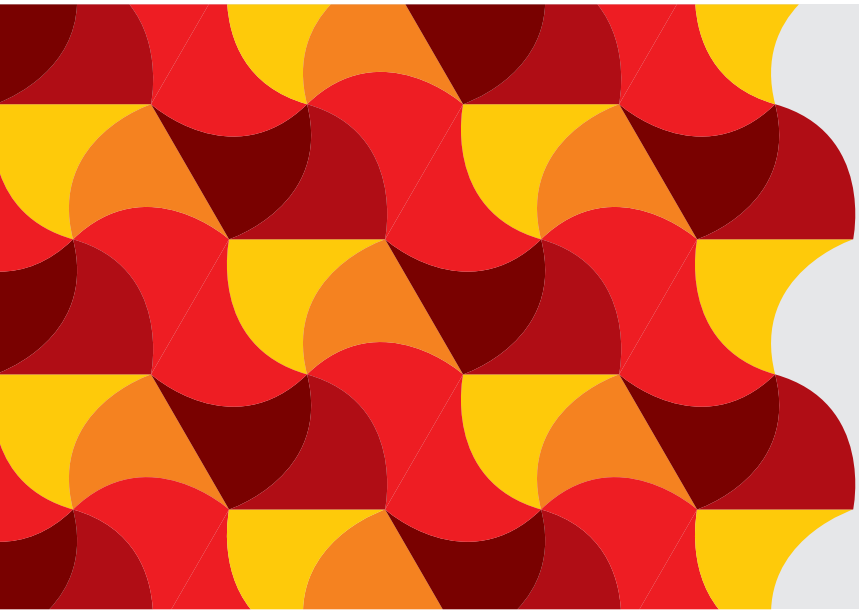
Registration Number
KOTRA19 - 056

2018 K-V Economic Cooperation Project

Enhancing Capacity for Effective Enforcement of Competition Legislations in Vietnam



Ministry of Economy and Finance
kotra Korea Trade-Investment Promotion Agency
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KOFAIR 한국공정거래조정원 KOREA FAIR TRADE MEDIATION AGENCY

Enhancing Capacity for Effective Enforcement of Competition Legislations in Vietnam

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Chapter 1

Introduction

1 Background and Purpose

In December 2016, the Vietnamese government asked the Korean government to provide support on the capabilities enhancement of fair competition to overcome the obstacles of the implementation of a healthy market economy at the "First Korea-Vietnam Free Trade Association joint committee meeting." Specifically, a request was made for the provision of Korea's experience to the leniency program and support to formulate measures that were suitable for Vietnam.

To briefly summarize, the Vietnamese government has devoted much effect to eradicate corruption and secure social transparency while implementing competition laws since 2005 to improve unfair trade practice and cartels, which are obstacles to the implementation of a healthy market economy. Against this backdrop, cartel activities in Vietnam have not been effectively regulated. This is demonstrated in the number of cartels detected by Vietnamese authorities, which, within ten years (2006-2016), consisted of only five instances. In addition, there were instances where local insurers engaged in collusion for more than 15 years.[1)]

1) Phạm Hoài Huấn, ThS, "Chính sách khoan hồng trong Dự thảo Luật Cạnh tranh nhìn từ lý thuyết trò chơi, "A Study on the Leniency Programs of Competition Law Drafts through 'Game Theory'" Nghiên cứu Lập pháp, Viện nghiên cứu Lập pháp, 06/2017, Số 11 (339), Available at http://lib.hcmulaw.edu.vn/opac/WShowDetail.aspx?intItemID=58525.

To address these problems and establish a healthy market economy, the Vietnamese government passed the amended law on June 12, 2018, which will take effect on July 1, 2019. Vietnam amended the competition law to conform to international standards and practices. The revised act included the establishment of an integrated competition authority with the introduction of a leniency program and newly regulated the expanded scope of the competition law. However, supplementing the expanded scope through secondary legislation and guidelines persisted.

With amendments to the Competition Law in Vietnam, the leniency program was also revised in 2018 and is now contained on a provision, Article 112 of the amended Competition Law. Thus, it is imperative for the Vietnamese government to establish regulations and guidelines to provide detailed procedures/clarifications as well as the specifications of the system.

As such, the fair competition capacity improvement project in Vietnam aims to establish a fair economic order within Vietnam by modeling a voluntary reporting system and providing knowledge sharing to implement the leniency program of Korea.

2 Scope and Expected Effects

This research aims to provide secondary legislation for the leniency program in Vietnam by analyzing the legislative system, competition-related laws, major industrial structures, and monopolies, and give analysis with the leniency program of Korea, OECD countries, and neighboring countries to come up with a suitable draft regulation for Vietnam.

Specifically, this research outlines the conceptual understanding of the leniency program, the advantages of introduction, and expected economic effects; provides a detailed explanation of the introduction of the leniency program in Korea; and explains the details of Korea's introduction of the leniency program as well as the reasons and specific procedures for revision to the enforcement system.

As Vietnam will be initially introducing the leniency program, relevant issues or questions that may arise through the introduction of the system is explained from the perspective of Vietnam. Furthermore, a comparative analysis is provided, which addresses the leniency programs of the United States, the European Union, some of the neighboring countries of Vietnam, and Korea.

At the end of this study, we analyze Vietnam's competition laws and cartel regulations and provide specific operational regulations for the leniency program in Vietnam.

Although the successful implementation of the leniency program in Vietnam can be achieved through a fair competition capacity improvement research project, the expected effect for the government will be the elimination of unfair trade practices such as cartels, transparency security in the market, and creation of a fair competition environment.

2
Chapter

Overview of Leniency Program in Korea

1. Conceptual Understanding of Leniency Program
2. Introduction of Leniency Program
3. Economic Effects of Leniency Program
4. Premise for the Efficient Operation of Leniency Program

Chapter 2

Overview of Leniency Program in Korea

1 Conceptual Understanding of Leniency Program

Cartels, an unjust cartel conduct that restricts competition among businesses, is prohibited by Article 19 Paragraph 1 of the Monopoly Regulation and Fair Trade Act (hereinafter referred to as the "Fair Trade Act"). The market economy should be according to the principle of providing free and fair competition for businesses across various transactional sectors. However, when cartels are permitted to exist, inefficient monopolistic markets are cultivated and are in direct contravention of the Fair Trade Act, which advocates consumer welfare and balanced development within the national economy.[2)]

While a primary objective of the Korea Fair Trade Commission (KFTC) is to detect and correct the existence of cartels, there have been difficulties because of the reserved nature of cartels. To address this issue, the US Federal Department of Justice, in 1978, introduced the "Leniency Program," which was effective in constraining cartels.[3)] As a result, competition authorities from various countries began to adopt a similar system. Furthermore, the OECD provided recommendations for the introduction of the leniency program,[4)] which is currently considered the

2) Korea Fair Trade Commission (KFTC), "Fair Trade White Paper 2018," p. 191.
3) Hyun-Jin Cho, "A Legal Study on Leniency - Focused on a Recent Supreme Court of Korea's Decision," Journal of Law and Politics Research, vol. 18, no. 3, 2018, p. 167.
4) OECD, "Report on leniency program to fight hardcore cartel," DAFFE/CLP(2001-13), 2001. 4.;

most effective system for detecting large cartels. To further assist with the dissolution of cartels, competition authorities in respective countries have collaborated to disseminate information and operate the leniency program through international cooperation.[5)]

The leniency program is a system where a participant in a cartel activity voluntarily reports the fact of participation and cooperates with the investigation, to which a competition authority exempts or reduces administrative sanctions such as corrective actions and fines.[6)] The leniency program induces voluntary reporting by a contributor to the cartel as well, thus prompting the detection of a cartel, disrupting the alliance between cartel operators, and preventing the establishment of a cartel. At the core of the leniency program is the prevention or cessation of cartel activities by disrupting any alliance that may be or is perceived by operators involved within a cartel.[7)]

2 Introduction of Leniency Program

Furthermore, competition authorities expeditiously secure evidentiary proof as key evidence is obtained from operators who are specifically involved in the commission of unfair cartel conduct, enabling competition authorities to save time and finances so that efforts may be focused to enhance the effectiveness of cartel regulations and the effective enforcement of laws.[8)]

Young-Hoa Son, "A Study for Leniency Programs in the Monopoly Regulation and Fair Trade Act," "Business Law Review," vol. 24, no. 2, 2010, p. 286.

5) Tae Hi Hwang, "Articles: A Study on the Current Leniency Program in Korea," Journal of Korean Competition Law, vol. 16, 2007, p. 72.

6) KFTC, op. cit, p. 192.

7) See Supreme Court of Korea, Decision of 14 January 2010, 2009Du15043; Oh Seung Kwon, Seo Jeong, "Korean Antitrust Law – Theory and Practice," Bobmunsa, 2016, p. 347: The Supreme Court thought that the main purpose of the leniency program is to prevent unfair joint actions in the future, and that the FTC's securing of evidence is considered to be an incidental derivative of the leniency program (Supreme Court of Korea, Decision of 3 June 2011, 2010Du28915); Sung Bom Park, "Practical Issues and Proposed Solutions for the Current Leniency Program - From the Perspective of Leniency Applicants," Journal of Korean Competition Law, vol. 26, 2012, pp. 14-15.

8) Hyun-Jin Cho, op. cit, p. 180.

