



## **Template pursuant to Section 3 (a) of the Framework on Competition Agency Procedures**

### **Ministry of Justice, International Legal Affairs Division; Republic of Korea**

The following template is submitted by Ministry of Justice of Korea(KMOJ), International Legal Affairs Division pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### **I. Introduction**

The Korean Ministry of Justice(KMOJ) is a governmental body in Korea, along with the Korean Fair Trade Commission(KFTC), responsible for legal enforcement of the antitrust laws of Korea.

The KMOJ is ;

- (i) the sole criminal authority in the territory of Korea, through the law enforcement of the Korean Prosecution Service(KPS), exclusively in charge of the investigation and prosecution of antitrust cases (i.e. Criminal Proceure Act, Monopoly Regulation and Fair Trade Act),
- (ii) responsible for the representation and direction of the civil, administrative litigations related to antitrust issues (i.e. Act on Litigation to which the State is Party, Articles 2, 6),
- (iii) in charge of the asset recovery or the forfeiture for the antitrust violation and
- (iv) the official legal advisor the Korean government in international legal affairs including the MLAT(mutual legal assistance treaty), the extradition, domestic and abroad legislation issues and etc.

KMOJ cooperates in various areas with the KFTC(Korean Fair Trade Commission), which is in charge of administrative antitrust enforcement of Korea.

One unique feature of Korean antitrust enforcement is a wide range of criminal penalties. For instance, (i) comprehensive 28 criminal penalty clauses ranging from the cartel to the misrepresentation in Monopoly Regulation and Fair Trade Act(hereafter 'Monopoly Act'), (ii) penalty clause of bid rigging and interference with bidding in the Criminal Act, (iii) penalty clause of interference with tender in the Framework Act on the Construction Industry and etc.

The criminal investigation may launch with information gathered from the KFTC and a receipt of its complaint or information on the leniency program. From 2015, Anti-corruption Department and Antitrust Division have been newly established within KPS to improve the enforcement of antitrust cases including international cartel cases.

The KMOJ, as the ultimate performer of state litigation, manages antitrust litigation by instructing or jointly performing with the KFTC. The KMOJ also operates special task force for forfeiture regarding governmental procurement bid-rigging and cartel cases.

## II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate. Please update your Template reflecting significant changes as they relate to the CAP, as needed.

### b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

Regardless of the natural or legal person's nationality, the KMOJ has implemented various institutional safeguards to ensure the fair enforcement of laws including antitrust issues.

The KMOJ's official guideline bans unreasonable discrimination on criteria such as social status, region of origin, race, nationality, and political opinion (Standards for Investigation for the Protection of Human Rights, Article 4).

The KMOJ, as the legal advisor of the Korean government for 89 BITs and 15 FTAs that Korea has entered into, is fully committed to disallowing the discrimination between foreigners and Korean nationals based on the obligations from Most-Favored Nation(MFN) and National Treatment(NT) clauses. KMOJ monitors the compliance to these obligations in the overall law enforcement including investigation and judicial proceedings.

### c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.

Korea's antitrust law and regulation, including the Monopoly Act and the Criminal Act, are publicly available. In accordance with the Article 11 of 'Act on the Promulgation of Statutes', all Korean domestic laws are available on the website of the National Law Information Center([www.law.go.kr](http://www.law.go.kr)).

The above website also provides English translation of each original texts but the translation is just for the reference purpose and not an official version of the Korean government.

Likewise, procedural rules of KMOJ and KPS on antitrust investigation and enforcement, including Criminal Procedure Act or investigative rules and guidelines, are also publicly available on the same website([www.law.go.kr](http://www.law.go.kr)).

The KMOJ and KPS follows applicable procedural rules in investigations and enforcement proceedings. Failure to do so would subject the relevant personnel to potential sanctions, including potential exclusion of the obtained evidence. For the criminal enforcement, most of specific procedural details are available in the Criminal Procedure Act of Korea.

