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Supreme Court Rulings on Determining the Cartel End Date

Seong Un Yun, Sung Ho Moon, and Nam Woo Kim[*]

Abstract

Since the very nature of cartels is to operate in ways that are undisclosed and difficult to track, it is often a matter of heated dispute in courts as to when a cartel has ended or been abandoned. Moreover, the cartel duration is a critical issue because it affects not only the level of sanctions imposed, but also the damages amount sought against the cartelists. The Korean Supreme Court has issued several important rulings regarding this matter, but there still remain areas where further guidance and clarification would be beneficial. Thus, this article explores the relevant Korean Supreme Court rulings and concludes that it is time for the highest court to further articulate the legal test for determining the ending date of a cartel in an effort to eliminate legal uncertainty and establish clearer guidance for market participants.

Key Words: Cartel, Conspiracy, Statute of limitations, MRFTA, Abandonment of cartel, Withdrawal from cartel, End of cartel, End date of the cartel, Cartel duration, Antitrust, Competition

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I. Introduction

A cartel under competition law refers to any group or association formed by competing firms to achieve anti-competitive objectives such as raising prices or reducing output. A cartel is formed when a group of competing firms reaches an express or implied agreement to dampen

* Seong Un Yun is a partner (Member of Korean and New York Bar), Bae, Kim & Lee LLC. Sung Ho Moon is a senior foreign attorney (Member of California Bar), Bae, Kim & Lee LLC. Nam Woo Kim is a foreign attorney (Member of North Carolina Bar), Bae, Kim & Lee LLC and Doctor of Judicial Science (S.J.D.), American University, Washington College of Law (2010). The views expressed are those of the authors alone and do not represent the views of Bae, Kim & Lee LLC or any other institutions or organizations associated with the authors.

competition and engage in overt activities in furtherance of the agreement.

A cartel is generally considered to be the "supreme evil of antitrust"[1] and is reviewed under the per se rule or equivalent standard of review in many countries.[2] Owing to its tremendous damage to consumer welfare and economic efficiency, a cartel is given the highest enforcement priority in most jurisdictions including the Republic of Korea.

The shortest-lived cartels survived for only a few months, whereas the most persistent cartels endured for more than 20 years. For example, a cartel formed by a number of producers of peroxides, a chemical used in making plastic and rubber products, was found to have lasted for 29 years in Europe between 1971 and 1999.[3] While it is not clear to what extent cartel stability negatively affects the interests of consumers, it is self-evident, assuming equal overcharges for the duration of the cartel, that long-lived cartels are in general more harmful than short-lived cartels.

Since most cartels operate in a covert manner and cartel participants are often induced to cheat on cartels while avoiding detection, it is not easy to pinpoint the exact date on which collusive activities permanently ceased. As explored below, the duration of cartels is a critical factor in the enforcement of the Monopoly Regulation and Fair Trade Act (hereinafter **MRFTA**). Therefore, this article will cover Supreme Court decisions on determining the cartel end date as it relates to various matters of practical importance.

Chapter II of this article addresses some practical issues relating to the duration of cartels, including the cartel end date. Chapter III outlines the Supreme Court rulings on determining the cartel end date. Chapter IV closes this article by proposing that the present tests be further refined to

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1) Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (noted, as one of the drawbacks of compulsory sharing of essential facilities, that "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion").

2) Certain types of agreements are so likely to harm competition and to have little potential for social benefits or efficiencies that they require little or no inquiry into market power or actual anticompetitive effects.

3) The cartel was uncovered by Akzo's confession to the EU Commission. The cartel was formed by Akzo, Luperox, and Peroxid Chemie. With a total duration of 29 years, this cartel was the longest-lasting cartel ever uncovered by the EU Commission. *See* European Commission, *Commission fines member of organic peroxides cartel*, *available at* http://europa.eu/rapid/press-release_IP-03-1700_en.htm?locale=en.

provide legal certainty for market participants and the enforcement agency.

