical progress to economic growth. In the high technology field, rights relations are complicated, and disputes are frequent, which is almost a regular pattern, and especially among the famous large enterprises, intellectual property disputes are more frequent to see, and there are increasing lawsuits. It is hard to say which enterprise is a pure victim, which enterprise is a pure infringer, and much less that which country is a pure victim. Under the market economy and society with rule of law, it is the right way to respect the basic law of economic operation and rule of law, and private right disputes have their channel of way. Therefore, it is required to firstly distinguish that the behavior involved is a state action, corporate behavior or individual behavior. Corporate or individual behavior should be not put on the head of state. In the society with rule of law, these can be solved in legal way, and the enterprises may seek for legal way to solve the matters between enterprises rather than by government intervention. America is a market-oriented nation, and also a society with rule of law, and American government should know this basic reason clearly. If the legislation, policy or practice of related government between the countries violates the rules of WTO, it may be filed to the organizational dispute settlement mechanism for settlement in legal way.

Facing the trans-national disputes between enterprises, American government has given up normal legal way and international rules, instead, the government has walked to the front stage, unilaterally used “301 clause” of its domestic law, and taken a country as the object of ruling, violating the rule of law.

II. China’s necessary basic reflection

After about 40 years of reform and opening-up, China will face new choices. We have many problems needing think, and the key lies in the selection of direction. For the long term plan, China’s intellectual property rule of law needs to be rooted in the deeply cultivated soil of culture and soil of rule of law, and also it is required to construct a system body deep-rooted and unbreakable. Thus, I think there are following problems needing think at last: first, how to place the position of China well in the “new era”; second, how to treat the so-called “reverse globalization” and how to develop ourselves in the globalization; third, how to lay a solid foundation. If we fail to think seriously, lack a clear direction, cannot make a decision, and have no effective schemes and feasible measures, the future development of China will be influenced.

(I) How to understand China’s walking into the “new era”? What are its basic features?

“The reform and opening-up policy” is the sign of an era. Previously, China was in an “isolated” era isolated from the external world, especially the western countries. Isolation was a main cause of backwardness. The same result was caused by passive isolation or active isolation. Since the Ming dynasty, China was once isolated time and again, causing its lagging behind the world. The achievements made in about 40 years of reform and opening-up are universally recognized. It is a long arduous historical practice and also a great theoretical innovation. It’s believed that the Chinese government will make an all-around summarization on the reform and opening-up. We can discover the distinctively different results of opening-up and isolation only from the perspectives of resource allocation and economic development. It’s often said that, China is vast in territory and rich in natural resources, however, due to isolation, our economic development was stagnant, and our country became weak with poverty-stricken people. Through opening-up, we have made a change, realized resource allocation throughout the world, and developed ourselves while making contributions to the world by addressing our weaknesses and highlighting our strengths. Therefore, to take the development as top priority and touchstone, and give up isolation and select opening-up will be the most fundamental and most profound reform.

“Reform and opening-up” is the connotation and sign of an era. This era has been going through nearly 40 years. If China has stepped into a “new era”, then what is the connotation of this era, and what is its difference from the past about 40 years? The basic mode of reform and opening-up is that our Chinese people keeping a foothold in China open up our “door” with conditions out of our own interests, and import the capital, technology and management knowledge from the Western countries on the basis of the principle “Chinese learning as the fundamental structure, and Western learning for practical application”, to make China’s economy catch up with the development of the world, therefore, the essential characteristic of reform and opening-up is “seeing the world from China”. With the acceleration of globalization, China has started to go abroad. From the perspective of economic development, “opening-up” is to handle affairs from the viewpoint of China, and the door to open up may be big or small, and essentially, we are just a “cooperator” of the world economy rather than an “interested party”. In the so-called “new era”, China will become an interested party of the world economy, and become the manager of the world economy together with other countries of the world, that is, we will be a member of “a community of shared future for mankind” as mentioned by Xi Jinping, and this is the essential characteristic of the “new era”. There is no turning back. Since the date of reform and opening-up, China has stepped onto a road of no return leading to the world. Although recently, it's doubted by some people from international society and China that, whether China is retracing its steps and has given up the road of “reform and opening-up” advocated by Deng Xiaoping. However, in fact, we needn’t worry about it too much. “Reform and opening-up” conforms to the law of nature, law of economy, and humanity; in a word, it conforms to both natural law and human nature, and reflects the appeal of all Chinese people. According to the constitution of China, all power belongs to the people. The supreme governing philosophy of CPC (Communist Party of China) is “people-centered”. “Reform and opening-up” is the choice of all Chinese people ultimately, and no one can go against the will of the people. “Reform and opening-up” has been implemented for about 40 years, and during the period, we have suffered the tortuous history that this policy was denied for times, however, “the high mountains can never prevent the river water from flowing”, the general direction of “reform and opening-up” has never been changed, and today, no force can prevent China from stepping into the process of modern society. China in the “new era” must go out, change its side, and learn to “stand in the world to see China”. Therefore, Chinese people still have many concepts needing to change, and the reform needed by China is more profound and more arduous.

(II) How to treat the so-called "reverse globalization"? How to develop jointly with each country in the globalization?

After President Trump's taking office, many people have unscrambled this as neo-conservatism and unilateralism, even given him a crown of "reverse globalization", and held that America's power became relatively weak and showed a declining tendency, so it was unable to continue to take the role of global police. On the contrary, China is rising, and walking to the center of global stage. Facing this situation, some people have asserted that, the change at present is a "change that has never appeared in 400 years", "we are faced with the fourth change of world order". Some people have even proposed that, China will take over the banner of globalization, and be the leader of the world.

This paper holds that, everything must proceed from reality, and we should insist on rational cognition and judgment.

Firstly, the recognition of America cannot be judged wrongly. In terms of globalization, America is absolutely not the advocator of anti-globalism taking a back seat and seeking hegemony in a corner. As the bellwether of post-war world order, America, as the leader and pusher of globalization, cannot give up its position easily and cannot be the advocator of "anti-globalism", and it has its ideal globalization.

Secondly, the cognition of China. China is a developing country, and generally speaking, it is still in the low end of international industrial chain, and not qualified for being the leader of world's technology and economy. In terms of globalization, China only can be the constructer, beneficiary, and vindicator. The success of China lies in that whether it can become the flag-bearer of "globalization" but lies in that it should not "select a wrong side", to avoid becoming an outside of globalization. As for China, a developing country, the determinant for it to keep strategically initiative and always remain invincible is not that whether it is capable or advanced or backward, but the key lies in the selection of direction and route. It is the basis of China's external relations that whether the Sino-American relations can be handled well.

Globalization is an irreversible tide of history, and also a historical opportunity of resource reorganization. China should seize this opportunity, to seek for joint development with the world.

(III) China should behave well.

The most important tool in the future competition is system. Globalization emphasizes mutual cooperation and mutual independence, therefore, market economy has become the "universal value" followed globally. Market is a shared school and examination room of various countries in the world. The one whose system is much closer to the market and reflects the law of market more profoundly will be more skillful in the sea of market economy, its system will have a higher performance cost, and it will get more market advantages. Chinese systems have lots of advantages, and also have many problems that have to be corrected and are better to be corrected earlier. Advantages certainly can bring about self-confidence, but self-confidence doesn't mean that we can have nothing to worry about and "sleep" on the confidence of system. The problems cannot be obliterated with self-confidence, and we must face new knowledge, new technologies, new things, and new problems hourly and daily, and we have no "wise" ready answers to these. In this aspect, China still has a long way to go.

This is a big topic and big article of China's reform. It's believed that China's top designers can write this article well.

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BOOK ONE

MRLC IP & COMPETITION LAW

2017 ANNUAL REPORT OF CHINA

PART I.

OVERVIEW OF POLICY AND LAW IN INTELLECTUAL PROPERTY AND COMPETITION OF CHINA

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY AND LAW

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY AND LAW

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY AND LAW

LIU Chuntian * / *WANG Jiajia* **

As China's economic development enters into a new normal of speed change, structure optimization, and dynamic conversion, intellectual property has become an important bridge and link for transformation of scientific and technological achievements to actual productivity, and also China has entered into the period of strategic opportunity to changing from a big country of intellectual property to a powerful country of intellectual property. Under the further drive of "mass entrepreneurship and innovation" tide, it has become a national priority to build an intellectual property protection and application mode with Chinese characteristics. To carry out the goal to accelerate the construction of powerful country of intellectual property deeply and comprehensively, in January 2017, the State Council printed and distributed the *National Planning of Intellectual Property Protection and Application during the 13th Five-year Plan*, which became a general guiding principle document of strategic construction of powerful country of intellectual property, aiming to deepen the reform in the intellectual property field, get through the full chain of national intellectual property innovation, application, protection, management and service, improve the intellectual property protection, and strengthen the international influence of China's intellectual property, trying to achieve decisive results in important fields and key points of intellectual property of China by 2020, with intellectual property protection and application abilities improved greatly.

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I. With the print and distribution of National Planning of Intellectual Property Protection and Application during the 13th Five-year Plan, the overall strategy of China's intellectual property protection and application in the new era is arranged.

In January 2017, the State Council printed and distributed the *National Planning of Intellectual Property Protection and Application during the 13th Five-year Plan*, which is a guiding document to implement a series of important deployments made by the Party Central Committee and the State Council on intellectual property work, and carry out and accelerate the construction of powerful country of intellectual property under the new situation comprehensively and deeply. Following the basic principles "adhere to innovation as leadership, adhere to overall planning and coordination, adhere to green development, and adhere to opening-up and sharing", this planning is expected to complete the goal of intellectual property strategy action plan by 2020 on time, and built a group of powerful provinces and cities of intellectual property, therefore, providing a powerful guarantee for promoting the mass entrepreneurship and innovation, laying a firm foundation for constructing a powerful country of intellectual property, and realizing the significant improvement of intellectual property protection environment, full manifestation of intellectual property application benefits, and great improvement of intellectual property comprehensive ability.

The primary task mentioned in the *National Planning of Intellectual Property Protection and Application during the 13th Five-year Plan* is "to deepen the reform in the intellectual property field, actively research and explore the intellectual property management system innovation, and make efforts to make breakthrough achievements in the important fields and key areas." Concretely speaking, by establishing the innovation drive evaluation system with intellectual property as important content, promote the incorporation of intellectual property products into the national economic accounting, and include the intellectual property index in the national economy and social development assessment system; strictly carry out the intellectual property protection, accelerate the formulation and amendment of intellectual property laws, rules and judicial interpretations, build a new pattern of intellectual property protection including judicial adjudication, criminal justice, executive law enforcement, rapid rights protection procedure, mediation and conciliation, industry self-regulation, and social supervision, and deepen the regional coordination and international cooperation of intellectual property protection; promote the efficient utilization of intellectual property; highlight the leading role of intellectual property in scientific and technological innovation and emerging industry cultivation, develop the intellectual property intensive industries greatly, perfect the patent navigation industry development work mechanism, and develop the intellectual property appraisal work deeply; and strengthen the transformation of intellectual property with a high technology content.

In the *National Planning of Intellectual Property Protection and Application during the 13th Five-year Plan*, key deployment work and major special projects of intellectual property protection and application have been developed further, and to perfect the intellectual property legal system has become the top priority. It's pointed out in this planning that, we should accelerate the construction of intellectual property laws and regulations, such as accelerate the formulation and amendment of *Patent Law, Copyright Law* and supporting regulations, and *Regulations on Protection of New Varieties of Plants, etc.*; improve the intellectual property-related legal systems, search and perfect the intellectual property protection system of business model and practical works of art. In addition, it is needed to further improve the intellectual property protection level, especially, develop the role of juridical protection of intellectual property, strengthen the criminal protection of intellectual property, enhance the construction of intellectual property administrative law enforcement system, strengthen the intellectual property protection of import and export trade, strengthen the intellectual property protection in the traditional advantageous fields, strengthen the intellectual property protection in new fields and new business forms, and strengthen the intellectual property protection in the field of people's livelihood. It is required to improve the quality efficiency of intellectual property, mainly focus on the intellectual property work of improving the patent quality efficiency, carrying out the trademark strategy, building high-quality copyright, and strengthening the intellectual property quality in areas such as geographical indication, new plant varieties, and layout designs of integrated circuits, and drive the industrial upgrading and development as well as intellectual property opening-up and cooperation. In the key special projects, it is mainly required to strengthen the construction of intellectual property transaction operation system, for example, innovate the financial service of intellectual property and strengthen the intellectual property collaboration application by improving the public service platform of intellectual property transaction operation; improve the public service ability of intellectual property, construct the public service platform of intellectual property information, and strengthen the public service system construction of intellectual property as well as the intellectual property service supervision. In addition, it is required to strengthen the intellectual property talent cultivation system construction, optimize the intellectual property talent growth system, establish the talent discovery and evaluation mechanism, and also strengthen the intellectual property culture construction, increase the intellectual property publicity, and carry out the intellectual property education popularization plan.

II. With the print and distribution of Promotion Plan of Deeply Implementing the National Intellectual Property Strategy to Accelerate the Construction of Powerful Country of Intellectual Property of 2017, the work of construction of powerful country of intellectual property has been detailed further.

In middle 2017, Promotion Plan of Deeply Implementing the National Intellectual Property Strategy to Accelerate the Construction of Powerful Country of Intellectual Property of 2017 was printed and distributed, to further detail the key tasks and work measures of intellectual property strategy of the year 2017. This promotion plan mainly focuses on comprehensive promotion mainly from five aspects, including, deepening the reform in the intellectual property field, strictly protecting the intellectual property, promoting the intellectual property creation and application, deepening the international exchange and cooperation of intellectual property, and strengthening the organization implementation and safeguard.

Deepening the reform in the intellectual property field: Firstly, promote the intellectual property management system and mechanism reform, and actively research and explore the intellectual property management system and mechanism reform; further propel the national pilot area and demonstration area construction of concentrated development of intellectual property service, determine the place of pilot reform, do well in supervision, urging and inspection as well as the assessment work of reform advancement in the pilot area, and timely summarize the successful experience of reform promotion. Secondly, reform and improve the significant policy of intellectual property, for example, actively promote the implementation of China National Economic Accounting System (2016), perfect the accounting methods of research & development, computer software, and other intellectual property products, and explore the accounting methods of intellectual property products like database, entertainment, literature, and artwork original. Establish the innovation-driven development evaluation system with intellectual property as important content, and publish the annual report of intellectual property development. Finally, deepen the reform “streamline administration, delegate power and optimize the service” in the service industry of intellectual property Carry out the reform measures of further relaxing the patent agent access, strengthen the trademark agency supervision, strengthen the supervision over centralized copyright management organization as well as foreign copyright institution, and standardize their various activities regarding copyright, to promote the further integration of copyright social organization resources.

Strictly protecting the intellectual property: It is mainly required to perfect the laws, regulations and rules, actively promote the legislation in each field, develop the special governance in key field, and strengthen the daily supervision and law enforcement, for example, amend the Patent Law, Copyright Law, and Regulations on Protection of New Varieties of Plants. In addition, it is also required to strengthen the long-term protection mechanism construction, by propelling the full coverage of organs and computers of software genuine inspection by government agencies, promote the software genuine use and management work guideline, and expand the domestic software application pilot range.

Promoting the intellectual property creation and application: By implementing the patent quality promotion work, optimize the patent statistical index system and various patent-related self-service policies, develop the centralized examination pilot of patent application in key advantageous industries, perfect the invention patent examination quality guarantee case sharing mechanism, strengthen the quality guarantee system construction and external feedback mechanism of examination quality, and improve the professional guidance system, to increase the intellectual property creation quality. In terms of strengthening the comprehensive application of intellectual property, it is required to perfect the scientific and technological achievements transformation support mechanism, accelerate the implement of national guidance fund of scientific and technological achievements transformation, and perfect the national intellectual property operation platform system. Develop the guiding role of intellectual property operation funds in key industries, and promote the realization of trademark acceptance and registered trademark mortgage registration work facilitation reform. In addition, the work of strengthening the intellectual property information utilization is mainly to build the patent navigation work system by promoting the patent navigation projects. Promote the layout of pilot project, release the layout development report and the report of intellectual property situation in key industries, and construct the basic public service platform of information service.

In the promotion plan, deepening the international exchange and cooperation of intellectual property is taken as a key, and it is mainly required to strengthen the overseas layout and risk prevention and control of key industries and improve the external cooperation level of intellectual property. Overseas layout and risk prevention and control of key industries are realized mainly by developing the research on intellectual property environment and timely publishing the intellectual property system information of the destination of external investment. Strengthen the construction of overseas intellectual property maintenance assistance mechanism, perfect the mechanism of communication with competent authorities of industries as well as chambers of commerce and industry associations, and continue to set up the intellectual property service stations for Chinese enterprises in the international fairs (expositions), to provide the guide of intellectual property for the enterprises' "going-out", and assist to settle the intellectual property disputes encountered by Chinese enterprises at abroad. Encourage the social capital to set up the overseas intellectual property protection assistance service funds for Chinese enterprises, select the overseas and foreign intellectual property protection service assistance organizations, and promote the settlement and development of “China’s time-honored” enterprises at abroad. To improve the external cooperation level of intellectual property, it is required to mainly strengthen the cooperation and exchange with world intellectual property organization, world trade organization, and other related international organizations, and actively promote the cooperation in intellectual property of countries along the “the Belt and Road Initiative” and BRICS countries. By use of the overseas exchange activity platform of intellectual property, expand the international influence of Chinese brands, and improve the effect of foreign intellectual property work. Set up the intellectual property academic education program to assist the developing countries, and develop the intellectual property academic education and short-term training facing the developing countries. Expand the ways for enterprises to take part in the formation and amendment of international and regional intellectual property rules. Promote the domestic service organizations and industry alliances to strengthen the cooperation and exchange with the related overseas organizations.

III. Comprehensive amendment work of laws and regulations in the intellectual property field is started, to help to realize the strategy of powerful country of intellectual property.

Intellectual property protection and application are not separated from the top design construction and perfection of legal system, and the key of institutional guarantee of the construction of powerful country of intellectual property lies in the perfection of basic laws like *Patent Law, Trademark Law,* and *Copyright Law* as well as the formulation and detailing of corresponding supporting laws and regulations. In 2017, with the promulgation and specific promotion of *National Planning of Intellectual Property Protection and Application during the 13th Five-year Plan,* the amendment and perfection of laws and regulations have been put on the agenda. In addition, the laws and regulations related to the procedures of intellectual property application, declaration of avoidance have also started a new mileage.

In terms of legislation, the basic laws and regulations in the intellectual property field have started the procedure of amendment. The fourth amendment work of *Patent Law* is in progress intensively. The third amendment of *Copyright Law* has also been developed in succession, new amendments have been published to the whole society for the purpose of seeking for opinions, and all sectors of society have deeply discussed the controversial problems in the amendments. According to the amendment progress of *Patent Law* and *Copyright Law*, the revision of supporting regulations and departmental rules like

Implementation Regulations of Patent Law, *Patent Examination Guideline*, and *Implementation Regulations of Copyright Law* will be promoted timely. In addition, China has also actively promoted the revision work of *Regulations on Protection of New Varieties of Plants*, as well as the legislative process of *Biogenetic Resources Acquisition Management Regulations* and *Human Genetic Resources Management Regulations*, taken part in the revision of *Olympic Insignia Protection Regulations*, and promulgated the *Explanation to Several Problems in Application of Laws about Examining the Intellectual Property and Competition Dispute Behavior Security Cases*. In addition, other supporting laws and regulations related to intellectual property protection have been improved and detailed gradually. For example, in patent implementation, Beijing Higher People's Court has published the revised *Guideline for Patent Infringement Judgement*, such Guideline is the most comprehensive normative document of infringement judgment published by Chinese court, and gives specific provisions in six parts, including determination of patent and utility model patent protection scope, infringement judgment of invention and utility model patent rights, determination of appearance design patent protection scope, infringement judgment of appearance design patent, recognition of infringing act, and infringement defense.

In terms of judicature, the release of guiding cases by the Supreme People’s Court, establishment of cross-regional juridical tribunal of intellectual property, and the development of pilot work have all manifested China’s determination and confidence to strictly protect the intellectual property. By promoting the “three-in-one” trial work of civil, administrative and criminal cases, drive the cross-regional management of partial intellectual property cases by the intellectual property tribunals of intermediate people’s courts in Nanjing, Suzhou, Wuhan and Chengdu, to actively promote the perfection of intellectual property case appeal mechanism. Strengthen the construction of professional forces of procuratorial organs to handle the intellectual property cases, strengthen the guide to new cases handling in the intellectual property field, and focus on investigating and handling a group of criminal cases of intellectual property infringement in serious situation and with a bad influence.

In terms of enforcement of law, it is required to strengthen the administrative law enforcement work of intellectual property protection. Provide the innovators with a more convenient right-defending channel by improving the way of law enforcement, increasing the judicial efficiency, and strengthening the investigation of source of counterfeiting, repeated infringement, willful infringement, and group infringement. In terms of law enforcement mechanism, by perfecting the joint law enforcement and cross-regional law enforcement collaboration mechanism of intellectual property, it is required to actively develop the special projects of law enforcement, mainly investigate the infringement cases which are cross-regional, in a large scale, and have a strong social reflection, promote the trans-departmental, trans-disciplinary, and cross-regional collaboration in law enforcement, and strengthen the handover of suspected criminal cases. In addition, strengthen the trademark brand protection, standardize and effectively protection the business secrets, improve the public service level of consumer goods trademarks, and continue to promote the software genuine work in government organs and enterprises. Develop the joint law enforcement with related international organizations and overseas law-enforcing departments. Strengthen the intellectual property law enforcement and protection work in the fields of superstore, exhibition, e-commerce, and import & export. Establish and perfect the online law enforcement and case handling system of patent and copyright. Perfect the report and complaint mechanism of fighting against the infringing fake goods. Innovate in the rapid right safeguard mechanism of intellectual property. Perfect the administrative law enforcement supervision of intellectual property, and strengthen the law enforcement and right safeguard performance management. Strengthen the intellectual property protection of exhibition. Strengthen the performance evaluation to strict intellectual property protection, and continue to develop the investigation on social satisfaction with intellectual property protection. Establish the multiple solution mechanism of intellectual property disputes, and strengthen the construction of intellectual property arbitration institution and dispute mediation organization.

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY AND LAW

MENG Yanbei[*]

Competition policy is an important policy system to promote the prosperity and development of market economy. It plays an important role in standardizing market order, maintaining fair competition, encouraging market innovation, promoting system reform, and enhancing market efficiency and social benefits. In 2017, The Chinese government has continuously strengthened the basic position of competition policy in the national policy system. On October 18th 2017, the *Determined in Building a Well-off Society in an all-round way to win the great victory of socialism with Chinese characteristics in the new era--the 19th National Congress Report* pointed out that China should speed up the improvement of the socialist market economic system. The economic system reform must focus on perfecting the and the marketization of the elements, to realize the effective incentive of the property right, the free flow of the elements, the flexible price response, and the fair and orderly competition. The system of negative lists of market access should be comprehensively implemented, various regulations and practices that hinder the unified market and fair competition should be cleaned up and abolished, the reform of the commercial system should be deepened, the administrative monopoly should be broken, the market monopolies should be prevented, the reform of marketization of factor prices should be speeded up, the restrictions on access to service industries should be broadened, and the market supervision system should be improved. At the same time, China's competition legal system has also formulated supporting regulations for anti-monopoly laws through the improvement of the fair competition review

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system. Revision of "*the anti-unfair competition law*" and other work is under constantly improvement.

I. *"13th Five-Year" Market Supervision Plan* Intensified Competition Policy

On January 23rd 2017, the State Council issued the *"13th Five-Year" Market Supervision Plan*, which is a comprehensive, basic and strategic plan for market supervision. It emphasizes the market supervision should be started from the national market environment, from maintaining the fair market and from protecting the interests of customers.

The *"13th Five-Year Plan" for Market Supervision and Control* pointed out that China should aim at improving the socialist market economic system, strengthen the basic position of competition policy in the state policy system, perfect the competition policy system, perfect the competition legal system, clarify the priority objectives of competition, establish a policy coordination mechanism, advocate a competition culture, and promote the effective implementation of competition policy. The State Council's Anti-monopoly Committee will play a role in researching and formulating relevant competition policies, assessing market competition condition, formulating anti-monopoly guidelines, and coordinating anti-monopoly administrative law enforcement. China should give play to the basic role of competition policy, run competition policy through the whole process of economic development, promote China's economic transformation and institutional perfection, and regard competition policy as an important basis for formulating economic policy. Guided by the national medium and long-term strategic plan, we should fully respect the market, give full play to the market forces, implement a neutral competition system, avoid distortions of the market mechanism, and affect the optimal allocation of resources. Also, the government should regard competition policy as an important guide for formulating reform policies, accurately grasp the direction and measures of reform in accordance with the direction of overall market-oriented reform, and promote the reform of monopoly industries. The shackles of the traditional system and management mode should be broken down, the market innovation and the vitality of development should not be suppressed. Regarding competition policy as an important guide for perfecting laws and regulations, we should continuously perfect the competition legal system in accordance with the requirements of governing the country, provide legal protection for the efficient operation of the market economy, break the pattern of inherent interests, and avoid the division of sectors and the legalization of local protection. Taking competition policy as an important advocacy of social culture, we should form a competitive culture adapted to the development of socialist market economy, reform the thinking and inertia of traditional planned economy, standardize and restrain government behavior, promote pioneering innovation, abide by the law, and make competition fairly.

The "13th Five-Year" Plan for Market Supervision also emphasizes the need to advocate a competitive culture and form a good atmosphere for the implementation of competition policies. At all levels of government departments, the theory of competition policy is comprehensively popularized to better promote the construction of market economy and eliminate the harm of unfair competition for economic development. The government should strengthen the propaganda of competition policy, enable all types of enterprises to better understand the rules of market competition, actively take the initiative to face the market, change the tendency of relying on government preferential policies, make enterprises become the real market players, and strengthen the micro foundation of economic development. We will use the role of the news media, especially the new online media, through various forms, to publicize the goals, objectives, and policies of popularizing competition policies. We should also strengthen the analysis of competition law enforcement cases, and promote the effective implementation of competition policies.

II. The improvement of fair competition review system can further realize the basic position of competition policy

The fair competition review system means that, by analyzing or evaluating the competitive influence that may be or has been generated by the current or existing public policies, the government's industry authority or competition authority may propose an alternative solution which does not impede the realization of the policy objectives and minimize the harm to the market competition. The establishment and implementation of the fair competition review system means that China has established a unified, open and competitively regulated market system, has fulfilled the requirements to "promptly establish the basic status of competition policies" set by the CPC Central Committee and the State Council, and has taken a critical step.

In May 2017, the first plenary session of the Inter-Ministerial Joint Meeting on Fair Competition Review examined and adopted the *Implementation Rules for the Fair Competition Review System (Interim), Work Program for Clearing up the Exclusion of Competition Policy in Current 2017-2018* and *Promote the Work Focus of 2017 in Establishing the Fair Competition Review System*. The current tasks of the fair competition review in China mainly include rigorous review of incremental policies, further improvement of the review mechanism, implementation of review responsibilities, prevention of government departments from promulgating policies and measures to eliminate or restrict competition, and orderly rectification of stock policies. The principle of orderly classification and non-retroactivity shall be adopted to eliminate the existing policies and measures that rule out restricting competition. Among them, key issues such as local protection, regional blockade and designated transactions will be eliminated in 2017-2018.

III. Formulation of Anti-Monopoly Supporting Regulations and Enforcement Guidelines can promote the Effective Implementation of Anti-Monopoly Law

The accurate and effective implementation of the anti-monopoly law also needs to rely on law enforcement agencies and courts in specific cases, to clarify and unify the scale of the law implementation through the application of laws. Also, the law enforcement agencies are required to formulate laws and regulations on the basis of summing up practical experience. This can provide guidance for law enforcement agencies and market competition behaviors of operators, and can also provide mature experience for antitrust judicial activities. 2017 marks the 10th anniversary of the promulgation of China’s *Anti-Monopoly Law*. In this year, China’s anti-monopoly supporting regulations and guidelines for enforcing the law have also made great progress. The National Development and Reform Commission has issued two guidelines on price behavior regulation. The State Administration for Industry and Commerce is revising the provisions on the *Prohibition of Monopolistic Agreement by the Administration for Industry and Commerce* and *Investigation on Monopoly and Abuse on Dominant Market position by the Administration for Industry and Commerce*. The Ministry of Commerce issued the *Measures for Centralized Examination of Operators* (revised draft for soliciting opinions), and the revision work of the *Anti-monopoly Law* has also been started.

In March 2017, the Anti-Monopoly Committee of the State Council publicly solicited opinions from the society on *the Anti-Monopoly Guide on Abuse of Intellectual Property Rights*. The guidelines seek to outline the analytical principles, analytical ideas, analytical elements in the intellectual property field. The guidelines also clarify how the anti-monopoly enforcement to regulate joint R&D, cross-licensing, exclusive feedback, no-questioning clauses, standard setting, refusal license, unfair high-price licenses, attached unreasonable trading conditions, differential treatment, patent pooling, and injunctive relief.

In July 2017, to further guide and standardize the price behavior of industry associations, to promote the industry associations playing a better and greater role in the process of China’s economic transformation and upgrading, to ensure the long-term development of industry associations’ health, the National Development and Reform Commission issued *Industry Association Price Conduct Guidelines*. This guideline provides industry associations with specific, actionable legal guidance on price behavior and provides important guidance for antitrust enforcement. From the perspective of legal risk identification, the guideline sorts out the price behavior of industry associations, and lists the different risk levels of price behaviors of industry associations, which can help industry associations and related member companies assess the legitimacy of related behaviors, effectively identify and prevent price monopoly risks. Except laws and administrative regulations, industry associations engage in the following price actions, which have the obvious effect of excluding and restricting competition. The legal risk is extremely high: (1) Organize the operators of the industry to reach a price monopoly agreement; (2) Exchange price information among members and inform each other of the price information among the members or other operators in the industry; (3) Organize the business operators in the industry to reach a price monopoly agreement by means of uniform preferential conditions or deadlines; (4) Release guiding prices, benchmark prices, reference prices, recommended prices and other guiding prices in the industry; (5) Limit cost components, profitability, etc. by publishing price calculation formulas; (6) Formulate rules, decisions, notices, and standards which can exclude and limit price competition; (7) Guarantee or promote operators to implement price monopoly agreements through disciplinary mechanisms within the industry.

In September 2017, the Ministry of Commerce decided to revise the *Measures for the Centralized Examination of Operators* to further standardize and improve law enforcement procedures for operators' review and to publicly solicit opinions from the public on the *Measures for Centralized Examination of Operators* (draft amendment). The revised draft is based on the current review methods and incorporates the provisions of the regulations, methods, and guidelines closely related to the centralized review of multiple operators promulgated by the Ministry of Commerce, including the *Measures for Centralized Reporting of Operators*, *Guiding Opinions on Concentrated Reporting of Business Operators*, *Guiding Opinions on Reporting Concerning Concentrated Cases of Business Operators*, *Provisional Regulations Concerning Applicable Standards for Concentrated Business Cases of Business Operators* and *Provisions Concerning Concentration of Business Operators on Restrictive Conditions*, as well as those included in the *Anti-Monopoly Review Form for Managerial Concentration Review*. This draft is intended to systematize the relevant regulations for centralized reporting and review by operators, make them more operable, and greatly improve the efficiency of the review.

In November 2017, to strengthen market price supervision for shortage medicines and APIs, effectively regulate the price behavior of shortage drug and raw material drug dealers, guide relevant operators to conduct operations in accordance with laws and regulations, curb illegal price increases and malicious control of sales, maintain fair competition and price order in the areas of shortage drugs and APIs, protect the interests of consumers, and ensure that the reform of the medical and health system is further advanced, the National Development and Reform Commission has formulated the *Guidebook for the Price Behavior of Shortage Drug and API Supplier*. The guideline lists the factors that determine the relevant market definition and market dominance status, clarifies the manifestations of price monopoly behaviors in the areas of shortage medicines and APIs, and confirms the identification of illegality and exemption conditions for price monopoly agreements. The risk of price violations that may arise during the production, operation, and service provision of pharmaceuticals and APIs is indicated, and guidelines are provided for the operators to evaluate the legality of various price behaviors.

IV. Revision of the *Anti-Unfair Competition Law* completes the competition law system.

As emerging market competition behaviors need to be responded with anti-unfair competition legislation, how to clarify the issue of overlapping regulatory issues with the *Anti-Monopoly Law* has also accelerated the legislative revision of the *Anti-Unfair Competition Law*. On February 25, 2016, the Legal Affairs Office of the State Council publicly solicited opinions from the public on the *Anti-Unfair Competition Law* (Revised Draft for Approval); on February 26, 2017, the National People's Congress Law Commission worked on the *Anti-Unfair Competition Law*. (Revised Draft) Publicly soliciting opinions from the public; and on September 5, 2017, the Twenty-ninth Session of the Standing Committee of the Twelfth National People's Congress conducted the review of the *Anti-Unfair Competition Law* (Second Revised Draft). After the deliberation, the National People's Congress Commission for Legal Affairs once again solicited opinions from the public; on November 4, 2017, the Thirtieth Session of the Standing Committee of the Twelfth National People's Congress passed the *Anti-Unfair Competition Act* (Revised 2017)".

The amended China's *Anti-Unfair Competition Law* passed the legislative purpose clause, the basic principle clause, the concept of unfair competition concept in Chapter 1 "General Provisions" and "Anti-Unfair Competition Act" in Chapter 2. The provisions of the "Other Unfair Competition Acts" in Clause 6 and Clause 12 indicate that the *Anti-Unfair Competition Law* is open and inclusive. For example, the continuous emergence of new types of unfair competition act required that the revision of China's *Anti-Unfair Competition Law* shall add pocket-ticket clauses when enumerating the typical acts of unfair competition in Chapter 2. Therefore, the Article 6 in revised *Anti-Unfair Competition Law* stipulates: "Operators shall not commit the following confusing practices, which lead to the misunderstanding of the goods of others or the existence of specific links with others: ... (4) Other confused acts sufficient to lead people to mistakenly believe that goods belong to others or the specific connection with others." Article 12 stipulates: “Operators must not use technical means to influence the normal operation of network products or services legally provided by other operators by affecting user selection or other methods: …… (4) Other obstructions and damages that will influence normal operation of the network products or services legally provided by other operators.” Moreover, the court may also identify new types of unfair competition act based on the legislative purpose clauses, basic principle clauses and unfair competition concept clauses of the *Anti-Unfair Competition Law*. Faced with the act of overlapping regulation in China’s *Anti-monopoly law* and *Anti-unfair competition law*, the *Anti-unfair competition law* in the revision deleted the corresponding terms to deal with the relationship between the two laws. The deleted terms are rules concerning the prohibition of misuse of exclusive status by public or exclusive enterprises, regulations prohibiting government and its subordinate departments from restricting competition, regulations prohibiting predatory pricing, provisions concerning the prohibition of tying, and regulations prohibiting collusion.

In addition, the revised *Anti-Unfair Competition Act* makes the provisions of typical unfair competition conduct more scientific and reasonable. For example, Article 6 of the revised *Anti-Unfair Competition Law* rebuilds the behavior of market confusion in Article 5 of the *Anti-Unfair Competition Law* of 1993, [1]with "unauthorized use", "certain influence", "commercial marking" and "market confusion" as the core elements. It is prohibited and no longer to list the different constituent elements of a business logo as separate provisions, but in the overall visual field of business identification, unified and standardized, which has made great legislative progress. For example, based on the unfair competition disputes arising from the process of operating Internet products or services, it has emerged with the continuous development of the Internet industry. The reliance on traditional industries is low, and the development of the industry lacks the guidance of rules. China’s *Anti-Unfair Competition Law* has added provisions on unfair competition conduct on the Internet during the revision process. To stipulate that operators shall not use technical means to engage in acts that affect the choice

1. Article 5 of the *Anti-Unfair Competition Law* of 1993: “Operators must not use the following unfair methods to engage in market transactions and damage competitors: (1) counterfeiting registered trademarks of others; (2) unauthorized use of unique names of well-known commodities, packing, decorating, or using names similar to those of well-known goods, causing the purchaser to mistakenly consider it as a well-known commodity; (3) unauthorized use of another person’s company name to attract people (4) falsifying or misusing quality marks such as certification marks and famous marks on goods, forging production areas, and making misleading statements about the quality of goods.”
Article 6 of the *Anti-Unfair Competition Law* of 2017: “Operators must not commit the following confusing practices, which leads to the misunderstanding that they are other people’s goods or that they have specific contact with others: (1) The unauthorized use of goods that have a certain influence on others, (2) Names of companies (including abbreviation, font size, etc.), names of social organizations (including abbreviation, etc.), and names (including pen names, stage names, translated names, etc.) (3) Unauthorized use of domain names, website names, web pages, etc. which have a certain influence on others; (4) Miscellaneous other confusing behaviors that may lead people to mistakenly believe that they are other people’s goods or have specific contact with others."

of users and interfere with the normal operation of other operators in the field of the Internet, namely: "the operators use the network to engage in production and business activities shall abide by the provisions of this Law. Business operators may not use technology to influence the user’s choice or carry out the following obstructions, Sabotage of the normal operation of network products or services legally provided by other business operators: (1) without the consent of other operators, inserting links into the network products or services provided legally by other operators, forcing the target to jump to another place; (2) misleading and deceptive, forcing the user to modify, close, or uninstall the network products or services lawfully provided by other business operators;(3) maliciously carrying out incompatibility with the network products or services legally provided by other operators; (4) acts that undermine the normal operation of network products or services lawfully provided by other business operators.

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

Vanessa Yanhua ZHANG[*]

In 2017, the implementation of China's Anti-Monopoly Law has continued to develop in depth, with economic analysis continuing to play an important role in the legislation and enforcement of competition policies. Economics has provided important theoretical tools for the analysis and judgment of relevant cases. The three anti-monopoly enforcement agencies and the judicial system have further applied economic analysis in their enforcement practice in the past year to achieve the three goals of the Anti-Monopoly Law: supervising and regulating the order of market competition, ensuring full competition among enterprises, and protecting consumer welfare.

I. Anti-Monopoly Legislation, Enforcement and Application of Economic Analysis in the Three Major Anti-Monopoly Enforcement Agencies

(I) Ministry of Commerce (MOFCOM)

The Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") is in charge of the filing and review of concentration of business operators. In 2017, MOFCOM received 400 mergers filings, among which 353 cases have been filed and 344 have been reviewed and cleared. Among the completed cases, seven were conditionally approved setting a new high since the implementation of the Anti-Monopoly Law. There was a substantial increase of major and complex cases, with non-simple cases accounting for 30%. Cases in the

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manufacturing industry accounted for more than 50%, with obvious diversification in other industries. Global mergers and acquisitions continue to be active, and firms from the U.S., Europe and Japan are still main players. There was a significant increase in transaction size, and more than 20% of the cases involved transactions which are worth than RMB 10 billion.

MOFCOM conditionally approved seven cross-border mergers and acquisitions with significant impact, including the merger of The Dow Chemical Company and DuPont, the merger of Agrium and Potash Corporation of Saskatchewan Inc., Maersk's acquisition of Hamburg Südamerikanische Dampfschifffahrts -Gesellschaft KG, HP's acquisition of Samsung Electronics' printer businesses, Broadcom's acquisition of Brocade Communications Systems, Inc., Advanced Semiconductor Engineering, Inc.'s acquisition of Siliconware Precision Industries Co., Ltd., and the merger of Becton, Dickinson and Company and C. R. Bard, Inc.. In all these cases, MOFCOM required the filing parties to divest relevant assets and technologies as well as other measures to protect fair competition in the markets of agricultural chemicals, shipping, printer, communications, semiconductors, etc. and to protect consumer interests. [1]

Among the multiple cases of unconditional approval, conditional approval and prohibition, the MOFCOM officials that reviewed the cases and the external experts continued to adopt modern and mainstream competition analysis frameworks and methods, even cutting-edge economic analysis tools in some cases, and made relatively objective and fair judgments. With the accumulation of experience and increasing difficulty of cases, MOFCOM has publicized more detailed and specific review results, mainly covering relevant market definition, market concentration, theory of harm, buyer power, market entry, etc. The main methods used include analysis of Herfindahl-Hirschman Index (HHI) and market share analysis pre and post-merger, price correlation coefficient analysis, merger simulation, profit correlation coefficient analysis, regression analysis, Upwards Pricing Pressure (UPP), Gross Upward Pricing Pressure Index (GUPPI), Illustrative Price Rise (IPR), etc.

The merger of Agrium and Potash Corporation of Saskatchewan Inc. is a representative one among the cases with conditional approvals that MOFCOM cleared in 2017. [2] We can see from this case that MOFCOM now has paid more attention to the characteristics of China's domestic industries and markets and the impact of mergers and acquisitions on the domestic

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1. *Section 9 of Year-end Review of Commerce Work in 2017 – Carrying out New Development Concept and Doing a Good Job of Anti-Monopoly Work in the New Era*, Ministry of Commerce of the People's Republic of China, January 9, 2018, available at http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml.
2. Announcement No. 75, 2017 of the Ministry of Commerce of the People's Republic of China on Anti-Monopoly Review Decision concerning the Conditional Approval of Concentration of Business Operators in the Merger of Agrium and Potash Corporation of Saskatchewan Inc., Ministry of Commerce of the People's Republic of China, February 12, 2018, available at http://yunnan.mofcom.gov.cn/article/sjwangshangzw/201802/20180202711834.shtml.

market in the M&A reviews. Therefore, regarding cross-border mergers and acquisitions, it is not enough to have simple analysis of the relevant industry on the global basis. Instead, the involved parties shall fully analyze and consider the uniqueness of China's domestic industries and markets in the merger filings as well as the design of the remedy schemes, in order to work out the best solution to eliminate MOFCOM’s competition concerns.

Besides, in 2017, MOFCOM significantly increased the supervision and punishment on cases that should have been filed, and announced six penalty decisions on such cases, involving multiples industries such as chemical, electromechanical, auto parts, minerals, medical, etc., with fines ranging from RMB 150,000 to RMB 300,000. The involved enterprises included Cummins (China) Investment Co., Ltd. / Xiangyang Kanghao Machinery Engineering Co., Ltd., OCI Company Ltd./ Tokuyama Malaysia Sdn. Bhd., Rising Hong Kong Holding Co., Ltd./ Australian Pan Australia Limited, Meinian Onehealth Healthcare (Group) Co., Ltd./ Shanghai Tianyi Asset Management Co., Ltd./ Shanghai Weitu Investment Management Co., Ltd./ Ciming Health Checkup Management Group Co., Ltd., Wuhu Construction Investment Co., Ltd./ Chery New Energy Automotive Technology Co., Ltd./ Yaskawa Electric Corporation, Sweitzer Asia Pte. Ltd./Binhai Harbor Investment Development Co., Ltd. In the supervision and investigation of enterprises that should have filed the concentration, MOFCOM also examined the key concerns from the perspective of competition analysis, with economic analysis throughout the entire review. Besides responding to the questions related to legal and economic analysis in the review, the investigated enterprise shall also complete the normal filing procedures.

(II) National Development and Reform Commission (NDRC)

The Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission is in charge of the price-related monopoly behaviors. In 2017, NDRC investigated more than 80 anti-monopoly cases with fines exceeding RMB 500 million. NDRC has also investigated several high-profile cases. In the PVC resin price monopoly case, NDRC imposed a total fine of RMB457 million on 18 PVC companies, setting the highest record of fines upon domestic enterprises by law enforcement agencies since the implementation of the Anti-Monopoly Law. In the Shanxi electricity price monopoly case, NDRC penalized the power industry for the first time, which was also the first fine upon large state-owned enterprises and central enterprises.[1]

In early 2017, NDRC received a complaint that some Polyvinyl Chloride (PVC) operators carried out price monopoly, which jointly pushed up the sales price of PVC, aggravated the cost burden on downstream companies that used PVC as raw materials, and harmed the legitimate rights and interests of consumers. Upon investigation, NDRC found out that 18 involved companies in the sale of PVC products in 2016 reached a monopoly agreement for a unified price increase several times through the Wechat group communication, and coordinated on price discriminations against customers. This led to a significant price increase in the PVC market. The PVC output of the involved parties accounted for three quarters of the total PVC output in China. Therefore, the monopoly behavior had huge impact on the market competition. On September 25, NDRC imposed a fine of 1%-2% of the relevant market sales in 2016 on 18 companies involved, totaling RMB 457 million.[2]

NDRC also imposed administrative penalties on Zhejiang Second Pharma Co., Ltd. and Tianjin Handewei Pharmaceutical Co., Ltd. for abusing their dominance in the Isoniazid API market and carrying out price monopoly behavior. Handewei and Second have had more than two-thirds of the domestic Isoniazid API market share for a long time, with strong market power over numerous manufacturers of isoniazid preparations. The two companies abused their dominance, sold Isoniazid APIs at unfairly high prices, and refused to sell Isoniazid APIs to downstream preparation enterprises without just cause. The two companies reached exclusive distribution agreements respectively with Weifang Longshunhe Pharmaceutical Co., Ltd., sold Isoniazid APIs only to Longshunhe and its designated preparation enterprises or commercial companies, and refused to sell Isoniazid APIs to other preparation companies without good cause. On July 28, 2017, NDRC decided to impose a fine of 2% of the relevant market sales in 2016 on Handewei and Second respectively.[3]

At the same time, NDRC vigorously investigated a number of agencies that abused administrative power to restrict market competition, including Beijing Housing Provident Fund Management Center, Baotou Housing Security and Housing Administration Bureau, Wuhai Housing and Urban-Rural Development Committee, Xi’an Housing Administration

1. *NDRC: Anti-Monopoly Work This Year will Accelerate the Promotion of the Fair Competition Review System*, Economic Information Daily, January 30, 2018, available at http://www.dzwww.com/xinwen/guoneixinwen/201801/t20180130_16982410.htm.
2. 18 PVC Operators Investigated and Fined for Price Monopoly, NDRC, September 27, 2017, available at http://www.ndrc.gov.cn/xwzx/xwfb/201709/t20170927_861737.html.
3. *Administrative Penalty Decision of National Development and Reform Commission [2007] No. 1*, NDRC, July 28, 2017, available at http://jjs.ndrc.gov.cn/fjgld/201708/t20170815_857737.html; *Administrative Penalty Decision of National Development and Reform Commission [2007] No. 2*, NDRC, July 28, 2017, available at http://jjs.ndrc.gov.cn/fjgld/201708/t20170815_857735.html.

Bureau, etc., involving issues such as designating evaluation companies to undertake second-hand housing assessment businesses through administrative means, limiting recommended enterprises to undertake housing maintenance projects, etc.

NDRC also vigorously supported local agencies to investigate and handle monopoly behaviors. In July 2017, NDRC guided Zhejiang Price Bureau to make a decision regarding the case in which the papermaking association of Hangzhou Fuyang District organized 17 paper manufacturers to reach and implement monopoly agreement on reel whiteboard paper prices. Fuyang District Papermaking Association organized 17 paper manufacturers including Zhejiang Honghao, Zhejiang Xin Sheng Da, Zhejiang Chunsheng, Zhejiang Sanxing, etc. to hold industry conferences, to negotiate jointly increasing the price of reel whiteboard papers, and reached the agreement that eliminated and restricted competition in the reel whiteboard market and illegally promoted the price increase of reel whiteboard, resulting an increasing cost burden upon the downstream printing and packaging enterprises, and thus hampered the interests of consumers. Therefore, NDRC revoked the registration of Fuyang District Papermaking Association, and imposed a fine of RMB7.78 million on these 17 enterprises which accounted for 1% of their total sales revenues of reel whiteboard in 2016.[1]

(III) State Administration for Industry and Commerce (SAIC)

The Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce is in charge of non-price monopolistic behavior. In 2017, SAIC announced 13 Competition Enforcement Notices, including 7 Administrative Penalty Decisions, 5 Investigation Termination Decisions, and 1 Investigation Suspension Decision. Among the 7 administrative punishment cases, 3 involved horizontal monopoly agreements and 4 involved abuse of market dominance, covering multiples industries including fireworks, water, medicine, insurance, gas, and telecommunications.

The medical industry is currently one of the focuses of the anti-monopoly enforcement by SAIC. In the case of abuse of market dominance by Wuhan Xinxing Elite Medicine Co., Ltd., the company used its dominant position in the API market of medicinal methyl salicylate, and imposed additional trading conditions, which disrupted the competition order in both the

1. *17 Paper Manufacturers Fined 7.78 Million for Price Monopoly*, NDRC, July 10, 2017, available at http://www.ndrc.gov.cn/xwzx/xwfb/201707/t20170710_854194.html.

API and finished drug markets, increased the cost burdens on drug manufacturers, and ultimately harmed the interests of consumers.[1]

II. Judicial Application of Economic Analysis in Courts

Since the implementation of the Anti-Monopoly Law, anti-monopoly civil litigation has played a pivotal role. On May 3, 2012, the Supreme People's Court promulgated the Provisions on the Application of Laws in the Trial of Cases of Civil Dispute Caused by Monopoly Behaviors [2] in which Article 13 particularly emphasizes that the parties may apply to the court for entrusting professional organizations or professionals to conduct market research or economic analysis reports on the specific issues of the case, and the people's courts may review the market research or economic analysis reports by referring to the provisions in the Civil Procedure Law and relevant judicial interpretations concerning the forensic conclusions. This judicial interpretation provides a policy basis for the application of economic analysis in anti-monopoly civil litigation.

In 2017, China's anti-monopoly litigation field was still very active, sometimes combined with intellectual property rights. In January 2017, Beijing Intellectual Property Court accepted two cases of Apple v. Qualcomm respectively regarding abuse of market dominance and disputes over licensing conditions of standard essential patents (SEPs). In the case of abuse of market dominance, Apple claimed economic losses of RMB 1 billion. The case focuses on whether the SEP licensing fees and licensing conditions are too high; whether the patentee refused to provide a license to certain standard technology implementers, or restricted the licensee to use the products/services provided or approved by the patentee; whether there was any tying or unreasonable trading conditions pursuant to Article 17 (1) item (5) of the Anti-Monopoly Law; whether the licensee was treated differently; whether the patentee fulfilled the FRAND obligation; etc.[3]

In September 2017, the first anti-monopoly case in China's domestic petroleum system was sentenced, in which Yunnan Yingding Bio Energy Co. Ltd. sued Yunnan Branch of Sinopec Sales Co. Ltd. for refusal to deal. Yunnan Provincial High People's Court made the second instance judgment, rejecting all the requests of Yunnan Yingding Bio Energy Co.

1. Competition Law Enforcement Announcement No. 4 of 2017 – Case of Abuse of Market Dominance by Wuhan Xinxing Elite Medicine Co., Ltd., SAIC, February 10, 2017, available at http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201703/t20170309_232297.html.
2. Regulations on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Caused by Monopolistic Behavior, Law Interpretation [2012] No. http://www.chinacourt.org/law/detail/2012/05/id/145752.shtml.
3. *Apple Sues Qualcomm for Abuse of Market Dominance, Claiming more than 1 Billion*, Sina, January 25, 2017, available at http://tech.sina.com.cn/it/2017-01-25/doc-ifxzyxmu8016452.shtml.

(hereinafter referred to as "Yunnan Yingding"), the biodiesel manufacturer and sustaining the original judgment. This is one of the few cases in which a seller sued a potential buyer for refusal to deal. In this case, the defendant retained an economic expert to testify on court. The focus of the dispute between the two parties was that the transaction had not entered the substantive consultation process, and the refusal to deal as regulated in the Anti-Monopoly Law usually refers to refusal to offer, instead of refusal to purchase. Therefore, it was inappropriate to apply the Anti-Monopoly Law in this case.[1]

At the end of 2017, Hainan Provincial Higher People's Court ("Hainan High Court") made the final judgment on Yutai's appeal against Hainan Price Bureau, which, for the first time, at the judicial level positively confirmed that the administrative law enforcement agencies might use the principle of "prohibition in principle + exceptional exemption" when determining the vertical price monopoly agreement. For a long time, the judicial system established the principle of "*rule of reason*" regarding the vertical price monopoly agreement in Beijing Rainbow vs. Johnson & Johnson, which was different from the principle of "*per-se illegal*" in administrative law enforcement. The case of Hainan Pricing Bureau embodied the court's recognition of the analytical thinking of the administrative law enforcement agencies, which has a far-reaching impact on judicial practices.

III. Summary

In summary, economic analysis plays an important role in the anti-monopoly legislation, law enforcement and justice. Both the anti-monopoly enforcement agencies and the judicial system in China have recognized the importance of economic analysis, and have consulted economists in succession to provide them with theoretical and empirical evidence. The involved parties and companies have also cooperated with economists, and the latter, from the perspective of economic theory and data, fully conduct extensive quantitative and qualitative analysis during the trial of the anti-monopoly cases, and provide support for scientific judgment.

1. Sinopec Wins the First Anti-Monopoly Case in Petroleum, Plaintiff to Apply to Supreme Court for Retrial, National Business Daily, September 14, 2017, available at http://finance.sina.com.cn/chanjing/gsnews/2017-09-14/doc-ifykyfwq7079205.shtml.

PART II.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF INTELLECTUAL PROPERTY LAW OF CHINA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW

GUO He[*]

I. OVERVIEW

In 2017, the number of patent applications in China created another new record. There were 1.381.594 applications for invention patent, 1.687.593 applications for utility model patent and 628.658[1] applications for design patent. The set of data reflect that the government of China and nationals are paying increasing attention to patent system from an indirect perspective. However, according to relevant report[2], the average life spans for domestic invention patent, utility model patent and design patent in China are respectively 3.8 years, 3.5 years and 3.2 years; the patent implementation rate only accounts for 2% of authorized patents. It can thus be seen that there is still a big problem in the quality of domestic patents in China, most of domestic patents at least lack of market value. As for the situation, the State Council of China has put forward the measures for patent quality improvement project in the *"Thirteenth Five-Year Plan" for National Intellectual Property Protection and Application*[3]. The State Intellectual Property Office has also presented corresponding measures, for instance, in the *Several Provisions on Regulating Patent Application Activities*[4],which is newly revised, it has determined the nature of those applications as abnormal application, including the submitted multiple applications with obviously same contents, the application which

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1. Development Planning Department of the State Intellectual Property Office *2017 Statistical Brief Data of Chinese Patents*, see the website of the State Intellectual Property Office http://www.sipo.gov.cn/docs/20180411102303821791.pdf, visited on April 30, 2018.
2. See the legal blue book *2017 Legal Development Report of China* and *2014 Annual Report on Valid Patents in China* as well as others released by the Chinese Academy of Social Sciences, CASS.
3. See the website of Chinese Government http://www.gov.cn/zhengce/content/2017-01/13/content_5159483.htm, visited on April 30, 2018.
4. See the website of the State Intellectual Property Office http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgzl/zlbmgz/1020136.htm, visited on April 30, 2018.

apparently plagiarizes existing technologies, the submitted multiple applications which fabricate experimental data or technical effect, the submitted multiple applications which simply replace or piece together materials, constituents, matching and components and parts and so on, as well as the application for several patents whose product's shape, pattern or color and others are generated casually through a computer, and has reinforced the handling measures for those acts to some extent. As all sectors of society pay more and more attention to such situation, it is firmly believed that the quality of patents in China will be improved gradually.

From the perspective of legislation, the fourth revision work of the Patent Law is still in progress; the legislatures also ask for public opinions on existing revision schemes from all aspects. From the perspective of justice, the Supreme People's Court, on the basis of summarizing the three-year running experience of three intellectual property courts in Beijing, Shanghai and Guangzhou, approves to establish intellectual property courts with cross-regional jurisdiction in 15 cities nationwide to strive to alleviate the contradictions that the judicial trial standards for the cases involved technical intellectual property including patents are inconsistent; meanwhile, it also focuses on preparing to establish a nationwide unified intellectual property appellate court as a court of final appeal so as to fundamentally unify the final judgment standard for patents and other technical cases.

On October 8, 2017, the General Office of the CPC Central Committee and the General Office of the State Council jointly issued the *Opinions on Deepening the Reform of the Evaluation and Approval System and Encouraging Innovation on Drugs and Medical Devices*, Article 16 hereof clearly presents to explore and establish drug patent linkage system, which is the most authoritative stand on patent linkage system issue taken by the officials of China. It can whereby be estimated that the issue will be taken into consideration comprehensively in the revision of the Patent Law in combination with compensation system of drug protection period and existing Bolar exception clauses and so on.

In addition, the Supreme People's Court has released the 16th batch of guiding cases, all of which are involved in intellectual property, including the infringement cases of patent right and new plant variety right[1]. National Defense Intellectual Property Office of Equipment Development Department of the Central Military Commission has centrally declassified more than 3,000 national defense patents, and firstly released the information of 2,346[2] declassified national defense patents. With the implementation of declassification system of national

1. See the China Court Network https://www.chinacourt.org/article/detail/2017/03/id/2575036.shtml, visited on April 30, 2018.
2. See the China Military Network http://www.81.cn/jmywyl/2017-04/03/content_7549413.htm, visited on April 30, 2018.

defense patents, it is bound to reinforce and accelerate the force and speed of "the transfer of military technology to civil use".

II. LEGISLATION AND POLICY

In 2017, China unveiled a series of documents which play a standardized role in legislation and policy regarding patents, among which, the revised *Guidelines for Patent Infringement Judgment* released by the Beijing Higher People's Court and the *Guidelines for Patent Examination* newly revised by the State Intellectual Property Office have the biggest impact on the patent system implementation. The revised contents are respectively introduced below.

The newly-revised *Guidelines for Patent Infringement Judgment* released by the Beijing Higher People's Court is the most comprehensive normative document for infringement judgment unveiled by the court of China. The document is divided into six parts, namely, determination of protection scope of invention and utility model patent rights, infringement judgment on invention and utility model patent rights, determination of protection scope of design patent right, infringement judgment on design patent right, identification of infringement act and infringement defense, amounting to more than 20,000 words.

The *Guidelines for Patent Infringement Judgment* revised this time has directly absorbed the experience accumulated by the court system in the trail of patent cases in recent years, which makes the design of relevant stipulation more perfect and more operable. Specifically, its contents are revised this time mainly from the following aspects: firstly, making adjustments for original inconsistent statements, such as judgment on joint infringement and indirect infringement and trial rules for the judgment on design patent infringement in accordance with the *Interpretation (II) on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases* released by the Supreme People's Court. Secondly, increasing purposive interpretation principles of claims, meanwhile, considering the contents through using the interpretation methods of technical contents including environment characteristics. Thirdly, further refining the equivalent infringement judgment rules, and stipulating the interpretation rules for functional defining characteristics in an all-rounded way. Fourthly, increasing or perfecting new situations arising in patent infringement trail in recent years, such as the factors which shall be taken into consideration amid special infringement judgment on the patent involved in computer programs and the design patent involved in graphical user interface, and special rules for the infringement judgment on relevant standard essential patents and in the information communication filed. Compared with the original *Guidelines for Patent Infringement Judgment*, the version after the revision becomes more operable in the juridical practice and makes the connection with reality even closer.

On April 1, 2017, the newly-revised *Guidelines for Patent Examination* came into force. The contents revised this time are mainly reflected from the following aspects: firstly, in respect of patent application of business model, if its claim includes not only business rules or methods, but also technical characteristics, it shall not be applicable to Article 25 of the Patent Law. In other words, such application has the possibility of obtaining a patent.

Secondly, a permissive measure for the invention involved in computer programs is taken, specifically representing in the following aspects: firstly, allowing to adopt the writing style "medium + computer program process" to write claims; secondly, specifying the "programs" can be a component of claims of devices, namely, "the stated components can include not only hardware but also programs".

Thirdly, the applicant for the invention patent in chemistry field under the proper situation is allowed to supplement and submit experimental data after the date of application, but "the technical effect proved from the supplemented and submitted experimental data shall be able to achieve from the contents unveiled amid patent application by the technicians in the involved technical filed".

Fourthly, in the course of examination of request for invalidation of the patent right, the patentee is allowed to supplement the technical characteristics from other claims amid invalidation proceedings so as to limit and narrow the protection scope of the claim. The change is good news for the patentee, otherwise, it is hard for the patentee to forecast the application and relevant request for invalidation at the time of patent application in the future.

In addition, the *Guidelines for Patent Examination* is revised properly on the preservation or injunction issued by courts in the examination process and expansion of scope of referring to patent application and examination documents by the public as well as other issues.

III. MAJOR CASES

(1) The patent infringement dispute between IWNCOMM Company and Sony Mobile Communications (China) Co., Ltd.[1]

Xi'an Wireless Network Communications Co.Ltd(hereinafter referred to as IWNCOMM Company) prosecuted Sony Mobile Communications (China) Co., Ltd. (hereinafter referred to as Sony Company) for the applied invention patent infringement of "a kind of method of WLAN mobile equipment security access and data confidentiality communication" in Beijing Intellectual Property Court in July 2015, and claimed RMB 33.36 million yuan. One month later, Sony Company requested for invalidation to the Patent Reexamination Board of SIPO, namely, requesting for announcement that the patent right of IWNCOMM Company was invalid. In March 2016, the Patent Reexamination Board made the decision on maintaining validity of the patent right. In March 2017, the Beijing Intellectual Property Court made the first instance judgment and affirmed that Sony Company infringed the patent right of IWNCOMM Company and ordered that Sony Company compensated a total of RMB 9.1 million yuan of economic losses and reasonable litigation expenses to IWNCOMM Company.

The case focused on the following two issues: firstly, infringement determination issue. First of all, with regard to the determination of scope of validity for the involved patent right of the accuser, because the communication method described in the patent claim of this case were involved in several parties, namely, only when main bodies of mobile terminal user, wireless access service provider and authentication server provider completed their own corresponding behaviors could the method described in the patent claim be achieved, therefore, the nature issue generated on how to treat that Sony Company provided mobile terminal as a manufacturer of mobile terminal in the Infringement Law. Wherein, those issues were involved, including how to define joint infringement, help or induce infringement and indirect infringement as well as other acts according to existing laws. Secondly, the Beijing Intellectual Property Court identified those issues one by one in its written judgment, including whether the implementation of the involved patent as well as other acts by the defendant amid access network detection of mobile terminal could be deemed as exception of infringement, and whether the infringement defense was true, for example, relevant chips in mobile terminal were purchased through normal market channel.

Secondly, the involved patent belonged to the standard essential patent, therefore, whether injunction shall be issued and how to confirm compensation for damages have

1. See the Paper of Civil Judgment (2015) JZMC ZI No. 1194 of Beijing Intellectual Property Court, date of judgment of the case was March 22, 2017.

become the most concerned problems in the trial. The communication technology standard involved in this case is the national standard of China GB15629.11-2003/XG1-2006. How to handle the request for injunction of the standard essential patentee is the most controversial topic in the patent case of communication field in recent years. The accuser in this case, namely, the patentee, has made an "fair, reasonable and non-discriminatory" commitment (FRAND), the Court directly made a judgment on cessation of infringement, instead of only compensation for damages, on the basis of affirming that the defendant was at fault in the negotiation between both parties. The impact of the judgment on the enterprise acts cannot be overlooked.

(2)The administrative dispute of invalid invention patent right between the Patent Reexamination Board of SIPO and Beijing Winsunny Harmony Science & Technology Co., Ltd. and Daiichi Sankyo (China) Holdings Co., Ltd.[1]

Beijing Winsunny Harmony Science & Technology Co., Ltd. (hereinafter referred to as Beijing Winsunny Company) requested for invalidation for the reason that the invention patent named as "the preparation method of pharmaceutical compositions for treatment or prevention of vascular hypertension" by Daiichi Sankyo (China) Holdings Co., Ltd. did not have creativity and other reasons to the Patent Reexamination Board of SIPO (hereinafter referred to as the Patent Reexamination Board). The patent claim shall be written in the method of Markush. On August 30, 2010, the two words "or ester" in the "or salt or ester for drug use", "alkyl group with 1 to 6 carbon atoms" in the R4 definition, and other technical schemes except for carboxyl and formula COOR5a in the R5 definition in the claim 1 were deleted in the replacement page of claims submitted by Daiichi Sankyo (China) Holdings Co., Ltd. The Patent Reexamination Board informed Daiichi Sankyo (China) Holdings Co., Ltd. of accepting the revision for deletion of "or ester" in claim 1 in the process of oral hearing; but other revisions did not conform to relevant regulations of the Patent Law which stipulated that revision beyond original application and recording scope was not allowed, so they cannot be accepted. Daiichi Sankyo (China) Holdings Co., Ltd. submitted the revision text of the claim on January 14, 2011, in which, "or ester" in the claim 1 was deleted. The Patent Reexamination Board made a decision on No. 16266 request for invalidation upon examination (referred to as No.16266 decision), and considered that the involved patent claim 1 had more creativity than evidence 1, therefore, the validity of the involved patent right was still maintained.

1. The Administrative Written Judgment (2016) ZGFXZ No. 41 of the Supreme People's Court.

Beijing Winsunny Company did not satisfy with the decision, and filed for administrative lawsuit to ask for withdrawal of the decision.

The Court of First Instance thought that the decision made by the Patent Reexamination Board was proper, so it still maintained No. 16266 decision. Beijing Winsunny Company did not satisfy with the decision again and continued to institute an appeal. The Court of Second Instance held the opinion that the Markush claim belonged to the special type of parallel technical schemes, therefore, the revision text of the claim submitted by Daiichi Sankyo (China) Holdings Co., Ltd. on August 30, 2010 which narrowed protection scope of patent right did not constitute the revision beyond the scope; the effect of specific implementation case covered in the involved patent claim was equivalent to the technical effect of implementation case 329 in evidence 1 of existing technologies, therefore, the involved patent claim 1 did not obtain unexpected technical effect, so it did not have creativity, therefore, the court made a judgment on withdrawal of the judgment of first instance and No. 16266 decision, and ordered the Patent Reexamination Board to made a new decision. The Patent Reexamination Board did not satisfy with the judgment, so it filed for retrial to the Supreme People's Court.

After ruling and arraignment and trail, the Supreme People's Court considered that the chemical compound expressed by Markush claim shall be understood as a recapitulative technical scheme rather than the collection of several chemical compounds; a kind of or single chemical compound with new performance and function shall not occur due to the revision of Markush claim, but factors of individual cases shall be taken into full consideration. The judgment on creativity for the claim of chemical compound expressed in the method of Markush shall still follow the basic method of judgment on creativity, namely the "three-step approach" stipulated by *Guidelines for Patent Examination*; the unexpected technical effect was the cofactor of judgment on creativity, generally, it was unsuitable to cross over the "three-step approach" to directly apply the unexpected technical effect to judge the creativity of the applied patent. The Supreme People's Court finally brought in a verdict of withdrawal of the judgment of second instance and maintaining the judgment of first instance. The judgment of the Supreme People's Court has solved the problems concerning nature of Markush claim, revision requirements of the claim in the invalidation procedure and judgment methods of creativity as well as other issues from one aspect.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

ZHANG Guangliang[*]

I. OVERVIEW

Provisions of the Supreme People's Court on Several Issues concerning Trial of Administrative Cases on Trademark Authorization and Verification came into force on March 1, 2017, which is very important for unifying the applicable standards of trademark authorization and verification laws. To further standardize and do well in trademark examination and trial, drive the facilitation reform of trademark registration, and improve the trademark-related public service level, in 2017, former State Administration for Industry and Commerce (hereinafter referred to as “SAIC”) released the revised Trademark Examination and Trial Standard, Notice on Adjusting the Trademark Registration Charging Standards, Notice on Simplifying the Madrid International Trademark Registration Application Materials and Formalities, and Opinions on Deepening the Facilitation Reform of Trademark Registration to Improve the Efficiency of Trademark Registration successively, and further expanded the channels of trademark application, including entrusting the local departments to accept the trademark registration application, setting up trademark examination collaborating centers outside of Beijing, and carrying out online application. To propel the brand strategy, and develop the brands with proprietary intellectual property rights, on April 24, 2017, the State Council approved to set up May 10 of every year as “China Brand Day” since 2017. On May 17, SAIC published the Opinions on Deepening the Implementation of Trademark Brand Strategy to Promote the Brand Construction of China. On June 24, Zhang Mao, director general of SAIC expressed that, it’s required to correct the phenomenon that the

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government endorses for the quality of enterprises, and suspend the appraisal of famous brands and well-known brands.

II. LEGISLATION AND POLICY

(1) Supreme People's Court: Unify the applicable standards of trademark authorization and verification laws

On March 1, 2017, *Provisions of the Supreme People's Court on Several Issues concerning Trial of Administrative Cases on Trademark Authorization and Verification* (hereinafter referred to as the *Provisions*) came into force. The *Provisions* are composed of 31 clauses, mainly involving the scope of examination, judgment of distinguishing characteristics, well-known trademark protection, prior right protection, and other substantive contents, as well as the procedure contents like violation against legal procedures and non bis in idem, and specifying the important problems involved in administrative cases of trademark authorization and verification and the difficulties in judicial practice. The *Provisions* have strengthened the substantive resolution of disputes, and specified the judgment methods of likelihood of confusion, openness of prior right and presumption of misconducts, and they are the summary of experience in juridical practice, and help the related stipulations to become more sound. The *Provisions* are formulated on the basis of *Opinions on Several Problems in Trial of Administrative Cases on Trademark Authorization and Verification given by the Supreme People's Court* in 2010, which is very important for unifying the applicable standards of trademark authorization and verification laws.