While benefits to the leniency program do exist, there is criticism that the program is antithetical to the concept of justice. This contradiction is purported in that immunity is granted to an operator that has knowingly committed a prohibited act in violation of the law and that the voluntary reporter is favorably accommodated. From this perspective, it is reasonable to assert that the program provides a means to report the misconduct of a voluntary-reporting operator will little or no repercussion. However, the need to provide sanctions is essential because unfair cartel conducts cause significant social harm. While difficulties exist in ascertaining data to support the aforementioned statement, it is reasonable to have, in effect, preventive measures for cartels that provide relaxed administrative sanctions.[9)]

Corollary with criminal law, where a person who commits an offense confesses to the commission of a crime, a discretionary reduction is recognized. Thus, the leniency program can be deemed appropriate for implementation by the competition authority as a "golden bridge" that would serve as a basis for voluntary reporters to reenter the legitimate market economy by acceptance of the reduced administrative sanctions.[10)] Additionally, compared to the effect in the supplementation of the enforcement of unfair cartel conducts, the possibility of criticism received by a voluntary reporter is relatively low unless the voluntary reporter coerced or requisitioned such unjust cartel conduct.[11)] Thus, the administrative sanctions imposed on other operators, as a result of the voluntary reporter, is considered to be an incidental effect, of which the primary effect is that those who are in violation of the law are penalized, albeit through the reduction of administrative sanctions, is acceptable from the perspective of society.[12)] The warning that the reduction in sanctions should be proportionate to the level of cooperation of the voluntary reporter should be implemented to minimize the possibility of abuse.[13)]

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9) Hang Lok Oh, "Articles: Performance and Task of Antitrust Leniency Program," Journal of Korean Competition Law, vol. 16, 2007, p. 91; See Ibid, pp. 346-347 for the conflicting views of the system, the social justice theory, and the utilitarian view.

10) Myung Su Hong, "A Study on the Exemption from Leniency Programs in Monopoly Regulations Act," Journal of Korean Competition Law, vol. 26, 2012, p. 49.

11) Doo Jin Kim, "Articles: Leniency Program in the Anti-Monopoly and Fair Trade Act," COMMERCIAL CASES REVIEW, vol. 21, no. 1, 2008, p. 80.

12) Hang Lok Oh, op. cit, p. 91.

13) Semin Park, "Key Issues and Implications of the Leniency Policy," The Justice, no. 166, 2018, p. 306.

3 Economic Effects of Leniency Program

A. Consumer Harm Caused by a Cartel

A cartel, in which a few firms collude to supply most goods and services to the market, has an incentive to raise the price for those goods and services:

If the cartel increases the price, the increased margin will lead to a profit increase, and demand for those goods and services very likely diminishes as some consumers cannot afford to buy them anymore. Thus, before increasing price, the cartel would compare the expected increase in profit caused by the price increase with the expected loss in profit because of a decrease in demand. Finally, the cartel sets up the price in such a way that the positive effect caused by the price increase excels the negative impact brought about by the demand loss.

If the cartel raises the price for goods and services, consumer welfare could be worse-off as follows:

First of all, consumers should pay higher prices compared to the price they pay in the effectively competitive market. As the cartel is highly likely to provide most goods and services, consumers rarely could find alternative goods and services. Thus, they have no choice but to consume those goods and services with higher price compared to the effectively competitive market.

Next, some consumers cannot afford to buy those goods and services at a higher price. Therefore, in the case that the cartel increases the price, the supply of the relevant goods and services highly likely reduces compared to the competitive market.

According to OECD (2002)[14], the estimated harm in consumer welfare is expected to be 15%-20% of the total revenue that the cartel achieves.

The following table indicates the estimated harm on consumers that the cartel in the United States could do.

14) OECD (2002), "Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws," p. 9.

〈Table 2-1〉 Estimated harm because of cartels in the United States and sanctions[15)]

Country	Case	Estimated Harm	Sanctions (including damages to private parties where applicable)
United States	Lysine	78 million in U.S.	147.48 million; imprisonment for three executives
	Citric acid	100 million in U.S.	141.89 million
	Cairo wastewater	100 million	87.7 million

Source: OECD (2002)

The Bundeskartellamt[16)] reports that the cartel highly likely brings about at least a 15% increase in the price of affected goods.

The Bundeskartellamt concludes that when the international cartel manipulates the market, the price for affected goods is 18% higher compared to the case when they effectively compete.

They also conclude that when the domestic cartel governs the market, the average price for affected goods is 13% higher compared to the competitive market.

Regarding the price increase and output reduction, Ivaldi (2016)[17)] collected data related to collusion in developing countries to measure price increases because of collusion and estimate the resulting output reduction.

〈Table 2-2〉 Estimates of price overcharges and output losses

Industry(country)	Period of existence	Min △p%	Max △p%	Min △q%	Max △q%
Civil airlines(Brazil)	Jan 99 ~ Mar 03	3.20	33.90	10.00	24.2
Crushed rock(Brazil)	Dec 99 ~ Jun 03	3.40	11.25	15.69	25.80
Security guard services(Brazil)	1990 ~ 2003	4.80	27.84	14.93	23.15
Industrial gas(Brazil)	1998 ~ Mar 04	4.12	29.96	5.00	22.77
Steel bars(Brazil)	1998 ~ Nov 1999	5.49	37.84	10.99	27.81
Steel (Brazil)	1994 ~ Dec 99	13.55	40.13	5.00	29.22

15) Ibid, pp. 21-23.

16) Bundeskartellamt (2016), "Effective Cartel Prosecution: Benefits for the Economy and Consumers," pp. 15-16.

17) Ivaldi, Marc, Frédéric Jenny, and Aleksandra Khimich (2016), "Cartel Damages to the Economy: An Assessment for Developing Countries," pp. 14-15.

Industry(country)	Period of existence	Min △p%	Max △p%	Min △q%	Max △q%
Medical gases(Chile)	2001 ~ 2004	37.50	49.40	2.00	14.93
Petroleum products(Chile)	Feb 01 ~ Sep 02	4.57	9.90	10.43	23.35
Construction materials(Chile)	20 Oct 06	47.78	83.48	7.24	22.95
Petroleum products II (Chile)	Mar 08 ~ Dec 08	1.78	11.13	9.63	18.99
Cement(Egypt)	Jan 03 ~ Dec 06	28.20	39.3	5.00	10.00
Average for the category		14.04	34.01	8.68	21.94
Average		24.02		15.41	
Median		18.6		16.9	

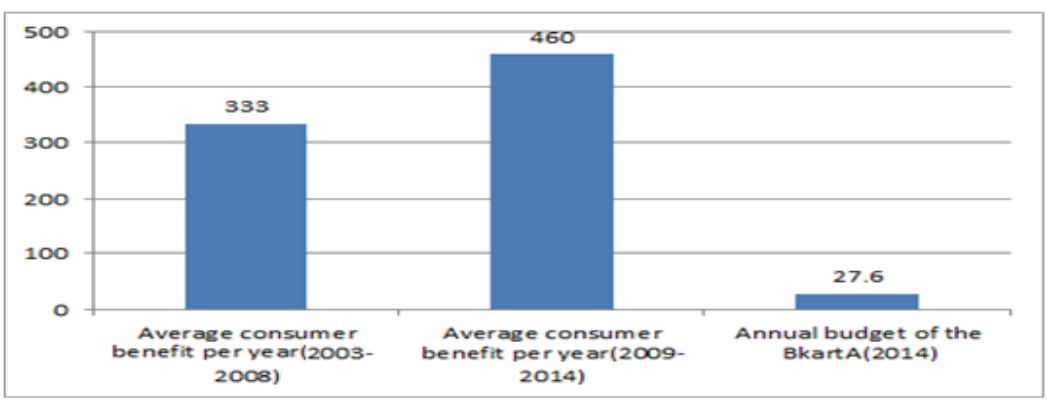
Source: Ivaldi et al. (2016) / Price increases are measured, and output decreases are estimated.

Although the difference between the minimum (Min) and maximum (Max) price increase rate and the output reduction rate is significant, the above table shows that if collusion occurs, prices will increase while output will decrease.

Besides, considering cases in which cartels were imposed on sanctions from 2009 to 2014, the Bundeskartellamt estimates the consumer benefit from the prosecution of cartels as follows.

[Figure 2-1] Estimated direct consumer benefit from the prosecution of hardcore cartels by the Bundeskartellamt

unit: EUR million per year



Source: Bundeskartellamt (2016)

The Bundeskartellamt concludes that consumers benefited EUR 2.75 billion from the prevention and prosecution of the cartel.

Therefore, the competition authority needs to protect consumers from estimated harm and damages caused by the cartel.

Conversely, in addition to the effect of collusion on consumers, Ivaldi et al. (2016)[18] estimated the portion of collusion among businesses in the overall economy, as demonstrated in the table below. More specifically, Ivaldi et al. (2016) calculated the proportion of that excess interest in a country's GDP if the entity obtained excess interest through collusion and derived the proportion of related sales revenue in that country's GDP as well.

〈Table 2-3〉 Aggregated Indicatorss

Country	Aggregated excess profits/GDP, %		Affected sales/GDP, %	
	Average	Max(year)	Average	Max(year)
Brazil(1995-2005)	0.21	0.43(1999)	0.89	1.86(1999)
Chile(2001-2009)	0.06	0.23(2008)	0.92	2.63(2008)
Colombia(1997-2012)	0.001	0.002(2011)	0.01	0.01(2011)
Indonesia(2000-2009)	0.04	0.09(2006)	0.50	1.14(2006)
Mexico(2002-2011)	0.01	0.02(2011)	0.05	0.11(2011)
Pakistan(2003-2011)	0.22	0.56(2009)	1.08	2.59(2009)
Peru(1995-2009)	0.002	0.007(2002)	0.01	0.023(2002)
Russia(2005-2013)	0.05	0.12(2012)	0.24	0.67(2012)
South Africa(2000-2009)	0.49	0.81(2002)	3.74	6.38(2002)
South Korea(1998-2006)	0.53	0.77(2004)	3.00	4.38(2004)
Ukraine(2003-2012)	0.03	0.03(2011)	0.15	0.16(2011)
Zambia(2007-2012)	0.07	0.09(2007)	0.18	0.24(2007)
Average	0.14		0.9	

Source: Ivaldi et al. (2016)

18) Ibid, pp. 16-19.

As shown in the table, the ratio of excess profit to GDP in 2004 was about 0.77%, while the average ratio between 1998 and 2006 was 0.53%. In Korea, the sales revenue related to collusion on GDP averaged around 3% during the same period. Ivaldi et al. (2016) concluded that collusion had a significant impact on the economies of the surveyed countries.

The table below illustrates the data that was used to derive the 〈Aggregated Indicators〉.