II. Practical Issues in Connection with the Duration of Cartels

In practice, it is often an important legal issue to determine the duration of a cartel or conspiracy because it affects the level of sanctions and damage amount that may be sought against the cartelists. More specifically, first of all, the duration of the cartel is important in that it allows for the determination of the date from which the statute of limitations begins to run. Under the MRFTA, the statute of limitations for violations of the MRFTA including cartel activity is five years starting from the date on which the Korea Fair Trade Commission (hereinafter **KFTC**), the antitrust enforcement agency in Korea, initiates its investigation or, if no investigation is initiated, seven years after the alleged cartel conduct ends or is completed.[4] Thus, depending on when the KFTC initiates its investigation, the statute of limitations period can run up to 12 years from the cartel end date. Particularly, because the seven-year statute of limitations period commences from the cartel end date, in practice, the issue as to when the alleged conduct was terminated often becomes a critical point of dispute.[5]

Secondly, the cartel duration is important in that it is one of the key factors to be considered in calculating the amount of the administrative fines to be imposed on the cartelists. The KFTC takes into account various aggravating factors, one of which is the conspiracy duration in determining the appropriate amount of the administrative fines to be imposed on the

4) Dogjeomgyuje Mich Gongjeonggeolaee Gwanhan Beoblyul [Monopoly Regulation and Fair Trade Act], Act No.13450, Sept. 25, 2015, Article 49 [hereinafter MRFTA]. Prior to its amendment in 2012, the statute of limitations for violations of the MFRTA including cartel activity was 5 years from the date of termination of the cartel and any investigation by the KFTC could not extend the statute of limitations period.

5) Supreme Court [S. Ct.], 2015Du37396, May 28, 2015 (S. Kor.). The statute of limitations continues to run unless the KFTC decision is issued to the defendants. The Supreme Court determined that the limitation period had expired because the KFTC decision was delivered to the defendants a day late.

conspirators.[6] Thus, to calculate the fine amount, the KFTC needs to determine the cartel start and end dates.

Thirdly, the KFTC considers the cartel duration in determining whether the case should be referred to the Prosecutor's Office for criminal prosecution. The MRFTA grants to the KFTC, the discretionary power to file a criminal complaint with the Prosecutor's Office.[7] To exercise this statutory power, the KFTC takes into account the cartel duration among various factors stipulated in the Guidelines for Criminal Complaint for the MRFTA Offenses issued by the KFTC.[8]

Lastly, the cartel duration is an important factor in calculating damages suffered by injured parties in civil cases. In civil cases, the amount of damages is usually considered to be the overcharge paid by the plaintiff as a result of the conspirators' charging supra-competitive prices during the cartel period.

As explained above, the cartel duration plays a critical role in issues related to, among others, statute of limitations, criminal liability and the amount of administrative fines and compensatory damages. Accordingly, in practice, it is a crucial matter to establish when the alleged cartel activity ended. However, this is still a grey area in Korea and the relevant law remains unsettled. This does not mean that the Korean Supreme Court has not provided any guidance in this area but, as shown below, the rules it has so far provided are unclear in a number of situations.

III. Legal Test to Determine CARTEL END DATE: Supreme Court Cases

1. Commencement of the Statute of Limitations Period

A cartel offense is committed when competing firms reach an express or

6) Article 55-3 of the MRFTA and the Guidelines for Imposition of Administrative Fines.

7) Article 71 of the MRFTA.

8) Dogjeomgyuje Mich Gongjeonggeolaee Gwanhan Beoblyul Deungui Wibanhaengwiui Gobale Gwanhan Gongjeonggeolaewiwonhoeui Jichim [Guidelines for Criminal Complaint for the MRFTA], Korea Fair Trade Commission Regulation No. 196, July 22, 2014.

implied agreement to lessen or eliminate competition. No overt act in furtherance of the agreement is required to constitute an unlawful conspiracy under the MRFTA. Thus, it is a legal question whether the statute of limitations period starts to run from the date of the unlawful agreement or begins to run anew after each overt act in furtherance of the conspiracy.