(2) SAIC: Perfect the trademark examination and trial work

① Revision of examination and trial standards

On January 4, 2017, SAIC issued the new *Trademark Examination and Trial Standards* after revision, in order to further standardize and do well in trademark examination and trial work, drive the reform of trademark registration facilitation, and improve the trademark-related public service level. In the revised *Standards*, following contents were added, including sound trademark examination, application of Opinion Book of Examination in practice of examination, application of Article 19 (4) and Article 50 of *Trademark law,* judicial application of Article 15 (2), and identification standard of interested parties, and also, the examination standards were revised correspondingly according to the partial modifications of Article 10 of *Trademark law.*

② Halving of registration charges

On March 30, 2017, Trademark Department of SAIC released the *Notice on Adjusting the Trademark Registration Charging Standards*, announcing to reduce the trademark registration charging standards by 50% since April 1, 2017. The specific charging items and standards are: fee of accepting trademark registration: RMB300, fee of trademark registration certificate reissuing: RMB500, fee of accepting trademark registration transfer: RMB500, fee of accepting trademark renewal registration: RMB1.000 fee of accepting delayed registration renewal RMB250, fee of accepting trademark examination: RMB750, change fee: RMB250, fee of trademark certificate issuing: RMB 50, fee of accepting collective trademark registration: RMB1,5000, fee of accepting certification trademark registration: RMB1,500, trademark opposition fee: RMB 500, trademark cancellation fee: RMB500, and fee of trademark use license contract recording: RMB150.

③ Expansion of accepting channels

According to the *Opinions of State Administration for Industry and Commerce on Vigorously Promoting the Reform of Trademark Registration Facilitation*, SAIC further expanded the trademark application channels, entrusting the local administrations to accept the trademark registration application, setting up trademark examination collaborating centers outside of Beijing, and carrying out online application. SAIC has set up the second, third, and fourth batches of local trademark acceptance windows successively. The scope of online trademark application acceptance has been expended from trademark registration application to trademark change, renewal, transfer, cancellation, and license record, 23 items in total, and “four online services” have been realized, including online application, online enquiry, online bulletin, and online payment. Shanghai Trademark Examination Collaborating Center, Chongqing Trademark Examination Collaborating Center, and other trademark examination collaborating centers have been put into operation in succession.

④ Simplificaiton of Madrid registration application

On August 23, 2017, Trademark Department of SAIC published the *Notice on Simplifying the Madrid International Trademark Registration Application Materials and Formalities*. The specific provisions are shown as below: First, when Madrid international trademark registration is applied, it is unnecessary to submit the copy of *Notice of Acceptance of Trademark Registration Application* or copy of *Trademark Registration Certificate*, while the acceptance or registration information in the trademark examination system of Trademark Department of SAIC shall prevail; when a fundamental trademark is changed, transferred, renewed or subject to other subsequent procedures, it is unnecessary to submit the copy of the certificate on change, transfer or renewal of fundamental trademark; if an applicant’s English name is already filled in a Chinese application form, it is unnecessary to submit a certificate of English name. Second, when the various subsequent procedures of Madrid international trademark registration are handled, it is unnecessary to submit the copy of *International Registration Certificate* issued by International Bureau of World Intellectual Property Organization; if the transferee's English name is already filled in a transfer application in Chinese, it is unnecessary to submit a certificate of English name. Third, when registrant's name and/or address change service is handled, it is unnecessary to take the approval of fundamental trademark as a precondition. If the change of fundamental trademark is already approved, there is no need to submit the copy of certificate of change approval; if the change of fundamental trademark is yet not approved, the applicant may submit the copy of change approval document or the printed related documents downloaded from the official website of registration authority to serve as the change supporting documents.

⑤ Deepening of registration facilitation reform

On November 17, 2017, SAIC issued the *Opinions on Deepening the Reform of Trademark Registration Facilitation to Improve the Efficiency of Trademark Registration* (hereinafter referred to as *Opinions on Trademark Registration*). It is stipulated in the *Opinions on Trademark Registration* that, on the basis of achieving the goals to shorten the time to issue the notice of acceptance of trademark registration application to be within 2 months, and the time of trademark registration examination cycle to be within 8 months at the end of 2017, following goals will be realized at the end of 2018: shorten the time to issue the notice of acceptance of trademark registration application to be within 1 month; shorten the time of trademark registration examination cycle to be within 6 months; shorten the time of trademark transfer examination cycle to be within 4 months; shorten the time of trademark change or renewal examination cycle to be within 2 months; and shorten the time of blind period of trademark retrieval to be within 2 months. Following contents are also stipulated in the *Opinions on Trademark Registration*: accelerate the establishment of trademark examination collaborating centers, improve the service level of local trademark application acceptance windows, and strengthen the guide and supervision to each trademark examination collaborating center; optimize the examination procedures, and improve the examination efficiency; strengthen the technical support, and increase the intelligence level; drive the law revision, and tamp the reform foundation; strengthen the propaganda guide, and promote the social governance; and meticulously organize the implementation, to guarantee the effect of reform.

⑥ Disclosure of review and ruling documents

On December 28, 2017, the comprehensive instant exposure system of trademark examination and ruling documents of SAIC was officially put into operation online, and all ruling documents given by Trademark Review and Adjudication Board will be made public automatically to actively accept the social supervision except for those not allowed to be disclosed as required. After the system is put into operation officially, the decision of re-examination refusal, decision of no re-examination for registration, verdict of request for invalidation, decision of invalidation re-examination, decision of re-examination cancellation, and other documents with the effect of terminating review procedures will be made public in the column Review Documents at the website of Trademark Review and Adjudication Board within 20 working days since the date when they are delivered for mailing.

(3) Trademark-related departments: Promote China's brand construction

① Set up "China's Brand Day"

On April 24, 2017, the State Council approved to set up May 10 of every year as "China Brand Day" since 2017. NDRC and other related departments will organize to implement the specific work. The establishment of "China's Brand Day" can help to improve the influence and recognition of self-owned brands.

② Deepen the implementation of trademark brand strategy

On May 17, 2017, SAIC published the *Opinions on Deepening the Implementation of Trademark Brand Strategy to Promote the Brand Construction of China* (hereinafter referred to as the *Opinions on Brand Construction*). The main contents are shown as below: First, deepen the trademark registration management system reform, including, continuing to promote the trademark registration facilitation, strengthening the trademark registration system and mechanism construction and perfecting the trademark right verification procedures. Second, practically strengthen the administrative protection of registered trademarks, including, making greater efforts to protect the exclusive rights to registered trademarks, promoting the trademark supervision standardization, and strengthening the trademark-related law enforcement collaboration. Third, comprehensively build the brand cultivation service system, including, standardizing the development of trademark brand service, giving different guidance to different kinds of enterprises to implement the trademark brand strategy, improving the enterprise's trademark brand asset application ability, developing the construction of trademark brand entrepreneurship and innovation base, and standardizing the development of trademark brand value evaluation system. Fourth, comprehensively promote the industrial region brand construction, including, strengthening the department/industry cooperation, promoting the agricultural branding construction, increasing the manufacturing brand construction level, promoting the service brand development, and perfecting the regional trademark brand cultivation system. Fifth, vigorously develop the international space of brand development, including, taking part in construction of a more fair and reasonable system of international rules in trademark field, strengthening the external cooperation mechanism construction of trademark brands, supporting the enterprises to take part in international competition with trademark brands, and helping the enterprises to improve the international influence of trademark brands, and perfecting the overseas right safeguarding coordination mechanism of enterprise brands. Sixth, organize the implementation and guarantee measures, including, strengthening the organizational leadership, propaganda guide, theoretical research, talent cultivation and fund guarantee.

③ Suspend the appraisal of famous brands and well-known brands

On June 24, 2017, Zhang Mao, director general of SAIC expressed that, it’s required to correct the phenomenon that the government endorses for the quality of enterprises, in promotion of brand and development of quality of product. In the past, the governments at different places appraised famous brands and well-known brands largely, which distorted the relations between the government and the market, for famous brands and well-known brands should be recognized by the consumers in the market competition rather than by the government. “We now have notified the provinces, municipalities and autonomous regions throughout the country to suspend the appraisal of famous brands and well-known brands.”

III. MAJOR CASES

(1) Case on “DAOHUAXIANG” trademark infringement dispute

Fuzhou Rice Factory is the owner with exclusive right to use No. 1298859 trademark “DAOHUAXIANG” (trademark involved in the case). In March 1998, it applied for registration of this trademark, and on July 28, 1999, its application was approved, and this trademark was approved to be used in category 30 rice. According to the Certificate of Crop Variety Accreditation of Heilongjiang Province issued by Crop Variety Examination Committee of Heilongjiang Province on March 18, 2009, it’s recorded that: the crop variety is “five-excellence rice 4#”, with the original code of “DAOHUAXIANG 2#”, and the promotion region is gravity irrigation region in the plain of Wuchang City, Heilongjiang Province, where rice transplanting cultivation will be adopted. In 2014, Fuzhou Rice Factory filed a lawsuit for its trademark was infringed by “Qiaojia Dayuan DAOHUAXIANG rice” produced and sold by Wuchang Jinfutai Agricultural Co., Ltd. (hereinafter referred to as Wuchang Company) and also sold by Fujian Xinhuadu Department Store Co., Ltd. Fuzhou

Jinshan Dajingcheng Branch (hereinafter referred to as Dajingcheng Branch). The court of first instance held that: “DAOHUAXIANG” was not a common name, and without prior permit, Wuchang Company used a logo highly similar to the trademark involved in this case on the product packaging bag, which was likely to mislead the consumers, and caused the infringement of trademark involved. The court of second instance held that: “DAOHUAXIANG” rice produced in the specific geographical planting environment of Wuchang City was a conventional generic name, and Wuchang Company’s using “DAOHUAXIANG” characters and spelling on the packaging of rice produced and sold by Wuchang Company to indicate the rice variety source was a normal use. Thus, the first-instance judgment was cancelled, and all claims from Fuzhou Rice Factory were rejected. Fuzhou Rice Factory was dissatisfied with the second-instance judgment, and then applied to the Supreme People’s Court for retrial. After hearing of this case, the Supreme People’s Court held that, Wuchang Company had no evidence to prove that “DAOHUAXIANG” was a statutory generic name; the generic name stipulated in the crop variety examination measures was not completely same as that given in Trademark law in a sense, and it’s not reasonable to affirm that such name was a generic name with the same meaning as that given in the Trademark law only on the basis of the name given in the approval announcement; the original code was “DAOHUAXIANG 2#” rather than “DAOHUAXIANG” in the approval announcement, and under the precondition that the trademark involved was registered before, it was unable to directly prove that “DAOHUAXIANG” was a statutory generic name. Therefore, the Supreme People’s Court decided to cancel the second-instance judgment and maintain the first-instance judgment.

The main ideas of judgment of this case are: first, the generic name stipulated in the crop variety examination measures was not completely same as that defined in Trademark law, and it’s not reasonable to affirm that such name was a generic name with the same meaning as that given in the Trademark law only on the basis of the name given in the approval announcement, second, the product-related market was not limited to a specific region but the places throughout the country would be involved, and it’s required to judge whether it was a conventional generic name according to the general understanding of related public throughout the country.

In this case, the relationship between the exclusive right to use a registered trademark and the variety name, judgment standard of generic name, and other problems were involved. The Supreme People's Court specified the trial standards of such case by explaining the judgment criteria of statutory generic name and conventional generic name, difference and link between the registered trademark exclusive right and the variety name, and other important legal issues; and also better balanced the interest relationship between the registered trademark owner and the variety name user, and maintained the fair and well-organized market competition order under the precondition of sufficient protection of trademark right. This case was listed into “top 10 cases regarding intellectual property rights of courts of China in 2017”.

(2) Case on“DONGFENG” trademark infringement dispute

Shanghai Diesel Engine Co., Ltd. (hereinafter referred to as SDEC) enjoys the right to use No.100579 and No.624089 “DONGFENG” trademarks used in category 7 diesel engine. No.100579 trademark was registered in 1962, and it enjoys a high brand awareness and business reputation. In 2013, Indonesia’s enterprise PTADIPERKASABUANA, in the identity of “DONGFENG” trademark and logo (certificate No.: IDM000089328) owner, entrusted Jiangsu Changjia Jinfeng Power Machinery Company (hereinafter referred to as Changjia Company) to produce diesel engine and its components by use of “DONGFENG” trademark and logo, and export them to importers and exporters, but they could only be sold in Indonesia. SDEC filed a lawsuit against Changjia Company for its infringing the exclusive right to use the registered trademark. The court of first instance held that: in the Fixed Mark Processing, the additional trademark of goods fully used for selling overseas and not entering into the market circulation field in China would have no function to identify the source of goods in China’s territory, this would not constitute the behavior of trademark use defined in the Trademark law, so Changjia Company’s behavior didn’t fall into the protection scope of SDEC’s involved trademark, and no infringement was constituted. SDEC was dissatisfied with the first-instance judgment, and then instituted an appeal. The court of second instance held that: to identify there is no infringement in Fixed Mark Processing , it’s required to meet the precondition that the domestic processing enterprise had already fulfilled the obligation to reasonably examine or notice the overseas trademark entrusted for Fixed Mark Processing; Changjia Company, knowing that “DONGFENG” trademark of SDEC was a famous trademark, still accepted the overseas commission, to use a trademark same as “DONGFENG” trademark of SDEC on the complained infringing diesel engine and its components, and it didn’t fulfill the obligation of reasonable attention and avoidance, which substantively damaged SDEC’s interests, and infringed the exclusive right to use the registered trademark of SDEC. Changjia Company was dissatisfied with the second-instance judgment, and applied to the Supreme People's Court for retrial. The Supreme People's Court held that: “the essential attribute of trademark is its recognizability or indicative property, and its basic function is to distinguish the source of goods or services. Generally speaking, the trademark use behavior not used for identifying or distinguishing the source would not cause misleading or confusion of commodity or service source, to influence the trademark function to indicate the commodity or service source, and this would not constitute the infringement defined in the Trademark law.” Therefore, the Supreme People's Court decided to cancel the second-instance judgment, and maintain the first-instance judgment.

Main ideas of this case are: first, the trademark use behavior not used for identifying the commodity source would not constitute the trademark use defined in the Trademark law, and not fall into the scope of trademark right protection; second, the people’s court should hear the trademark infringement cases in combination with the objective reality of international economic and trade situation, and conduct specific analysis on the trading form of specific market in the specific time.

The typical significance of this case lies in that: first, it specifies that, Fixed Mark Processing, as a kind of common and legal international trading form, will be not regarded that it has caused the trademark infringement except that there is contrary evidence to indicate that the parting accepting the commission didn’t fulfill the obligation of reasonable attention, and such behavior caused a substantial damage to trademarks of others; second, under the complicated situation that globalization of economic development is increasingly intensified, and international trade division and economic and trade cooperation are increasingly closer, the people’s court should hear the trademark infringement cases in combination with the objective reality of international economic and trade situation development, conduct specific analysis on the trading form of specific market in the specific time, and accurately judge the actual influence of related behaviors on trademark owner’s lawful rights and interests, so as to apply governing laws more accurately.

(3) Case on “Xinhua Dictionary” trademark infringement and unfair competition

Commercial Press Co., Ltd. (hereinafter referred to as Commercial Press) has continuously published the *Xinhua Dictionary* from general version to version 11 since 1957. As of 2016, the global circulation of *Xinhua Dictionary* was more than 567million volumes. Commercial Pressobtained many honors like Guinness World Records “Most Popular Dictionary” and “Best-selling Book (periodical revision)”. Commercial Press complained that, the behavior of Sinolingua Teaching Press Co., Ltd. (hereinafter referred to as Sinolingua) to produce and sell “Xinhua Directory” infringed the non-registered well-known brand “Xinhua Dictionary” of Commercial Press, and also the behavior of Sinolingua to use the special packaging or decoration of famous commodity *Xinhua Dictionary* (version 11) of Commercial Press already constituted an unfair competition. The trial court held that, “Xinhua Directory” had the significance and effect of indicating the commodity source, possessed the distinguishing features of trademark, and it was already known by the related public throughout the country, so it could be regarded as that "Xinhua Dictionary" was a non-registered well-known trademark. Sinolingua used the very similar decoration design in its dictionary commodity, which was sufficient to cause the related public's confusion and misunderstanding of the commodity source, and this constituted an act of unfair competition stipulated in Article 5 (2) of *Anti-Unfair Competition Law*. Therefore, the court made a decision as below: require Sinolingua to immediately stop the infringement, eliminate the influence, and compensate the economic losses to Commercial Press.

Main ideas of this case are: first, if a commodity name with the product and brand mixing attribute has formed a stable recognition among the related consumers, it will have the significance and effect of indicating the commodity source, and possess the distinguishing features of trademark; second, the protection of exclusive right of trademark use in the Trademark law is to the trademark itself rather than the attached commodities, and no monopoly will be caused.

This case is a typical case regarding the protection of non-registered well-known trademark; and in the case, fact finding, application of law, benefit balance and other complicated problems were involved. This case gave the criteria of judgment on whether the commodity name like "Xinhua Dictionary" with product and brand mixing attributes has distinguishing features of trademark. Apart from the protection of "Xinhua Dictionary" non-registered well-known trademark, this case emphasized to balance the protection with normal operation management order of publishing industry and promotion of cultural and knowledge spreading. It's specified in the judgment that, the protection of exclusive right of trademark use in the Trademark law is to the trademark itself rather than the attached commodities, and to give Commercial Press the right to exclusively use "Xinhua Dictionary" trademark didn't indicate to give the exclusive right to publish the dictionary books to Commercial Press, so no monopoly would be caused. This case was listed into "top 10 cases regarding intellectual property rights of courts of China in 2017".

(4) Case on "LANDROVER" trademark infringement dispute

LANDROVER Company possesses No. 3514202 "LANDROVER" trademark and No. 4309460 "LANDROVER" trademark registered in the territory of China respectively in 1996, 2004 and 2005, and the trademarks above are all approved to be applied in category 12 "land motor vehicles". Guangzhou Fenli Food Co., Ltd. (hereinafter referred to as Fenli Company) propagandized and sold its "LANDROVER vitamin drink", and the complained logos used on the related products, packaging boxes and website promotion materials include "LANDROVER", "Landrover" and "LandRover", etc. LANDROVER Company filed a lawsuit against Fenli Company for its infringement. The court of first instance made a decision to require Fenli Company to stop the infringement and compensate economic losses and reasonable expenditures for right safeguarding amount to RMB1.2million to LANDROVER Company. The court of second instance held that: the evidence submitted by LANDROVER Company was sufficient to prove that the trademark involved was widely known by the social public in China, and already reached the famous degree. The complained infringement act weakened the conspicuousness and good reputation possessed by LANDROVER Company's famous trademark involved, and damaged the interests of LANDROVER Company, so it should be stopped. Therefore, the court of second instance decided to reject the appeal, and maintain the original judgment.

Main ideas of this case are: As for an infringement act with an apparent subjective malice, it's required to manifest the judicial attitude to stop vicious hoarding of trademark.

It is a typical case on well-known trademark protection between different categories to improve IPR protection. Its difference lies in that, apart from the logo infringement complained in this case, Fenli Company also took lots of behaviors to scramble for registering trademark regarding well-known enterprise and well-known personage, with very apparent subjective malice in its infringement act. In terms of determination of compensation amount, this case comprehensively judged and set forth in details the facts and legal grounds of compensation amount RMB1.2million, manifesting the judicial attitude to stop vicious hoarding of trademark. This case had a good effect of judgment guide and demonstration in strengthening the well-known trademark protection, governing the malicious trademark registration, and guiding the public to respect the intellectual property rights. This case was listed into "top 10 cases regarding intellectual property rights of courts of China in 2017".

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CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

LI Chen / LI Mingxuan***

I. OVERVIEW

In 2017, although China did not make much progress in the area of copyright legislation, the executive authorities have introduced many new policies. The Office of the Joint Conference of the Implementation Department of the Intellectual Property Strategy under the State Council issued the *2017 In-depth Implementation of the National Intellectual Property Strategy to Accelerate the Construction of a Powerful Intellectual Property Promotion Plan*. The National Copyright Administration released the *Thirteenth Five-Year Plan for Copyright Work* to make a plan for the next five years of copyright work in China. The National Copyright Administration also abolished certain regulations and regulatory documents. In addition, in terms of copyright registration, the National Copyright Administration has further regulated the provisions of the registration certificate for electronic works, and the China Copyright Protection Center has begun to suspend the registration fees for software copyrights. There have been some important cases with major influence in the judicial field. Particularly worthy of attention is the response of Shanghai Pudong Court to the issue of whether the characters of the written works and other elements are protected by copyright law in the judgment of the case that " Shanghai Xuanting Entertainment Information Technology Co., Ltd. Appeal's against Beijing Xinhua Pioneer Cultural Media Co., Ltd. etc. ".

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II. LEGISLATION AND POLICY

(1) On January 25, 2017, the National Copyright Administration issued the *Notice on Printing and Distributing the "Thirteenth Five-Year Plan" for Copyright Work*. The notice printed and issued the *Thirteenth Five-Year Plan for Copyright Work*, which includes copyright development environment, guiding ideology, basic principles and development goals, key tasks, safeguard measures, etc., together with copyright works during the "Thirteenth Five-Year Plan " period. It pointed out the direction for copyright work during the "Thirteenth Five-Year Plan" period.

(2) On March 29, 2017, the China Copyright Protection Center issued the *Notice Concerning the Termination of the Payment of Registration of Software Copyright Registration*. The notice stipulates that, as of April 1, 2017, payment notices for registration and inquiry applications will not be issued. If the application materials for registration or inquiry meet the requirements for acceptance, a notification of acceptance shall be issued and accepted.

(3) On June 5, 2017, the National Copyright Administration issued the *Notice on Regulating Electronic Registration Certificates*. The main contents of the notice include: The National Copyright Administration and provincial copyright administrations can issue electronic registration certificates; electronic registration certificates issued by different registration authorities are identical in legal validity; The electronic version of the work registration certificate issued by the work registration authority is identical to the legal validity of the paper version registration certificate of the same work; The electronic version of the work registration certificate shall be issued and issued in accordance with the *Notice on Regulating the Registration Certificate of Works* of the National Copyright Administration, and any information shall not be changed, added or deleted. According to the regulations or requirements of judicial and customs authorities and related rights holders, the registration authority shall issue a registration certificate for a hard copy of a work while issuing an electronic version of the work registration certificate.

(4) On June 23, 2017, The Office of the Joint Conference of the Implementation Department of the Intellectual Property Strategy under the State Council issued the *Deepen Implementation of the National Intellectual Property Strategy and Accelerate the Construction of a Strong Country of Intellectual Property Promotion Plan in 2017*. The plan includes the promotion of the third revision of the Copyright Law, the strengthening of online infringement and piracy prevention, and other issues concerning copyright laws.

(5) In September 2017, the National Copyright Administration interviewed major network music service providers and domestic and foreign music companies in response to

the phenomenon that online service providers vie for exclusive licenses for musical works and promoted licensing fees. The National Copyright Administration requires that online music works should be protected from exclusive licenses, and network music copyright authorization and operation models that conform to market laws and international practices should be guided and established

(6) On December 11, 2017, the National Copyright Administration issued the *Decision on Repealing Certain Regulations and Regulatory Documents*. The decision abolishes the *Administrative Measures on the Establishment of Permanent Representative Offices in China by Foreign Copyright Accreditation Organizations* (G. Q. L. [1996] No. 35) and the *Opinions on Strengthening the Management of Permanent Representative Offices of Foreign Copyright Accreditation Organizations in China*. (G. Q. [2000] No.24) (2000) 24).

III. MAJOR CASES

(1) Dispute case of Shanghai Xuanting Entertainment Information Technology Co., Ltd. appealed against Beijing Xinhua Pioneer Cultural Media Co., Ltd. etc. over copyright infringement and unfair competition

The plaintiff Shanghai Xuanting Entertainment Information Technology Co., Ltd. obtained the property rights of the novel *The Adventures of Three Tomb Raiders* from the defendant Zhang Muye. Zhang Muye used the character names, relationships, tomb rules, taboos, and other elements the same as in the series of *The Adventures of Three Tomb Raiders* in the *Ghoul Collegiate* that he created afterwards. The plaintiff believed that the book *Ghoul Collegiate* has used a lot of creative elements such as character names, characters, tomb methods, and taboo rules to be followed in the series of *The Adventures of Three Tomb Raiders* novels, which infringes the right of interpretation by the plaintiff, but also violates honest credit and recognized business ethics and constitutes unfair competition.

The defendant argued that the storyline and story content of *Ghoul Collegiate* was completely different from the *The Adventures of Three Tomb Raiders* series of novels. Moreover, its timeline has not extended the *The Adventures of Three Tomb Raiders* series of novels, but it is a new work. The image of the character advocated by the plaintiff and the rules and taboos of the tomb are not part of the story but belong to the ideological category. Zhang Muye’s use of his own character image, setting, and method to create is a normal way for authors to continue to create in the industry, and it did not violate commercial ethics.

The court held that, according to the principle of " Expression is protected by copyright law, but ideas are not protected by copyright law. " of copyright, works protected by copyright law must be external expressions that can be objectively perceived by others. In practice, protected expressions and unprotected ideas often need to be identified in the case based on the type, nature and characteristics of the work. The elements of the characters in the works involved in the work are derived from written works. Characters and other elements in the written works are often just the media of the plots of the works and the tools of the author's storytelling, which makes it difficult to form the expression itself. When the characters and other elements can only be fully and uniquely described during the development of the plot of the work, and thus become the content of the story of the work, it is possible to obtain copyright protection. The elements such as names of people and relationships that leave the plot of the work are often too difficult to protect as a form of expression because of their simplicity. Although the accused infringing book used the same character names, relationships, tomb rules, taboos, and other elements as the rights works of the plaintiff, the accused infringing book have its own independent plots and expressions. The accused infringing books form a new story content after combining these elements with its own plot, the story content is not the same in the plot or similar and there is no continuation relationship with the plaintiff's right works. Therefore, the plaintiff's claim that the image of the people, tomb rules, and taboos in the right works are protected under the Copyright Law is insufficient. Therefore, the court does not support the plaintiff's claim that the defendant infringed copyright.

The court also held that the characters, such as the characters advocated by the plaintiff, played an insignificant role in the *The Adventures of Three Tomb Raiders* series of novels. Even if it is not protected by the Copyright Law, the whole may still be protected by unfair competition law. Since there is a relatively stable relationship between the characters and other elements of the readership group and the work, it has specific reference and recognition functions, which makes it distinct from the general copyright protection object. In particular, elements such as characters clearly have a high commercial market value. It is entirely possible to use its market appeal and attractiveness to increase the reputation of new works by using these characters and other elements, so that it can easily attract a large number of fans in the original works, and thus obtain economic benefits and enhance their competitive advantage. Obviously, the use of elements in the creation of new works should be based on industry norms. The legal adjustment of this use behavior must take into account the identity of the user, the purpose of use, the nature of the original work, and the potential impact on the original market and other factors. On the one hand, it should fully respect the legitimate rights and interests of the original work. On the other hand, it must also guarantee the freedom of creation and commentary so as to promote cultural communication and promote cultural prosperity. The characters, tomb rules and taboos advocated by the plaintiff in this case were first created by the author himself, the defendant Zhang Muye. Where these elements do not constitute an expression and do not fall within the scope of protection of the property rights of the work, the defendant Zhang Muye, as the author of the original work, has the right to use the elements created in his original novel to create new works. It is not inappropriate for the defendant Zhang Muye to use these elements created by him to create new works that are different from the expression of the right works. Therefore, the plaintiff argued that the defendant's use of his rights to the above elements of his works constitutes a basis for unfair competition lacks of law basis, and it shall not be upheld by the court.[1]

The main point worth paying attention to in this case are as follows: a. The court found that the characters in the written works and other elements are difficult to construct and express separately, and only if they are combined with the plot of the works can they be protected by copyright law. b. The court proposed that characters such as characters in written works may play a role of identification and be protected by unfair competition laws. c. The court proposes that the use of elements such as the original character in the creation of new works should follow industry norms, and that the legal adjustment of this use behavior must respect the legitimate rights and interests of the original work as well as the freedom of creation. d. The court held that the author has the right to create new works using certain elements of his works. This shows that the court admitted that the author's act of creating a sequel to the work after transferring the copyright of the work does not constitute unfair competition. The fact that “the defendant in this case was the author of the disputed work” played an important role in the referee’s position and reflected the court’s value orientation towards the conflict between creative freedom and commercial interests.

1. Shanghai Pudong New Area People's Court (2015) Pumin San (zhi) Chu Zi No. 838 civil judgment.

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADE SECRETS

*JIN Haijun**

I. OVERVIEW

The NPC Standing Committee granted an amendment to the *Anti-Unfair Competition Law* on November 4, 2017, which was also the first revision since the law was enacted 24 years ago. It is therefore of great significance. The relevant regulations concerning trade secrets have undergone major changes, and it is also the most important part of the legislation development of the trade secret this year. According to the 2017 Typical Intellectual Property Cases published by the Supreme People's Court and some Provincial Higher People's Courts, the number of disputes concerning trade secrets is not significant. Here are two cases that will be introduced in this paper. One is trade secret infringement disputes between Hebi Reflective Material Co., Ltd. and Song Junchao, Hebi Ruimingte Technology Co., Ltd. The second is trade secret infringement disputes concerning Huaao Automobile Service Co., Ltd. sued the Wuhan Ali Automobile Service Co., Ltd. Both of them were caused by employee turnover or departure, and business information concerning customer lists, transaction data, etc. were both involved. However, the results of the two cases are completely opposite.

II. LEGISLATION AND POLICY

On November 4, 2017, the 12th session of the NPC Standing Committee approved the revision of the *Anti-Unfair Competition Law* at its 30th meeting. The newly revised *Anti-*

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Unfair Competition Law came into force on January 1, 2018. The provisions concerning trade secret are mainly in Articles 9, 17 and 21 in the new *Anti-Unfair Competition Law* (hereinafter referred to as the 2017 Law), and they have undergone significant changes compared to the relevant provisions of the law in 1993.

(1) The definition of trade secret is slightly adjusted. Paragraph 3, Article 9 of the 2017 Law stipulates that "the Trade Secret in this Law refers to technical information and business information that is not known to the public, with commercial value, and is subject to corresponding measures of confidentiality by the right holder". The statement that "can bring economic benefits to the rights holders" in the 1993 Law is deleted but the basic meaning remains unchanged.

(2) The controversy over the subject of infringement of the trade secret still exists. Paragraphs 1 and 2 of Article 9 in the 2017 Law define two types of infringements. Paragraph 1 regarding to the operator's trade secret infringement and divides it into three situations: "(a) Obtain the trade secret of the right holder by theft, bribery, fraud, coercion, or other improper means; (b) Disclose and use or allow others to use the trade secret of the right holder obtained by the previous method; (c) Disclose, use, or allow others to use the trade secret possessed in violation of the agreement or breach of the right holder's request for confidentiality of trade secret." Compared with the 1993 law, in the unjustified methods listed in the situation (a), " temptation" was changed to "bribery ", and "fraud" was added, and the rest remained unchanged. Paragraph 2 deals with acts that the business operator considers to be infringing on the trade secret, that is, "the third party still obtains, discloses, uses, or permits others to use the relevant trade secret in cases where he/she clearly or should have known that the employees, former employees of the right holder of the trade secret or other units or individuals have committed the illegal acts listed above, it should be considered an infringement of the trade secret." By the look over it, compared with the 1993 Law, except for the specific reference to "the employees, former employees of the right holder of the trade secret or other units or individuals have committed the illegal acts listed above," this provision has not been changed, however, there is a huge controversy. Why specifically include "employees, former employees"? According to the review of the second draft of the law by the NPC Standing Committee in 2017, the draft has set the terms of the trade secret protection into two. One is about the situation in which business operators infringe on the trade secret, and the other is to specifically prohibit the trade secret infringement from the employees and former employees of the right holder, as well as stipulated the obligations of state functionaries and lawyers, certified public accountants and other professionals to keep the trade secret. The offender shall be "regarded as infringing the trade secret". However, the relevant provisions of the draft "were opposed by some members of the Standing Committee and departments and enterprises with reason which is the regulated subject of the *Anti-unfair Competition Law*

was the business operator, while the employees and former employees of the right holder of the trade secret did not belong to the business operator, the right holder could obtain remedies through other legal approaches for their trade secret infringement; Some have proposed that relevant laws have already provided for the trade secret confidentiality obligations of state functionaries, lawyers, certified public accountants and other professionals, and there is no need to make duplicate stipulations in this Law." Therefore, after studying the matter, the Legal Committee finally proposed to delete the other provision of the revised draft, while incorporating the corresponding contents into the current Paragraph 2, Article 9.

(3) Legal protection and infringement remedies have been significantly improved. Article 17 of the 2017 Law stipulates that the business operator should bear civil liability for breach of legal obligations, including taking actual damages caused by infringement and infringement profits as the basis for the calculation of damages, and specifically providing statutory compensation could be up to 3 million against trade secrets infringement in paragraph 4. At the same time, Article 21 stipulates the administrative responsibility for infringement of the trade secret, which is, ordering the cessation of illegal acts, imposing a fine of 100,000 yuan up to 500,000 yuan; if the circumstances are serious, a fine of 500,000 yuan up to 3 million yuan shall be imposed.

III. MAJOR CASES

(1) Trade secret infringement disputes between Hebi Reflective Material Co., Ltd. and Song Junchao, Hebi Ruimingte Technology Co., Ltd.

Song Junchao has been a salesperson at Hebi Reflective Material Co., Ltd. (hereinafter referred to as Reflective Material Company) since 2006 and was mainly responsible for sale and customer development in some provinces. Reflective Material Company and Song Junchao have signed two labor contracts successively and agreed on confidentiality clauses and competitive restrictions. Reflective Material Company has established a confidentiality system for its business information and has taken necessary confidentiality measures for information of customers and potential customers, and has also paid confidentiality fees to Song Junchao and other salespersons. Hebi Ruixin Trading Company (hereafter referred to as Ruixin Company, the predecessor of Hebi Ruimingte Technology Co., Ltd.) was established on June 22, 2011, with the business scope of steel, building materials, hardware, electrical appliances, coated panels, reflective barriers.

During the period of Ruixin Company's operation, Song Junchao participated in the registration procedure of the Ruixin Company in the name of Song Xiang. The bank account of Ruixin Company shows that from August 1, 2011 to July 31, 2015, Ruixin Company and the Reflective Material Company's multiple trading customers overlapped. Song Junchao used his personal name to withdraw funds from Ruixin Company account several times. Reflective Material Company then sued Song Junchao et al. to the court on the grounds of infringement of trade secrets.

Court of First Instance believes that Song Junchao and Ruixin Company constituted a joint infringement of the trade secret of Reflective Material Company. Court of Second Instance believes that, based on the transaction records and customer notes provided by Reflective Material Company, “Varieties”, “Specifications” and “Quantities” can explain the unique needs of customers, while “Transaction Date” can reflect the law of customers’ purchasing period, “Unit Price” can describe the customer’s ability to withstand price and their bottom line of price transaction, and “Note” reflects the special information of the customer. The contents mentioned above together constitute the secret point of the operating information of Reflective Material Company. The customers involved in the above business information have formed a stable supply channel with Reflective Material Company, maintain a good trading relationship, have practicality in production and operation, and can bring economic benefits and competitive advantages to Reflective Material Company. Reflective Material Company has established a specific confidentiality system for the above business information, and has taken necessary confidentiality measures for customer and prospective customer information, and has explicitly agreed with Song Junchao on confidentiality terms, business restrictions, and paid Song Junchao and other salesmen the corresponding confidentiality fee, which can prove that Reflective Material Company has taken reasonable confidentiality measures for the above business information. In summary, it can be assumed that the customer list produced by Reflective Material Company constitutes a trade secret. Song Junchao has a duty of loyalty to Reflective Material Company, which includes the obligation to keep confidential of the business information that it comes into contact with during the work. Knowing the company's relevant management regulations and the non-publicity and commercial value of the customer list, he still trades with the customers of Reflective Material Company and communicates with the Ruixin Company frequently, which constitutes the disclosure, use, and permission of others to use the operating information of the Reflective Material Company and his behavior violated the trade secret of Reflective Material Company. Ruixin Company improperly acquired and used the trade secret owned by the Reflective Material Company through Song Junchao. Song Junchao and Ruixin Company formed a joint infringement of the trade secret of Reflective Material Company.

The Hebi City Intermediate People’s Court of Henan Province made the (2015) H. M. Ch. Z. No. 96 civil judgment of the first instance, ruling that Song Junchao and Ruixin Company constituted a joint infringement of Reflective Material Company’s trade secret; they should immediately stop the infringement and the use of the trade secret owned by Hebi Reflective Material Co., Ltd. within two years; collective compensation for Hebi Reflective Material Co., Ltd. economic loss was 350,000 yuan. The Higher People’s Court of Henan Province made a civil judgment of the second trial (2016) Y. M. Zh. No. 347, rejecting the appeal and upheld the judgment of first instance.

This case is a typical case concerning the protection of trade secret. Trade secret cases are often difficult to examine due to the complexity and concealment of evidence. In particular, the trade secret protection problem caused by employee departure has always been a difficult issue in judicial practice. This case verifies the important legal issues such as “not known to the public”, “confidential measure”, “commercial value”, and determination of liability for compensation in the trade secret case, while making detailed and comprehensive explanations in connection with the case, which has a strong rule-guiding significance for hearing similar cases. The case was therefore also listed by the Supreme People's Court as one of the 50 typical intellectual property cases of courts of China in 2017. Since this case was judged according to the 1993 *Anti-Unfair Competition Law*, in accordance with judicial practices, the employees who divulge the trade secret and the business operator who use the trade secret are listed as co-defendants and their joint tort liability is investigated. However, since the new provisions of Article 9 of the 2017 *Anti-Unfair Competition Law*, especially paragraph 3 thereof, clearly stipulate that the business operator is the subject of liability of trade secret infringement, which make whether employees or ex-employees can be brought together by the trade secret right holder as a co-defendant in the case of infringement of the trade secret and be convicted of joint infringement with the company as a competitor and take joint responsibility become a problem in the judiciary.

(2) Disputes regarding infringement in trade secret between Wuhan Branch of Beijing Hua-Ao Automobile Service Co., Ltd. and Wuhan Ali Automobile Service Co., Ltd., Nie Jun, Du Ying

The business scope of Wuhan Branch of Beijing Hua-Ao Automobile Service Co., Ltd. (hereafter referred to as Huaao Branch) covers automotive decoration, auto parts sales, technical services, and technical consulting, etc. In the course of its business, Huaao Branch manages its business information and customer information through the “Security Business Service Management Platform” system. At the end of February 2016, Du Ying entered Huaao Branch. On March 1st of the same year, Huaao Branch and Du Ying signed the *Labor Contract*, which stipulated Du Ying as the Account Manager of Huaao Branch, and on the same day, both parties also signed the *Professional Code Commitment*, and Du Ying promised the Huaao Branch that she will keep confidential of the customer information obtained during sales and service. After the above-mentioned contracts and undertakings were signed, Du Ying joined

Huaao Branch and was assigned to work in the car maintenance business at Fuss Co.Ltd, a 4S shop cooperated with Huaao Branch. On September 1, 2016, Du Ying filed a resignation application on the grounds of "personal reasons." On the same day, Huaao Branch and Du Ying signed a *Confidentiality Agreement*, which stipulates that the long-term agreement will be effective from the date of signing and never be terminated due to the end of work, etc. Since then, Du Ying has left Huaao Branch. Huaao Branch has not paid her compensation. Du Ying married Nie Jun. After leaving Huaao Branch, Du Ying entered Wuhan Ali Automobile Service Co., Ltd. (hereafter referred to as Ali Company) whose legal representative was Nie Jun. The business scope of Ali Company and Huaao Branch is basically the same. After Du Ying entered the Ali Company, Huaao Branch found that the business performance of its 4S shop, Anqi Dongfang, which had a cooperative relationship with the company, has declined. Huaao Branch filed a lawsuit in the court on suspecting that this was related to Ali Company, Nie Jun and Du Ying.

After the trial, the court found that whether the defendant in the case constituted an infringement of the trade secret was mainly related to the following two issues. The first question is whether the pricing strategy and customer list that Huaao Branch advocated in this case constitute its trade secret. Firstly, the pricing strategy and the customer list are all operational information and may become trade secrets. However, Huaao Branch did not submit evidence to prove the content, characteristics, scope, and carrier of the information of the pricing strategy. Therefore, it cannot be judged whether the pricing strategy advocated by Huaao Branch constitutes a trade secret in the sense of anti-unfair competition law and its possibility of being protected. Secondly, the list of customers submitted by Huaao Branch records Huaao Branch's service targets, service contents, and contact information. It is specific and is inseparable from the specific services provided by Huaao Branch. It is the unique and exclusive customer information of Huaao Branch. This customer information is stored in the “Security Business Service Management Platform” system of Huaao Branch. Huaao Branch has adopted corresponding control measures for this system. Therefore, the information constitutes a trade secret in the sense of *Anti-Unfair Competition Law* and should be protected by law. Third, the obligation of confidentiality is a statutory obligation, and the obligation of non-competition is a contractual obligation. Huaao Branch did not pay confidential price to Du Ying, and it must not be extended to allow her freely disclosing, using, or authorizing others to use the trade secrets of Huaao Branch that she had acquired during her employment.

The second question is about whether the three defendants advocated by Huaao Branch illegally obtained and used its claimed trade secret. Firstly, because Du Ying did not honestly inform the company about the fact that Nie Jun worked for Ali Company during her stay at Huaao Branch, there was a subjective motivation for acquiring the Huaao Branch's list of clients. Du Ying has a marriage relationship with Nie Jun and Ali Company has a competitive relationship with Huaao Branch. After Du Ying left Huaao Branch and entered the Ali Company where Nie Jun worked, it could conclude that Nie Jun and Ali Company had the possibility to get to Huaao Branch's client list. Secondly, Huaao Branch has no evidence to prove that the customers served by Ali Company have crossed or overlapped with Huaao Branch's customers involved in the case; at the same time, Huaao Branch has not proved that the decline in the performance of the cooperative 4S store Anqidong Store is caused by or has a causal relationship with the three defendants' actions. Therefore, Huaao Branch did not complete the burden of proof that proves the Ali Company's customers are the same and have a causal relationship with the customers in the Huaao Branch’s customer list.

The People's Court of Jianghan District, Wuhan City, Hubei Province issued the civil judgment of the first instance (2017) E. E0103, M. Ch. No. 3785, which determined that the plaintiff lost the lawsuit and rejected the plaintiff's request. Both parties in the case did not appeal, and the verdict has come into effect.

The case was listed as the top ten intellectual property cases of the Hubei Provincial Court in 2017. Regarding its legal and practical significance, the advisor has put forward the following comments:

First of all, this case actively responds to the hot issues of the dismissed employees and the protection of customers lists in the auto service industry, especially in the after-sales service industry of the auto retail market under the new economic situation. It has novelty characteristic. According to reports, such infringement cases are still rare in China. Therefore, the trials and adjudications of this case have attracted the attention of the business operators, industry practitioners, industry associations, and especially the public and related media. Although the case ended with the plaintiff losing, the court issued judicial recommendations to the relevant automobile industry associations on business competition restrictions and trade secret protection of employees leaving the car retail service industry, and guided the market players to establish a sound trade secret management system according to law, which got a positive response from the Automotive Industry Association and achieved good social results.

Secondly, this case clarifies the relationship between the secret elements of trade secret case, especially the operation secret, details the distribution of the burden of proof of the parties involved in the case, defines the basic rules for adjudicating such trade secret cases, and provides relatively clear Trial ideas and relatively strict referee logic for such case. First, the customer list belongs to the customer information formed in the business and records the service objects, service contents, and contact methods of the right holder. It is inseparable from the specific services provided by the right holder, and has exclusive and distinctive features, which can be identified as a trade secret. The right holder stores customer information in the service management platform system, and restricts and controls the login subject, mode, and equipment, and informs personnel who have contact with information about their confidentiality obligations, which can determine that the right holder has taken confidential measures. Second, the identification of infringement of trade secrets should follow the "contact + substantive similarity" rule. In addition to the burden of proof of the possibility of the accused infringer being exposed to the trade secret, the right holder must bear the burden of proof that the customers of the accused infringer crosses or overlaps with the customers in the customer list of the right holder. Third, the statutory obligation of former employees to retain the trade secret of the former work unit is emphasized in the determination of the subjective fault of the infringement, and it clarifies the relationship between the *Anti-Unfair Competition Law* and the *Contract Law,* the *Labor Law* the *Labor Contract Law,* and finally clarifies the value hierarchy between statutory obligation of employee confidentiality obligations in trade secret cases and the contractual obligations for business restrictions. The obligation of confidentiality is a legal obligation, while the obligation of non-competition is a contractual obligation. The right holder’s not paying the confidentiality consideration to the departed employee cannot be extended to freely disclose, use or authorize others to use the trade secret the former employee held during his or her employment; otherwise, the departed employee can be deemed to be subjectively at fault.

PART III.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW OF CHINA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF MONOPOLY AGREEMENTS

TAN Yuan[*]

I. OVERVIEW

In 2017, China has made significant achievements in legislation on monopoly agreement, enforcement of the anti-monopoly law, and anti-monopoly action. In terms of legislation, the National Development and Reform Commission (hereinafter referred to as NDRC) formulated *Guide to Price Behavior of Industry Associations* and *Guide to Price Behavior of Operators of Shortage Drugs and Bulk Drugs*. In China, many monopoly agreements are organized, concluded and implemented by the industry associations, while the NDRC formulated *Guide to Price Behavior of Industry Associations* for the purpose of making effective guidance of the price behavior of the industry associations in a better way. And the *Guide to Price Behavior of Operators of Shortage Drugs and Bulk Drugs* involves monopoly agreement behavior in more specific industry, which indicates that legislation on monopoly agreement in China is more targeted, and it has turned to those special industries with more outstanding competitive problems.

In terms of enforcement of monopoly agreement, NDRC, SAIC and local enforcement agencies of anti-monopoly law actively carried out enforcement of anti-monopoly law, investigated many cases on monopoly agreement, involving the fields such as vehicle inspection, telecommunications, property assessment, papermaking, electric power, vehicle drivers' training, insurance, sales and service of value added tax invoice system, etc. There

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was also new dynamic in the method by which the operators concluded monopoly agreement, and social media have already become an important platform where the operators conclude monopoly agreement. The enforcement agencies of anti-monopoly law have also applied the most severe punitive measures to the industry associations for the first time, namely cancelling registration of the industry associations which organized the operators to conclude and implement monopoly agreement for many times.

In terms of judicial practice of monopoly agreement, the court has heard many monopoly agreement cases. Including, the most typically significant case was the administrative case filed by Hainan Yutai Company due to objection against the penalty decision made by Price Bureau of Hainan Province as heard by Haikou Intermediate People’s Court of Hainan Province and Higher People’s Court of Hainan Province, and this was the first administrative case on vertical monopoly agreements. This case has intensively revealed the opinions of the enforcement agencies of anti-monopoly law and the court on affirming vertical monopoly agreements as well as the existing disputes.

In 2017, China has orderly carried out legislation, law enforcement and justice on monopoly agreements, and has achieved remarkable performance, meanwhile, the problems reflected in anti-monopoly enforcement and justice practice, especially the disputes concerning vertical monopoly agreement, were in urgent need for theoretical response. In 2017, China hasn’t investigated some monopoly agreement cases of great social impact, which also indicated that China has entered normalization gradually in investigating monopoly agreement cases. However, some new problems reflected in law enforcement and justice had important value.

II. LEGISLATION AND POLICY

In China, the agencies carrying out law enforcement toward monopoly agreements, are NDRC and SAIC at central government level, and are provincial NDRC organs and provincial administrations for industry and commerce at local level. Legislation and formulation of relevant policies on relevant monopoly agreements are under the charge of NDRC and SAIC. SAIC did not carry out legislation and policy formulation work on monopoly agreements in 2017, while NDRC continued to achieve staged performance in formulating relevant rules, and the main performances were as follow:

(1) NDRC's Guide to Price Behavior of Industry Associations[1]

On July 20, 2017, NDRC issued *Guide to Price Behavior of Industry Associations*, aiming to encourage and advocate the industry associations to be engaged in behaviors beneficial for industry development, market competition and protecting legal rights and interests of the consumers, meanwhile, prompt the legal risks of the price behaviors engaged by the industry associations which may violated *Anti-monopoly Law*, *Price Law* and *Provisions on the Administrative Punishment of Price-related Violation* and other laws and regulations, and guide the industry associations to assess the legality of its various price behaviors. This *Guide* is mainly used for guiding the industry associations to engage in the following price behaviors: (1) price behaviors engaged by industry associations which involve or influence the members and other operators; (2) behavior of industry associations in issuing price information; (3) behaviors that the industry associations exchange price information among them or take joint actions; (4) behaviors of selling goods and providing paid services. This *Guide* is beneficial for regulating price behaviors of the industry associations, guiding the industry associations to play their full role in promoting healthy industry development, and protecting market price order and fair competition, etc.

(2) NDRC's Guide to Price Behavior of Operators of Shortage Drugs and Bulk Drugs[2]

On November 16, 2017, NDRC issued *Guide to Price Behavior of Operators of Shortage Drugs and Bulk Drugs*, aiming to prompt the illegal price behavior risks of the operators which may occur during the production, operation and service process of shortage drugs and bulk drugs, and provide guidance for the operators in assessing legality of various price behaviors. In terms of definition of relevant market, it is pointed out in the *Guide* that, defining relevant market involving shortage drugs and bulk drugs shall comply with general rules and methods for defining relevant market, and meanwhile, it shall consider the special properties of the pharmaceutical field and the specific circumstance of individual cases. In Article IV of the *Guide*, the operators of shortage drugs and bulk drugs of competitive relation are forbidden from concluding horizontal price monopoly agreements, which include ten circumstances in total. In Article V, operators of shortage drugs and bulk drugs are forbidden from concluding vertical price monopoly agreements with the trading counterparties. It is stipulated in Article

1. NDRC website: *Guide to Price Behavior of Industry Associations*, http://jjs.ndrc.gov.cn/zcfg/201707/W020170725565585873203.pdf.
2. NDRC website: *Guide to Price Behavior of Operators of Shortage Drugs and Bulk Drugs*, http://jjs.ndrc.gov.cn/zcfg/201711/W020171123358148881623.pdf.

VI that, operators of shortage drugs and bulk drugs may claim exemption of monopoly agreement according to law. This *Guide* is beneficial for regulating market price behaviors of shortage drugs and bulk drugs, establishing a level playing field for shortage drugs and bulk drugs, and protecting interest of the consumers.

III. MAJOR CASES

(1) The case that Papermaking Association in Fuyang District, Hangzhou City, Zhejiang Province organized to conclude and implement price monopoly agreement[1]

On July 10, 2017, NDRC issued announcement, notifying that it has guided Price Bureau of Zhejiang Province to make handling decision on the case that Papermaking Association of Fuyang District, Hangzhou City organized 17 papermaking enterprises to conclude and implement price agreement on coiling blocks and white boards, cancel registration of Fuyang Papermaking Association, and fine RMB 7,780,000 against the 17 enterprises.

On October 28, 2016, Fuyang Papermaking Association organized 17 papermaking enterprises to convene industry meeting, to jointly make negotiation on raising the price of coiling blocks and white boards, and conclude the following agreement: “1. For this price adjustment, the enterprises shall implement in place consciously; 2. Implement the price adjustment in stages, and for the first time, up-regulate RMB 200 per ton, allowing for a fluctuation within RMB 50 under special circumstances; 3. The price adjusted this time is the price of coiling blocks; 4. The enterprises shall make mutual supervision, report to Secretariat of the Association timely in case of discovering problems, and the Secretariat will examine and handle according to ‘the rule of self-discipline’.” Before concluding monopoly agreement, average monthly price of coiling blocks and white board is RMB 2,470 per ton. In the next month after concluding monopoly agreement, namely in November 2016, the enterprises involved in this case all up-regulated their sales price according to the monopoly agreement, and the up-regulated amount was about RMB 70 to 270 per ton respectively, and the average monthly price was RMB 2,640 per ton; in December 2016, the enterprises involved in this case continued to up-regulate the sales price, and the average monthly price was RMB 3,049 per ton, which had an increase of RMB 579 per ton in accumulation before concluding the agreement, and the accumulative increase rate was about 23%. The behavior of Fuyang

1. NDRC website: “17 papermaking enterprises are fined RMB 7,780,000 due to implementation of price monopoly”, http://www.ndrc.gov.cn/xwzx/xwfb/201707/t20170710_854194.html.

Papermaking Association in organizing operators of this industry to conclude monopoly agreement violated stipulation in Article 16 of the *Anti-monopoly Law*, [1] while the 17 enterprises involved in this case violated stipulation in Article 13 of the *Anti-monopoly Law* due to their conclusion and implementation of monopoly agreements under organization of industry associations.

Fuyang Papermaking Association has received administrative penalty in 2010 due to organizing the enterprises to conclude and implement monopoly agreements, therefore, it was recidivism since it organized the enterprises to conclude and implement monopoly agreements this time again, the enforcement agencies of anti-monopoly law decided to give a heavier punishment to it, and make the social organizations' registration and management organs to cancel its registration according to law. As for the 17 enterprises involved in this case participating in concluding monopoly agreements, the enforcement agencies of anti-monopoly law deemed that, since the monopoly behavior of these enterprises lasted for only two months, and they could cooperate in the investigation and make rectification actively, therefore, the enforcement agencies decided to fine them at 1% of sales volume of coiling blocks and white boards of the previous year respectively, which was RMB 7,780,000 in total.

The place needing attention of this case lies in that: This is the first case in China that the industry associations are cancelled registration due to organizing to conclude and implement monopoly agreements, and it is the severest punishment confronted with by the industry associations.[2] When determining the category and amount of administrative penalty, the enforcement agencies of anti-monopoly law would consider the illegal details of the law breaker, and for industry associations of recidivism, aggravate their punishment, and for enterprises involved in slight cases, reduce their punishment.

(2) The case that 18 PVC operators implemented monopoly agreement[3]

On September 27, 2017, NDRC issued an announcement, disclosing the case that it investigated 18 PVC operators which implemented price monopoly. At the beginning of 2017, NDRC received a report, reflecting that part of operators of PVC resins (hereinafter referred

1. It is stipulated in Article 16 of *Anti-monopoly Law* that: "The industry associations shall not organize operators of this industry to engage in monopoly behaviors prohibited in this Chapter."
2. It is stipulated in Item 3, Article 46 of *Anti-monopoly Law* that: "If the industry associations violate stipulation of this law, and organize the operators of this industry to conclude monopoly agreement, the anti-monopoly agencies may fine below RMB 500,000; for cases of gross violation, the social organizations' registration and management organs may cancel the registration according to law."
3. NDRC website: "18 PVC operators which implemented price monopoly are investigated according to law", http://www.ndrc.gov.cn/xwzx/xwfb/201709/t20170927_861737.html.

to as “PVC”) implemented price monopoly agreements, and jointly raised the PVC sales price, which has increased the burden of downstream enterprises taking PVC as raw material, and damaged legal rights and interests of the consumers. After receiving the report, NDRC carried out anti-monopoly investigation immediately. It was discovered in the investigation that, the 18 enterprises involved in this case have reached monopoly agreement on raising price uniformly via WeChat group for many times during selling process of PVC product in 2016, which resulted in obvious increase of the PVC market price.

According to investigation, between March and December 2016, the enterprises involved in this case have convened 6 meetings successively in the name of “Northwest Chlorine-alkali Complex” to exchange the market quotation and discuss the output and sales volume, and have concluded 13 price monopoly agreements through WeChat group, to raise the PVC sales price jointly. Including, Hubei Yihua Group Co., Ltd. and CNSG Jilantai Salt Chemical (Group) Co. Ltd. serving as “Secretary-general Unit” and “President Unit” respectively, have successively taken the lead to organize the 6 meetings of “Northwest Chlorine-alkali Complex”, and proposed to raise the price initiatively via WeChat group for many times, and they played a dominant role in the case. The other 16 enterprises involved in this case participated in the “Northwest Chlorine-alkali Complex” meetings, and made response and support to the proposition of raising price initiated by the two leading units mentioned above. During the actual sales process, all the enterprises involved in this case have implemented the monopoly agreements concluded. The enterprises involved in this case produced up to 12,000,000 tons of PVC in accumulation last year, accounting to three fourths of the national total production, and their behavior had a great influence on the PVC industry. The above-mentioned behavior of the enterprises involved in this case has violated the *Anti-monopoly Law*, and NDRC fined the 18 enterprises involved in this case at 1% - 2% of the relevant market sales volume in 2015 according to law, which was RMB 457,000,000 in total.

The place needing attention of this case lies in that: In this case, the operators concluded monopoly agreements via social media – WeChat group, this was the first case concluding monopoly agreements via social media which has been found out. With rapid development of social media in recent years, social media have also become an important method for the enterprises to conclude monopoly agreements. Supervision by enforcement agencies of the anti-monopoly law is not only limited to the traditional “off-line”, but they also conduct strict supervision on the operators’ behavior of concluding monopoly agreements by “online” means.

(3) The case that Hainan Yutai Company and the distributors concluded vertical monopoly agreement[1]

On February 28, 2017, Price Bureau of Hainan Province made administrative penalty decision, affirming that Yutai Company and its distributions concluded vertical monopoly agreement, and fined RMB 200,000 against it. It was discovered through investigation by the Price Bureau of Hainan Province that, Yutai Company signed *Sales Contract of Feed Products* in uniform format with the distributors in 2014 and 2015, which stipulated that the distributors should keep the profit-surrender standard confidential for Yutai Company, and follow the guiding sales price formulated by Yutai Company, otherwise Yutai Company would be entitled to reduce its profit surrender. Price Bureau of Hainan Province deemed that this behavior excluded the price competition among the distributors in selling the same brand “Yutai” fish feed, violated stipulations in Article XIV (I) of the *Anti-monopoly Law of the People’s Republic of China*, and constituted the behavior of concluding monopoly agreement on fixed price of reselling goods to third persons”.

Yutai Company was dissatisfied with the punishment of the Price Bureau of Hainan Province, and sued to Haikou Intermediate People's Court according to law. The Court deemed that, for the affirmation of vertical monopoly agreement stipulated in Article XIV of the *Anti-monopoly Law*, it cannot take the fact that whether the operators and the trading counterparty have concluded fixed or limited resell price agreement only as the basis, instead, it shall make further comprehensive consideration that whether relevant price agreement had the effect of excluding or limiting competition or not by combining with the contents stipulated in Item II of Article XIII of the *Anti-monopoly Law*. The Court found that, after comprehensive consideration of Yutai Company’s operation scale, market share of the fish feed in relevant market under contract concluded by Yutai Company and the distributors, competition level of fish feed in the market, influence degree of such agreement on supply quantity and price of the product, influence of such agreement on market quotation and other factors, it was deemed that such agreement didn’t have the effect of excluding and limiting competition, therefore, it did not constitute monopoly agreement, and it decided to cancel the punishment decision made by the Price Bureau of Hainan Province.

The Price Bureau of Hainan Province was dissatisfied with the Court’s decision, and instituted an appeal to the Higher People’ s Court of Hainan Province. The Court of Second Instance deemed that, in order to realize the legislation purpose of the *Anti-monopoly Law* such as preventing and stopping monopoly behavior, protecting interest of the consumers and the social public, etc., under the condition of no specific stipulation, it could not draw the

1. (2017) QXZ No. 1180 Administrative Judgment of Higher People’s Court of Hainan Province.

conclusion that vertical monopoly agreement must take exclusion and limitation of competition as the constitutive requirement as affirmed by enforcement agencies of the anti-monopoly law.

A core issue involved in this case is, whether affirmation of vertical monopoly agreement should take the effect of excluding and limiting competition as the constitutive requirement or not. In this case, enforcement agencies of the anti-monopoly law deemed that, the vertical monopoly agreement would constitute monopoly agreement once it was concluded, and there is no need to confirm whether it constitutes a monopoly agreement or not according to whether it has the effect of excluding and limiting competition. It was deemed by the Court of First Instance that, for the affirmation of vertical monopoly agreement, it cannot take the fact that whether the operators and the trading counterparty have concluded fixed or limited resell price agreement as the basis only, instead, it shall make further comprehensive consideration that whether relevant price agreement had the effect of excluding or limiting competition or not. It was deemed by the Court of Second Instance that, the administrative organ's affirmation of vertical monopoly agreement is different from civil subject's claims of actual losses resulted from the monopoly behaviors, the civil cases involving monopoly behaviors took the actual losses generated as the premise, while the actual losses generated must take whether such monopoly behavior has the effect of excluding and limiting competition as the premise. However, there is no need for the enforcement agencies of the anti-monopoly law to make administrative punishment decision taking whether the vertical monopoly agreement has the effect of excluding and limiting competition as the premise, and there is also no need to take the losses caused to others as the premise.

The place needing attention of this case lies in that: This case is the first administrative case on vertical monopoly agreement. For the punishment decision made by enforcement agencies of the anti-monopoly law on vertical monopoly agreement cases, the parties concerned begin to choose to protect their interest through instituting administrative proceeding. However, as for whether vertical monopoly agreement should have the effect of excluding and limiting competition, enforcement agencies of the anti-monopoly law and the court have different opinions, and there are even different opinions within the judicial authorities.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF ABUSE OF DOMINANT MARKET POSITION

DONG Dudu∗

I. OVERVIEW

In 2017, the development of China's abuse of dominant market position was embodied in three aspects: legislation, policy and implementation. At the legislative level, the behaviors of public utility enterprises trade limiting, below cost sales and bundle sales stipulated in Article VI, Article XI and Article XII of 1993 *Anti-unfair Competition Law* were overlapped with the regulation of abusing of dominant market position in the *Anti-Monopoly Law*. The three rules were removed by the revised law on unfair competition in 2017. At the policy level, the State Council issued the *"13th Five-Year" Market Regulation Plan* in 2017, emphasized the need to strengthen the enforcement of anti-monopoly law, anti-unfair competition law, price law and so on, and seriously investigated and dealt with the implementation of monopoly agreements and abuse of dominant market position. At the implementation level, the website of the State Administration for Industry and Commerce (hereinafter refers to as SAIC) and the National Development and Reform Commission (hereinafter refers to as NDRC) published 11 administrative law enforcement cases of abusing dominant market position, of which 2 were published on the website of the NDRC, and 9 were published by the SAIC. Up to May 1, 2018, 131 civil disputes over the abuse of dominant market position in 2017 were found in the Chinese referee's document network, of which 127 involved the dispute over the domain name registration of the China Internet Information Center. These administrative law

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enforcement and civil disputes cases show the problem of coordination of China's regulations about abuse of dominant market position, unfair transaction and fair competition review.

II. LEGISLATION AND POLICY

(1) Anti-unfair Competition Law

Article VI of *Anti-unfair Competition Law* in 1993 stipulates that "public enterprises or other operators with exclusive status according to law shall not force the others to purchase the commodities pointed by the enterprises or prohibit the competition from the other companies".

Article XI: operators shall not sell goods at the price lower than the commodity's cost in order to put the other competitors out of the competition. Any of the following cases does not belong to the unfair competition behavior: (I) selling fresh goods; (II) dealing with commodity or other backlog of goods that are about to expire; (III) seasonal price reduction; (IV) selling goods for cleaning debts, changing or suspending business.

Article XII Operators shall not sell goods in violation of the wishes of buyers, or add other unreasonable conditions.

Article VI of *Anti-unfair Competition Law (revise draft for review)* on February 25, 2016 stipulates that "the operator shall not use the relative superiority to carry out the following unfair transactions: (I) limit transaction counterparty without proper reason; (II) limit transaction counterparty to purchase specified commodity without proper reason; (III) limit transaction terms between the counterparty and other operators without proper reasons; (IV) charge indiscriminately or demand other unreasonable economic benefits from the transaction counterparty; (V) add other unreasonable trading conditions. The relative dominance position of this Law means that in the process of specific transaction, the party is in a dominant position in the aspects of capital, technology, market access, marketing channels and raw material procurement, etc. The relative parties are dependent on the operator and are difficult to turn to other operators.

In *Anti-unfair Competition Law* of November 4, 2017, Article VI, Article XI, Article XII of 1993 *Anti-unfair Competition Law* and Article VI in 2016 *Anti-unfair Competition Law* (revise draft for review) have been deleted.

(2) 1997 Pricing Law

Article XIV The operator shall not conduct any of the following improper price acts:

(I) Collude with each other, manipulate market prices, and harm the legitimate rights and interests of other operators or consumers;

(II) In order to exclude competitors or monopolize the market, dump at a price below the cost, disrupt the normal order of production and operation, and damage the interests of the state or the legitimate rights and interests of other operators, except for the behavior of selling fresh commodities, seasonal commodities and backlog of commodities in lower price according to the law;

(III) Fabricate and spread information of rising price, drive up prices, and push commodity prices up too high;

(IV) Use false or misleading price means to deceive consumers or other operators to trade with them;

(V) Conduct price discrimination for other operators with equal trading conditions when offering the same goods or services;

(VI) Rise or lower prices in a disguised way when buying or selling goods or providing services by raising or lowering grades;

(VII) Profiteer in violation of laws and regulations;

(VIII) Other improper price actions prohibited by laws and administrative regulations.

(3) January 12, 2017 *"13th Five-Year" Market Regulation Plan*

In view of the outstanding problems in the economic development, the public enterprises and the specialized monopoly industries are taken as the regulatory focus, and the supervision of the water supply, power supply, gas supply, tobacco, post and other industries is strengthened, and the restrictions on the competition and monopoly are severely compromised, such as indiscriminate charge, forced trading, bundling sales, and additional unreasonable transaction conditions.

(4) November 16, 2017 *Guide for Price Behavior of Shortage Drugs and Bulk Drugs (Twentieth announcement of the NDRC in 2017)*

Article II Relevant market definition

It is necessary to define shortage drugs and bulk drags relevant market comply with the general principles and methods, namely, it need to define the relevant commodity market and the relevant regional market, as well as to consider the special properties of the medical field and the specific situation of each case.

(I)The definition of the related commodity market.

When defining the relevant commodity market, we should mainly consider the demand substitution, and consider supply substitution analysis if necessary. The factors that can be considered for demand substitution include but not limited to the functional properties of drugs, price differences, pay subjects, related product quality standards, treatment methods, clinical medication preferences, and the subject’s dependence on the drug. For drugs and bulk drugs, it also needs to consider the types, uses and therapeutic effects of the pharmaceuticals or terminal drugs. Supply substitution needs to consider the difficulty of other pharmaceutical and bulk drug production enterprises to obtain production qualifications, the cost of transforming production facilities or processes, the risks undertaken, the time needed to transfer production, and the market competitiveness and marketing channels of the products provided after the transfer.

(II) Definition of relevant regional market.

When defining the relevant regional market, from the perspective of demand substitution, the light weight, high value of drugs, the characteristics and costs of refrigerated transport, the actual areas of the majority of the demand for drug and bulk drugs, the policy of purchasing drugs and bulk drugs in different regions, the regulatory policy, environmental requirements and taxes, etc. should be taken into account. From the perspective of supply substitution, we should consider the immediacy and feasibility of other regional operators turning to the supply of related drugs and bulk drugs, and the conversion cost.

When the market scope of the operator is not clear enough and not easy to determine, and the information is asymmetric, it is difficult to carry out sufficient demand substitution or supply substitution analysis. The method of hypothesis monopolist test can be used.

Article VII The factors that determine the operator's dominant market position

When recognizing whether the shortage drugs and bulk drugs operators has a dominant market position, the following factors should be taken into account:

(I) The market share of the operators in the relevant market and the competitive situation of the relevant market；

(II) The ability of the operator to control the sales market or the raw material procurement market；

(III) The financial and technical conditions of the operator；

(IV) the dependence of other operators on the transaction of the operator；

(V) The difficulty of other operators entering relevant markets；

(VI) Other factors related to the identification of the dominant position of the operator.

Market share is a key element to measure the market power of operators in the field of shortage drugs and bulk drugs. When evaluating the market share, we can consider the factors such as the actual capacity, potential capacity, and intellectual property rights of the operators. In addition, the law enforcement authorities shall consider the evidence that the operators having substantial control over the relevant enterprises to gain dominant market position.

In accordance with the market share standard stipulated in Article XIX of *Anti-monopoly Law*, the operators of shortage drugs and bulk drugs can be presumed to have the dominant market position, except otherwise testified by opposite evidence that the operator has no dominant market position.

Article VIII The factors that determine the abuse of dominant market position by unfair trading at high prices or low prices.