〈Table 2-4〉 Availability of quantified impacts of detected cartels (numbers)

Country(period)	No. of cartels recorded	No. of cartels with data on sales	No. of cartels with data on overcharges
Brazil(1995-2005)	18	17	17
Chile(2001-2009)	17	16	16
Colombia(1997-2012)	18	17	17
Indonesia(2000-2009)	12	8	8
Mexico(2002-2011)	17	17	17
Pakistan(2003-2011)	14	14	14
Peru(1995-2009)	11	10	10
Russia(2005-2013)	15	11	11
South Africa(2000-2009)	37	23	23
South Korea(1998-2006)	26	26	26
Ukraine(2003-2012)	7	7	7
Zambia(2007-2012)	7	1	1

Source: Ivaldi et al. (2016)

B. Benefits from Leniency

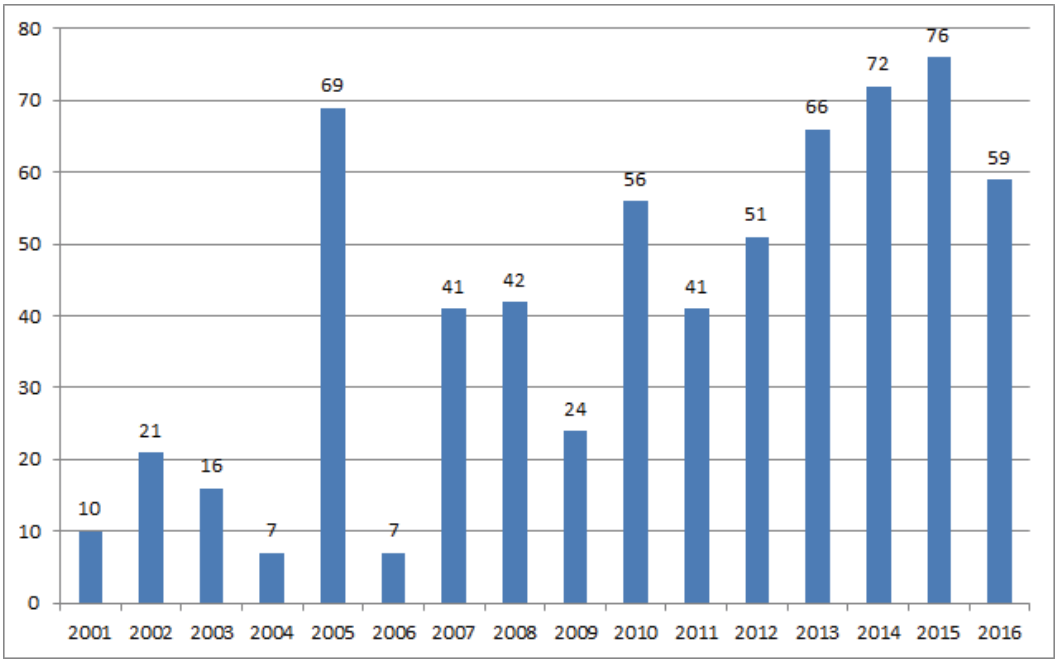
Leniency program is such that a member who voluntarily confesses the cartel is exempted from sanctions and any other penalties.

The US Department of Justice used the leniency program to detect and

prosecute the cartel, and they sanctioned 90% of USD 2 billion, which was the total amount of fines imposed on the cartel, from 1997 to 2004 through the leniency program.[19]

The following figure indicates that the leniency program is also an important tool to detect and prosecute the cartel in Germany.[20]

[Figure 2-2] Number of leniency applications received by the Bundeskartellamnt 2001-2016



Source: Bundeskartellamnt (2016)

If the leniency is used to detect and prevent cartels, consumer welfare is protected from harm and damage.

19) KFTC (2009), "11-year of Implementation of the Leniency Program, Outcomes, and Challenges"; Nam Hoon Kwon, "An Economic Analysis of Leniency in Korea," The Korean Journal of Industrial Organization, vol. 18, no. 4, 2010, p. 46.

20) Bundeskartellamt (2016), "Effective Cartel Prosecution: Benefits for the Economy and Consumers," p. 20.

〈Table 2-5〉 Number of penalties for unfair cartel conduct by year and the use of the leniency program[21)]

Year	'02	'03	'04	'05	'06	'07	'08	'09
Number of cases of fines	14	11	14	23	27	24	43	21
Number of the use of the leniency program	2	1	2	7	7	10	21	13

Source: Kwon, Nam Hoon (2010)

C. Economic Analysis of Leniency Program

It is difficult to find the previous literature that directly analyzes the economic effect of the leniency program.

Alternatively, we indirectly analyze the economic effect of the leniency program by estimating the future consumer savings brought by the prosecution and deterrence of the cartel even though they are not necessarily done by using the leniency program. This analysis is based on OFT (2007)[22)] and Lee (2007).[23)]

We do not directly analyze the economic effect of the leniency program. Instead, we estimate the future consumer savings by stopping the operation and existence of the cartel already detected. This is another way we can indirectly analyze the economic effect of the leniency program.

Now, we introduce the approach suggested by OFT (2007) and the analysis proposed by Lee (2007). OFT (2007) suggests the method to estimate future consumer savings, while Lee (2007) applied this method to real cases to estimate future consumer savings.

How to calculate future consumer savings by dismantling and prosecuting the

21) Nam Hoon Kwon, "An Economic Analysis of Leniency in Korea," Korea Academic Society of Industrial Organization, 2010, p. 45.

22) OFT (2007), "Positive Impact 06/07 – Consumer Benefits from Competition Enforcement, Merger Control, and Scam Busting," pp. 29–33, pp. 36–39.

23) Lee, Kwang Hoon (2007), "An Analysis of Economic Effects of Law Enforcement Activities of the Fair Trade Commission," Korea Academic Society of Industrial Organization, quotation of pp. 72–76, reorganization of pp. 109–147. However, Lee's study analyzed the economic effects of the FTC's law enforcement activities by applying the methodology of OFT (2007) to Korean cases.

operation of the cartel through the competition authority's intervention.[24)]

First, consumer savings at a certain time are measured by relevant turnovers of firm members belonging to the cartel. Next, the number of years in which the cartel would have remained operational for the competition authority's intervention is evaluated. Finally, future consumer savings are derived, considering two estimates mentioned earlier.

〈Table 2-6〉 Consumer welfare measures to be retained in the event of dissolution of an cartel conduct

Act	Detailed Classification	Method for the Calculation of Annual Sales Related to Unjust Cartel Conduct	Method for the Determination of Additional Expected Duration of Unjust Cartel Conduct	Increase Rate for Price / Consumer Damage Rate Estimation Method
Cartel Conduct	General Cartel	Participating Business Related Sales Figures	• If the duration of the offense is less than seven years or if there is no data on the duration ⇒ Six years • If the duration of the offense exceeds seven years ⇒ 1.4 × (duration of the offense) - 3.5 years	The rate of increase of 10% derived in the investigation process

Source: Lee (2007)

1) Measuring the annual impact of the cartel in terms of consumer savings

① $a = t \cdot p$

a = annual impact, t = turnover of affected goods or services, p = price increase caused by the cartel

② Measuring the annual impact: We consider turnover relevant to only the goods and services of firms (involved in the cartel), which are affected by the cartel. Thus, we exclude the turnover of other firms as the price of goods and services of other firms is supposed to be unaffected by the cartel.

※ When the cartel has a vertical structure, only the turnover of goods and services in the downstream market closest to the consumer is considered.

24) Lee (2007) mentions that the methods to calculate the future consumer savings adopted by countries are similar to each other.

③ Measuring the price increase: When the price increase caused by the cartel is observed, it would be used. Otherwise, USSC and OFT support using a 10% price increase.

2) Estimating the additional duration of the cartel if competition authority does not intervene

Estimating the additional duration: If the historical duration[25] of the cartel is within seven years, the cartel can be expected to be operational over another six years without the authority's intervention. If the authority detects the existence of the cartel, which has been operational beyond more than seven years, it can be expected to last 1.4 times the existence time observed of the cartel minus 3.5 years.

$$E(c) = 6 \quad \forall y \leq 7$$
$$E(c) = y \times 1.4 - 3.5 \quad \forall y > 7$$

c = number of years cartel may be expected to last
y = historical duration of cartel

3) Calculate future consumer savings that will be lost because of cartel conducts

Considering both annual impact of the cartel from "1)" and additional duration of the cartel for the competition authority from "2)", the present value of the future consumer savings is derived as follows.

$$f = \sum_{s=1}^{c} a/(1+\rho)s$$

f = future consumer savings
c = number of years cartel would have been active without thecompetition authority's intervention
ρ = forward-looking social discount rate

25) OFT (2007) calls this method the rule of thumb.

4) Example

〈Table 2-7〉 Case about the economic value of cartel regulation by KFTC

No.	Firms Prosecuted	Annual Impact of the Cartel (hundred million)	Historical Duration of the Cartel (year)	Additional Duration of the Cartel (year)	Price Increase	Future Consumer Savings (hundred million)
1	Nine firms to produce and sell the polypropylene	4,583	11	12	0.1	4,166
2	Eight firms to produce and sell wheat flour	7,397	7	6	0.1	3,898
3	Three firms to manufacture wheel excavator	7,240	7	6	0.1	3,816
4	Eight firms to produce and sell high-density polyethylene	3,684	11	12	0.1	3,350
5	Two manufacturers to produce tires	4,878	7	6	0.08	2,057

Source: Lee (2007)

Consider case No. 1; it indicates that the annual impact of the cartel is KRW 4,583 hundred million, a 10% price increase is supposed to occur, and the cartel already had existed over 11 years before it is detected by the competition authority. Then, the additional duration of the cartel equals (1 × 1.4 - 3.5) since the historical duration of the cartel, which equals 11 years exceeds the critical value, 7 years. Thus, supposed that the social discount rate 5.5%, future consumer savings are derived as follows.

$$4{,}166=\sum_{s=1}^{12}(4{,}583\times 10\%)/(1+5.5\%)s,$$

※ Here, the social discount rate is supposed to be 5.5%.