The Supreme Court addressed this question in 2006.[9] The Court ruled that the statute of limitations begins to run anew after each affirmative action is taken in furtherance of a conspiracy. Thus, the statute of limitations does not begin to run on the date of the conspiratorial agreement but on the date when the last overt act taken to achieve the purpose of the conspiracy is completed.[10] For example, if a group of competing firms reached an agreement on January 1, 2015 to divide up the market from February 1, 2015, and the parties began to sell the relevant product on February 1, 2015 in accordance with such agreement and the last sale at supra-competitive pricing was made on December 31, 2015, based on the Supreme Court ruling, the statute of limitations would run from December 31, 2015 and not from either February 1, 2015 nor January 1, 2015.[11]

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9) Supreme Court [S. Ct.], 2004Du11275, Mar. 24, 2006 (S. Kor.). The U.S. Supreme Court at an earlier time also addressed this question of law. The statute of limitations applicable to a criminal violation of the Sherman Act is five years after an offense has been committed. The U.S. Supreme Court in United States v. Kissel, 218 U.S. 601 (1910), rejected the argument that despite subsequent acts in furtherance of the agreement, *which by themselves were not actionable* [emphasis added], the statute of limitations should run from the time of the original agreement, holding that "if [the defendants] do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success." The U.S. Supreme Court in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) clarified this principle in the civil context by stating, "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business …. In the context of a continuing conspiracy to violate the antitrust laws, […] this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants […] the statute of limitations runs from the commission of the act. Thus, the statute of limitations runs from the commission of each act that is subsequent to the original conspiracy act. The party bringing the antitrust action must therefore show that the conspiracy continued into the limitations period." Further, the requirement that the acts be taken in furtherance of the conspiracy necessarily leads to a factual inquiry into the actual purpose and scope of the conspiracy.

10) Regarding abandonment or withdrawal, please *see infra* Chapter III. 3.

11) Like the Korean Supreme Court, the U.S. Court of Appeals for the Fourth Circuit in

On the other hand, in a bid-rigging case, the Supreme Court ruled that the statute of limitations begins to run from the date the conspiring parties participate in the last tender pursuant to the agreed conspiracy scheme.[12] In that case, the Seoul Metropolitan Rapid Transit Corporation (**SMPTC**) solicited bids in connection with the construction of a mall project. A consortium composed of a few data communications companies participated in the bidding process but the bid process initially failed because no other party submitted a competing bid. To prevent another bid process failure, the consortium members entered into an agreement with Lotte Data Communication Company (**LDCC**) under which LDCC would submit token bids or comp bids to enable the consortium to win the bid through a second bidding process. Based on such bid-rigging efforts, the consortium was ultimately awarded the project from SMPTC. The Court in that case held that the bid-rigging conspiracy ended on the date when the conspirators participated in the second bid, not on the date of the agreement, reasoning that (i) the conspiratorial agreement did not call for any other action in furtherance of the agreement other than LDCC's submission of token or comp bids in the second bid and (ii) the anticompetitive goal –bid rigging– was achieved by the bid participation.

The Supreme Court has established the rule that the statute of limitations does not begin to run until the purpose of the conspiracy is achieved or begins to run anew after each overt act in furtherance of a conspiracy. Simply put, the Court's rule is that the statute of limitations starts running from the time of abandonment or success.

2. Multiple Agreements and Cartel Duration

1) Existence of Principal Agreement

In a case involving certain graphite electrodes manufacturers, the Supreme Court addressed the question of when the statute of limitations

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United States v. A-A-A- Elec. Co., 788 F.2d 242 (4th Cir. 1996) held that the statute of limitations does not run on conspiracy claims until the last payment for goods delivered under the conspiracy has been made. *See also* United States v. Therm-All, Inc., 373 F.3d 625 (5th Cir. 2004) (held that the statute of limitations in an antitrust case starts to run from the last overt act in furtherance of the conspiracy).