It is an act prohibited by *Anti-monopoly Law* that operators with dominant market position selling drugs with unfairly high prices or buying drugs with unfairly low prices. To identify "unfair high prices" and "unfair low prices", the following factors can be considered:

(I) The selling price or purchase price is obviously higher than or lower than that of other operators during the same period；

(II) If the market environment is stable and the cost is not significantly affected, whether it exceed the normal range, raise the selling price or reduce the purchase price；

(III) Whether the selling price increase of the shortage drugs and bulk drugs is obviously higher than the cost increase, or whether the purchasing price reduction of the drugs is obviously higher than the cost reduction of the trade counterparties；

(IV) Whether there is an excessive price difference between the different periods of the same regional market, or between different regional markets at the same time section;

(V) Other related factors to be considered.

Article IX The factors that determine the abuse of dominant market position by refusal to trade

The operators of the shortage drugs and bulk drugs with the dominant market position with no justifiable reason to refuse to deal with the trade counterparties by setting high selling prices or low purchasing prices, belongs to the behaviors prohibited by *Anti-monopoly Law.*

Whether there are legitimate reasons for refusing to trade, the following factors can be considered according to the specific circumstances:

(I) Whether there is a bad business record or a deteriorating business condition, may cause greater risk to the transaction security;

（II） Whether the counterparty of the transaction is able to purchase the same or alternative shortage drugs and bulk drugs from other operators at a reasonable price, or to sell the related drugs to other operators at a reasonable price；

(III) Whether the trading terms proposed by the counterparty, such as packaging, transportation and product characteristics, conform to the usual market trading habits;

(IV) Whether the existing capacity of the operator is able to meet the market supply, or the product needs to provide production for self-use, and whether its supply or self-use seriously exclude the competition from the downstream market;

(V) Other related factors to be considered.

Article X The factors that determine operators' abuse of dominant market position by limiting transactions

The operator of shortage drugs and bulk drugs with a dominant market position has no justifiable reason to restrict the transaction by means of a price subsidy, a price discount, or a sole transaction to manipulate the price, or to trade only with a designated operator, which is prohibited by *Anti-monopoly Law.*

Article XI Operator's abuse of dominant market position by adding unreasonable cost

The operators of the shortage drugs and bulk drugs with the dominant market position, if adding unreasonable cost except for price of the transaction, belong to the act prohibited by *Anti-monopoly Law.*

Article XII Operator's abuse of dominant market position by implying differential treatment.

To carry out differential treatment on the trading conditions such as the transaction price of the same counterparty with the same condition, belongs to the act prohibited by *Anti-monopoly Law.*

Article XIII The behavior of the operator in violation of *Price Law*

The operators of the shortage drugs and bulk drugs under any of the following circumstances are prohibited by *Price Law*:

(I) The operators of the shortage drugs and bulk drugs fabricate and disseminate information on price increases, push prices of shortages drugs and bulk drugs rising too fast and too high, disrupt market price order;

(II) Except for production for self-use, the operators hoard shortage drugs and bulk drugs which are tight in supply and have abnormal price fluctuations with storage quantity or storage cycle beyond normal, to promote the prices of the drugs rising too fast and too high, continue to hoard after the warning of price department;

(III) The operators of the shortage drugs and bulk drugs use other means to drive up prices, push prices of drugs rising too fast and too high；

(IV) The operators of the shortage drugs and bulk drugs collude with each other to manipulate the market price of the drugs, and harm the legitimate rights and interests of other operators or consumers；

(V) The operators of the shortage drugs and bulk drugs use deceitful or misleading price mean to deceive consumers or other operators to trade with them;

(VI) The operators of the shortage drugs and bulk drugs do not implement government guidance price and government pricing;

(VII) The operators of the shortage drugs and bulk drugs do not implement statutory price intervention measures and emergency measures.

(VIII) The operators of the shortage drugs and bulk drugs violate the marked price requirement.

III. MAJOR CASES

(1)Wujiang Huayan Water supply Co., Ltd. abuses the dominant market position.[1]

Wujiang Huayan Water Co., Ltd., the administrative counterpart of the case, is authorized by the former Wujiang Municipal People's government to obtain the exclusive franchise right of the Wujiang region's water supply. The operation period is 30 years. It is the only water supply franchisor in the area under the jurisdiction of the Wujiang District, which has the features of irreplaceable and non-selectivity of the natural monopoly as a regional water supply public enterprise.

In the water supply management, the administrative counterpart made use of its dominant position in the public water supply service in the Wujiang area, indicated or suggested that the real estate development enterprise should give the water supply installation project, the secondary water supply project, the water supply loading project and so on to its wholly owned subsidiary, Wujiang Huayan Construction Engineering Installation Co., Ltd. or its designated enterprise. For the main materials and equipment such as water meters and pipes required for the water supply project, the real estate development enterprises and construction units were required to use the appointed brands and manufacturers provided or designated by the parties.

In the process of providing water supply services, the administrative counterpart has added other unreasonable transaction conditions, and has no justifiable reason to exclude and restrict the fair competition of other legal operators in the construction of water supply engineering and the material equipment market. The market of construction and material equipment of water supply project should be an open competitive market. As long as the

1. State Administration for Industry and commerce competition law enforcement notice No.3 in 2017, Wujiang Hua Yan Water Company Limited abuse of dominant market position case, Suzhou Industrial and commercial [2016]00050.

operators with legal qualifications or materials and equipment which conform to the state, industry and local standard, all of them can enter the fair competition in the market. There are about 90 enterprises in Wujiang District, which have the third-level qualification of general contracting for building construction projects or the third-level and above qualification certificates for municipal public works general contracting. Many real estate development enterprises also have the qualifications for water supply engineering construction. A large number of enterprises with the quality of water supply engineering and the suppliers of materials and equipment conforming to the standard are excluded from the competition in the relevant regional market, which unfairly restricts the competition of such goods or services.

Where the case is worth paying attention to is after Article VI of *Anti-unfair Competition Law* in 1993 was deleted from *Anti-unfair Competition Law* in 2017, the competition law enforcement agencies will apply the abuse of dominant market position clause in *Anti-monopoly Law* to regulate such actions concerning limited transactions led by public enterprises. In order to prove that such acts have the illegality in the antitrust law, the competition law enforcement agencies need to prove that the operator has a dominant position in the market, the conduct of a limited transaction, the action that causes the exclusion or restriction of competition and has no justification. This case shows a specific way of competition law enforcement agencies to prove that specific behavior has the effect of excluding competition. Whether this method is reasonable and whether it is necessary to further introduce economic analysis, are worthy of further study.

(2) Monopolistic disputes between Zheng Minjie and China Internet Information Center [1]

The China Internet Information Center was established on June 3, 1997. It is authorized by the former Ministry Of Information Industry (currently known as Ministry Of Industry And Information Technology) to run, maintain and manage ".cn" and Chinese domain name service devices as the registration management organization of top domain name ".cn" and Chinese domain name. On December 12, 2002, China Internet Information Center issued *A Notice on the implementation plan of the CN level 2 domain name registration*, which includes: the words violating the Article XIX of *Management Measures for China Internet network domain name* should not be registered as the CN domain name. In order to safeguard the stability and scalability of the DNS system and protect the public interest, restrictive registration measures are adopted against several words. To apply for registration, the name of the registration shall

1. People’s Court (2017) Jing Min Zhong 380 civil judgment.

be submitted to the registrar for registration. The China Internet Information Center will decide whether to grant the registration according to the actual needs of the domain name system or according to the specific circumstances of the applicant.

On June 24, 2010, Zheng Minjie, the plaintiff, submitted a registration application to the China Internet Information Center on the domain name, but the China Internet Information Center did not grant for the reason that the domain name is reserved for the People's government of Tonghua city. The plaintiff believed that the defendant's refusal to register constituted an abuse of dominant market position.

The first instance court held that Zheng Minjie did not give evidence on the substitution relationship between the ".cn" domain name registration service and the other domain name registration services, as well as the regional market scope. And the plaintiff did not give the evidence to prove the relevant market, and the Internet center had dominant market position in the relevant market of the claim, as well as what kind of exclusion or restriction of market has raised because of the Internet Center refused to grant the registration. Therefore, the evidence on the case cannot prove that the action of the Internet Center belongs to Article XVII Paragraph 1 Subparagraph 3 of *Anti-monopoly Law*.

The court of second instance believes that the organization that is authorized by laws and regulations to manage public affairs is not equal to other operators, and it cannot be used as a basis for determining whether the operator has a dominant market position. Zheng Minjie claimed that the Internet center has a dominant market position based on that Internet center has the right to decide whether to allow the applicant to register the domain name, and has the domain name management functions, which is not found by the law, the court of second instance do not support. Therefore, Zheng Minjie still needs to give evidence on the specific market scope of the case and whether the Internet Center has a dominant position.

What is worth paying attention to of this case is: how to regulate the abuse of dominant market position stipulated in *Anti-monopoly Law* for the policies and measures issued by organizations with the function of managing public affairs. On October 23, 2017, the five departments of the NDRC jointly issued the *Detailed Rules for the Implementation of Fair Competition Review System (Provisional)*. The implementation rules clearly stipulate that the administrative organs and the organizations authorized by the laws and regulations have the function of managing public affairs, when formulate regulations, normative documents and other policies concerning market subjects economic activities, such as market access, industrial development, inviting investment, bidding, government procurement, standard of conduct of management, qualification standards and so on, fair competition review should be carried out to assess the impact on market competition and prevent exclusion or restriction of market competition. However, the fair competition review system only provides preventive measures in advance, how to provide judicial guarantee for the fair competition review system, and to realize the judicature of fair competition review is one of the problems faced by the Chinese market supervision system.

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF CONTROL ON CONCENTRATION OF UNDERTAKINGS

Adrian EMCH∗

I. OVERVIEW

As antitrust agency in charge of merger control in China, The Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") worked on implementing rules on the review of concentration between business operators to improve the merger review regime .[1] From the enactment of the Anti-Monopoly Law ("AML") until the end of 2017, MOFCOM has cleared around 2,050 notifications. Among these cases, 35 transactions were approved subject to conditions and two transactions were prohibited.[2] . In 2017, according to its statistics, MOFCOM cleared 344 cases, which represents a decrease of around 13% relative to 2016.[3] Among these cases, seven were conditional approval decisions: the merger between the Dow Chemical and Du Pont De Nemours, the acquisition by Broadcom of Brocade, the acquisition by HP of Samsung Electronics 's printer business, the merger between Agrium and Potash Corporation, the acquisition by Maersk Line of Hamburg Süd, the acquisition by Advanced Semiconductor Engineering of Siliconware Precision Industries, and the merger between Becton & Dickinson and C, R, Bard, Inc.[4] No transaction was blocked in 2017. In 2017,

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1. According to *Plan on Deepening Reform of Party and State Institutions* issued by the CPC Central Committee in March 2018, MOFCOM's Anti-Monopoly Bureau is to be merged into the State Administration for Market Regulation, *see* http://www.gov.cn/zhengce/2018-03/21/content_5276191.htm#1.
2. *Coca-Cola/Huiyuan*, [2009] MOFCOM Public Announcement No.22, 18 March 2009, *see* http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml; and *Maersk/MSC/CMA CGM*, [2014] MOFCOM Public Announcement No. 46, 17 June 2014, *see* http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml.
3. MOFCOM Press Release, *MOFCOM year-end working summary No. 9: Implement New Concept of Development and Solidly Accomplish Antitrust Works*, 9 January 2018, *see* http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml .
4. *Dow/Du Pont*, [2017] MOFCOM Public Announcement No. 25, 29 April 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502568075.shtml; *Broadcom/Brocade*, [2017] MOFCOM Public

MOFCOM further streamlined its merger review process and shortened the average duration of its procedures: according to its own, the average filing period and closing period were reduced by 14.2% and 8% year-on-year, and 97.8% of the simple cases were cleared within phase 1 in 2017.addition, MOFCOM also continued sanctioning failures to file reportable transactions.

II. LEGISLATION AND POLICY

In 2017, MOFCOM cleared 7 transactions subject to conditions. This is the highest number of conditional clearance decisions per year since the entry into force of the AML in 2008, even though the overall quantity of the reviewed cases decreased. In addition, MOFCOM's continued to improve the merger control regime through the adoption and amendment of AML implementation rules. During the course of 2017, MOFCOM completed the revised draft of the *Measures on the Review of Concentrations between Business Operators*, to further improve the procedural rules. MOFCOM also issued the *Detailed Rules for the Implementation of the Fair Competition Review System (for Interim Implementation)* jointly with the National Development and Reform Commission, the Ministry of Finance and the State Administration for Industry and Commerce, to further strengthen the fair competition review system. [1]

In the arena of global antitrust cooperation, MOFCOM signed antitrust cooperation memoranda with the antitrust enforcement agencies of the United Kingdom, Spain, Brazil, etc., and participated in the BRICS Summit in Brazil. There, MOFCOM also signed the *Joint Statement of BRIC Leaders in Competition Agencies*. MOFCOM is said to have cooperated w in over 20 cross-border merger cases, with the antitrust authorities of the United States, European Union, South Africa, India, etc. [2] In 2017, though major and complex cases increased remarkably, MOFCOM continued to advance the simple case procedure regime. MOFCOM had introduced this procedure in early 2014. Under the simple case procedure,

Announcement No. 46, 22 August 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201708/20170802632065.shtml; *HP/Samsung (Printer Business)*, [2017] MOFCOM Public Announcement No. 58, 5 October 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201710/20171002654063.shtml; *Agrium/Potash Corporation*, [2017] MOFCOM Public Announcement No. 75, 6 November 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102666641.shtml; *Maersk Line/Hamburg Süd*, [2017] MOFCOM Public Announcement No.77, 7 November 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102667566.shtml; *Advanced Semiconductor/Siliconware*, [2017] MOFCOM Public Announcement No.81, 24 November 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102675701.shtml; and *Becton & Dickinson/Bard*, [2017] MOFCOM Public Announcement No. 92, 27 December 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201712/20171202691390.shtml.

1. Notice on Issuing the Detailed Rules for the Implementation of the Fair Competition Review System (for Interim Implementation), [2017] FaGaiWei Jia Jian No. 1849, see http://www.gov.cn/xinwen/201710/5234731.htm .
2. MOFCOM Press Release, MOFCOM year-end working summary No. 9: Implement New Concept of Development and Solidly Accomplish Antitrust Works, 9 January 2018, see http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml.

cases that do not raise obvious antitrust concerns can usually be cleared in phase 1 (within 30 calendar days after case acceptance). In 2017, the number of simple cases accounted for around 70% of notifications.[1]

III. MAJOR CASES

(1) Dow/Du Pont

In May 2017, MOFCOM conditionally approved the merger between Dow and Du Pont. According to MOFCOM's assessment, the acquisition would have the effect of eliminating or restricting competition in the markets of selective herbicide for rice, pesticide for rice, acid copolymer and ionomer. However, MOFCOM found that the final remedies submitted by the notifying parties were able to remove the negative effect that the transaction was said to have on competition, and hence MOFCOM eventually granted conditional approval. The key remedy was to require Du Pont to implement a series of structural remedies and behavioural remedies in the markets of selective herbicide for rice and pesticide for rice, as well as to require Dow to divest its acid copolymer and ionomer businesses.

(2) Agrium/Potash Corporation

In November 2017, MOFCOM conditionally approved the merger between two Canadian companies, Agrium and Potash Corporation. Both parties to the transaction were producers of potash fertilizers (potassium chloride). The relevant geographic market for potassium chloride products was global, but MOFCOM's main focus was on the transaction's impact on the Chinese market. MOFCOM noted that the transaction would further enhance the control of both parties on the global potassium chloride market, further weaken the bargaining control of the buyers, and raise the barriers for entry into the relevant market in the short term. Thus, MOFCOM approved the transaction subject to the conditions that Potash Corporation transfer the shares in certain Israeli, Arab and Chilean companies reduce its investment and rights in an unidentified company in China.

(3) Maersk Line/Hamburg Süd

In November 2017, MOFCOM conditionally approved Maersk Line's acquisition of 100% equity of Hamburg Süd. Upon review, MOFCOM noted that the transaction may weaken

1. MOFCOM Press Release, MOFCOM year-end working summary No. 9: Implement New Concept of Development and Solidly Accomplish Antitrust Works, 9 January 2018, see http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml.

competition in the general container transport market and the refrigerated container transport market via the vessel sharing agreements to which Hamburg Süd is a party with respect to the Far East - South America West Coast route and the Far East - South America East Coast route. MOFCOM was also concerned that the transaction could lead to an increase in prices and other anti-competitive effects in the refrigerated container transport services on the Far East - South America West Coast route. Therefore, following Maersk Line's remedy proposal, MOFCOM approved the transaction subject to behavioural remedies including withdrawal from some existing vessel sharing agreements, prohibition to join new vessel sharing agreements, reduction of transport volume, etc.

(4) HP/ Samsung Electronics (Printer Business)

In October 2017, MOFCOM conditionally approved HP's acquisition of all equity and assets of Samsung Electronics' printer business. MOFCOM found that the parties' combined share in the market of A4 format laser printers was as high as 50-55%. MOFCOM noted that the transaction would further enhance HP's market control, so that HP would have the ability and incentive to eliminate or restrict competition in the Chinese market of A4 format laser printers. MOFCOM also noted that HP would have the ability and incentive to bundle printers with materials, thereby eliminating or restricting competition in the Chinese market of A4 format laser printing materials and damaging consumer interests. Thus, MOFCOM approved the transaction subject to restrictive conditions. In particular, HP was required to accept certain behavioural remedies including continuing to sell A4 laser printer products on fair and reasonable supply conditions.

(5) Broadcom/Brocade

In August 2017, MOFCOM conditionally approved Broadcom's acquisition of Brocade. Upon review, MOFCOM believed that the transaction might have the effect of eliminating or restricting competition in the markets of fibre channel storage area network switches ("FC SAN") and fibre channel host bus adaptors ("FC HBA") globally and in China. Thus, MOFCOM decided to conditionally approve the transaction subject to remedies. The major obligations for Brocade were to commit not to discriminate against third-party FC HBA suppliers, as well as to take firewall measures for confidential information from third-party FC HBA suppliers. At the same time, Brocade was obliged to take firewall measures for confidential information on third-party FC SAN switches and not to engage in tying or bundling- sales in any form in the Chinese market.

(6) Advanced Semiconductor/Siliconware

In November 2017, MOFCOM conditionally approved Advanced Semiconductor's acquisition of Siliconware. The parties overlapped in the area of outsourcing services for semiconductor packaging and testing ("P&T"). MOFCOM defined the relevant product market as that for semiconductor package and test outsourcing services without further segmentation. The relevant geographic market was found to be global. Given that the transaction was found to have the potential effect of eliminating or restricting competition in the global market of P&T outsourcing services, MOFCOM decided to approve the transaction subject to condition. In particular, MOFCOM required Advanced Semiconductor and Siliconware to perform certain behavioural obligations within the remedy period of 24 months.

(7) Becton & Dickinson/Bard

In December 2017, MOFCOM conditionally approved the merger between Becton & Dickinson and Bard. MOFCOM found the notifying parties to overlap in the Chinese market of core needle biopsy devices. MOFCOM concluded that the transaction may eliminate or restrict competition in the global market of core needle biopsy devices. However, MOFCOM decided to approve the transaction subject to conditions, and required the parties to divest global product lines as well as developed products of soft tissue core needle biopsy, and find qualified buyers within 3 months.

(8) Sanctions for failure to file

During 2017, MOFCOM posted six decisions on its website in which it announced sanctions on companies for failing to file transactions by law, i.e. Cummins (China)/Kanghao, Korea OCI/Tokuyama Malaysia, GRAM Hong Kong/PanAust, Health-100/Ciming, Wuhu Construction Investment/Chery New Energy/Yaskawa and Schwitzer/Binhai Investment.[1]All 6 failure-to-file cases were initiated upon the parties' self-report or consultation request, except for the Health-100/Ciming case where MOFCOM initiated the investigation upon a complaint from third parties. . As in prior years, the level of the fines imposed was not very high, ranging from RMB 150,000 to 300,000. MOFCOM found that none of these transactions would eliminate or restrict competition.

1. Schwitzer/Binhai Investment, [2017] MOFCOM Administrative Penalty Decision No. 410, 11 July 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201707/20170702612619.shtml; Wuhu Construction Investment/Chery New Energy/Yaskawa, [2017] MOFCOM Administrative Penalty Decision No. 408, 11 July 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201707/20170702612611.shtml; Health-100& Tianyi& Weitu/Ciming, [2017] MOFCOM Administrative Penalty Decision No. 206, 5 May 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502573416.shtml; GRAM Hong Kong/PanAust, [2017] MOFCOM Administrative Penalty Decision No. 205, 5 May 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502573413.shtml; Korea OCI/Tokuyama Malaysia, [2017] MOFCOM Administrative Decision No. 171, 21 April 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502568693.shtml; Cummins (China)/Kanghao, [2017] MOFCOM Administrative Decision No. 6, 9 January 2017, *see* http://fldj.mofcom.gov.cn/article/ztxx/201704/20170402556103.shtml .

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE IN TACKLING ADMINISTRATIVE MONOPOLY CONDUCT

*MENG Yanbei**

I. OVERVIEW

In 2017, there were many highlights in Chinese legislation and practice of prohibiting administrative monopoly. In order to effectively prevent and regulate the administrative monopoly behavior, the legislative work was mainly focused on the improvement of fair competition review system, especially after the National Development and Reform Commission, Ministry of Finance, Ministry of Commerce, the State Administration of Industry and Commerce, and the Legal Affairs Office of the State Council on October 23, 2017 jointly issued the *Fair Competition Review System Implementing Rules (Provisional)*, the subject, object, principle and standards of review were gradually clear, which effectively promoted the implementation of fair competition review system. At the same time, many administrative monopoly behaviors were investigated, especially when the National Development and Reform Commission guided the pricing authorities of every province of China to finish and publish 56 acts of abusing administrative power for the purpose of eliminating or limiting competition in 2017, correcting such behaviors as designated trading and local protection of a number of local government authorities in public utilities, intermediary services, medical management, transportation and other areas, which had a great influence nationwide and even worldwide. On June 28, 2017, Guangdong Higher People's

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Court made a second-instance judgment on the case of Thsware Technology Co., Ltd.'s accusing Guangdong Education Department of suspicious administrative monopoly. This is the first administrative monopoly lawsuit for substantive judicial procedure after the promulgation of China's *Anti-Monopoly Law*, which is of great significance.

II. LEGISLATION AND POLICY

On January 24th, 2017, the State Council issued *Letter of General Office of the State Council on Approving the Establishment of Inter-Ministerial Joint Meeting System for Fair Competition Review Work* and agreed that the National Development and Reform Commission should take the lead in establishing the inter-ministerial joint meeting system for fair competition review work. Meanwhile, the main responsibilities, member units, working rules and work requirements of the system have also been stipulated. The establishment of the system will contribute to the coordination and cooperation of the ministries and commissions in fair competition review work, and further promote the standardization and perfection of the market competition order.

On July 3rd, 2017, the National Development and Reform Commission, Ministry of Finance, Ministry of Commerce and the State Administration of Industry and Commerce jointly issued *Notice of Work Focus of Promoting the Implementation of the Fair Competition Review System in 2017*, which included: introducing the detailed rules for the implementation of fair competition review system; issuing the work program of clearing cumulated policies and measures in 2017 and 2018; carrying out the clearing work of cumulated policies and measures which eliminating or limiting competition; earnestly completing the review work of incremental policies and measures; organizing the implementation of special supervision of fair competition review system; strengthening the publicity and training of fair competition review system.

On October 23rd, 2017, the National Development and Reform Commission, Ministry of Finance and Ministry of Commerce jointly issued *Fair Competition Review System Implementing Rules (Provisional)*, which required administrative organs and legally authorized organizations with the public affairs administration functions to carry out fair competition review and evaluate the impact on market competition when formulating the rules, normative documents and other policy measures involved in such market economic activities as market access, industrial development, investment invitation, tendering and bidding, government procurement, management norms and qualification standards in order to prevent the elimination or limitation of market competition. After review, rules considered having no effect of eliminating or limiting competition could be implemented; those with effect of eliminating or limiting competition should not be promulgated or otherwise until being adjusted to meet relevant requirements; those without fair competition review should not be promulgated. The fair competition review of the policy measures jointly formulated by various organs was in the charge of leading organs and participated by other organs within their respective scope of responsibilities. The fair competition review standards in *Fair Competition Review System Implementing Rules (Provisional)* were divided in the form of specialized section into standard of market access and exit, standard of free flow of commodity and elements, standard of affecting production and operation cost, standard of affecting production and management behavior with specific provision respectively, which could guide and regulate the work of policy-making authorities.

On December 5th, 2017, the National Development and Reform Commission, Ministry of Finance, Ministry of Commerce jointly with other organizations concerned issued *Work Program for clearing the Existing Policies and Measures Excluding or Restricting Competition*, which required each department of the State Council and local people's government at different levels and their departments to, according to the principle of "who formulates the rules, who is in charge of the clearance ", clear such contents as local protection, designated trading and market barriers in current regulations, normative documents and other policies and measures. The above contents included: setting unreasonable and discriminatory access and exit conditions; restricting the operation, purchase and use of goods and services provided by specific operators; implementing discriminatory price and subsidy policy on non-local and imported goods and services; restricting non-local and imported goods and services into the local market or hindering local goods export and services output; eliminating or restricting non-local operators' participating in local tendering and bidding activities; forcing operators to engage in the monopoly behaviors banned in *Anti-Monopoly Law.*

III. MAJOR CASES

In 2017, Chinese anti-monopoly law enforcement agencies were investigating administrative monopoly behaviors with unprecedented efforts, trying hard to put the power into the cage, and the local governments also increased the intensity of self-review and self-correction. According to incomplete statistics, the National Development and Reform Commission guided the pricing authorities of every province of China to finish and publish 56 acts of abusing administrative power for eliminating or limiting competition, the industry and commerce supervision department investigated 13 cases of administrative monopoly, the courts at different levels concluded a total of 5 cases of administrative monopoly, which included typical cases.

(1) Health and Family Planning Commission of Shenzhen promised to correct the act of abusing administrative power for eliminating or limiting competition in pilot reform of group purchasing organization of public hospital

The main way of centralized drug purchasing in China's public hospitals was "provincial double-envelopes short-listed and municipal medical institutions jointly purchased with quantity", but at the same time, "second bargaining" and other issues also came into being. Group Purchasing Organization ("GPO" for short) was a new purchasing way to cover the shortage of centralized drug purchasing system with pilot projects mainly in Shanghai, Shenzhen and some municipal purchasing joint complexes. Shanghai and Shenzhen were the first pilot cities adopting GPO drug purchasing mode, but the two cities had different practices.

On April 7th, 2017, *Health and Family Planning Commission of Shenzhen Promised to Correct the Act of Abusing Administrative Power for the Purpose of Eliminating or Limiting Competition in Pilot Reform of Group Purchasing Organization of Public Hospital* published in the National Development and Reform Commission website pointed out that the Municipal Health and Family Planning Commission of Shenzhen was suspected of abusing administrative power for the purpose of eliminating or limiting competition during the process of pilot reform of group purchasing organization of public hospital. After investigation, Health and Family Planning Commission of Shenzhen had the following violations of the *Anti-Monopoly Law*: (1) Allowing only one group purchasing organization (selected as quanyaowang pharmaceutical industry) to provide drug group purchasing services. The group purchasing organization was commissioned by the hospital to purchase the required drugs and provide group purchasing services. All the operators who meet the national qualification and can provide group purchasing services for the hospital could equally enter the drug group purchasing market of Shenzhen public hospitals. Only when a competition existed among the group purchasing organizations could better and more efficient services be provided. Health and Family Planning Commission of Shenzhen, via selection, determined a group purchasing organization from qualified enterprises and eliminated other operators with the ability and willingness to provide drug group purchasing services, which caused only one operator in the drug group purchasing market of Shenzhen public hospitals with no competition. (2) Limiting Shenzhen public hospitals and drug manufacturing enterprises in the use of the services provided by quanyaowang pharmaceutical industry. Firstly, all Shenzhen public hospitals were neither allowed to choose other qualified group purchasing organizations except for quanyaowang pharmaceutical industry, nor purchased the drugs independently on the provincial drug centralized purchasing platform. Secondly, drug manufacturing enterprises were limited in disguised form to sell drugs to Shenzhen public hospitals only through quanyaowang pharmaceutical industry instead of provincial drug centralized purchasing platform, which disrupted the normal competition order in the pharmaceutical market. (3) Drug distribution enterprises were designated by quanyaowang pharmaceutical industry, which violated the provision of drug manufacturing enterprises independently choosing their distribution enterprises in *Guiding Opinions of General Office of the State Council on Improving the Public Hospital Drug Purchasing Work* ([2015] No.7 Document of General Office of the State Council). The practice of Health and Family Planning Commission of Shenzhen violated the provisions in the *Anti-Monopoly Law*, of article 8 that "administrative organs and legally authorized organizations with the public affairs administration function shall not abuse their administrative power to eliminate or limit competition," and of article 32 that "the administrative organs shall not abuse their administrative power to limit or limit in a disguised form the units or individual to operate, purchase and use goods provided by designated operators", which constituted the behavior of abusing administrative power to eliminate or limit competition.

Health and Family Planning Commission of Shenzhen has recognized that the above practices have eliminated and limited the fair competition of the drug group purchasing market of Shenzhen public hospitals, and put forward three specific rectification measures, that is, (1) ensuring the autonomy of drug purchasing of public hospitals. Under the principle of centralized purchasing, there were no mandatory requirements for drug purchasing of public hospitals, and public hospitals were allowed to independently choose and commission the existing group purchasing organizations (i.e. quanyaowang pharmaceutical industry) to purchase or purchase in Guangdong platform. (2) revising and perfecting the distribution system of group purchasing drugs of public hospitals, and restoring the autonomy of drug manufacturing enterprises to determine their distribution enterprises. (3) ensuring the autonomy of drug manufacturing enterprises, allowing drug manufacturing enterprises to independently choose the existing group purchasing organizations or other purchasing platforms to sell drugs to Shenzhen public hospitals. In addition, Health and Family Planning Commission promised to revise and improve relevant policy documents during the pilot period, make the documents conform to the provisions of *Anti-Monopoly Law* and *Opinions on the Establishment of Fair Competition Review System in the Market System* ([2016] No.34 Document of the State Council), support qualified group purchasing organization to enter relevant market, and promote the standardized and orderly development of drug group purchasing mode.

Observed from the system design and operation effect of current China drug group purchasing mode pilot, the determination of drug group purchasing organizations, the evaluation of bid drug, the setting of cutting-cost target and the determination of drug distribution enterprises were likely to have administrative monopoly behaviors such as limitations on free transaction, regional blockade, forcing operators to limit competition respectively. In order to avoid the problem of administrative monopoly which may be involved in the current pilot program, Health and Family Planning Commission and other administrative organs should pay special attention to the standardized exercise of power, which neither beyond the statutory authority nor unreasonable exercise to destroy the market competition order. The administrative organs should also avoid determining the only GPO for all group purchasing work, avoid the permissive opinions to the local enterprises during the drug review process of GPO, avoid directly-issued unreasonable cutting-cost target to GPO, and avoid assigning GPO to determine the drug distribution enterprises. Attention should be paid to implementing fair competition review system, fundamentally preventing policy with contents of eliminating or limiting competition, and reasonably constraining GPO to prevent their abuse of market dominance to damage the market competition.

(2) The case of Thsware Technology Co., Ltd.'s accusing Guangdong Education Department of abusing administrative power for eliminating or limiting competition

This case, from the prosecution of Thsware Technology Co. Ltd. (hereinafter Thsware Company for short) in 2014 in Shenzhen, Guangdong province to the second-instance judgment of Guangdong Higher People's court in June 28th, 2017, lasted more than three years and was a landmark case of the behavior of Chinese *Anti-Monopoly Law* regulating administrative monopoly.

On January 17th, 2013, the Ministry of Education issued a letter to the faculty (2013) No. 2, *Notice of Ministry of Education on the Establishment of Organizing Committee and Executive Committee of National Vocational Student Skills Competition in 2013-2015*, and decided to set up Organizing Committee and Executive Committee of National Vocational Student Skills Competition in 2013-2015. On February 15th, 2014, *Notice on Requirements of National Vocational Student Skills Competition Rules in 2014* announced by Executive Committee office stipulated the specific programs and policy regulations of the National Vocational Student Skills Competition in 2014, followed by the announcement of the *Rules of "Basic Skills of Construction Costs" of National Vocational Student Skills Competition in 2014*, which stipulated in item 8 of Article VI that" competition-required hardware, software and assistive tools are provided by the sponsor software company". Item 1 of Article IX stipulates as follows, software requirements: (1) Glodon civil engineering calculations software GCL2013; (2) Glodon rebar calculations software GGJ2013; (3) Glodon installing calculations software GQI2013. Thsware Company applied to the Ministry of Education for an administrative reconsideration on Organizing Committee's designating Glodon software program to be used for the competition on April 16th, 2014. However, because the "national competition" of Basic Skills of Construction Costs scheduled on June 13th did not take place, Thsware Company withdrew the application for administrative reconsideration on June 18th, 2014.

In April 2014, the Organizing Committee of “Basic Skills of Construction Costs” competition among Guangdong Education Department, higher vocational colleges and industry-and-enterprises designated Glodon software as their competition software. On April 29th, 2014, the plaintiff Thsware Company accused the Guangdong Education Department to Guangzhou Intermediate People's court of their abuse of administrative power to limit or limit in disguised form the competitors to purchase and use the designated Glodon Company’s exclusive software and corresponding equipment, and of their suspicious violation of the open, fair and impartial legal procedures. The behavior of Guangdong Education Department did not have any legal basis, which seriously distorted the market competition order of engineering cost-related products industry and infringed the fair competition right of Thsware Company. The court was requested to confirm that the specific administrative act of Guangdong Education Department’s abusing administrative power to designate or designate in disguised form the Glodon company’s exclusive software and corresponding equipment in the province division “Competition of Basic Skills of Construction Costs” was illegal. The Guangdong Education Department argued that all the competition rules in this competition were based on the documents of the Ministry of Education, and the Organizing Committee office of the "national competition", in the charge of Ministry of Education, on April 2nd, 2014, issued Rules on “Basic Skills of Construction Costs”, which explicitly stipulated the use of Glodon company’s exclusive software. The third party Glodon Company considered that Glodon Company, on February 27th, 2014, participated in the public selection, and the Organizing Committee finalized Glodon Company as the provider of competition platform, software and technical support for "basic skills of construction costs” competition. Thsware Company and Shanghai Luban Software Co. Ltd. also participated in the selection, so there was no administrative power abuse problem. On February 2nd, 2015, Guangdong Intermediate People's Court made the first-instance judgment: confirming that it was illegal that defendant Guangdong Education Department’s designating the exclusive use of the third party Glodon Software Co., Ltd.’s corresponding equipment in the higher vocational group of “Competition of Basic Skills of Construction Costs” of National Vocational Student Skills Competition in 2014; rejecting the compensation claim of plaintiff Thsware Technology Co., Ltd. The defendant Guangdong Education Department and the third party Glodon Software Co., Ltd. lodged an appeal. On June 22, 2017, Guangdong Higher People's Court made the second-instance judgment, confirming that the act of Guangdong Education Department’s designating the software of Glodon Company as the exclusive competition software was a behavior of abusing administrative power for eliminating or limiting competition, so the appeal of Guangdong Education Department and Glodon Software Co., Ltd. was rejected and the original judgment was ratified.

The issues of this case were as follows: (1) Did the case belong to the scope of accepting case of administrative litigation? The court held the opinion that the competition of basic skills of construction costs involved in this case was hosted by Guangdong Education Department and the technical specification and competition rules could be published only after the approval of Guangdong Education Department. Guangdong Education Department had the responsibility of managing the competition held by vocational college, and the exclusive use, in the competition of basic skills of construction costs involved in this case, of free software provided by Glodon Company is an administrative act of exercising administrative authority, so it belonged to the scope of accepting case of administrative litigation. (2) Was the Guangdong Education Department a proper defendant? The courts of the first and second instances did not explain too much on this issue, but they all considered, for the issue of whether it belonged to the scope of accepting case of administrative litigation, that the competition of basic skills of construction costs involved in this case was hosted by Guangdong Education Department and the technical specification and competition rules could be published only after the approval of Guangdong Education Department, and the designation of exclusive use, in the competition of basic skills of construction costs involved in this case, of corresponding software provided by the third party is an administrative act of exercising administrative authority, so the Guangdong Education Department was considered the proper defendant. (3) Did the behavior of Guangdong Education Department's designating the exclusive use of the software of Glodon Software Co., Ltd. constitute "the behavior of abusing administrative power to eliminate or limit competition"? The court of second-instance held the opinion that the abuse of administrative power to eliminate or limit competition should have the following three elements: the first is that the subject is administrative subject; the second is that administrative organs and correlative organizations have the behavior of limit or limit in disguised form the units or individuals to operate, purchase or use the goods provided by designated operators; the third is that administrative organs and correlative organizations abuse administrative power in the process of above behaviors, producing the effect of eliminating or limiting competition and damaging market competition order. The second-instance judgment mainly discussed the element of "abusing administrative power to eliminate or limit competition", considering that Guangdong Education Department should decide corresponding software through open and fair competitive selecting process when there was no explicit stipulation of laws, and the behavior of Guangdong Education Department's designating company for dealing, unless there was a justifiable reason, was considered abuse of power. In the case of Guangdong Education Department's designating the exclusive use of Glodon software, although the final decision of the expert group meeting remained the same as that of national competition, the decision had neither legitimate and rational argumentation, nor other evidence. In addition, Guangdong Education Department's designating the exclusive company for dealing not only eliminated the fair competition right of other competitors, but also caused participant teachers and students to form their corresponding habits, which had excellent effect on improving the market reputation of Glodon Company, thus increasing the market share of their software. However, this led to the decrease of other competitors' product market share with Thsware Company included, which further damaged the market competition order. Therefore, Guangdong Education Department's designating to use Glodon Company software was the behavior of abusing administrative power for eliminating or limiting competition.

The case shows that Chinese courts are playing an increasingly important role in the practice of regulating administrative monopoly behaviors because of the transcendence and independence of their interests.

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION

YAO Haifang *

I. OVERVIEW

On November 4, 2017, Anti-*Unfair Competition Law of the People's Republic of China* was revised at the 13th meeting of the Standing Committee of the 12th National People's Congress, and it was implemented since January 1, 2018. Its revision is helpful to cope with the new development of economic society and new changes of unfair competition, perfect the legal rules, and safeguard the competitive orders and lawful rights and interests of all market bodies. In 2017, the enforcement and judicature work of the *Anti-Unfair Competition Law* were steadily pushed forward. Open data shows that, in the five years (2013-2017) since the 18th National Congress of the Communist Party of China, industry and commerce administration and market regulation authorities had jointly investigated and treated 153,000 cases on unfair competition. [1] The people’s courts jointly accepted 2,429 first instance civil cases on unfair competition, increasing by 6.26% over the year 2016.

II. LEGISLATION AND POLICY

In the new revised *Anti-Unfair Competition Law*, the concept of “unfair competition” was perfected; on the basis of original 11 acts of unfair competition, following 5 behaviors were deleted, including restriction and exclusion in sales, restriction and exclusion in

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1. Zhang Mao: Deepening the Implementation of the Spirits of the 19th National Congress of CPC, to Make Efforts to Create a New Situation of Industry and Commerce and Market Supervision Work, source: http://www.saic.gov.cn/fldyfbzdjz/gzdt/201712/t20171230_271527.html.

depreciation, tie-in sale, collusion in submission of tenders, and abuse of administrative power in limiting competition; cyber acts of unfair competition was added; and also business confusion, commercial bribery, misleading commercial promotion, infringement of trade secrets, improper prize-giving sales, and commercial slander were appropriately modified. In addition, the law also increases the enforcement measures of the supervision and inspection departments, regulates their law enforcement behaviors, enriching and strengthening the means and intensity of punishment for unfair competition.

In 2017, the State Council issued the *Market Supervision Plan during the Period of the "13th Five-year Plan"* (G.F. [2017] No.6), affirming that "anti-monopoly and anti-unfair competition law enforcement has achieved remarkable results", requiring continuing to "crack down unfair competition like counterfeit, false propaganda, price fraud, commercial bribery, illegal prize-giving sales, infringement of commercial secrets, and operation of imported goods without legal sources." According to the *Letter of the General Office of the State Council on Approval of the Establishment of the Inter-Ministerial Joint Meeting System for Market Regulation* (G.B.H[2017]No.118), it's agreed to "establish the inter-ministerial joint meeting system for market supervision led by the State Administration for Industry and Commerce", and promote the effective implementation of *Market Supervision Plan during the Period of the "13th Five-year Plan"*.

State Administration for Industry and Commerce, National Development and Reform Commission, and Ministry of Industry and Information Technology jointly issued the *Special Action Plan on Internet Market Supervision 2017* (G.S.B.Z.[2017]No.84), demanding "to strengthen the investigation and treatment of cyber acts of unfair competition and internet pyramid selling", and stipulating that the State Administration for Industry and Commerce would "investigate and treat the behaviors disturbing the network market order like unfair competition, monopoly, and internet pyramid selling." According to *the Focus of Work of National Industry and Commerce Administration and Market Supervision Authorities to Combat infringement of Intellectual Property Rights and Manufacture and Sale of Fake and Inferior Commodities* (B.Z.[2017] No.100, it's required that competition enforcement bureau should "crack down the unfair competition like infringement of intellectual property rights, and focus on the acts of unfair competition in the Internet field." According to the *Notice of the General Office of State Administration for Industry and Commerce on Standardizing the "Double Eleven" Online Centralized Sales Promotion and Strengthening the Network Market Monitoring and Supervision* (B.Z.[2017] No.184), it's emphasized that "not conduct fictitious transaction, and false propaganda of platform-based trading volume or amount; not restrict and repel the competition, not attack or devalue the opponents, and not limit and reject the promoters from taking part in the promotional activities organized by other platforms".

In addition, to coordinate with the implementation of *Anti-Unfair Competition Law,* the State Administration for Industry and Commerce issued the *Notice of State Administration for Industry and Commerce on Actively Developing, Publicizing and Implementing the New 'Anti-Unfair Competition Law',* the industry and commerce administration and market supervision authorities have gradually developed the related learning and propaganda activities. Since January 1, 2018, the industry and commerce administration and market supervision authorities have started to follow the new law in investigation and treatment of related cases.

III. MAJOR CASES

(1) Case on click farming of Hefei Yilu E-commerce Co., Ltd. [1]

Founded in 2016, Hefei Yilu E-commerce Co., Ltd. (hereinafter referred to as "Yilu Company" is a company specializing in e-commerce training and consultation. From November to December 31, 2017, it helped 117 trainees (merchants) to brush 4,658 faked sales, realizing a turnover of more than RMB56, 000, and getting a profit of over RMB20, 000. At the end of 2017, The Hefei Municipal Administration for Industry and Commerce and the Network Supervision Bureau received a report and set up a team to investigate. On January 15, 2018, six computers were found in a residential area. By extracting the related business data, the team obtained lots of documents, forms, chatting records and other evidential materials suspected of click farming. Thus, Hefei Administration for Industry and Commerce firmly made sure that this company provided the trainees (merchants) with service of clicked business, to increase the number of transactions in the form of fictitious trading, and improve the merchant's credit by giving false good reputation. Its behavior already violated the *Measures on Administration of Online Transactions* and *Anti-Unfair Competition Law,* and it was an act of unfair competition that damaged the lawful rights and interests of other operators and disturbing the order of the socialist market economy. Therefore, Hefei Administration for Industry and Commerce decided to give an administrative penalty to Yilu Company to stop its illegal act and fine RMB50, 000. This case was the first case on clicked business handled by Hefei Administration for Industry and Commerce since the implementation of *Anti-Unfair Competition Law.*

Clicked business is a new type of false propaganda emerging with the internet development in recent years. Its operational process is roughly: an online shopping merchant and a company engaging in clicked business negotiate to determine the related matters, and

1. Refer to Zhao Yujing: *Rapid Handling of the First Case on Click Farming in Hefei This Year*, recorded in China Industry & Commerce News March 5, 2018.

then this merchant will provide its shop number, commodities involved, and other information to this company; this company screen and examine the brushers, and forward the information on the merchant and its goods involved. Brushers will simulate real shopping scenes, including browsing other merchants having the same commodities, and then enter into this merchant to pick up commodities, to complete the simulation of “web searching, and shopping around” process; the brushers browse the commodities in this merchant to reach a certain time, and during the period, they can collect partial commodities in the shop; and then, they will enter into the website of commodities involved in clicked business and stop for a certain time, browse the commodity information, evaluation, and other contents, and even exchange with this merchant; finally, they will place an order to buy the commodities, and confirm the receiving of goods and fill in the good reputation according to the procedures. These brushers send the screenshots of click farming process to the company above or merchant involved in click farming, and finally the payment for goods as well as the obtained commissions will be settled. Without careful distinguishing, it’s difficult to discover this for the entire false purchasing process is highly similar to the user’s true goods purchasing behavior.

behavior of clicked business has significant hazards: in the era of online purchasing, to judge whether to buy some commodities, the consumers need to know about the performance, price and other factors of the commodities, and also will refer to the trading volume, comments from other purchasers, and other factors. The trading volume and user’s comments of commodities were falsely obtained through clicked business, which would mislead the consumers, damage the lawful rights and interests of the operators with same commodities, and disturb the competition order. To treat this behavior, network business platforms should undertake the front-line duty of supervision, and purify the platform’s transaction environment. However, in the short term, this behavior has developed the effect in boosting the platform popularity and false transactions, and can attract more merchants to settle in the platform. Therefore, e-commerce platform may take an attitude of letting it drift.

As for the investigation and treatment of such behavior, the industry and commerce administration or market supervision authorities at different places, before the modification of the *Anti-Unfair Competition Law*, mainly followed the provisions given in the Article 9 of this law “misleading false propaganda” as well as the provisions given in item 4 of Article 19 (1) of *Measures on Administration of Online Transactions* “boosting the business reputations for yourself or others by making false transactions, deleting the unfavorable comments, or other means”. After modification of the *Anti-Unfair Competition Law* in 2007, second paragraph of Article 8 was added: “no operator is allowed to help other operators to conduct false or misleading commercial propaganda by organizing false transactions and other means”, and this became a direct legal basis for fighting against the clicked business. In the investigation and treatment process of such behavior, market supervision authorities need to master huge electronic data of operating transaction, and make a comparison with true transactions in combination with flow direction of payment for goods, goods express waybill (empty bill), and other supporting documents item by item.

(2) Case on dispute of unfair competition between Beijing Taoyou Tianxia Technology Co., Ltd. and Beijing Weimeng Chuangke Network Technology Co., Ltd.

Beijing Weimeng Chuangke Network Technology Co., Ltd. ("Weimeng Company" for short) operates a social media platform Sina microblog, and this company also provides an open access for the third-party application software; the microblog users register accounts with their mobile phone numbers or emails, and they may select to make public their phone numbers to non-specific parties, while the user's portrait, name (nickname), sex, and individual resume to everyone, and also may set the disclosure range of other personal information, in which, occupational information and education background are default information disclosed to everyone, and the Sina microblog users who are friends to each other can see the occupational information and education background of each other.

Beijing Taoyou Tianxia Technology Co., Ltd. ("Taoyou Technology Company" for short), and Beijing Taoyou Tianxia Science & Technology Development Co., Ltd. ("Taoyou Science & Technology Company" for short) jointly operate Maimai software and Maimai website. Maimai is a social network application based on mobile terminal, which provides the functions like career news sharing, interpersonal relations management, personnel recruitment, and anonymous career-related gossip, and it is devoted to helping the occupational users to manage and develop their interpersonal relations easily.

Sina and Maimai once cooperated with each other through Sina microblog Open API in the period from September 11, 2013 to August 15, 2014. According to the *Developer Agreement* of Sina microblog, Weimeng Company allowed Maimai software to access to Sina microblog open platform, to obtain the user-related information including the user name, sex, portrait, and email on the microblog platform, and Taoyou Technology Company and Taoyou Science & Technology Company could display the obtained Sina microblog user information in Maimai software, and also provide the users with Sina microblog account registration and login entrance.

After the cooperation was over, in August 2014, Sina microblog discovered that in Maimai products, lots of non-Maimai users directly displayed the Sina microblog user portrait, name, career, education background and other information. Weimeng Company filed a lawsuit to the People’s Court of Haidian District, Beijing City, holding that Maimai had four acts of unfair competition: first, illegally collecting and using the Sina microblog user information; second, illegally obtaining and using the corresponding relations between Maimai user’s mobile phone contacts and Sina microblog users; third, simulating the V certification mechanism and display method of Sina microblog; fourth, giving online comments to constitute business discrediting to Sina microblog.

As to the first complaint, Haidian court held that, Taoyou Technology Company and Taoyou Science & Technology Company, during the period of cooperation with Sina, had the behavior of illegally collecting and using the Sina microblog user’s career information and education background information involved in the case; after the cooperation was over, Taoyou Technology Company and Taoyou Science & Technology Company illegally used the user information of Sina microblog involved in the case. As to the second complaint, Haidian court held that, Taoyou Technology Company and Taoyou Science & Technology Company had no contractual basis and also lacked good reasons for obtaining and using the corresponding relationship between the user’s mobile phone contacts and Sina microblog users reflected in one-dimensional human relations of Maimai software. As for the third complaint, it was not supported by Haidian court. As for the fourth complaint on business discrediting, it was supported by Haidian court. Finally, Haidian court made a decision that Taoyou Technology Company and Taoyou Science & Technology Company should stop the unfair competition involved, publish a statement to eliminate the influence, and compensate economic losses RMB2million and other reasonable expenses to Weimeng Company.

Taoyou Technology Company and Taoyou Science & Technology Company refused to accept the judgment and ruling of the first trial, and then instituted an appeal. After court hearing, Beijing Intellectual Property Court decided to “reject the appeal, and affirm the original judgment”.

This case was called as China’s first case of unfair competition on illegal collecting of big data, and there were many focuses involved, mainly shown as below:

First, the Supreme People’s Court put forward in (2009) M.S.Z. No.1065 “Case of Retrial on Dispute of Unfair Competition between Shandong Food Import & Export Company and Qingdao SKD Credit Trading Co., Ltd.” that, following conditions should be satisfied for affirmation of unfair competition according to Article 2 of *Anti-Unfair Competition Law*: 1. Such competition is not specially stipulated in laws; 2. The lawful rights and interests of other operators are actually damaged by such competition; 3. Such competition is unjustifiable for it violates the principle of honesty and credibility and the recognized commercial ethics. On the basis of considering that an modest judicial attitude shall be taken in application of

Article 2 to Internet fields, another three conditions were also given in the judgment of second instance judgment: 4. The technical means taken in the competition actually damaged the consumer's interests, for example, restricting the consumers' right to make choices, not safeguarding the consumers' right to know, and damaging the consumers' right of privacy; 5. The competition damaged the open, fair and justice market competition order in the Internet environment, causing vicious competition or having such possibility; 6. As for the act of competition using new technical means or new business models in Internet, it's required to firstly presume the satisfaction of legitimacy, and invalidity should be proved by evidence. Although this case is not judged by the Supreme People's Court, because of its considerable social influences, after modification of the *Anti-Unfair Competition Law*, to respond to the circumstance that there are increasing cases on cyber acts of unfair competition, to specify the applicable conditions above has a positive value for reference.

Second, it's specified in the judgment of this case that, "it is the social responsibility of Internet enterprises to protect the user information in the Internet era." On the one hand, the court required Weimeng Company to improve its consciousness of responsibility and technical level to protect the user information, on the other hand, the corresponding rules on commercial development and use of user data were specified in the judgment. According to the *Law on Protection of the Rights and Interests of Consumers*, *Decision on Strengthening the Network Information Protection*, and other provisions, it's ruled that "to collect and use the user information, the network service providers should follow the lawful, rational and necessary principle and get the consent from those with information to be collected", including "it's required to give the right of protection and control to the users and data providers when personal information flow, passing on or other means of recycling are involved." Therefore, in Open API development cooperation model, a third party should stick to the three-level authorization principle of "user authorization" + "platform authorization" + "user authorization" while obtaining the user information via Open API.

In terms of claimant involved in infringement of user data, it's ruled that, "when an acts damages the consumer's rights and interests, but not constitutes any damage to fair competition order, it is not an act of unfair competition, and the consumers may safeguard their rights and interests through other legal approaches"; in this case, without the consent of Sina microblog users, Maimai obtained and used the Sina microblog information of non-Maimai users, which saved lots of economic input, and also reduced the competitive advantages of Sina microblog as a competitor in disguised form, therefore, Weimeng Company was entitled to claim for its lawful rights and interests.

It's also put forward in the judgment that, with the rapid development of Internet technology and the emerging of various new development models and applications, when the interests of consumers were likely to be touched, the operators should follow the principle of good faith, abide by recognized commercial ethics, and give priority to the protection of consumers' benefits, but not obtain the related data information or competitive advantages by virtue of technical capacity.

CHAPTER 6.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW INVOLVING INTELLECTUAL PROPERTY

WANG Chunyan[*]

I. OVERVIEW

In 2017, the development of legislation and policy of antimonopoly law related to intellectual property in China was mainly reflected in the *Antimonopoly Guidelines on the Abuse of Intellectual Property (Exposure Draft)* (hereinafter referred to as *Exposure Draft*) issued by Antimonopoly Committee office of the State Council on March 23 of the same year.[1] The Exposure Draft was launched on the basis of the *Antimonopoly Guidelines on the Abuse of Intellectual Property (Recommended Draft)* respectively drafted by National Development and Reform Commission, Ministry of Commerce, State Administration for Industry and Commerce and Intellectual Property Office jointly with committee consultative expert group.

On June 23, 2017, office of the inter-ministerial joint conference on the implementation of intellectual property strategy under the state council issued the *Promotion Plan of Fully Implementing the National Intellectual Property Strategy and Accelerating the Establishment of Intellectual Property Power in 2017*. The item 22 of this plan was that: "publish the antimonopoly guideline of abusing intellectual property, define the judgment standards of monopolistic behaviors in intellectual property field, and strengthen the supervision of behavior of abusing intellectual property".[2]

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1. "Public Consultation on the Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights (Draft for Comment)", source: http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml. Published: March 23, 2017.
2. http://www.gov.cn/xinwen/2017-06/28/content_5206337.htm. Published: June 28, 2017.

In 2017, there were 14 monopoly cases involving intellectual property concluded by People's Court at all levels, of which 12 cases were the dispute related to the copyright or domain name registration of plaintiff complaining the defendant's abusing the market dominant position rather than the monopolistic disputes caused by the suspected abuse of intellectual property. [1] Only two cases were started by plaintiff complaining that the defendant's abusing intellectual property caused the monopoly behavior

II. LEGISLATION AND POLICY

The preface of Exposure Draft issued on March 23, 2017 firstly showed that "antimonopoly and the intellectual property protection have the common goal, that is, protecting challenge and stimulating innovation, increasing the efficiency of economic operation, and safeguarding the customer interests and social public interests." On this basis, Exposure Draft defined that "the behavior that operators abuse intellectual property, eliminate and limit competition is not an independent monopoly behavior; instead, it means that the operators reach or implement monopoly agreement, abuse market dominant position, or implement the undertakings concentration which can or may eliminate and limit competition when they perform intellectual property or engage in related behavior."

The Exposure Draft consists of five chapters (27 articles) stipulating the following issues respectively: (1) General issues. This part includes the basic principle and thoughts to analyze whether operators abuse intellectual property to eliminate and limit competition; the identification of relevant market especially relevant technical market; the factors considered in analyzing the effects of eliminating and limiting competition. (2) Monopoly agreement involving intellectual property. This chapter lists the restrictive terms commonly adopted in intellectual property license agreement and stipulates the factors considered of these terms' effects on eliminating and limiting relevant market competition. The abovementioned restrictive terms include joint development, cross-licensing, exclusive feedback, not question terms, standard establishment and other restrictive types imposed by operators when licensing intellectual property. The abovementioned behaviors are suitable to use chapter two of *Antimonopoly Law*. In addition, this part introduces "safe harbor rules", and lists several conditions which are suitable to use the "safe harbor rules", for example, operators with competitive relations have at most 20% market shares in total in relevant market, operators without competitive relations have at most 30% market shares in any relevant market which

1. For example, Xu Shuqing v. Shenzhen Tencent Computer Systems Co., Ltd., Tencent Technology (Shenzhen) Co., Ltd., (2016) Yuemin End 1938; Tianjin Hexi District Speedway Network Technology Service Department v. China Internet Network Information Center case, (2017) Beijing 73 people early 38th.

is affected by the agreement involving intellectual property. In these situations, generally the agreement involving intellectual property is not considered as the monopoly agreement stipulated in subparagraph 6, paragraph 1, article 13 and subparagraph 3, article 14 of *Antimonopoly Law*. (3) Behaviors of abusing market dominant position involving intellectual property. This chapter lists the following common behaviors of abusing market dominant position involving intellectual property: licensing intellectual property at an unfair high price, refusing to license intellectual property, and the tying, additional unreasonable terms of exchange and differential treatment involving intellectual property. These behaviors are suitable to use regulations of chapter three of *Antimonopoly Law*. (4) Operators concentration involving intellectual property. This part mainly stipulates the condition of operators concentration, the factors considered and additional restrictive conditions of reviewing the operators concentration. The rules of chapter four of *Antimonopoly Law* is applicable to constitute the operators concentration involving intellectual property. (5) Other conditions involving intellectual property. This part stipulates certain issues including patent pool, injunctive relief and collective management organization of copyright. The above conditions involving intellectual property may constitute different types of monopolistic behaviors or involve specific subjects, we can make analysis according to individual case, and the relevant regulations of *Antimonopoly Law* is applicable.[1]

III. MAJOR CASES

(1) Monopolistic dispute between Qilu Pharmaceutical Co, Ltd. and Beijing Sihuan Pharmaceutical Co, Ltd.[2]

In this case, the plaintiff Qilu Pharmaceutical Co, Ltd. complained that: 1. the defendant was the exclusive production retailer of Cinepazide Maleate Injection (involved drug for short) from April in 2002 to the end of 2015 and owned multiple patents for invention which was related to this drug and the patent numbers were ZL200810093966.9 (No. 966 patent for short), ZL200910176994.1 (No. 994 patent for short), and ZL201110006357.7 (No. 357 patent for short) respectively; later No. 994 patent and No. 357 patent were incorporated into the revised national standards for involved drug by National Drug Regulatory Agency and then these two patents became the standard essential patents. The National Drug Regulatory Agency required the accuser to execute the revised national standards for involved drug when approving the plaintiff's production of the involved drug. 2. When negotiating with the plaintiff about the

1. <Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights (Draft for Comment)>, Source: http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml, Release Date: March 23, 2017.
2. Beijing Intellectual Property Court Civil Ruling, (2017) Beijing 73 Minchu 42.

patent license, the defendant did not follow the licensing principles of “Fair, Reasonable and Non-discrimination”, refused to give the license and intended to forbid the plaintiff’s competing with the defendant by reasonably using the available technology to produce relevant drugs, which showed obvious market monopoly; the above behavior of the defendant violated the obligation of license principles of “Fair, Reasonable and Non-discrimination”, and the regulations of article 6 and article 17 of *Antimonopoly Law*, so it was the behavior of abusing market dominant position and eliminating and limiting competition, which constituted monopolistic behavior.

The plaintiff requested the court’s judgment that: 1. confirm that the defendant has the license obligation of the Fair, Reasonable and Non-discrimination principles on the involved standard essential patents; 2. confirm that the defendant violates the license obligation of the Fair, Reasonable and Non-discrimination principles on the involved standard essential patents and instruct the defendant to perform the abovementioned license obligation and negotiate with the plaintiff about the license conditions of implementing standard essential patents; 3. confirm that the behavior of the defendant’s accusing the plaintiff of implementing relevant standard according to the involved standard essential patents when the defendant does not perform the license obligation of the Fair, Reasonable and Non-discrimination principles infringes the plaintiff’s right and applying for injunctive relief constitutes the monopolistic behavior of abusing market dominant position, and instruct the defendant to stop the monopolistic behavior; 4. instruct the defendant to stop applying for the implementation of or implementing the injunctive relief measures gained according to the involved standard essential patents when the defendant does not perform the license obligation of the Fair, Reasonable and Non-discrimination principles; 5. instruct the defendant to compensate for the economic loss of the plaintiff (including reasonable expense) of RMB 4 million yuan.

On August 7, 2017, the plaintiff applied to court for withdrawing the lawsuit of this case. After court hearing, Beijing Intellectual Property court held that, the accuser’s withdrawing the lawsuit is voluntary and does not violate the provisions of law, so it should be permitted. This case involves the FRAND license commitment of standard essential patents and whether the defendant eliminates and limits competition by abusing the standard essential patents. Because the plaintiff withdraws the lawsuit, court does not identify the above issues.

(2) Monopolistic dispute between Yunnan Haiyan Waterproof Material Co, Ltd. and Southwest Design Institute of Chinese Architecture Co, Ltd., Keshun Waterproof Technology Co, Ltd. [1]

In this case, the appellee Keshun Waterproof Technology Co, Ltd. (hereinafter referred to as “Keshun Waterproof Company”) was approved to register the trademark with No. 4195730 “APF” transformed letters, the verified commodity is class 19, including waterproof coiled materials, fireproof cement coating, etc., the valid period of registration is from July 7, 2007 to July 6, 2017.

The appellant (the plaintiff of the first instance) of this case Yunnan Haiyan Waterproof Material Co, Ltd. (hereinafter referred to as “Haiyan Company”) complained that: Southwest Design Institute of Chinese Architecture Co, Ltd. (hereinafter referred to as “Southwest Design Institute of Chinese Architecture”) and Keshun Waterproof Company incorporated the registered trademark APF of Keshun Waterproof Company into *Construction Atlas of APF Self-Adhesive Waterproof System* and *Recommended Application Atlas of Architectural Standard Design in Southwest Region*, and published them in society, each designing institute designed the construction drawings by reference to them; after these two atlas were published, the product of self-adhesive waterproof coiled material with the APF brand of Keshun Waterproof Company became the designated products and constructors had no choice but bought the waterproof coiled materials with “APF”; if the construction was done according to “PAF” waterproof coiled materials designated in design drawings, it actually made constructors could only buy the waterproof coiled materials produced by Keshun Waterproof Company; the appellee abused intellectual property by compiling atlas and made Keshun Waterproof Company become the exclusive supplier of “APF” self-adhesive waterproof coiled materials used in waterproof layer, which constitutes market monopoly.

The appellant requested court to confirm that the behavior of appellee’s publishing *Construction Atlas of APF Self-Adhesive Waterproof System* and *Recommended Application Atlas of Architectural Standard Design in Southwest Region* constitutes monopolistic behavior; they requested court to decree that the appellee compensate for the economic loss of the appellant for 25000 yuan; they requested court to decree that the appellee destroy the atlas and papers with “APF” words. The dispute focus of this case is whether these two appellees compiles atlas and use APF trademark in atlas constitutes monopolistic behavior.

The opinion of the first instance court includes the following aspects: 1. according to relevant provisions of Trademark Law, Keshun Waterproof Company, as the obligee of No.

1. Civil Judgment of Sichuan Higher People's Court, (2017) Chuanmin 976.

4195730 “APF” transformed letter registered trademark, enjoys according to law the rights of exclusive use of registered trademark, and is protected by law. 2. although Keshun Waterproof Company and Southwest Design Institute of Chinese Architecture jointly compile the involved atlas and use “APF” letter in the atlas, the current fact can prove that their compiling the atlas aims to implement relevant regulations of *Engineering Construction Standard Design Management Regulations* and promote and improve the quality and design efficiency of waterproof construction work of building; the function of atlas is to provide corresponding reference and standard for development organization and construction unit in selecting suitable building materials, and it belongs to recommended application standard; it is also the common practice for the production enterprise of relevant products to participate in compiling the atlas; at the same time, because the compiling contents involve different production enterprises, when enterprises describe the standard construction methods of their own products, they will use their own trademark and brand to distinguish the sources of different products; in the process of compiling atlas by Keshun Waterproof Company and Southwest Design Institute of Chinese Architecture, the behavior of these two companies to use the legally-owned registered trademarks to describe the practice and structure of this company’s waterproof products is not improper. 3. Haiyan Company, in respect of their proposed fact, does neither define the monopolistic behavior stipulated in *Antimonopoly Law* done by Keshun Waterproof Company and Southwest Design Institute of Chinese Architecture, nor illustrate with examples the fact that Haiyan Company as the competitor of these two companies is squeezed out and limited due to the monopolistic behavior, they do even not prove the loss result and degree caused by the monopolistic behavior. And in this case, no evidences are provided to prove the market access of the similar products of Haiyan Company is affected by the atlas or caused by the illegal behavior of Keshun Waterproof Company and Southwest Design Institute of Chinese Architecture.

Therefore, court of first instance thinks that: Haiyan Company’s proposal that the behavior of Keshun Waterproof Company and Southwest Design Institute of Chinese Architecture constitutes market monopoly lacks corresponding facts and evidences, so the proposal shall not be supported. All the claims of Haiyan Company are rejected. Court of the second instance thinks that: the current evidences cannot prove that compiling the involved atlas and using “APF” letter have an effect on the market access of appellant’s similar products, and cannot prove that the behavior of these two appellees limits the appellant’s participating in market competition. Therefore, Haiyan Company’s grounds of appeal that the behavior of Keshun Waterproof Company and Southwest Design Institute of Chinese Architecture violates the *Antimonopoly Law of the People’s Republic of China* and constitutes market monopoly lacks facts and legal basis. The appeal is rejected and the original judgment is affirmed.

This judgment has reference significance for how to judge the distinction between the behavior of justly exercising trademark right and that of exercising monopoly by intellectual property.

APPENDIX.

RELEVANT DATA OF INTELLECTUAL PROPERTY AND COMPETITION LAW OF CHINA

APPENDIX I.

RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY LAW

APPENDIX II.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW

APPENDIX I.

RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY LAW

ZHANG Guangliang[*]

I. PATENT

(1) Patent applications

In 2017, the State Intellectual Property Office accepted 3,697,845 patent applications. Including, 1,381,594 invention patent applications, which had a year-on-year growth of 14.2%; 1,687,593 utility model applications, and 628,658 design applications. [1]

(2) Patent granted

In 2017, China granted total 420,000 invention patents, including, 327,000 domestic invention patents, which had a year-on-year growth of 8.2%. Among the granted domestic invention patents, there were 304,000 service invention patents, accounting for 92.8%; 23,000 non-service invention patents, accounting for 7.2%.[2]

In 2017, the top ten enterprises of the invention patents granted in China (excluding Hong Kong, Macao and Taiwan) in sequence were: State Grid (3,622 pieces), Huawei Technologies Co., Ltd. (3,293 pieces), China Petroleum & Chemical Corporation (2,567 pieces), BOE (1,845 pieces), Zhongxing Telecommunication Equipment Corporation (1,699 pieces),

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1. See *Monthly Statistics of Patent Business Work and Comprehensive Management by the State Intellectual Property Office*, source: http://www.sipo.gov.cn/docs/2018-02/20180201163426321301.pdf.
2. *Image-text Live Broadcast: Press Conference on Statistical Data and Relevant Condition of Main Work in 2017 by the State Intellectual Property Office*, source: http://www.sipo.gov.cn/twzb/gjzscqj2017nzygztjsjjygqkxwfbk/index.htm。

Lenovo (Beijing) Co., Ltd. (1,454 pieces), Gree Electric Appliances, Inc. of Zhuhai (1,273 pieces), Guangdong Oppo Mobile Communications Co., Ltd. (1,222 pieces), China National Petroleum Corporation (1,008 pieces), and Semiconductor Manufacturing International (Shanghai) Corporation (SMIC) (862 pieces). [1]

(3) PCT applications and granted quantity

In 2017, the State Intellectual Property Office accepted total 51,000 PCT international patent applications, which had a year-on-year growth of 12.5%. Including, 48,000 pieces were domestic ones, which had a year-on-year growth of 12.5%. In 2017, there were 7 provinces (autonomous regions and municipalities) whose PCT international patent applications exceeded 1,000 pieces, and in sequence they were Guangdong (26,800 pieces), Beijing (5,100 pieces), Jiangsu (4,600 pieces), Shanghai (2,100 pieces), Shandong (1,700 pieces), Zhejiang (1,400 pieces) and Hubei (1,300 pieces), PCT international patent applications of the above-mentioned 7 provinces and cities accounted for above 90% of the domestic amount.

(4) Patent holding quantity

By the end of 2017, domestic (excluding Hongkong, Macao and Taiwan) invention patent holding quantity was 1,356,000 in total, and the invention patent holding quantity per ten thousand people was up to 9.8. The provinces (autonomous regions and municipalities) whose invention patent holding quantity per ten thousand people ranked top ten in China in sequence were: Beijing (94.5 pieces), Shanghai (41.5 pieces), Jiangsu (22.5 pieces), Zhejiang (19.7 pieces), Guangdong (19.0 pieces), Tianjin (18.3 pieces), Shaanxi (8.9 pieces), Fujian (8.0 pieces), Anhui (7.7 pieces) and Liaoning (7.6 pieces) .