For criminal cartel cases, KPS has published “Cartel Criminal Enforcement Guideline” in January 2020. The KPS plans to publish Explanatory Notes(with FAQ) for the guideline in late 2020. Both the guideline and the notes will be translated in English and made public within the year of 2020.

#### **d) Investigative Process**

i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.

ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.

iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.

The KMOJ has general jurisdiction for antitrust criminal law enforcement, MLATs and extradition and related civil, administrative litigations. Specific investigation and enforcement of criminal antitrust cases are handled by the KPS and its Antitrust Division or regional Prosecutor's Offices.

Each tier of Prosecutor's Office has the authority to launch an antitrust case investigation within its jurisdiction. The department that is fully dedicated to antitrust cases is installed in Seoul Central Prosecutor's Office. Under the Korean law, prosecutors have the authority to summon and interrogate the suspects and witnesses. Prosecutors also launch an investigation by seizure, search and financial account tracking based on the warrant issued by the judge.

When the prosecutor launches antitrust investigation, enough time is granted to the suspect upon the requested summon unless there is an urgent need(Criminal Procedure Act Article 200, General Standards for Investigation for the Protection of Human Rights Article 33 para. 2). The prosecutor is obliged to inform the reason for the summon, including the name of the crime and the gist of the suspected crime(General Standards for Investigation for the Protection of Human Rights Article 33 subpara. 3).

When the prosecutor interrogates a criminal suspect, the right to refuse to make statement and the right to have the assistance of the defense counsel are announced to the suspect, allowing the suspect to receive interrogation under full support of the counsel(Criminal Procedure Act Article 244-3). When the prosecutor prepares the protocol concerning interrogation of a criminal suspect, the rights of the suspect to defend him/herself is provided including the right to request for an addition, subtraction or modification of the protocol(Criminal Procedure Act Article 244 para. 2).

Also, in interrogating the suspect, enough opportunity is given to the suspect to explain about the suspicion on antitrust law violation, and the data submitted by the suspect is researched without prejudice or bias(General Standards for Investigation for the Protection of Human Rights Article 38). Before starting an interrogation, the suspect should be provided the explanation on the background and reason of the examination, the opportunity to submit advantageous material, and the opportunity to state any other requests or opinion that may be considered for examination(Regulation on Administration of Prosecutory Cases Article 13-5).

The KMOJ and KPS interrogation of criminal suspect is limited to the necessary matters concerning the facts and conditions of the offense(Criminal Procedure Act Article 242), and a detailed standard is set to specify the criteria for interrogation into motivation, cause, characteristic, time, location, method, and result of the offense in order to identify the facts and conditions of the offense(Rules on the Prosecutor's Direction on Investigation to the Judicial Police Officer and the Standard for the Judicial Police Officer's Investigation Article 20).

Also, in order to prevent unnecessary delay in investigation, the investigation standard bans the unreasonable request for multiple appearance of the suspect(General Standards for Investigation for the Protection of Human Rights Article 33 subpara. 5).

#### **e) Timing of Investigations and Enforcement Proceedings**

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

The KMOJ and KPS make best efforts to conclude antitrust law investigation and enforcement within reasonable time frame. The prosecutor investigates independently within the scope of the law. When the prosecutor launches an investigation based on criminal complaint or accusation, within 3 months the investigation should be concluded and the decision should be made on whether to institute public prosecution(Criminal Procedure Act Article 257).

Above time period is a recommendation and an investigation longer than 3 months is also possible. Still the prosecutor, as a representative of public interests, typically directs an investigation in a prompt manner.

The prosecutor also bears in mind that the limitation period for public prosecution of the antitrust law offenses is five years, which is another motivation to speed up the investigation.

## **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.

All the domestic laws and regulations that are applied in regard to the identification and the treatment of confidential information during the investigation of antitrust law violation are made public through the abovementioned National Law Information Center([www.law.go.kr](http://www.law.go.kr)).