12) Supreme Court [S. Ct.], 2015Du37396, May 28, 2015 (S. Kor.).

begins to run in a case where the cartelists entered into one principal agreement along with a number of subsequent ancillary agreements.[13] According to the facts found by the appellate court, a group of firms manufacturing and selling graphite electrodes conspired to engage in price fixing on a continuous basis by holding a series of meetings. The participating firms had a meeting on May 21, 1992 at which the principal scheme was formulated containing the details on how to successfully elevate prices. Thereafter, a series of meetings (five in total) had been held to coordinate their prices for the Korean market. Although no further meeting was held after April 1997, their price coordination continued until the end of 1997.

The Court clearly held that the statute of limitations does not begin to run "until the purpose of the conspiracy is accomplished," rejecting the cartelists' argument that the statute of limitations should run separately for each agreement made by the cartelists. The Court added that the subsequent agreements made through a series of meetings should be deemed to be parts of the total scheme to accomplish the purpose established by the principal agreement made on May 21, 1992. Thus, in case a principal agreement exists which provides the basic framework under which subsequent agreements are made to coordinate prices, the statute of limitations does not begin to run until every aspect of the principal agreement agreed to by the conspirators is completed.[14]

Nevertheless, the existence of a principal agreement is not a necessary factor to prosecute multiple conspiracies as a single cartel offense. As described below, the Supreme Court reiterated that a series of agreements even if not based on a principal agreement may still constitute a single cartel offense.

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13) Supreme Court [S. Ct.], 2004Du11275, Mar. 24, 2006 (S. Kor.).

14) The U.S. approach appears to be different from that of Korea's. Under the U.S. law, if each subsequent meeting to adjust price and output constitutes an actionable violation, it is deemed to be independently illegal from the original conspiracy. Obviously, such meeting restarts the statute of limitations. *See* Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 634 (3d ed., 2005) (cited Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997)).

2) Non- Existence of Principal Agreement

In case there is a principal agreement among the cartelists, each of the subsequent agreements does not constitute a separate cartel offense. Such succeeding agreements are no more than an overt act in furtherance of the principal conspiracy. Therefore, if this is the case, the statute of limitations starts to run on the date of the final act performed to achieve the purpose of the principal agreement.

The Supreme Court when confronted with the question of whether multiple conspiratorial agreements should each be treated as a separate conspiracy in case no principal agreement exists held that if the KFTC can prove that each act of the cartelists including a series of conspiratorial agreements has been conducted to achieve the same unlawful purpose, the KFTC may prosecute the multiple conspiracies as a single offense in which case the limitations period runs from the final act committed to achieve the unlawful purpose.[15] For this purpose, the KFTC must prove that the subsequent conspiratorial agreements and each overt act in furtherance thereof were rendered to achieve the same goal. The conclusion reached in making that determination will not be affected by an insubstantial deviation from the initial agreement or the change of a member of the cartel.

The same issue often appears in bid-rigging cases. In a case where multiple agreements were found among the conspirators, the Supreme Court recently ruled that each agreement of the conspirators constitutes a separate cartel offense, applying the same test discussed above.[16] In that case, a group of electric cable manufacturers conspired in 1998 to rig bids on a procurement project by Korea Electric Power Corporation (**KEPCO**), but the electric cable manufacturers failed to engage in bid-rigging and ended up submitting competitive bids in the subsequent bids. However, upon KEPCO soliciting bids for a new project, the manufacturers gathered again in 2000 and made specific measures to avoid the recurrence of the bid-rigging failure that occurred in 1999. The appellate court held that

15) Supreme Court [S. Ct.], 2007Du3756, Sept. 25, 2008 (S. Kor.); Supreme Court [S. Ct.], 2008Du16179, Jan. 3, 2009 (S. Kor.); Supreme Court [S. Ct.], 2008Du16339, June 25, 2009 (S. Kor.).