(5) Other

In 2017, published patent applications of China in countries along the “Belt and Road” (excluding China) was 5,608 pieces, which had a year-on-year growth of 16.0%. Including,

1. Since 2018, the State Intellectual Property Office will no longer issue the ranking of invention patent applications of the domestic enterprises, instead, it will continue to issue the ranking of invention patents granted to domestic enterprises, in order to further strengthen the State Intellectual Property Office’s guiding role of paying attention to quality orientation and highlighting the statistical index.

published patent applications in India was 2,724 pieces, published patent applications in Russia was 1,354 pieces, and the patent applications begun to take shape. In 2017, countries along the “Belt and Road” applied for 4,319 patents in China, which had an increase of 16.8% compared with 2016; the number of countries applying for patents in China was up to 41, had an increase of 4 compared with 2016.

In 2017, the pledge financing amount of patents was RMB 72 billion, which had a year-on-year growth of 65%; the number of the pledge items was 4,177, which had a year-on-year growth of 60%.

In 2017, Patent Re-examination Board accepted total 34,123 re-examination requests, which had a year-on-year growth of 160%; accepted 4,565 applications for invalidation, which had a year-on-year growth of 15%.

II. TRADEMARK

(1) Trademark applications

In 2017, China’s trademark registration applications were 5,748,000 pieces, which had a year-on-year growth of 55.7%, and both the applications and the growth rate have created a historical high. Proportion of online trademark registration applications has increased, the number of applications increased to 4,897,000, accounting for 85% of total applications, with an increase of 4% compared with 2016. Examination of 4,252,000 trademarks was completed, which had a year-on-year growth of 36.7%, and the rejection rate of trademark registration applications was 37.5%. By the end of 2017, China’s trademark applications have been 27,842,000 in accumulation. [1]

According to statistics by the World Intellectual Property Organization, in 2017, China’s applicants submitted 4,810 applications for Madrid international trademark registration, which had a year-on-year growth of 59.6%, ranking the 3rd among the Madrid Union. The categories of the most applications were Class 9 (instrument; computer; storage medium), Class 7 (machine and tool, motor engine) and Class 25 (clothes, shoes, hats), etc., which matched with the trend of main export products in China.

1. *SAIC held press conference on relevant conditions of market environment circumstance in 2017*, source: http://www.scio.gov.cn/xwfbh/gbwxwfbh/xwfbh/gszj/Document/1618496/1618496.htm.

(2) Trademark granted

By the end of 2017, accumulated registration amount in China was 17,301,000 pieces, and the quantity of valid registered trademarks was 1,4920,000, ranking the 1st in the world for 17 consecutive years.

(3) Trademark holding quantity

By the end of 2017, the average trademark holding quantity per ten thousand market subjects in China was 1,520, which had an obvious increase compared with 1,074 in 2011.

(4) Other

The number of trademark examination cases continued to grow rapidly. In 2017, total 205,200 various examination cases have been received, which had a year-on-year growth of 31.45%. Examination of 168,900 cases were completed, which had a year-on-year growth of 34.87%. There were 9,310 cases involved in the first instance of administrative litigation, which had an increase of 74.2% compared with the corresponding period. The complaint rate was 5.51%, with an increase of 1.25% compared with corresponding period in 2016. In 2017, 880 applications for administrative re-examination were newly received, with an increase of 3.65%, administrative re-examination of 580 cases was completed, with a decrease of 32.1%.

Trademark pledge registration quantity continued to grow rapidly. In 2017, total 1,291 pledge registrations were handled nationwide, which involved secure claims of RMB 37.022 billion. Including, the local acceptance sites handled 848, which involved an amount of RMB 16.824 billion, accounting for 65.68% and 45.44% respectively.

III. COPYRIGHT

(1) Copyright registrations

In 2017, China's copyright registrations were up to 2,747,652, which had a year-on-year growth of 36.86% compared with 2,007,698 in 2016. Including, there were 2,001,966 works registrations, with a growth rate of 25.15%; 745,387 registrations of computer software copyright, which had a year-on-year growth of 82.79%; 299 registrations of copyright pledge, which had a year-on-year decrease of 5.38%. [1]

(2) Network copyright

It was shown in *China's Network Copyright Industry Development Report (2018)* that, in 2017, market scale of China's network copyright industry was RMB 636.5 billion, which had an increase of 27.2% compared with 2016. Including, the consumer payment scale of China's network copyright industry was RMB 318.4 billion, whose proportion broke through 50%. [2] The report showed that, in 2017, consumer payment market scale of China's network videos was RMB 21.8 billion, which had a year-on-year growth of being doubled approximately; market scale of digital reading broke through RMB 10 billion, which had a year-on-year growth of 31.1%, and it is estimated that the compound growth rate will still be close to 30% in the next few years; market scale of network games was up to RMB 235.5 billion, which had a year-on-year growth of 32%; market scale of network music was up to RMB 17.5 billion, which had a year-on-year growth of 22%; market scale of network news information was up to RMB 30.5 billion, which had an accelerated year-on-year growth of above 40%, among which, proportion of news income from mobile terminals exceeded 75%. [3]

Rewarding mode of network live broadcast rose suddenly in 2017, which drove growth of the overall market scale. In 2017, network live-broadcast user scale was up to 422,000,000 persons, with an increase of 77,780,000 compared with 2016, the netizen penetration rate was up to 54.3%, and the industrial market scale was close to RMB 40 billion. Short-video industry also had rapid growth in 2017, and the user scale has broken through 410,000,000 persons, which had a year-on-year growth of 115%. User flow and advertisement value of the short-video market out-broke, and it is estimated that market scale of short videos will exceed RMB 35 billion in 2020.

(3) Other

1. *Notification of the General Office of the National Copyright Administration on National Copyright Registration Condition in 2017*, source: http://www.ncac.gov.cn/chinacopyright/contents/483/359696.html.
2. *Press Conference of 2018 Copyright Publicity Week was Held in Beijing*, source: http://www.ncac.gov.cn/chinacopyright/contents/518/372267.html.
3. *Output Value of China's Network Copyright Broke Through RMB 600 Billion*, source: http://www.ncac.gov.cn/chinacopyright/contents/518/372557.html.

In 2017, the national Party and government offices at all levels purchased total 1,277,000 sets of operation systems, office software and anti-virus software, the central enterprises and financial institutions purchased total 2,451,100 sets of operation systems, office software and anti-virus software, and total 37,667 enterprises have been promoted to realize software legalization in accumulation nationwide. In 2017, revenue from software and information technology service industry was up to RMB 55,000, which had a year-on-year growth of 13.9%. [1]

IV. ADMINISTRATIVE PROTECTION

(1) Administrative protection of patents

In 2017, China's administrative enforcement patent cases were 66,649 in total, which had a year-on-year growth of 36.3%. Including, 28,157 patent dispute cases pieces (including 27,305 patent infringement dispute cases), which had a year-on-year growth of 35.0%; 38,492 counterfeit patents cases were investigated, which had a year-on-year growth of 37.2%. In 2017, the ratio between the patent dispute cases and the patent counterfeit cases was about 1:1.37, which was more optimized compared with 1:1.62 five years ago.[2]

In 2017, settlement rate of various patent cases was 98.5% (ratio between the cases established and settled in the current year and that in last year), which had a year-on-year increase of 1%; including, settlement rate of patent infringement dispute cases was 96.5%, which had a year-on-year increase of 2.1%, and the enforcement rate of the cases was further improved. 17 intellectual property right rapid protection centers supported enforcement of the cases actively, and assisted with the local intellectual property offices in mediating 2,983 patent infringement cases, and the average lawsuit-closure period was about 29 days.

(2) Administrative protection of trademarks

In 2017, total 30,000 illegal trademark cases were prosecuted, with a year-on-year decrease of 5.1%. Including, 27,000 trademark infringement and counterfeit cases, with a year-on-year decrease of 4.3%.

1. *Ten Big Events on China's Copyright in 2017*, source: http://www.ncac.gov.cn/chinacopyright/contents/518/361129.html.
2. *[Data Release] Enforcement Work of Intellectual Property Right System Continued to be Strengthened in 2017*, source: http://www.iprchn.com/cipnews/news_content.aspx?newsId=105855.

(3) Administrative protection of copyright

In 2017, National Copyright Administration, the Cyberspace Administration of China, Ministry of Public Security, and Ministry of Industry and Information Technology (MIIT) jointly carried out the 13th "Sword Network" special action for fighting with network infringement and counterfeit, investigated 63,000 websites in total, closed 2,554 infringement and counterfeit websites, deleted 710,000 infringement and counterfeit links, captured 2,760,000 infringement and copyright products, and registered and investigated 543 network infringement and counterfeit cases, and investigated and handled 57 criminal cases together with Ministry of Public Security, involving an amount of RMB 107,000,000, and published 20 typical network infringement and counterfeit cases to the public. [1]

V. JUDICIAL PROTECTION

In 2017, Chinese Courts received total 237,242 new cases on various intellectual property rights for first instance, second instance and re-examination, settled 225,678 cases (including the former cases left last year), which had an increase of 33.50% and 31.43% respectively compared with 2016. For the civil first instance cases newly received by the Courts on intellectual property right, the increase rate was up to 47.24%. Including, the courts at all levels in Guangdong Province received 58,000 new civil first instance cases on intellectual property right, which had an increase of 84.70% compared with 2016. During the 5 years from 2013 to 2017, average increase rate each year of first instance cases on various intellectual property rights newly received by national courts exceeded 20%. [2]

In 2017, the national procuratorial organs approved of arresting total 4,272 persons involved in 2,510 cases of intellectual property right related crimes, and instituted a public prosecution against 6,809 persons involved in 3,674 cases of intellectual property right related crimes. [3]

In 2017, the Supreme People's Court successively approved of establishing specialized agency of intellectual property right with cross-regional jurisdiction in Nanjing, Suzhou, Wuhan, Chengdu, Hangzhou, Ningbo, Hefei, Fuzhou, Jinan, Qingdao and Shenzhen, total 11

1. *Annual Report of 2017 China Network Copyright Protection*, source: http://www.ncac.gov.cn/chinacopyright/upload/files/2018/4/2692945560.pdf.
2. *Press Conference on Holding Publicity Week of Judicial Protection of Intellectual Property Right*, source: https://www.chinacourt.org/chat/fulltext/listId/49492/template/courtfbh20180419.shtml.
3. Sun Ying: *The Supreme People's Court and the Supreme People's Procuratorate Issue Typical Cases Successively Improve Intellectual Property Right Protection*, source: http://k.sina.com.cn/article_2810373291_a782e4ab02000h2r1.html?cre=tianyi&mod=pcpager_news&loc=1&r=9&doct=0&rfunc=11&tj=none&tr=9.

cities. 10 provinces (municipalities directly under the central government) formulated "three-in-one" implementation scheme of civil, administrative and criminal cases concerning intellectual property right, and submitted to the Supreme People's Court for approval.

By the end of 2017, the Supreme People's Court has issued 36 judicial interpretations concerning intellectual property right, which has greatly enriched legal system of intellectual property right, and ensured effective implementation of laws and professional judicial decision. Perfecting judicial protection system of intellectual property right and giving full play to dominant role of judicial protection of intellectual property right are of great significance.

VI. OTHER

In 2017, applications for right of China's agricultural and forestry new variety plants were up to 3,842 and 623 respectively. [1]

In 2017, total trade volume of China's intellectual property right royalty was USD 33.384 billion, which had a year-on-year growth of 32.7%. Including, export amount of intellectual property right royalty was USD 4.786 billion, which had a year-on-year growth of 311.5%, and the growth rate ranked the first among domestic service trades. [2]

1. Tang Hongli: *China's Intellectual Property Right Increased Both Quantity and Quality in 2017*, source: http://ex.cssn.cn/zx/bwyc/201804/t20180427_4216904.shtml.
2. Zhao Jianguo: *Export Amount of Intellectual Property Right Royalty Had a Year-on-year Growth of 311.5% in 2017*, source: http://www.sipo.gov.cn/mtsd/1120434.htm.

APPENDIX II.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW

LIN Xinyue / LIN Qiaoqiao***

The anti-monopoly law enforcement in 2017 was jointly implemented by the three agencies including the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and commerce. At the same time, the people's court accepts the civil action caused by antitrust and anti-unfair competition, as well as the administrative proceedings brought about by the refusal to obey the law enforcement of the aforementioned three law enforcement agencies. The specific data of competition law enforcement and litigation of three agencies including the State Development and Reform Commission, Ministry of Commerce and State Administration for Industry and Commerce as well as People's court are as follows.

I. NATIONAL DEVELOPMENT AND REFORM COMMISSION

The National Development and Reform Commission (hereinafter referred to as the NDRC mainly investigates monopoly agreements and abuse of dominant market position. Most of the antitrust investigations published are closed by the decision of administrative penalty, and a few cases are closed in the form of rectification opinions. In 2017, the NDRC published 20 administrative penalty decisions on its official website. Compared with the 8 penalty decisions published in 2016, the total number increased. Among the 20 decisions on administrative penalties, 18 of them punished 18 enterprises for the act of jointly establishing and implementing a monopoly agreement on fixing or changing the price of PVC resins. The

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areas involved include Shandong, Shanxi, Shaanxi, Hebei, Anhui, Sichuan, Ningxia, Xinjiang, Inner Mongolia and Hubei. The total of fine is 457 million Yuan. It is particularly important to note that the NDRC used WeChat records in the penalty decision as evidence to prove that the parties reached and implemented the monopoly agreement. 2 other penalty decisions were to punish Tianjin Handewei Pharmaceutical Co., Ltd and Zhejiang Second Pharmaceutical Co., Ltd for abusing the dominant position in the domestic isoniazid raw material market, selling isoniazid raw materials with high price unfairly, refusing to sell isoniazid raw materials to downstream pharmaceutical companies without good cause and implementing price monopoly agreements. In addition, the NDRC conducted antitrust investigations on the port prices of port enterprises including Shanghai International Port (Group) Co., Ltd, Tianjin Port (Group) Co., Ltd, Qingdao (Group) Co., Ltd and Ningbo Zhoushan Port Co., Ltd recently and found that some port enterprises were accused of restricting transactions, implementing unfair high prices, and adding unreasonable trading conditions. The related enterprises are required to reorganize and adjust the price of the port.[1]

In addition to conducting independent anti-monopoly investigation and enforcement, the NDRC also instructs the provincial development and reform commission to carry out anti-monopoly law enforcement, and jointly enforce the law with the provincial development and Reform Commission. In 2017, the NDRC directed the two provinces of Shanxi and Guizhou to investigate the motor vehicle inspection agencies in some areas of the province for reaching and implementing the price monopoly agreement, and to impose an administrative penalty according to law, with a total fine of 1 million 1,596,800 Yuan. [2]In addition, the State Development and Reform Commission, together with the Guangdong provincial development and Reform Commission, investigates the abuse of administrative power in the process of medical procurement reform by the Shenzhen Health Planning Commission for restricting public hospitals and drug production enterprises to use the services provided by the whole drug network pharmaceutical industry and to exclude and restrict competition. Then, the Shenzhen Health Planning Commission puts forward specific rectification measures and promises to amend relevant policy documents to make it conform to the fair competition review system.[3] This case serves as a canonical example of the application of fair competition review system.

1. Refer to "National Development and Reform Commission carries out port antitrust investigation to reduce import and export logistics cost", published on Price supervision and inspection and Anti-Monopoly Bureau network of People's Republic of China state development and Reform Commission http://jjs.ndrc.gov.cn/fjgld/201711/t20171115_867112.html.
2. Refer to “The Price Authorities of Shanxi and Guizhou have investigated and dealt with the price monopoly agreement of motor vehicle testing institutions in accordance with the law”, published on price supervision and inspection and Anti-Monopoly Bureau network of People's Republic of China state development and Reform Commission http://jjs.ndrc.gov.cn/fjgld/201701/t20170104_834259.html.
3. Refer to “Shenzhen Health Planning Commission promised to correct abuse of administrative power in public hospitals drug group procurement reform pilot and exclude restrictive competition”, published on price supervision and inspection and Anti-

In addition, the NDRC published the “guidelines on the pricing of the shortage drugs and API by operators (exposure draft)” in August 2017. On the whole, the anti-monopoly in the pharmaceutical industry is the focus of NDRC in 2017.

II. DEPARTMENT OF COMMERCE

The Ministry of Commerce is responsible for merger control. According to the statistics by the Ministry of Commerce, in the first half of 2017, 202 notifications were received, 172 were filed, 156 were concluded, and 1 were conditional approval. Among them, the number of major and complex cases increased, manufacturing mergers and acquisitions remained the top, and overseas mergers and acquisitions continued to be active. [1] By the end of December 31, 2017, there were 325 cases of unconditional approval for operators published by the Ministry of Commerce on its official website, including 71 in the first quarter, 77 in the second quarter, 106 in the third quarter and 71 in the fourth quarter. Compared with the 351 cases of unconditional approval of business operators in 2016, the total number has decreased slightly. In this case, the Ministry of Commerce has publicized 269 cases of using summary procedures to review the concentration of operators, and the total number of cases has also fallen compared with the 285 cases in 2016, but the difference is small. It is worth noting that in December 1, 2017, the Ministry of Commerce updated the software installation package for the centralized declaration form of antitrust operators, which greatly enhanced the report efficiency of the concentration of the operators.

In 2017, the Ministry of Commerce announced 7 additional restrictive conditions, which had been approved by the operators, and increased significantly compared with the 2 cases approved in 2016. In 2017, the Ministry of Commerce announced 7 cases of concentration of operators approved with additional restrictive conditions. Compared with the 2 cases approved with conditions in 2016, the number of cases increased considerably. 7 cases approved by additional restrictive conditions include merger case of Dow Chemical Company and E.I.Du Pont Company, Broadcom Limited Company acquiring stake of Brocade Communication Corp, HP Company acquiring part of business of Samsung Electronics Co Ltd, the merger of Agrium Inc. and Saskatchewan Potash Corp, Maersk Shipping Company acquiring stakes of Hamburg South American Shipping Group, ASE INDUSTRIAL HOLDING CO., LTD.

Monopoly Bureau network of People's Republic of China state development and Reform Commission http://jjs.ndrc.gov.cn/fjgld/201704/t20170407_843754.html.

1. Refer to “We should do a solid job in the Anti-monopoly review of business operators, create an international business environment of obeying law and facilitating convenience”, published on price supervision and inspection and Anti-Monopoly Bureau network of People's Republic of China state development and Reform Commission http://fldj.mofcom.gov.cn/article/xxfb/201707/20170702609486.shtml.

acquiring stakes of Silicon precision industry Limited Company, the merger case of Becton Dickinson Company and Budd Company in the United States, and The industry scope covers agro chemical products, materials, optical fiber equipment, shipping, semiconductor, medical equipment and other manufacturing industries. The Ministry of Commerce believes that the concentration of operators in these 7 cases will exclude competition in the relevant market and impose restrictive obligations on the parties concerned.

In 2017, the Ministry of Commerce published 6 decisions on administrative penalties on its official website to punish enterprises that don't report concentration of operators according to law. The number of administrative penalties was flat compared with 2016.

III. STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE

The State Administration for Industry and commerce ("SAIC" for short) is responsible for the two contents of anti-monopoly law enforcement and anti-unfair competition law enforcement. Among them, the anti-monopoly law enforcement objects of the industry and commerce administration include non-price monopoly agreements, abuse of dominant market position and anti-competitive administrative actions.

According to the official website of SAIC, by the end of 2017, the SAIC announced 61 anti-monopoly enforcement notices. The number of announcements issued in 2017 is 13, of which two announcements involve the same case, the number of cases is 12, which are all investigated by the Provincial Administration for Industry and commerce that are authorized by the State Administration for Industry and Commerce authorized. The details of the 12 cases are as follows:

No.	Cases	Results of the case	Behavior type	Provinces	Related market
1	State Grid Shandong electric power company Yantai Muping power supply company is suspected of monopoly	Suspend investigation； terminate investigation	Limit transaction	Shandong	power supply

2	Monopoly agreement of five enterprises including Gushi fireworks and firecracker factory etc.	Administrative sanction	Horizontal monopoly agreement	Henan	Fireworks and firecrackers
3	Wujiang Hua Yan water Co., Ltd. abuses the dominant position in the market	Administrative sanction	Limit transaction	Jiangsu	Water supply
4	Wuhan emerging elite Pharmaceutical Co., Ltd. abuses market dominance	Penalty decision	Additional unreasonable transaction conditions	Hubei	Medicine
5	China Tietong Group Co., Ltd. Ningxia branch is suspected of monopoly	Terminate investigation	Unreasonable tying	Ningxia	Communication
6	China United Network Communications Corp Ningxia branch is suspected of monopoly	Terminate investigation	Unreasonable tying	Ningxia	Communication
7	China Telecom Company Ningxia branch is suspected of monopoly	Terminate investigation	Unreasonable tying	Ningxia	Communication
8	Three companies including Erdos Sanya liquefied petroleum gas Co., Ltd. is suspected of monopoly	Terminate investigation	Limit transaction	Inner Mongolia	Liquefied petroleum gas
9	Hechi Insurance Industry is suspected of monopoly	Administrative sanction	Horizontal monopoly agreement	Guangxi	Insurance
10	Suqian PetroChina Kunlun Gas Co., Ltd. abuses market dominance	Administrative sanction	Limit transaction	Jiangsu	Gas
11	Sichuan Jiuyuan Yinhai Chang Hui Software Co., Ltd. abuses market dominance	Administrative sanction	Unreasonable tying	Sichuan	Software service

12	The monopoly agreement of Hunan Bai Wang Jin Fu Technology Co., Ltd. and Hunan Spaceflight Information Co., Ltd.	Administrative sanction	Horizontal monopoly agreement	Hunan	Software service

Table 1_Antimonopoly law enforcement of State Administration of Industry and Commerce

As can be seen from table 1, compared with the previous years, the number of antimonopoly cases released by the SAIC in 2017 has remained stable in general. In the way of closing the case, there are 5 cases that terminate the investigation because the parties actively fulfill the rectification commitment. The 1 case is made a decision to suspend investigation (the case was terminated in 2017 when the parties concerned fulfilled their commitments). In 7 cases, the decision of administrative punishment was taken. Nearly half of the cases is terminated the law enforcement investigation because parties actively take the initiative to stop illegal activities, eliminate or mitigate the impact. Most of the units involved are state-owned enterprises. More than half of the cases involve telecommunications, water supply, electricity and other basic services. About the type of cases, there are 3 cases of 12 antitrust cases involving monopoly agreements, 9 cases involving abuse of dominant market position, and no cases related to administrative monopoly. About regional scope, the cases are distributed in 9 provinces, from the eastern coast to the southwest provinces. [1]

The SAIC at all levels shall also assume the responsibility of anti-unfair competition law enforcement. 2017 is the last year that the unrevised anti-unfair competition law was implemented. The SAIC issued a law enforcement situation against unfair competition in the past 23 years. The anti-unfair competition law has been implemented since December 1, 1993. Over the past more than 20 years, the industrial and commercial supervision departments at all levels of the country have investigated and dealt with 682 thousand cases of unfair competition. The value of the case is 42 billion 600 million Yuan, and the penalty amount is 9 billion 500 million Yuan. It has made positive contributions to maintain fair competition in the market order and safeguard the legitimate rights and interests of operators and consumers.

1. Refer to “Analysis of monopolistic cases investigated by the national industrial and commercial supervision system in 2017”, published on China Industrial and Commercial Newspaper Network http://www.cicn.com.cn/zggsb/2018-02/08/cms104449article.shtml.

IV. COURT

Provided the case of "competition dispute" is searched in 2017 on the Chinese referee's net, according to incomplete statistics by the end of April 25, 2018, there are 89 civil cases arising from monopoly disputes, and 1342 civil cases arise from unfair competition disputes. In the case of monopoly disputes, according to the division of the court, 3 cases have been dealt with by the Supreme People's court. The 67 cases are concluded by the high people's court, and the 19 cases are handled by the intermediate people's court. According to the geographical distribution, the top three are 69 cases in Beijing, 6 cases in Guangdong, each 3 cases in Shanghai and Fujian. According to the trial procedure, there are 18 cases in first instance, 10 in second instance, 2 in retrial and trial, and 59 in other procedures (jurisdiction, appeal, etc.).

In cases of unfair competition disputes, according to the level of the court, There are 22 cases dealt with by the Supreme People's court, 187 cases dealt with by the high people's court, 580 cases handled by the intermediate people's court and 553 cases handled by the grass-roots court. According to the geographical distribution, the top three are 256 cases in Guangdong, 152 cases in Beijing, 10 cases in Shanghai, each 111 cases in Jiangsu and Shandong. According to the trial procedure, there are 864 cases in first instance, 423 cases in second instance, 48 in retrial and trial, and 7 in other procedures.

In the “annual report of the Supreme People's Court on intellectual property cases (2017)” published by the Supreme People's Court, according to statistics, the Supreme Court handled 4 monopoly cases, 11 infringement of commercial secrets cases and 14 other unfair competition cases in 2017. [1] In unfair competition cases, there are a large percent of disputes involving infringement of trade secrets and unauthorized use of well-known goods, names of packaging and decoration. The number of monopoly cases is relatively small, and how to identify the relevant market and whether the operator has a dominant market position is a difficult point for the court.

“Two disputes cases of appellant Guangdong JDB drink & Food Co., Ltd. and appellees Guangzhou Pharmaceutical Holdings Limited and Guangzhou Wang Lao Ji Health Industry Co., Ltd. for unauthorized use of the unique packaging and decorating of famous goods “was released as the top 10 intellectual property cases of Chinese courts in 2017. The Supreme Court pointed out that the "commodity" and "packaging decoration" in the special packaging and decoration of well-known commodities should have a specific directional relationship. In

1. Refer to “Annual report of the Supreme People's Court on intellectual property cases (2017)”, published on Chinese Court Net https://www.chinacourt.org/article/detail/2018/04/id/3278877.shtml.

determining the ownership of the special packaging and upholstery, we should not only encourage honest labor under the premise of following the principle of honesty and credit, but also respect the consumers' cognition of directional relations towards source of goods based on the remarkable characteristics of the packaging and upholstery itself. In addition to the above cases, "Case of infringement of trademark rights and unfair competition between the Commercial Press Limited and the Chinese language publishing house limited liability company "tried by the Beijing intellectual property court and infringement of commercial secret disputes case between Hebi anti-light material Co., Ltd., Li Junchao, Hebi Rui Mint Technology Co., Ltd. and Li Jianfa" tried by Henan Province Higher Peoples Court was also selected as the top 10 intellectual property cases of Chinese courts in 2017 were also selected as the top 10 intellectual property cases of Chinese courts in 2017. [1]

In the 50 typical cases of intellectual property rights published by the Supreme Court in 2017, there were 9 cases involving unfair competition and monopoly, which includes 5 cases of confusing behavior, 2 infringement of commercial secret cases, and each 1 case of commercial discredit and abuse of dominant position in the market.[2]

1. Refer to "Notice issued by the general office of the Supreme People's Court on printing and distributing 10 cases of intellectual property rights and 50 typical cases of intellectual property rights by China's courts in 2017" published on the website of the Supreme People's Court of People's Republic of China. http://www.court.gov.cn/fabu-xiangqing-91332.html.
2. Refer to "Notice issued by the general office of the Supreme People's Court on printing and distributing 10 cases of intellectual property rights and 50 typical cases of intellectual property rights by China's courts in 2017" published on the website of the Supreme People's Court of People's Republic of China http://www.court.gov.cn/fabu-xiangqing-91332.html.

BOOK TWO

MRLC IP & COMPETITION LAW

2017 ANNUAL REPORT OF KOREA

PART I.

OVERVIEW OF POLICY AND LAW IN INTELLECTUAL PROPERTY AND COMPETITION OF KOREA

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY AND LAW

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY AND LAW

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY AND LAW

*AHN, Hyo Jil**

I. OVERVIEW OF LEGISLATION AND POLICY IN 2017

(1) In the field of industrial property rights, the most significant legislative change in 2017 is the implementation of the patent cancellation system and the shortening of the patent review filing period.

In terms of policy, policies for strengthening the competitiveness of intellectual property of small and medium-sized enterprises (SMEs) were newly implemented. Hence, the Korean Intellectual Property Office (KIPO) has selected SMEs with high export growth potential as global intellectual property companies starting in 2017, and have started to provide customized support according to the needs of the company. In addition, in order to strengthen standard patents, policies to support research and development, standardization strategies and standard patent strategies have been put in place to promote the capacity of SMEs that have top-class technology capable of international standardization. In terms of tax benefits, when SMEs acquire external technologies such as patents, the tax credit for technology acquisition costs have increased from 7% to 10%. Further, policies to promote employee inventions by expanding the scope of non-taxable items to the application, registration and execution of employee invention compensations have been implemented. Previously, non-taxation was limited to patent registration compensation. As part of public service enhancements, the number of intellectual property courses offered for free at the KIPO Training Center was expanded from the current 5 courses to 11 courses. Credits earned in these courses may be used towards graduation credits at certain universities.

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KIPO set policy initiatives to support securing intellectual property in the fields of artificial intelligence (AI) and internet (IoT) as a priority task in 2017 to prepare for coming of the 4th industrial revolution. KIPO also implemented a so-called ‘intellectual property data gift system’ starting May 1, 2017 which provides data on patent publications for free to promote business start-ups using intellectual property information and corporate growth.

Since 2015, KIPO has been organizing technology exchange events in each technology field and has actively promoted intellectual property transactions by engaging companies, universities, research institutes and technology trading experts. In 2017, the network was expanded to 8 technology fields including bio, materials, energy and telecommunications.

KIPO has operated a ‘multi-year (2-year) guarantee of IPR litigation insurance’ program since September 13, 2017 in order to help export companies deal with international intellectual property disputes. In the past, there was only 1-year insurance programs available. ‘Intellectual property litigation insurance’ is an insurance that guarantees expenses related to litigation and legal representation when an IPR dispute occurs overseas.

(2) In the field of copyright law, significant legislative changes in 2017 include the collection of performance fees in stores such as cafes and health clubs. In terms of policy, the Ministry of Culture, Sports and Tourism has established a ‘government-civil agency partnered infringement response system’ centered on the Korea Copyright Commission (KCC) starting in September 2017, and enforced policies that strengthen the ‘process of notifying infringement according to protection request by the right holder’. This partnership system includes online service providers and interest groups. The infringement notification process is initiated when KCC receives a request for protection regarding illegal work from the right holder and notifies the online service provider to delete such work. Due to the establishment of the new system, the duration of such process has been reduced from 2 weeks to 2 days.

In addition, the Ministry of Culture, Sports and Tourism has decided to extend the ‘dismissal of juvenile copyright infringement complaints’ program by 1 year until 2018. According to this program, a copyright infringement by a juvenile who has no history of violation will be dismissed without investigation (limited to 1 time) if it was accidental. This program was introduced in 2009 in order to prevent abuse of juvenile copyright infringement claims brought by copyright agents, and has been extended every year since on 1-year terms.

II. LEGISLATIVE AND JUDICIAL TRENDS IN EACH FIELD

(1) There have been no significant amendments in the field of patent law in 2017 but there were important changes that were legislated in 2016 and put into effect in 2017.

The Patent Act revised as of March 21, 2017 and effective on September 22, 2017 stipulated the marking of the word “patent” and the patent number on patented products, and the marking of the word “patent application (in review process)” and the application number on products for which patents are applied for (Article 223 of the Patent Act). This was to provide clear information to consumers.

Several new systems were introduced in the Patent Act revised as of February 29, 2016 and effective on March 1, 2017. Measures to prevent defective patents were the most important among these. In the past, patent invalidation trials were the only measure available to invalidate defective patents under the Patent Act of Korea. Since patent invalidation could only be filed by interested parties, they were not utilized frequently. The review handling period of KIPO is one of the fastest in the world, but the number of examinations per examiner is excessive, raising concerns regarding patent quality. In addition, it is difficult to conduct a thorough search of similar technical information for a review due to the surge of technical information around the world. Hence, the revised Patent Act introduced a patent cancellation application system (Article 132.2 of the Patent Act) so that defective patents can be revoked early on. According to this provision, anyone can cancel a patent through the Patent Tribunal if he provides a legitimate reason for patent cancellation within 6 months of the publication of a patent right. This is similar to the Ex Parte re-examination system of the U.S. or the appeal system of the European Patent Office (EPO) and Japan.

If an examiner finds a clear reason for rejection after a patent decision, he can cancel the patent decision and re-examine the patent under the ‘Direct Investigation Re-examination System’ (Article 66.3 of the Patent Act). However, this is only possible until registration for the sake of patent right stability. The Patent Offices of the U.S. and Europe operate similar systems.

In addition, the limitation of the application period for a legitimate right holder to be granted the application date of the illegitimate right holder retroactively (2 years from the date of registration) was deleted (Article 35 of the Patent Act). If an illegitimate right holder is granted a patent, the legitimate right holder can request transfer of the patent right (Article 99.2 of the Patent Act). This is intended to minimize the damage of legitimate right holders and strengthen protection for them.

In the past, in order to receive a patent examination in Korea, one needed to file a request for examination within 5 years from the application date. But there was criticism that the examination request period was too long compared to other countries, and the period was shortened to 3 years (Article 59 of the Patent Act). A program that allowed an examiner to order submission of technical information used in the examination of the first country was introduced when reviewing patents for a patent application based on an application of another country (Article 63.3 of the Patent Act).

The Patent Act revised as of December 2, 2016 and effective on June 3, 2017 changed the preceding technology investigation expert agency from a ‘designation system’ to a ‘registration system’ (Article 58 of the Patent Act). This intended to enhance the quality of services by strengthening competition in the preceding technology investigation market. In 2016, 3 specialized agencies were designated by KIPO to monopolize preceding technology investigation work. However, as of 2018, 9 specialized agencies are providing such services.

Significant cases in the field of patents include a case in which the Supreme Court ruled that even if there is reason for an employee invention to be invalidated, that does not mean that the company is exempt from an obligation to compensate the employee and can be used in calculating the amount of compensation (Supreme Court Judgment in Case No. 2014Da220347 delivered on January 25, 2017). In a scope of rights trial, the so-called ‘free-to-work’ technology defense was held to still apply when the invention (subject of the trial) turns out to a so-called ‘literal infringement’ in which the subject invention shows organic synthesis with all the elements that appear in the patent invention filing (Supreme Court Judgment in Case No. 2016Hu366 delivered on November 14, 2017).1 In addition, to avoid negating the progressiveness of inventions, all sub-concepts included in a subject invention need to have qualitatively different effect from the effect of the preceding invention, and if not qualitative difference, distinct quantitative difference. Such effects compared to the preceding invention need to be clearly stated in detail in the description of the subject invention. For such description, quantitative descriptions confirming that there is qualitative difference or showing distinct quantitative difference need to be included in detailed explanations of the invention (Supreme Court Judgment in Case No. 2014Hu1631 delivered on May 11, 2017). In one case, the Supreme Court held that for the progressiveness of a medical invention regarding particular intake methods and dosages to be recognized, the remarkable or heterogeneous effects of the invention that ordinary technicians could not anticipate need to exist (Supreme Court Judgment in Case No. 2014Hu2702 delivered on August 29, 2017). In another case, the Supreme Court ruled that it is sufficient if even a part

1. This case was discussed in page 38 of the China-Korea IP & Competition Annual Report 2016 Volume II. It overruled the Patent Court Judgment in Case No. 2015Hu4019 delivered on January 15, 2016.

of it has remarkable effects in a heterogeneous or quantitative manner compared to the preceding invention for progressiveness to be acknowledged (Supreme Court Judgment 2014Hu2696 delivered on August 29, 2017). Lastly, when an application was filed with the Food and Drug Administration for a medical invention according to the Pharmacist Act, and the Food and Drug Administration requests that the applicant supplement the examination data, causing the review to stall during that period, the term of the patent's validity needs to be extended to the entire period from the date of application to the date the application was finally granted (Supreme Court Judgment in Case No. 2017Hu844, 851, 868, 875 delivered on November 29, 2017).

(2) There were no meaningful legislative changes in the field of trademark law. There was, however, an amendment that increased the fines for false markings (Article 232~234 of the Trademark Act).

Important cases relating to trademark law include a judgment that acknowledged the acquisition of distinctiveness based on use even when the trademark did not originally have distinctiveness but was used in combination with other letters (Supreme Court Judgment in Case No. 2015Hu2174 delivered on September 12, 2017). This case is thought to show the court's leanings in issues of acquisition of distinctiveness, gradually relaxing the criteria for acquisition of distinctiveness by use. In another case, in connection with a registration cancellation trial due to non-use, the Supreme Court ruled that advertising a trademark in the margins of a newspaper advertisement for other goods 1 month immediately prior to a cancellation suit being filed would be considered a nominal use to avoid the cancellation of the unused registration (Supreme Court Judgment in Case No. 2015Hu2006 delivered on June 29, 2017). When a trademark includes a critical part, the Supreme Court ruled that similarity can be determined by comparing the critical part whether or not such part can be separated (Supreme Court Judgment in Case No. 2015Hu1690 delivered on February 9, 2017). Lastly, the Supreme Court ruled that if a part of a trademark is registered related to identical or similar goods (to the designated good), that part can be considered to not have distinctiveness (Supreme Court Judgment in Case No. 2015Hu932 delivered on March 9, 2017).[1]

In a lower court case, the court held that even if the name of a city located in North Korea is mentioned in the textbooks of elementary, middle and high schools in Korea, such name cannot be said to be a distinctive geographical name widely known to general consumers or traders (Patent Court Judgment in Case No. 2016Hu8841 delivered on May 12, 2017). The Patent Court also ruled that if 'Hyundai' is registered designating cars, construction and

1. Similar cases include Supreme Court Judgment in Case No. 2015Hu949 delivered on March 9, 2017 and Supreme Court Judgment in Case No. 2016Hu2447 delivered on March 15, 2017.

insurance as its designated goods, registering ‘Hyundai’ with funeral services as a designated good does not create confusion (Patent Court Judgment in Case No. 2017Hu3171 delivered on November 2, 2017). Lastly, the Patent Court ruled that if ‘THE KOREA TIMES’ is a registered trademark with the designated goods of newspaper publication, a third-party reporting internet news under the domain name ‘koreatimestoday.com’ would constitute a trademark infringement (Patent Court Judgment in Case No. 2017Na1407 delivered on September 29, 2017).

(3) There were no major legislative changes in the field of copyright law. However, the Enforcement Decree of the Copyright Act was revised on August 22, 2017, and became effective August 23, 2018. Accordingly, the scope for limitation of performance rights has been reduced by Article 29.2 of the Copyright Act. Hence, from now on, cafés, pubs and health clubs (excluding those with a floor space of less than 50 square meters) need to pay copyright royalties.

Also, Article 106 of the revised Copyright Act (amended on March 22, 2016) stipulated collective collection of performance fees. But the Ministry of Culture, Sports and Tourism selected a collective collection organization at the end of March 2017, and such measures were enforced starting on April 1, 2017. As a result, store music providers (a total of 13 businesses) collect performance fees from stores (such as hotels and department stores) that use digital audio transmission services, and the Korean Music Copyright Association collects performance fees for stores that do not use store music services (such as karaokes or nightlife pubs).

Important cases in the field of copyright law include the first Supreme Court Judgment that acknowledged creativity of the format of a television broadcast (Supreme Court Judgment in Case No. 2014Da49180 delivered on November 9, 2017). The Supreme Court ruled that even if individual elements such as stage, background, props, music, progression methods and game rules constituting the reality broadcast program were not creative in themselves, the selection and arrangement of such elements can acquire creative originality distinct from other broadcast programs. In another significant lower court case, the act of creating a link to a broadcast program without permission of the copyright owner on an overseas video sharing site was not considered a direct infringement of public transmission rights but an act of aiding infringement of public transmission rights (Seoul Hight Court Judgment in Case No. 2016Na2087313 delivered on March 30, 2017). In this case, the creator of the link arranged illegal broadcasting programs by their titles and broadcast dates so that users could search programs and watch them for free. This judgment is in conflict with a Supreme Court Judgment that denied both direct infringement and aiding infringement claims (Supreme

Court Judgment in Case No. 2012Do13748 delivered on March 12, 2015).[1] This Seoul High Court Judgment was affirmed by the Supreme Court (Supreme Court Judgment in Case No. 2017Da222757 delivered on September 7, 2017), but there was no dispute pertaining to the recognition of aiding infringement. Hence, it cannot be concluded that the Supreme Court's stance has changed based on this ruling. Although there are few cases, the court is progressing toward acknowledging copyright infringement for organized and systematic creations of links, but there remains division in opinions regarding such liability issues for creating links in Korea.

In addition, the Supreme Court ruled that even when the actual author gave consent, indicating a person other than the author as the author constitutes illegal publication under the Copyright Act since such provisions protect the general public's trust in the author's name as well as the personal rights of the author (Supreme Court Judgment in Case No. 2016Do16031 delivered on October 26, 2017). The Supreme Court also held that even if illegal transmission actually occurs, as long as the special type of online service provider (such as web hards) takes 'necessary measures' required by the Copyright Act, no liability can be found (Supreme Court Judgment in Case No. 2014Ma503 delivered on August 31, 2017). The Supreme Court found that a part of a computer program being stored in the RAM (the main storage device of a computer) during the course of use would not constitute a copyright infringement and considered it to be a 'temporary copy' (Supreme Court Judgment in Case No. 2015Da1017, 1024, 1031, 1048, etc., delivered on November 23, 2017). In a meaningful lower court case, the court held that the game rules of a match-3-game could not be protected as an idea under the Copyright Act. Thus, copying such rules not protected by the Copyright Act was allowed on principle, and would only be considered an appropriation of achievements under the Unfair Competition Prevention Act under 'special circumstances' (Seoul High Court Judgment in Case No. 2015Na2063761 delivered on January 12, 2017).

(4) There were no legislative changes in the field of trade secret protection in 2017.

Important cases in trade secret protection include a case in which the Supreme Court ruled that the trademark infringement prohibition period can be calculated based on the point the employee actually deviated from the work of dealing with the trade secret if trade secret infringement is sought in advance as a preventive measure to protect against trade secret infringement by an employee (Supreme Court Judgment in Case No. 2016Ma1630 delivered on April 13, 2017). In another case, the Supreme Court found a person who acquired a trade secret illegally to be infringing upon business interests of the trade secret holder regardless of whether the trade secret was actually used or not (Supreme Court Judgment in Case No.

1. See p. 332, China-Korea IP & Competition Law Annual Report 2015.

2014Da27425 delivered on September 26, 2017). In a lower court case, referring to another's trade secret to reduce trial-and-errors and save time and expenses related to necessary experiments were considered a use of trade secrets in addition to simply copying technology constituting a trade secret (Seoul Central District Court Judgment in 2016No3163 delivered on February 15, 2017).

In a case involving criminal breach of fiduciary duty for a trade secret, when an employee leaks or takes out important business assets that are not trade secrets to use for his own interests, such acts constitute a criminal breach of fiduciary duty (Supreme Court Judgment in Case No. 2017Do3808 delivered on June 29, 2017). Also, if an employee bound by confidentiality obligations leaks a computer program and user manual developed by a software company to deliver to another company, such program and manual are considered to be a trade secret or important asset. Hence, such act was seen to constitute a criminal breach of fiduciary duty (Supreme Court Judgment in Case No. 2015Do1877 delivered on August 18, 2017).

(5) There were no major legislative changes in unfair competition prevention in 2017. However, the Unfair Competition Prevention Act was revised as of January 17, 2017, and became effective July 18, 2017. Imitation of goods was added to the scope of acts of unfair competition subject to investigation by the head of the Korean Intellectual Property Office (KIPO) and local governments (Article 7 and 8 of the Unfair Competition Prevention Act) and penalties can be imposed on such violators (Article 18.3.1 of the Unfair Competition Prevention Act).

Important cases in the field of unfair competition prevention include a case in which the Supreme Court ruled that unauthorized broadcasting of the results of a predictive election survey that 3 broadcasting companies requested from a public opinion survey agency without prior consent would constitute an appropriation of achievements (infringing upon the plaintiff's economic interests by unauthorized use of outcomes achieved by substantial investment or efforts through means in conflict with fair trade practices or competitive order) and an act of unfair competition (Supreme Court Judgment in Case No. 2017Da200139 delivered on June 15, 2017). On the other hand, in a lower court case involving the so-called 'Eyeball Bag' (a bag with a 'eye'-motif design attached to the front of a Hermes-like bag), the court held that although the form is similar to the Hermes bag, it had originality and did not infringe upon the economic interests of Hermes since its price and category of consumers were different. Hence, the bag was not seen to be an appropriation of an achievement (Seoul High Court Judgment in Case No. 2016Na2035091 delivered on February 16, 2017). In this judgment, the court allowed imitation of a product not protected by intellectual property rights (such as copyrights) in principle, unless there are 'special circumstances' by which such imitation cannot be justified in light of fair trade practices and free competitive order. If so, imitation is prohibited as an appropriation of achievement under unfair competition prevention. 4 concrete examples were presented as constituting a 'special circumstance'.[1]

In another case involving portable double-valve fire extinguishers that were supplied to the National Policy Agency, if there was a product in substantial identical form that was registered as a practical design a long time ago and sold by another company, the form of such fire extinguisher cannot be protected since it is in a 'form that similar type of products usually take' (Supreme Court Judgment in Case No. 2015Da216758 delivered on January 25, 2017). In a case involving anti-slip bathroom mats, advertising that the mat uses environmentally friendly material when it actually used material with environmental hormones constituted an act of unfair competition (Seoul High Court Judgment in Case No. 2016Na2081469 delivered on June 15, 2017).

1. A similar case can be found in Seoul High Court Judgment in Case No. 2015Na2063761 delivered on January 12, 2017.

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY AND LAW

LEE Hwang *

I. OVERVIEW

The 19th presidential election held on May 9, 2017, caused tremendous change to Korean society as the result of the so-called “Candlelight Revolution”, an unprecedented event in Korean history. The radical change of political ideology from conservatism to progressivism called for a fundamental change of direction in Korean economic and social policies, faced with the structural difficulties of continually stagnating economic growth amid bipolarization. For this reason, the current administration selected so-called “economic democratization” as the larger objective and adopted a so-called “3-wheel growth theory” to support that goal. The 3-wheel growth theory consists of 3 major policies, which are ‘income-led growth’, ‘growth by innovation’, and ‘realizing a fair economy’. Competition policy is not only exclusively responsible for realizing a fair economy but is also recognized as a major policy tool to promote growth by innovation, and therefore takes a more substantial role as an essential component of economic democratization. As competition policy stands out as a leading policy tool to achieve the policy direction of the current administration, which is considerably distinct from the former administrations, competition policy has attracted much more attention than the past, when it was relatively alienated. Moreover, the substance and direction of competition policy has changed significantly.

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The previous edition of this report (published last year) commented on the 2016 competition policy carried out by the previous administration as follows:

As social and economic polarization has intensified and demands for due process and resolution of overall conflict have not been satisfied, it is regretful that competition policies have continuously been unable to reach expectations in most of its objectives, such as increasing efficiencies and consumer welfare, protecting economic inferior parties such as SMEs, and restricting economic polarization.[1]

Competition policies, which have been steadily evolving along with economic development to focus on economic efficiency based on market competition, have not been able to provide a new direction to raise market competition in the past ten (10) years. It is unfortunate that it has only been able to deal with incidental tasks to soothe economically inferior parties while growth-oriented economic policies relying on large corporations have been implemented.[2]

Then, the report forecasted the competition policy of the new government for the year of 2017 as follows.

2016 marked a period of seeking a new direction in the chaos of such competition policy as the administration was changed by the so-called “candle revolution”. Whether to focus on enhancing economic efficiency by promoting market competition similar to policies prior to 2008 or to concentrate on the protection of economically inferior parties in self-reflection of former policies is a choice and task given to competition policies in 2017. In any case, it seems clear that fairness will be highlighted as much as economic efficiency pursued by traditional competition policies. However, considering the limited human and material resources of the KFTC, it may create an excessive burden if the KFTC tries to resolve issues of fairness in transactions among individuals.

The biggest challenges for the Korean economy concern issues of limited growth potential and polarization due to the decline of population and limitations of the existing industrial structure concentrated on large corporations. Against the backdrop of a difficult world economy and domestic circumstances, the question of how Korea’s competition policies will utilize its limited resources to effectively solve complex and wide-ranging policy

1. China-Korea IP & Competition Law Annual Report 2016 Vol. I, p.164.
2. *Id.*, at 174.

goals to achieve a balance between efficiency and fairness will need deep reflection on what the essence of competition policies is.[1]

It is difficult to evaluate that the competition policies taken by former administrations prior to 2017 achieved notable accomplishments in promoting market economy, maximizing economic efficiency or establishing fairness in transactions. There was a tendency to emphasize the protection of economically inferior parties to some extent, but it was not to the degree of giving the impression that the policy was weighed toward the protection of economically inferior parties. This report forecasted that, considering the current economic and social situation, the task of competition policy after 2017 would be to pursue “efficiency and fairness” in a balanced way. On the other hand, this report pointed out that trying to exhaustively resolve the fairness in individual transactions is not viable and hardly effective. Efficiency and fairness can be conflicting goals at first glance. Moreover, with regards to fairness, it is difficult to establish standards of illegality and physically impossible for a small government agency to supervise fairness in individual transactions thoroughly. Therefore, it is a task that needs philosophical consideration pertaining to the role of the government and its relationship with the market.

2018 is an excellent time to review the performance of the new government’s competition policy since it has been a year since the new government took office and the current chairman of the Korea Fair Trade Commission (KFTC) has put in efforts to change competition policy.[2] Looking at the whole picture, there is a consensus among most experts and the public that the current KFTC recognized the fairness in transactions as a far more important goal than the value of traditional competition policy such as consumer welfare, and have devoted much more resources to issues of fair trade. Of course, traditional competition law enforcement such as abuse of market dominant position, prohibition of cartel, control on the anticompetitive concentration of undertakings were not entirely neglected and the KFTC managed to achieve certain results as the following chapters will further describe. However, the major focus was on the protection of SMEs and the small business owners through prohibition on abuse of superior bargaining positions. This was complemented by regulation of large business groups and improving corporate governance to restrict economic concentration. It is hard to deny that as competition policy attracted more social attention, the enforcement resources of the KFTC (such as organization, manpower and budget) has increased considerably on the whole[3] and

1. *Id.*
2. ICR Center at the Korea University held a two-days seminar titled "The First Year Achievements and Challenges in Competition Policy of the Current Administration" in June 2018. In this seminar, experts pointed out that the issue of traditional competition policy enforcement was relatively underappreciated. The contents of the seminar and the resource book can be found on the ICR Center homepage (www.icr.re.kr) through the following link. https://goo.gl/cvQZZN.
3. A representative example was the establishment of the "business group bureau" in September 2017 dedicated to large business group policy with 60 new officials added. It is an exceptional occasion for Korean central administrative agency to see a new bureau established and 60 officials increased.

the result has been external expansion of competition policy. Nevertheless, it can be said that there is no great difficulty to see that policy is weighed toward fairness in transactions from the viewpoint of harmonizing efficiency and fairness. It is regrettable that among the 2 big challenges of the Korean economy, which are the aggravation of bipolarization and stagnation of economic growth, policy consideration was only given to the former. Moreover, it leaves room for questions concerning whether such policy efforts achieved the desired results.

The next section briefly overviews the contents of the Korean Monopoly Regulation and Fair Trade Act (MRFTA), then examines the regulation of large business group and the improvement of Gap-Eul relationship[1] which were the focus of the KFTC in 2017.

II. OVERVIEW OF COMPETITION LAWS

1. Introduction

The MRFTA was promulgated at the end of 1980. A notable characteristic of the MRTFA is that, unlike the experience of other countries, it was not the result of the influence by the foreign countries or international organizations, but it was introduced voluntarily in response to the domestic demand for stopping the tyranny of the chaebols and establishing free and fair market economy during the political and economic turmoil. It is comparable to the U.S experience that enacted the Antitrust law for the first time against the backdrop of the economic concentration by the small number of monopolists with the consequence of economic unrest and threat to the democracy.

The competition law institution of Korea has a constitutional foundation based on the Article 119(2) of the Korean Constitution law, so-called the economic democratization clause. While the MRFTA act as a general law, there are 4 special laws to protect economically inferiors such as SME, which consist of Fair Subcontract Transactions Act, Fair Franchise Transactions Act, Act on Fair Transactions in Large-Scale Distribution, Fair Agency Transactions Act.[2] The substance of the MRFTA falls into 3 categories. The first category is the area of the traditional competition law and seeks to protect and promote the free competition in the market. Abuse of market dominant position, prohibition of cartel, control on the anticompetitive concentration of undertakings belong to this category. The second category is the prohibition against unfair trade practices and purports to maintain fair trade

1. “Gap-Eul” Relationship is a Korean buzzword that refers to relationship between economically superior (Gap) and economically inferior (Eul) in a relative sense. Gapjil refers to the abuse of the superior position of a Gap.
2. The KFTC is also the competent authority for consumer policy. It seeks to create a synergy effect by closely combining the competition policy and consumer policy.

between the transacting parties. 4 special laws including Fair Subcontract Transactions Act which purport to protect economically inferior in the vertical relation provides more detailed provisions by the specific industry or the type of conduct for the unfair trade practices, especially for the ‘abuse of superior bargaining position’, which refers to the situation in the transaction between parties where a stronger party holding the superior bargaining power improperly exercise its power against the other party. These laws were originally enacted in the form of the public notice of the KFTC regarding the abuse of superior bargaining position but were promoted to the special laws as public attention and their importance has increased. Still, those laws can be said to be parts of the competition law. The third category is the repression of economic concentration that was promulgated to repress or relieve the excessive economic concentration caused by the government-led export-oriented unbalanced economic development process since the 1960s. The regulation in this category had weakened after the mid-2000s and it came to be said to become a dead letter law except for the prohibition on the new circular-shareholding, the unfair assistance and the regulation on the unfair internal transaction. In 2017, as the economic environment and political landscape has changed significantly, the relevant policy in this category was expected to be strengthened considerably. However, 2017 had not seen a notably enhanced measure except for law enforcement against siphoning private benefits of control by family members of the head of large business groups and pressure to resolve cross-shareholding. These challenges were passed on to be resolved in 2018.

2. Brief Overview by Specific Area

(1) Abuse of Market Dominant Position

This provision applied primarily when an enterpriser with market power abuses its market power and its conduct raises a concern of restricting competition. In the past, there had been a long-standing debate regarding whether abuse of market dominant position covers unfair trade practices beyond its traditional domain. However, after the Supreme Court clarified its effect-based approach in the Posco case (2007) stipulating that to regulate the refusal to deal by a market dominant enterprise, anticompetitive effect needs to be proven. Since the Posco case, the debate seems to be resolved at least among practitioners. The MRFTA includes both exclusionary conduct and exploitative conduct by market dominant enterprises within its regulatory scope. However, there is a very limited enforcement record with regards to exploitative conduct because of narrow statutory ground and strict standards for illegality and a high burden of proof required by the Supreme Court. For exclusionary conduct, it is generally accepted that it is necessary to prove anticompetitive intent or objective and anticompetitive effect according to the Posco judgment.

The KFTC, suffering from excessive caseloads, has been cautious to devote its limited resource to cases of abuse of market dominant position because the requisite elements of this conduct are hard to prove and often require detailed economic analysis. As a result, recent regulatory efforts tend to be limited to large-scale and important cases. Especially when dealing with multinational corporations, it seems that the KFTC refrains from applying unfair trade practices provisions as much as possible and tries to apply abuse of market dominant position provisions.

(2) Control on the Anticompetitive Concentration of Undertakings

In the Korean market where oligopolistic and monopolistic market structures have solidified, the regulation of anticompetitive merger has great significance, and there has been active enforcement since the 21st century. Active enforcement has not been limited to domestic mergers and there has been active extraterritorial application against foreign mergers that affect the Korean market. Recently, many experts pointed out that KFTC has relied too heavily on behavioral remedy (which is often criticized for difficulty in ex-post monitoring of compliance) instead of structural remedy.

(3) Prohibition of Monopoly Agreement

Since the 2000s, as the KFTC defined cartels as the no. 1 public enemy of the market economy and enhanced law enforcement, there has been outstanding enforcement record and performance on this issue. The KFTC has imposed fines totaling about KRW 1 trillion every year, and about 70 % of those fines were imposed against cartels. Law enforcement against international cartels that affects the domestic market and international cooperation with foreign competition authorities have been active. The leniency program is thought to have contributed to the excellent cartel regulation performance of the KFTC which has limited investigatory power as an administrative agency. Recently, the Prosecutor’s Office has taken a more aggressive stance toward cartel regulation. Therefore, criminal enforcement is expected to increase steadily.

(4) Prohibition against Unfair Trade Practice

The prohibition of the unfair trade practices which focuses on the unfairness, unlike the 3 conducts mentioned above which focus on the monopoly power and anticompetitive effect in the market, accounts for more than 50% of the 500-800 MRFTA violation cases the KFTC handles every year. This is because relieving economically inferior parties harmed by the unfair practices of other trading parties have been recognized as one of the main functions of competition law in Korea where the bipolarization phenomena due to the economic concentration and tyrannies of economically superior parties (such as large corporations) are regarded as serious problems. In recent years, the KFTC has made it a principle to encourage voluntary dispute resolution between parties through mediation or civil litigation when the case involves an alleged victim of unfair trade practices and is likely to be a simple economic dispute between trading parties, based on the decision to concentrate its enforcement resources on fields of traditional competition law to improve the efficiency of enforcement. However, after the inauguration of the new administration in 2017, the KFTC has been strengthening efforts to protect economically inferior parties. Accordingly, the KFTC takes a more aggressive enforcement stance than before focusing on abuse of the superior bargaining position among unfair trade practices provided in the MRFTA, as well as the Fair Subcontract Transactions Act and so-called 3 distribution laws concerning vertical restraints in the distribution industry. Unfair trade practices consist of 9 type of conducts and 29 sub-type of detailed conducts. The type of the conducts that is subject to regulation is very wide in scope while vertical restraints by a single firm take up the majority. In addition to single firm conduct, there are multilateral conducts such as collective refusal to deal, and consumer-protection-type conducts such as unfair inducement of customers, and repressing-economic-concentration-style conducts such as unfair assistance. In terms of the effect, the unfair trade practices include not only conduct that has anticompetitive effect, but also conduct that has anticompetitive effect in its incipiency and conduct that tends to impede fair trade order because of its method and substance. As a consequence, the unfair trading practice regulation is often subject to criticism because of the vague standard of illegality and excessively wide-range of regulatory scope. On the other hand, from very early on when the MRFTA was promulgated, the KFTC has shown a tendency to apply unfair trade practice provisions under which it is easier to prove illegality, instead of abuse of market dominant position provisions, to avoid the high burden of proof concerning anticompetitive effect, even when the conduct is likely to amount to anticompetitive conduct by market dominant firms. This tendency had been somewhat alleviated since the 2000s, but it has remained essentially the same until now. This has been criticized for its high likelihood of false positive and its possibility to undermine the efficiency of law enforcement by the competition authority.

(5) Repression of Economic Concentration

The 4 types of regulation described above are the so-called 4 pillars of Korean competition law. In addition, the MRFTA has a peculiar institution for repressing economic concentration. In a broad sense, this consists of regulations applicable to business groups subject to the limitation on cross-shareholding with assets totaling more than KRW 10 trillion, which include prohibition of new circular-shareholding, prohibition of cross-shareholding, restriction on debt guarantee, restriction on voting rights in finance and insurance companies; regulations applicable to business groups subject to obligation of public disclosure, such as the timely public disclosure of the status of the business group and other material matters; holding company regulation; and unfair assistance and siphoning private benefits of control by family members of the head of the business group. Repression of economic concentration can be distinguished from competition law regulation in that it consists of ex-ante regulations based on the size of the large business group except for provisions of unfair assistance and the siphoning private benefits of control by family members of the head of the business group. Among them, prohibition of the cross-shareholding and restriction on debt guarantee are not meaningful anymore in reality because their regulatory goals have already been achieved. Since the inauguration of the current administration, emerging issues under discussion are regulation of large business groups and the improvement of the holding company system and restriction on voting rights in finance and insurance companies in relation to the separation of finance and commerce, and the argument for strengthening various public disclosure obligations is attracting public support.

Among various regulations for repressing economic concentration, prohibition of new circular-shareholding as well as prohibition of the unfair assistance and unfair internal dealing are currently recognized as important tasks. With the 2013 revision to the MRFTA, existing circular-shareholdings were permitted to be maintained but new circular-shareholding was strictly prohibited. However, the current administration purports to gradually get rid of existing circular-shareholdings. The prohibition of unfair assistance was introduced to the MRFTA in 1996. By regulating tunneling activities between affiliates in a large business group, the prohibition of unfair assistance achieved outstanding performance in regulating the exercise of excessive and undue control with small equity ownership by the families of the head of the business group. Director’s duty of care and duty of loyalty should be regulated by corporate and tax law, but because of the institutional limitation in Korea by which the rights of minority shareholders are not fully protected, the MRFTA has taken responsibility for a substantial portion of the role of those laws. However, this regulation was said to have a limits in preventing the expediential inheritance of chaebols by means of related party transactions because existing case law required a very high burden of proof with regard to finding illegality. As a consequence, the MRFTA was revised in 2013 and introduced the regulation for so-called ‘siphoning private benefits of control by the family members of the head of the business group’ and the KFTC applied it in 2 cases (Hyundai case and Korean Air case) in 2016 for the first time.

(6) Competition Advocacy

One of the main features of the MRFTA is the vigorous competition advocacy function that takes advantage of the KFTC's status as an administrative agency. The KFTC has continuously presented measures to promote competition and deregulate anticompetitive regulation to improve oligopolistic and monopolistic market structures. Every government agency is obliged to consult with the KFTC in advance when they promulgate or revise anticompetitive legislation. This turns out to be very effective for the KFTC to advocate competition policy interests through the chairman of the KFTC participating and commenting in cabinet meetings and presenting opinions during legislative consultation procedures. However, for nearly a decade prior to 2017, as the status of the KFTC in the government was relatively reduced, such competition advocacy functions have significantly weakened.

(7) Private Enforcement

Private enforcement such as damages lawsuits involving the violation of the MRFTA are increasing significantly. Like most jurisdictions (except the U.S.), competition law enforcement in Korea heavily depended on public enforcement by the KFTC. Beginning in the 21st century, damages lawsuits against cartel participants have been on the increase as detection of cartels, level of fines imposed by the KFTC and victims' awareness of their rights have increased. However, it is still difficult to say generally that private lawsuits are active enough because of the difficulty in collecting the evidence of illegal conducts and proving the concrete amount of the damages, as well as procedural difficulties such as the lack of a class action system.

However, since the Defense Acquisition Program Administration successfully won KRW 135.5 billion from oil refineries as a result of the Military Oil Rig-bidding damages litigation, the practice of the government agencies filing damages litigation after the KFTC or the prosecution detected a cartel violation has been established as a principle. This tendency has affected private companies. In fact, the Flour Cartel case is well known, in which bakeries filed damages lawsuits against cartel participants after the KFTC detected a wheat flour price cartel by 8 milling companies in 2006 and the Supreme Court ruled for KRW 1.2 billion in damages compensation. Stimulated by the 2 cases mentioned above, a significant increase in the number of the damages litigations has attracted attention. The government actively promotes such private enforcement in the form of the follow-on action after the KFTC's imposition of corrective measures because it can contribute to the deterrence of the cartel formation along with the public enforcement of the KFTC and the prosecution. The most crucial issue in a damages lawsuit is the calculation of damages. Recently, Korean courts have made significant progress in the detailed method of analysis considering that they had shown a tendency to adopt the before and after comparison method as a primary method.

III. REPRESSION OF ECONOMIC CONCENTRATION[1]

One of the main backgrounds behind the significant interest in repression of economic concentration of the current administration is that this issue was pointed out as one of the causes of the so-called “Candlelight Revolution” at the end of 2016. A renewed awareness was urged on the long-pending fact that overly concentrated economic power in a very small number of large business groups conspired with political power and harmed the democratic political system. At the same time, concern was raised against the so-called tunneling phenomenon, in which few family members of the head of the business group control the business group by distorted means and misappropriating corporate profit. Then corporate governance matters emerged as a serious competition policy issue along with general concentration issues. In response to these concerns, radical and powerful reform policies regarding large business groups were expected to be pursued in 2017, but the action taken fell short of expectations. The KFTC did not go further than urging voluntary improvement of the corporate governance structure for the time being, with reasoning that it will pursue so-called ‘irreversible’ reform without shocking the market. This approach is highly regarded to have resolved issues of circular shareholding structures, but it is also pointed out that the change in policy direction or law enforcement efforts were not evident. One of the main areas for voluntary resolution was the circular-shareholding structure which was alleged to enable the family members of the head of the business group to control the business group with small equity rights and unduly inherit corporate control rights. In fact, many large business groups strived to dissolve the complex web of tangled circular-shareholding structures by converting to a holding company. As a result, among 31 business groups subject to the limitation on cross-shareholding, all but 7 groups dissolved their circular-shareholding structure in entirety by the end of 2017. As to the fact that most of them converted to holding companies, there is some criticism that economic concentration by large business groups was acquiesced under the cover-up of the holding company system. Anyway, for now, it is evaluated to have made progress in that opaque and distorted governance structures have become transparent.

In 2017, in relation to repression of economic concentration, the focus was placed on the effort to address siphoning private benefits of control by family members of the head of the business group. The MRFTA introduced prohibition against unfair assistance as a type of unfair trade practices at the end of 1996, and based on this provision, the KFTC successfully detected and corrected many unfair assistances involving affiliated companies of many large business groups. Unfair assistance was pointed out to be one of the reasons that caused the foreign exchange crisis in 1997. However, the so-called Samsung SDS case (in which the

1. As the repression of economic concentration is not addressed separately in this, the issue will be described here in detail.

Supreme Court delivered a judgment in 2004) revealed a critical loophole. In this case, some family members of the head of the business group with special interests bought bonds with a warrant of Samsung SDS at a lower price and earned significant amounts of undue profit. The KFTC issued corrective measures for violating unfair assistance and imposed a fine totaling KRW 15.8 billion. Supreme Court annulled the KFTC decision based on the reasoning that the negative effect on the market competition such as the exclusion of the competitor should be proven even for a case in which a large business group is alleged to have unduly supported an individual.

Since then, as the number of cases in which the KFTC's decisions were annulled at court increased regarding unfair assistance by so-called 'related party transactions', and there was no viable way to prevent tunneling by family members of the head of the business group. In addition to the difficulty of regulating unfair assistance by new methods (such as assisting individuals who belong to the families of the business group head and related party transactions), the effectiveness of the regulation has been continuously weakened as the courts have continued to require high thresholds for proving illegality.[1]

As this became an issue during the presidential election in late 2012, the MRFTA was revised in 2013. In this amendment, the scope of the prohibition of the unfair assistance provision was expanded and prohibition of siphoning private benefits of control by family members of the head of the business group was newly added. This provision prohibits affiliated companies of the business group subject to the obligation of public disclosure with assets totaling more than KRW 5 trillion from providing affiliated companies in which the family members of the head of the business group have a significant stake with undue profits by means of related party transaction, etc.[2] This regulation can be distinguished from prohibition of the unfair assistance in that the target of the regulation is limited to large business groups with assets totaling more than KRW 5 trillion and does not require proving anticompetitive effect in principle.

The regulation on siphoning private benefits of control was enacted in 2015. The KFTC launched investigations in 2015 shortly after the new provision was enacted and imposed corrective measures against affiliated companies of Hyundai and Korean Air in July 2016. Among these, in the case regarding affiliated companies of Hyundai[3] (such as Hyundai Logistics), the KFTC decision was made final as is since Hyundai did not appeal. However, the Korean Air case, in which the affiliated companies of Korean Air provided inappropriate

1. Seoul High Court Judgment in Case No. 2017Nu1490 delivered on September 1, 2017.
2. When the provision was promulgated in 2013 the target was business groups subject to limitation on cross-shareholding with assets valued at more than KRW 10 trillion, but after the 2017 revision of the MRFTA, the regulatory scope was expanded as the main text describes.
3. KFTC Decision in Case No. 2016-189(2014Seogam1689) delivered on July 7.

benefits to family members of the head of the business group, proceeded to appeal for annulment. On September 2017, the KFTC lost in the Seoul High Court appeal and the corrective measures and the fines were annulled.[1] The case is currently pending in the Supreme Court. The Korean Air case is regarded as a touchstone for the regulation of large business groups and has attracted a great deal of social attention.

IV. EFFORTS TO ADDRESS “GAP-EUL” RELATIONSHIP

To accomplish a ‘fair economy’, which is 1 wheel of the ‘3-wheel growth theory’, the KFTC has focused on law enforcement to protect economically inferior parties such as SMEs and small businesses in the field of the subcontract transactions and the distribution industry. This was in response to the demand that to correct the tendency of weakening the potential for economic growth in the era of bipolarization, it is necessary to remedy the exploitation of SMEs by large corporations and protect the creativeness and self-growth capability of SMEs. As a result, there is a current tendency to believe that these are the center of the competition policy.