All the Korean officials in charge of investigation and prosecution have the obligation to respect the human rights and to keep the confidential information known in the course of investigation(Criminal Procedure Act Article 198, Regulation on Administration of Prosecutory Cases Article 7). The above articles also apply to judges and court officials, and non-officials including expert witnesses, interpreters, and translators. In the criminal law aspect, the Korean law also stipulates "Publication of Facts of Suspected Crime" in order to protect suspect's overall human rights and privacy(Criminal Act Article 126). The Korean law has similar obligations set out in the administrative investigation procedures. The investigating officials have the obligation to keep the confidential information obtained during the performance of duties.

The KMOJ in principle bans the public disclosure of information related to criminal cases, including the launch of an internal investigation, the gist of the suspected crime, and the status of the investigation(Regulation on Prohibition of Disclosure of Criminal Cases Article 4). Even when the disclosure is allowed as an exception to fulfill the people's right to know, the deliberation of the "Criminal Case Disclosure Committee" is mandated in order to balance the suspect's human rights and the people's right to know(Article 9).

Also, when the related person requests administrative information disclosure, the disclosure should be decided within 10 days from the receipt of the request(Official Information Disclosure Act Article 11). Whether to disclose the information is decided upon objective criteria that balance the people's right to know and the protected rights through confidentiality.

## **g) Conflicts of Interest**

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

### **1. Korean laws related to the prevention of conflict of interest**

The KMOJ and KPS manages the matters of conflict of interest in a serious and strict manner.

In order to prevent conflict of interest in antitrust investigation and law enforcement, Korea has laws and regulations such as Public Service Ethics Act, General Standards for Investigation for the Protection of Human Rights, and Code of Conduct for Public Officials in the Prosecutor's Office.

## **2. The prevention of conflict of interest in criminal procedure**

A prosecutor, as a representative of public interests, has the obligation to investigate in a fair and objective manner. Also, if there is doubt in the fairness of the investigation because the prosecutor is a relative of or has acquaintance with a person related to the case, necessary measures such as request for reassignment and report to the superior are taken (General Standards for Investigation for the Protection of Human Rights Article 5).

For example, if the prosecutor has a status or financial relationship with a person related to the case, or owns stocks above certain amount, a written report should be made to the head of the agency (Code of Conduct for Public Officials in the Prosecutor's Office Article 5).

## **3. Other institutions to prevent conflict of interest**

In accordance with the Public Service Ethics Act, all the public officials of the Korean government have the obligation to beware of the property interests that may cause difficulties in their fair performance of duties, and to faithfully perform their duties with a preference of public interests (Public Service Ethics Act Article 2-2).

### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.

Korea's Constitution guarantees the right to have a trial under due process (Constitution of Republic of Korea Article 12 para. 3), and the defendant's right to counsel is protected by timely notices throughout the antitrust law enforcement process.

When the prosecutor indict an antitrust case, the court serves the criminal defendant with a copy of the bill of indictment without undue delay (Criminal Procedure Act Article 266). Within 7 days of the receipt of the copy, the defendant may submit a written opinion that states whether he/she admits the facts charged and his/her opinion on the procedure for preparatory proceedings (Article 266-2).

Korean law adopts discovery in Criminal Procedure Act Article 266-3 to protect the defendant's right to defense in criminal law enforcement. The defendant may file to the prosecutor for an inspection of the documents and evidences that the prosecutor will submit for trial(Article 266-3 para. 1). In this case, full disclosure should be done in principle, including the evidences that are advantageous to the defendant. Thus, the application for inspection is available not only on the evidences that the prosecutor will submit, but also on the paper that describes the names of persons whom the prosecutor plans to produce as witnesses and their involvement in the case. If the prosecutor refuses or limits the inspection of the documents, the defendant may make a motion to the court for allowing such inspection(Article 266-4 para. 1).

Civil Procedure Act applies to Korea's administrative litigation unless otherwise provided in the Administrative Litigation Act(Administrative Litigation Act Article 8 para 2). Therefore, the principle of open review, the principle of oral trial, and the pleadings principle are applied. If an administrative litigation is instituted as an appeal against the KFTC's administrative disposition, the court without prejudice adjudicates on the disposition itself.