5) Economic value of the cartel regulation by KFTC

① Lee (2007) estimates that KFTC's law enforcement from January 1, 2005, to June 30, 2007, is worth KRW 4 trillion 9,120 hundred million.

〈Table 2-8〉 Economic effects of KFTC's law enforcement (presumption)

Type	Freq.	Consumer Savings (hundred million)
Merger	8	4,712
Cartel	75	37,547
Prohibited activities of enterprises' organization	58	1,418
Prohibition on the abuse of market dominance	16	3,373
Prohibition on unfair business practices and resale price maintenance	35	2,070
Total	192	49,120

Source: Lee (2007)

② The number of cases relevant to the cartel equals 75 of all cases is 192. Excluding cases related to the bid-rigging from the 75 cases, the future consumer savings through the cartel regulation are derived from the remaining cases as follows.

③ The manufacturing sector is separated from the nonmanufacturing sector as there is a significant difference between the two sectors in terms of turnover of the affected goods and services.

④ The difference results in the disparity in terms of future consumer savings.

⑤ In the manufacturing sector, the duration of the cartel is, on average, 7.4 years. In the nonmanufacturing sector, the duration means averagely less than seven years.

⑥ In the manufacturing sector, the annual impact of the cartel averagely equals KRW 1,993 hundred billion. When the cartel is broken up by the detection of the competition authority, consumers will enjoy the future savings, which is worthy of KRW 1,242 hundred billion over 6.6 years in the future.

⑦ In the nonmanufacturing sector, the average annual impact of the cartel is worth KRW 785 hundred billion. When the cartel is prosecuted by the competition authority, future consumer savings are expected to be KRW 392 hundred billion over six years.

〈Table 2-9〉 Comparison between manufacturing sector and nonmanufacturing sector

	Variable	No. of OBS	Mean	S.T.D	Min	Max
Manufacturing Sector	No. of the cartel members	22	7	4	2	15
	Turnover of the cartel (hundred million)	23	1,993	2,313	10	7,397
	Historical cartel duration (year)	23	7.4	1	7	11
	Future consumer savings (hundred million)	23	1,242	1,417	5	4,166
Nonmanufacturing Sector	No. of the cartel members	18	6	4	2	19
	Turnover of the cartel (hundred million)	22	785	1,327	3	4,071
	Historical cartel duration (year)	22	7.0	0	7	7
	Future consumer savings (hundred million)	22	392	630	2	1,902

Source: Lee (2007)

⑧ Classifying the manufacturing sector by KSIC10, the future consumer savings are shown in the following table. The future consumer savings seem to be relatively high in the food production and chemical manufacturing industry, etc.

〈Table 2-10〉 Future consumer savings from the cartel prosecution

KSIC 10 (first two digits)	Mean			
	No. of Cartel Members	Turnover of the Cartel (hundred million)	Historical Cartel Duration (year)	Future Consumer Savings (hundred million)
Agriculture (01)	5	9	7	5
Manufacture of food products (10)	7	2,167	7	1,142
Manufacture of chemicals and chemical products; except pharmaceuticals and medicinal chemicals (20)	7	2,178	8	1,562

KSIC 10 (first two digits)	Mean			
	No. of Cartel Members	Turnover of the Cartel (hundred million)	Historical Cartel Duration (year)	Future Consumer Savings (hundred million)
Manufacture of rubber and plastics products (22)	5	2,917		1,836
Manufacture of other nonmetallic mineral products (23)	9	121		64
Manufacture of fabricated metal products, except machinery and furniture (25)	6	2,350		7
Manufacture of electrical equipment (28)	4	1,061	8	7
Manufacture of other machinery and equipment (29)	3	4,585		7
Waste collection, treatment, and disposal activities; materials recovery (38)	4	181		7
Wholesale trade on own account or on a fee or contract basis (46)	6	62		7
Land transport and transport via pipelines (49)	12	30		7
Warehousing and support activities for transportation (52)	19	183		7
Broadcasting activities (60)	2	23		7
Postal activities and telecommunications (61)	4	1,749	7	7
Financial service activities, except insurance and pension funding (64)	12	3,608		7
Other personal services activities (96)	4	17		7
Mean of total	**6**	**1,372**		**7**

Source: Lee (2007)

4 Premise for the Efficient Operation of Leniency Program

Based on the current empirical research undertaken on the effectiveness of the program, the consensus is that the detection and prevention of cartels, there is a significant positive effect as a result of the leniency program.[26)]

For effectiveness to occur, the leniency program necessitates that the following prerequisites are satisfied: ① the sanctions against the operators involved in the cartel must be significant;[27)] ② business operators who abstain from voluntary reporting must be fully aware that their risk of being exposed is significant; and ③ the advantages and disadvantages associated with voluntary reporting must be clearly comparable to promote certainty and transparency of the leniency progra m.[28)]

As such, when immediate gains, attainable through voluntary reporting, are greater than the gains from maintaining cartel conduct, the desired objective of the leniency program is ascertained.[29)] However, to achieve this and to prompt business operators to voluntary report, an easily accessible comparison of the advantages and disadvantages must be provided to secure the predictability and transparency of the leniency program.[30)]

26) Sung Bom Park, op. cit, p. 5.
27) In particular, the greater the amount of fines levied on cartel, the greater the effect will be according to relevant studies, which require a fine of more than five times the expected profit from the cartel to the extent that business operators stop cartel out of fear of fines to be imposed upon detection. Semin Park, op. cit, pp. 303-304.
28) Hyun-Jin Cho, op. cit, p. 167.
29) Na Young Kim, Yung San Kim, "The Determinants of Leniency Program Application and Its Effects on Antitrust Enforcement," The Korean Journal of Industrial Organization, vol. 18, no. 4, 2010, p. 91.
30) Doo Jin Kim, op. cit, p. 191; Sung Bom Park, op. cit, p. 6.

3
Chapter

Leniency Program in Korea

1. Performance of the Leniency Program in Korea
2. Implementation of the Leniency Program in Korea
3. Requirements and Effectiveness of the Current Leniency Program

Chapter 3

Leniency Program in Korea

1 Performance of the Leniency Program in Korea

A. Quantitative Growth of the Performance

With increased predictability and transparency of the leniency program in 2005, there has been a steady increase in detection rates.[31] From the total of 539 cartel cases from 1999 to 2017, in which fines were imposed, the leniency program was used in 301 cases, reaching 55.8%. Specifically, from 2005 to 2017, 297 out of 462 cases, 64.2% applied for the leniency program.[32] Currently, the leniency program is rooted in our society.[33]

Since the implementation of the leniency program 1997 and until 2004, the number of cartel detections averaged about one detection per year, which signaled the under the use of the program. This resulted from the analysis that there was ambiguity regarding the exemption requirements and the high degree of discretion of the Fair Trade Commission to grant exemptions and the extent of those exemptions that there was difficulty in predicting benefits operators obtain.[34]

31) KFTC, op. cit, p. 192.
32) Ibid, pp. 192-193.
33) Hyun-Jin Cho, op. cit, p. 169.
34) Hang Lok Oh, op. cit, p. 109.

Year	Total Number of case	Number of cases of fines	Number of cases in which the leniency program is applied (number of cases in which fines are imposed)	The ratio of the number of cases to the number of cases in which the plan is applied (%)
1999	34	15	1(1)	6.7
2000	47	15	1(1)	6.7
2001	43	8	-	-
2002	47	14	2(1)	7.1
2003	23	11	1(1)	9.1
2004	35	14	2(0)	0
2005	46	21	7(6)	28.6
2006	45	27	7(6)	22.2
2007	44	24	10(10)	41.7
2008	65	43	21(20)	46.5
2009	61	21	17(13)	61.9
2010	62	26	18(18)	69.2
2011	72	34	39(29)	85.2
2012	41	24	13(12)	50.0
2013	45	28	23(23)	82.1
2014	76	56	44(44)	78.6
2015	88	63	48(48)	76.1
2016	64	43	27(27)	56.3
2017	69	52	42(41)	78.8
Total	1,242	539	316(301)	55.8

B. Qualitative Assessment of Leniency Program

For cases where voluntary reporting or investigation cooperation was provided, the Fair Trade Commission was able to obtain detailed material that evidenced violations to the Fair Trade Act, which increased the likelihood of success for those litigated cases and resulting additionally to increased compliance by the defeated party. In addition, with the proliferate use of voluntary reporting through the leniency program, difficulty occurs in building confidence amongst business operators, which in turn weakens the basis of cartels. Where voluntary reporting was evidenced in any transactional sector, operators are more reluctant to cooperate with one another. Particularly, in sectors where voluntary reporting occurred for cartel conducts, the identical unjust act was not recommitted. Upon this analysis, the suggestion placed forth is that the leniency program could systematically undermine the foundation on which cartel could be formed.[35)]

2 Implementation of the Leniency Program in Korea

Order	Enactment/ Amendment	Effective Date	Main Contents[36)]
New	Establishment of Article 22(2) of the Act and Amendment to Article 35 of Enforcement Decree	April 1, 1997	- Establishment of the requirements of voluntary reporters within the leniency program a. Where the Fair Trade Commission may not have been able to obtain sufficient evidence b. Where the initial voluntary reporter provides the of necessary evidentiary material c. Cooperation is required until investigations are completed d. No conclusive evidence that the operator was the initiator of the cartel conduct or a business operator who coerced other operators in the commission of the cartel conduct
2001 amendment	Amendment of law(1) and	April 1, 2001	- Establishment of the standards for reduction or exemption of fines through the leniency program for voluntary reporters

35) Hang Lok Oh, op. cit, pp. 111-112.