Despite popular demand, several problems lie in these policy directions. First, the issues of how desirable it is to apply a wide range of regulations based on the external unfairness of the conduct and to what extent it is compatible with consumer welfare or economic development may be controversial, while serious consideration has not been made regarding economic efficiency of vertical trade. Actually, it seems that in 2017, too much enforcement resources have been devoted to prohibition of unfair trade practices, especially prohibition against abuse of superior bargaining position and the 4 special laws, while not directly serving the intrinsic mission of remedying market power issues and maximizing social welfare by enforcing the 3 pillars of the competition law (which are the abuse of market dominant position, the anticompetitive merger and the cartels). Considering that the fundamental problems of the Korea economy lie not only in the bipolarization but also the weakened potential for economic growth, it should be remembered that goals to promote economic efficiency are as significant as goals of protecting the economically inferior.

Second, it is fundamentally impossible for governments with limited capabilities to intervene in individual trading relationships between economic agents, even if they pursue the protection of economically inferior parties based on abuse of superior bargaining position provision. It is inevitable that measures taken in the name of so-called “wiping tears of Euls”

1. Seoul High Court Judgment in Case No. 2017Nu1490 delivered on September 1, 2017.

reveal limitations that cannot satisfy public expectations because of the fundamental restriction that “it cannot wipe all the tears of fifty million people”. Although the unfairness problem in the individual trading relationship is serious, it is undeniable that the fundamental solution lies in the competitive pressure in the market and voluntary legal dispute resolutions between economic agents. It is true that for now the Korean law lacks the institutions necessary for a large number of victims with small damages to get relief through systems such as class actions and U.S. style discovery, while the court requires plaintiffs to meet very high burdens of proof regarding illegality and amount of damages. It is also true that even if the victim of an illegal ‘Gapjil’ relationship seeks legal relief despite these procedural deficits, they are very likely to be exposed to additional damage by retaliation. If serious and fundamental efforts to address these problems are not made, it is hard to expect that the problem will get better even if the KFTC reinforces regulation on unfair trading practices that are exposed externally.

Third, in this reality where the dominant strategy for vertically-integrated large corporations is to secure profit by exploiting downstream companies, simple efforts to behaviorally improve the Gap-Eul Relationship while turning away from improving oligopolistic and monopolistic markets and restructuring industries are unlikely to make a difference. The economic concentration phenomena in Korea is getting aggravated and has reached a severe level, according to the most economic indicia such as general concentration, ownership concentration and industry concentration.[1] However, it is difficult to deny that one of the essential factors of the Gap-Eul relationship syndrome is the intensification of various concentration including market monopoly and oligopoly in Korean industries which have grown based on vertical integration by a small number of large business groups. In the past development alliance era, at least minimal market entries and exits took place even though they were carried out by the inefficient method of mandatory industry restructuring by the government. However, after democratization, some cases (such as the shipbuilding industry) revealed that as the multi-market domination by a small number of large business group got intensified, the industry restricting became more inactive. These situations can be attributed to the major reason that to secure votes to seize power, political parties concentrated on short-term stimulus such as construction rather than establishing a competitive market from a mid-to-long term perspective. In addition, in the face of the apparent limitation of the input-driven

1. For more details, see Lee Jae Hyung et al., Report on the 2017 Market Structure Survey, Korea Development Institute (2017).Text available at http://www.prism.go.kr/homepage/origin/retrieveOriginDetail.do?pageIndex=1&research_id=1130000-201700016&cond_organ_id=1130000&leftMenuLevel=120&cond_research_name=%EC%8B%9C%EC%9E%A5%EA%B5%AC%EC%A1%B0%EC%A1%B0%EC%82%AC&cond_research_start_date=&cond_research_end_date=&pageUnit=10&cond_order=3; Wi Pyoung Ryang, Economic Concentration Toward Chaebol: Its Dynamic Change and Policy Implication, Economic Reform Report 2018-02, Economic Reform Research Institute, 2018. 2. 19,. Text available at http://www.erri.or.kr/bbs/board.php?bo_table=B11&wr_id=317.

growth model of the development alliance era, the liquidation of marginal firms was artificially delayed, incumbent large corporations failed to develop new innovation-driven business models and the innovative businesses increasingly got frustrated in the market entry. In this situation, large corporations seem to tend to seek to maintain and create profitability through cost reduction and indiscriminate scale expansion. In an industry structure where monopoly (or oligopoly) and vertical-integration are prevalent, as such a business strategy boiled down to exploit downstream firms, Gap-Eul relationship is not just a matter between the large enterprises and SMEs, but also a hierarchical issue among large corporations, medium enterprises, micro-enterprises and self-employed. At the same time, as the level of transaction gets lower, the number of related companies and employees increases exponentially, but the profitability gets much worse. Under this circumstance, it is a reality that every economic agent manages to survive by taking advantage of its bargaining power against the downstream firm with inferior economic position compared to itself if possible, and by exploiting downstream firms.

While regulatory authorities including the KFTC failed to achieve the intended effect in their effort to detect and remedy illegal exploitation due to the limitation of the resource and capability, upstream firms became aware of the fact that expected profit by illegally forcing the downstream firms to excessively reduce cost exceed the expected expense from the penalty to be imposed when detected. Thus, it is not hard to understand that in an environment where the economic incentive to exploit downstream firms still exist, the naive effort to regulate the ‘Gapjil’ has clear limitations.

The situation where competition policy does not make a significant contribution to the growth by innovation, being 1 wheel among the ‘3-wheel growth theory’, can be explained likewise. Without proper restructuring corresponding to economic development, companies have often failed to enhance their own innovative capability while faced with deteriorating profitability. On the other hand, recognizing market penetration or attempts to enter the market by new innovative companies as a threat, large incumbent companies increasingly interfere with their soft landing on the market or even take their innovative capabilities by misappropriating or imitating the technology and idea of the venture companies. In-house venture companies, which are popular recently, seem to suffer from similar problems. While the government did not present a creative alternative regarding the proper sharing of functional roles between the innovative companies and large companies, and while regulatory attempt against the illegal conduct have not been successful, crying out for ‘growth by innovation’ in the name of complementing economic democratization and income-led growth may give a sense of emptiness.

V. CONCLUSION

In 2017, competition policy faced both more significant opportunities and challenges than ever before. In the era of the bipolarization crisis, the KFTC assumed much social expectation as a government agency dedicated to fair economy goals. In the meantime, the general assessment is that the KFTC took a ‘soft’ stance approach in its effort to ameliorate the corporate governance structure of the large business groups in 2017 while focusing on improving Gap-Eul relationship.

With regard to large business group policy, NGOs which expected a more aggressive reform over the problems revealed during the so-called candlelight revolution are quite critical. Nevertheless, it is not easy to succeed in regulating large business groups in a challenging economic environment, within the framework of the rule of law and with limited resources. It will be interesting to see to what extent the KFTC can offer effective ways to reform beyond the self-improvement by the business groups.

On the other hand, it seems to be generally accepted that the KFTC made some progress in addressing Gap-Eul relationship. But despite the enthusiasm and efforts of the KFTC, there is a concern that there will be inherent limitations to the current approach. In a situation where there exist structural and intrinsic incentives to engage in so-called the ‘Gapjil,’ focusing on external problems and strengthening behavioral remedies are highly likely to turn the problems into latent matters rather than solving them. Considering that the essential cause of the Gap-Eul relationship lies in economic incentives, the top priority is to improve the economic incentive structure by aggressively restructuring the oligopolistic and monopolistic market, executing competition promotion policies and exerting efforts to actively enforce competition law. It is also urgently necessary for companies to break away from the old business model of cost reduction and to recognize the need for growth by innovation and to realize the value of SMEs as their business partners.

It is very hard to expect that these tasks can be completed only by the efforts of government agencies. Also necessary are more competitive pressures from the civil sector and creating judicial institutions to warrant the successful private seeking of remedy. In particular, it should be emphasized that these tasks cannot be accomplished solely by efforts of the KFTC or the competition policy. Not to speak of the close cooperation between relevant government agencies, national capabilities should be gathered including politics to complete the judicial process structure to enable the economic agents to solve problems autonomously in the market.

With a generally accepted regret and criticism that the Korean economy has entered a crucial turning point, it will be difficult to neglect the situation that the economy as a whole is dominated by the ‘large corporation zoo’ which consists of downstream companies subordinate to the vertically-integrated large corporation. Excessive economic concentration may go beyond the matter of economic risk management and reach a degree that raises concern over the threat to the democracy. Considering that the most important objective under any circumstance is to increase the social welfare and potential for the sustainable economic development, it will not be desirable if the efforts to repress the economic concentration and to address the Gap-Eul relationship result in neglecting the benefit of consumers. I expect that in 2018 the basic principle is remembered and faithfully followed, which is that the competition policy fosters a competitive market and active competition promotion and law enforcement is warranted to enhance the economic efficiency and consumer welfare. Accomplishing these basic tasks will be the shortcut ensuring the efforts to repress the economic concentration and to address the Gap-Eul relationship achieve the desired results and building a system in which large corporations and the SMEs can establish a win-win cooperation.

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

KIM Chongmin / LEE In Ho***

I. OVERVIEW

It is very difficult to expect smooth operation of a market economy through enforcement of competition law if there is a lack of systematic understanding of how corporate actions affect competition. Thus, the importance of economic analysis in establishing and implementing competition policies need not be emphasized anew. Against this background, it is understandable that the U.S. and Europe competition authorities, pioneers in the development of economic analysis methods, have been leading competition law enforcement worldwide. While competition law enforcement in the U.S. takes an effectiveness approach by focusing on economic efficiency or consumer welfare, European competition law enforcement emphasizes competition as a process and focuses on a variety of goals that include SME protection and economic efficiency. But these differences have been eased along with the modernized implementation of competition laws pursued by the EU. Recently, the EU is seen to draw closer to the US-style effectiveness approach.

Korea is seeking ways to simulate U.S./EU-style competition law enforcement, the recognized global standard, in place of existing regulatory practices focusing on unfair trade practices. In this process, the scope of its application has expanded to include both domestic and global corporations. The Korea Fair Trade Commission (KFTC) actively promotes exchanges with law enforcement agencies around the world[1] in lieu of such global trends. In this regard, events such as the '2017 Korea-EU Competition Enforcement Authority Joint

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1. The KFTC has executed MOUs with 20 countries including the EU.

Seminar on Economic Analysis of Competition Policy' and the 'Korea-EU Competition Authority Exchange Meeting on Economic Analysis' are meaningful. The KFTC and EU Chief Competition Economist Team (CET), EU Economic Analysis experts and Korean experts participated in the '2017 Korea-EU Joint Seminar on Economic Analysis of Competition Policy' to introduce and discuss recent issues in economic analysis of competition policies. This event has held annually since 2016, and in 2017, it focused on "abuse of market-dominant position" and "mergers", for which economic analysis plays a particularly important role. Especially, in the field of "abuse of market dominant position", experts who participated in the economic analysis of the Qualcomm case in both jurisdictions participated in the discussion showing the role economic analysis plays in a real case. The Qualcomm case was significant in that the KFTC imposed a corrective action on Qualcomm's abuse of market dominant position in the license and chipset market for the first time worldwide. In addition, the 'Korea-EU Competition Authority Exchange Meeting on Economic Analysis', held separately from the joint seminar, was attended by experts of the KFTC and EU Competition Authority to share experiences and methods of economic analysis in cases of each authority and strengthen cooperation between them. This meeting was first held in 2015 in Brussels and is seen to have contributed to the understanding and cooperation of the two competition authorities.

II. LEGISLATION AND POLICY

In April 2017, the results of a research project to implement Korea's competition regulations in a more systematic manner were released. The KFTC published a research report titled "Understanding and Using Economic Analysis" to help promote systematic economic analysis in the review of competition cases. The KFTC stated that the purpose of publicizing the research report was to improve the quality of economic analysis and the consistency and reliability of the KFTC's handling of cases. The report details key economic analysis theories, methods, major regulations and cases related to market definition, mergers and abuse of market dominant position.

The report is largely deals with market definition, assessing restriction on competition in mergers and abuse of dominant position cases. First, in the market definition part, the report discusses economic theories and analytical methods related to market definition (the basis for handling important competition cases) in connection to major regulations and cases including cartels, mergers and abuse of market dominant position. In particular, the report introduced theories and methods of market definition in special markets such as the Two-Sided Market Theory and After Market Theory, the most recent major issues concerning market definition.

Secondly, the report provides a detailed introduction to real cases where economic theories and analytical methods related to assessing restriction on competition have been applied by the type of the M&A (horizontal, vertical or conglomerate). In particular, new analysis methods that have been used in real cases such as UPP (Upward Pricing Pressure) which is widely used in cases of stand-alone pricing increases in differentiated markets and VGUPPI (Vertical Gross Upward Pricing Pressure Index) were introduced. “UPP” is a numerical methodology for determining whether a party of a horizontal merger may raise prices of goods and services on its own after the merger, such as in the ‘SKT-CJ Hello Vision merger case’ (2016) and the ‘Eyeglass lens manufacturer merger case (Essilor-Dae Myung Optical)’ (2014). “VGUPPI” is a methodology that numerically calculates whether a vertically-merged firm has an incentive to discontinue the supply of inputs to competitors or to exclude competitors through input price increases, proposed by MORESI & SALOP (2013). However, there is no known example of actual application of this theory to a real case.

Finally, in the abuse of market dominant position part, important theories and analytical methods used in assessing competition restriction in abuse of market dominant position cases (such as wholesale price setting, bundling, loyalty discounts and trading on exclusive condition) are discussed along with relevant regulations.

KFTC expects to improve the quality of its case handling through in-depth economic analysis to achieve consistent law enforcement and better rates of winning at court. It also hopes to improve its credibility by increasing transparency in case handling, reducing costs of economic analysis incurred by companies and preventing distorted economic analyses. Internally, the KFTC expects to improve the staff's expertise in economic analysis in the case handling process. By raising its expertise in case handling and consistency in enforcement, the KFTC expects to lower the percentage of cases appealed and raise its rates of winning at court in the mid- to long-term. On the other hand, by disclosing its key economic analysis methods and case applications to the public, the reliability of the KFTC’s case handling is expected to increase and corporate compliance costs are expected to be minimized. In addition, distortion of economic analysis is expected to decrease by providing reasonable standards for surveys, data collected and analysis methods required when submitting evidence for economic analysis.

III. MAJOR CASES

1. An increase in economic analysis for Damage Claims

In 2017, economic analysis played an important role in damages claims related to various cartels. Enforcement against cartels have been central to the KFTC's administrative sanctions. However, litigation can play an important role in providing substantial relief to those affected by cartels, and recently, claims for damages have been on the rise. But if plaintiffs and defendants cannot find an acceptable method to estimate damages, the effectiveness of substantive relief being provided may be reduced due to the delay in litigation. Further, this increases the unreliability and uncertainty, thereby reducing the growth of damage claims. Therefore, the establishment of scientific and reasonable methods of damage estimation can be seen as a vital element in private sanctions of cartels. In addition, the importance of economic methodology in such rational estimation is evident in the fact that economic methodology, especially the methodology of quantitative economics, is dominant in private lawsuits around the world.

However, as shown in the case of the 5 oil refineries' oil and gas bidding cartel case (which are considered to have made a great contribution to damage lawsuits in Korea), the introduction of economic analysis does not always make it easy for plaintiffs and defendants to agree on damage estimation. In particular, the main cause this case took approximately 12 years from the filing to closing was over disputes of damage calculations. In the litigation, there was fierce dispute on whether to use the standard market comparison method or the quantitative economics method of difference-in-difference (DID) using multiple regression analysis in estimating the "but-for competitive price or counter-factual competitive price" necessary for calculating the damages. As a result, the first-tier court used the difference-in-difference (DID) method, the intermediary appellate court used the standard market comparison method (or yardstick method), and the case concluded when the Supreme Court adopted the first-tier court's methodology in its final ruling. Since then, the method of quantitative economic analysis has become the main methodology in determining the amount of damages in most cartel cases. Recently, lawsuits due to bid-rigging are rapidly increasing, mainly related to bid-rigging in construction projects. In the past, the court uniformly used the winning bid rate (set according to different bidding methods) as the standard for damages related to construction biddings, not considering the construction industry's unique characteristics in bidding (especially alternative/turn-key projects) such as winning bidder methods. However, establishing the amount of damages by using the winning bid rate of other biddings without considering the bidding method is starting to be criticized.

In particular, the need to develop appraisal methods that take the special nature of construction into account is gaining attention after the Subway Line 7 damages lawsuit[1]. This case showed that it necessary to calculate damages reflecting elements that affect the price of

1. Seoul Central District Court Judgment in Case No. 2011GaHab26204.

the winning bid (winning bid rate) other than the collusion itself considering the nature of construction, such as bidding method, number of bidders, cost of construction, correlation between design score and pavement rate, the tactical strategy of the individual contractor (according to its need to win the bid and gain experience), the ability of the contractor to perform, and the difference in calculation of construction cost by the client. In the case of bid rigging, various analytical methods of quantitative economics analysis (including the method of adding multiple regression analysis of quantitative economics to the double-differential model combined with the comparative market method and before-after comparative method) are being used in combination with economic theories on bid rigging.

2. The abuse of market dominant position case concerning Qualcomm Incorporated (KFTC Case No. 2015ShiGam2118)

On January 20, 2017, the KFTC delivered a decision on a case involving Qualcomm, which had been reviewed for many years. The KFTC's resolution stated that Qualcomm's license terms regarding standard essential patents for mobile communication including CDMA, WCDMA and LTE should not interfere with other operators' business activities and provided terms to correct such license agreements. The KFTC also imposed a fine of approximately KRW 1.30 trillion on Qualcomm.

Qualcomm filed an appeal for cancellation and suspension of the KFTC's decision in February. The application for suspension has been rejected by the High Court and the Supreme Court, and the cancellation lawsuit is expected to resume. In 2018, Qualcomm has signed a patent renewal agreement with Samsung, a cooperator for KFTC's review of Qualcomm. According to this agreement, Samsung has agreed to not participate in future administrative litigations. It remains to be seen how this change will affect the cancellation lawsuit.

The Qualcomm case has developed at the point of contact between the patent system and competition regulation, and its significance is expected to grow as the role of technology patents increase in market competition. Factors to consider in this case include patent-related concepts, such as SEP (Standard Essential Patent), patent exhaustion, FRAND commitment, cross grant, and competition regulation on market exclusion.

In this case, the KFTC claims that Qualcomm's patent licensing practices are market exclusionary. However, in order to regulate market exclusionary acts in Korea, it is necessary to prove the intent and effect of the competitor's exclusion as stipulated by the so-called POSCO judgment. The main issue of this case concerned dispute over the effectiveness of the FRAND commitment in the patent system. First, a judgment must be made as to whether

Qualcomm's acts violated the FRAND commitment. If Qualcomm’s acts are found to be a violation of the FRAND commitment, then, judgment should be made as to whether such violation had any market exclusionary effects.

In economic analysis of this case, consideration should be given to the legitimacy of the patent system and how the allocation of intellectual property affects the effectiveness of market transactions.

Basically, a market economy system relies on competition from market participants to create efficiency in the allocation of resources, while in the patent system, the government grants exclusive rights to certain market participants, inconsistent with competition principles of a market economy system. The patent system originates from the thought that it is difficult to compensate information goods (such as technology patents) in a competitive market, which may lead to reducing incentives for innovation. Thus, even in the case of standard essential patents, the argument that FRAND commitments should provide patents at the marginal costs of developing and distributing the technology is inconsistent with the original intent of the patent system. There remains a question as to how much patent fees should match the intent of FRAND agreements, but no competition law in the world provides the answer to this question.

It is also unclear what position FRAND commitments have in competition cases. Since FRAND Commitments are made in private contracts between the Standard Setting Organization (SSO) and participating companies at the time of granting the standard essential patent, it is uncertain whether they are subject to competition law. If a FRAND commitment is not automatically subject to competition law, a competitive effect analysis needs to be performed to determine whether an act at issue in a FRAND commitment violation case constitutes an abuse of market dominant position.

It is not easy to define intellectual property rights such as patents clearly, or negotiate terms involving them efficiently. Thus, the so-called Coase theorem cannot be applied in a standardized manner and decisions by policy authorities on the allocation of intellectual property play a crucial role in the effectiveness of market transactions. In particular, it is important for policy authorities to make judgments by considering not only current patent practices but comparing the effectiveness of transactions under patent practices that will develop if current practices are regulated.

Qualcomm's case is currently being dealt with in a higher court, so it is difficult to make a judgment on it in advance. However, it is important to remember the two points above in the review process.

PART II.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF INTELLECTUAL PROPERTY LAW OF KOREA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW

CHUN Hayoun *

I. OVERVIEW

In 2017, several new procedures were introduced in Korea. First, Patent Cancellation Proceeding was introduced, allowing non-interested party to challenge the validity of a patent through a simple process within 6 months of registration. Procedures to prevent false registration of patent, procedures such as re-examination initiated by examiner was introduced. Further, a patent transfer request process, where a true inventor or its successor can request non-legitimate patentee to transfer its patent was installed. Also, the time-limit was alleviated for a true inventor or his successor to be protected by filing a new application after the patent registered by a non-legitimate patentee is invalidated

The Supreme Court revoked the Patent Court's decision to confirm that the "Free-to-Work Technology defense" can be applied in the context of literal infringement. In addition, the Supreme Court decided that compensation for employee invention shall be paid even when a patent based on an employee invention is invalidated and acknowledged employee's right to require compensation.

II. LEGISLATION AND POLICY

1. New procedures for preventing false patent registration

(1) Introduction of patent cancellation proceedings

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Under the Patent Act, an invalidation trail can be brought only by an interested party. The Supreme Court acknowledges the interest broadly by ruling that an interested party means a person who is facing or is at risk of facing a patent infringement claim, and has a direct and practical interest in the validity of a patent, including a person who is or plans on producing or selling products of same kind with the patented invention.[1] However, since filing an invalidation trial by an interested party may result in notifying potential infringement to the patentee, interested parties are sometimes reluctant to file an invalidation trial before a patent infringement action is brought.

For this reason, the law allowed a 3-month period from the issuance of a patent when anyone can file an invalidation trial. Nonetheless, the proceeding was burdensome in terms of cost and effort and not frequently used by non-interested parties since an invalidation trial is an inter-parte proceeding.

The Revised Patent Act effective as of March 1, 2017 introduced a cancellation proceeding which is an ex-parte proceeding before the patent office to encourage examination by public. In this new proceeding, anyone can file a request for cancellation based on specific grounds within 6 months from the issuance of a patent (Articles 132.1 to 132.15 of the Patent Act).

Patent cancellation proceeding has several differences, compared to an invalidation trial.

First, the grounds for cancellation are limited to: lack of novelty, lack of inventiveness and violation of first-to-file rule, and the prior product cannot be used as prior art (Article 132.2.1(i) of the Patent Act). A request based only on the reference cited by the examiner and indicated in the patent publication is not allowed, unlike an invalidation trial (Article 132.2.1(ii) of the Patent Act). Ne bis in idem is not applied in a cancellation proceeding, and additional cancellation request can be made based on the same prior art, while invalidation trial based on the same prior art with the previously determined trial is not allowed (Article 163 of the Patent Act).

Procedurally, a cancellation trial is reviewed by an examiner panel consisting of 3 or 5 trial examiners. To expedite the procedure and alleviate burden to requesting party, the examiners render decision in a cancellation proceeding based on records, unlike an invalidation trial where an oral hearing is held and constitute an important part of process, and in case several requests are filed for the same patent, the requests are consolidated. In case a patent registration is cancelled via cancellation proceeding, the patentee may file an appeal to the Patent Court, but a requesting party cannot file an appeal against a decision to dismiss a cancellation request (Article 132-31(5) of the Patent Act). In case the requesting party

1. See, e.g., Supreme Court Judgment in Case No. 2007Hu1022 delivered on January 28, 2010.

qualifies as an interested party, the party can bring an invalidation trial to challenge the validity of the patent, which survived previous cancellation request.

Upon introduction of the cancellation proceeding, an invalidation trial can only be filed by an interested party under the revised law.

(2) Reexamination Initiated by Examiner

Under the revised Patent Act effective as of March 1, 2017, an examiner may re-examine a patent application after he/she issued allowance in case clear grounds for rejection are found before the allowed application is registered (Article 66(3) of the Patent Act). In Korea, a patent is registered by paying a registration fee after examiner's issuance of allowance, and a patent right is vested in the patentee upon the registration. The new statute aims to prevent false patents by allowing examiners to cancel the allowance before a patent is registered and a right is vested.

Under the new law, an applicant may need to pay the registration fee as soon as possible to mitigate risk of an examiner's reexamination.

2. Enhanced Protection of True Right Holder from Patent Registration by a Non-Legitimate Patentee

(1) Extended Due for True Right Holder's Application

An application filed by a person who is not an inventor or its successor ("Non-legitimate Person") shall be rejected, and, if registered, shall be invalidated. If a true inventor or its successor ("True Right Holder") files his/her application within 30 days from the day Non-Legitimate Person's application is rejected or Non-Legitimate Person's patent application is finally and conclusively invalidated, True Right Holder's application shall be deemed to have been filed on the date Non-Legitimate Person's application was filed (Patent Act Arts. 34 and 35).

In addition to the above requirements, to benefit from the above law, a True Right Holder shall file an application within 2 years from the issuance of Non-Legitimate Person's patent under the previous statute in case the patent is finally and conclusively invalidated, according to the previous statute. Thus, if a decision to invalidate Non-Legitimate Person's patent became final and conclusive after the 2-year period was passed after the issuance, a True Right Holder could not be protected. The protection of True Right Holder was insufficient especially since an invalidation trial was often brought after a patent infringement dispute arose and it was not very usual for an invalidation trial to be filed within 2 years of the issuance of a patent.

Under the revised law that became effective March 1, 2017, the 2-year period limitation was abolished. A True Right Holder can benefit from the deemed application date in case he/she files an application within 30 days from the final and conclusive invalidation of Non-Legitimate Person's patent (Article 35 of the Patent Act).

(2) Patent Transfer Request

As discussed above, protection of True Right Holder under Korean law was achieved by rejecting or invalidating Non-Legitimate Person's application or registration, and requesting True Right Holder to file a new application. Thus, a True Right Holder shall go through the entire invalidation process and patent prosecution process to obtain his/her right.

To avoid complicated process, it was proposed to allow a True Right Holder to request transfer of a Non-Legitimate Person's patent to him/her so that the patent is vested in the rightful person. However, in 2014, the Supreme Court rejected such proposal by ruling that "given that the Patent Act protects True Right Holder via deemed application date, which is an exception to first-to-file principle, even if a Non-legitimate Person who did not success a right from the True Right Holder filed an application and obtained a patent, the True Right Holder shall be protected via the procedure provided by the Patent Act, and does not have to request the Non-legitimate Person to transfer the patent to him/her, without using the available procedure under the Patent Act."[1]

However, as the patent transfer request proceeding was introduced in the revised act, in case a Non-Legitimate Person files an application and has a patent registered, a True Right Holder can request that the Non-Legitimate Person transfer the patent to him/her (Article 99-2 of the Patent Act). Thus, the True Right Holder can recover his patent without invalidating Non-Legitimate Person's patent and filing a new application. In addition, under the revised act, the right to claim compensation after publication of application[2] for a patent so transferred shall be deemed to be vested in the transferee from the date of patent registration.

1. Supreme Court Judgment in Case No. 2012Da11310 delivered on May 16, 2014.
2. In Korea, after a patent application is laid open, the applicant may give a person who has practiced the invention claimed in the application for business purposes, a written warning stating that a patent application has been filed for the invention. The applicant may claim compensation from a person who has practiced the invention claimed in the patent application for business purposes, for the period from the time of the written warning (or the time he/she becomes aware that the invention he/she practice is claimed in the laid-open application) until the time the grant of the patent is registered. *See* Article 65 of the Patent Act.

3. Period for request for examination shortened

In Korea, an application is examiner only when a request for examination is made. Previously, a request for examination shall be made within 5 years from the application date. Otherwise, the application is deemed to be withdrawn.

In case the request for examination is not made promptly, the application may be pending without being examined for a long time. This delays the patentability decision for the pending application and increases uncertainty as to whether a third party would face patent infringement dispute with regard to the claimed invention. Compared to other counties, the 5-year period provided in the previous Patent Act was the longest among major countries as a request for examination is made upon application in the U.S., and Japan and China provide a 3-year period for request for examination.

In view of the above problems, the revised Patent Act shortened the period for request for examination to 3 years from the application date so that the patentability decision can be made quickly (Article 93 of the Patent Act). The act also provides a tool for delaying the examination, called delayed examination, where the examination can be delayed up to 5 years upon applicant’s request. Applicant may employ this delayed examination in case delayed decision on the patentability is desired.

4. Patent Court holds a pilot English trial

On June 28, 2017, the Patent Court held a pilot English trial for the first time in Korea. Under Korean procedural law, Korean language shall be used in the court room, and hearings cannot be conducted in English. Thus, the Patent Court conducted the pilot trial in English after it held a hearing in the same case in Korean.

The case heard was an appeal against Korean Intellectual Property Office (“KIPO”)’s rejection to an application relating to light control film, also known as ‘privacy protection film’ or ‘security film,’ filed by 3M, a multinational company. 3M, the plaintiff, and KIPO, the defendant, agreed in a case management video conference to hold an English hearing, and the court allowed it. This pilot trial was held as a test bed for English hearings.

In the trial, both sides presented their arguments in English. The court led the hearing, however, in English and conveyed its opinion in English to the extent it was necessary. Simultaneous interpretation service was provided. The decision was to rendered in Korean and an English translation will be attached.

According to the Patent Court, in 2016 more than 40% of cases before the Patent Court involved a foreign party. With a goal to make Korean courts an international patent dispute resolution hub, the Patent Court pushes forward establishing an international panel, which handles patent cases in English language, and the related bills such as Court Organization Act are pending at National Assembly. If the proposed revisions are passed in the National Assembly, the parties can submit briefs and present oral arguments in English, without translation or interpretation. Further, in case relevant Supreme Court's rule is established, an expert can make a testimony or presentation via video conferencing without traveling to the court house in Korea. This will be beneficial for multinational companies since its technical experts in the head office can readily make testimony or presentations. However, even after the bills are passed, the court will lead hearings in Korean, and the decision is rendered in Korean while an English translation of the decision is provided.

III. MAJOR CASES

1. Legitimacy of KIPO's calculation of extended patent term (Supreme Court Judgment in Case No. 2017Hu844 delivered on November 19, 2017)

(1) Background

The term of a patent on a pharmaceutical invention may be extended only once by up to five years to compensate for the period during which the invention cannot be practiced, if the invention requires approval, registration, etc. ("Approvals") under any other laws or rules to practice patented invention and it takes a long time to undergo necessary tests for validity, safety, etc. for such Approvals. However, the extension shall not be granted for the period required due to a cause attributable to the person who has obtained Approvals. (Article 89 of the Patent Act).

The above law is provided for the purpose of securing actual patent term for the pharmaceutical inventions which require substantial time to undergo tests for FDA approval. However, in pharmaceutic market, it is typical that a new drug (so called, "original") is followed by launch of drugs having the same active ingredient with the original (so called, "generic"). Accordingly, generic drug makers adopt a strategy of developing generic drugs and completing all the required procedures such as test and approval before the patent on the original drug expires, and launches the drug as soon as the patent expires. Thus, any extension of the term of the patent on original drug delays launch of generic drugs and has a significant impact to generic drug makers' business. In this case, Korean generic drug makers filed suit for invalidating an extension of term of a patent on original drug.

(2) Main Issues

The defendant Astellas Pharma Inc. obtained a patent entitled “Remedy for Overactive Bladder Comprising Acetic Acid Anilide Derivative as the Active Ingredient” registered on June 23, 2010, and entered into a non-exclusive license agreement with Astellas Pharma Korea Co. Ltd. (“Astella Korea”). The license was registered with KIPO on January 24, 2014.

On January 31, 2013, Astella Korea filed to Korean Ministry of Food and Drug Safety (“MFDS”) applications for drug import approval of the drug at issue, BETAMIGA PR tab 50mg (drug substance: Mirabegron), and requested clinical trials, MFDS’s review of safety and efficacy, review of specifications: test procedures and acceptance criteria, GMP (Good Manufacturing Practice) review, and DMF (Drug Master File)review.

MFDS requested Astella Korea to submit supplemental materials for review of safety and efficacy, review of specifications: test procedures and acceptance criteria and DMF review on March 20, 2013, and for GMP review on July 25, 2013. Astella Korea submitted the requested materials for review of safety and efficacy, review of specifications: test procedures and acceptance criteria and DMF review on May 29, 2013, and for GMP review on December 12, 2013. MFDS reviewed the supplemental materials and approved importation of the drug at issue on December 31, 2013.

On March 28, 2014, the defendant filed to the KIPO an application for patent term extension with respect to claims 1 to 10 of the patent at issue for the period of 382 days, including 48 days from the date of patent registration, June 23, 2010 to the date of completion of clinical trials, August 10, 2010, and 334 days from the date of application for import approval, January 31, 2013 to the date of defendant’s receipt of MFDS’s approval, December 31, 2013. KIPO granted the extension as requested.

The plaintiffs, Han Wha Pharma Co., Ltd., et al., argued that MFDS’s review was suspended due to a cause attributable to Astella Korea from the date MFDS requested supplemental materials to the date Astella Korea submitted the requested materials, and that KIPO’s grant of extension should be invalidated for the period when such review was suspended.

The Patent Court did not accept plaintiffs’ argument and affirmed KIPO’s grant of extension. The Plaintiffs filed an appeal to the Supreme Court.

(3) The Supreme Court’s ruling

Applications for drug manufacture and sale or import approval by MFDS are reviewed by relevant regulatory divisions of MFDS according to Article 4(1) of Drug Safety Regulation, and the review process including request of supplemental materials is also controlled by the regulatory division according to circumstances of the division. However, each division conducts its review according to its roles and responsibilities in MFDS, and the approval can be made only after all of the reviews are completed. Thus, each division's review is only a part of the entire approval process, which can be considered as a single process as a whole.

In view of this, in case one division in MFDS requested supplemental materials and its review was suspended until the requested materials was submitted, but another division continued its review for drug manufacture and sale or import approval, the period when one division suspended review can be considered as a time spent for approval process, unless other special factors existed. Thus, such period cannot be said as period in approval process required due to a cause attributable to the person who has obtained the approval.

Based on the grounds of Patent Court's decision, there was no time period when MFDS's review was not conducted at all during the period the patented invention could not be practiced, and no reason was found to acknowledge certain period as a period required due to a cause attributable to the person who has obtained the approval. Thus, there is no ground to invalidate KIPO's grant of extension under Article 134(1)(iii) of the Patent Act.

(4) Implications

It was KIPO's practice to grant extension for the entire period from the date of application for import approval to the date of applicant's receipt of MFDS's approval. In an attempt to reduce the extended term of patent on original drug and expedite launch of generic drugs, however, generic drug makers argued that the period during the approval process when applicant prepared supplemental material should be regarded as a period required due to a cause attributable to applicant. As the Supreme Court rejected this argument, KIPO's practice will stand without any changes.

2. Compensation for Employee Invention (Supreme Court Judgment in Case No. 2014Da220347 delivered on January 25, 2017)

(1) Background

In case an employee makes an invention in relation to his work and the invention is patented, the treatment of such patent varies in every jurisdiction. Korea has a compensation system for employee's invention. "Employee Invention" means an invention that an employee, executive officer of a corporation, or public official ("Employee") makes in connection with his/her duties, where it falls within the scope of business of the employer, the corporation, the

State, or the competent local government ("Employer") and the activities that have led to the invention fall within the present or past duties of the Employee (Article 2(ii) of the Invention Promotion Act).

Unless otherwise agreed, Employer has a royalty-free non-exclusive license to an Employee Invention. However, Employer can execute in advance a contract such as employment rules by which Employer succeeds to rights to Employee Invention or is granted with an exclusive license to Employee Invention (Article 10(1) of the Invention Promotion Act). In case of succeeding to rights or being granted with an exclusive right, Employer shall provide a fair compensation or reward to Employee, and the amount of compensation shall be determined in consideration of benefit to be obtained by Employer from the Employee Invention and contribution to the completion of the Employee Invention by Employee and Employer (Article 15(1) of the Invention Promotion Act).

It is typical that companies establish an internal rule on compensation for Employee Invention, and provide compensation with an amount set by uniform standard in the rule. As the uniform standard often fail to reflect the value of Employee Invention in specific cases, dispute over the fairness of compensation rises, especially when Employee Invention is employed in actual products and makes significant contribution to Employer’s business.

(2) Main issues

The plaintiff made two Employee Inventions related to a method for searching dial information using dial keys in a telephone device (“First Patented Invention”) and a method for searching dial information group-wise (“Second Patented Invention”). The defendant Samsung Electronics Co., Ltd. succeeded the inventions and obtained patents.

The plaintiff argued that the defendant succeeded his Employee Inventions and was practicing them, and claimed a compensation of KRW 110,000,000. The defendant rejected that it was practicing the Employee Inventions, and argued that it was not benefitted from exclusive right based on the inventions because they lacked novelty or inventiveness.

The first instance court ruled that since the First Patented Invention lacked inventiveness and the defendant could not be considered to have benefitted from exclusive right based thereon. However, the court found the Second Patented Invention inventive, and provided following formula for calculating amount of fair compensation: amount of compensation = Employer’s revenue × contribution of Employee Invention × royalty rate × contribution of exclusive right × contribution of inventor. According to this formula, the court ruled that the amount of fair compensation shall be KRW 10,925,589 (= Employer’s revenue KRW

136,569,871,101,526 × contribution of Employee Invention 2% × royalty rate 2% × contribution of exclusive right 0.1%[1] × contribution of inventor 20%).

However, the second instance court decided that although the First Patented Invention lacked inventiveness, it was not identical to the prior art, and that fact that a patented invention can be invalidated did not mean that the defendant was not benefitted from exclusive right. Thus, the court decided that the defendant shall provide the plaintiff with compensation for both the First and Second Patented Inventions of amount KRW 21,851,179 (= Employer's revenue KRW 136,569,871,101,526 × contribution of Employee Invention 2% × royalty rate 2% × contribution of exclusive right 0.2% × contribution of inventor 20%).

Both the plaintiff and the defendant appealed.

(3) The Supreme Court's ruling

Article 40(2) of the former Patent Act (before amendments made by Act No. 7869 of Mar. 3, 2006)[2] provides that, in cases where an Employer succeeds the right to obtain a patent for an Employee Invention, the amount of benefits that the Employer is to obtain from the invention and the degree of contribution by the Employer and the Employee in completing the invention shall be taken into consideration when determining the amount of fair compensation to be paid to the Employee who developed the invention. Article 39(1) of the same Act stipulates that an employer shall have non-exclusive license to use an invention developed by an employee even if that employer has not succeeded to the right to obtain a patent for the Employee Invention. In that context, the phrase "benefits to be obtained by an employer" refers to the benefits that an employer is anticipated to reap by acquiring exclusive license, which exceeds non-exclusive license, to use an Employee Invention (*see* Supreme Court Judgment in Case No. 2009Da91507 delivered on Sept. 8, 2011). Meanwhile, inasmuch as "benefits to be obtained by an employer" mean benefits that an employer is to reap from an Employee Invention itself and not profits recorded in a financial account (such as operating profit after balancing revenues and expenses), it is deemed that benefits to be obtained by the employer exist if benefits are generated from the Employee Invention *per se* regardless of the outcome of balancing revenues and expenses. Also, even if a product manufactured and sold by an employer does not fall under the scope of right to an Employee Invention, insofar as the product can substitute demand for a product implementing the Employee Invention and sales of the product was increased by preventing competitors from using the Employee Invention based on the patent right thereof, benefits incurred directly or indirectly by the Employee

1. The court found that the defendant did not practice the Second Patented Invention. However, acknowledging the benefit from exclusive right in that competitors were prevented from using the Second Patented Invention, the court decided that contribution of exclusive right was 0.1%.
2. Previously, the provisions regarding compensation for Employee Invention were included in the Patent Act. After the revision, the provisions were moved to the Invention Promotion Act.

Invention can be considered as Employer's benefits (*see* Supreme Court Judgment in Case No. 2009Da75178 delivered on Jul. 28, 2011).

Furthermore, unless an employer cannot be deemed to be generating any substantial and exclusive benefits from a patent because an Employee Invention for which a patent was registered after the Employer succeeded to the right to the invention is either a publicly known art or obvious to a person having ordinary skill in the art and the patent is to be invalidated and competitor can readily be aware of such grounds of invalidation, the fact that there exist grounds to invalidate a patent for an Employee Invention cannot be the sole basis to unilaterally deny exclusive benefits from a patent and subsequently exempt an employer from providing compensation for an Employee Invention. The invalidity grounds may only be taken into consideration when calculating the exclusive benefits of obtaining a patent for an Employee Invention.

The First Patented Invention may be invalidated for lack of inventiveness because it can be seen as readily conceivable from prior art reference 1 and 2 considered in the original decision and conventional technology. However, mere existence of such potential invalidity grounds does not completely deny the value of the First Patented Invention or exempt the defendant from providing compensation for an Employee Invention. It can only be considered in determining contribution of exclusive right.

(4) Implications

In many cases where the amount of compensation for Employee Invention is at dispute, Employers argue that the patent based on Employee Invention shall be invalidated and thus compensation is not necessary. The first instance court accepted such argument and decided that if Employee Invention lacks patentability, exclusive right cannot be acknowledged and Employer cannot be said to obtain benefit from exclusive right, denying Employer's obligation to provide compensation. However, the Supreme Court revoked such reasoning, and lack of patentability does not exempt Employer from the obligation to provide compensation, and can only be considered in calculating the amount of compensation.

As patents are property of a company, it does not provide benefit to company only by being practiced. Further, since patents can be finally invalidated via invalidation trial proceeding, the exclusive right of a patent cannot recklessly be denied before KIPO or court's final and conclusive decision to invalidate the patent. In view of the above, Supreme Court's ruling that lack of patentability does not exempt Employer from the obligation to provide compensation, and can only be considered in calculating the amount of compensation is reasonable.

[Applicability of Defense of Free-to-Work Technology (Supreme Court Judgment in Case No. 2016Hu366 delivered on November 14, 2017)]

In 2016, the Patent Court decided that the defense of free-to-work technology is applicable when the patentee claims infringement under the doctrine of equivalent, but not applicable when literal infringement is claimed. (*See* pp. 190-191, China-Korea IP & Competition Law Annual Report 2016 Vol. I: MRLC Annual Report Series No. 3).

In 2017, the Supreme Court revoked Patent Court's decision, and ruled as follow:

"In a case where a challenged invention, which is compared with a patent invention, is comprised solely of the prior art or can be readily practiced by persons of skill in the art in view the prior art, the challenged invention shall be deemed as free-to-work technology and not falling within the scope of the patent, without having to compare it with the patented invention in an affirmative scope confirmation trial. This allows for a reasonable and prompt resolution of dispute by comparing the challenged invention with the prior art, rather than determining the validity of the patent, and deciding whether the challenged invention falls within the scope of the patent.

In view of the inherent nature and function of defense of free-to-work technology and what is compared with the prior art, the above defense is generally applied when determining as to whether a patent is infringed. Accordingly, the defense is also applicable in cases pertaining to literal infringement, that is, where a challenged invention includes all of the claimed elements and combination thereof."

The Supreme Court returned the case to the Patent Court. According to the current decision, the defense of free-to-work technology will maintain its role in patent disputes.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

KIM Wonoh[*]

I. OVERVIEW

1. Legislation and Policy

Since there was a full-scale revision of the Trademark Act (Law No. 14033, effective September 1, 2016), no significant revisions of the Trademark Act are expected for the time being. In 2017, there was a simple and partial revision of the Trademark Act to adjust the penalties for punishment, and an amendment to expand the eligibility of applicants for collective mark was initiated (Proposed Bill No. 2009193). In addition, required documents were simplified through a revision of enforcement regulations of the Trademark Act, and some changes to standards of determination and improvement of review were brought about by revision of trademark review standards and review processing rules.

2. Major Cases

There were no groundbreaking rulings by the Supreme Court in the field of the trademark law in 2017, but some significant cases to note include: i) a judgment that recognized the acquisition of discrimination by use of the ‘Quick Loan’ mark (Case No. 2015Hu2174), ii) a judgment that provided standards for trademark determination and review in relation to consumer deception (Case No. 2014Hu1921), iii) a judgment that provided standards of fair use which showed the difficulty in avoiding cancellation of a registered trademark due to the non-use based on nominal advertisements, and iv) a series of Supreme Court rulings based on

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critical observations that considered trading practices in determining similarity of trademarks (Supreme Court Judgment in Case No. 2015Hu932 delivered on March 9, 2017, Case No. 2015Hu949 delivered on March 9, 2017, and Case No. 2016Hu2447 delivered on March 15, 2017). These rulings all upheld the Supreme Court Judgment in Case No. 2015Hu1690 delivered on February 9, 2017 (the “Jasengcho” case).

II. LEGISLATION AND POLICY

1. Revision of the Trademark Act

(1) Revision of Amounts of Fines: March 31, 2017 (Promulgation), September 22, 2017 (Effective)

Revised provisions so that KRW 10 million won per year of imprisonment sentenced could be assessed for perjury (Article 232), using a false mark (Article 233), and false acts (Article 234).

(2) Expansion of applicants for geographical indication collective marks (pending at the National Assembly: Proposed Bill No. 2009193)

○ Major Points of the Amendment

Revised provisions so that ‘a corporation composed of persons who produce, manufacture or process goods’ could apply for geographical indication collective marks. Previously the provision only allowed for ‘a corporation composed solely of those who produce, manufacture or process goods’.

○ Analysis

The current law restricted persons who can register for geographical indication collective marks to a “corporation composed solely of persons who produce, manufacture, and process goods which can use the geographical indication”. However, such provision excluded corporations that distribute and sell products, and was perceived excessive. Therefore, it was necessary to delete ‘solely’ from the provision to relax eligibility requirements for applicants so that corporations that distribute and sell products could also apply. This would solve the inconvenience caused by a need to establish separate corporations and help promote the regional economies.

2. Amendment to Enforcement Regulations (Rule No. 280 of the Ministry of Industry and Commerce, effective January 1, 2018)

(1) Simplification of submission documents when abandoning certain designated products (Rule 53)

Provisions revised to require only a submission of a payment slip including the purpose of abandoning certain designated products (rather than both a payment slip and an abandonment form) when abandoning certain designated products with registration. This intended to simplify required documents since previously one had to list the purpose of abandonment on the registration fee payment slip and then submit an additional abandonment form.

(2) Introduction of rules for labeling registered trademarks (Rule 101)

This rule allowed registered trademark letters and registered trademark numbers to be displayed on a product or its packaging, and allowed display of an internet address (where the registered trademark number is displayed) in substitute of displaying the registered trademark number. This rule stipulated the specifics for labeling registered trademarks according to Article 222 of the Trademark Act. It intended to diversify the method of labeling trademarks and provide consumers with accurate information on them.

3. Revision of Trademark Review Standards and Handling Procedures

A. Revised Standards of Review enacted as of February 1, 2016 (KIPO Regulation No. 100, December 19, 2017)

(1) Change in judging distinctiveness for three-dimensional trademarks (standard of review)

○ If the three-dimensional shape is recognized as the shape of the product itself (including the package or container), or if it is recognized to be a part of the shape of the designated item even though there is partial modification or decoration, distinctiveness is not acknowledged.

- However, in cases where a distinctive three-dimensional shape is combined with symbols, letters, figures, etc., which have distinctiveness, distinctiveness may be recognized.

- In addition, if a three-dimensional shape without distinctiveness acquires distinctiveness by use, such distinctiveness may be recognized.

○ If a three-dimensional shape is not recognized as indicating the shape of the designated product (including packaging and containers) and is a very unusual shape that is not common, distinctiveness may be recognized.

(2) Improvements in processing reviews for trademark applications where a previously-registered trademark is cited but the registration fee is unpaid for such previously-registered trademark

○ Amendments

In order to improve applicant convenience and to shorten the period of review, if a registration fee has not been paid within the due period (2 months) for a previously registered trademark, such trademark shall be regarded as abandoned in accordance with Article 75 of the Trademark Act, and any trademarks applied for will be processed without delay.

○ Analysis

Previously, even if a registration fee was unpaid within the due period for a previously registered trademark, new trademark applications were delayed for approximately 8 months[1] since it was possible to recover rights for the previously registered trademark if an additional registration fee was paid (based on causes out of the right holder's control) under Article 77[2] of the Trademark Act.

However, with the full revision of the Trademark Act in 2016, such recovery rights were extended to 1 year (from 6 months), and it took 14 months after a registration was accepted (due period for registration fees 2 months + 1 year) for a previously registered but unpaid trademark to be excluded from grounds of refusal, causing a great increase in processing times and number of deferred cases. On the other hand, there has been no cases in which trademark registration applications have been restored by paying additional registration fees since the recovery rule has been introduced (February 2001). Therefore, in order to deal with such issues, if a registration fee is not paid within the due period, trademark applications can be

1. Under the previous law, the trademark registration application restoration period was 6 months. Therefore, a previously-registered trademark would only be inconsequential after 8 months of non-payment (2-month due period for registration fee + 6 months).
2. Article 77 of the Trademark Act (Reinstatement of Application for Trademark Registration by Payment of Trademark Registration Fees or Remainder Payment) ①…he/she may pay such trademark registration fee or pay the remainder within two months from the date such grounds cease to exist: provided that when one year has elapsed since the expiration of the period for payment or of the period for remainder payment, whichever occurs later, he/she shall not be able to pay the trademark registration fee or pay the remainder.
1.～3. (omitted)
② Notwithstanding Article 75, any person who has paid or paid for the registration fee pursuant to Paragraph 1 shall be deemed not to have renounced the trademark registration application.

decided without considering recovery periods of previously registered trademarks, similar to patents or designs.

(3) Introduction of review standards for distinctiveness of ‘distinctive geographical name + university’ combination marks

○ Amendments

- In principle, a mark that consists of a simple combination of a ‘distinctive geographical name and a university’ is not considered distinctive.

- If a mark of a ‘distinctive geographical name + university’ is widely recognized as a trademark of a certain entity in an ‘education related field’, such distinctiveness can be acknowledged based on use.

- In the case of ‘Seoul National University’, distinctiveness was acknowledged based on the new concept formed between general consumers and the principal.

○ Analysis

In reflecting the Supreme Court’s judgment in the Seoul National University case[1] with regards to determining acquisition of discrimination by use, it was ruled that although recognition of distinctiveness should be limited to goods or services in principle, in ‘education-related fields’, if a university is running a business, distinctiveness can be acquired.

(4) Clarification of who is another party when determining similarity with a famous mark

○ Amendments

Distinguished standards between Article 34.2[2] of the Trademark Act which states that whether or not an applicant falls under Articles 34.1.11, 13, 14, 20 or 21 shall be determined

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1. Seoul National University case: Supreme Court Judgment in Case No. 2014Hu2283 delivered on January 29, 2015 (introduced in the 2015 edition of this Report).
2. Change of the time of judgment of a trademark that cannot be registered: Article 34.1.7
① (omitted)
② Paragraph (1) and whether the applicant for trademark registration falls under the category of another person shall be the time when he/she makes a decision that falls under any of the following subparagraphs: However, in the case of paragraphs 1, 11, 13, 14, 20 and 21, the decision shall be made based on the time of filing of a trademark registration application.
1) Decision of rejection of trademark registration pursuant to Article 54
2) Decision on trademark registration pursuant to Article 68

based on the time of trademark application, and the text of the Article which states that determining who is another party is based on when a decision is made on a trademark application.

○ Analysis

When whether a cited trademark could be considered a famous mark is at issue in determining the acquisition of distinctiveness of a trademark, the standards for acknowledging fame should be applied at the point of trademark application so that unreasonable ex post refusal based on a famous mark does not occur. However, determination of whether it is a trademark of another party can be changed based on circumstances (such as transfer of a trademark), providing grounds to relieve grounds of refusal. Therefore, distinctiveness would be based on the point of final registration. This amendment clearly stipulated such point in review standards to assist understanding of the law.

B. Revision of Review Operation Procedures

(1) Addition of exceptions to review suspension due to invalidation

○ Amendments

Revised regulations so that a review would not be suspended when invalidation would not affect the results of a review.[1]

○ Analysis

When (procedural) invalidation measures are taken on a matter in review, if invalidation is cancelled in an administrative court judgment, such invalidation may affect the review. Hence, this revision dealt with the issue of no benefit in suspending the review in cases where cancellation of invalidation would not affect the review and delay of the review process and interference with the applicant's remaining due procedures.

(2) Change of International registration information disclosure WIPO site

Previously, an applicant could confirm registration of an international trademark in a designated country through the Madrid search system (ROMARIN, http://wipo.int/romarin)[2].

1. (Example) In case the applicant makes an invalid document due to incorrect filing, the applicant pays the fee payment in duplicate and invalidation is made against one of them.
2. At the time of its introduction in 1991, the "Read-Only-Memory of Madrid Active Registry Information", or ROMARIN, was the first database to consolidate details of the Madrid Registry.

Reflecting WIPO's policy change, this revision changed the information disclosure site from ROMARIN" to "Madrid Monitor" (http://www.wipo.int/madrid/monitor/en/index.jsp).[1]

Ⅲ. MAJOR CASES

1. Relaxing requirements to recognize distinctiveness when using the 'Immediate Lending' mark

(1) Issue and Ruling

This case involved company A which operated a loan service business for clients through its own marketing and without intermediaries for 2 years before trademark application.

Company A designated 'loan business' as its designated service business and applied for the 'Immediate Loan' mark, but KIPO refused such application according to Article 6 (currently Article 33), Article 1.3 (Character Showing Mark), and Article 7 (Other Marks with No Distinction) of the Old Trademark Act. The applicant argued that it had obtained distinctiveness through use and the Patent Court cancelled the Patent Tribunal's judgment.[2] The Supreme Court ruled that although the service table of the application did not include the marks actually used, considering the whole circumstance, the application table was seen to have obtained distinctiveness through use under Article 6.2 of the Old Trademark Act and the application was approved.

(2) Analysis

The issue of this case is thought to be the scope of 'similarity between the mark used and the mark applied for' when determining acquisition of distinctiveness through use. Previously, when concerning a mark for which exclusive use should not be permitted because distinctiveness did not exist, granting a general right was interpreted and applied under strict criteria. This judgment reflected recent trends relaxing such standards. In this case, company A did not use the "Immediate Lending" mark on its own, but in combination with actually used marks such as 'Welcome Loan Immediate Lending', 'Internet', 'One Call', 'Mobile',

1. On January 1, 2018, Madrid Monitor became WIPO's only tool for tracking the status of international trademark applications and registrations under the Madrid System. WIPO's original monitoring tools ROMARIN, Madrid e-Alert and Madrid Realtime Status, has been discontinued and replaced by the simpler and more streamlined Monitor.
2. Patent Court Judgment in Case No. 2015Hu2914 delivered on November 12, 2015.

etc., through broadcast media and newspapers, repeatedly advertising its direct lending methods.

With regards to the issue of whether use of a combination mark could be considered valid proof of obtaining distinctiveness, the Supreme Court ruled that even if the mark actually used did not include the service mark on its own, if the character part used in conjunction with the part identical to the service mark is recognized as representing company A or if it is a mark commonly used in the loan industry, the service mark applied for can be seen to have obtained distinctiveness under Article 6.2 of the Old Trademark Act when considering that the remaining parts identical to the service mark were organized to maintain independence and could be separately identified due to the difference in font, font size, font color and the background color of letters, such parts were commonly and repeatedly used in actually used marks to be emphasized and recognized by consumers, the scale of direct loans, the number and duration of media advertisements and the fame of the company as a loan company.

2. A case setting the criteria and standards to determine 'consumer deception trademarks'

(1) Issue and Ruling

This case concerned company A (a foreign company) which previously used the marks "", "", "". on table tennis racquets and sports bags.

Company A filed a registration cancellation suit against company B which held rights for registered trademark "" under Article 7.1.11 of the Old Trademark Act (currently Article 34.1.12) based on claims that the registered trademark could confuse and deceive consumers. While the Patent Tribunal and Patent Court acknowledged this claim, the Supreme Court reversed the ruling that the registered trademark in question could not be considered a consumer deception trademark.

(2) Analysis

This case is considered to set new criteria for article 7.1.11 of the Old trademark ant and show a difference in view on the issue of adoption of evidence and other specifics.

In this case, the Supreme Court held that "for a trademark to be considered likely to deceive a consumer, although the previously-used trademark or product it is used on does not need to be well-known, it does need to be known enough to be perceived as the trademark or product of a specific person to domestic consumers. If the trademark identical or similar to a previously-used trademark is being used on an identical or similar product, specific usage and the economic relationship between the products need to be reviewed. The court adopted the traditional standard[1] that based on general trade practices the trademark must be misleading or confuse consumers regarding source leading to concerns of consumer deception, but also noting that this only occurs when there are special circumstances where a trademark being used on an identical or similar product gives rise to a misconception that the holder of the previously-used trademark is using such trademark. According to this standard, the Supreme Court held that although the previously-used trademarks in this case were registered on October 30, 1995, and could be seen to be have become known to domestic consumers as the trademark of a particular person around this period, the trademark was not known to domestic consumers in relation to table tennis products, table tennis products cannot be said to be similar to the designated goods of the registered trademark (bags or wallets) and there was little economic relationship between them. Merely attaching a portion of a previously-used mark on a sports bag in a table tennis magazine, suggests that it was introduced as a sponsored product and does not prove that is acquired recognition. The court held that the registered trademark and previously-used trademark of this case incurred no concerns of source confusion due to their differences in appearance, and hence, there was no concern for consumer deception.

3. Case on standards for fair use of cancellation of a registered trademark due to non-use (Supreme Court Judgment in Case No. 2015Hu2006)

(1) Issue and Ruling

In this case, company A registered trademark " " (with soju as the designated product) and filed suit against trademark holder B requesting cancellation of the trademark registration since it had not been used in the domestic market for more than 3 years before the date of the cancellation trial. The court ruled that even if company B used the registered trademark in the margins of an advertisement for soju that it manufactured and sold approximately 1 month before the cancellation trial, it could not be seen to have been used to indicate the source of the product, but merely nominally used to avoid cancellation of

1. Supreme Court Judgment in Case No. 96Hu412 delivered on March 14, 1997; Supreme Court Judgment in Case No. 2009Hu3268 delivered on January 28, 2010.

registration. Hence, the court held that the registered trademark could not be seen to have been used fairly.

(2) Analysis

Reflecting the purpose of trademark registration cancellation due to non-use, the registered trademark must be genuinely used as a source indicator for a designated product. Therefore, even if there was an advertisement, if the designated product was not circulated in the domestic market nor was planned to be so, and the registered trademark was simply nominally used in an advertisement to avoid cancellation due to non-use the registered trademark cannot be deemed to have been fairly used by traditional precedents.[1] This case can be seen to have reconfirmed criteria to determine genuine use. Plaintiff B advertised soju (manufactured and sold by B) in newspapers before the date of filing and showed the registered trademark of this case in the margins of the advertisement in the form of ‘’. But in the advertisements related to this case, separate marks such as ‘Halasan Original’ or ‘Come to Halasan’ are used in connection with the soju manufactured and sold by the plaintiff and there are no advertisement phrases related to the registered trademark of this case other than the parts where the registered trademark is shown. Also the registered trademark of this case is not displayed on the soju product, but faintly in the blank margin of the advertisement. In light of these circumstances, the court found it is difficult to rule that the registered trademark of this case was used to indicate the source of the soju product manufactured and sold. The court held that it was used only nominally in order to avoid cancellation of trademark registration. The court ruled that the registered trademark was not properly used in the domestic market within 3 years prior to the filing of suit in this case.

4. A series of Supreme Court Judgments on determining the similarity of trademarks

(1) Summary of Cases

The Supreme Court ruled on determining the similarity of trademarks based on critical parts with consideration of trading realities as shown in the table below.

1. Supreme Court Judgment in Case No. 2011Hu354 delivered on June 30, 2011.

Registered Trademark	Trademark Already Registered	Case No. / Holding	Summary of the Holding
“JaSengCho”	**“JaSeng”, “JaSeng Oriental Doctor”**	2015Hu1690 [Registration Invalidated due to Similarity]	The critical part of a trademark can be used to determine similarity with other trademarks since it is perceived by consumers and has independent distinctiveness separate from other elements of the trademark. Thus, when a trademark includes a critical part, similarity with other trademarks can be determined just by comparing such critical parts without any consideration to whether that part can be separated.
“**SUN SCIENCE**”	SENSCIENCE STYLING	2014Hu2535 [Registration Invalidated due to Similarity]	
롯데 몬스터	MONSTER ENERGY	2015Hu932, 949 [Registration Valid: No Similarity]	The critical part of a trademark can be used to determine similarity with other trademarks since it is perceived by consumers and has independent distinctiveness separate from other elements of the trademark. Hence, parts of a trademark that have no or weak distinctiveness cannot be a critical part. When determining whether a part of a combination trademark has the distinctiveness to be considered a critical part, whether the trademark that includes such part has been used on identical or similar products with the designated good can also be considered.
망고몬스터	MONSTER ENERGY	2016Hu2447 Registration Valid: No Similarity]	

(2) Analysis

The issue of the four cases discussed in the table above concerned similarity of a combined trademark made up of 2 or more characters or a combination of figures. In the first 2 cases, the plaintiff prevailed, and the registered trademark was invalidated because the trademarks in the case were determined to be similar. On the other hand, in the latter two cases, trademark registration was validated since the courts found that the similar parts of the trademarks were not the critical parts and that otherwise they were not similar.

In general, the similarity of a combined trademark consisting of 2 or more characters or a combination of figures should be determined based on appearance, name, and concept of the entire mark. But when the trademark includes a critical part which provides an impression or association of the product's source independently, the similarity of the trademark needs to be determined based on comparison of the critical parts. Since the independent distinctiveness of a critical part is notably perceived by consumers on its own and unrelated to other parts, when there is a critical part existing in a trademark, similarity can be determined by comparison of such critical part without any need to consider whether such part can be examined separately. According to this standard, the trademarks of the first two cases had similar names since they had identical critical parts. Hence, if the two trademarks were used for identical or similar designated products, there was a concern that a general consumer may be misled or confuse the source of the product. Hence, the courts held that the marks of the cases were similar to each other.

On the other hand, in the latter 2 cases, the criteria to determine critical parts was at issue. While whether a part that is noticeable, well-known or gives a strong impression to a general consumer could be determined a critical part was at question, the general view took into consideration whether the part occupied a high proportion of the whole trademark comprehensively with the relative level of distinctiveness, condition and degree of combination, relationship with the designated product, and trade practices of other parts.

In addition, since the critical parts of a trademark are subject to determining similarity with other trademarks because of their independent distinctiveness (which general consumers recognize based solely on the critical part and not in relation to other parts), parts that do not have distinctiveness or that are weak cannot be a critical part. On the other hand, the court also confirmed that when determining whether a part of a combined trademark has distinctiveness that could function as a critical part, it would consider whether the trademark that includes such part has registered identical or similar products as designated goods in multiple numbers. Based on such standards, since several trademarks including 'Monster' or 'MONSTER' were registered in relation to identical or similar products with the designated good prior to the filing date of the trademark in question, it was not proper to recognize distinctiveness or allow monopoly to a particular person in public interest. Therefore, the court held that there was no similarity since there were differences in appearance, name and concept when examining the whole form.

CHAPTER 3.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

CHOI Seung Soo[*]

I. OVERVIEW

1. Legislation and Policy

The August 22, 2017 amendment to the Enforcement Decree of the Copyright Act expanded the scope of business premises exempted from the restriction on right of public performance among the author's economic rights. It seems to be a response on the part of the Administration to the constitutional lawsuit raised by a copyright holder with respect to Article 29(2) of the Copyright Act, which restricts the right of public performance of the holder of author's economic rights included in commercial phonograms, etc. As a result, business operators are now required to obtain license from the copyright holder if they wish to play commercial phonograms at a coffee shop or a cafe.

In the meantime, the Ministry of Culture, Sports and Tourism implemented the integrated collection system in April 2017, under which the royalties, which used to be payable separately to up to 4 copyright management agencies, can now be paid to a single organization or agency, for convenience of the users in connection with payment of copyright royalties/fees under Article 106 of the Copyright Act.

2. Major Cases

Under the existing Supreme Court precedents, website operators could not be held liable for copyright infringement with respect to illegal use of works through online links. However, a Seoul High Court decision reversing the above (Seoul High Court decision 2016*Na*2087313 dated March 30, 2017) was finally affirmed by the Supreme Court. There was also a first

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decision granting copyright protection to a reality program format (Supreme Court Judgment in Case No. 2014Da49180 delivered on November 9, 2017). The liabilities for copyright infringement were denied in a dispute between Candy Crush Saga by ‘King.com’ and a Korean game ‘Forest Mania’ (Seoul High Court decision 2015Na2063761 dated January 12, 2017), which is pending at the Supreme Court.

The court issued a decision, finding the practice in the publishing industry of indicating another person as the author in making the works public to be a violation of the Copyright Act subject to criminal punishment (Supreme Court Judgment in Case No. 2016Do16031 delivered on October 26, 2017).

II. LEGISLATION AND POLICY

1. Amendment to the Enforcement Decree of the Copyright Act (enforcement date: August 23, 2018; Presidential Decree No. 28251, August 22, 2017, partial amendment]

(1) Expansion of the scope of business premises exempted from restriction on author’s economic rights (right of public performance)

Article 29(2) of the Copyright Act provides that it is permissible to play and perform publicly any commercial phonograms or cinematographic works made public for commercial purposes for the general public if no benefit in return for the relevant public performance is received from audience or spectators. It restricted the right of public performance of musical works contained in commercial phonograms or cinematographic works. In the meantime, there were certain exceptions to such restriction in case of certain business premises prescribed by the presidential decree, which included entertainment bars, large sports facilities, casinos, and hotels, etc. Therefore, it was necessary to obtain permission from the holder of author’s economic rights in order to play commercial phonograms at such business premises. However, the scope of businesses exempted from the restriction on right of public performance has now been expanded through the present amendment to the Enforcement Decree. It is intended to reasonably protect the author’s economic rights by allowing the holder of author’s economic rights to exercise the right of public performance even when no benefit in return for the relevant public performance is received from audience or spectators in playing and publicly performing any commercial phonograms, etc. at places such as cafes among rest restaurants under the Enforcement Decree of the Food Sanitation Act, sports facilities under the Enforcement Decree of the Installation and Utilization of Sports Facilities Act, or superstores other than traditional markets among superstores under the Distribution Industry Development Act.

2. Integrated Collection of Royalties for Musical Performance

The integrated collection of royalties for musical performance is being implemented gradually since April 2017. It follows the amendment to the Copyright Act of March 2016 which enables the Minister of Culture, Sports and Tourism to request integrated collection to copyright trust service providers and remuneration collection organizations for the convenience of those who publicly perform and use music.

Previously, the fees for public performances were payable separately to up to 4 organizations, i.e. the royalties to Korea Music Copyright Association, and Korean Society of Composers, Authors and Publishers; and remuneration for performances to Federation of Korean Music Performers, and Recording Industry Association of Korea. The service fees were payable separately if they were using the store music services. From the perspective of business premises using the music, it entailed cumbersome remittance of individual fees, and additional transaction costs such as fees, while leaving them with the impression that they were bearing a double burden although they were compensation for lawful exercise of copyright.

As such, Korea Music Copyright Association with nationwide branches was selected as the integrated collection agency in initially implementing the integrated collection system on April 1, 2017 with respect to businesses which do not use the store music services (type 1: 8 businesses including entertainment bars and karaoke bars). Another integrated collection agency will be designated and implemented for businesses which mainly use the store music services (type 2: 14 businesses including hotels, membership resorts, department stores, and supermarkets).

3. 2017 IPR Trade Balance Status

The IPR trade balance recorded a deficit of USD 1,990 million in 2017.

The industrial property rights saw a deficit of USD 3,210 million, with a deficit of USD 1,380 million in patents and utility models, and a deficit of USD 780 million in trademarks and franchise rights. However, there was a surplus of USD 450 million in copyrights, which was attributable to the USD 880 million surplus in R&D and software copyright.

By industry, while there was a deficit of USD 1,320 million in manufacturing, automobiles/trailers recorded a surplus of USD 780 million. There was a USD 720 million deficit in service, which was countered by a surplus of USD 260 million in publishing, cinematography, broadcasting & communication, and information service.

By country, Korea recorded a deficit in the descending order with the US (-46.60 million), Japan (-5.20 million), and Germany (-4.20 million), while we recorded a surplus with Vietnam (24.00 million), and China (19.80 million).

III. MAJOR CASES

1. Decision finding online links to be aiding in infringement upon transmission right (Seoul High Court Judgment in Case No. 2016Na2087313 delivered on March 30, 2017; subsequently affirmed by the Supreme Court)

(1) Factual background and issues

Plaintiff is the copyright holder of a TV program. Defendant collected *en masse* the embedded links to plaintiff's TV program posted in an overseas video sharing site (Dailymotion). Defendant opened a website and posted the hyperlinks to the TV program, etc. by title and by air date.

This enabled the users of defendant's website to view the desired TV programs free-of-charge by searching the program at defendant's website, clicking on the relevant link, which was connected to a copy of the relevant TV program for transmission. Defendant lured users to his/her website through the above method, and made profit depending on the number of clicks to the banner ads posted on the website.