16) Supreme Court [S. Ct.], 2013Du6169, Feb. 12, 2015 (S. Kor.).

although a more structured agreement was made in year 2000 compared to 1998, such as adopting methods to prevent cheating, the 2000 agreement should be deemed to be a part of the conspiratorial scheme instituted in 1998 because both agreements are intended to achieve the same unlawful purpose. However, the Supreme Court reversed the ruling of the appellate court. The Supreme Court decided that the statute of limitations had expired for the 1998 conspiracy because the agreement made in 2000 was substantially unrelated to the 1998 agreement by observing that (i) the repeated failures to rig bids during 1999 did not represent merely temporary cheating behavior but may be deemed be a failed cartel; (ii) the 2000 agreement departed significantly from the 1998 agreement, and (iii) the 1998 agreement did not stipulate a scheme that would address bid-rigging failures. The Court concluded that only the 2000 agreement may be subject to the KFTC's review because the 2000 agreement cannot be considered to constitute any part of the cartel scheme established under the 1998 agreement.

In sum, the question of whether multiple agreements constitute a single cartel violation leads to a factual inquiry into the actual purpose and scope of the alleged cartel. If a subsequent agreement may properly be regarded as an overt act in furtherance of the original cartel, multiple agreements may still constitute a single cartel offense, regardless of whether each agreement individually is a cartel offense actionable under the MRFTA.

3. Abandonment or Withdrawal from Cartel

The Supreme Court held that cartels can be terminated by abandonment or withdrawal from the conspiracy.[17] In other words, the statute of limitations period begins to run from the date of abandonment or withdrawal. Unless all of the participating firms abandon or withdraw from a conspiracy simultaneously, the limitations period begins to run only with respect to the withdrawing conspirator.

In a relatively recent case, the Court rejected a cartelist's argument that withdrawal should be recognized when its price had been often reduced

17) Supreme Court [S. Ct.], 2007Du12774, Oct. 23, 2008 (S. Kor.).

while others' increased their prices. In that case, five sodium hydroxide manufacturers that held 95% of the Korean sodium hydroxide market conspired to raise prices. The price for sodium hydroxide manufactured by some of the cartelists had been reduced several times within a few months after the market prices of sodium hydroxide soared following each conspiratorial agreement made respectively in April 2003, September 2004 and October 2010.

The Supreme Court in that case held that the abandonment or withdrawal from all of the cartel members will be recognized if every participating member not only expressly informs the other conspirators of its withdrawal from the conspiracy but also takes affirmative action which undermines the conspiracy such as returning its prices to competitive levels. Further, the Supreme Court also held that the termination or abandonment of a cartel by all its members may be inferred from their conduct such as the members repeatedly engaging in price competition.[18)]

The Supreme Court also presented a similar but slightly different two-pronged test applicable to situations where less than all cartel members withdraw from the cartel. The Court held that the mere ceasing of collusive conduct is not enough to constitute withdrawal; but rather, a conspirator wishing to withdraw from the conspiracy must *expressly or impliedly* inform its co-conspirators of its withdrawal and also take affirmative action inconsistent with the purpose of conspiracy.[19)]

The Court appeared to distinguish cheating (i.e., a temporary price-cut) from conduct suggesting withdrawal by requiring express or implied notification of withdrawal to the other co-conspirators in addition to taking affirmative action against the conspiracy. Otherwise, the cessation of cartels could be found simply by cartel members engaging in any action against

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18) *Id.* The Court provided an example of a "factual situation insinuating that the cartel has been undermined." The Court said that a cartel is deemed to be undermined if price competition repeats for a considerable period.

19) The requirements for withdrawal from a cartel are similar in the U.S. and the EU. For the U.S., *see* United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65 (1978) ("Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach coconspirators have generally been regarded as sufficient to establish withdrawal or abandonment."). For the EU, *see* Cimenteries CBR and Others v. Commission, 2000 ECR II-491; Adriatica di Navigazione v. Commission 2003 ECR II-05349.

the conspiracy although such action is only an act of cheating with its perpetrator having no intention of abandonment or withdrawal from the conspiracy.