Order	Enactment/ Amendment	Effective Date	Main Contents[36]
	the enforcement decree(2)		a. The initial voluntary reporter will have fines reduced by 75% or more b. The initial cooperator with investigation will have fines reduced by 50% or more c. For other voluntary reporters or cooperators of investigations will receive a reduction of fines within a range that is less than 50%
2005 amen dment	Amendment of law(2) and of enforcement decree(3) and establishment of the public notice	April 1, 2005	- Requirements for the leniency program a. A new requirement for reduction is that the cartel conduct must cease b. The requirement that the person is not the initiator of the cartel conduct or a business operator who has coerced other operators to commit the cartel conduct within the reduction requirements has been deleted - Standard for reduction or exemption c. Complete exemptions from fines and corrective orders for the initial voluntary reporter or the initial cooperator of investigations d. 30% reduction of fines and reduction of corrective orders for the second subsequent voluntary reporter or second subsequent cooperator of investigations - Others e. Civil servant investigators have an additional obligation to protect the confidentiality of voluntary reporters or cooperators f. Introduction of Amnesty Plus g. Introduction of a compensatory reporting system h. If the reduction is not accepted, the reduction can be provided to subsequent reduction applicants i. The application for exemption is prohibited by telephone (requires written submission by email or fax)
	Amendment of public notice	July 1, 2006	a. Verbal application for exemption is permitted b. After a simplified application for exemption is submitted, the correction period for the application is generally 15 days; however, for extenuating circumstances, the correction period can be extended to 75 days c. Upon reporting, by a third party through the

Order	Enactment/ Amendment	Effective Date	Main Contents[36]
			compensatory reporting system, reductions are permitted for subsequent voluntary reporting
2007 amendment	Amendment of law(3)	November 4, 2007	- Requirements of the leniency program a. The application of the voluntary reporting mechanism in the leniency program by a person who coerced other business operators in the commission of cartel activity is not permitted T ⇒. However, the application of the program is permitted for an operator who initiates cartel activity - Standard for exemption or reduction b. Complete exemption of fines and reduction or exemption of corrective measures for initial cooperators of investigations c. Amendment to the applicable rate for reduction of fines for the second subsequent voluntary reporter or the second cooperator of investigations (30% ⇒ 50%) - Miscellaneous d. To prevent the disclosure of the identity of voluntary reporters, the KTFC is to hear and decide each case separately (applicable only if a request is made by the voluntary reporter, applicant, etc.)
2008 amendment	Amendment of enforcement decree(4)	July 1, 2008	- Requirements of the leniency program a. Deletion of the requirement to cease cartel conducts by the initial cooperator of investigations b. Deletion of requirements for desisting from the cartel conducts by a second subsequent voluntary reporter or cooperators in investigations and the requirement for cooperation
2009 amendment	Amendment of enforcement decree(5)	May 13, 2009	- Requirements of the leniency program a. In the event that two or more business operators participated in the cartel conducts are affiliated companies with substantial control or for the case of a company that has divided or transferred operations to one of the affiliated company, a joint report is regarded as separate voluntary reporting (addition of the requirement for joint voluntary reporting) b. The time to desist from cartel conducts is generally,

Order	Enactment/ Amendment	Effective Date	Main Contents[36]
			desisting immediately after the application for exemption is submitted c. For extenuating circumstances, where a fixed period has been set, upon the expiry of such fixed period immediate cessation.
2011 amendment	Amendment of public notice	July 21, 2011	a. KFTC specifies reasons for the cancellation of status verification b. Expansion of the types and scope of materials to be submitted c. For those only cooperating in investigations, the reduction is to be provided by a penalty notice. d. New regulations are provided to extend the material correction period for international cartels to a maximum of 75 days from the date of receipt e. Adjustment the rate of penalty reduction for applicants of additional reductions
	Amendment of enforcement decree(6)	January 1, 2012	- Requirements of the leniency program Exclusion of exemption benefits for operators who are repeat offenders for a certain period
	Amendment of public notice(7)	January 3, 2012	a. In the event that a person who receives a corrective measure and an order for payment of a fine repeats the offense within five years from the date of receipt of a corrective measure for cartel conduct, the benefits of reduction and exemptions are not permitted. b. No reduction shall be made for a person who has been provided reductions or exemptions from corrective measures or fines for cartel conduct if there is the commission of the same act within five years of the reduction or exemption.
	Amendment of enforcement decree(8)	June 22, 2012	New regulations to limit reductions and exemptions for a second subsequent voluntary reporter are introduced to eliminate the effectiveness of cartels
	Amendment of law	January 17, 2014	- Standard of exemption or reduction Voluntary reporters or cooperators in investigations may be

Order	Enactment/ Amendment	Effective Date	Main Contents[36]
			exempt from prosecution pursuant to Article 71 of the Fair Trade Act
	Amendment of public notice(9)	January 2, 2015	a. The abolition of tentative status verification system b. Improvement of exemption restriction regulations for repeat offenders c. New regulation introduced to prevent denial of consent by a voluntary reporter d. Supplementation of regulations for necessary evidence to prove a cartel conduct e. New standards introduced to determine the reduction for the second subsequent voluntary reporter
	Amendment of law(10)	March 29, 2016	- Requirements of the leniency program A new regulation that excludes any benefit obtained where a new cartel occurs after the date of exemption
	Amendment of public notice(11)	September 30, 2016	a. Improve the process for the application of exemption b. Crystallization of additional reduction system and standards c. Reinforcement of requirements for ranking in succession d. Revision of standards to determine repetitive cartel activities

A. Leniency Program Newly Established in 1996

The former Fair Trade Act of 1996 (before the statutory instrument, Act No. 6371 of January 16, 2001) introduced the leniency program to which implementation occurred in the following year. With the introduction of the program, specific procedural provisions were insufficient, and the requirements and effects were unclear, which did not provide the certainty and incentive necessary for business operators to participate in the leniency program.[37] Particularly, the initial introduction excluded cases where a business operator coerced other business operators to engage in unfair joint acts, or where an operator initiating cartels with

36) Gun Sic Kim, "The Problem and Improvement Plan of Leniency Program Related to Proof of Agreements of Cartel," KOFAIR Research Report 2014-3, 2015. 5, p. 23 (See major amendments made until 2014).

37) Hyun-Jin Cho, op. cit, p. 168.

no further clarification provided for the concept of an "initiator."[38]

The reduction of administrative sanctions were approved for those who, before the commencement of investigations by the Fair Trade Commission and at the outset, voluntarily reported, in addition to the requirements to cooperate until the conclusion of investigations and that such reporter was definitively not an initiator of a cartel, or coerced others to participate in cartels. However, issues that occurred pertain to the scope of reduction, where the FTC had wide discretion as no specific criteria and procedural matters were provided. As such, the application requirements, procedures, and effects were unclear and thus uncertain, which did not prompt business operators to adopt the leniency program. Thus, to facilitate improvements to the leniency program, the issues aforementioned were supplemented within the legislation to revitalize the program.[39]

B. Amendment of 2001

The Fair Trade Act 2001 and its Enforcement Decree supplemented the initial leniency program by providing more detailed requirements and its effects. The scope of persons who could obtain exemptions was expanded by including a voluntary reporting operator who could obtain exemptions were expanded by including "a voluntary reporting operator" before the commencement of the investigation and a"cooperator in the investigation" upon the commencement of the investigation. For those who satisfied the criteria, the first voluntary reporter was provided with a reduction of 75% or more, the first cooperator in investigations received a reduction of 50% or more, and for any subsequent persons, the reduction that was attainable was less than 50%.[40]

Nevertheless, the issue of uncertainty continued to exist as the KFTC had wide discretion to the extent of reduction (75% or more) or complete exemption (100%) for initial voluntary reporters. Furthermore, while initiators of unjust joint acts continued to be excluded from the scope of persons provided exemptions, criticism continued to the interpretation of who an initiator of unjust joint acts was. To

38) Hyun-Jin Cho, op. cit, p. 174.
39) Hang Lok Oh, op. cit, pp. 92-93.
40) Ibid, p. 94.

further aggravate the proper functioning of the leniency program, institutional safeguards, such as confidentiality for voluntary reporters and cooperators of investigations, were lacking.[41]

C. Amendment of 2005

1) Introduction of Compensatory Reporting System

In 2005, the Fair Trade Act implemented a "compensatory reporting system," that provided compensation to persons that reported violations of the Fair Trade Act, which facilitated in the detection and verification of violations.[42] Korea was the first country to implement this compensation scheme, to which, in 2008, the United Kingdom benchmarked.[43] Comparatively, the leniency program is directed at those who are explicitly involved in the commission of the unfair joint acts; while the compensatory reporting system targets neutral third parties, not involved in any means with the commission of unfair joint acts and without any burden of penalization or administrative sanctions, with the expectation that active reporting will occur.[44] As the compensatory reporting system is independent of the leniency program, when a neutral third party reports and unfair joint act and the KFTC has already obtained relevant materials, for the same unfair joint act, a voluntary reporter can benefit from the reductions or exemptions that are provided as an initial voluntary reporter or cooperator in investigations.[45]

The KFTC will provide notification of any violation of the Act, and the person who is the initial submitter of evidentiary materials to prove such violations will receive compensation within the scope of the budget that has been appropriated for the KTFC (Fair Trade Act Article 64-2 and the Enforcement Decree Art. 64-7(1)). Within the regulations, under specified circumstances, contingencies exist where a refund is mandated (Art. 64-3 Fair Trade Act). This is exemplified in the exclusion of eligibility of compensation for a business who has committed an act that violates the Fair Trade Act.

41) Young-Hoa Son, op. cit, pp. 288-289.
42) Ibid, p. 286.
43) Hyeon Soo Kim, "Articles: A Study on the Incentives for Cartel Informants - Focused on the Leniency Program," Journal of Business Administration & Law, vol. 19, no. 3, 2009, p. 337.
44) Ibid, p. 337.
45) Ibid, p. 315.

2) Introduction of the Amnesty Plus System

While the leniency program has been proliferating in Korea, the extent and scope to which receiving the benefits of reduction or exemption are uncertain for what extent must an operator cooperate with investigations to obtain reduction or exemption. Additionally, concerns for the confidentiality of a voluntary reporter became apparent, which necessitated a mechanism to protect confidentiality and concerns that the current system permitted reduction benefits, to meet the current trends, to initiators of unjust joint acts and those operators who coerced other business operators in the commission of such acts.