Plaintiff filed an action for damages against defendant for copyright infringement.

The existing Korean Supreme Court precedent (Supreme Court Judgment in Case No. 2012Do13748) found that online links were merely indication of the location information or route to a web page intended to be linked online. Specifically, the court found that even if clicking on an online link enabled the users to directly access a web page which infringes on the reproduction right or public transmission right of the copyright holder through posting of works without authorization from the copyright holder, or through transmission of such works to the Internet users, it cannot be deemed to simplify the execution itself of the infringing activity. Therefore, the court found that the mere provision of links does not constitute aiding in infringement upon the author's economic rights.

However, the above Supreme Court was highly criticized because it contributed to aggravation of copyright infringement through online links.

(2) Summary of the Ruling

The Seoul High Court found that defendant was not directly liable for infringement upon copyright (transmission right) based on the facts that (i) the copies of the TV program were transmitted directly from the overseas video sharing site to the users of defendant's web site through the links in question, and thus the transmission did not actually occur in defendant's web site, (ii) apart from the fact that it contributes to proliferation of infringement upon the transmission right, the provision of links itself cannot be deemed to be equivalent to uploading on an overseas video sharing site by a person, (iii) the person posting at the overseas video sharing site is the person substantially controlling the transmission occurring at the overseas video sharing site, and (iv) the links in question are merely indication of the location information or route to a web page where the copies of the TV program in question are posted at the video sharing site.

However, the Supreme Court found that the provision of links constitutes an act of aiding in infringement upon the transmission right by the person posting at the sharing site as it substantially expands the act of making available to the public by the person posting at the overseas video sharing site. Even if it cannot be deemed to be aiding in infringement upon the transmission right, the provision of links is an act of free-riding, with the intent to illegally seek one's own profit, on the reputation of the achievements made by another person through time, efforts and capital, and thus falls under a general illegal act proscribed under the Civil Act as it constitutes an illegal infringement upon plaintiff's interests which warrant legal protection.

(3) Commentary

This decision directly reversed the existing Supreme Court precedent which found that the provision of online hyperlinks was not sufficient to constitute an act of aiding in infringement upon the author's economic rights. Defendant filed a final appeal, but the Supreme Court affirmed the decision without any alteration.

Copyright infringement through hyperlinks (inline link) is a global phenomenon, and has been the subject matter of many precedents in other countries. For instance, in *Perfect 10. v. Google*, the US court found that the operator of a website which posted the online links can be held indirectly liable for copyright infringement. The Court of Justice of the European Union (CJEU) also found that the act of providing links to copyrightable works is the act of making available to the public, which constitutes an act of communication under Article 3(1) of its Copyright Directive.

It seems that the Korean court has made a forward-looking decision based on the necessity to regulate copyright infringement, in line with global trends related to indirect copyright infringement through online links. However, links are the basic structure of the Internet, which may be likened to veins which keep the Internet alive. For this very reason, prudence will be required in recognizing civil/criminal liabilities of persons who have provided online links or of bulletin board operators. However, any online site operator who makes commercial profit through copyright infringement shall certainly be held liable for copyright infringement since he/she is operating such a site with links to avoid liabilities.

2. Decision recognizing originality of a reality show program (Supreme Court Judgment in Case No. 2014Da49180 delivered on November 9, 2017)

(1) Factual background and issues

Plaintiff is the copyright holder of a TV program for a network broadcasting company (SBS). The reality show recorded the process of pairing up among ordinary people at marriageable age through introductions, games and dates, etc., at a place called ‘*Aejeongchon* (love village)’ which they shared and lived for a certain period. Defendant 1 produced and aired an adult comedy which parodied plaintiff’s TV program. Defendant 2 is a game company which produced and distributed an ad for its game where a group of game lovers gathered at a place called ‘*Aejeongchon* Dunjeon’ to find a game partner of the opposite sex. In this regard, plaintiff filed an action for damages, allegedly on account of copyright infringement upon its reality TV program.

The issue in this case was copyrightability of the format of a reality TV program. The appellate court (Seoul High Court decision 2013Na54972) denied the copyrightability by finding that the “scenes which SBS claims are copyrightable are merely ideas that are not copyrightable, or not original because they have been used in other cinematographic works”.

(2) Summary of the Ruling

Supreme Court found that “plaintiff’s cinematographic work is a reality TV program which recorded the process of pairing up among ordinary people at marriageable age through introductions, games and dates, etc. at a place called ‘*Aejeongchon*’ which they shared and lived for a certain period. There have been TV shows where men and women of marriageable age appeared and finally paired up with a favorite partner through games and conversations. However, plaintiff’s cinematographic work is distinguishable from the other programs in that the male and female cast were required to collectively stay at a place without a host and act according to the rules set by the production crew, and that the viewers were able to objectively observe the interactions arising during the process. *(Omitted)*”

The court further found that the "individual elements of plaintiff's works cited by the high court are in themselves not creative enough as they are merely ideas, or they have been used already in other programs. However, apart from the issue of originality of the individual elements comprising the program as a whole, plaintiff's cinematographic works is creative and original because the selection and arrangement of such elements mingle sufficiently so as to be distinguishable from the existing programs, since plaintiff selected only the necessary elements given the nature of such a program and arranged them according to its unique editing policy, based on its accumulated experience and knowledge on production".

(3) Commentary

This is the first Korean decision to substantially recognize copyrightability of a TV program. It is quite complicated to determine whether the format of a TV program falls under the scope of expression under the copyright doctrine, or whether it is not copyrightable because it is merely an idea. But it is high time that legal measures were established since more and more formats of TV dramas or entertainment programs are being copied every day.

In the US, copyright infringement was denied upon comparison/analysis of the respectively elements in a dispute between TV program, i.e. <Survivor> by CBS and <I'm a Celebrity, Get Me Out of Here> by ABC (*CBS v. ABC*, 2003 U.S. Dist. LEXIS 20258.)

However, the High Court of the UK recently found that "copyright protection will not subsist unless, as a minimum, (i) there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type; and (ii) that those distinguishing features are connected with each other in a coherent framework which can be repeatedly applied so as to enable the show to be reproduced in recognizable form" (*Banner Universal Motion Pictures Ltd. v. Endemol Shine Group Ltd. & Anor* [2017]).

Although the high court denied the copyrightability in accordance with the traditional idea-expression dichotomy, the Supreme Court recognized the copyrightability on the ground that there is originality in the selection and arrangement of individual elements in the program.

3. Candy Crush Saga decision: copyright infringement not recognized in a similar game (Seoul High Court Judgment in Case No. 2015Na2063761 delivered on Jan. 12, 2017)

(1) Factual background and issues

Plaintiff is ‘King.com Limited’ of Malta, a developer of the game ‘Farm Heroes Saga’, and defendant is Avocado Entertainment of Korea, the developer and distributor of the game ‘Forest Mania’. Both games had similar methods and appearances where the player gained points by matching three or more tiles of the same shape in a straight line. Plaintiff filed a lawsuit against defendant, claiming for suspension of game service and damages.

The major issues in this case were, first, whether the rules, expression and visual design of the game are creative works that are copyrightable, and second, whether it constitutes an illegal act proscribed under Article 2.1(j) of the Unfair Competition Prevention Act.

Although the trial court found that the rules of the game were not copyrightable and did not recognize copyright infringement based on dissimilarity in detailed expression, the high court found that it constituted violation of the Unfair Competition Prevention and Trade Secret Protection Act (the “UCPA”) based on similarities in the method and identicalness in the unfolding method of the games.

(2) Summary of the Ruling

① Decision on copyright infringement

With respect to the copyright infringement issue, the court found that the rules of plaintiff’s game falls under the category of ideas, and there are differences in the expression of ideas between the two games on the ground that (i) the rules of a game are merely an element of the game which determine the concept, genre or unfolding method of an abstract game, and thus fall under the category of ideas which are unprotectable, (ii) the keys in copyright infringement of games lie in the aspect of expression such as the visual appearance or characters, and (iii) the *scènes à faire* doctrine applies with respect to expression of ideas, i.e. rules of a match-3 game.

The court further found that there was no substantial difference upon close analysis of both games, e.g., appearance and design elements of the games.

In the meantime, the court also found that the combination and arrangement of rules of the game also basically fell under the category of ideas, and that it would be unreasonable to decide copyright infringement based on the similarities in the overall concept or impression because it would end up expanding the scope of copyright protection even to ideas.

② Decision on Article 2.1(j) of the UCPA

While suggesting the limitation that Article 2.1(j) of the UCPA shall apply only to the extent not contradicting or conflicting with the existing IPR laws including the Patent Act and the Copyright Act, the court found that it can apply only under ‘special circumstances’ which cannot be justified in light of fair trade and free competition, in order to regulate use of the achievements made by other persons which are not subject to protection under the existing IPRs.

The examples of ‘special circumstances’ suggested by the court include acquisition of achievements or ideas of another person through illegitimate means such as theft; imitation markedly contrary to the contractual obligations with a predecessor or good faith doctrine; intentional interference with the competitors’ business or use with the sole purpose of causing damage; and virtual absence of creative elements on the part of the imitator.

The court found no such special circumstances in the case at hand on the ground that (i) the rules of a game basically fall under the category of ideas, (ii) the merger doctrine or *scènes à faire* doctrine applies with respect to expression of the rules of a match-3 game, (iii) there is no evidence to suggest that defendant illegally obtained information on the rules of plaintiff’s game, (iv) defendant further added creative elements not found in plaintiff’s game, and (iv) plaintiff made sufficient profit after release of its game.

(3) Commentary

The court made it clear that the rules of a game are merely an element of the game which determine the concept, genre or unfolding method of an abstract game, and thus fall under the category of ideas which are unprotectable. The court also affirmed that the *scènes à faire* doctrine can apply with respect to expression of ideas that comprise the rules of a certain game. It is also significant that the court harmoniously established the relationship between the existing IPR system including copyrights, and Article 2.1(j) of the UCPA. While suggesting the limitation that Article 2.1(j) of the UCPA shall apply only to the extent not contradicting or conflicting with the existing IPR laws including the Patent Act and the Copyright Act, the court found that it can apply only under ‘special circumstances’ which cannot be justified in light of fair trade and free competition, in order to regulate use of the achievements made by other persons which are not subject to protection under the existing IPRs.

4. Criminal punishment against publication with indication of another person as the author (Supreme Court Judgment in Case No. 2016Do16031 delivered on Oct. 26, 2017)

(1) Factual background and issues

Article 137.1 of the Copyright Act provides that any person who makes a work public under the real name or pseudonym of a person other than the author shall be punished by imprisonment with labor up to one year or by a fine up to ten million won.

One of the accused in this case, a professor, was prosecuted for identifying himself as a co-author in publishing a book on ‘electric circuits’ although he did not author it (violation of the Copyright Act). He was also charged with submission of the book for faculty performance evaluation (obstruction of justice by fraud). The other two professors also listed their names in the book as co-authors although they did not write it, which they subsequently submitted for faculty performance evaluation and faculty rehiring evaluation (violation of the Copyright Act and obstruction of business).

(2) Summary of the Ruling

Article 137.1.1 of the Copyright Act provides that any person who makes a work public under the real name or pseudonym of a person other than the author shall be subject to criminal punishment. The purpose of this provision is to protect the credibility of the society in general with respect to the name of an author, as well as the personal rights of the person who was identified as the author in another person’s work against his will, and the actual author in whose work another person was identified as the author against his will. Given such purpose of legislation, the crime under the above provision stands since another person was indicated as the author in publishing the book, and the conclusion will not change even if the book were published with the consent of both the actual and false authors, unless there is any special circumstance which is sufficient to recognize that the credibility of the social in general was not damaged in light of the social norms.

Under the Copyright Act, the term “making works public” means to make the works open to the public by means of public performance, public transmission, or exhibit and by other means, and to publish the works (Article 2.25 of the Copyright Act). In light of such wording of the term ‘making works public’ and the legislative purpose of Article 137.1.1 of the Copyright Act, the crime under the above provisions shall stand even if the book in which the authors were falsely represented, have been made public before.

(3) Commentary

It seems that the abnormal practice of ‘cover replacement’ has been maintained in the educational circle for scores of years due to coincidence of interests between the relevant parties where the false author can establish his academic authority through submission of research achievements, the publisher can get rid of inventory, and the original author can receive additional royalties. This decision is significant that the judicial authorities affirmed and corrected such unfair publishing practice involving specialty books as violation of the Copyright Act and obstruction of business.

5. Decision on liabilities requirements of an online service provider with respect to copyright infringement (Supreme Court Judgment in Case No. 2014Ma503 delivered on August 31, 2017)

(1) Factual background and issues

Article 104.1 of the Copyright Act provides that the online service provider who aims principally at enabling interactive transmission of works by using computers between other persons ("special-type online service provider") shall take necessary measures, such as technological measures, that block illegal forwarding of the relevant work upon request from the holder of rights. In such cases, matters regarding the request of holder of rights and necessary measures shall be prescribed by Presidential Decree.

Accordingly, the Enforcement Decree of the Copyright Act provides the following 'necessary measures': '1. technological measures capable of identifying the work, etc. by comparing the title, etc. and characteristics of work, etc.; 2. measures of limiting search or interactive transmission to block illegal interactive transmission of work, etc. that came to be recognized pursuant to subparagraph 1; and 3. where the illegal interactive transmitter of the relevant work, etc. is identifiable, the dispatch of warning sign wording to the interactive transmitter of the work, etc. requesting for the prohibition of infringement on the copyright'.

The Minister of Culture, Sports and Tourism imposed administrative fines to service providers with low blocking rates upon monitoring of special-type online service providers. Some of the service providers raised an objection upon being notified that they have taken technical measures such as introduction of DNA technology for the relevant field of works, or filtering through comparison of hash values.

(2) Summary of the Ruling

The purpose of Article 104.1 of the Copyright Act, and Article 46.1 of the Enforcement Decree of the Copyright Act is to impose the restricted obligation to take 'necessary measures' prescribed in the Presidential Decree upon 'request from the holder of rights' given the fact that it is impossible to impose the obligation to entirely block the illegal transmission due to technical limitations even in light of such legislative purpose, as well as to impose weighted obligation to special-type online service providers for protection of copyright against illegal transmission of works.

In light of the wording and purpose of such legislation, if the special-type online service providers took the 'necessary measures' prescribed in Article 46.1 of the Enforcement Decree of the Copyright Act, they shall be deemed to have taken the necessary measures under Article 104.1 of the Copyright Act, and the court shall not reach a different conclusion only on the ground that the illegal transmission actually took place.

(3) Commentary

Special-type online service providers are obliged to take necessary measures in order to prevent copyright infringement, upon violation of which varied administrative fines will be imposed based on the 'unblocked ratio (based on number of downloads)' in accordance with the 'criteria for imposition of administrative fines' prescribed by the Ministry of Culture, Sports and Tourism. The court found that, in terms of actual application, it is unreasonable to uniformly impose administrative fines simply based on the unblocked ratio, notwithstanding the fact that the service providers took the 'best measures possible in reality'.

6. Decision finding that 'temporary storage' where a part of software is stored momentarily in the memory while the software is running is not reproduction prohibited under the Copyright Act (Supreme Court Judgment in Case No. 2015Da1017, 1024, 1031, 1048 delivered on Nov. 23, 2017)

(1) Factual background and issues

'OpenCapture', a software which enables to capture the screen was initially distributed free-of-charge, but the updated version in 2012 came with a condition that it can be used freely only for non-commercial/personal purposes. It was intended to be sold under a separate license for business purposes by companies. Upon finding that employees of some 80 companies were using the program without authorization, OpenCapture claimed for copyright royalty of KRW 1.4 billion, but the companies refused to pay and responded with a lawsuit.

The key issues in this lawsuit is whether downloading of the updated version by the companies constituted infringement upon reproduction right of the copyright holder, and whether upon the change to a paid version, 'temporary storage' made in the memory when the program is running can be deemed to be reproduction prohibited under the Copyright Act. Temporary storage is inevitable because the program has to be retrieved to the memory in order to be executed in the computer OS, and if such temporary storage were deemed to be reproduction, the mere execution of the program will constitute copyright infringement.

(2) Summary of the Ruling

The use of a computer program by a person, who obtained approval for reproduction thereof through installation from the holder of author's economic rights, through installation in auxiliary memory such as HDD falls under use of works within the authorized method and scope of use by the authorized person. Even if a person authorized to reproduce the works violated the method or terms of use of the program agreed under a contract with the holder of author's economic rights, such user cannot be deemed to have violated the reproduction right of the holder of author's economic rights, let alone be deemed liable for non-performance arising from breach of contract.

When the user executes a computer program installed in the auxiliary memory such as the HDD, or searches, peruses or transmits digitalized works online, the CPU loads the computer program in the main memory (RAM), in order to improve processing speed of the executed program. The reproduction of computer programs occurring during such a process is temporary reproduction since the reproduced program will be erased entirely once the power is cut off. In the meantime, while Article 2.22 of the Copyright Act includes 'temporary fixation of works in a tangible medium or a remaking of works' in the concept of reproduction, it also provides indemnification for temporary reproduction in Article 35.2 by prescribing that 'where a person uses works, etc. on a computer, he/she may temporarily reproduce such works, etc. in that computer to the extent deemed necessary for the purpose of smooth and efficient information processing; provided that, this shall not apply where the use of such works infringes on copyright.' These provisions intend to seek a proper balance between copyright protection and smooth utilization of works through prevention of excessive restriction on the use and distribution of works in computers, while faithfully protecting the rights of the copyright holders in line with the ever-changing environment for use of copyright works. Given such legislative purpose, etc., the 'extent deemed necessary for smooth and efficient information processing' shall include the case where temporary reproduction is carried out to enhance stability or efficiency, as well as when it is inevitable for use of the works, but shall not include cases where temporary reproduction itself has an independent economic value.

(3) Commentary

The issue in this case was that when a user executed the free version of OpenCapture program installed in the computer, the paid version was installed automatically in the HDD of the computer, followed by the terms of use popping up after the update to the effect that 'this program can be used free-of-charge if used for non-business purpose, but shall be used under a separate license if used for business purpose', enabling the user to use the paid version of the program only upon consent to such terms of use.

When plaintiffs' employees used the paid version of OpenCapture, which became available by consenting to the terms of use for business purposes, the defendant copyright holder claimed copyright infringement, in response to which plaintiffs filed a lawsuit against defendant for confirmation of non-existence of liabilities arising from copyright infringement.

Supreme Court found that downloading of the updated version in the hard disk by the companies 'does not constitute infringement upon the reproduction right since it was carried out with authorization from defendant'. The copyright holder shall be deemed to have approved reproduction as far as the mere downloading of the update, since the users are required to choose between 'personal (free) or business (paid) version' through a pop-up window only after the updated version is downloaded in the hard disk.

With respect to 'temporary storage', Supreme Court found that it 'cannot be deemed to constitute copyright infringement' since 'it inevitably follows the ordinary use of computer programs and cannot be deemed to have independent economic value'.

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF KNOW-HOW AND TRADE SECRETS

KIM Byungil[*]

I. OVERVIEW

In 2017, a Legislative Notice to amend the Unfair Competition Prevention and Trade Secret Protection Act (the “Unfair Competition Prevention Act”) was issued to prevent the stealing of small-to-medium venture companies’ ideas. Such legislation passed the National Assembly plenary session on March 30, 2018.[1] The following introduces legislative trends aimed at preventing takeover of technology and ideas by small-to-medium venture companies along with major cases and judicial precedents related to trade secrets in 2017.

II. LEGISLATION AND MAJOR CASES

1. Legislation and Policy Development:

-Strengthening protection of technology and ideas of small-to-medium sized venture companies

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1. The law incorporated using the technical or business ideas of others with economic value in an illegal manner for one’s own or a third party’s business interests when such ideas were provided in the course of business negotiations and transactions, and in violation of the purpose of providing them. If the ideas provided are well known in the industry or are proven to be facts already known at the time of the provision of the ideas, the law allowed exemption. The law also provided authority to carry out investigations and impose corrective measures (Article 2.1(j)). This measure will be implemented 3 months after the promulgation, so it is expected to be implemented starting at the second half of 2018.

On September 20, 2017, KIPO announced comprehensive measures to eradicate technology and ideas from small-to-medium venture companies. This policy is based on the fact that the compensation for patent infringement is only 1/6 of the US even considering the difference in GDP, and the damage to the idea of small venture companies has increased in the process of business proposals since the level of protection for Korea is low. It intended to improve impediments to the technological innovation and growth that small venture companies led. There is a requirement prohibiting demands to provide technical data and use of such data in the Subcontracting Act, but reporting a violation is not easy in subcontracting relationships due to fear of losing business and such laws do not apply when not in a subcontracting relationship. When not in a subcontracting relationship, punitive damages have been introduced for infringements on patents and trade secrets of small venture companies, and the act of seizing the unpatented ideas and technical data provided through contests or consultings are considered acts of unfair competition.

In addition, the government has strengthened the protection of the technology of small venture companies by introducing a punitive damage system that increased damages up to three times in cases of malicious patent infringements by parties with a dominant position. In order to resolve the difficulties of presenting and proving evidence (the biggest difficulties for SMEs and venture companies in an intellectual property litigation), the patent infringer is required to present the patent implementation form under certain conditions. The government is planning to introduce the Patent Act's rules regarding strengthening evidence presentation in litigation[1] (effective June 2016) to the overall legal system concerning intellectual property such as Trademark Act, Design Protection Act and the Unfair Competition Protection Act. Further, stealing and using SMEs' ideas that arise from various business relationships (such as business proposals) will be incorporated as an act of unfair competition under the Unfair Competition Prevention Act to prohibit and make damage claims available. Even if the idea or technology is not registered as a patent, if its use violates the principle of good faith between the parties and is used for commercial purposes against the purpose of provision, civil relief will become possible. A punitive damages system that increases damages up to three times against malicious trade secret infringements will be introduced, and protection of trade secrets will greatly increase by raising the upper limit of fines for trade secret infringement by 10 times.[2]

1. Article 132 of the Patent Act imposes an obligation to submit trade secrets when it is absolutely necessary to prove infringement.
2. Revision of relevant laws (the "Subcontract Act", "Collaborative Growth Cooperation Law", "Patent Act", "Unfair Competition Prevention Act", and "Industrial Technology Protection Act") to raise the maximum amount of penalties related to domestic sales (domestic outflow) from 50 million won to 500 million won, and overseas sales (overseas outflow) from 100 million won to 1 billion won are expected to take place soon.

2. Starting Points for Trade Secret Infringement Periods and Time Periods for Prohibition Claims

Since trade secrets are of economic value only while confidentiality is maintained, the right to claim prohibition and prevention (the “Prohibition Claim”) is the most direct and effective means. However, unlike patent rights, trade secrets are no longer subject to legal protection if they are disclosed due to an infringement and confidentiality is lost, leaving no value in a prohibition claim. The following is a brief comparative review of the concepts of trade secrets, protection of legal interests and acts of infringement in order to examine standards to determine the starting point for the duration of trade secret infringement prohibitions. This section will then discuss general theories of prohibition claims, its contents, and especially the starting point when determining the duration of trade secret infringements and the establishment of a reasonable time range for prohibition claims.

In the following, legal reasoning and recent precedents regarding criteria to determine the starting point for trade secret infringement prohibition periods are discussed.

(1) Starting Point for Trade Secret Infringement Prohibition Periods

1) Theories about the Starting Point

According to the ‘theory of decision-making’, the reason for granting a right to prohibition claims under the Unfair Competition Prevention Act is to give the trade secret holder a ‘head start’ or ‘lead time’. In order to do this, the period is calculated not at the point of retirement of the infringer or at the time of infringement, but at the point of time when the prohibition of infringement starts, that is, when an injunction of the prohibition of infringement is decided upon or the final judgment of prohibition of infringement is executed, securing an head start or lead time for the trade secret holder.[1] In other words, if the starting point was set at the point of retirement or infringement, the stop of the Statute of Limitations under Article 14 of the Unfair Competition Prevention Act would be meaningless, and against the legislative intent for the Statute of Limitations. If a trial is held for a considerable period of time, even if infringement is later recognized, it is likely that the infringement prohibition period has already lapsed during the period of the trial, making the need for prohibition claims obsolete.

On the other hand, the ‘theory of point of retirement’ argues that the starting point should be at the point of retirement of the person who had the duty of maintain the confidentiality of the trade secret, or at the point that the trade secret was acquired, if intending to prevent a head

1. Jung, Sang Jo. *The Principle of Unfair Competition Prevention Act*. Sechang Publishing Co., 2007. Page 124. Print.

start or lead time in deciding the period of protection for trade secrets. This line of thought believes that it is not reasonable to set the period of trade secret protection from the time a judgment is finalized.

2) Views of the Court

Regarding the starting point for the period of prohibition of trade secret infringement, court opinions are not uniform and have accepted both the theory of decision-making and the theory of point of retirement. Supreme Court Judgment in Case No. 97Da24528 delivered on February 23, 1998, held that “the lower courts’ rulings were not significantly unreasonable to acknowledge that the period of time in which the Complainant was not allowed to use the technical information of the trade secret being set as 3 years after retirement was acceptable in light of the principle of equity, and as such, grounds for appeal are not acceptable”. In Supreme Court Judgment in Case No. 98Da45751 delivered on November 10, 1998, the court held that “prohibition of trade secret infringement should be limited to a period of time that serves the purpose of achieving fair and free competition and protection of human trust, and the following should be considered in setting such period of time: the content and level of difficulty of the technical information that consists the trade secret, the length of time and cost of acquiring the technical information for the trade secret holder, the efforts and methods devoted to the maintenance of the trade secret, time required to acquire the technical information for infringers or other fair competitors through legitimate means (such as independent development or reverse engineering), or when the infringer is an employee, the time period the infringer was employed by the employer, his position, assigned duties and degree of access to the trade secret, internal terms or contracts relating to trade secret protection, the employee’s freedom concerning career choice and business activities, comparison with the period of protection of other intellectual property rights such as patent rights (for which duration is determined), and the personal and physical facilities of the parties.[1] From such a point of view, the lower court’s ruling was reasonable to see the starting point of the prohibition of use and disclosure of the plaintiff’s trade secret as “the point of the defendant’s retirement from the plaintiff’s company, and not 1986 when the plaintiff company received technical guidance from Yachida Co.”, hence acknowledging the point of retirement as the starting point of the period of prohibition of trade secret infringement.

On the other hand, there are cases recognizing the starting point as the date of a final judgment[2], and those recognizing the date an injunction was finalized, notified or became

1. *See* Supreme Court Judgment in Case No. 97Ma24528 delivered on February 23, 1998, and Supreme Court Judgment in Case No. 96Da16605 delivered on Dec. 23, 1996 (Monami).
2. There are cases acknowledging the trade secret infringement prohibition period as 1 year from the date of the final verdict (Seoul District Court Judgment in Case No. 2001GaHab19320), 2 years from the final verdict (DaeGu High Court Judgment in Case No. 2000Na2291 delivered on September 28, 2001, dismissed by Supreme Court Judgment in Case No. 2001Da71293 delivered on March 15, 2001), and 3 years from the final verdict (Supreme Court Judgment in Case No. 16605 delivered on December 23, 1996, and DaeGu District Court Judgment in Case No. 95GaHab32093 delivered on May 7, 1998): “The period of use and prohibition of technical information in this case shall be limited to a reasonable period of time necessary for the defendants or other fair competitors to acquire the technical information of this case in a legitimate manner such as

effective[1]. In Supreme Court Judgment in Case No. 2005Ma423 delivered on November 15, 2007[2], the court ruled on this issue that "from this point of view, when considering all circumstances, the lower court's ruling that setting the period of prohibition of trade secret infringement till April 17, 2005, two years from the date the Respondent quit the Complainant's company is reasonable", using the point of retirement as the starting point.

(2) Time Period for Prohibition of Infringement Claims

Unlike patent rights, trade secrets are no longer subject to legal protection if they are disclosed and lose confidentiality due to trade secret infringement, dissipating the need to pursue a prohibition claim. However, a trade secret holder may prohibit the use of a trade secret for a reasonable period against a trade secret infringer.

When establishing the prohibition period for trade secret infringement, the fundamental purpose of prohibiting trade secret infringement, to prevent an infringer from taking unfair advantages (such as a "head start" or "lead time") is considered. The Supreme Court holds the view that the prohibition period should be set as the period necessary for defendants or other fair competitors to obtain the technical information through legitimate means such as independent development or reverse engineering.[3] However, the problem is how to set such "considerable period". In establishing such period, one must first consider the length of time the trade secret holder actually spent in developing the trade secret. In light of the pace of development of science and technology, the time the trailing developer spends to develop the trade secret will be shorter than the time spent by the original holder, and as such, the prohibition period should not be set longer than the development period of the holder. It is also necessary to consider the period of time required for the independent development by the infringer, and the speed of development and life cycle concerning the relevant technology. In other words, in determining the time period of the prohibition claim, the following needs to be considered: the content and level of difficulty of the technical information that consists the trade secret, the length of time and cost of acquiring the technical information for the trade secret holder, the efforts and methods devoted to the maintenance of the trade secret, time required to acquire the technical information for infringers or other fair competitors through

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independent development or reverse engineering. In this case, when considering rapid development and the personal and physical facilities of the defendant, the prohibition period for the use and disclosure of technical information in this case shall be three years from the date of finalization of the judgment. With respect to some technical information that the plaintiff claims to have taken 2 years (which is less than the above period), the period shall be set for 2 years. The lower court's ruling is reasonable and there are no issues with its factual or legal findings according to records and related laws and regulations".

1. There are cases in which the trade secret infringement prohibition period was set as 1 year from the date the injunction was finalized (ChungJu District Court Judgment in Case No. 2001KaHab679 delivered on June 12, 2002), and 1 year from the date the injunction was notified (DaeGu High Court Judgment in Case No. 2000La22 delivered on December 11, 2001).
2. Supreme Court Judgment in Case No. 2005Ma423 delivered on November 15, 2007.
3. *See* Supreme Court Judgment in Case No. 96Da16605 delivered on December 23, 1996, Supreme Court Judgment in Case No. 98Da45751 delivered on November 10, 1998, and Supreme Court Judgment in Case No. 2005Ma423 delivered on November 15, 2007.

legitimate means (such as independent development or reverse engineering), or when the infringer is an employee (including retired employees), the time period the infringer was employed by the employer, his position, assigned duties and degree of access to the trade secret, internal terms or contracts relating to trade secret protection, the employee's freedom concerning career choice and business activities, comparison with the period of protection of other intellectual property rights such as patent rights (for which duration is determined), and the personal and physical facilities of the parties

(3) Supreme Court Judgment in Case No. 2016Ma1630 delivered on April 13, 2017[1]

This case confirmed the court's views on the following issues: the purpose of prohibition of trade secret infringement, method of determining the period of prohibition, whether the starting point can be set as the point when the employee actually deviated from his work of handling the trade secret when there is a concern of trade secret infringement and the holder is seeking prohibition of trade secret infringement as a preemptive measure, and whether the same applies when prohibition of trade secret infringement is sought after an employee retires. The facts and holding of the case follow.

1) Facts

The creditor company has dealt in three-dimensional measuring equipment and system development since March 30, 2004. Later it added manufacturing, and currently produces and sells three-dimensional industrial scanners and three-dimensional dental scanners (a device that acquires shape information of an object by projecting a laser or a white light to an object or a specific product and converts the information into digital information).

Debtor Park joined the creditor company in February 2004 and engaged in hardware development and production until April 30, 2011. He worked as a hardware development team leader, a hardware production team leader, an overseas sales team leader, and eventually retired to establish Excel Technology. On August 20, 2012, he established debtor company. Debtor Shim joined the creditor company in August 2001 and worked in the software development team until 2005 and then left the company. In the winter of 2008, he re-joined the creditor company and worked as a researcher in the software development team until August 5, 2011. He worked in developing after-processing parts for three-dimensional scanner data and user interface and later retired, and has worked at Excel Technology and debtor company since then.

1. Supreme Court Judgment in Case No. 2017Do3808 delivered on June 29, 2017 is the related criminal case.

The creditor alleged that the debtors had infringed upon the creditor's trade secret and applied for an injunction requesting prohibition of business and trade secret infringement. The District Court followed Supreme Court precedent (Supreme Court Judgment in Case No. 97Da24528 delivered on February 13, 1999), and ruled that the period of protection of trade secrets of this case would be 6 months to 2 years from the date debtor Shim left the creditor company, and rejected the application for injunction since the period of trade secret protection had already lapsed.[1] The creditor appealed on grounds of illegality of violation of prohibition of trade secret infringement period, and inconsistency with the Statute of Limitations that apply under Article 14 of the Unfair Competition Prevention Act[2]. But the Supreme Court rejected such appeal on the following grounds[3].

2) How to determine the purpose and period of prohibition of trade secret infringement

The prohibition of trade secret infringement is to prevent the infringer from taking unfair advantage or a superior position through lead time, and to return the trade secret holder to the position he would have retained without such infringement. As such, the prohibition of trade secret infringement should be limited to the time necessary for achieving the purpose of guaranteeing fair and free competition and protection of human trust. In establishing the scope, the content and difficulty of the technical information, the time and cost of obtaining the technical information for the trade secret holder, the effort and method of maintaining the trade secret, the time required to obtain the technical information by legitimate means (such as independent development or reverse engineering), or when the infringer is an employee (including retired employees), the time period the infringer was employed by the employer, his position, assigned duties and degree of access to the trade secret, internal terms or contracts relating to trade secret protection, the employee's freedom concerning career choice and business activities, comparison with the period of protection of other intellectual property rights such as patent rights (for which duration is determined), and the personal and physical facilities of the parties.[4]

In order to impose a duty to prohibit trade secret infringement, determinations as to whether the information is a trade secret and the duration of the trade secret must be evaluated based on the trade secret possessed by employees who handles the trade secrets. Since Article 10 of the Unfair Competition Prevention Act stipulates that one may prohibit acts of infringement and take measures for prevention of infringement, if there is a concern that the

1. Seoul Central District Court Judgment in Case No. 2014KaHab107 delivered on April 24, 2015.
2. Article 14 (Prescription) When infringement of trade secrets continues, the right to request prohibition or prevention of the infringement of trade secrets under Article 10(1) expires unless the right is exercised within 3 years from the date on which a person possessing trade secrets learned the fact that business interests were damaged or threatened to be damaged by an infringer and the identity of the infringer. The same shall also apply where 10 years have elapsed after the date on which the act of infringement first occurred.
3. Seoul High Court Judgment in Case No. 2015La700 delivered on October 18, 2016.
4. *See* Supreme Court Judgment in Case No. 97Da24528 delivered on February 13, 1998.

employee may infringe upon a trade secret even when he has not quit but is preparing to leave the employer and a preemptive preventive measure to prohibit trade secret infringement is being taken, the period of prohibition of trade secret infringement will be calculated based on the point at which the employee actually deviates from the business in which the trade secret was handled. Further, since prohibition of trade secret infringement may be sought as long as the trade secret exists, when seeking prohibition of trade secrets after an employee retires, it is reasonable to set the starting point for prohibition of trade secret infringement as the time when the employee has left the business of handling the trade secret.[1]

In light of such considerations, the District Court reasoned that the period of prohibition of trade secret infringement for the files in this case would be 6 months to 2 years from August 5, 2011 when the debtor who leaked the files departed from the research and development duties of the three-dimensional scanner program for the creditor company. Further, the court ruled that even if each file constitutes a trade secret according to Article 2.2 of the Unfair Competition Prevention Act, and the debtor’s acts constitute an act of trade secret infringement, the period of prohibition of trade secret infringement had lapsed as of the date of the District Court’s judgment. Hence, the District Court’s judgment to reject the case was upheld. When reviewing the court’s reasoning in light of the legal reasoning and precedents discussed earlier, it is reasonable to say that such judgment is justified. There is no misguided misconception about the time period in which trade secrets are protected or the starting point of prohibition periods.

3) Statute of Limitations and prohibition of infringement under Article 14 of the Unfair Competition Prevention Act

The creditor company was informed that the debtor company had infringed upon the trade secrets at the end of 2013, when the debtor company and Park were criminally charged with the content identical to this case. The creditor company applied for injunctive relief on January 21, 2014. The creditor company argued that an injunction must be applied for ‘within 3 years of the date the trade secret holder knew of an act of infringement or had such concerns and knew the identity of the infringer’ according to Statute Limitations stipulated under Article 14 of the Unfair Competition Prevention Act. If the court finds that the period of prohibition of trade secret infringement has expired before the end of the Statute of Limitation, the trade secret holder may request the court to prohibit the infringement of trade secret. The creditor company argued that such reasoning is unfair because it allows the period for which the claim would be definitively dismissed to be set arbitrarily regardless of whether an act of infringement or damages exist, in conflict with the Statute of Limitations established under Article 14.

1. *See* Supreme Court Judgment in Case No. 2002Ma4380 delivered on July 16, 2003.

However, the Statute of Limitations is a system that terminates certain rights for cases in which a right holder does not exercise his right for a certain period of time even when he could have.[1] On the other hand, prohibition of trade secret infringement focuses on not allowing an infringer acquire unfair advantage from an infringement by gaining a superior position (a ‘headstart’ or ‘lead time’) and to make it possible for the holder to return to the position he would have held without such infringement. Thus, the purpose and intent are different. As such, it is reasonable to recognize that the purpose of prohibiting the infringement of trade secrets is only within the time frame necessary for achieving the above purpose. If it is permanently prohibited, it will act as a restriction, and work against public interests of promoting free competition and encouraging employees to exercise their knowledge and capabilities.[2] Therefore, the court did not accept the creditor company’s argument that its right to claim for prohibition of trade secret infringement would not be subject to limitations applied to trade secret infringement prohibition periods since the intent and purpose of such scheme is different.

3. Acts of Trade Secret Infringement and Breach of Fiduciary Duties

(1) Overview

Regarding trade secret infringement, a variety of criminal legal schemes (such as theft, leaking business secrets or infringement of confidentiality) are applicable according to the nature of the trade secret, the identity and acts of the illegal acquirer.[3] However, the Supreme Court usually applies violations of the Unfair Competition Prevention Act or breach of fiduciary duties under criminal laws[4], and in some cases, applies the violation of laws related to prevention and protection of industrial technology.

Establishment of a fiduciary duty involves a retired employee handling the affairs of another person causing damages by using information that does not constitute a trade secret for his or a third party’s profits. In such cases, the courts focus on the issue of whether the

1. *See* Supreme Court Judgment in Case No. 84Nu134 delivered on March 24, 1987.
2. *See* Supreme Court Judgment in Case No. 97Da24528 delivered on February 13, 1998.
3. Han, Sang Hoon. “Possibilities and Improvement Measures for Criminal Punishment of Trade Secret Infringement.” *Comprehensive Discussion of Legal Studies* (Kookmin University Press) Volume 14: 240-251; Choi, Ho Jin. “Protection under Criminal laws for Corporate Trade Secrets – with a focus on the Unfair Competition Prevention and Trade Secret Protection Act –.” *Criminal Law Research* (Korea Criminal Law Society, 2006 Summer) Volume 25: 379-402; Yoon, Jong Heng. “Criminal Issues and Recent Trends in the Courts for Trade Secret Protection”. *Comprehensive Discussion of Legal Studies* (Ehwa Womens University Legal Institute, September 2014) Volume 19-1: 116.
4. Article 355.2 of the Criminal Act stipulates that even if a person who, administering another’s business, receives property or obtains pecuniary advantage from a third party or aids and abets a third person to receive property or obtain pecuniary advantage, in violation of his duty, incurs a loss himself, the punishment is identical to the provision above. Article 356 of the Criminal Acts provides that “a person who commits the crime as prescribed in Article 355 in violation of his duties, shall be punished by imprisonment for not more than ten years or by a fine not exceeding 30 million won”.

information can be seen as an important asset of the business, whether a fiduciary duty may be acknowledged and whether damages were caused and profits were gained.

The Supreme Court held that “employees of a company who pledged not to leak corporate trade secrets outside the company and then leak trade secrets to competitors for economic compensation, violate the trust of the victim and constitute a violation of a fiduciary duty”.[1] Even if the data does not constitute a trade secret, if it was not disclosed to the public and it is an important asset that the user produced with considerable time, effort and cost, leaking such data constitutes a breach of fiduciary duty. Further, even when an employee legally takes out data that is an important asset of the business and such act does not constitute a violation of fiduciary duty, if he did not return or dispose of the data at the point of leaving the company to leak it to a competing business or use it for personal use despite a duty to return and discard the data, such act constitutes a violation of fiduciary duty.[2]

To be protected as a business secret, not all confidential information possessed by a company is protected, and only information meeting specific requirements are considered a trade secret. On the other hand, in the previous Supreme Court Judgment in Case No. 2004Do7962 delivered on July 14, 2005, even if data or information is not a trade secret but is an important business asset, a breach of fiduciary duty may be found. In other words, in actual litigation, even if the requirements of a ‘trade secret’ are not met as defined in the Unfair Competition Prevention Act, abstract terms such as ‘important business assets’ have been applied to find breach of fiduciary duty in court opinions.

(2) Supreme Court Judgment in Case No. 2017Do3808 delivered on June 29, 2017 – breach of fiduciary duty even if the data is not a trade secret but is taken out without authorization

1) Facts

The defendant, P, worked for 7 years at S Company, and left the company on April 30, 2011 to establish E Company. Defendant H joined S Company after working for 8 years on August 5, 2011.

1. Multiple judgments including Supreme Court Judgment in Case No. 98Do4704 delivered on March 12, 1999.
2. Supreme Court Judgment in Case No. 2008Do9433 delivered on October 15, 2009.

P and H conspired to steal the scanner control source code[1] necessary for 3D optical scanners[2] when P left the software development team, and copied or used 34 source code files to create a competing company source code and develop it into a 3D optical scanner program.

P and H conspired, and P took trade secrets when retiring from plaintiff company. Prosecutors filed charges with regards to these trade secrets being used 34 times at the competing company H founded [violation of Unfair Competition Prevention Act (leak of trade secrets)] and causing damage to the plaintiff [breach of fiduciary duties].

The court found P guilty and sentenced him to 1.5 years of imprisonment with a 3-year suspension. H was found partially guilty for only 1 of the 34 uses, and was sentenced to 4 months of imprisonment with a 1-year suspension.

2) Lower Court's Ruling

① P was found guilty on all charges

i) Non-disclosure and economic value acknowledged

According to the findings of the Korea Copyright Commission, the source code of the victim company and the source code of the competitor were found to be similar (the defendants submitted other codes they referred to, but those were found similar to the plaintiff company's source code). Some parts of the files were disclosed on related open source libraries, but the files themselves were not disclosed. The files contain the detailed algorithms, functions, and data necessary for fast and efficient operation of the 3D scanner, and would take a considerable amount of time and effort to develop.

ii) Secret management acknowledged

It should be considered to some extent that the plaintiff company has limited monetary resources as a small-to-medium sized company. In other words, courts acknowledge trade secrets based on facts that a company has not neglected efforts to maintain and manage trade secrets considering its size and monetary resources. At the plaintiff company, only H, the research and development team leader, could freely access the entire source code. When the plaintiff company conducted an individual comprehensive evaluation twice a year, it included evaluation of 'security management', and also emailed employees several times to call for execution of security measures. Above all, H acknowledged to prosecutors that he "knew that

1. Currently, most companies are adopting 3D scanners, and because of the nature of 3D scanners, the operating program is a critical component as is the source code of an operating program. In order to run a 3D scanner, the source code is the core technology, and would not be disclosed to the public as an open source. This means that if there is similarity, as long as it has not been disclosed, there is a high possibility that it has been copied from.
2. If there is an object, it is difficult to produce them without the drawings. If you scan the product through a 3D scanner, you can outline the shape into a drawing. This technology is widely used at companies (If you have a 3D printer, you can also reproduce the object).

the source code should never be exported without the permission of the plaintiff company, and that especially file # 14 was very important”.

iii) Whether ‘use’ can be established under the Unfair Competition Prevention Act

In addition to cases of producing products by simply imitating the technology of a trade secret, being able to reduce the trial and error and necessary tests by referring to the trade secrets of others can constitute a “use of trade secrets” under the Unfair Competition Prevention Act.

In this case, H referring to 33 source code files to generate the source code of the competing company, and using that source code to create a 3D scanner operating program may be seen as use of a trade secret.

iv) Ruling of the courts regarding P (Court of First Instance and the Intermediate Appellate Court)[1]

Charges	Court of First Instance		Intermediate Appellate Court	
	File No. 14	The Rest of the Files	File No. 14	The Rest of the Files
Violation of the Unfair Competition Prevention Act	Guilty	Not Guilty	Guilty	Not Guilty
Breach of Fiduciary Duties	Not Guilty	Not Guilty	Guilty	Not Guilty

The court of first instance found no evidence that H colluded in H’s breach of fiduciary duties, and found him not guilty on all such charges (1~34 of the attached Table listing

1. (Court of First Instance) Seoul Central District Court Judgment in Case No. 2013GoDan7560 delivered on August 11, 2016; (Intermediate Appellate Court) Seoul Central District Court Judgment in Case No. 2016No3163 delivered on February 15, 2017.

criminal charges). The Appellate Court found that P guilty of breach of fiduciary duty since he was involved in the conspiracy to develop a new program using a code that H did not return or discard after leaving the company.

② H was found guilty of violation of the Unfair Competition Prevention Act and breach of fiduciary duty on 1 count out of 34

i) Grounds for finding H not guilty: There was insufficient evidence that P colluded or joined in H's use of trade secret and breach of fiduciary duty. P is only a hardware person, so I do not know about the software, and the fact that H is responsible for the development of the source code of the competitor is the same. As P was only a person in charge of hardware, he did not have any knowledge about software, and H was responsible for the development of the source code of the competitor company.

ii) Grounds for finding H guilty: Regarding File No. 14, P directly requested that H use the plaintiff company's files to create the 3D scanner license, and H acquiesced (both P and H acknowledged this fact).

3) Grounds for Appeal

① Grounds for Defendant's Appeal

i) Judicial Misconception of Violation of the Unfair Competition Prevention Act

- The secret management requirements regarding trade secrets were not satisfied: the source code of the plaintiff company was not marked as trade secret, no security regulations or security officers existed in the affected company, no security training, and any developer could browse and copy the source code without any restrictions.

- The non-disclosure requirements of trade secrets were not satisfied: Most of the 15 files could be easily found on the internet and thus disclosed to the public, or could be found in manuals of other companies or in published articles. The plaintiff company also released the source code to outsiders, such as non-employee graduate students.

- 'Use' of trade secrets was not satisfied: The 18 files cannot be said to have been used since H only clicked and opened the files but did not read or refer to them when writing the source code of the competing company. Thus H's use did not constitute a use relevant to the attributes of the information.

- Lacked ‘intention to obtain unfair profits or cause damages to the holder of the trade secret’ under the Unfair Competition Prevention Act: Since the plaintiff company had not applied its licenses on all products since August 8, 2011, using File No. 14 (license) could not cause damages to the plaintiff company.

ii) Judicial Misconception regarding breach of fiduciary duty

- Judicial misconception regarding the actor and whether a breach of fiduciary duty has occurred: It cannot be said that H had an obligation to return or discard the source code file when he left the company, and there was no intentional breach of fiduciary duty. The defendants and other employees of the plaintiff company never agreed to a confidentiality agreement or pledge, nor received security training, nor were prohibited from taking out any work resources.

- Judicial misconception regarding P’s breach of fiduciary duty (File No. 14): The Intermediary Appellate Court ruled that H committed a breach of fiduciary duty by not returning File No. 14, but since the use of the File No. 14 happened after the fact, it cannot be punished as a breach of fiduciary duty. Even if P conspired or participated in the crimes of H, because he was not in a position that handled another’s business, he should not be punished as an accomplice to a simple breach of duty and not of a “fiduciary duty”.

② Grounds for the Prosecutor’s Appeal - Confusion of facts and Judicial Misconceptions

i) The prosecutor included the entirety in the scope of the appeal regarding P

- By combining the various pieces of evidence, one can find that P made a conspiracy with H in advance. They planned to leave the plaintiff company to develop and sell scanners by taking the plaintiff company’s trade secret (scanner development technology) and establishing a competitor company.

- The Intermediate Appellate Court’s legal ruling that did not recognize H’s statement at the Prosecutor’s Office was wrong: H stated that he knew that P was using the plaintiff company’s source code in developing a program, but the Intermediate Appellate Court did not accept the statement as evidence denying that it constituted an actual truth. Although H stated in the court that he did not know whether the statement was a truthful representation of his statement at the Prosecutor's Office, since the investigator who investigated H at the time testified at court that H’s statement was a correct representation (constituting proof by an objective method), it should be acknowledged as evidence under Article 312.2[1] of the Criminal Procedure Act.

- Even if H’s statement is not considered evidence, P’s participation in the conspiracy can be found in light of other objective circumstances: In particular, when looking at data seized from the competing company, P and H had plans to develop the core technology for 3D scanners within 4 months from October 10, 2011 and to produce 3D scanners within 6 months from that date. In view of the fact that H was the sole employee in charge of developing 3D scanner software at the competing company, they would not have been able to do so without a conspiracy. Prior to the seizure, the defendants formatted or replaced all of the PC hard disks at the competing company, giving more reason to reach a conclusion of conspiracy. Thus, the crimes of this case were ordered by P and put into action by H.

4) The Supreme Court’s Ruling

Whether P and H breached a fiduciary duty depends on what kind of work they did for company S (plaintiff company) after they left it.

To find a breach, one must find that H had a duty to not take out major assets of the plaintiff company after leaving the company without consent nor provide them to outside parties for a considerable period of time.[2] Although the Intermediate Appellate Court ruled that H’s acts of not returning nor discarding the files after leaving the company constituted a breach of fiduciary duty, the use of File No. 14 happened after the fact and was not punishable. Assuming a duty, H’s acts of using a source code he did not return or discard after leaving the company to develop a new program is a violation of such duty and constitutes a breach of fiduciary duty.

The Intermediate Appellate Court ruled that P joining in H’s acts constituted a separate breach of fiduciary duty and there is a question as to whether this was appropriate. The Supreme Court ruled that “if an employee leaks or takes out company data without authorization for his own interest, even if the data does not constitute a trade secret, if the data is not disclosed to the public and cannot be acquired without going through the holder, is an important asset that the holder produced with considerable time, effort and cost, and could be used to gain an advantage against competitors through the use of data, a breach

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1. Article 312 of the Criminal Procedure Act (Protocol, etc. Prepared by Prosecutor or Senior Judicial Police Officer)
① A protocol in which the prosecutor recorded a statement of a criminal defendant when the criminal defendant was at the stage of criminal suspect, shall be admissible as evidence, only if it was prepared in compliance with the due process and proper method, the criminal defendant admits in his/her pleading at a preparatory hearing or during trial that its contents are the same as he/she stated, and it is proved that the statement recorded in the protocol was made in a particularly reliable state.
② Notwithstanding paragraph (1), if the criminal defendant denies the authenticity in formation of the protocol, it shall be admissible as evidence, only when it is proved by a video-recorded product or any other objective means that the statement recorded in the protocol is the same as the criminal defendant stated and was made in a particularly reliable state.
2. Page 31 of the Intermediate Appellate Court’s Opinion.

of fiduciary duty may be found". Further, "even if an employee legitimately removes a trade secret or data that is an important asset of a business, and such removal does not constitute a breach of fiduciary duty, if he does not return or discard data to pursue his own interest despite a duty to return or discard the data, a breach of fiduciary duty may be found.[1]

5) Analysis

A breach of fiduciary duty concerns a person who handles the business affairs of another person on the job breaching such duty and gaining a profit himself or through a third party and causing damages. The finding of a breach of fiduciary duty depends upon the acts of the person handling the business affairs of another person.

Supreme Court Judgment in Case No. 2017Do3808 delivered on June 29, 2017, ruled on the criteria to establish a breach of fiduciary duty when an employee removes company data without authorization for his own interest.

In short, the Supreme Court made clear that although workplace data may not be a trade secret, one cannot pass data that is not open to the public and inaccessible without going through the company to a competitor or use the data for his personal interest. If one legitimately possesses the data as its handler and then leaves the company, when the data is not returned or disposed of and then passed on to a competitor and used for personal interest, a breach of fiduciary duty may be found.

III. CONCLUSION AND ANTICIPATED TRENDS IN THE FIELD OF TRADE SECRET PROTECTION

A trade secret holder may prohibit the use of a trade secret for a reasonable period of time against a person who has committed an infringement of such trade secret. As discussed previously, according to the general rule of prohibition claims, a prohibition claim may start at the time of infringement. Therefore, the starting point of a prohibition claim against a trade secret infringement is not the time an injunction is finalized but at the time of infringement (in some cases, at the date of retirement). However, even if the trade secret is public, the prohibition of infringement may be granted depending on the 'lead time' in certain cases. In other words, for a request for prohibition of trade secret infringement to be acknowledged, the confidentiality must be maintained at the point of request as well as the point the claim is accepted. The period of prohibition of trade secret infringement shall be limited to the period

1. Supreme Court Judgment in Case No. 2015Do17628 delivered on July 7, 2016.

required to achieve the objective of ensuring fair and free competition and protection of trust. On the other hand, prohibition of trade secret infringement is to prevent the infringer from taking unfair advantage in the superior position (by a 'headstart' or 'lead time') over fair competition through such infringement and return the holder to the position he would have held without such infringement. Therefore, even if the confidentiality of the technological or business information is not maintained at the time of the request for prohibition of infringement, infringement may be prohibited for a considerable time period necessary for an infringer or another fair competitor to obtain the trade secret by a legitimate method such as independent development or reverse engineering considering the rapid development of technology and the human and physical facilities of the infringer. Permanent prohibition, however, is unacceptable due to its restrictive nature and in the public interest of promoting free competition and encouraging employees to exercise their knowledge and capabilities.

The main reason why it is not proper to recognize a non-trade secret as a main asset of a business to establish breach of fiduciary duty concerns the relationship between breach of fiduciary duty under criminal law and the Unfair Competition Prevention Act. When in violation of the Unfair Competition Prevention Act, criminal penalties can be 5 years or less of imprisonment or fines from 2 to 10 times of the profit gained (Article 18.2 of the Unfair Competition Prevention Act). On the other hand, a breach of fiduciary duty is punished by imprisonment for up to 10 years or a fine of up to 30 million won. Hence, although punishment under the Unfair Competition Prevention Act is weaker than those under breach of fiduciary duty, it must meet the stricter requirements of establishing a trade secret to be applied.[1] As a result, most cases apply breach of fiduciary duty since it is easier to prove and is punished more heavily, causing concerns of invalidating the legislative intent and reason for existence of the Unfair Competition Prevention Act. Accordingly, since the application of breach of fiduciary duty based on the concept of important business asset can cause the decline of trade secret infringement, criminal accusations relating to breach of fiduciary duty may be abused.[2] Since such extended application of criminal law (general law) may curb the application of the Unfair Competition Prevention Act (special law), legal stability may be harmed and is likely to cause confusion of legal application. Hence, review of the relevant legal reasoning is necessary.

1. Jung, Tae Ho. "Critical Review of Criteria for Trade Secrets and Breach of Fiduciary Duties." *Creation and Rights* Volume 66: 150 (2012).
2. Kim, Dong Jin. "Use of Information and Breach of Fiduciary Duty for Retired Employees – New Solutions for Trade Secret Disputes." *BupJo* Volume 60 Issue 6 (657-Ho): 190 (2011).

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION

PARK Junu[*]

I. OVERVIEW

Korea enacted the “Unfair Competition Prevention Act” in 1961. Later, the “protection of trade secrets” was added (1991), and the act was divided into provisions regulating “unfair competition” and “trade secret infringement”. Under Article 2.1, an “act of unfair competition” is stipulated as an act that causes confusion or misleads by using source indications, which includes: causing confusion with another person’s business activity by using a well-known mark (Items (a) and (b)); false indication of origin (Items (d) and (e)); and misleading the public about product quality (Item (f)). In 1998, the title of the act was amended to the ‘Unfair Competition Prevention and Trade Secret Protection Act (the “Unfair Competition Prevention Act”).

Recently, the most notable trend related to the Unfair Competition Prevention Act is the diversification of the types of disputes. While industries were once mainly driven by manufacturing and off-line services, they have now shifted to cultural products/services and on-line services, giving rise to new types of unfair competition and disputes, with legislations and court decisions following in response.

II. LEGISLATION AND POLICY

Since provisions on trade secret protection were set forth in 1991, prohibition of dilution of a famous mark (Item (c) (2001) and protection of a domain name and product shape (Item (h) and (i)) (2004) have been added. The most recent revision was in 2013 to insert a ‘general

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provision defining acts of unfair competition' to 'Item (j) in Article 2.1 of the Unfair Competition Prevention Act to respond to new types of unfair competition arising from the development of the internet and digital technology. This has been the most significant change since its enactment in 1961. Hence, act of unfair competition that were limited to Item (a) to (i) in Article 2.1 of the Unfair Competition Act are now an enumeration of examples of unfair competition and the function and role of the Unfair Competition Act has significantly expanded. Item (j) provides for prohibition of: any act of infringing upon another's economic interests by appropriating trade values resulting from another's substantial investment or efforts, for one's own business contrary to fair competition practices.

The elements that comprise an act of unfair competition stated in Item (j) include ① outcomes achieved by a plaintiff's substantial investment or efforts (subject matter of protection), ② use for one's own business without permission (act by a defendant), ③ infringement upon another person's economic interests (economic loss), ④ violation of fair commercial practices or competition order (illegality), and ⑤ causation. These stipulate the general requirements for unfair competition, not a specific type of unfair competition. The Seoul High Court applies Item (j) only when it cannot be protected by other intellectual property rights. As a principle, even if it has the commercial value, information that is not protected by existing intellectual property rights is in the 'public domain' and can be freely imitated. However, if an incentive for information production is deemed necessary, Item (j) applies as an exception for cases where there is a 'gap in protection' that is 'strikingly unfair'.

III. MAJOR CASES

The following introduces the major cases at the Supreme Court and Seoul High Court in 2017. The relevant provisions for these cases are listed at the end of this chapter.

1. The Anti-Slip Mat case (Seoul High Court Judgment in Case No. 2016Na2081469 delivered on June 15, 2017) [1]

In this case, both plaintiff and defendant produced 'anti-slip mats' used in bathrooms. From 2012 until the time of judgment, there were 3 companies selling anti-slip mats in Korea including the plaintiff and defendant, and the plaintiff and defendant were competing for the top place in market share. But from August 2013 to August 2015, the defendant advertised that the Defendant's product is an environmental hormone-free product that uses

[1] The Seoul Central District Court ruled for the plaintiff (partially) on October 21, 2016 (2016GaHab502154) and the Supreme Court dismissed the case on October 26, 2017 (2017Da245972).

environmentally friendly material GL300 instead of DOP (diethylhexyl phthalate, a type of environmental hormone) and the Korea Testing and Research Institute has proven that GL300 is non-toxic and harmless to the human body even if it is directly exposed to the skin of infants and children. However, DOP was used for the defendant’s products.

The Seoul Central District Court ruled that the defendant’s acts constituted an act of unfair competition under Item (f) as it is misleading about the quality, content and manufacturing method of the product. In the appeal, the defendant argued that there was no causation between his acts of unfair competition and the plaintiffs' damages. However, the Court acknowledged that ① the defendant's sales growth rate rose sharply to 87%, while the plaintiff’s sales growth rate was only 14% after the defendant's false advertisement, the plaintiff’s sales growth rate sharply increased to 73.6% while the defendant's sales growth rate decreased 31.1% after the false advertisements stopped, and ③ the plaintiff’s market share increased to 56.4% from 33.7% while the defendant’s market share decreased from 54.4% to 27.4% after the false advertisements stopped. Hence, the Court found that the defendant's false advertising caused the loss of sales to the plaintiff as a competitor, resulting in a loss of business.

2. The Model Name of Agricultural Machine Case (Seoul High Court Judgment in Case No. 2016Na2067272 delivered on March 17, 2017) [1]

In this case, both plaintiff and defendant manufactured and sold farm product tying machines (machines that bundle agricultural products such as flowers, scallions, garlic, leeks, etc. by volume, size or weight). The Korea Ministry of Agriculture and Forestry registers a model name for agricultural machines that have passed certain quality standards. Farmers who purchase registered agricultural machines can receive governmental loan support for the purchase, and after-sale service guarantees from the Korea Agricultural Machine Industry Cooperative(KAMIC). The plaintiffs registered its tying machines under the model name ‘SK25SUR’, and the defendant sold its own tying machines marked as ‘SK25SUR’.

The Seoul Central District Court ruled that the model name for agricultural machinery is not a simple serial number of the product for consumers but represents ① whether the machinery would qualify for governmental loan support and ② whether the machinery would qualify for after-sale service guarantees by the KAMIC. Based on this, the court found that the defendant’s act constituted an act of unfair competition under Item (f).

[1] The Seoul Central District Court ruled for the plaintiff (partially) on September 2, 2016 (Case No. 2015GaHab576325), and the Supreme Court dismissed the case on July 7, 2017 (Case No. 2017Da220911).

In the appeal, the defendant argued for a reduction in the amount of damages awarded by the District Court since the defendant’s product was sold based on its independent quality, performance and price, the defendant’s credit and dependable after-sale service. The Seoul High Court ruled that ① most of the defendant’s products were sold in the defendant's business area, not in the plaintiff’s business area, and ② many of the defendant’s buyers had kept long-time business relationship with the defendant, showing that those buyers bought the defendant’s product based on their trust of the defendant. Based on these facts, the court reduced the amount of damages.

3. The Fire Extinguisher Bidding Case Supreme Court Judgment in Case No. 2015Da216758 delivered on January 25, 2017)[1]

In this case both plaintiff and defendant manufactured and sold fire extinguishers. In 2010 and 2011, the plaintiff supplied double-valve aerosol fire extinguishers to the National Police Agency through bidding. In 2012, the defendant was selected as the winning bidder and supplied fire extinguishers (of almost identical shape to the plaintiff’s extinguishers) to the National Police Agency. In the 2012 bidding notice, the National Police Agency required supplied products to be similar in specification and shape to the plaintiff’s fire extinguishers.

Both the District and Appellate courts ruled that the shape of the plaintiff’s fire extinguisher should be considered ‘a shape that similar type of products usually take’ based on the fact that fire extinguishers of a similar shape with the plaintiff’s fire extinguisher had been sold since 2007. Accordingly, both courts held that the defendant’s acts did not constitute an act of unfair competition of Item (i), and the Supreme Court upheld the holding.

4. The Bicycle Rack Bidding Case (Seoul High Court Judgment in Case No. 2017Na2036732 delivered on September 28, 2017) [2]

In this case, Ansan City (testifier for the defendant) made a bidding notice regarding the ‘Unmanned Public Bicycle System Construction Project’ around July 2012 (first notice). The plaintiff was selected as the winning bidder in August 2012, and provided Ansan City with bicycle rakcs and kiosks for its unmanned public bicycle system. In March 2014, the Ansan City made an additional bidding notice (second notice) to expand the public bicycle system. The defendant was selected as the winning bidder and provided bicycle racks and kiosks

1. Court of First Instance: Incheon District Court Judgment in Case No. 2013GaDan34640 delivered on August 26, 2014 (ruling against plaintiff); Appellate Court: Incheon District Court Judgment in Case No. 2014Na54489 delivered on April 23, 2014 (appeal dismissed).
2. The Seoul Central District Court ruled for the defendant on June 16, 2017 (Case No. 2016GaHab514973).

similar in shape with the plaintiff's products to Ansan City from August 2014. Ansan City provided bidders in the second round with the design drawings of the bike racks which had been provided by the plaintiff.

The District court ruled that 'since the defendant had received the permission of Ansan City who held the right to the shape of the plaintiff's product, the defendant's acts of imitation did not fall under Item (i),' and the Seoul High Court upheld this holding. These rulings were based on the following grounds: ① Ansan City stipulated in the request for proposal form in the first bidding that "All intellectual property rights and usage rights of the winning bidder (plaintiff) related to the system automatically transfer to Ansan City. Ansan City may exercise all rights pertaining to the design, such as using the designs of the winning bidder for other projects."; ② Ansan City required bidders to supply the same shape of product to the plaintiff's bicycle racks; ③ The above regulations and requests were necessary to ensure compatibility of the system.

5. The Exit Poll Results Case (Supreme Court Judgment in Case No. 2017Da200139 delivered on June 15, 2017 [1]

To broadcast exit poll results for the sixth national regional elections (conducted on June 4, 2014), the plaintiff broadcasting companies KBS, MBC and SBS made a 'Exit poll consortium' and the consortium entered into a 'service contract for the exit poll' with three survey agencies around April 2014. The cost was 2.4 billion won, and the major terms of the contract were:

- Contents of Survey: Predicting the winner of the Governor and Superintendents
- Size of the survey: telephone survey-41,000 samples. exit survey-648 polling stations.
- Deadline for final results by the survey agencies: June 4th at 17:30
- Duty of confidentiality of the Consortium and the Survey Agencies regarding the exit poll results.
- Penalties for violating the duty of confidentiality: 50% of the contract amount for each survey agency.

1. Court of First Instance: Seoul Central District Court Judgment in Case No.2014GaHab43866 delivered on August 21, 2015; Appellate Court: Seoul High Court Judgment in Case No. 2015Na2049789 delivered on November 24, 2016.

However, from 18:00:49 on the day of the election, the defendant broadcasting company started to disclose such exit poll results starting with the top candidates and their predicted shares for the City of Seoul Mayor Election under the heading ‘Exit Poll of Major Broadcasts SBS, KBS, MBC’ without the plaintiffs’ consent.

The plaintiffs first disclosed the top candidate in areas where winning seemed very likely and the top two candidates in areas where there was a competition ongoing, along with their expected shares of voting. In other areas, KBS started disclosing candidates and expected shares at 18:01:24, MBC from 18:00:46 and SBS from 18:01:04. Hence, plaintiff MBC disclosed the exit poll results before the defendant, but KBS and SBS disclosed certain exit poll results later than the defendant did.

The plaintiffs argued that the defendant’s appropriation of the exit poll results were contrary to the fair commercial practices under Item (j) of the Unfair Competition Prevention Act. The court found that the exit poll results constituted ‘an outcome achieved by substantial investment or efforts’ based on the cost of the service contract for the exit poll survey, the scale of the survey, and the efforts to maintain the confidentiality of the survey results. Also, the court held the defendant’s act in conflict with fair commercial practices and competition order because ① since 1995, broadcasting companies who had directly conducted exit polls for various elections broadcast the results first, and then other companies quoted such results, and ② “If the defendant, a competitor of the plaintiffs, were allowed unauthorized broadcasting of exit poll results at a point when the information is still fresh, it is obvious that incentives for the establishment of the exit poll systems for broadcasting companies would be hindered. Hence, the acts of defendant’ were beyond socially acceptable limits”. In addition, the court held that the defendant’s use of the exit poll results ‘infringed upon the plaintiffs’ economic interest’ based on the fact that plaintiffs had negotiated for licensing the use of the exit poll results with other media companies that wanted to purchase the results. The Supreme Court upheld the judgments of the Seoul High Court.

6. The Match 3 Game Case (Seoul High Court Judgment in Case No. 2015Na2063761 delivered on January 12, 2017) [1]

In this case, the plaintiff company[2] released the ‘Farm Hero Saga’ game (plaintiff’s game) internationally around April 2013 (started development around September 2012) through

1. The Seoul Central District Court ruled for the plaintiff in Seoul Central District Court Judgment in Case No. 2014GaHab567553 delivered on October 30, 2015 (partial win for plaintiff). The case was appealed to the Supreme Court (Case No. 2017Da212095).
2. “Match 3 game” is a game designed to get points when specific tiles in a game are tied together in three or more straight lines.

Facebook platform based on the ‘Farm King’ game (a ‘Match 3’ game). Subsequently, the plaintiff launched the game on mobile platforms around January 2014 and on the KakaoTalk platform on June 10, 2014. The defendant company entered into an exclusive license agreement to distribute “Forest Mania”, a match 3 game developed by Zentertain company of Hong Kong (first released abroad in 2014), on January 23, 2014, released the Korean version of the game on the KakaoTalk platform on Feb. 11, 2014 (defendant’s game), and provided it through Google Play Store and Apple App Store. The plaintiff company argued that the defendant company’s acts were subject to copyright infringement and Item (j) of the Unfair Competition Prevention Act, but both lower courts denied copyright infringement on grounds that there was no substantial similarity between the two games.

The Seoul High Court ruled that the defendant’s conduct was not contrary to fair trade practice or competition order’ in light of the following circumstances: ① the game rules that the plaintiff argued to be unique to its game (hence, the outcome of the plaintiff company’s substantial investment) had already been used in previous match 3 games or no more than a ‘modification or combination’ of those rules. Hence, the game rules were ‘ideas’ that anyone should freely use as a principle, ② the defendant obtained the game rules through generally permitted means and not through any improper means, ③ the defendant’s game was not a ‘direct imitation’ of the plaintiff’s game but a ‘productive or transformative use or imitation' since they differed in the overall form of the game (such as the form in which the game rules are expressed and screen configuration and design), and the defendant game contains a number of new elements such as original game rules, game levels and systems not in the plaintiff’s game, ④ the plaintiff’s game had enjoyed sufficient benefit of lead-time allowed by the Unfair Competition Prevention Act.

