Introduction

This chapter is part of the ICC Compendium of Antitrust Damages Actions (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conduct. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** Liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** A statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** A competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** Categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Private antitrust enforcement in South Korea has not been very vigorous compared to other jurisdictions. This is because Korean antitrust enforcement has largely relied on the initiative of the Korea Fair Trade Commission ("KFTC"), which has served as the primary enforcer of Korean antitrust law including the Monopoly Regulation and Fair Trade Act ("MRFTA"), the basic Korean antitrust statute. With its legislative intent of promoting private as well as public antitrust enforcement, the MRFTA currently provides for a lesser burden of proof in a damages action arising from a violation of the MRFTA. In practice, however, this provision has yet to be fully adopted by Korean courts because there have been relatively few antitrust damages actions in Korea, whether initiated in the aftermath of relevant KFTC proceedings or otherwise, and because antitrust damages actions essentially remain “civil” in nature.

Under Korean civil law, neither punitive damages nor a class action is generally available. However, this long-standing characteristic of the Korean legal regime has been undergoing major changes, particularly in the antitrust sphere. For instance, a quasi-treble damages provision was introduced with the 2011 amendment of the Korean subcontracting statute,1 which is also enforced by the KFTC.2 A similar treble damages-like provision was added to the MRFTA in September 2018 and became effective in September 2019. Incidentally, among the proposed amendments is a provision for injunctive relief to be available to a private party against an unfair trade practice. Also in serious discussion is the proposed introduction of a class action procedure for antitrust damages claims. All these developments bode well for invigorated private antitrust litigation in Korea.

1. Jurisdiction

Because the MRFTA does not address jurisdiction over private antitrust litigation including damages actions, the Civil Procedure Act applies. Under the latter statute, a claimant alleging an antitrust injury may bring an action before the district court that has jurisdiction over (i) the defendant’s domicile or (ii) the locus of the defendant’s conduct at issue

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1 Article 35 (2) of the Fair Transactions in Subcontract Act provides that “If a person is injured or incurs loss as a result of conduct by a principal contractor in violation of Article 4, 8 (1), 10, 11 (1) or (2), or 12-3 (3) of this Act, the principal contractor shall be liable for the injury or loss to the extent not exceeding three times the injury or loss; provided that the foregoing provision shall not apply where the principal contractor proves the absence of intention or negligence regarding the injury or loss.” In other words, the amount of damages is not automatically trebled but simply may be increased up to three times the actual damages.

2 However, a damages claim in Korea can be decided only by a Korean court, rather than the KFTC, which may only issue administrative sanctions.
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(Articles 2 through 6 and 18 of the Civil Procedure Act).

Korean law does not provide for a court with specific jurisdiction to hear competition law cases.

2. Relevant legislation and legal grounds

To be valid, an antitrust damages claim must be based on one of the two provisions below:

i. Article 56 of the MRFTA (antitrust provision):

“Where a person suffers harm due to any violation of this Act by a business entity or trade association, the business entity or trade association is liable for the ensuing damages; provided that the foregoing shall not apply where the business entity or trade association proves the absence of intention or negligence regarding the violation.”

ii. Article 750 of the Civil Code (tort provision):

“Any person who causes loss to or inflicts injury on another by unlawful conduct, whether intentionally or negligently, shall be held liable for the ensuing damages.”

These two provisions serve as elective jurisdictional grounds for private antitrust litigation including damages actions. Before its 2004 amendment, the MRFTA contained a provision explicitly stating that a claim based on the MRFTA did not preclude an identical claim under the Civil Code. Even though that provision was repealed through the 2004 amendment, it has been consistently recognised that a claimant alleging an antitrust injury may rely on either Article 56 of the MRFTA or Article 750 of the Civil Code as the jurisdictional grounds for the antitrust claim at issue.

From a claimant’s perspective, Article 56 of the MRFTA is more advantageous since, unlike Article 750 of the Civil Code, it shifts to the defendant the burden of proof for the absence of the defendant’s wilfulness or negligence. However, there is one important caveat: under Article 56 of the MRFTA, a claimant may file a damages action only against a business entity or trade association. In contrast, Article 750 of the Civil Code allows for the filing of a damages action against individuals as well as business entities.