4. Corporate Restructuring and Cartel Withdrawal

In a relatively recent case, the issue of antitrust liability in the context of a spin-off was addressed by the Supreme Court. A corporate spin-off involves a company separating a division or business to form a new entity. In the case of a spin-off, a question arises as to whether the newly established company should assume the predecessor company's liability for MRFTA violations.

The KFTC found in 2005 that three fork lift manufacturers had been engaging in cartel conduct for approximately five years between December 1999 and November 2004.[20] One of the cartelists, Daewoo Heavy Industries (Daewoo), spun off its machinery division into Doosan Infracore (Doosan) on October 23, 2000, but the cartel continued its activities even after the spin-off. In that case, the KFTC included Doosan instead of Daewoo in its investigation report. In response, Doosan filed a challenge, contending that it should not be sanctioned for a cartel offense committed by its predecessor. The KFTC rejected Doosan's argument reasoning that (i) because the nature of a spin-off is a separation of a company into two equal entities, all of the rights and obligations of the relevant business division of Daewoo were assigned to Doosan as a result of the spin-off; (ii) the spin-off plan provided that all things connected with the operations of the spun-off business would be transferred to Doosan and Daewoo's cartel offense was clearly related to the spun-off business; (iii) Doosan and Daewoo may be deemed to be the same entity as Doosan continues to use the same facilities of Daewoo and is operated by the same workforce (including the employees who continued to engage in cartel activity); and (iv) the spin-off plan required Doosan to assume all obligations and liabilities of Daewoo related to the spun-off business which would include contingent liabilities, one of which would be the liability for the cartel offense.

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20) KFTC Decision, 2005-080, June 24, 2005 (S. Kor.).

However, the Supreme Court did not uphold the KFTC's decision,[21] but instead held that no liability should attach to the newly established company for any cartel conduct of its predecessor, because the KFTC had failed to uncover any illegal conduct of the predecessor prior to the spin-off. The Court in this case simply stated that no liability arises until the KFTC uncovers a violation of the MRFTA and because the violation of the predecessor was not uncovered prior to the spin-off, Daewoo cannot be held liable for Doosan's post cartel conduct. In other words, Daewoo is deemed to have withdrawn from the conspiracy by the spin-off while the newly established company, Doosan, can only be held liable for conspiracy that it engaged in after the spin-off.

The Court's interpretation gives rise to a situation where no liability can be attached to a company engaging in a spin-off, which is a form of demerger resulting in the break-up of a company into a number of new entities with the parent company ceasing to exist. This problem was solved by legislative enactment overriding the Supreme Court decision. The National Assembly enacted a new provision in the MRFTA, Paragraph 3 of Article 55-3, which empowers the KFTC to impose administrative fines on a company newly established through a corporate consolidation or spin-off as well as the predecessor companies existing prior to the consolidation or spin-off. In sum, a consolidation or spin-off does not safeguard a newly established company against legal sanctions for MRFTA offenses.

On the other hand, a business transfer case is still under controversy because no legislative solution has been achieved so far. A business transfer under Korean law is treated differently from a consolidation or spin-off in that a business transfer, unlike a consolidation or spin-off, does not automatically assign all of the rights and liabilities of the seller.

The KFTC, observing the distinctive legal nature of a business transfer, has ruled in many cases that a business transfer is sufficient to establish a withdrawal from a cartel.[22] For example, in a case where Samsung General Chemicals (SSGC), which was engaged in price-fixing for low density polyethylene film, sold its petrochemical business unit to Samsung Total (SST), the KFTC determined that SSGC withdrew from the conspiracy on

21) Supreme Court [S. Ct.], 2006Du18928, Nov. 29, 2007 (S. Kor.).