To address these concerns, the amnesty plus system was implemented. This system provides that when a person, who is under investigation and is the initial reporter or cooperator in investigations of another unjust joint act, such person receives a complete exemption from administrative sanctions for the other unjust joint act such person receives a complete exemption from administrative sanctions for the joints of such acts. The intention of this system is to concurrently resolve the existing commission of an unfair joint act by the operator who is investigated and the related violation in law. The degree of additional reduction is dependent on the "other unfair joint act."[46)]

3) Reform of the Leniency Program

Upon the implementation of the leniency program and where the requirements for leniency are satisfied, the FTC has the discretion to provide reduction. As such, voluntary reporters were not provided certainty as to the provision of leniency, which effectively leads to the lack of use of voluntary reporting.

To further assist with the proliferation of the leniency program, the scope of the reductions were expressly stipulated in the law, which included the full exemption of fines for the initial voluntary reporter or cooperator in investigations, the reduction of fines by 30% for the second subsequent voluntary reporter or cooperator in investigations and the procedural application for leniency.[47)]

As the degree of reduction between the initial and second subsequent reporter

46) Hang Lok Oh, op. cit, pp. 96-97.
47) Ibid, p. 94.

significantly differ, and where any following reporters are not provided with leniency, this induces cartel participant to become the initial reporter, thus ensuring that there is an early disruptive effect to cartels. Particularly, the exemption for the initiators of unjust joint acts and coercers of unjust joint acts were deleted, and a new requirement for exemption was provided for which stipulated that the unfair joint act was to be ceased.

Pertaining to the initiating person, there is ambiguity surrounding the concept of the joint act. The ambiguity arises from whether the unfair joint act itself was commissioned on the basis of consensus between the operators, to which the initiator is the collective. Here, a determination becomes whether the concept of initiator is the "consensus" between the operators. However, to attain the objectives of this system, providing those initiating business operators exemption benefits would effectively diminish cartels.[48)]

For effective cartel regulations, it is essential to raise the level of sanctions and the detection rate for cartels while recalibrating the leniency program transparently. Thus, if the leniency program operates transparently, operators participating in a cartel will become skeptical of one another and effectuate impediments to the formation of cartels or dismantle cartels ex post facto.

In 2005, the complete revision of the leniency program significantly reduced the discretion of the FTC in the provision of leniency to provide certainty for voluntary reporters for the provision of leniency.

Furthermore, specific criteria and procedures that were established as internal guidelines were implemented in the Enforcement Decree and Notices to which the external effect demonstrated was the enhancement of transparency of the leniency program. By permitting only those persons who provided evidence to be exempted from corrective action, cartel participants were encouraged to report themselves.[49)]

The FTC revised the Fair Trade Act in 2004 to increase the penalty rate for cartels from 5% to 10 of related sales, significantly raising the risk, if detected, for those participating in cartels.

This comprehensive reform of the system provided the necessary opportunity for

48) Young-Hoa Son, op. cit, p. 189.
49) FTC press release, "Significant Improvement in the Leniency Program of Cartels," (April 4, 2005).

the voluntary reporting system to be triggered after 2005.

D. Amendment of 2007

Addressing the criticisms of the 2005 amendments: ① the Fair Trade Act and the Enforcement Decree provided a confidentiality guarantee system for voluntary reporters so that related matters of the voluntary reporter would not be provided for third parties except under extenuating circumstances provided for by the law; ② the Act and the Decree raised the rate of reduction to 50% for second subsequent voluntary reporter; ③ requirements for voluntary reporting are strengthened by imposing an obligation for candid cooperation in investigations;[50] and, ④ in addition, were excluded from the benefits of exemption because the likelihood for criticism for an act in violation of the law is greater.[51]

E. Amendment of 2009

The Enforcement Decree of the Fair Trade Act and the Voluntary Reporting Leniency Notice, which took effect in 2009, provided an opportunity to encourage more organic cooperation by allowing two or more businesses participating in the joint act to report their own business where a company was an affiliate whose governance relationship was interlinked, where a company separated, or where a company transferred part of its business operations.

The Voluntary Reporting Leniency Notice, as a requirement for an application for leniency, provided for the immediate cessation of the joint act after the submission of an application and in exigent circumstances, after the expiry of a period of time set as necessary for investigation. This requirement effectively prevented the continuation of obtaining the benefit of the joint act up to the completion of the investigation.[52]

In addition, the Leniency Notice stipulates that where two or more persons submit a joint leniency application and where a joint leniency application is

50) Hang Lok Oh, op. cit, p. 97.
51) Young-Hoa Son, op. cit, p. 291.
52) Gun Sic Kim, op. cit, p. 45.

canceled for some or where succession status, etc. is canceled or where leniency is invalidated or where for any other reason leniency is not recognized, those subsequent successors for the relevant leniency application will replace the position of those invalidated applicants (Article 9(3)) and that reapplying for leniency becomes infeasible (the latter portion of Article 8(2)(1)).

F. Amendment of 2011

Key components of the revised Leniency Notice, which were implemented on July 20, 2011 are: ① provision of the reason for the Committee for cancellation of status verification, ② increased scope and type of materials that must be submitted, ③ provision of reduction of fines for those who solely cooperated in investigations, ④ regulatory basis for supplementation of material for international cartels extended to no more than 75 days from the date of submission of an application, and ⑤ five conditions for the adjustment, etc. of fine reduction percentage of applicants for Amnesty Plus.[53)]

The previous Leniency Notice did not provide a legal basis for the reasons for the Committee to cancel the FTC's succession position confirmation. A further analysis provides that cancellation of status could be provided for if full cooperation was not provided until the deliberations of the Committee terminated, if submitted materials were falsified, where cessation of the joint act was not undertaken, coercion of collusion on another operator was undertaken, where submitted evidentiary materials were not recognized to substantiate the collusion of the accused, etc.[54)]

According to the previous Leniency Notice, "evidence necessary to substantiate a joint act" was limited to a written statement, which included documents, real property, asset materials, communication materials, etc., which was restrictive. However, the amended notice provided for a more comprehensive definition as to scope and type by stipulating, "documents, real property, asset materials, communications materials" in addition to "any other comparable evidentiary materials, when comprehensively

53) FTC press release, "Amendment Decision of Leniency Program," (July 22, 2011)
54) FTC press release, "Amendment Decision of Leniency Program," (July 22, 2011); Gun Sic Kim, op. cit, p. 27.

taking into consideration the relevant facts, substantiating the cartel."

In addition, the additional reduction rate of fines was adjusted for the applicants of Amnesty Plus, and the previous Leniency Notice uniformly applied an additional reduction rate (20%) for applicants of Amnesty Plus, which resulted in illogical results such as in instances where there was a large fine compared to those subject to Amnesty Plus were equally provided an additional rate reduction of 20% where the fine was minimal.[55]

In addition, the additional reduction rate was amended from the uniform "20%" to "up to 20%" so that the Commission could reasonably determine the reduction rate through a relative comparison of the size of the two joint acts.[56]

G. Amendment of 2012

The Enforcement Decree of the Fair Trade Act, as amended on January 1, 2012, provided that operators who repeatedly violate the law for a certain period would not be entitled to a reduction in fines or other benefits of the leniency system (Article 35(1)(5)).[57]

Accordingly, the January 3, 2012, amended Leniency Notice provides that ① if a person in contravention of Article 19(1) who has received a corrective order and the payment of a fine violates the relevant corrective order by committing any contravening act to such order within five years of receiving the corrective order, or ② if a person in contravention of Article 19(1) is ordered to take corrective action or is exempted from or is provided with a reduction of a fine or commits the same offense within five years since when leniency was granted, etc., such person will not be provided with any leniency benefits.

Furthermore, in June 2012, to improve the effectiveness of collusion sanctions, restrictions on the second subsequent reporter were newly provided for in the Enforcement Decree.

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55) FTC press release, "Amendment Decision of Leniency Program", (July 22, 2011); Gun Sic Kim, op. cit, pp. 28-29.
56) Ibid, FTC press release; Gun Sic Kim, op. cit, p. 29.
57) Gun Sic Kim, op. cit, p. 29.

H. Amendment of 2014

Key provisions of the December 2014 amendments to the Leniency Notice include: ① repeal of the provisional succession status verification system, ② improvement to rules limiting leniency for repeat offenders, ③ establishment of cautionary rules as to the denial of consent by a voluntary reporter, ④ supplementing rules pertaining to the necessary evidentiary materials to substantiate a joint act, and ⑤ establishing the criteria for determination of reduction for second subsequent reporters, etc.[58)]

Specifically, the provisional succession status verification system was repealed, and the related provisional status verification system before the resolution of the FTC provided by the former head of the Secretariat was revoked as well. The Secretariat was required to report to the Committee the applicant's submitted material, circumstances relating to cooperation, and the surrounding circumstances to determine that matters related to succession verification.

In addition, the provisions concerning limitations to the leniency of repeat violators (Paragraph 1) in violation of the relevant corrective order within five years from when such order was provided were deleted as many issues occurred with the interpretation of the "relevant corrective order" and the possibility of voluntary enforcement of the law. Furthermore, where a person who has received leniency and within five years from receiving a resolution for leniency commits a violating act (Paragraph 2) that continues with the current act, to eliminate the unreasonableness of voluntary reporting after a significant time has lapsed since such act continued, an exemption for violators were provided for stipulating, "cases where five years have lapsed from the day such violators have received leniency."

Furthermore, a precautionary provision was included so that persons who had been granted leniency could not deny consent as a voluntary reporter by disclaiming the facts.

58) Ibid, pp. 29-30.