Irrespective of the choice of jurisdictional grounds, a claimant may initiate a private antitrust action in Korea even before the commencement of any KFTC proceedings against any defendant in the private action. Such “stand-alone” action, however, rarely takes place due to the difficulty in satisfying the burden of proof, particularly for the very first element of any private antitrust action: the presence of an antitrust violation by the defendant(s).

3. What types of anti-competitive conduct are damages actions available for?

In Korea, any antitrust violation may serve as the substantive grounds for an antitrust damages action. Thus, such an action may allege a violation ranging anywhere from cartel activity (Article 19 of the MRFTA) and abuse of dominance (Article 3-2 of the MRFTA) to unfair trade practice (Article 23 of the MRFTA), improperly benefitting a specially related

The locus could be any of the following: the place of decision; the place of implementation, and the place of effect.
4. What forms of relief may a private claimant seek?

Until recently, the only relief available was compensatory damages with the notable exception of up to three times the actual damages for certain violations of the Korean subcontracting statute. On 19 September 2019, however, the following treble damages-like provision of the MRFTA (in other words, no automatic trebling of the actual damages amount but the maximum amount could be up to three times the actual damages) went into effect:

Article 56 (3): “Notwithstanding paragraph (1), where a person sustains loss because of conduct by a business entity or an organization of business entities in violation of Article 19 (prohibition of cartel activity), Article 23-3 (prohibition of retaliatory measure) or Article 26(1)(i) (prohibition of unfair restraint on competition by an organization of business entities), the business entity or the organization is liable to the extent not exceeding three times the damages; provided that the foregoing shall not apply where the business entity or the organization proves the absence of intention or negligence regarding the violation.”

On the other hand, it is as yet unclear whether a provision for injunctive relief will be introduced into the MRFTA. Under an amendment proposed by the KFTC on August 27, 2018, a party injured by an unfair trade practice will have the right to seek to enjoin the conduct at issue even without first filing a complaint with the KFTC or waiting the KFTC’s decision on the matter. This bill has been re-introduced and will likely pass sometime during the current National Assembly’s term, which ends in May 2024.

5. Burden of proof/Passing-on defence

Any party injured by a violation of the MRFTA—whether a direct or indirect customer, a competitor, a supplier, or otherwise—is entitled to damages if the party proves (i) the violation of the MRFTA, i.e. the anti-competitive conduct; (ii) the presence and extent of injury, i.e. the damages; and (iii) causation between the anti-competitive conduct and the injury. Here, causation must be direct; hence, the claimant must prove that the injury at issue was caused, in its entirety, by the anti-competitive conduct at issue. As for the extent of injury, where it is practically impossible to determine the damages even though the claimant has satisfied the other two elements, the court may at its discretion award a reasonable amount of damages based on the available evidence (Article 57 of the MRFTA). In this regard, the Korean Supreme Court, while not explicitly recognizing the passing-on defence in principle, held that costs passed on to the claimant’s customers after a price increase resulting from the defendant’s cartel activity may be considered in limiting the damages awarded to the claimant.

With respect to the burden of proof, the Korean Supreme Court held that even where the KFTC’s corrective measure against a violation was judicially affirmed, the facts ascertained by the KFTC with respect to the violation are not binding in a damages action but may

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4 Supreme Court Case No. 2010Da93790, decided November 29, 2012
simply constitute strong evidence of the violation. Thus, they have the effect of being deemed to be presumptive facts.\(^5\)

Once the claimant satisfies the requisite burden of proof in a private action jurisdictionally based on antitrust grounds, the defendant is liable for the damages unless it proves that the violation at issue was neither intentional nor negligent (Article 56 (1) of the MRFTA).\(^6\) In contrast, if the claimant initiates a damages action on tort grounds (Article 750 of the Civil Code), it must also affirmatively prove the defendant’s intention or negligence.

### 6. Pre-trial discovery and disclosure, treatment of confidential information

Under Korean civil procedure, there is no U.S. style pre-trial discovery. Whereas discovery is allowed to a limited extent (through a document production order as explained below), depositions are prohibited. The burden of proof falls on the parties, none of whom have a general disclosure obligation. If a party seeks a document possessed by the opposing party or a third party, it may request a court order for document production pursuant to Articles 344 through 350 of the Civil Procedure Act.