In particular, regarding ‘sufficient benefit of lead-time’, the court reasoned that ① the defendant’s game was released on February 11, 2014, about 10 months after the launch of the plaintiff’s game around April 2013). Previous computer games typically had long development periods, making profits through user loyalty and prolonged use. On the other hand, the development and operation period for mobile casual games (like the plaintiff’s games) [1] are relatively short term because they gain popularity and acquire maximum profitability over a short term. Hence, 10 months may be considered a ‘sufficient time required for the recovery of the capital put into the development of the plaintiff’s game’, and ② the development cost of the plaintiff’s game was actually US$ 5.2 million, while it earned US$ 150 million or more through the Facebook platform by July 31, 2014, US$ 180 million or more through the mobile version, and US$ 2.2 million or more through the KakaoTalk

1. ‘Casual game’ means ‘a small-scale online game that anyone can easily enjoy in their free time because the game playing methods are easy or convenient’. This is in contrast to large-scale RPGs (Role Playing Games) where players create fiction-like episodes or stories in playing the game.

platform (launched in June 10, 2014). Hence, it is difficult to find that the defendant's game caused severe loss to the plaintiff company's business in relation to the plaintiff's game.

7. The Hermes Shygirl Bag Case (Seoul High Court Judgment in Case No. 2016Na2035091 delivered on February 16, 2017) [1]

In this case, the defendant designer made popular handbags similar to the plaintiff Hermes 'Kelly Bag' and 'Birkin Bag' with artificial leather, attached eyeballs or lip symbols that she designed on them, and sold them for 100~200 thousand won since 2013.

First, the court first reviewed the following to determine striking unfairness ① the process of imitating or exploiting the outcome of others' substantial investment, ② the purpose or intention of the user, ③ the ways and degree of use, ④ the time interval until use, ⑤ the means by which the defendant acquired the plaintiff's achievement, and ⑥ the result of the use (such as when the business of the predecessor is severely affected). The court listed some examples of 'strikingly unfair' acts under Item (j): ① the acquisition of the plaintiff's outcomes or ideas ~~were~~ by improper means, such as theft; ② the imitation violating a contractual duty or strikingly violating a duty of trust with the plaintiff; ③ the acts not constituting sound competition, but constituting intentional and improper interference with a competitor's business, predatory pricing in a competing area, or use of the outcome only to harm plaintiff's business; and ④ 'direct imitation' which simply took most of the plaintiff's outcome with little addition of creative elements by the imitator, contrary to 'productive or transformative imitation'.

In addition, the Court held that this case did not constituted a 'special case' in which the production and sale of the defendant's products could not be justified in the light of fair trade and free competition order in consideration of the circumstances below since it was not obvious that the defendant's act lowered the plaintiff's incentives for creation below the proper level: ① the defendant's design was not a 'simple imitation' but a "representation of new aesthetics and originality", hence a "re-creation"; ② the defendant's design had its own credibility and consumer goodwill (strong distinctiveness) as it was popular even when it was applied to plaintiff's other products-and there was no likelihood of confusion.

1. The Seoul Central District Court ruled for the plaintiff in Seoul Central District Court Judgment in Case No. 2015GaHab549354 delivered on June 1, 2016. This case is currently being reviewed at the Supreme Court.

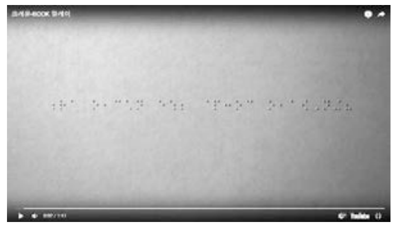
8. The Braille Book Donation Campaign Case (Seoul High Court Judgment in Case No. 2016Na2053921 delivered on March 30, 2017)[1]

In this case, the plaintiff advertisement agency (plaintiff company) ran a ‘Point Publishers Campaign’ (plaintiff campaign) on behalf of credit card companies that ‘donated braille books to blind children by converting credit card points from late 2012 to early 2013, and won several advertisement awards both home and abroad. The defendant advertisement agency ran a ‘ㅇㅇㅇ-BOOK Relay’ event that ‘donated braille books to blind children’ in early 2015 in commemoration of the 4th anniversary of the ‘ㅇㅇㅇ service’ (the defendant securities company’s online securities trade service). However, plaintiff company claimed that the defendant's events imitated the plaintiff's campaign (detailed in the table below), which constituted an infringement of copyrights and Item (j) of the Unfair Competition Prevention Act.

[Table] Comparison of the plaintiff’s campaign and defendant’s event

Component		Plaintiff’s campaign	Defendant’s Events
Slogan		Your point of changing the world	ㅇㅇㅇ -BOOK relay to illuminate the world
Advertising video Narration and Image		Your ㅇㅇ points become Braille ... Then become a braille book, and the power to see the world.	Your line becomes a braille, then a braille book that gives pleasure, and then eyes for children to see new dreams and hope.
Plot	Problem (numerical data)	Numerical data including Braille book shares and blind literacy rate	Numerical data such as holding of braille books at large bookstores and the National Assembly Library, and braille book distribution rates in 2013
	Necessity	The necessity for continuous distribution of Braille books to solve intellectual needs, publication of	The necessity for manpower and time to make Braille books

1. The Seoul Central District Court ruled against the plaintiff in Seoul Central District Court Judgment in Case No. 2015GaHab568102 delivered on July 22, 2016.

		Braille book with credit card point donations	
	Solution	If you select a sentence, it will be translated into Braille and a Braille book will be created.	A braille book is created, as you select and type a sentence from a book.
Internet site Introduction screen		 Hangul enters from the right side of the book and braille goes out to the left.	 In the middle of the screen says, “How many books do you read each year?”
How to participate		When a customer selects a text using their credit card points, they are translated into Braille and donated.	If the customer enters the text directly, it will be translated into Braille and donated.

On the issue of copyright infringement, regarding ‘substantially identical parts’ between the plaintiff’s campaign and defendant’s events, the District Court ruled that such parts constituted ideas, based on the followings: ① the “narration and subtitles of the advertising image” was an introduction of simple facts (the process of converting texts into braille, braille into a braille book, and braille books being donated to the blind, etc.). These were very common expressions(: such as “something becomes something else, and that something else becomes something else again.”) and it was difficult to imagine other expressions; ② the ‘composition of the advertisement image of the plaintiff’s campaign which consisted of ‘identifying an issue → showing necessity → proposing solution’ was a commonly used composition that is used to encourage participation, and hence, within the domain of ideas; ③ similar parts in the advertisement image (such as the ‘scene that presents low rate of braille book distribution by showing bookcases in libraries or book stores’) could be considered ‘typical and essential expressions’ used to present ‘problem situations’ and within the domain of ideas (‘doctrine of scenes a faire’). In particular, the court held that the ‘composition of the advertisement images’ of the plaintiff’s campaign did not constitute copyrightable work.

Further, the court ruled that the evidence above did not constitute Item (j) and the Appellate Court upheld such holdings regarding copyright infringement and Item (j).

Article 2 (1) of the Unfair Competition Prevention Act

(f) An act of falsely assuming another person’s goods or an act of advertising any goods or making a mark in any manner of leading the public to misunderstand their quality, content, manufacturing process, usage, or quantity, in latter goods or advertisement thereof, or selling, distributing, importing, or exporting goods using such method or mark

(i) An act of transferring or lending goods whose shape has been copied (referring to the form, image, color, gloss, or any combination of these, including the shape of any prototype and the shape in goods brochure; hereinafter the same shall apply) from the goods manufactured by any other person; exhibiting such goods for transfer or lending; or importing or exporting such goods: Provided, That either of the following acts shall be excluded herefrom:

(1) An act of transferring or lending goods whose shape has been manufactured by counterfeiting the shape of the other goods for which three years have elapsed from the date on which the shape of the other goods, including the production of the prototype, was completed; exhibiting such goods for transfer or lending; or importing or exporting such goods

(2) An act of transferring or lending goods whose shape has been manufactured by counterfeiting the common shape of goods that are identical to the goods manufactured by any other person (where the goods of the same kind are nonexistent, referring to other goods whose function or utility is identical or similar to the relevant goods); exhibiting such goods for transfer or lending; or importing or exporting such goods

(j) Any other acts of infringing on other persons’ economic interests by using the outcomes, etc. achieved by them through substantial investment or efforts, for one's own business without permission, in a manner contrary to fair commercial practices or competition order

PART III.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW OF KOREA

CHAPTER 1.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF
MONOPOLY AGREEMENTS

CHAPTER 2.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF
ABUSE OF DOMINANT POSITION

CHAPTER 3.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF
CONTROL ON CONCENTRATION OF UNDERTAKINGS

CHAPTER 4.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF
UNFAIR COMPETITION

CHAPTER 5.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PRIVATE LITIGATION

CHAPTER 6.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF
COMPETITION LAW INVOLVING INTELLECTUAL PROPERTY

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF MONOPOLY AGREEMENTS

KUM Changho / PARK Shinae[*]

I. OVERVIEW

While sanctioning 69 cases of unreasonable collaborative acts (hereinafter "cartels") in 2017,[1] the Korea Fair Trade Commission (the "KFTC") imposed a total of approximately KRW 360 billion (approximately USD 340 million) in administrative fines. In regard to the legislations and policies related to cartels, the imposition standard for administrative fines was adjusted upward and sanctions for the act of refusing or interfering with the KFTC's investigation were also strengthened in 2017. Meanwhile, the KFTC's 2018 Work Plan has in store the plans for the adoption of a class action lawsuit system against cartels that cause small-sum and numerous consumer injuries and for the overall reorganization of the Monopoly Regulation and Fair Trade Act (the "MRFTA") reflecting the changes in twenty-first century economic environment.[2]

There were also a few interesting court decisions regarding cartels in 2017. For example, with respect to the KFTC's standard for calculating administrative fines in a bid-rigging case, the Supreme Court offered a new, or an expansive legal doctrine. Moreover, the Supreme Court decisions on the issue of whether the KFTC's decision to deny the leniency application for administrative fines by a cartel leniency applicant is subject to an independent administrative litigation and on the standards for differentiating between the withdrawal and termination of a cartel were also subject to much attention.

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1 Here, "sanction" includes not only corrective orders and administrative fines, but also "warnings," which are the lowest level of sanctions.

2 See KFTC 2018 Work Plan (January 2018).

II. LEGISLATION AND POLICY

A. Amendment of the Notification on the Detailed Standards, Etc. for the Imposition of Administrative Fines

On November 30, 2017, the KFTC amended and implemented the "Notification on the Detailed Standards, Etc. for the Imposition of Administrative Fines" (Notification No. 2017-17; the "Administrative Fine Notification"). The key purpose of such amendment is to prevent the recurrence of violation and to enhance the deterrent effect by strengthening the administrative fine sanctions.

Adjustment of the base imposition rate for cartels: The administrative fines imposed on the violation of the MRFTA by the KFTC are calculated by multiplying (i) the revenue of the violator affected by the violation during the period in which such violation has continued (this is referred to as the "relevant revenue") to (ii) a certain ratio prescribed pursuant to the violation's degree of gravity (this is referred to as the "base imposition rate"). The base imposition rates for cartel are divided into 5 levels depending on the degree of gravity. In the pre-amendment Administrative Fine Notification, in the order of the gravity, the maximum base imposition rate for each level was stipulated as 10%, 8%, 7%, 5%, and 3%, respectively. In the amended Administrative Fine Notification, the ceiling of the second-level base imposition rate was increased from 8% to 8.5%. Accordingly, the level of administrative fines actually imposed on cartel by the KFTC may increase.

Bolster the aggravation of administrative fines pursuant to the duration and instances of violations: First, (i) the ceiling of the administrative fines that can be imposed additionally on violations that have continued for an extended period of time was increased from "within 50%" to "within 80%." Second, (ii) the administrative fines imposed on repeat violations were also raised: (a) the ceiling of additional base administrative fine for repeated violations was increased from "within 50%" to "within 80%"; (b) the reckoning period that serves as the base for counting the number of violations was increased from past three years to past five years; and, (c) while previously administrative fines could be added only when there were two or more violations during the reckoning period, the amended Administrative Fine Notification now permits additional administrative fines to be imposed even when there is only one violation during the reckoning period.

B. Bolster the sanctions against refusal of and interference with investigation

The MRFTA grants the KFTC with the authority to investigate enterprisers that are suspected of violating the laws. Such an investigation is not a compulsory investigation performed upon obtaining a warrant from a court, but, rather, it is an investigation conducted under the voluntary consent of the investigated enterpriser. However, if an enterpriser refuses or interferes with the KFTC investigation (the "interference with investigation"), such enterpriser may be subject to a certain sanction. For example, with respect to the interference with investigation, the KFTC may (i) impose civil penalty, which is a type of administrative sanction (Article 69-2(3) of the MRFTA), and (ii) refer the enterpriser to the Prosecutor's Office for criminal punishment in certain cases where the extent of interference with investigation is serious. Once the investigated enterpriser or person is referred to the Prosecutor's Office for criminal punishment, such enterpriser or person may be subject to criminal punishment, such as imprisonment or criminal penalty, pursuant to the criminal procedure (Article 66(11) of the MRFTA). The MRFTA amended on April 19, 2017 has bolstered the sanctions against such an interference with investigation.[1]

First, the types of conducts subject to criminal punishment were expanded. Prior to the amendment, only the interference of investigation based on verbal or physical assault against the KFTC officials who conduct investigations upon entering the place of business of the enterpriser ("on-site investigation") was defined as conduct subject to criminal punishment. Yet, the amended MRFTA expanded the aforementioned definition in also classifying (i) the refusal to submit materials necessary for the investigation or the submission of false materials, and (ii) the concealment, destruction, forgery, or falsification of investigated materials, as conducts subject to criminal punishment (Article 67(9) and 67(10) of the MRFTA). Prior to the statutory amendment, interference of the foregoing (i) and (ii) types could be imposed only with civil penalties.

Next, enforcement charge system for the KFTC investigation was newly introduced. Accordingly, if an enterpriser does not respond to the KFTC investigator's request for submission of materials, the KFTC can order the relevant enterpriser to make such material submissions through a subcommittee decision and may impose an enforcement charge within 0.3% of the relevant enterpriser's average daily revenue per day until the aforementioned order is performed (Article 50-4 of the MRFTA). Pursuant to the delegation of the foregoing amended MRFTA, the Enforcement Decree of the MRFTA stipulated a specific enforcement charge imposition standard and collection procedure, and such system has been enforced since October 19, 2017.

1. *See* Act No. 14813 implemented on July 19, 2017.

III. MAJOR CASES

A. Case concerning Lexus dealers' cartel (Supreme Court Judgment in Case No. 2015Du2352 delivered on January 12, 2017)

This was a case that reaffirmed the existing legal doctrine of the Supreme Court that defining the relevant market is necessary for determination of anticompetitiveness even in the case of a hardcore cartel such as price-fixing. The U.S. courts apply the "*per se illegal* principle" to hardcore cartels and do not review whether the relevant cartel causes anticompetitive effects; the EU also view such hardcore cartels to be clearly anticompetitive by its "nature." Conversely, the MRFTA and the Korean procedural laws do not acknowledge the "*per se illegal* principles." Hence, even in the case of price-fixing, the Supreme Court has consistently required the definition of the relevant market to determine whether the challenged price-fixing is a cartel "that unreasonably restricts competition" (Article 19(1) of the MRFTA), albeit hinting that the KFTC's burden of proving such relevant market may be somewhat relaxed.[1]

The cartel at issue in this case involved an agreement by nine Lexus sedan sellers ("Lexus Dealers") to restrict price discounts and free provision of benefits such as navigation to the customers.[2] In the administrative litigation where the Lexus Dealers had sought annulment of the KFTC's foregoing disposition, the Seoul High Court broadly defined the relevant market to cover Lexus passengers cars, imported sedans, and domestic luxury sedans upon viewing that they were substitutes to one another and subsequently annulled the KFTC's disposition on the ground that the cartel's anticompetitiveness cannot be established because Lexus' market share in such relevant market was low. In response, the KFTC appealed to the Supreme Court, and the Supreme Court reversed the original judgment based on the lack of factual evidence to determine the reasonableness of the Seoul High Court's above market definition and subsequently remanded the case back to the Seoul High Court.[3]

In the Seoul High Court's second review of the reversed and remanded case pursuant to the Supreme Court's foregoing judgment, the Seoul High Court defined the relevant market as the luxury imported cars (six brands including BMW, Mercedes Benz, Lexus, Infiniti, and Volvo) based on the critical loss analysis submitted by the KFTC (i.e., exclusion of domestic luxury sedans). Subsequently, while finding anticompetitiveness in such relevant market based on the fact that Lexus accounts for 25.6% of the relevant market and the fact that the

1. *See* Supreme Court Judgment in Case No. 2012Du11829 delivered on April 11, 2013; *see also*, Supreme Court Judgment in Case No. 2013Du24471 delivered on November 27, 2014.
2. *See* KFTC Decision in Case No. 2008-324 delivered on December 15, 2008.
3. *See* Seoul High Court Judgment in Case No. 2012Nu11241 delivered on May 7, 2015; *see also*, Supreme Court Judgment in Case No. 2010Du11757 delivered on April 26, 2012.

consumers had paid higher price in purchasing Lexus sedans as a consequence of the cartel, the Seoul High Court only annulled part of the administrative fine. At the following final appeal held upon the appeals by both the Lexus Dealers and the KFTC, the Supreme Court maintained its previous position that relevant market must be specifically defined even in cartels similar to the above-captioned case, while affirming the anticompetitiveness determination by the original court.

B. Case concerning bid-rigging in water quality restoration facility construction (Supreme Court Judgment in Case No. 2016Du35199 delivered on January 12, 2017)

When a participant to a cartel applies for reduction of or exemption from administrative fines by reporting such cartel to the KFTC, i.e., the so-called "leniency application," the KFTC decides on whether to acknowledge the leniency applicant's rank by examining whether such applicant had satisfied the requirements for leniency application pursuant to the relevant statutes.[1] As a general practice, the KFTC makes decisions on leniency application together with its decisions on the corrective order and administrative fine to be imposed on the cartel itself at the KFTC's deliberation procedure. However, if deemed necessary, the KFTC may deliberate and decide the matters involving leniency application as a separate case. If the KFTC denies the leniency application, the relevant applicant can generally obtain recourse by instituting an administrative litigation seeking the annulment of the KFTC's corrective order and administrative fine imposed on the cartel itself; hence, there was an opinion that decision on leniency application was not subject to an independent administrative litigation. In the present case, however, the Supreme Court reaffirmed the existing legal principle that the KFTC's decision to deny a leniency application also forms a subject matter for an independent administrative litigation.

The cartel at issue in the above case involved the agreement between Company A and Company B, the only two bidder participants in a bidding for a water quality restoration facility (a facility that includes sewage treatment facility, environmental pollution prevention facility, and ecological park) construction, to refrain from competing with price, but, rather, competing only with designs, around September of 2009. When the KFTC's investigation

1. If a cartelist is found to be "first-rank leniency applicant" (when the applicant satisfies the requirements of reporting the cartel to the KFTC with the relevant evidence as the first reporter at a time when the KFTC has not sufficiently secured evidence for cartel and of cooperating in good faith with the KFTC until the conclusion of the investigation while ceasing its cartel activities), such cartelist would be fully exempt from administrative fine. The status of "second-rank leniency applicant" allows the reduction of the administrative fine by 50%. Any leniency applicant under the third-rank applicant may be able to mitigate part of the administrative fine as general "cooperator to investigation."

began regarding the foregoing tender, Company A filed for a leniency application around October of 2011, but Company B only filed for leniency around May of 2014. Hence, on September 11, 2014, the KFTC decided on the corrective order and administrative fine payment order against Company B and, separately, denied Company B's leniency application based on the fact that Company B falls in the ground for excluding second-rank leniency applicant from reductions.[1]

Company B instituted lawsuits each seeking the annulment of the foregoing administrative fine payment order and the denial of the leniency application. In response, the Seoul High Court dismissed the lawsuit regarding a leniency application on the ground that there is no benefit of litigation regarding the part seeking the annulment of the denial of the leniency application since the lawsuit directly seeking the annulment of the final decision is the most effective and appropriate remedial means in case there is a separate final decision regarding the administrative fine from the denial of the leniency application. This indicated that, regardless of whether the KFTC's grounds for denying the leniency application is lawful, Company B's claim seeking the annulment of such denial lacked the litigation requirements.

However, in the final appellate decision of the above case, the Supreme Court reaffirmed its previous position that, absent special circumstances, the benefit of lawsuit seeking the annulment of the denial of the leniency application is established.[2] As bases for its judgment, the Supreme Court held that the KFTC's administrative fine payment order and the denial of the leniency application are each independent and separate disposition with distinguishable specific supporting provisions, requirements, and procedures having different grounds for illegality or legal characters. Therefore, the Supreme Court concluded that the enterpriser has actual benefit of seeking the annulment of both dispositions. However, the Supreme Court further held that the Seoul High Court should have denied Company C's annulment claim regarding the denial of leniency application.

1. *See* KFTC Decisions in Case No. 2014-186 (Decision on Cartel) and in Case No. 2014-188 delivered on September 11, 2014. The reason for denying the leniency application was that Company B fell in the following grounds for excluding second-rank leniency applicant from reductions prescribed by Article 35(1)(vi) of the Enforcement Decree of the MRFTA: (i) there are only two participants to the cartel, and (ii) the second-rank leniency application was made more than two years after the first-rank leniency application.
2. With respect to such "previous position," please refer to Supreme Court Judgment in Case No. 2016Du43282 delivered on December 27, 2016.

C. Case concerning bid-rigging in high-speed railroad facility construction (Supreme Court Judgment in Case No. 2016Du33360 delivered on April 27, 2017)

This was a case where the calculation method for the relevant revenue, which is the basis for the calculation of the administrative fines imposed on bid-rigging, was at issue. As discussed above, administrative fine imposed on cartel is calculated by multiplying certain ratio to the revenue of the cartelist affected by the relevant cartel (i.e., the relevant revenue). The proviso of Article 9 of the Enforcement Decree of the MRFTA stipulates that, in the case of bid-rigging, the "contract price" of the relevant tender is deemed the relevant revenue. Yet, since the contract price of the tender is not actually realized revenue in many cases from the perspective of the enterpriser that participated in the bid-rigging,[1] several issues regarding the reasonable interpretative method for the foregoing "contract price" have been raised. This case also involved the issue of whether the foregoing standard for calculating the relevant revenue of bid-rigging was reasonable.

The bid-rigging at issue in this case was a type of "market division" agreement with somewhat complex facts. First, 7 large construction companies broadly classified the 13 zones subject to Honam High-Speed Rail new roadbed construction tender into 3 groups around the first half of 2009. Subsequently, such construction companies agreed to decide on the enterpriser that would win the tender for each group through a lottery (hereinafter the "Intended Winner"). Pursuant to the demands from the foregoing 7 large construction companies, the other 14 construction companies also participated in the lotteries for such bid-rigging. The total of 21 construction companies above agreed to provide construction companies that did not obtain allocation of construction zones as results of lotteries with the right to participate in the construction by constituting a consortium with other successful bidders or with priority right over tenders for other constructions in the future. Company C, which was subject to the disposition of the KFTC in this case, initially did not participate in the agreement among the 21 construction companies above, then belatedly participated in the tenders for the 7 construction zones nominally upon receiving the request from the construction companies decided as the Intended Winners for each construction zone pursuant to the above lotteries around latter half of 2009.

The KFTC used the total sum of the contract prices for the seven construction areas that Company C had nominally participated in the tender as the base amount for the calculation of administrative fines for Company C's participation in the above bid-rigging; after applying

1. For example, if an enterpriser succeeded in winning the tender as a result of bid-rigging, but failed to enter into an agreement due to other circumstances, or an enterpriser had only nominally participated in the tender to help another enterpriser win the tender, revenue from such bid-rigging would not have accrued to the relevant enterpriser. In such cases, it may be viewed that "revenue affected by bid-rigging" does not actually exist.

the reduction factors pursuant to the Administrative Fine Notification, the KFTC decided on the final administrative fine of KRW 19,998,000,000 (approximately USD 18.7 million).[1] By arguing that such administrative fine calculation method was unlawful, Company C raised an administrative lawsuit seeking the annulment of such administrative fine. The Seoul High Court excluded all allegations made by Company C and dismissed Company C's claim. In response, Company C filed a final appeal to the Supreme Court and the Supreme Court affirmed that the method of calculating the administrative fine based on "contract price" is indeed lawful, but found the administrative fine imposed on Company C by the KFTC was excessive. According to such holding, the Supreme Court reversed the original judgment and remanded the case back to the Seoul High Court.

In the above case, while holding that the administrative fines imposed on not only the enterprisers that entered into an agreement upon winning the tender through bid-rigging, but also the enterprisers that nominally participated in the tender to assure such winning bidders to actually win the tender according to agreement, can be calculated based on the "contract price" of the relevant tenders, the Supreme Court offered the following grounds: (i) from the perspective of the enterpriser that had nominally participated in the tender, the fact that the KFTC would use the contract price constituting the "benefit related to the bid-rigging" as the base figure for the administrative fine was foreseeable, and (ii) the issue of imbalance that can be caused by the difference between the economic benefit that an enterpriser who nominally participated in the tender can actually acquire and the contract price used as the base for calculating administrative fine can be controlled through judicial review regarding whether the KFTC had deviated and abused its delegated discretionary power related to the imposition of administrative fine. Indeed, the Supreme Court held that the administrative fine imposed by the KFTC on Company C was unlawful because it was excessive amount that was disproportionate when compared to the illegality of Company C's conduct of participating in the bid-rigging and the size of the benefits acquired by Company C from the bid rigging.

D. Case concerning bid-rigging in wiper systems (Supreme Court Judgment in Case No. 2015Du48884 delivered on May 30, 2017)

This was a case involving the issue of how "contract price," which serves as the base figure for calculating administrative fine for bid-rigging, should be identified if only the unit price of the contract object is established and the volume is undecided at the bidding stage. The cartel at issue in this case involved an agreement among 3 automobile wiper system

1. *See* KFTC Decision in Case No. 2014-203 delivered on September 17, 2014.

manufacturers and sellers that decided the Intended Winners in advance while participating in a tender. In the relevant tender, the winning bidder was decided based on the unit price per product and discount rate pursuant to passage of time submitted by the bidders while the total order volume remained undecided. Even at the time of the KFTC's disposition on the above bid-rigging, the overall supply volume and the total "contract price" had not been defined. Accordingly, the KFTC calculated the administrative fine by viewing as the "contract price" the amount calculated by multiplying the (i) "quotation price submitted by the winning bidder" by (ii) "the anticipated sales volume of the relevant vehicle model described in the request for quotation" (hereinafter "Intended Amount for Execution of Contract").[1] With respect to the administrative lawsuit seeking the annulment of such administrative fine imposition, the Seoul High Court held that such calculation method for "contract price" was unlawful and the Supreme Court also subsequently affirmed such original judgment.

In the above case, the Supreme Court offered the following specific legal doctrines in relation to the current system that uses the "contract price" as the base of administrative fine calculation in bid-rigging. (i) The administrative fine for cartel is originally a means to deprive of illegal economic gains and to realize the administrative purpose of suppressing cartel in addition. Since bid-rigging has particularly serious illegality, a system that imposes administrative fine based on "contract price" pursuant to policy determination for securing effectiveness of sanctions was introduced. (ii) However, when interpreting "contract price" as the base of calculation of administrative fine on bid-rigging, the ordinary meaning of the plain language should not be exceeded. Administrative regulations that form the bases of interest-infringing administrative disposition must be strictly interpreted and applied, and such disposition cannot be subject to excessively expansive interpretation or analogical interpretation toward the direction unfavorable to the sanctioned party.[2] (iii) In the present case, since the specific supply volume or supply price is defined through subsequent negotiations between the winning bidder and the ordering party, the "Intended Amount of Execution of Contract" calculated by multiplying the expected sale volume to the per-unit quotation price does not actually coincide with the supplied volume or price under the actually executed agreement. Therefore, the KFTC's imposition of administrative fine that used such "Intended Amount of Execution of Contract" as "contract volume" used as the base of the

1. *See* KFTC Decision in Case No. 2014-012 delivered on January 16, 2014.
2. This was a reaffirmation of the legal doctrine established previously by the Supreme Court. *See* Supreme Court Judgment in Case No. 2007Du13791 and 13807 delivered on February 28, 2008; *see also*, Supreme Court Judgment in Case No. 2015Du53961 delivered on September 30, 2016.

administrative fine calculation is unlawful as a disposition that deviated from and abused the delegated discretionary power of the KFTC.[1]

E. Case concerning bid-rigging in multi-purpose dam construction (Supreme Court Judgment in Case No. 2016Du48447 delivered on September 7, 2017)

This was also a case where the method for identifying "contract price," which is the base for the calculation of administrative fine in bid-rigging case, was at issue. More specifically, the case concerned the tender for a multi-purpose dam construction project ordered by the Korea Water Resources Corporation, and the issue was whether material prices should be deducted from the "contract price," which was the base for the calculation of the administrative fine for bid-rigging, in case where such material was purchased by the ordering party and supplied to the winning bidder (often referred to as the "government-furnished material"), and such material price is included in the contract price of such tender. The foregoing material price was deducted from the contract price paid to the winning bidder by the ordering party after the ordering agency directly purchased the material at its own cost and supplied to the winning bidder (i.e., construction company). Therefore, the material price was not realized as revenue of the bid-rigging construction company.

In the above case, the KFTC had imposed administrative fine based on the contract price that included the price of the "government-furnished materials."[2] However, the Seoul High Court had annulled such administrative fine imposition as an illegal government action and the Supreme Court affirmed such conclusion arrived by the Seoul High Court. The key grounds for the Supreme Court's decision were as follows: (i) in calculating administrative fines for bid-rigging, "contract price" was only recognized as a special type of "relevant revenue" by taking into account the uniqueness of bid-rigging, but such contract price neither has a substantively different nature nor is completely separate concept from the relevant revenue stipulated based on general standard for calculation administrative fine in the MRFTA; (ii) therefore, even in the case of bid-rigging, if there is a special circumstance that makes it impossible to view that part of the contract price of the agreement executed as a result of bid-rigging as the revenue of the bid-rigging enterpriser, such amount should be deducted from the contract price as the base for the calculation of administrative fine.

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1. For reference, in order to resolve this type of issue, the current Administrative Fine Notification required the KFTC to identify the sales revenue of each cartelist that actually occurred as of the KFTC's decision date as the relevant revenue that forms the base of the calculation of the administrative fine in the case of unit-price tender that did not decide on the supply volume.
2. *See* KFTC Decision in Case No. 2015-095 delivered on April 2, 2015.

F. Case concerning price-fixing in burial of waste asbestos (Supreme Court Judgment in Case No. 2015Du37433 delivered on November 23, 2017)

This case handled in what circumstance a cartel can be deemed terminated. As discussed above, in calculating administrative fine for cartel, the relevant revenue used as the basis therefor is the revenue of the cartelist that has been affected by the relevant cartel during the period during which the cartel continued. Therefore, once the cartel is found to have been terminated in a certain point in time, any revenue thereafter is excluded from the relevant revenue; hence, the administrative fine would also be reduced proportionate thereto. The established standards of the existing Supreme Court precedents regarding the termination of the cartel are as follows: (i) In order for termination of cartel for "some" enterprisers participating in the cartel to be found, the relevant enterpriser (a) must inform other enterprisers of its intent, explicitly or implicitly, to leave the cartel, and (b) must engage in a conduct that is contrary to the cartel such as reducing the price to the level that would have existed in the absence of cartel pursuant to such relevant enterpriser's independent decision. (ii) In order to find termination of cartel for "all" cartelists, the cartelists have to explicitly terminate the agreement and each of them has to engage in conducts adverse to the cartel, or there has to be an objective fact to deem that the cartel has been terminated such as the continuous price competition among cartelists and other acts for a certain period of time sufficiently showing the *de facto* termination of the cartel.[1] The court judgment in this case was in the same vein as the existing determination standard established by the Supreme Court.

The cartel at issue in this case involved an agreement on base price for burial of waste asbestos among 7 waste disposal companies around the first half of 2008. Among them, six companies had independently decided on lowering prices from either September or November of 2008; hence, such companies alleged during the KFTC's deliberation procedure that the cartel was terminated at the aforementioned point in time. The KFTC, however rejected such allegation and calculated the administrative fines upon deeming September 27, 2013, which was the deliberation date of the KFTC, as the date the cartel was terminated.[2]

In the administrative litigation seeking the annulment of the foregoing disposition, the Seoul High Court found that some of the enterprisers had "withdrawn" from the cartel through (i) implicit expression of intent, and (ii) independent price reduction, and subsequently held that the KFTC's calculation of administrative fines that did not acknowledge such "withdrawal" as unlawful. In response to such decision, the KFTC appealed to the Supreme Court. The Supreme Court, by applying its existing determination standard above, while not

1. *See* Supreme Court Judgment in Case No. 2007Du12774 delivered on October 23, 2008.
2. *See* KFTC Decision in Case No. 2013-175 delivered on October 23, 2013.

finding some of the enterprisers to have had “withdrawn” from the cartel, found that the foregoing cartel should have been deemed “terminated” at least after November of 2009, and endorsed the Seoul High Court’s conclusion of illegality of the KFTC’s imposition of administrative fines reasonable. The Supreme Court held that the foregoing cartel was “terminated” on the following grounds: (i) After the agreement on base price around the first half of 2008, new companies X and Y had entered the market for burial of waste asbestos around September of 2008 and March of 2009, respectively, thereby intensifying the competition. Moreover, the KFTC had conducted dawn raids regarding the suspected cartel above around October of 2008. Hence, it appears that the foregoing 9 cartelists seemed to have had difficulty in maintaining the existing cartel. Additionally, (ii) multiple enterprisers that participated in the cartel had reduced the price significantly compared to the base price for a substantial period of time after at least September or November of 2009. Finally, (iii) the price difference between companies in each time period was also substantial.

CHAPTER 2.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF ABUSE OF MARKET DOMINANT POSITION

LEE Changhun / SEOK Geun-Bae[*]

I. OVERVIEW

With the start of the new administration in 2017 and the appointment of Sang-jo Kim who had been active in civil society as the Chairman of the Korea Fair Trade Commission ("KFTC"), there were several changes at the KFTC. However, compared to other fields, there were no significant changes in legislation and policy in the abuse of market dominance field. Also, there were few cases related to abuse of market dominance among cases decided by the KFTC and the courts in 2017.

II. LEGISLATION AND POLICY

There were no special changes in law or policy in relation to regulation of abuse of market dominance in 2017. However, the KFTC has stated that it will set prevention of abuse of market dominance in fields such as intellectual property rights as an important policy objective. The KFTC has also stated that, in fields with expansion of technology standards, such as next generation semiconductor and wireless communication fields, it will build a system to constantly monitor abuse of patent rights that hinder the growth of innovative companies.[1] In relation to this, the KFTC has conducted or is planning to conduct inspections and on-site

* Attorneys, Shin & Kim. The opinions expressed in this article are solely those of the authors and do not reflect the official opinions of Shin & Kim.

1. *See* KFTC's Annual Report for the National Policy Committee of the National Assembly dated September 18, 2017.

investigations in fields such as IoT, 5G mobile communication, digital broadcasting, pharmaceutical, and biotechnology. The KFTC is also monitoring with a focus on exclusion of competitors in relation to online monopolistic and oligopolistic platforms. In addition, the KFTC is establishing a plan to strengthen ability to respond competition issues related to big data, where issues have begun to arise in full recently in Europe and the United States.

Furthermore, the KFTC has begun reform of the Monopoly Regulation and Fair Trade Act (“MRFTA”). We expect that in the future, through such reform, the regulation of abuse of market dominance will become more modernized as well. We predict that in the MRFTA reform process, there will be active discussions on various issues related to abuse of market dominance, such as how the law will regulate abuse of market dominance in various industries that are becoming more complex, whether provisions on presuming an undertaking’s market dominance is appropriate, how to set the relationship between provisions on abuse of market dominance and provisions on unfair trade practice, and whether exploitation abuse regulation will be maintained. There is much attention on the result of future discussions on amendment of provisions regarding abuse of market dominance.

III. MAJOR CASES

As mentioned above, there were not many cases related to abuse of market dominance among cases decided by the KFTC and the courts in 2017.

We discuss below the Seoul High Court’s decision in KT and LG Uplus’s abuse of market dominance case related to corporate message service and the KFTC’s decision in Qualcomm’s abuse of market dominance case.

1. Seoul High Court’s Decision in KT and LG Uplus’s Abuse of Market Dominance Case

This case is related to the *corporate message service*, through which text messages are transmitted from a company’s computer to users’ handsets through mobile carriers’ wireless communication network.

An overview of the case is as follows. Corporate message service providers, in return for providing such service, receive a certain fee for each service from corporate customers. Mobile carriers transmit text messages to users through the wireless communication network, and in return for providing such service, receive a certain fee from corporate message service providers (i.e., mobile carriers sell transmission service to message providers, and message service providers uses this as a necessary source for selling message service to its corporate customers). In relation to this, mobile carriers KT and LG Uplus sell transmission service to corporate message service providers, and apart from this, also sell corporate message service directly to corporate customers as a vertically integrated undertaking. Accordingly, corporate message service providers can largely be divided into (i) undertakings that have a wireless communication network (KT and LG Uplus) and (ii) and general service providers that do not. KT and LG Uplus, unlike other corporate message service providers, sold corporate message service to customers that had applied for its mobile communication service at a lower price than the average lowest rate for each transmission service.

Regarding such price-cutting of message service by KT and LG Uplus, the KFTC viewed this as unreasonably excluding competitors specified in Article 3-2(1)5 of the MRFTA and as constituting underselling specified in Article 5(5)1 of the Enforcement Decree of the MRFTA (i.e., unreasonably supplying goods or services at a lower price than the normal trading price”). The KFTC viewed KT and LG Uplus as market dominant undertakings and determined that, because the message service was being sold at below the transmission service fee level, the element for establishing underselling had been met (i.e., conduct giving rise to a concern of excluding competitors by supplying at a lower price than the normal trading price). Also, the KFTC presented the following, among others, as bases for finding unreasonableness (anticompetitive concern and anticompetitive intent): (i) whereas the market shares of KT and LG Uplus rose vertically, the market shares of other message service providers decreased sharply; (ii) if KT and LG Uplus continue to sell message service at below the transmission service feel level, even KT and LG Uplus are unable to structurally engage in price competition with respect to message service without facing losses; and (iii) it is difficult to find reasonable grounds for the lower price other than an intent to exclude competitors from the market. Based on the above, the KFTC imposed a remedial order and a surcharge order on KT and LG Uplus.

However, the Seoul High Court issued a decision that such measures of the KFTC were improper (Seoul High Court Decision No. 2015*Nu*38131). The Seoul High Court saw KT and LG Uplus as having market dominant status in the corporate message service market in Korea but determined that it is difficult to view the normal trading price for corporate message service calculated by the KFTC as lawful and also determined that the concern regarding exclusion of competitors by unreasonably supplying at a lower price than the normal trade price is not recognized.

The Seoul High Court's determination is discussed more specifically as below. First, with respect to interpretation of normal trading price, the court determined that because there is no detailed definition provision regarding the concept of normal trading price in the MRFTA and the Enforcement Decree of the MRFTA, its interpretation must be strict. In other words, the court determined that normal trading price must be determined by considering the following: (i) regulation pursuant to the provision above may lead to a decrease in price competition to a certain extent; (ii) competition through price in the market is a basic and fundamental aspect of competition that the MRFTA seeks to protect and promote; (iii) a reduction in sales price can contribute to consumer welfare; and (iv) the provision that is the basis for the disposition is the basis for administrative sanctions and criminal punishment, but in case the concept of normal trading price is unclear or the governmental authority can decide the concept arbitrarily, the people cannot predict what types of conduct will be criminally punished, which leads to a result that is contrary to the principle of legality, or *nullum crimen sine lege, nulla poena sine lege*.

Second, with respect to the standard for determining unreasonableness regarding underselling as well, the court referred to the legal principle in the *POSCO* decision[1] and determined that it is difficult to view anticompetitive effect as having been proven to a degree where unreasonableness is in fact presumed due to the conduct in this case. The court also determined the concern of unreasonably excluding competitors was not recognized. After the court made clear that the essence of the conduct in this case is reduction of the price of corporate message service, the court determined that it is difficult to recognize unreasonableness, based on the following: (i) it appears that the price of service rather decreased due to price competition; (ii) the size of the market during the period of the conduct in this case shows a growth rate of 10 to 20% every year, and the total number of transmission service used by corporate message service providers is increasing as well; and (iii) there is no evidence to support that innovation or variety in corporate message service was harmed or reduced. In particular, in relation to "trend of KT and LG Uplus's market share increase and competitors' market share decrease," which the KFTC pointed to as the main basis supporting unreasonableness, the court recognized that such a trend exists but determined that it is difficult to say there is a clear causal relationship between competitors' decrease in market share and the conduct in this case, considering the following: (i) the trend appears to have continued from before the conduct in this case and (ii) there are no circumstances supporting that competitors' market share decrease became particularly more accelerated after the conduct in this case.

1. Supreme Court Judgment in Case No. 2002Du8626 delivered on November 22, 2007.

Such a determination by the court reflects the intent of the *POSCO* decision related to the element for establishing abuse of abuse of market dominance and determination of unreasonableness. Thus, the court made clear that even if a comparatively non-efficient competitor is harmed by the low-price policy of an efficient competitor, this cannot be challenged in that there has been an overall increase in efficiency. In particular, the decision is meaningful in that it made clear the essence of competition law that competition through price must be protected and that this should not be discouraged; that competition law should not be an obstacle hindering technology innovation and price competition; and that if prices are protected for non-efficient competitors, this may harm consumer welfare by restricting price reductions that are beneficial to consumers. The court's decision is also significant in that, even if competitors' market shares decreased, the court considers whether there is a clear causal relationship, of whether the competitors' market share decrease is due to the conduct of the market dominant undertaking. As the KFTC has appealed, the Supreme Court is expected to hear this case (Supreme Court Case 2018*Du*37960), and it will be worthwhile to pay attention to the Supreme Court's decision.

2. Qualcomm's Abuse of Market Dominance Case

The *Qualcomm* case is worth noting among the cases on abuse of market dominance decided by the KFTC in 2017. On January 20, 2017, the KFTC issued a remedial order and a surcharge order on grounds that Qualcomm abused market dominance. According to the press release dated December 28, 2016 by the KFTC, the KFTC determined that Qualcomm engaged in the following conducts and that such conducts constitute abuse of market dominance specified in Article 3-2(1) of the MRFTA (i.e., unreasonably interfering with the business activities of another business entity).

(1) "Despite requests from competing modem chipset makers, Qualcomm refused or restricted provision of cellular SEP licenses necessary for the manufacture and sale of chipsets."

(2) "By linking chipset supply and patent license agreements, Qualcomm held chipset supply hostage and coerced execution and performance of unfair license agreements, avoiding the FRAND commitment."

(3) "Qualcomm provided only portfolio licenses to handset makers and coerced license terms that had been unilaterally decided without going through a process for calculating fair compensation, and Qualcomm also coerced unreasonable license agreements, such as requiring free cross licenses from handset makers."

However, Qualcomm has filed a lawsuit at the Seoul High Court for cancellation of the KFTC's measures, and fierce exchange of arguments is currently ongoing with respect to almost all of the facts and application of law. In particular, there is strong criticism in the academia regarding the KFTC's measures as well. Therefore, there is a need to continue to pay attention to the progress of the litigation at the Seoul High Court and the result of the court's determination.

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF CONTROL ON CONCENTRATION OF UNDERTAKINGS

KIM Kyoung Yeon *

I. OVERVIEW

Statistics on business-combination trends published annually by the Korea Fair Trade Commission (the "KFTC") show that in 2017, a total of 668 business-combination reports were filed with the KFTC, among which 514 cases were transactions between Korean enterprises (with a total value of KRW 53.8 trillion) and 154 cases involved foreign enterprises (with a total value of KRW 455.6 trillion). Business combinations between Korean enterprises increased in both number and transaction value compared to the previous year, while the transactions involving foreign enterprises maintained the previous year's level in terms of number, with transaction value slightly reduced.[1]

With respect to statistics on business combinations between Korean enterprises, there is notable difference between 2016 and 2017. In 2016, Korean enterprises refrained somewhat from entering into new businesses through M&A transactions due to economic uncertainty in both local and global markets. However, according to the KFTC's analysis of 2017 statistics, while the global economy continued to grow at a steady pace, in 2017 the domestic economy showed its recovery. And due to this enhanced market stability, many Korean enterprises, especially large business groups, aggressively sought to secure new growth engines, in the form of mergers with non-affiliates, and business diversification, through conglomerate mergers in electricity/electronics, petrochemicals/pharmaceuticals, and most of the service

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1. *See* KFTC press release, Feb. 14, 2018, *2017 Business Combination Trends and Key Features* ("Domestic companies actively engage in securing new growth engines, and large business groups seek business restructuring and diversification").

industry.[1] In cases of business combinations between foreign enterprises, in 2017 there were fewer large M&A deals with a value exceeding KRW 20 trillion compared to the previous year, which caused the total transaction value to decrease. However, if specifically focused on the Korean market, it is notable that significant investments by foreign enterprises were made in cosmetics, biomedicine, and the fourth industrial revolution through the acquisition of Korean enterprises.[2]

In 2017, like in previous years, the number of cases where a controlling relationship was created through a business combination (a total of 370 cases) was similar to the number of cases where a controlling relationship was not created (a total of 298 cases). This is because under the current merger-review regime in Korea, filing a business combination report is required for every designated type of business combination satisfying the filing thresholds, regardless of whether the transaction parties are already under the same control or not. Stock acquisitions among affiliates are the only exception to the filing obligation. A simplified filing and review process is allowed in those intra-group transactions, but they have still imposed a significant work burden on the M&A division of the KFTC. Around 700 cases to review per year is a tremendous number considering the current size of the division; and thus, the selection of critical cases to focus on has become an institutional demand and a key task for the KFTC. How to reduce effort spent on reviewing business combinations between affiliated companies will, among other things, play an important role in pursuing that goal.

Lastly, regarding its remedies and sanctions, the KFTC ordered corrective measures against four business-combination cases in 2017 and imposed fines of KRW 577,010,000 in 28 cases in which notifying companies failed to report within the required period. Section III of this chapter will examine three cases in which corrective measures were ordered by the KFTC due to anticipated anticompetitive effects in the relevant markets.

II. LEGISLATIVE AND POLICY DEVELOPMENTS

1. Amendment to the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (effective from October 19, 2017): Increased party-size thresholds

The KFTC has raised the base amount of the party-size thresholds that trigger a reporting obligation, by amending the Enforcement Decree of the Monopoly Regulation and Fair Trade

1. Samsung Electronics-Harman (automotive electronics), SK-LG Siltron (semiconductor wafers), LINE Friends-LIJV (AI speakers), LG U plus-Focus Media Korea (two-way customized ads), etc.
2. For example, Unilever-Carver Korea (Cosmetics), Leguh Issuer-Hugel (Biomedicine), Khaki Holdings-Kakao Mobility (Mobile navigation), and Alipay-Kakao Pay (Mobile payment).

Act (the "MRFTA"); now business combinations between a company with total assets or sales of more than KRW 300 billion and a target company with total assets or sales of more than KRW 30 billion must be reported. These changes are intended to reasonably account for the increased size of Korean enterprises' assets and sales volumes, as a result of economic growth. Also, under this amendment the local turnover threshold for foreign to foreign mergers has been increased to KRW 30 billion from KRW 20 billion.

2. Amendment to the Guidelines on the Assessment of Business Combinations (KFTC Notification) (effective from December 20, 2017): Establishment of a joint venture in a foreign country that does not have any impact on the Korean market has been included in the category subject to simplified review.

Under a recent amendment of the Guidelines on the Assessment of Business Combinations (the "Guidelines") by the KFTC, when establishing a new joint venture outside of Korea, the business of which does not have any impact on the domestic Korean market, the case will be subject to the KFTC's simplified review process, though an ordinary notification is still required. Before the amendment, such cases were subject to ordinary review by the KFTC. This amendment to the Guidelines came into effect on December 20, 2017 and applies to cases where the notification triggering event arose on or after the effective date.

The purpose of this amendment is to apply the KFTC's simplified review process to cases with no impact on competition in the domestic market, which have added significantly to the KFTC's workload. In 2016, the Guidelines on Business Combination Notification were amended to permit a simplified notification process for many types of cases and, thereby, significantly reduce documentation requirements for the transaction parties. Logically, there is no clear reason to require that cases subject to the simplified review process follow the ordinary notification process, or vice versa. Nevertheless, different criteria apply to the notification process and review process under the current regulations, which creates some confusion. We expect that such confusion will be eliminated by the KFTC sooner rather than later, through efforts such as administrative rulemaking.

As amended, the simplified review process is limited to joint ventures where a new company is established, as opposed to joint ventures where one party acquires shares of the subsidiary after formation. This is the case even though the only difference between these two types of joint venture is the procedure of establishing them, and there is no real difference between these two types of joint venture for purposes of analyzing their anti-competitiveness. The KFTC might need to review more joint venture cases before it comes to a different view, but we hope that the KFTC will revisit this issue sooner rather than later.

Lastly, a further clarification may be necessary in relation to the meaning of “cases where a new company’s business has no impact on the domestic market.” One may interpret it as referring to cases where the geographic scope of the market is limited to the borders of the concerned foreign country in light of the nature of the business or the purpose of the joint investment. However, there are no clear guidelines on cases where a joint venture that did not have sales revenues in Korea at the time of establishment, later comes to generate indirect sales due to a change in its business scope. We hope the KFTC will provide more detailed guidelines on this issue in the future.

III. MAJOR CASES

1. Dow-DuPont Merger: Conditional Approval (asset sale)[1]

(1) Outline of the Business Combination and the KFTC’s Decision

The Dow Chemical Company (“Dow”) and E.I. du Pont de Nemours & Company (“DuPont”) are global chemical firms headquartered in the U.S. They entered into an agreement on December 11, 2015 to set up DowDuPont Inc. through an all-stock merger of equals[2] which—corresponds to a consolidation (merger into a new company) under the laws of Korea—and they reported the merger to the KFTC on May 4, 2016. As a result of the merger, the existing shareholders of Dow and DuPont each owned 50% of the shares in DowDuPont Inc., a newly established company. Both parties had a plan to undertake a tax-free spin-off of three business units, agriculture, materials science, and special products, after the merger.

The KFTC ordered that (1) either one of the two companies must sell its assets related to the development, production, and sale of acid co-polymer within six months after the completion of the merger, and (2) the selling company should separate those assets related to its co-polymer business and operate them independently during the interim period until the process of selling them was complete.

1. The KFTC’s decision in this case has not be published yet. Therefore, this section was prepared based on the KFTC’s press releases and relevant news articles.
2. “All-stock merger of equals” refers to a business combination where two firms of about the same size come together to form a single new company. In an all-stock merger of equals, shareholders from both firms surrender their shares and receive securities issued by the new company. The term is used to distinguish such transactions from other mergers where one company actually acquires a counterparty rather than both companies being combined on an equal basis. In addition to the Dow-DuPont merger, the creation of DaimlerChrysler via the merger of Daimler-Benz and Chrysler is an example of a merger of equals.

(2) Major Issues

The KFTC reviewed the situation in various markets of the two companies' existing businesses, such as petrochemicals, seeds, agricultural pesticides, and other chemical products. For most businesses, either (i) the parties' businesses did not overlap in the relevant markets, or (ii) the parties' shares of the relevant markets were insignificant. The KFTC thus concluded that the merger would not restrict competition in those markets. On the other hand, the acid co-polymer market was defined as a separate product market, and the KFTC conducted a thorough anti-competitive-effect assessment in that sector and came to a different conclusion.[1]

Restriction of competition in that market was presumed because[2] (i) the parties to this case are the largest (DuPont – 32.5%) and the third largest (Dow – 15.3%) suppliers in the acid co-polymer market and their combined market share would be over two times higher than ExxonMobil, the second largest supplier; and (ii) with the merger of the two firms, the market share of the top three acid co-polymer producers would exceed 75%. Furthermore, as a result of time-series analysis, the KFTC concluded that the current acid co-polymer market has long been dominated by a handful of manufacturers with a technological entry barrier. The KFTC recognized that there was a possibility of unilateral price increases after the merger ("unilateral effect"), considering the above-mentioned factors as a whole. Also, additional factors such as (i) the fact that the number of actual competitors in the market had decreased; (ii) the significant gap in the market shares between the merging parties and their competitors; and (iii) the production lines of the remaining competitors, which also covered a wide range of products like the parties; also supported the KFTC's conclusion that there is a high possibility of price-following by competitors after the merger ("coordination effect").

The KFTC ordered a structural remedy in this mega global deal of approximately KRW150 trillion of value, through cooperation with competition authorities in other jurisdictions such as U.S., Japan, etc. It seems that the particular nature of this case helped such cooperation because local suppliers of acid co-polymer products entirely rely on imported goods to meet domestic demand, so a separate assessment of the local market, which the KFTC has been focusing on in other cases, was not necessary. The KFTC announced in its press release that it would pursue more active cooperation with other foreign competition authorities in relation to any such super-size global mergers in terms of anti-competitiveness review, the substance of corrective measures, and the timelines thereof. We expect the KFTC

1. Considering that it is relatively easy to transport acid co-polymers long distances, and domestic demand entirely relies on imports, the KFTC defined the geographic market as the global market.
2. Under the MRFTA, it is presumed that there is a possibility of restricting competition if (i) after the merger of the two firms, the combined market share of the top three market leaders (including the merged company) will exceed 75% and the difference in market shares between the merged company, as the No. 1 market participant, and the No. 2 company, will exceed 25% of the market share of the merged company.

to establish more detailed guidelines for such a cooperative review process, to help parties better understand and prepare for filing.

2. Esmeralda's Stock Acquisition of DS Power: Conditional Approval (price restrictions)[1]

(1) Outline of the Business Combination and KFTC's Decision

Esmeralda Co., Ltd. ("Esmeralda"), a special purpose company, signed a deal to acquire 45.13% of the shares in DS Power Co., Ltd. ("DS Power"), an integrated energy supplier, on April 14, 2017, and reported the merger to the KFTC on the following day.

The KFTC ordered that, until the end of 2028—which is the termination date of the waste-heat supply contract between Shindaehan Refined Fuel Co., Ltd. ("Shindaehan") and DS Power—the parties to this acquisition shall be (i) prohibited from increasing prices for the steam supplied to existing steam consumers above any increase in the PPI released by the Bank of Korea; (ii) prohibited from unfairly discriminating against any new waste heat supplier in relation to conditions such as pricing method and contract quantity; and (iii) required to provide pricing information when they charge customers for steam. The KFTC stated that they referred to a U.S. precedent in 2011 which related to the establishment of Entergy-Koch Industries. In that case, the FTC imposed behavioral measures based upon its concern that price increases in the upstream market could be transferred to customers in the downstream market due to the vertical combination effected by the subject merger.

(2) Major Issues

The KFTC found that (i) a horizontal merger may occur in the "waste heat supply market" where both of Shindaehan, an affiliate of Esmeralda, and DS E&E Co., Ltd., an affiliate of DS Power, operate businesses in competition with each other;[2] and (ii) a vertical merger may occur in the "integrated energy supply market," in which DS Power conducts business, because Shindaehan supplies waste heat (steam) to DS Power.[3]

1. The KFTC's decision in this case has not been published yet. Therefore, this section was prepared based on the KFTC's press releases.
2. The KFTC viewed it as a horizontal merger in that Shindaehan and its competitor DS E&E Co., Ltd. would come under common control after the merger.
3. Since such horizontal and vertical combinations occurred in the "waste heat supply market" and "integrated energy-supply market," and waste heat and integrated energy is supplied to manufacturers and customers through pipes in Osan City, the geographic market was defined as Osan City.

The KFTC paid attention to the fact that there would be a dominant player in both the supply and demand markets for waste heat because the transaction at hand was a merger between two existing companies in the waste heat supply market. The KFTC also found that (i) it is not easy for a new company to enter into the waste-heat supply market in the short term; (ii) the vertical combination caused by this merger would create an integrated energy supply market and make it more difficult for new waste-heat suppliers to enter it; and (iii) even if new entry is possible, new entrants could be unfairly discriminated against in terms of price and transaction terms by the combined companies. Furthermore, as energy customers are highly dependent on steam, and an increase in the waste-heat price may easily lead to an increase in the price of steam, the KFTC deemed that the change of market structure from the transaction could allow the combined business to increase the waste-heat price at its own discretion without competitive pressure from its peers in the market. Considering that there was no independent control over the price of steam by the relevant authority—unlike with heat for warming/cooling, and electricity—the KFTC decided to use impose corrective measures to restrict excessive price increases.

After conducting an in-depth review, the KFTC found that price increases in the upstream market could be transferred to end-market customers through the existence of a monopolist in the downstream market due to vertical integration of the upstream and downstream markets. If there is a monopolist in a small local market where the service is provided only through a physically restricted channel such as pipes, the unilateral effect of horizontal integration and the foreclosure effect of vertical integration would become significant. It is also notable that the KFTC first considered whether the relevant industrial regulatory authorities have the authority to regulate prices when it determined to impose price controls as a corrective measure.

3. Maersk's Acquisition of HSDG Stock: Conditional Approval (withdrawal from consortium)

(1) Outline of the Business Combination and KFTC's Decision

Maersk Line A/S ("Maersk"), the world's largest container shipping company incorporated in the Netherlands, signed a contract on October 28, 2016 to acquire 100% of the shares of Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG ("HSDG"), the world's seventh largest container shipping company incorporated in Germany, and reported the merger to the KFTC on April 24, 2017.

The KFTC ordered the parties (i) to withdraw from a consortium on sea routes between Far East Asia and Central America & the Caribbean, and not to extend the term of the current a consortium contract on sea routes between Far East Asia and the west coast of South America; (ii) not to join any other consortium to which current consortium members belong, for five years after the expiration of the consortium contract and withdrawal from the consortium; and (iii) not to share any acquired sensitive information such as freight charges of any consortium member, between the merging parties or with other members of the consortia. In addition, the KFTC ordered that, when the parties later request early removal of the corrective measures—no sooner than one month prior to the third anniversary of the withdrawal from the consortium and the expiration of the consortium contract—they have to submit relevant documents and conduct advance consultations with the KFTC.

(2) Major Issues

The KFTC defined the relevant product market in this case as the “container shipping market” in which the parties compete with each other, [1] and selected a total of ten sea routes associated with ports in Korea, [2] including sea routes between Far East Asia and Central America & the Caribbean, as the relevant geographic market where their shipping businesses overlap.

In order to determine whether the proposed acquisition may restrict competition in the market, the KFTC conducted analysis on the individual enterprises’ market shares by shipping volume (total share and HHI) and market shares of the consortia to which the parties belonged on the basis of data from Container Trades Statistics Ltd. on each sea route. The KFTC further analyzed whether there existed competitive pressure taking into account the total bottoms of the consortiums and those of their competitors both individually and in consortia, as well as consortium-related factors for each sea route such as membership status and composition of the consortia. The KFTC also reviewed whether there would be a possibility of unilateral effects resulting from increased market share and connections with consortia. Also on the issue of a possible coordination effect, the KFTC analyzed (i) whether the parties’ consortia would allocate the bottoms, or decide a shipping schedule and a port of call through an agreement by the members; and (ii) whether, given the nature of the consortia, it would become easier to exchange competitively sensitive information, and the container shipping

1. The KFTC also analyzed the vertical merger between HSDG’s container shipping and Maersk’s (i) container terminal; (ii) marine transportation (iii) port salvage; (iv) container manufacturing, and (v) inland transportation; as well as on the horizontal merger in the liquid freight tramp transportation market where the businesses of Maersk and HSDG overlap. However, the KFTC concluded that there was no concern over restricting competition in the relevant markets.
2. Sea routes where the ports of departure and arrival are Busan and Gwangyang in Korea.

industry in the concerned sea routes would become oligopolistic. Based upon the result of its review, the KFTC concluded that competition would actually be restricted in the Far East Asia-Central America & Caribbean Sea routes and Far East Asia-west coast, South America routes.

Like in other global mergers, the KFTC heard the opinions of the interested parties, referred to similar precedents in other jurisdictions including the EU, and consulted with its peer competition authorities in China and Japan on whether there would be a possibility of restricting competition and on the appropriate level of corrective measures.

This case is significant in that the KFTC reviewed for the first time the possibility of competition restrictions between consortia and between members of consortia, at the same time, by conducting a market share analysis of not only ordinary individual enterprises but also consortia, to determine anti-competitiveness. That was a very reasonable approach because most container shipping companies operate by forming consortia and, therefore, they exert more influence through consortia than when they individually conduct business. However, not only in the ocean container shipping industry but also in other transportation industries worldwide, it is hard for a single enterprise to operate its business alone because the transportation industry requires economies of scale to some extent. Thus, collaborations among players, such as consortia or alliances, have been common in those industries. How to reasonably measure efficiency-enhancing effects, and proper functioning or dysfunction of such collaborations, and to compare and balance them with presumed anti-competitiveness, is a really important task from the perspective of merger review and other competition regulation.

According to the KFTC's decision on this case, the parties claimed an efficiency-enhancing effect, stating "Through this merger, we can provide more varied services and efficiently carry out those services thereby leading to cost reductions. As a result, this merger will increase consumer welfare through reduction of shipping charges." However, the KFTC disregarded this argument because the parties failed to establish that such effect would surely appear in the near future or that the merger would be the only cause. In many cases, while the anti-competitiveness is determined almost intuitively based on market-share calculation/analysis, the KFTC recognizes efficiency-enhancing effects only when there are supporting figures derived from rigorous analysis. But it is usually very difficult for the parties to show such efficiency-enhancing effects because well-founded models customized to particular industries are generally very rare and, more critically, the parties cannot gather the necessary market-wide information to conduct an analysis of efficiency-enhancing effects in most cases. Companies considering a merger with certain anti-competitive concerns should keep this KFTC position in mind, and practitioners and academics are encouraged to conduct critical review and develop reasonable approaches to this issue.

4. Others: Extension of Implementation Period for Corrective Measures

In 2017, the KFTC approved an extension of the period for implementation of corrective measures in relation to two mergers on which the KFTC gave conditional approval in 2016. First, in the merger deal between Boehringer Ingelheim International GmbH ("BI") and Sanofi for their animal health business, the KFTC considered these factors in granting an extension: (i) Ceva, the purchaser of a porcine circovirus vaccine named "Circovac" from BI, is setting up an affiliate in Korea to sell Circovac for import, and the procedure will take considerable time to complete; (ii) due to Ceva's decision not to buy assets related to "PREVICOX," a non-steroidal anti-inflammatory drug for pet dogs, BI had to solicit interest from 20 domestic and overseas companies to buy those assets, which caused some inevitable delay in implementation of the order; and (iii) BI only recently received a binding final offer from Green Cross Veterinary Products Co., Ltd. and began consultation with the KFTC.

Second, in Abbott's acquisition of St. Jude Medical, Abbott actually sold off its assets to a third party and received the purchase price, but it will require more time than initially expected to complete the transfer of the intellectual property rights in related assets and the procedures to obtain approval for changing the relevant declaration of import business.

The core logic behind the KFTC's approval of extending the implementation period, in both cases, can be summarized as follows: (i) the implementation period determined by the original decision was not sufficient to implement corrective measures in reality; (ii) the respondents made earnest efforts to perform the order to sell the assets and did not appear to delay or avoid such order on purpose; and (iii) the possibility that the respondents may exert influence over the business or assets to be sold was actually eliminated, and the other corrective measures have already been implemented, which means that the competition concerns on which the orders were based had been removed.

CHAPTER 4.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION

KANG Il / SHIN Sang Hoon[*]

I. OVERVIEW

Following the inauguration of the new administration in 2017, the Korea Fair Trade Commission (the "KFTC") has made significant legislative efforts to improve the law-enforcement systems and strengthen enforcement capacity for the Fair Transactions in Subcontracting Act (the "FTSA"), Fair Agency Transactions Act (the "FATA"), Fair Transactions in Franchise Business Act (the "FTFBA"), and Monopoly Regulation and Fair Trade Act (the "MRFTA").

With respect to Airbnb Ireland's non-compliance with the corrective action regarding its refund policy, the KFTC criminally referred the company as well as its representative, which is the first criminal referral in its history against a global business entity related to the Act on the Regulation of Terms and Conditions.

With respect to the KFTC's decision to issue corrective order and impose administrative penalties upon Golfzon for its alleged tie-in sales and conferral of a disadvantage to its franchisees, the Supreme Court again affirmed the lower court's judgment to the effect that the KFTC's disposition was unlawful and defined the standards for determining the degree of "disadvantage."

II. LEGISLATION AND POLICY

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Following the inauguration of the new administration in 2017, the KFTC has made significant legislative efforts to improve the law-enforcement systems and strengthen enforcement capacity.

(1) Strengthened protection of subcontractors' technology

To strengthen the protection of subcontractors' technology and knowhow, the degree of effort required for subcontractors to keep secret the technical data eligible for protection under the FTSA was relaxed from "considerable effort" to "reasonable effort." It also provides that, if the prime contractor restricts its subcontractors' technology exports, demands its subcontractor's management information, or compels its subcontractors to trade with the prime contractor or any other particular business, such an act would result in unlawful interference with the business management of subcontractors.

(2) Strengthened protection of franchisees' business rights

Under the amended FTFBA, a franchiser's act of unilaterally changing any business territory without a mutual agreement with the relevant franchisee was added as a new type of illegality, for which a corrective order or administrative penalties may be imposed. Although the acts subject to treble damages under the current FTFBA are limited to the acts of "providing false or exaggerated information" and "unreasonably rejecting transactions," the amended FTFBA included a franchiser's "retaliatory action against any franchisee" as a violation that would also result in treble damages.

(3) Expanded applicability of the FATA

The current FATA has had the limited applicability because it only applies to franchise agreements renewed or newly executed on or after December 23, 2016, which is the enforcement date of the current FATA. To address the blind spot, the FATA's addenda were amended so that the FATA can also apply to franchise agreements executed before the enforcement date of the FATA.

III. MAJOR CASES

(1) Criminal referral of Airbnb for its failure to comply with the KFTC's order to amend its unfair terms and conditions

A. Background

On September 28, 2017, the KFTC criminally referred Airbnb Ireland ("Airbnb") and its director Eoin Hession for failing to comply with a corrective order to amend its unfair terms and conditions. The KFTC had recommended the global company on March 8, 2016, to amend the following two clauses in the refund policy of Airbnb: (1) the clause to impose 50% of the total price for the entire stay as a penalty in the event a reservation is canceled at least seven days prior to the scheduled check-in date; and (2) the clause to give no refund of the Airbnb service fee (6-12% of the total price) even when a reservation is canceled. When Airbnb failed to comply with such a recommendation without justification, the KFTC issued a corrective order on November 15, 2016, to require Airbnb to amend or remove the clauses in its strict refund policy and no refund policy for service fees within 60 days from the date of issuance of such order through consultation with the KFTC.

B. Decisions of the KFTC

Airbnb continued to enforce the aforementioned clauses for its users with Airbnb listings ("host") without any modification while displaying the clauses to Korean consumers ("Korean guest") as if they had been modified. In this regard, the KFTC determined that Airbnb failed to fully comply with the corrective order because Airbnb used the existing terms and conditions for hosts only with a partial amendment thereto and because it applied the strict refund policy with limited modification to Korean guests only when the hosts gave consent thereto.

While refunding the service fees for any reservation canceled before check-in, Airbnb amended the proviso to the refund policy at the same time to permit no refund if any customer cancels more than three reservations during a period of one year or cancels a reservation after making duplicate reservations. The KFTC found that the refund policy failed to fully comply with its corrective order because of the proviso of denying any refund of the service fees in certain circumstances such as fourth or subsequent cancellation within a year and cancellation of duplicate reservations.

Consequently, the KFTC criminally referred both Airbnb and its representative for using unfair terms and conditions that might cause harm to consumers and for failing to comply with the corrective order issued.

C. Implications

Such criminal referral was the first in the KFTC's history to be made against any overseas business and its representative for non-compliance with the KFTC's corrective order issued in connection with a violation of the Act on the Regulation of Terms and Conditions (the "ARTC"). Since uniform terms and conditions represent a form of contract uniformly executed with multiple consumers, global companies that conduct business in several countries often enter into an agreement with consumers worldwide in the same form with the same contents. Nevertheless, to strengthen protection of Korean consumers, the KFTC has recently issued recommendation or order for correction to require global companies such as Apple and Airbnb to amend specific clauses of their terms and conditions applicable in Korea and even made a criminal referral of the business entity and its representative for failing to comply with such recommendation or order. Taking into account such tendency, the companies doing business in Korea are advised to closely look into whether their terms and conditions applicable to Korean consumers are in breach of the ARTC or the MRFTA and, if necessary, take proactive measures to amend certain clauses.