22) KFTC Decision, 2008-082, Mar. 5, 2008 (S. Kor.).

the date of the transfer of its petrochemical business unit to SST. However, in another business transfer case involving LG-Philips, the KFTC suggested that the transferee in a business transfer may be liable for the transferor's cartel offense. The KFTC in dicta mentioned that the transferee company should be liable for the transferor company's violation of the MRFTA if the transferor exercised control over the transferee in relation to the transferred business even after the date of the transfer.

The KFTC in a case involving Air France-KLM confirmed its position articulated as dicta in its LG-Philips decision.[23] In the Air France-KLM case, 12 air cargo carriers were fined for engaging in price fixing between December 1999 and July 2007. One of the 12 air cargo carriers implicated in the conspiracy, KLM, became a subsidiary of Air France on May 21, 2004 and sold its air cargo business to a wholly-owned subsidiary of Air France on September 15, 2004. Soon thereafter, Air France changed its name to Air France-KLM and the subsidiary which had acquired Air France's air cargo business, was renamed as Air France. Thus, Air France-KLM became a holding company owning two subsidiaries, KLM and Air France, both of which were engaged in the air cargo business. Consistent with its dicta contained in the LG-Philips decision, the KFTC determined that Air France-KLM cannot be deemed to have withdrawn from the conspiracy by virtue of the business transfer and thus the statute of limitations with respect to Air France-KLM does not begin to run on the date of the business transfer. The KFTC based its decision on the fact that Air France had sold its air cargo business to a wholly owned subsidiary, which continued to be under control of Air France after the transfer and further that the wholly owned subsidiary is no more than an alter ego of Air France. The KFTC thus decided that Air France-KLM should be liable for price-fixing for the entire cartel period while Air France only for the price-fixing carried out after the business transfer.[24]

Two divisions of the Seoul High Court, which is the appellate court for

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23) KFTC Decision, 2010-143, Nov. 29, 2010 (S. Kor.) (air cargo leaving from Korea); *See also* KFTC Decision, 2010-144, Nov. 29, 2010 (S. Kor.) (air cargo leaving from the Europe).

24) The KFTC seems to have referred to the decision by the European Court of Justice, Akzo Nobel and Others v. Commission, 2009 ECR I-8237 (held that companies higher up in the corporate chain can be held responsible for the conduct of companies over which they are deemed to exercise 'decisive influence.').

MRFTA cases, expressed conflicting views on this matter.[25] Division 6 of the Seoul High Court overturned the KFTC's decision while Division 7 upheld the decision. Division 6 held that the statute of limitations expired with respect to Air France-KLM on September 15, 2009, five years after the sale of its air cargo business to its wholly owned subsidiary, observing that (i) Air France-KLM had withdrawn from the price-fixing conspiracy by the business transfer; (ii) the facts uncovered (e.g., the same person served the chairman of both Air France-KLM and Air France and Air France-KLM continued to intervene in Air France's operation through a strategic management committee, and Air France-KLM received dividends from Air France) are not sufficient to prove that Air France-KLM induced Air France to participate in a price-fixing cartel.

The appellate court's split eventually called for the Supreme Court's review. The Supreme Court upheld Division 6's ruling.[26] But, this should not be read to mean that a business transfer is always sufficient to establish a withdrawal from a conspiracy. The Supreme Court stated that this rule may not apply if extraordinary circumstances are found where the transferee company's conduct may be deemed to be indistinguishable from the transferor company's conduct without specifying what would constitute "extraordinary circumstances."

5. Miscellaneous Issues

1) Leniency Application and Cartel Abandonment

The Supreme Court in a case involving a soy milk cartel held that filing an application for leniency with the KFTC should be deemed to be a withdrawal from the cartel.[27] In the soy milk case, multiple soy milk manufacturers conspired to raise the wholesale price for soy milk. The Supreme Court stated that a confession made in the form a leniency filing

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25) Air France-KLM appealed the KFTC's decision on price-fixing with respect to air cargo shipped from Korea to Division 6, whereas KFTC's decision with respect to air cargo shipped from Europe was appealed to Division 7.