In case of the imposition of penalty surcharge, unlike other administrative litigation procedures, the court generally allows the suspension of the effect of disposition, minimizes the plaintiff's damage, and sets the burden of proof on the KFTC in relation to the disposition's legality in order to protect the plaintiff(Supreme Court Decision 2016. 10. 27. 2015Du42817).

#### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.

The Constitution guarantees the suspect's right to counsel in the entire criminal procedure(Constitution of Republic of Korea Article 12 para. 4). As this is a constitutional right, under no circumstances shall the appointment of the counsel be restricted. Such principle is also applied in the KFTC's administrative procedure. In case of the Criminal Procedure Law, certain articles such as 243-2 are designed to ensure actual participation of the counsel during the criminal procedure.

The counsel may provide legal advice to the suspect throughout the entire investigation procedure. To be specific, the suspect may request the attendance of a counsel during the entire interrogation process, and the counsel may attend the entire interrogation process with the suspect (Regulation on Administration of Prosecutory Cases Article 9-2). The counsel may interview a suspect who is under interrogation or waiting for an

interrogation, and may interview at a location where confidentiality is ensured if the counsel and the suspect so agrees(Guideline for the Counsel's Interview and Communication with the Suspect Article 5).

The Korean law does not directly stipulate the Attorney-Client privilege. The Korean supreme court decided that there is no such client privilege that allows for a non-disclosure of counsel's legal advice that was made on a general basis to a non-suspect(Supreme Court Decision 2012. 5. 17. 2009Do6788).

However, the Korean law has institutions that indirectly protect the Attorney-Client privilege. For example, the attorney is not allowed to disclose the secret that is known during the antitrust investigation and law enforcement procedure(Attorney-at-Law Act Article 26). Currently, an amendment of the Attorney-at-Law Act to strengthen the protection of suspects has been proposed to the National Assembly, and the Korean Bar Association is also independently making suggestions for amendment to strengthen the Attorney-Client privilege.

#### **j) Decisions in Writing**

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.

For criminal antitrust cases, the written copy of the bill of indictment is delivered to the defendant(Criminal Procedure Act Article 266). If the prosecutor decides not to indict the case, the record and the decision for non-prosecution(Regulation on Administration of Prosecutory Cases Annex 124) are disclosed to the suspect.

The bill of indictment can be found in the written judgment, and the written judgment is made publicly available with personal information redacted. In case of non-prosecution, the decision and the case record are made available to the suspect and not disclosed to the public in principal.

## **k) Independent Review**

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

### **1. Methods to appeal against the antitrust criminal law enforcement**

For antitrust criminal law enforcement, the prosecution may launch an investigation on suspicions of crime such as cartel, and indict if it finds that the burden of proof can be satisfied. Korea has a system that ensures fair enforcement of law in each stage of procedure.

The prosecutor, as a representative of public interests according to the Prosecutor's Office Act, have the obligation to be objective in investigation and indictment. Upon deciding on the prosecutor's request for warrant and indictment, the judge rules independently according to their conscience (Constitution of Republic of Korea Article 103). Furthermore, the Criminal Procedure Act adopts a three-tier trial system by guaranteeing the right to appeal to High Court and make final appeals to the Supreme Court(Criminal Procedure Act Articles 357 and 371).

### **2. Methods to appeal against the antitrust administrative law enforcement**

Any party dissatisfied with an administrative measure taken by the KFTC may file an objection, requesting for a decision by the KFTC(Monopoly Act 53) As this procedure is viewed as a specialized administrative appeal under the Administrative Appeals Act which allows the KFTC to make decisions and corrective measures.

Also, the Korean law guarantees the opportunity to receive judicial remedies in courts against the KFTC's measures. Since the Korean government becomes party to this administrative litigation, KMOJ manages the litigation by directing or jointly performing with KFTC. In cases where the Minister of Justice deems it necessary for the administrative litigation, he/she may designate staff of the Ministry of Justice, public prosecutors or public-service advocates (Article 6, Act on litigation to which the State is a party).