(2) The case on the validity of a letter of guarantee in violation of the statutory prohibition of abuse of superior bargaining power [Supreme Court Judgment in Case No. 2017Da229048 delivered on September 7, 2017]

A. Background

On September 1, 2012, a department store operator (plaintiff) and a clothing supplier for the plaintiff (defendant) entered into a clothing supply agreement, under which the plaintiff would purchase the products supplied by the defendant, sell the products and return the unsold goods to the defendant. After continued transactions thereafter, it was found that the defendant had an obligation to return KRW 232,225,685 to the plaintiff for the goods returned. Accordingly, both parties signed a letter of guarantee to make the payment in four installments from December 31, 2014, to September 30, 2015.

B. Court ruling

The Seoul High Court ruled that the form of the trade is legally categorized as a direct purchase and that, when it comes to a direct purchase agreement, if the plaintiff, a large retailer, could return all or some of the goods to the defendant supplier without any justifiable reasons, such act constitutes abuse of superior bargaining power, which is one type of the unfair trade practices prohibited under Article 23(1)4 of the MRFTA. In addition, the court found that the letter of guarantee in this case, which was intended to facilitate such illegal act, is invalid because it involves an illegal act that violates good customs and other social order. Based on the foregoing, the court rejected the plaintiff's claim for KRW 81,843,690 as the outstanding payment for the goods under such guarantee and for delay damages.

The Supreme Court also affirmed the lower court's ruling that the letter of guarantee was invalid because: (i) such guarantee represents an act of the plaintiff to secure unjust gains by abusing its superior position and simultaneously to impose excessive counter-performance or other unjust burden on the defendant and (ii) it is reasonable to conclude that enforcing such act lacks social validity and therefore would be against social order.

C. Implications

This judgment is of significance as the Supreme Court's first decision to the effect that an act in violation of the MRFTA provisions that prohibit the abuse of superior bargaining power may be found invalid as a violation of Article 103 of the Civil Act. In general, except for collusion, which is prescribed as invalid under the MRFTA, the validity of a contract in breach of the MRFTA has been found invalid only when the contract is against good customs and other social order. For this reason, courts have rarely found that any act in breach of the MRFTA was actually invalid. In this regard, the court's ruling in the above-described case became the first precedent to deny the legal effect of the return arrangement executed between a supplier and a distributor, as well as the arrangement based thereon to return the payment for the goods, because such arrangement is unfair and in breach of the MRFTA.

Only in few countries do the competition authorities regulate the unfair trade practices of business entities that do not have a market-dominant position, and Korea is one of the small numbers of countries that aggressively regulate such unfair trade practices. Consequently, even if the companies doing business in Korea are not market-dominant entities, as long as they believe that they have superior bargaining power over their counterparties, they need to carefully examine whether their transactions may be deemed unfair under the MRFTA. If any transaction is found to violate the MRFTA, the KFTC may, as the competition regulator in Korea, take disadvantageous actions against the relevant companies, including administrative penalties and criminal referral, and the counterparties to such transaction may file a civil lawsuit such as damages claim. Further, even the legal effect of the transaction itself may be denied.

(3) The case on Golfzon's conferral of a disadvantage (Seoul High Court Judgment 2014Nu62052 dated November 23, 2016; Supreme Court Judgment in Case No. 2016Du64999 delivered on April 14, 2017)

A. Background

Golfzon develops and supplies game software products related to indoor screen golfing, which require the system called the golf simulation system or golf simulator ("GS system"). The GS system consists of sensors that build the data of the directions, speed and rotation of the balls hit by each user, swing plates that automatically change angle based on the location of the balls, projectors and screens that display the magnified images, and computers that control and operate such equipment.

Since the late 2000s, the screen golf market in Korea has grown with the annual number of users almost tripling from 630,000 in 2008 to 1.86 million in 2012. Among around ten GS system suppliers including Golfzon participating in the Korean screen golf market, Golfzon has over 60% market share among the top five suppliers as of June 2012 in terms of the number of indoor golf courses using each supplier's products. When it comes to the number of the GS systems sold, Golfzon's market share exceeds 90%.

With the continued development of sensors, software and hardware, Golfzon has continued to release new generations of its GS system, introducing a new product every two years on average between 2002 and 2012. Golfzon sells its GS systems through a separate sales subsidiary, and the business of installing and maintaining the system and customer management (call center) is outsourced to its subsidiary Golfzon Networks.

Those who wish to run an indoor golf course using the GS system supplied by Golfzon ("franchisee") generally purchase the GS system and join the membership on the Golfzon website. At the same time, they need to access the Golfzon Live Manager (GLM) website and consent to the Terms and Conditions for Golfzon Live Service Users. Only after they obtain approval from Golfzon, the franchisees can start a business with the Golfzon Live service ("GL service") provided by Golfzon in an online environment.

To provide its online service, handle franchisees' claims, and offer event rewards, event prize money and payback services, Golfzon has introduced various cash/point management policies for Real Cash (or R Cash), Live Cash, Bonus Cash, G Money, and Cyber Points. As of July 31, 2013, a total of 5,326 indoor golf courses nationwide have purchased 23,484 sets of the GS system from Golfzon or its sales subsidiary.

B. The decision of the KFTC

By its Ordinary Session Resolution No. 2014-176 dated August 11, 2014, the KFTC issued a corrective order and imposed administrative penalties on the ground that the following acts of Golfzon constitute an act of coercing transactions under the latter part of Article 23(1)3 and abuse of superior bargaining power (conferral of a disadvantage) under Article 23(1)4 of the MRFTA.

a. Coercion to make transactions: Tie-in sales of projectors

Since June 2009, Golfzon has sold its GS system bundled with two or three projectors designated by Golfzon.

b. Abuse of superior bargaining power (conferral of a disadvantage)

① Failure to compensate for the franchisees' loss caused by system breakdowns

In the event any franchisee claims a compensation for business loss resulting from suspension or interruption of games due to a failure of the GS system attributable to Golfzon, instead of relying on objective standards for compensation and making appropriate compensation accordingly, Golfzon made only partial compensation for such loss based on the amount arbitrarily determined by Golfzon or otherwise unilaterally settled the issue without any compensation.

Requiring the franchisees to collect the GL service fees and unfairly deducting a penalty upon giving a refund of cash points

In collecting the GL service fees payable by the golf course users to Golfzon starting from January 31, 2008, Golfzon required the franchisees to collect such fees on behalf of Golfzon without reasonable compensation therefor, in accordance with the terms and conditions unilaterally set by Golfzon ("Golfzon Terms and Conditions"). In addition, when the franchisees requested a refund of the balance of Real Cash, which had been accumulated by the franchisees as a means to pay the GL service fees to Golfzon, due to business shutdown or other reasons, Golfzon refunded the balance only after deducting 10% of the balance as a penalty.

Failure to distribute the advertising earnings

With regard to commercial advertising begun in July 2009 using the facilities and equipment owned by the franchisees, Golfzon has distributed no advertising earnings to the franchisees pursuant to the applicable clauses in the Golfzon Terms and Conditions.

② Discrimination of the trade-in sales conditions for the franchisees that purchased the second-hand GS system

To encourage the franchisees to switch to the latest GS system, Golfzon launched a trade-in sales campaign for older GS system models. Whereas the existing price kept applying to the franchisees that purchased the GS system from Golfzon or its sales subsidiary on or after September 15, 2012, the trade-in price was set as KRW 5 million higher only for the franchisees that purchased the GS system from second-hand product dealers or other franchisees.

C. Court ruling

On November 23, 2016, the Seoul High Court affirmed the trial court's judgment that the KFTC's decision [Case on Golfzon's forced transactions and abuse of superior bargaining power (Resolution No. 2014-176 dated August 11, 2014)] was unlawful in finding that Golfzon had conferred a disadvantage to the screen golf course franchisees, and dismissed the appeal filed by the KFTC. A further appeal was finally and conclusively dismissed by the Supreme Court on April 14, 2017.

a. Coercion to make transactions: Tie-in sales of projectors

To establish a violation of Article 23(1)3 of the MRFTA, it is necessary to prove that Golfzon either solicited or coerced the customers of its competitors that also sell the GS system, to make transactions with Golfzon. However, the fact that Golfzon bundled its GS system with a specific projector does not suggest that Golfzon solicited or coerced the customers of other GS system sellers, which have nothing to do with Golfzon projectors, to make transactions with Golfzon. Further, because Golfzon did not sell its projectors separately or otherwise participate in the projector market, the sellers of other projectors not designated by Golfzon cannot be deemed the competitors of Golfzon. In this respect, Golfzon's act of requiring the franchisees to purchase its GS system together with a specific model of compatible projectors does not constitute "an act of unfairly soliciting or coercing customers of competitors to make the transaction" as set forth in Article 23(1)3 of the MRFTA.

In addition, the sales of Golfzon GS system and projectors should not be deemed to fit the particular type of "tie-in sales" prohibited under the MRFTA for the following reasons:

Projectors are indispensable in operating Golfzon's GS system, and therefore projectors cannot be deemed subordinate products—the products that the counterparties are not willing to purchase or needless.

Given that Golfzon released a new product every two years on average, the franchisees that wanted to keep using the existing projectors had an option not to purchase a new projector. The franchisees that switched to Golfzon's GS system after using the system of other suppliers could also purchase the GS system without a projector. Nevertheless, only 4.1% of the franchisees that purchased the new GS system between 2009 and the first half of 2013 chose to use the existing projectors instead of replacing them with a new model. This was mainly because most franchisees who adopted the new GS system voluntarily selected the projectors recommended by Golfzon to fit with the new GS system.

It cannot be said that Golfzon coerced the purchase of projectors only because it did not provide the franchisees with the above information regarding all projectors available in the market. On the contrary, Golfzon tested the compatibility of several key manufacturers' projectors that can work with the GS system and provided the information on the projectors selected after such test.

① In addition to Golfzon, other golf simulator sellers also include the projectors as basic components of the hardware products they sell. This demonstrates that not only the projectors are necessary components of the GS system in terms of functionality as described above, but also the industry as a whole perceives that the projectors and the GS system are inseparable.

b. Abuse of superior bargaining power (conferral of a disadvantage)

① Analysis of the failure to compensate for the franchisees' loss caused by system breakdowns

Golfzon did not unfairly confer a disadvantage to the franchisees by failing to make appropriate compensation for the franchisees' loss caused by system breakdowns.

To impose an administrative disposition against "an act of unfairly taking advantage of one's superior bargaining power to set or change transaction terms disadvantageous to a counterparty or confer a disadvantage in the course of performing under such terms" prohibited under Article 23(1)4 of the MRFTA, it is necessary to objectively and clearly define the substance of "disadvantage" given to the counterparty and, if such "disadvantage" involves pecuniary loss, define the existence of loss for which legal liability is acknowledged and the scope of such loss—i.e., the amount of damages (*see* Supreme Court Judgment in Case No. 2000Du6213 delivered on May 31, 2002). Although the KFTC maintained that the loss incurred by the franchisees was pecuniary, it imposed the disposition in this case without at all defining the existence of loss incurred by the franchisees and the scope of such loss.

The substance of any act being somewhat disadvantageous to a counterparty is not sufficient to establish "conferral of a disadvantage." Instead, one party needs to unfairly takes advantage of its superior bargaining power to the point of being comparable to coercing purchase, coercing conferral of benefits, or coercing sales targets and subsequently set or change the transaction terms or confer a disadvantage in the process of performing under such terms. Further, the act should unfairly confer a disadvantage to a counterparty in light of the ordinary business practices and be likely to impede fair trade (*see* Supreme Court Judgment in Case No. 2000Du6213 delivered on May 31, 2002).

Given that Golfzon has internal compensation rules, Golfzon's non-disclosure of such rules should not be deemed unlawful unless, despite the existence of such rules, Golfzon arbitrarily handled the compensation issue without applying such rules. In addition, Golfzon's compensation to the franchisees is not sufficiently disadvantageous to be deemed comparable to coercing purchase, coercing conferral of benefits or coercing sales targets, and no evidence exists to support such claim.

Golfzon has set compensation rules as part of its internal business guidelines and made compensation based thereon and, even if no agreement had been reached despite Golfzon's efforts to settle the amount of compensation with the franchisees, the franchisees could have still sought compensation through a civil lawsuit. Further, because Golfzon often voluntarily made compensation to the franchisees when the cause was clearly attributable to Golfzon, it cannot be concluded that Golfzon unilaterally neglected compensation for loss or made partial compensation only.

Should the franchisees request compensation for loss, under the duly required procedures Golfzon would investigate the existence of its liability and the appropriate amount of compensation before making any compensation. In this process, disagreements may arise with respect to Golfzon's liability and the amount of compensation, and it cannot be said that the franchisees incurred disadvantages only because Golfzon did not accede to their request. Rather, because the amount of compensation is calculated based on the liability and the amount of compensation, if Golfzon and the franchisees fail to reach an agreement, they can still determine the specific amount through civil proceedings, as contemplated by the legal system of Korea. Based on the foregoing, Golfzon should not be deemed to have unfairly conferred a disadvantage.

② Analysis of the act of shifting the burden of collecting the GL service fees and unfairly deducting a penalty upon giving a refund of cash points

Golfzon's act of requiring the franchisees to collect the GL service fees on behalf of Golfzon under the Golfzon Terms and Conditions and refunding the cash points to the franchisees after deducting 10% penalty does not constitute "an act of conferring a disadvantage" prohibited under the MRFTA.

Upon signing the GS system sales agreement with Golfzon, the franchisees joined the GLM website and consented to the Golfzon Terms and Conditions online, and therefore they would have been aware of the clauses of the Golfzon Terms and Conditions even before the installation of the GS system. Given that the franchisees would generally review the potential costs and profits before deciding whether to start a business, they should have been informed by Golfzon about the method of paying GL service fees and charging cash points, which are indispensable elements of the management of a screen golf course. Further, it appears that, although the separate charging system was available as an alternative option, the franchisees preferred directly collecting the GL service fees on behalf of Golfzon in consideration of user convenience and economic benefits.

Still, the franchisees had to bear an additional burden equal to the amount of interest incurred when charging cash points in advance and the credit card fees (approximately 2-3%) corresponding to the GL service fees. Taking account of such additional costs to be incurred by the franchisees, Golfzon began to provide the franchisees with 5-10% of the GL service fees (10% for log-in, 5% for no log-in) or 8% in the form of Bonus Cash from around January 2013 without regard to log-in. The amount of such payback paid to the franchisees in exchange for their collection of the GL service fees exceeds the sum of interest and credit card fees each franchisee had to pay due to cash-point charging. In this respect, it cannot be said that the franchisees incurred any economic disadvantage when they collected the GL service fees on behalf of Golfzon; rather, they earned certain economic benefits.

Golfzon' deduction of 10% penalty for a refund of cash points may be slightly disadvantageous to the franchisees, but such action does not extend as far as to conferral of a disadvantage compared to coercing purchase, coercing conferral of a disadvantage, or coercing sales targets prohibited under the MRFTA.

Analysis of failure to distribute advertising earnings

The act of not distributing advertising earnings to the franchisees does not constitute "an act of conferring a disadvantage" prohibited under the MRFTA.

Article 15 of the Golfzon Terms and Conditions provides that "Franchisees shall consent to publish ads exposed during the use of online service and shall have no rights to direct or indirect profits generated from advertising," and all franchisees actually consented to the Golfzon Terms and Conditions.

The Terms and Conditions Examination Guidelines of the KFTC stipulate that examination of the terms and conditions requires "determination in comprehensive consideration of the intention and objective to set the terms and conditions, ordinary business practice within the industry, applicable laws, characteristics of products or services to be traded, necessity in the business entity's operation, and the substance and degree of disadvantage to be incurred by customers." In addition, examination of an act of conferring a disadvantage under the KFTC Unfair Trade Practice Examination Guidelines requires "determination in comprehensive consideration of the intention and purpose of the relevant act, foreseeability of counterparties, ordinary business practice within the industry, applicable laws, characteristics of products or services to be traded, and the substance and degree of disadvantage." As such, the two examination standards are substantially identical.

Despite its decision on January 31, 2013, that Article 15 of the Golfzon Terms and Conditions could not be deemed unfair (Resolution No. 2012*Yakgwan*3326), the KFTC subsequently found that Golfzon's failure to distribute advertising earnings to the franchisees constituted an act of conferring a disadvantage, which is a stark opposition to the KFTC's previous holding that justified Article 15 of the Golfzon Terms and Conditions.

With respect to such conflicts, the KFTC claims that, whereas the examination of terms and conditions involves an abstract examination of criteria that focuses on the text of each clause in the terms and conditions, the examination of unfair trade practices is based on the specific market situations and business practices, and that the standards for determining the illegality differ. However, the standards for determining illegality of terms and conditions and unfair trade practices are substantially identical. Further, given that the purpose of the analysis is to examine whether a specific act constitutes unfair trade practice on the basis of abstract terms and conditions, in the absence of any extraordinary circumstance, the act should not be deemed unfair as long as the applicable clauses can be justified. It also appears that Golfzon trusted the results of above examination of terms and conditions conducted by the KFTC and accordingly did not distribute advertising earnings to the franchisees pursuant to Article 15 of the Golfzon Terms and Conditions. If this is the case, Golfzon hardly had any intention or objective to confer a disadvantage.

The KFTC claims that, because Golfzon used the franchisees' facilities for its advertising, certain disadvantages occurred such as shortened business hours. However, as Golfzon mainly used the data loading time between holes for its advertising, the claim that the loading time became longer after such advertising began cannot be acknowledged, and no evidence supports such claim.

It is also of note that, with respect to the advertisements in addition to online ads that require the franchisees' cooperation and endeavor, Golfzon has distributed its advertising earnings in various manners depending on the level of contribution on the part of the franchisees. In the case of general advertising through television, radio, Internet or other media outlets, ordinary business practices hold that advertising earnings are retained by the entity that transmits ads and that no advertising fees are paid to the owners of advertising facilities.

③ Analysis of trade-in sales discriminating the franchisees using the old GS system

Introducing its trade-in sales campaign, Golfzon offered KRW 5 million less to the franchisees that purchased the second-hand GS system compared to the franchisees that directly purchased the GS system from Golfzon, and this act does not constitute "an act of conferring a disadvantage" prohibited under the MRFTA.

Golfzon released a new generation of its product only one year after it had introduced the older model in January 2011. Considering the potential disadvantage to the franchisees that recently purchased the older model and trying to encourage the franchisees to switch to the new model, Golfzon launched a trade-in sales campaign. This campaign did not confer a disadvantage but instead offered an advantage, to the franchisees, only with the difference in the trade-in prices based on the criteria set by Golfzon. With respect to this trade-in sales policy, the KFTC claims that Golfzon's discriminatory trade-in prices significantly lowered the market price in the second-hand product market. It is only natural, however, for the price of old products to gradually fall when a new product is introduced and successfully settles in the market, and there is no evidence to establish that the significant fall in the prices in the second-hand market as claimed by the KFTC was caused by Golfzon's discriminatory trade-in sales.

When the trade-in sales campaign was launched, the franchisees had different interest depending on the timing they purchased the older system and the method of purchase, and it was necessary to coordinate such differences. Consequently, Golfzon applied different trade-in prices not only based on whether the franchisees directly purchased the system from Golfzon, but also based on when the franchisees purchased the current system. Even among the franchisees that directly purchased the GS system from Golfzon, there was a difference of approximately KRW 6 million between the franchisees that purchased the system within latest one year and those that purchased the system more than four years ago. Generally, the franchisees that directly purchased the GS system from Golfzon paid the full price at the time of purchase, whereas the franchisees that purchased the second-hand system paid relatively less. As a result, if Golfzon would confer an advantage to the purchasers of its new product through the trade-in sales and offer the same benefit to the franchisees that directly purchased the system from Golfzon and that purchased the second-hand system, the direct purchasers would end up incurring a disadvantage. Ordinary business practices hold that, upon release of a new product, sellers would tend to encourage consumers to purchase the new product and further offer a certain benefit to the consumers that choose to purchase the new product from the same seller from which they had previously purchased the current product.

Based on the foregoing, Golfzon had reasonable justification to set different trade-in sales prices for the franchisees that directly purchased the GS system from Golfzon and the franchisees that did not.

D. Implications

This case is of practical significance in that the court reconfirmed the clear standards as to the KFTC's burden to prove any disadvantage conferred upon counterparties to establish the abuse of superior bargaining power (conferral of a disadvantage). The court also made it clear that, if "disadvantage" at issue represents pecuniary loss, not only the existence of loss for which Golfzon is legally liable but also the scope of such loss—i.e., the amount of damages—should be clearly defined. Further, the fact that the substance of such act is somewhat disadvantageous to a counterparty is not sufficient. Instead, one party should have admittedly set or changed the transaction terms or conferred a disadvantage in the process of performing under such terms by unfairly taking advantage of its superior bargaining power to the point of being comparable to coercing purchase, coercing conferral of benefits, or coercing sales targets, which act threatens to unfairly confer a disadvantage to the counterparty compared to the ordinary business practice and consequently impede fair trade.

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PRIVATE LITIGATION

HONG Daesik[*]

I. OVERVIEW

The Monopoly Regulation and Fair Trade Act (the "MRFTA"), the main body of Korean competition law, has been primarily enforced by the Korea Fair Trade Commission (the "KFTC"). Although private damage actions have been an available legal remedy, there were few cases until 2003. Private litigations began to increase starting in 2004, mostly in the form of follow-on suits filed by the victims after the KFTC found violations in cartel cases.

The Systematic development that contributed to the increase in private litigation was the amendment of the MRFTA in 2004.[1] Two important changes made by the amendment were: First, the plaintiffs (or victims) were now free to bring damage actions based on the MRFTA before the KFTC's decision on a violation was finalized. Second, even if the plaintiffs did not prove the amount of damages precisely, the courts could acknowledge a considerable amount of damages at its discretion. The Supreme Court established criteria for such application in a 2016 ruling.

The representative case that triggered the increase in private litigations brought by cartel victims was the Military Oil Bid-Rigging case[2] and the Flour Price Cartel case[3], in which the plaintiffs were the government and baking companies, respectively. The Supreme Court ruling on these cases raised the incentives for more private lawsuits by clarifying the position of the court on important legal issues such as the method for quantifying damages and the standing to sue for indirect purchasers.

Unlike claims for damages compensation, the MRFTA does not explicitly provide a right to seek injunctive relief for a private party. However, considering that the Supreme Court has

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1. OECD, Korea Progress in Implementing Regulatory Reform, OECD Reviews of Regulatory Reform (2007), p.85.
2. Supreme Court Judgment in Case No. 2010Da18850 delivered on July 28, 2011.
3. Supreme Judgment in Case No. 2010Da93790 delivered on November 29, 2012.

opened a way by a judge-made law to grant injunctive relief on unfair trade practices based on laws other than the MRFTA[1], request for injunctive relief is available at least in theory.

Allegations of MRFTA violations in a private litigation can be used as a counterclaim against allegations of breach of contract or infringement of intellectual property rights.[2] The Supreme Court ruled on criteria that allows invalidation by civil law regarding contracts that violate the MRFTA in 2017.

II. LEGISLATION AND POLICY

1. General procedures

Despite institutional improvements, private litigations in competition law cases are generally not brought without KFTC's prior action finding illegal conduct. Since class action systems and discovery procedures are not available, it is very difficult for a private litigant to pursue a stand-alone case without a KFTC decision finding illegality.

If there is a KFTC action on illegality, follow-on private litigations can avoid such hurdles. Although the KFTC's decision does not have a binding effect as to its fact-finding,[3] the courts may use KFTC's fact-finding as a de facto presumption. Based on such presumption, plaintiffs have a greater incentive to bring a damage action alongside a pending administrative litigation. The KFTC is mandated to send all information regarding a case if the court requests it.

2. Calculation of damages

The burden of proof for the amount of damages by an illegal act covered by the MRFTA lies on the plaintiff. However, the standard of proof and the degree of conviction necessary for judicial estimation of the amount of damages are relatively low compared to those required for proving the factual occurrence of damages. The Supreme Court has held that the proper amount of damages in private litigation is 'the difference between the amount of assets the plaintiff would have had but for the defendant's illegal acts and the amount of assets with the illegal acts committed'[4]. In other words, the court has generally taken a 'but for' approach in calculating damages in private litigation. For cartels, the difference can be calculated by

1. Supreme Court Judgment in Case No. 2008Ma1541 delivered on August 25, 2010.
2. Whish, Richard and David Bailey, Competition Law, 8th Ed., Oxford University Press (2015), p.313.
3. Supreme Court Judgment in Case No. 89Daka29075 delivered on April 10, 1990, etc.
4. Supreme Court Judgment in Case No. 91Da33070 delivered on June 23, 1992 (per curiam).

multiplying the amount of purchase with the difference between the price that victim actually paid and the but-for competitive price.[1]

In order to prove the amount of damages caused by a cartel, the amount of purchase and the actual price paid by the victim must also be proved, but the more difficult part lies in the proof of the but-for competitive price. The but-for competitive price should be calculated by excluding the increase of price caused by a cartel while keeping other price-forming factors of the relevant market stable. If the economic factors affecting price formation before and after cartel remain the same, the proof may not be difficult because it is reasonable to calculate but-for competitive price using before and after comparison methods, based on the transaction price assessed after the termination of a cartel. However, in a case where there is a significant change in economic factors, even if there is comparable price available in the market, it cannot be used as such. This is because the influence caused by variable factors should be excluded. In these cases, a party must depend heavily on economic reasoning such as empirical economic analysis.

The calculation of the amount of damages results in an extremely tricky situation derived from the nature of the matter, and proving necessary facts is difficult. In light of these difficulties, the MRFTA allows the courts to determine an adequate amount of damages based on overall arguments and the outcome of investigating evidence. If multiple plaintiffs have respective amounts of small damages, this provision relaxes a plaintiff's burden by letting the court decide on an amount of damages rather than requiring a plaintiff to prove the exact amount of damages incurred by the defendant. In the 2016 Diesel Price Cartel case,[2] the Supreme Court held that proving purchase volume and virtual competition price or excess price (necessary to prove the amount of damages) would be extremely difficult due to the nature of the facts, and that it could exercise its authority to acknowledge a considerable amount of damages. The court ruled that, although the underlying methodology should be reasonable and objective in such cases, the actual court should make active judgement on virtual competition price or excess price, even if the methodology the plaintiff claims is not valid.

While the court's discretionary power to determine the amount of damages has eased the burden of private litigation for individual plaintiffs, the use of economic approach in damages calculation has become a hot issue in cases like the Military Oil Bid-Rigging case (in which huge amounts of damages were claimed). Examples of cases where the courts found an economic approach reasonable include the Flour Price Cartel case using the econometrics using the dummy variable after cartel,[3] the hepatitis vaccine price fixing case of the drug

1. Supreme Court Judgment in Case No. 2010Da18850 delivered on July 28, 2011.
2. Supreme Court Judgment in Case No. 2014Da81511 delivered on November 24, 2016.
3. Supreme Court Judgment in Case No. 2010Da93790 delivered on November 29, 2012.

wholesaler using the yardstick method,[1] and reverse payment settlement cases of pharmaceutical companies using market share theory.[2]

3. Major Trends in 2017

In 2017, there were no special changes in legislation related to private litigation. The National Assembly has already submitted bills regarding treble damages, the KFTC's authority to issue corrective orders for compensation, and the introduction of an injunction system, but none of these bills have been passed in 2017. However, there has been significant changes in the KFTC's policy on private litigation.

In February 2018, the KFTC published a final report on 11 tasks discussed by a task force (composed of outside experts) formed in August 2017 for a consultation to comprehensively improve the enforcement system of MRFTA. The report included 5 tasks related to improving private litigation including: introduction of injunction requests by private persons, introduction of punitive damages, introduction of class action lawsuits, promotion of alternative dispute resolution systems, and strengthening the capacity for victims to obtain evidence.

Although there was consensus regarding introduction of injunction requests by private persons, opinions were divided on whether it should be limited to unfair trade practices or extend to all violations. The introduction of punitive damages in the MRFTA was also discussed, but opinions divided on the scope and limits of damages. Regarding class actions, while consensus was reached on introducing it for types of violations that would incur small amounts of damages for multiple consumers, different measures were proposed on the scope of such introduction and application methods. In order to strengthen victims' capacity to obtain evidence, the task force agreed on the need to introduce regulations to define obligations of companies to submit information in response to court requests and require the KFTC to submit case information to the courts (including trade secrets) more proactively. On the other hand, the need to exclude leniency filings from documents required to be submitted to the court was also discussed.

The KFTC plans to establish policy directions regarding such results of the report, present its opinions on related bills, and include them in the revision of the MRFTA, if found necessary. Most policy measures need amendments to the relevant laws or enforcement regulations. If the KFTC's policy measures become legislated, the scope of choice for private

1. Seoul High Court Judgement in Case No. 97Na4465 delivered on May 20, 1998.
2. Seoul Western District Court Judgement in Case No. 2014Gahap38388 delivered on August 12, 2015.

parties to bring private litigation is expected to expand in the long run in a variety of ways including injunctions or punitive damages.

III. MAJOR CASES

In 2017, there was an important ruling on whether an agreement between parties to realize acts violating the MRFTA could be recognized as invalid by law and what the criteria would be for such cases.

<Factual background>

In this case, a large retailer operating a department store purchased goods from a clothing supplier, paid for and sold the goods, returned the remaining stock to the clothing supplier, and then filed for a refund for the cost of the goods. Because the substance of the transaction between the large retailer and clothing supplier was a direct purchase, the return of all or part of the goods to the supplier constituted an unfair trade practice under the MRFTA. The issue was whether a contract confirming that the supplier had an obligation to refund a certain amount to the large retailer along with provisions to pay the refund in installments could be considered legally valid separate from whether the act constituted an unfair trade practice.

<Holding>

The Supreme Court ruled that if a contract between companies allows a party with a superior bargaining position (due to disparity in economic power) use such position to gain unfair advantage and force the other party to bear excessive burden, such contract is legally invalid since it is against good faith customs and social order, separate from whether the act constitutes an unfair trade practice. In this case, the Supreme Court did not consider the purpose or content of the contract between the parties against social order in itself, as it related to the return of goods and refund. However, the Court focused on the fact that the transaction allowed the large retailer to return fashion-sensitive clothing when advantageous to itself although the transaction was effectively a direct purchase transaction. The Court considered this possible due to the superior bargaining position of the large retailer derived from the difference in economic power. Accordingly, the Supreme Court held that when considering the substance and circumstances of such contract, the contract in this case would be invalid as a violation of good faith custom and social order and not enforceable.

<Comment>

This Supreme Court case set a clear precedent on the issue of legality of MRFTA violations which had only been discussed theoretically. In other words, the case ruled on whether an act violating the MRFTA would only be subject to damages claims as an illegal act or whether its legal effect would be denied, and the terms deemed unenforceable. Although the criteria for determining whether an agreement constituting a violation of the MRFTA seems separate from determining whether such act is a violation of the MRFTA, it became clear that a violation of competition order or transactional order protected by the MRFTA could form the basis for finding a violation of social order and legal invalidity.

CHAPTER 6.
DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW INVOLVING INTELLECTUAL PROPERTY

CHUN Kee-Hong / LEE Kyung Yul[*]

I. LEGISLATION AND POLICY

Article 59 of the Monopoly Regulation and Fair Trade Act (the "MRFTA") of Korea provides that the MRFTA shall not prohibit any conduct that is deemed a legitimate exercise of intellectual property rights ("IPRs").[1] The Korea Fair Trade Commission (the "KFTC"), the competition law enforcement authority in Korea, also issued the Review Guidelines on Unfair Exercise of Intellectual Property Rights ("IPR Guidelines") in 2000 to articulate general principles and specific criteria for applying the MRFTA to the exercise of IPRs. The IPR Guidelines reaffirm the limitations of applying the MRFTA by providing that "[t]he legitimate exercise of IPRs under Article 59 of the MRFTA means an exercise of IPRs within the scope of the IPRs' exclusive right of usage as defined by the relevant laws and in such case, shall not be subject to the MRFTA, in accordance with Article 59 of the MRFTA." The IPR Guidelines further state that "whether the exercise of IPRs is legitimate requires consideration of various circumstances as a whole, including the purpose and aim of the relevant IP laws such as the Patent Act, the content of such IPR, and the effect of such act on competition in the relevant market." This is similar to the standard provided by the Supreme Court (Supreme Court Judgment in Case No. 2012Du24498 delivered on February 27, 2014[2]).

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1. The provisions of this Act shall not apply to actions deemed to be a legitimate exercise of rights stipulated in the Copyright Act, Patent Act, Utility Model Act, Design Protection Act, or Trademark Act.
2. "Conduct that is not deemed to be a legitimate exercise of patent rights' refers to conduct which may outwardly appear to be an exercise of patent rights, but whose substance deviates from the object of the patent system and therefore runs counter to the fundamental purpose of the patent system, and the determination of whether an exercise of patent rights is legitimate shall be

The KFTC revised the IPR Guidelines in March 2010, March 2013, December 2014, and March 2016 after the enactment of the IPR Guidelines in 2000, but no further amendments were made in 2017.

II. KFTC ENFORCEMENT TRENDS RELATED TO INTELLECTUAL PROPERTY RIGHTS

A. KFTC Enforcement Trends in 2017

In 2017, the KFTC conducted an extensive review of IPR abuse in the pharmaceutical industry.

According to media reports, the Knowledge Industry Division of the KFTC's Anti-Monopoly Bureau sent an official questionnaire to 71 pharmaceutical companies in late May, requesting information on the sales of pharmaceutical products marketed or licensed during the period between 2010 to 2016 and the launch status of original/generic products, as well as the status of patent licensing, patent disputes, and litigation (including reconciliation, arbitration, mediation, etc.).

Media reports further state that the KFTC is mainly focused on investigating the abuse of IPR in pharmaceutical sectors, such as drug licensing and patent applications, and reverse payment patent settlements in particular, also known as 'pay-for-delay' agreements. 'Pay-for-delay' refers to an act where a pharmaceutical company with the original patent rights to a product pays an economic benefit to a generic manufacturer in return for the latter agreeing to delay or abandon its entry into the market.[1] The pharmaceutical company with the original patent rights is regarded as sharing part of its monopoly profits with generic pharmaceutical companies in return for unfairly extending the period of monopoly by delaying the entry of generic drugs, resulting in consumers being harmed by high monopoly prices.

B. KFTC's Annual Enforcement Plan, 2018

On January 25, 2018, the KFTC revealed its Annual Enforcement Plan, introducing the KFTC's five major initiatives for 2018. One of these initiatives was to "promote innovative

made taking into account the overall circumstances, including the purpose and object of the Patent Act, the details of the patent rights concerned, and the effect of the conduct on fair and free competition."

1. The KFTC has in fact found an agreement between the original maker of a new drug and a generic drug maker to cease production and sales of its already released generic product, as well as to not develop, produce, sell or handle any generic product with pharmacologically active ingredients identical to the new drug or that may compete with the original drug, or even generic drugs or rival products of another original drug unrelated to the drug patent at issue, in return for a substantial financial benefit, to constitute "illegal cartel conduct" as stipulated in Article 19(1) of the MRFTA, and accordingly imposed fines and corrective orders.

competition," which is a key task being pursued by the KFTC in order to establish a fair market economic order in accordance with the current administration's three major economic policy objectives of income-led growth, innovative growth and fair economy.

According to the above Enforcement Plan, the KFTC will place particular emphasis on "preventing acts that restrict or inhibit innovative competition" in order to promote innovative competition. The details of the initiative are as follows.

(1) Prevent Abuse of Market Dominance Involving IRPs

First, the KFTC stated that it would concentrate on monitoring industries where leading firms are likely to abuse monopoly power. The KFTC stated that it would: (1) investigate and rectify acts that restrict market entry and hinder innovative competition in the pharmaceutical sector, such as pay-for-delay; (2) monitor exclusionary conduct against competitors in app store markets related to monopolized online platforms; and (3) monitor conduct limiting competition and hindering R&D innovation by abusing patent rights in new future growth sectors, such as next-generation semiconductors.

Moreover, the KFTC plans to commission research studies in the second half of 2018 to identify anti-competitive issues related to big data, thereby strengthening its analytical and response capabilities with regard to data-based innovation markets.

(2) Eradicate Technology Misappropriation

The KFTC announced that it would select industries with high probability of technology appropriation for intensive monitoring and initiate direct investigations. For instance, it stated that it would closely review acts such as the principal contractor requesting joint ownership of patent rights, despite having made no contribution to the subcontractor's original technology.

After discussions with the ruling party, the KFTC announced 'Measures to Eradicate Technology Misappropriation for Co-Existence and Cooperation of Large and Small Enterprises'. The main focus is on selecting specific industries to monitor each year, such as machinery/automobiles (2018), electronics and chemicals (2019), and software (2020), and preemptively conduct direct investigations, and to improve the KFTC's written survey process to more easily identify problematic companies in advance and select target companies for direct investigation.

As part of the above, the KFTC revised the Review Guidelines for Demand and Misappropriation of Technical Materials, a sub-decree of the Fair Transactions in Subcontracting Act ("Subcontracting Act"), and has applied the amended guidelines since January 3, 2018. The purpose of the amendment was to clarify the acts of technology misappropriation prohibited under the Subcontracting Act. One of the major amendments was to confirm that the act of requesting the filing of a joint application for a patent right or utility model right with regard to an original technology independently developed by the subcontractor is a violation of law. Moreover, the Guidelines explicitly prohibit the principle contractor from using and not returning (disposing) the technical materials provided by the subcontractor despite the deadline for return (disposal) coming due or a request from the subcontractor to return (dispose of) the materials. In addition, the Guidelines added technical materials relating to the growth industries of software and pharmaceuticals as examples of technical materials, making it clear that such materials also fall within the scope of "technical materials" under the Subcontracting Act.[1]

Unlike in most cases where the MRFTA and IP laws maintain a certain tension despite their common goal of promoting innovation through dynamic competition, such prohibition of technology misappropriation can be regarded as an area where the MRFTA directly supports the rights of IPR owners who are in an inferior bargaining position vis-à-vis their partners.

III. MAJOR CASES INVOLVING IPRS

A. Corrective Measures Imposed on Qualcomm-NXP Semiconductors Deal

While there were no notable KFTC cases regarding the exercise of IPR rights in mid to late 2017, in January 2018 the KFTC imposed a corrective order in its review of Qualcomm's acquisition of NXP Semiconductors. The corrective order focuses on preventing anti-competitive concerns raised by the possession and exercise of IPRs, and may become meaningful precedent for mergers of companies with strong IP portfolios. Based on the KFTC's corrective orders and their general basis as confirmed from the KFTC's January 18th press release, the KFTC appears to have attempted to maintain consistency with the corrective

1. Meanwhile, other government departments have been introducing other various measures in order to prevent large companies from stealing original technology independently developed by SMEs. For instance, the Ministry of SMEs and Startups and the Corporate and Agricultural Cooperation Foundation introduced the Technical Data Deposit System through which SMEs can deposit their technical data to prevent it from being leaked. Furthermore, the government and the ruling Democratic Party announced 'Measures to Eradicate the Stealing of SME Technology' at a joint meeting, pursuant to which a punitive damage system will be introduced so that large companies found to have stolen SME technology will be made to reimburse the SME with up to ten times the amount of financial damage suffered.

orders it imposed on Qualcomm in January 2017 for alleged abuse of market dominant position.

The press release revealed that the KFTC defined the relevant product markets as the baseband chipset market, NFC chip market[1], secure element ("SE") chip market[2], and SE operating systems market as incorporated into mobile devices (while defining the relevant geographic market as global). The KFTC imposed the following corrective actions on Qualcomm on the basis that it has market dominance in the baseband chipset market and NXP has market dominance in the other relevant markets.

(i) To sell NFC standard-essential patents ("SEPs") and system patents held by NXP.

(ii) For other NFC patents held by NXP, to prohibit exercise of patent rights and provide royalty-free license on a stand-alone basis.

(iii) To provide NFC SEPs held by Qualcomm on FRAND terms and not to link sale of NFC ships with provision of licenses.

(iv) Not to impede interoperability with competing baseband chipsets, NFC chips and SE chips.

(v) Not to refuse to provide licenses to NXP's MIFARE technology.

Meanwhile, on March 27, 2018, the European Commission (EC) also disclosed its decision,[3] dated January 18, 2018, on the same merger. While the decision contains commitments that are largely similar to the above KFTC corrective orders (i), (ii), (iv) and (v), there is no commitment that corresponds to (iii).

The KFTC explained that corrective orders (i) and (ii) were intended to address the concern that Qualcomm might change NXP's NFC patent license policy in an anti-competitive manner after acquiring NXP, and it appears that the European Commission determined that this was sufficient to address any anti-competitive concerns relating to NFC patents. However, it appears that the KFTC added corrective order (iii) due to concerns that Qualcomm, which only owned NFC patents, would become a vertically integrated enterprise by acquiring an NFC chip business from the merger and engage in anti-competitive conduct linking NFC patents and chips.

Because the NFC chip market is significantly different from the cellular baseband chip market (such as the existence of various alternative technology, relatively low prices, and non-essentiality), it is questionable whether the legal principles of the previous case on

1. The KFTC defines "NFC chips" as "semiconductors used in wireless near-field communication (NFC) within a 10cm range, for making payments, confirming identities, deciphering product information, etc.
2. The KFTC defines "secure elements" as "semiconductors with reinforced security that are used for the safe storage of card information, etc., necessary for NFC communication."
3. Case M.8306-Qualcomm/NXP Semiconductors.

Qualcomm's abuse of dominant position can be applied as-is to this case, but the KFTC it could be regarded as maintaining consistency in its enforcement. It is unclear, however, whether the KFTC will impose similar corrective measures in future business combination cases with similar circumstances, or whether this was a unique case where such corrective measures were imposed due to the existence of a prior decision on the licensing practices of one of the parties to the combination.

B. Court Decision on Qualcomm's Request for Suspension

Challenging the fine and corrective measures the KFTC imposed in January 2017 for its alleged abuse of dominant position, Qualcomm appealed the KFTC decision to the Seoul High Court on February 21, 2017, seeking revocation of the decision while simultaneously requesting a stay of execution of the KFTC's decision (imposition of fine and corrective measures) until the court issues a judgment. In response to Qualcomm's argument that the corrective measures would cause irreparable damage to Qualcomm, the KFTC argued that since Qualcomm had unjustly profited by violating the MRFTA, any operating loss incurred due to the corrective orders could not be seen as damage. On September 4, 2017, the Seoul High Court dismissed Qualcomm's request for stay of execution, and although Qualcomm once again appealed to the Supreme Court, the Supreme Court also dismissed the request on November 28, 2017.

Currently, Qualcomm's appeal for revocation is still under deliberation at the Seoul High Court. Meanwhile, five companies, including Samsung Electronics, had also joined the litigation as intervenors and each advanced their own arguments, but Samsung withdrew from the litigation after it signed a cross-license agreement with Qualcomm in late January 2018. According to media reports, a Samsung spokesperson explained that, "Samsung Electronics renewed its agreement as a follow-up measure to the KFTC's corrective order against Qualcomm to renegotiate its existing agreements with other companies, and as a result was no longer in a position to intervene."

The following is a summary of the KFTC's 2017 decision on Qualcomm's alleged abuse of its dominant position. The text was printed in last year's article but is republished here for the reader's convenience.

January 20, 2017 corrective order and administrative fines for Qualcomm's abuse of market dominant position (KFTC Press Release announced in December 2016 and public version of written decision released in February 2017)

<Findings of Fact by the KFTC>

In the KFTC's recent investigation of and decision against Qualcomm, it defined the relevant market as (i) the worldwide licensing market for all standard essential patents ("SEPs") owned by Qualcomm with regard to each mobile telecommunication standard such as CDMA, WCDMA and LTE, and (ii) the worldwide modem chipset market for each mobile telecommunications standard such as CDMA, WCDMA and LTE. The KFTC then held that Qualcomm has a market dominant position with regard to each relevant market.

According to the KFTC, Qualcomm engaged in three types of problematic conduct. First, Qualcomm allegedly refused to provide a license to its mobile telecommunications SEPs to competing chipset manufacturers or provided or offered only a restricted license (e.g., exclusion of 'use' rights, restriction of customers to whom modem chipsets could be sold, requirement to provide detailed business information to Qualcomm, provision of royalty-free cross-grants to Qualcomm) or other restrictive agreements (such as covenants not to sue, 'exhaust remedies' agreements or 'standstill' agreements), requiring mobile phone manufacturers to obtain a separate license from Qualcomm in order to purchase and use modem chips.

Second, Qualcomm allegedly conditioned the supply of its modem chipsets to mobile phone manufacturers on the execution of a patent licensing agreement with Qualcomm. Furthermore, the modem chipset supply agreements that were entered into with mobile phone manufacturers allegedly stipulated that (1) the sale of modem chips did not include the right to use Qualcomm's patents, (2) the purchased modem chips could be used only for the development and manufacture of mobile phones, and the sale and use of mobile phones needed to comply with the terms of the license agreement, and (3) the modem chip supply agreement could be terminated or the supply of chipsets could be refused or suspended if the purchaser breached the terms of its modem chipset supply agreement or its license agreement with Qualcomm. According to the KFTC, Qualcomm used threats to discontinue its supply of modem chipsets as negotiating leverage during actual negotiations with mobile phone manufacturers.

Third, Qualcomm allegedly engaged in certain licensing practices such as (1) licensing all of its patents on a 'package license' basis without distinguishing between cellular SEPs, non-cellular SEPs, and non-SEPs or between mobile technology standards such as CDMA, WCDMA, and LTE, (2) on the basis of such package license, unilaterally determining the royalty rate to be applied with the entire handset as the base, without undergoing good faith negotiation procedures to assess the value of its patents, and (3) in return for a license to its patents, demanding royalty-free cross-licenses to patents owned by mobile phone manufacturers for Qualcomm and its modem chip customers, thereby constructing a ‘patent umbrella’ favoring its modem chip business.

<Holding>

The KFTC held that the first type of conduct (refusal to license to modem chipset manufacturers) constituted abuse of market dominance due to unreasonable interference with the business activities of another enterpriser by (i) offering unreasonable terms in light of normal trade practice, and (ii) denying or restricting, without legitimate reason, use of or access to essential elements for the production and sale of products by another enterpriser.

With regard to whether such conduct was unreasonable in light of normal trade practice, the KFTC held that (i) the practice of providing SEP licenses at the modem chipset or component level did exist, (ii) there was a need for SEP licenses to be provided at the modem chipset level in light of the concept and nature of SEPs and the fact that Qualcomm itself recognized that a license to its patents was necessary in order to operate a modem chipset business, (iii) in light of the general understanding of FRAND commitments and Qualcomm’s own stated positions regarding FRAND, there was a legitimate expectation that FRAND-compliant SEP licenses would be provided to willing modem chipset licensees, and (iv) it was not unreasonably difficult or impossible to provide licenses at the modem chipset level, and therefore the normal trade practice was to provide unrestricted SEP licenses under FRAND terms to modem chipset manufacturers who were willing licensees.

The KFTC also stated that as a vertically integrated enterpriser with a dominant position in both the SEP license market and the modem chipset market, Qualcomm was under an especially strict obligation to comply with its FRAND commitments.

Meanwhile, the KFTC rejected arguments by Qualcomm that (i) device-level licensing was a normal trade practice that had been in existence since Qualcomm’s initial entry into mobile telecommunications, (ii) modem chipset manufacturers were free to manufacture and sell modem chipsets without risk of patent disputes even without any license from Qualcomm, (iii) ETSI’s IPR policy allowed for device-level licensing, (iv) device-level licensing allows for proper compensation for Qualcomm’s patents, as its patents are implemented not only at the component or modem chipset level, but also at the device level, (v) being forced to license at both the modem chipset level and device level would only lead to patent disputes and inefficiencies.

The KFTC further held that Qualcomm had anti-competitive intent to restrict competition in the modem chipset market by refusing to license to competing modem chipset manufacturers in order to obtain, maintain and strengthen its dominant position in modem chipsets and thereby implement and enforce its device-level licensing policy. According to the KFTC, (i) Qualcomm had an incentive to restrict competition as a vertically integrated dominant enterprise, (ii) Qualcomm knowingly breached its FRAND commitment, (iii)

Qualcomm refused to provide SEP licenses to competitors despite recognizing that obtaining full licenses was important in the modem chipset market, (iv) Qualcomm enacted a double standard by requiring its competitors to provide royalty-free cross-licenses to their patents while not providing licenses to its own patents to competing modem chipset manufacturers, and (v) the more powerful the competitor, the more unfavorable were the terms provided by Qualcomm.

The KFTC held that there was anti-competitive effect or the concern of anti-competitive effect due to the above conduct as (i) competing modem chipset manufacturers were exposed to the risk that they would be prohibited from selling modem chipsets, (ii) it raised the costs of competing modem chipset manufacturers, (iii) it functioned as an entry barrier to potential competitors, (iv) it interfered with the business activities of competitors and provided Qualcomm with an advantage vis-à-vis its competitors, (v) numerous competitors were driven from the market or went out of business while Qualcomm's overall share of the modem chipset market increased and its position became more entrenched, (vi) Qualcomm's violation of its FRAND commitment as a market dominant enterprise and vertically integrated firm made it even more difficult to control its abuse of market dominance, (vii) market power was leveraged to adjacent markets (such as application processors), (viii) innovation in the modem chipset market was restricted, and (ix) it was used as a means of forcing mobile phone manufacturers to enter into license agreements.

Regarding refusal to provide access to essential elements, the KFTC held that the SEPs held by Qualcomm were essential to the manufacture, sale and use of modem chipsets, and Qualcomm refused or restricted the use of such essential elements, thereby unfairly harming the business activities of competing modem chipset manufacturers.

The KFTC held that the second type of conduct (conditioning the supply of modem chips on the execution of a patent license agreement) constituted abuse of market dominance due to unreasonable interference with the business activities of another enterprise by unreasonably forcing a detrimental transaction or conduct on the transaction counterparty.

Specifically, the KFTC held that by linking the modem chipset supply agreement and license agreement, (i) Qualcomm deprived its customers of the opportunity to fairly negotiate a SEP license, (ii) customers were exposed to the risk of stoppage of their mobile phone business, and (iii) various customers were forced to enter into patent license agreements with Qualcomm.

The KFTC held that Qualcomm had anti-competitive intent as (i) it had the incentive to restrict competition in the license market as a dominant vertically integrated enterprise, (ii) it avoided its obligation to engage in good-faith negotiations under FRAND, (iii) it prevented device manufacturers from circumventing Qualcomm's business model by using competing modem chipsets, (iv) it actually utilized the threat of halting modem chipset supply in the course of licensing negotiations, and (v) its business model was atypical compared to other modem chipset manufacturers.

The KFTC held that there was anti-competitive effect as (i) Qualcomm avoided engaging in good-faith license negotiations in breach of its FRAND commitment, (ii) Qualcomm transferred its dominance in the modem chipset market to the SEP license market, and (iii) Qualcomm's coupling of modem chipset supply and patent license agreements functioned as a means of patent hold-up to force various licensing practices on handset manufacturers.

The KFTC rejected arguments by Qualcomm that (i) its licensing practice was established since it was a small company, its license terms were well known to the industry prior to the standardization of WCDMA and LTE, it had never actually stopped supply of modem chipsets even when there was a dispute in the process of negotiating patent license agreements, and that it had never employed modem chip supply to obtain an advantage in the negotiation of license agreements, (ii) Qualcomm was merely protecting its patent rights and not facilitating infringement of its own patents, as the use of its modem chips without a license agreement would inevitably infringe Qualcomm's patents, (iii) handset manufacturers were not prevented from manufacturing devices as they were able to obtain modem chipsets from other suppliers, and (iv) there was no exclusionary anti-competitive effect.

The KFTC held that the third type of conduct (forcing various licensing terms on handset manufacturers, such as package licensing, unilateral royalty terms, and royalty-free cross licenses) also constituted abuse of market dominance due to unreasonable interference with the business activities of another enterprise by unreasonably forcing a detrimental transaction or conduct on the transaction counterparty.

Specifically, the KFTC held that (i) Qualcomm imposed contractual terms that were favorable to Qualcomm by denying licensees the opportunity to engage in FRAND negotiations and the option of reasonable license terms and (ii) imposed royalty-free cross grant terms without providing just compensation.

The KFTC also held that there was anti-competitive intent to (i) strengthen dominance in the telecommunications SEP license market and (ii) exclude competitors in the modem chipset market, and there was anti-competitive effect as (i) Qualcomm strengthened its monopoly power in the telecommunications SEP license market, (ii) Qualcomm engaged in patent hold-up, (iii) competitors were excluded from the modem chipset market, (iv) technical innovation was hampered as the R&D incentives of other patentees were restricted, and (v) end-consumer welfare was harmed.

The KFTC rejected arguments by Qualcomm that (i) the cross-licenses it obtained from handset manufacturers were not royalty-free but were reflected in the overall license fees it received from handset manufacturers and (ii) package licensing, unilateral royalty terms and royalty-free cross-licenses are separate conduct but the KFTC failed to satisfy its burden of proof by regarding them as illegal as a whole instead of assessing the legality of each type of conduct.

The KFTC further held that while the first, second and third types of conduct were each anti-competitive and a violation of the MRFTA, the combination of the three types of conduct further increased their overall anti-competitive effect.

The KFTC also held that the second and third types of conduct also constituted unfair trade practice (abuse of superior trading position).

Based on the above findings and analysis, the KFTC issued a corrective order and imposed an administrative fine of KRW 1.03 trillion (approximately USD 900 million). The KRW 1.03 trillion fine imposed in this case is the largest ever imposed in any single case by the KFTC.

The KFTC's corrective order required Qualcomm to: (i) not force modem chip manufacturers to accept unfair license terms, (ii) engage in good faith negotiations for a patent license agreement, if requested by a modem chip manufacturer; (iii) not force handset manufacturers to execute a patent license agreement by conditioning the supply of modem chipsets on the execution of a licensing agreement, and modify or delete related contractual provisions in existing chipset supply agreements; (iv) not force handset manufacturers to accept unfair contractual terms in their license agreements with Qualcomm, and renegotiate existing patent license agreements if requested by handset manufacturers; and (v) notify modem chip manufacturers and handset manufacturers of the KFTC's corrective order and report details of new or amended agreements to the KFTC.

The scope of handset manufacturers to which the corrective order applies includes (a) handset manufacturers headquartered in Korea (and their affiliates), (b) handset manufacturers selling handset in or to Korea (and their affiliates), and (c) handset manufacturers supplying handsets to handset manufacturers falling within (b) above (and their affiliates).

The scope of modem chip manufacturers to which the corrective order applies includes (x) modem chip manufacturers headquartered in Korea (and their affiliates), and (y) modem chip manufacturers supplying modem chips to the handset manufacturers (a) through (c) listed above.

<Implications of the KFTC Decision >

The KFTC Decision covers a broad range of controversial issues which are expected to be litigated in court, of which a few are mentioned below.

First, the KFTC held that Qualcomm has an obligation to license to modem chip manufacturers. Given that there are SEP licensors other than Qualcomm that engage in device-level licensing, it is unclear whether the KFTC regards such obligation as unique to Qualcomm (due to its nature as an allegedly dominant vertically integrated enterprise) or applicable to all FRAND-encumbered SEPs.

Second, the KFTC relies heavily on Qualcomm's FRAND commitments and its alleged breach of such commitments as a basis for a finding of anti-competitive intent and effect. However, it is still unclear whether FRAND commitments, which are civil contracts in nature, may directly be relied upon by competition authorities as giving rise to anti-competitive intent and effect.

Third, the corrective orders imposed by the KFTC are extremely broad, as the handset manufacturers and modem chipset manufacturers covered by the corrective orders could conceivably include almost all manufacturers worldwide, and there is no limitation on the territorial scope of the patents that are subject to the corrective orders regarding licensing practices. Given this extremely broad scope, it is unclear whether the requirement that there be a "direct, substantial, and reasonably foreseeable effect" on the Korean market for extraterritorial application of the MRFTA is satisfied for the corrective orders.

APPENDIX.
RELEVANT DATA OF INTELLECTUAL PROPERTY AND COMPETITION LAW OF KOREA

APPENDIX I.
RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY LAW

APPENDIX II.
RELEVANT DATA IN THE FIELD OF COMPETITION LAW

APPENDIX I.
RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY LAW

CHOI Jipil[*]

I. PATENT[1]

A. Number of applications

The total number of IPR applications – including patents, utility models, designs, and trademarks declined by 1.3% from 463,862 in 2016 to 457,960 in 2017. In 2016, the total number of IPR applications (which had been increasing since 2010) showed a downturn for the first time in 6 years, and in 2017, this trend continued.

Classification	2013	2014	2015	2016	2017	YoY(%)
Patent	204,589	210,292	213,694	208,830	204,775	(△1.9)
Utility Model	10,968	9,184	8,711	7.767	6,811	(△12.3)
Design	66,940	64,413	67,754	65,659	63,451	(△3.4)
Trademark	159,217	160,663	185,443	181,606	182,923	(△0.7)
Total	441,714	444,552	475,802	463,862	457,960	(△1.3)

Table 1) Applications by the Right Type in Recent 5 years

* Research Fellow, ICR Law Center.

1. Statistics regarding Intellectual Property in Korea are based on the Korean Intellectual Property Office, 2017 Annual Report (2018), unless otherwise indicated. See http://www.kipo.go.kr/kpo/user.tdf?a=user.html.HtmlApp&c=3072&catmenu=m02_03_04. (In Korean). For the English summary, see http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=60114&catmenu=ek07_01_01_15.

Patent applications totaled 204,775, showing a 1.3% decrease year-over-year (“YoY”). However, Korea maintained fourth place in the number of global patent applications.

First office actions for patent applications in 2017 amounted to 174,112, a 2.1% decrease YoY. The average pendency period between patent application filings and first office actions was 10.4 months, on par with major jurisdictions. The total number of final decision for patent examination in 2017 reached 177,118, a 2.9% increase YoY. The rate of decision of refusal was 35.5%.

B. Number of registrations

The total number of new IPR registrations in 2017 amounted to 286,589, a 1.1% increase YoY. The total number of registration for patent reached 120,662, a 10.8% increase YoY.

Classification	2013	2014	2015	2016	2017	YoY(%)
Patent	127,330	127,786	101,783	108,786	120,662	(10.8)
Utility Model	5,959	4,955	3,253	2,854	2,993	(4.9)
Design	47,308	54,010	54,551	55,603	49,293	(△11.3)
Trademark	100,094	99,791	114,747	119,256	116,705	(△2.1)
Total	280,691	288,542	274,424	286,589	289,653	(1.1)

Table 2) Registration by the Right Type in Recent 5 years

C. Number of PCT applications and registrations

According to WIPO statistics, the number of international applications filed globally under the PCT amounted to 243,000, representing a 1.3% increase compared to 2016. The number of international PCT application designating Korea as a country of origin amounted to 15,790, an 1.3% increase compared to 2016. Korea retained its rank at 5th place followed by the U.S., China, Japan and Germany.[1]

Classification	2013	2014	2015	2016	2017
PCT application	12,439	13,138	14,594	15,595	15,790
YoY(%)	4.8	5.6	11.1	6.9	1.3

Table 3) International PCT Application in Korea in Recent 5 years

It is notable that the share of Korea, China and Japan increased continuously and rapidly, from 46.4% to 49.1% in 2017. The world's top 10 PCT applicants in 2017 includes 2 Korean companies (Samsung Electronics and LG Electronics).

II. TRADEMARK

Trademark applications for 2017 totaled 182,934, a 0.7% decrease YoY. Design applications totaled 63,451, a 3.4% decrease YoY.

The total number of international trademark applications filed under the Madrid System in 2017 reached 55,709 and the amount of international trademark application designating Korea as a country of origin totaled 1,053, a 11.8% increase YoY. Also, the total amount of registered international trademark under the Madrid System was 56,267 and among which the amount of registered international trademark designating Korea as a country of origin totaled 997.

Classification	2013	2014	2015	2016	2017
Application	616	706	990	942	1,053
YoY(%)	11.7	14.6	40.2	△4.8	11.8

Table 4) International Trademark Application in Korea in Recent 5 years

1. WIPO, Patent Cooperation Treaty Yearly Review – 2018, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2018.pdf.

Regarding international design applications filed under Hague System in 2017, Korea took 1st place (1,011) with regards to number of applications, and got the 3rd place (1,742) with regards to number of designs, following Germany (4,261), Swiss (2,945).

III. COPYRIGHT

In 2016, there were 39,400 works were voluntarily registered, which represented a 5% increase YoY.[1]

IV. NUMBER OF CASES ON INTELLECTUAL PROPERTY RIGHTS IN KOREA

10,677 cases were filed at the Intellectual Property Tribunal (a 10.7% decrease YoY). Decrease ratios by category were 14.7% for patent, 21.2% for utility model, 17.6%for design and 3% for trademark. This is mainly because the number of appeals against decisions of rejection decreased to 6400 from the 7400 of the previous year.

Classification	2013	2014	2015	2016	2017	YoY(%)
Patent	8,111	7,335	9,112	6,796	5,798	(△14.7)
Utility Model	336	251	252	306	241	(△21.2)
Design	454	572	477	512	422	(△17.6)
Trademark	4,113	3,823	4,145	4,346	4,216	(△3.0)
Total	13,014	11,981	13,986	11,960	10,677	(△10.7)

Table 5) Cases referred to the IPT in Recent 5 years by the Right

1. Korea Copyright Commission, Copyright Statistics - Copyright Registration, https://www.copyright.or.kr/information-materials/statistics/registration/index.do (last visited Aug. 31, 2018)(In Korean). Statistics for 2017 were unavailable at the time of writing this chapter.

The ratio of appeal to patent court judgments was 11.6%, showing a 3.8% decrease and the rate of annulment of tribunal decisions was 25.1%, a 0.2% decrease from the previous year.

	2013	2014	2015	2016	2017
Applicable cases	6,816	6,567	6,347	6,417	7,389
Appeal filed	1,044	954	873	987	859
Appeal ratio(%)	15.3	14.5	13.8	15.4	11.6
Cases concluded	1,025	971	817	889	971
Found Invalid	214	247	198	225	244
Invalidation ratio	20.9	25.4	24.2	25.3	25.1

Table 6 Cases filed to the Patent Court Recent 5 years by the Right

In 2017, 860 cases were filed to the Patent Court, of which 544 were patent and utility model cases.[1] Patent Court handled 970 cases (614 patent and utility model cases).

In 2017, filing for appeal to the Supreme Court in appeal of a Patent Court judgment amounted to 323 cases, and the rate of appeal was 41.0%, a 1.3% decrease YoY. The reversal rate in patent cases by the Supreme court was 3.7%, a 0.6% decrease YoY.

1. Patent Court of Korea, Annual Case Statistics, http://patent.scourt.go.kr/patent/news/news_07/index.html (last visited Aug. 31, 2018).

APPENDIX II.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW

*CHOI Jipil**

I. KOREA FAIR TRADE COMMISSION[1]

In 2016, the KFTC received 3,802 cases (a 5.8 % decrease year-over-year, "YoY"), and received 41,894 citizens' petitions and reports (a 32% increase YoY). After the new chair Kim Sang-Jo took office, such petitions and report increased by more than 50% percent in late 2017.

The number of cases the KFTC closed with a warning or a voluntary correction decreased, but the number of major cases in which the KFTC imposed corrective order, fine or filed a complaint with the prosecution increased. The number of warning cases decreased by 26% and voluntary correction cases by 22% YoY, but the number of cases in which a complaint was filed with the Prosecutor's Office increased by 18% and cases with fines imposed increased by 14%.

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1. For the official statistics for the Korea Fair Trade Commission, see KFTC, Statistical Yearbook of 2017 (2018) (in Korean), http://ftc.go.kr/www/cop/bbs/selectBoardArticle.do?key=190.

	Classification	2015	2016	2016	YoY(%)
MRFTA	Abuse of market dominance	5	0	4	100
	M&A	24	22	35	59.0
	Economic power concentration	97	120	60	△50.0
	Cartel	88	64	69	7.8
	Prohibited act of enterprisers organization	63	35	42	20.0
	Unfair business practice	103	60	45	△25.0
	Subtotal	380	301	255	△15.2
Consumer Protection Related Laws		783	737	534	△27.5
Fair Subcontract Transactions Act		1358	1035	782	△24.5
Fair Franchise Transactions Act		121	190	240	26.3
Fair Transaction Act in a Large-scale Retail Sector		15	9	15	66.6
Etc. (failing to submit data, denial of investigation, etc.)		4	7	8	14.2
Total		2661	2279	1,834	△19.5

Table 1 Recent 3-year Record of KFTC Case Handlings (higher level of sanction than a warning)

Classification	2015	2016	2017	YoY(%)
Accusation to the Prosecutor’s Office	56	57	67	17.5
Corrective Order	450	252	287	13.9
Surcharge (Amount)*	202(5,889)	111(8,038)	149(13,308)	34.2(65.6)
Voluntary Correction	1,220	739	580	△21.5
Recommendation, Warning, etc.	953	1,231	906	△26.4
Total	2,661	2,279	1,840	△26.0

Table 2 Recent 3-year Record of KFTC Case Handlings (higher level of sanction than a warning) (*KRW Billion)

In 2017, there were 147 cases on which surcharges were imposed. The number of cases increased by a 34% YoY, but total surcharges reached KRW 1830 billion, a 66% increase YoY. This increase is mainly due to the fact that the KFTC imposed KRW 1.031 trillion in Qualcomm case, which is the largest fine imposed in a single case in the history of the KFTC. Another cases with significant fine imposed are as follows: a bid-rigging by 6 companies regarding the steel pipe tendered by the Korea Gas Corporation(KRW 99.2 billion), a bid-rigging regarding Wonju-Gangneung railway line by 4 construction companies (KRW 70.2 billion), a cartel by 9 car shipping carriers (KRW 41.5 billion), a violation of the Fair Labeling and Advertising Act by 3 car manufacturers (KRW 37.3 billion).

In 2017, after new chairman Kim Sang-Jo took office, the law enforcement performance in the area with so-called ‘Gap-Eul relationship’ involved played a significant role and the record shows the following: fines were imposed in 64 cases, a 42% increase YoY, corrective orders were imposed in 150 cases, a 5% increase YoY. Warnings were issued in 412 cases, a 11% decrease YoY, and voluntary collections were made in 338 cases, a 29% decrease YoY.

KFTC filed 67 criminal accusations to the Prosecutor’s Office, and the number of accused were 143. .

In 2017, among 352 KFTC enforcement actions that could be appealed, 69 cases (19.6%) were appealed to the court. 145 cases reached final judgement in 2017, of which the KFTC won in 106 cases, partially won in 24 cases and lost in 15 cases. However, it is important that surcharges returned as an outcome of lost suits amounted to KRW 251.8 billion in 2014, KRW 357.2 billion in 2015, and KRW 330.3 billion in 2016.[1] The rate of returned surcharges dropped to 17.8% in 2017, mainly due to the Qualcomm case where record fine were imposed.

The total number of M&A notification in 2017 was 688 cases, a 22% increase, but the collective worth of the M&A was KRW 509.4 trillion (less than KRW 84.2 trillion than the previous year).[2] Overall, M&A by domestic companies tend to grow both in terms of the net amount or the number of transaction due to the global economic growth and domestic economic recovery. KFTC intensively evaluate 20 cases and issued remedies in 4 of them: Dow/Dupont merger, Esmeralda/DS Power acquisition, Maersk/HSDG acquisition and CJ Television/Hana Broadcasting. The number of the case related to failing to report M&A amounted to 19, upon which the KFTC imposed fine of KRW 385.5 million.

II. COMPETITION ADVOCACY[3]

In 2017, the KFTC received prior legislative consultation on 1,940 proposed legislations initiated by government, and gave opinion on 8 cases, 5 of which reflected the KFTC opinion (67.5% acceptance rate).[4]

As a continuous mission for reforming anticompetitive regulation, the KFTC selected 25 areas in which anticompetitive regulation should be reformed, after consulting relevant agencies and went through the office for government policy coordination. In the first half of the 2017, the KFTC continues its competition advocacy mission and pursued 7 anticompetitive regulations which were closely related to the livelihood of the public, such as foods, daily necessity, leisure, which are impeding the SMEs business.[5] In the second half of 2017, the KFTC continued its competition advocacy mission and pursued 18 anticompetitive regulations which were closely related to the livelihood of the public, such as beer, eel, eyeglasses, and other categories which affect SMEs businesses.[6]

1. National Assembly Budget Office. Fiscal Year 2017 Fiscal Program Performance Evaluation (National Policy Committee) (2018).
2. KFTC Press Release on February 29, 2018, “Trends and Features in the M&A in 2017”.
3. This part covers updates and new developments in 2016, based on the chapter on competition advocacy written by Professor Daesik Hong in the previous version of this report. See Deasik Hong, Developments in Legislation and Practice of Competition Advocacy, in MRLC, China-Korea IP & Competition Law Annual Report 2014 (Meng Yanbei & Lee Hwang eds. 2015), pp. 130-133.
4. KFTC, Statistical Yearbook of 2017 (2018).
5. KFTC Press Release on Jul. 27, 2017, http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1
6. KFTC Press Release on December 28, 2017, http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=7593.

KEYWORD INDEX