26) For the U.S. court's decision, *see* Morton's Mkt. v. Gustafson's Dairy, 198 F.3d 823 (11th Cir. 1999) (selling business was sufficient to signal withdrawal from price-fixing conspiracy).

27) Supreme Court [S. Ct.], 2013Du987, Feb. 12, 2015 (S. Kor.).

to the KFTC is deemed to be sufficient to establish a withdrawal from a cartel, unless the leniency applicant fails to cease its cartel activity or the leniency marker granted by the KFTC is cancelled for failure to meet any of the requirements maintain the marker such as providing continuous cooperation until the end of investigation. Thus, the statute of limitations begins to run on the date of filing of an application for leniency.

2) Affirmative Action Required under the Supreme Court's Two-Pronged Test

According to the Supreme Court's two-pronged test for abandonment or withdrawal from a conspiracy, express or implied notice of withdrawal from the cartel to the other co-conspirators together with affirmative action repudiating cartel conduct is required.[28] The Court appeared to consider that the second prong of the test, affirmative action inconsistent with the object of the cartel, is necessary because express or implied notification to co-conspirators alone is often insufficient to signal the withdrawal from the cartel to the market. However, the only example of such affirmative action provided by the court so far has been the voluntary reduction of prices to a considerable extent.

In the absence of further court decisions on this matter, the KFTC has been providing directional guidance regarding what may constitute an affirmative action against a cartel. In an insurance interest rate fixing case, the KFTC ruled that express notification to co-conspirators is sufficient to constitute abandonment or withdrawal from a price–fixing agreement notwithstanding that no affirmative action was taken to reduce interest rates to competitive levels because it was not practically feasible to reduce the interest rate owing to the government regulation requiring prior approval.[29] In another case involving beverage price-fixing, the KFTC determined that the cartel ended on the date when the leading manufacturer, Lotte, applied for leniency and reduced its prices, reasoning that the cartel cannot be sustained without the participation of Lotte which had the largest market share and Lotte had played the role of price leader for the cartel.[30]

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28) Supreme Court [S. Ct.], 2007Du12774, Oct. 23, 2008 (S. Kor.).

29) KFTC Decision, 2007-443, Sept. 12, 2007 (S. Kor.).

30) KFTC Decision, 2009-249, Nov. 9, 2009 (S. Kor.).

In addition, the Supreme Court held that mere stoppage of collusive conduct is not sufficient to constitute an abandonment of a conspiracy. The Court set up the two-pronged test – express or implied notification of withdrawal and affirmative action against the cartel's goal. However, the two-pronged test may not properly work in certain situations. In a case where cartel participants resume competition immediately without taking any overt act in furtherance of the agreement, it would make no practical sense to require them to satisfy the two-pronged test because they do not engage in any act to fulfil the agreement. Simply put, the cartelists in this situation should be deemed to have already impliedly informed each other of their withdrawals and taken an affirmative action by returning to competition. Thus, the two-pronged test needs to be applied less strictly in such a case.

IV. Conclusion

This article reviewed the Supreme Court decisions relating to the cartel end date. The cartel end date is very critical in determining various legal issues relating to the statute of limitations, administrative fines, criminal prosecution, and civil damages. This is particularly so considering the fact that the level of sanctions for cartel conduct is very severe relative to other antitrust offenses governed by the MRFTA.

The Supreme Court has produced helpful precedents to resolve many practical issues relating to determining the date when a cartel is terminated or abandoned. However, despite these precedents, there still remain areas where further guidance and clarification would be beneficial. In particular, it is time the highest court attempted to further articulate the details of the test for "affirmative action" taken against a cartel which is one of the factors in determining whether a cartelist may be deemed to have abandoned or withdrawn from the cartel. The KFTC's rulings in this regard appear very helpful but are inadequate in providing the necessary legal certainty for market participants.