However, as noted above, the facts ascertained by the KFTC are deemed to be presumptive facts in a private action. Therefore, the claimant in a private action can more easily satisfy the requisite burden of proof by citing the facts ascertained by the KFTC in its investigation and decision. Furthermore, in a damages action on antitrust grounds (Article 56 (1) of the MRFTA), the court may compel the KFTC to provide the record of the relevant case, including interview reports, expert witness reports, the stenographic record, and any other evidence (Article 56-2 of the MRFTA). On the other hand, under the amended Article 52-2(2), which will go into effect on May 20, 2021, the KFTC may refuse to provide such documents to damages claimants and third parties on grounds of Article 22-2(3), which prohibit the KFTC from disclosing information concerning a leniency application unless (i) the leniency applicant consented to disclosure, or (ii) disclosure is required for purposes of bringing a related lawsuit or carrying out related official duties.

Documents presented by the parties during the court proceedings are not available to the general public. In addition, confidential information contained in a court submission may be protected through redaction when a third-party requests access to litigation record, subject to the court’s review and ruling (Article 163 of the Civil Procedure Act). The court may also decide to examine certain evidence “in-camera” since a court hearing in Korea is generally open to the public (Article 347(4) of the Civil Procedure Act). Such decision, however, is seldom made. However, once any information, including business secrets, is submitted to the court, the opposing party may access it. On the other hand, a party may refuse to submit certain information to the court on grounds that it constitutes business secrets (Article 344(1)(3) and Article 315(1)(2) of Civil Procedure Act).

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5 Korean Supreme Court Civil Case No. 89Daka29075, decided April 10, 1990

6 However, there is no known instance in which this defence succeeded.
7. **Limitation Periods**

The MRFTA itself does not provide for the statute of limitations period governing private damages claims. Since the liability for damages under the MRFTA is categorized as tortious liability, Article 766 of the Civil Code is applicable. Under that provision, the limitation period is three years from the date on which the injured party became aware of or should reasonably have become aware of (i) the injury and (ii) the identity of the infringer.

Specifically addressing private antitrust damages actions, the Korean Supreme Court held that even where an injured party becomes aware of a corrective order issued by the KFTC, the three-year limitation period does not begin to run until the order is confirmed by a final judgment issued by an intermediate appellate court, i.e., the Seoul High Court. However, if at least ten years have passed from the date of the violation, a damages action based on the violation is time-barred regardless of whether the three-year limitation period has passed.

8. **Appeal**

An appeal from a district court decision is heard by a high court unless the district court proceedings were before a single judge, in which case the ensuing appeal is heard by an appellate panel of the district court (Article 28 of the Court Organization Act). The proceedings of an intermediate appeal are similar to trial proceedings, and the parties are granted opportunities to raise new allegations and to produce new evidence. An intermediate appellate decision may be appealed to the Korean Supreme Court, the court of last resort (Article 14 of the Court Organization Act), which only decides issues of law and does not engage in any fact-finding (Article 432 of the Civil Procedure Act).

9. **Class actions and collective representation**

At present, a class action is not available for claimants alleging antitrust injury. Claimants with claims based on essentially the same factual and legal grounds can however jointly file actions in the form of a joinder of named claimants. Under this joinder procedure, such claimants may select one or more among them as their representatives (Article 53 of the Civil Procedure Act). Once this option is exercised, any judgment issued to the representative claimants are also binding with respect to the claimants who exercised the option.

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7 Article 766 of the Civil Code: (1) The right to claim damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing on the date when the injured party or his/her legal representative becomes aware of the injury and of the identity of the person who caused the injury. (2) The provision of paragraph (1) shall also apply if 10 years have elapsed from the time that the unlawful act took place.

8 Korean Supreme Court Civil Case No. 2013Da215843, decided September 4, 2014
Calculation of damages

Assessing the harm suffered by the victims of an MRFTA infringement is always a complex task in light of the Korean Supreme Court’s adoption of the “difference-between-two-prices” theory. That is to say, the total amount of damages due to an illegal action is the difference between (i) the hypothetical financial status the victims would have been in but for the illegal conduct and (ii) their actual financial status after the illegal conduct. For example, in case of collusion, the difference between the but-for price (i.e. the hypothetical price but for the collusion) and the actual price (the price resulting from the collusion) is the amount of damages due to the collusion. The parties or the court usually appoints an economic expert to conduct analysis under various economic models and to calculate the but-for price.
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