I. Current Leniency Program

In September 2016, the Leniency Notice was once again amended to include: ① revisions to the procedures for leniency applications, ② detailed criteria for Amnesty Plus, ③ strengthened requirements for succession, and ④ revised determination criteria for repetitive collusion.[59]

Concerning the method of application for exemption, the criteria were clearly stipulated to require submission only through visits or dedicated faxes and emails with the head of the FTC's cartels according to the Civil Act principle of arrival. Regarding an on-site submission of an application, where demanding circumstances existed, the leniency application could be made verbally when the applicant submitted on-site, to which the principle of arrival was determined by when the recording began.[60]

To improve upon Amnesty Plus, detailed criteria was established for when more than one joint act was committed. In other words, the additional exemption system for the sequential detection of collusion is based on the fact that a person who missed the chance to voluntarily report a joint act (the "concerned joint act") and where such person voluntarily reported "a different joint act" and was granted initial reporter status, in providing leniency, the rate of reduction for the joint act should be determined according to the size of the different joint act. However, when the concerned joint act and different joint act are to be compared, as there are no specific criteria, a difficulty arises in the determination of the reduction rate. Thus, the determination of the reduction rate is provided by comparing the total amount of both joint acts and selecting a reduction rate upon which such rate is applied uniformly to all joint acts.[61]

In addition, to strengthen the requirements for ranking succession, leniency rank can be recognized only when the corresponding leniency requirements are satisfied. The basis of this amendment was strengthening succession requirements to ensure that excessive leniency was not granted where the subsequent applicant did not additionally contribute to the detection of collusion. According to the strengthened

59) FTC press release, "Cartel Leniency Program Notification Amendment," (September 27, 2016).
60) Ibid, FTC press release.
61) Ibid, FTC press release.

requirements of the rank succession, for those next in succession to the initial reporter has, the same requirement apply that state "where the FTC is not able to obtain sufficient evidence." Where the FTC has obtained sufficient evidence from the initial reporter and where the status of the initial reporter is revoked for such initial reporter, the second subsequent reporter would not succeed to initial reporter status.[62)]

In 2009, a new regulation was introduced to which operators who satisfied certain requirements were permitted to apply for leniency as one operator. In 2014, leniency was provided for such applicants for corrective measures, fines, and additional exemption from indictment under the Fair Trade Act. Thus, with the amendments in 2005, the Fair Trade Act and the Enforcement Decree of the same Act has maintained the larger framework while specifically addressing the necessary details.[63)]

3 Requirements and Effectiveness of the Current Leniency Program

A. Requirements of Reduction under Current Law

Voluntary reporting does not mean that the unjust joint act committed by the reporter becomes nonexistent; it means that to receive reduction from administrative sanctions for the unjust act in violation of the law, the voluntary reporter must admit to the commission of such act, and there must be an exceptional reason for the reduction to apply. Accordingly, the current Fair Trade Act provides for reduction or exemption if there is voluntary reporting and where the initial or the second subsequent voluntary reporter satisfies certain requirements.

The requirements for exemption provided for by the Fair Trade Act are as follows.

62) Ibid, FTC press release.
63) Young-Hoa Son, op. cit, pp. 292-293.

1) A person that provides the necessary evidentiary material to prove the commission of the unfair joint act[64]

For the relevant unjust joint act, the initial voluntary reporter or the second subsequent voluntary reporter must provide necessary evidentiary material to prove the commission of such act to be considered for applicable exemptions. The initial voluntary reporter means ① a business operator who, before the commencement of investigations, exclusively provides the KFTC with the evidentiary materials to prove the commission of the unfair joint act or ② a business operator who provides the necessary evidentiary materials after the investigation begins.[65] The categorization of a business operator are: under the aforementioned ① a "voluntary reporter" and in ②"cooperator in investigations" (Article 2, Nos. 1 and 2 of the notice of exemption).[66] Pertaining to the cooperator in investigations, the scope is limited to operators who provide evidence where the Fair Trade Commission has insufficiency of evidence. Where evidentiary materials are provided for jointly, having satisfied specified requirements, i.e., instances where there is a substantive governance relationship between two or more operators (Paragraphs 1(1) and (3) of Article 35 of the Enforcement Decree and Article 4-2(2) of the Notice of Exemption), such evidentiary materials will be regarded as being provided by a sole operator. While such circumstances are designated under the classification of "joint exemptions," there is a need to clarify the definition of such designation so as "joint exemptions" is closely interpreted to mean "substantive governance relationship."[67]

The second subsequent voluntary reporter is defined as a person that subordinately and voluntarily reports an unfair joint act or cooperates with an investigation that is subject to the reduction of fines or corrective measures when satisfying certain requirements.[68]

The specifics of leniency program are as follows: ① where the KFTC has not obtained information about the relevant unfair joint act or where insufficient necessary evidentiary materials for the unfair joint act persists, the operator that cooperates in the investigation will be recognized as an "initial" reporter; and ② where the KFTC

64) Enforcement Decree Fair Trade Act Art. 35 (1) Subparagraph 1 - (a), (b).
65) Oh Seung Kwon, Seo Jeong, op. cit, pp. 348-349.
66) Hyun-Jin Cho, op. cit, p. 170.
67) Sung Bom Park, op. cit, p. 12.
68) Hyun-Jin Cho, op. cit, p. 170.

commences with investigations and where a sole operator who cooperates with investigations by providing the necessary evidentiary materials for the unfair joint act, such operator is recognized as the second subsequent reporter (Fair Trade Act Art. 22-2(1) and Enforcement Decree Art. 35(1)(3)(Ga) and (Na) and 35(1)(1)(Da)).

Evidentiary materials, regardless of form, to be submitted should expressly demonstrate the unfair joint acts occurred; or detailed material that substantiates the fact, using 5 Ws and 1 H, that unjust joint acts were discussed and material that can indirectly substantiate such discussions (Article 4 of the Notification of Reduction). For evidentiary materials already secured by the KFTC, the evidence provided should demonstrate supplementary support to the secured evidence.[69)]

In practice, after an on-site investigation of the Fair Trade Commission, most voluntary reports are affected. Thus, reporting by business operators are frequently undertaken after the KFTC has already obtained relevant evidence and materials. As such, the issue that becomes apparent is the actual scope and extent of materials provided by business operators. To elaborate, as there is uncertainty to whether statements expressing involvement in unfair joint acts by executive and employees can be considered "demonstrative additional evidence," this could be the rationale underlying the reluctance to report voluntarily.[70)]

Therefore, if the burden of proof is increased to satisfy all the requirements concerning whether an act was an unfair joint act, it may run contrary to the objectives of the program. As such, if the core requirements of the joint act can be proved, it is reasonable to take a broader approach.[71)]

The Supreme Court of Korea has a relatively broad understanding of the scope of evidence required to demonstrate "unfair joint acts" because there is no restriction on the form or type of evidence to obtain the benefit of reduction. Under this presumption, additional data that verifies or supplements information provided in secured or pre-existing evidentiary materials will qualify.[72)] In addition to "necessary evidence" taking on the definition as evidence that can directly or indirectly prove unfair joint acts, which is inclusive of witness statements, etc..[73)]

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69) Tae Hi Hwang, op. cit, p. 78.
70) Sung Bom Park, op. cit, p. 8.
71) Ibid, p. 9.
72) See Supreme Court of Korea, Decision of 23 May 2013, 2012Du8724.

Key Case Regarding the Submission of Evidence for Voluntary Reporting

The "evidence must substantiate the unjust joint act" and is not limited to the document, but additionally includes statements (Supreme Court September 25, 2008 case reference number 2007Du3756).

To be considered the second subsequent cooperator in investigations or the initial cooperator of investigations, such cooperator must submit"the evidence necessary to substantiate an unfair joint act." However, if a statement is excluded or if the statement in itself is insufficient, in addition to the statements of participants in the joint act, other evidentiary materials must be provided. If such is not possible, the relevant person is not deemed to be a voluntary reporter, etc. and from a systemic perspective, such is in contravention to the purpose of the leniency program (Supreme Court March 21, 2012 case reference number 2011Nu26239).

The "evidence required to substantiate an unjust joint act" does not necessarily limit itself to evidence directly substantiating an unjust joint act but includes evidence that indirectly substantiates an unjust joint act (Supreme Court October 23, 2008 case reference number 2007Du2920).

Thus, unless there is any special provision in the law, evidence that can strengthen the provenance of evidence already submitted or reinforce the veracity of the factual relationship uncovered at the investigatory stage can also be considered to be "evidence necessary to substantiate an unjust joint act" (Seoul Court of Appeals March 21, 2012 case reference number 2011Nu26239).

Concurrently, regarding the decision of a relevant business operator to voluntarily report during the period in which the business did not participate, the Supreme Court stated that a series of agreements collectively formed one unjust joint act and that the implementing operator participated in the joint act only with respect to a portion of the total joint act period. Moreover, the initial submission of evidentiary materials for the entire period by the relevant business operator would be recognized as the initial cooperator in investigations. As for other participating business operators and the acquisition of the status of initial cooperators in investigations, there has been a ruling that for those additional business operators, who cooperated in investigations and submitted evidentiary material of an unfair joint act during the period that the initial cooperator in investigations did not participate, such operators would not be viewed as a separate initial cooperator for the relevant period.[74)]

73) See Supreme Court of Korea, Decision of 25 September 2008, 2007Du3756.

Case Related to the Recognition of Rank and Submission of Materials for Voluntary Reporting

If business operators have reached consensus on the basic principles of unfair joint act and on several occasions in the course of implementation, and even if they have reached consensus over a long period without agreement on such basic principles, if each consensus has been performed without disconnect with a single intention, even if there have been some changes to the specific contents or members of each consensus, the series of consensus will be deemed as one unjust act (Supreme Court January 30, 2009 case reference number 2008Du16179).

If the joint act is with a single intention to implement such act for the same purpose to perform the same purpose, the first operator to provide evidence for the relevant joint act will be deemed the initial reporter for the collective acts. It is not necessary to be the first to provide evidence for the period for the totality of collusion, but much like this case, when considering the period for the totality of the collusion, where the initial voluntary reporter, although participation in the collusion was short, may still be deemed initial reporter status (Seoul Court of Appeals March 21, 2012 case reference number 2011Nu26239).

2) Continuous and Forthright Cooperation

A voluntary reporter or cooperator in investigations (hereinafter referred to as the "voluntary reporting party") shall cooperate in a forthright manner until the end of the investigation[75] to which the standards for forthright manner are determined on ① whether the voluntary reporting party provided all relevant facts such party is in knowledge of without delay; ② whether all materials pertaining to the unfair joint act that are retained or collected are submitted promptly; ③ whether response to cooperation was undertaken promptly, and such party cooperated in the investigations; and ④ whether evidentiary materials and information related to unfair joint acts had been tampered, destroyed, manipulated, defiled, or otherwise disposed (Exemption Notice, Article 5(1)). In addition, if a voluntary reporting party discloses to a third party the fact that a reduction was applied without the consent of the committee before the deliberation of the KFTC is concluded, the duty of forthright cooperation will be deemed to be violated (Exemption Notice, Article 5(2)).

Furthermore, the timing of the submission of relevant materials by a voluntary reporting party, except under extenuating circumstances, is perceived as a significant

74) See Supreme Court of Korea, Decision of 8 September 2011, 2009Du15005; Supreme Court of Korea, Decision of 12 February 2015, 2013Du987.

75) Item (b) of Subparagraph 1 of Paragraph (1) of Article 35 of Enforcement Decree Fair Trade Act; Oh Seung Kwon, Seo Jeong, op. cit, pp. 350-351.

consideration in the determination of the degree of cooperation.[76]

The Supreme Court recently ruled that before voluntary reporting, where relevant evidence was destroyed, the duty of forthright cooperation arises, in principle, from the time of voluntary reporting or at the point where cooperation in investigations began. As the duty of forthright cooperation assumes that the voluntary reporting party must provide all relevant facts related to the violation and submit relevant evidentiary materials, even if the act of destroying evidence was performed before the voluntary reporting or the commencement of cooperation in investigations, the destruction of evidence will inevitably affect the forthrightness of the act of voluntary reporting or cooperating in investigations, with exception to extenuating circumstances. Thus, the destruction of evidence, as at the time where voluntary reporting or where cooperation in investigations begins, is determined to be the submission of insufficient evidence and as such, the duty is deemed to have been violated.[77]

Case Regarding Full Cooperation

On April 9, 2012, the Fair Trade Commission conducted an on-site investigation related to cartel activities of Company "A," to which "A" deleted materials pertaining to the joint act, which was stored on the company's computer by reformatting the computer.

From the date where such destruction of evidence occurred, Company A, approximately one month later, on May 18, 2012, submitted a leniency application as the second subsequent voluntary reported.

The judgment of the Supreme Court is as follows. It is necessary to consider the time because the act of the destruction of evidence related to the unfair joint act by Company A must be regarded in relation to whether to cooperate in investigations in the near future. Company A voluntarily reported at a time that was proximate and was found to have submitted insufficient evidence at the time of voluntary reporting through the act of destroying evidence and as such determined that A did not provide full cooperation in voluntary reporting or in cooperating with investigations. Thus, it was determined that Company A, "for the relevant joint act, the applicant shall provide the testimony of all relevant facts, submission of evidentiary materials, etc. in full cooperation until the end of investigations," was not satisfied (Supreme Court July 11, 2018 case reference number 2016Du46458).

76) Seoul High Court of Korea, Decision of 12 April 2012, 2011Nu27584
77) See Supreme Court of Korea, Decision of 11 July 2018, 2016Du46458

3) Desisting of the Relevant Unfair Joint Act

With regard to desisting from unfair joint acts, Article 22-2(1) of the Fair Trade Act and Article 35(1)(1) of the Enforcement Decree of the same Act only stipulates that the requirement for an initial voluntary reporter or initial cooperator in investigations, in regard to desisting from unfair joint acts, is that "the unjust joint act has been desisted from."

Cessation of Cartel Activities Case

To prove that the unfair joint act has ceased, all participating operators in the agreement must expressly state that the agreement has been terminated, and each participant must readjust to the decreased price levels to which the prices would have been if no collusion was undertaken. In addition, the circumstances must demonstrate that the agreement has been effectively terminated through the continuation over a certain period to recognize that the collusion has actually ceased through repeated price competition between the participants.

Where some of the operator stipulate withdrawal from the agreement to other operators, for the agreement to be deemed continuously ceased, the average price level as a whole must be decreased rather than the decrease of the average price levels of such operators, as the time when the agreement has ceased will be regarded as the time where all participants, who agreed to the agreement for price levels, begin to decrease price (Supreme Court October 23, 2008 case reference number 2007Du12774).

However, there is no requirement for "the act to have been a priori proactively discontinued." Furthermore, according to Article 35(1)(3) of the Enforcement Decree of the same Act, the equivalent requirement applies for second subsequent voluntary reporters or cooperators in investigations. In response, the Supreme Court held that the meaning of the above requirement for desisting from unfair joint acts in the context of the relevant provisions should be interpreted correspondingly, and if the above requirement only meant "a priori discontinuation of the unfair joint acts," other operators who participated the unfair joint acts, with exception to those who first desisted from the joint act, would have difficulty satisfying the above requirement. This, in turn, would result in the nonrecognition of the second subsequent voluntary reporter or cooperator in investigations.[78)]

Voluntary reporting party and others shall immediately cease to engage in unfair

78) See Supreme Court of Korea, Decision of 27 December 2016, 2016Du43282.

joint acts subject to the relevant investigation after application for the reduction of exemption, except as necessary for investigations.[79] Whether to desist from an unfair joint act is determined based on whether the act under the agreement has been terminated.

In relation to the desisting of the performance of the unfair joint act under agreement, the Supreme Court determined that among those operators who participated in the unfair joint act, those to desist would need to: ① provide an express or implied statement of withdrawal from the performance of the agreement from another business operator; and ② according to an independent judgment, that if the relevant cartel did not exist, the price standard would be decreased if an operator had not participated in the act.[80]

Cessation of Cartel Activities Case

The Enforcement Decree of the Fair Trade Act for the cessation of joint acts stipulates, "the unfair joint act shall be ceased" and does not provide a requirement to the proactive cessation of the joint act before reporting. If the requirements of voluntary reporting are interpreted as being satisfied only for those who proactively cease joint activities first, as claimed by Company A, the remaining participants will no longer be entitled to leniency benefits even if they stop the joint act first and postpone the voluntary reporting for an extended period, which is not consistent with the objective and purpose of the leniency program.

Therefore, the Supreme Court determined that Company A did not meet the requirements of the initial voluntary reporter or cooperator in investigations solely because Company B had voluntarily reported the joint action first and was recognized as the legitimate initial voluntary reporter (Supreme Court December 27, 2016 case reference number 2016Du43282).

4) Passive Requirement (Reduction Exemption Provision)

A voluntary reporter must not coerce any other business operator, against the intention of such operator, to participate in the relevant unfair joint act or coerce such operator to continue with the relevant unfair joint act, and such voluntary reporter must not duplicate the relevant unfair joint or participate in a new unfair joint act (Article 35(1)(5) of the Enforcement Decree). In addition, if two business

79) Item (d) of Subparagraph 1 of Paragraph (1) of Article 35 of Enforcement Decree Fair Trade Act; Oh Seung Kwon, Seo Jeong, op. cit, p. 352.
80) See Supreme Court of Korea, Decision of 23 October 2008, 2007Du12774, etc.

operators participate in the unfair joint act to which it is determined that the two are considered one, no reduction shall be provided (Article 35(1)(6)). The interpretation of the current Fair Trade Act, for the exemption from the application of the leniency program, for an operator are: ① an operator who coerces any other to participate in the act; ② a repeat offender of the same act; and ③ an operator who is the second subsequent voluntary reporting party when the act is performed by two operators.

Requiring such strict requirements is consistent with the intention of the leniency program, which prevents strategic use of the system to eliminate competing businesses from the relevant market and inhibits unfair joint acts.[81)]

Whether coercion of any other operator, in contravention of the intention of such operator, to participate in the relevant unfair joint act, or the coercion to continue with the relevant unfair joint act occurred is determined based on: ① whether any other operator was subject to assault, intimidation, etc.; and ② whether, in the relevant market, the exercise of normal business activities was difficult because of intimidation, sanctions, etc.

In practice, assault or intimidation is rarely a problem. The issue in Korea, where a monopolistic market exists, is the interpretation of the ② requirement. Particularly, because of the lack of clarity to the determination of "the extent of intimidation or sanctions that cause difficulty to normal business operations," whether the appropriate legal interpretation should be "actual coercion."[82)]

As for the interpretation of a repeat offense of an unfair joint act, an unfair joint act will have been repeated, if upon the day of receipt, a corrective measure or an order for the payment of a fine to the expiry of five years from such date, the same unfair joint act for which such measure or order recurs (Exemption Notice Article 6-3). From this perspective, a business operator that receives administrative sanctions within the five-year time limit will be excluded from reduction benefits, participating in the leniency program is perceived as not beneficial resulting in a more concealed recurrence of the relevant unfair joint act. Thus, the detection of such recurring unfair joint act becomes problematic.[83)]

81) Hyun-Jin Cho, op. cit, p. 173.
82) Sung Bom Park, op. cit, p. 16.

Explained previously, the leniency program is considered a waiver from the principles of justice and the sentiment of the law to promote the effectiveness of regulations to which the application of the leniency program to operators who repeatedly committed unfair joint acts is objectionable. To safeguard against the detrimental effect of the exemption, provisions of the leniency program and empirical analysis is necessitated, to which whether the determination of "recurrence" should be judged upon the past and the period.

In the same context, a similar discussion occurs for two business operators who participate in the joint act and whether the second subsequent reporter is exempted from the reduction benefits. If there is no exemption for the second subsequent reporter, there is no incentive to report such act. However, allowing "all" operators involved in the joint act to obtain reduction benefits would run contrary to what is considered just.[84)]

B. Effect of a Voluntary Reporter Satisfying the Criteria of the Leniency Program

An operator who participates in an unfair joint act is subject to necessary measures to desist from the act and other corrective measures that the KFTC determines (hereinafter referred to as "corrective actions"). Specifically, the corrective actions that the KFTC can exercise for an unfair joint act are: if the relevant act is continued, an order for cessation; and if the relevant act is terminated, an order to prohibit such act in the future (Article 21 of the Fair Trade Act).

In addition, a fine will be imposed to the extent that it does not exceed KRW 2 billion where no turnover exist for the relevant operator(Article 22) and where there is a turnover, less than 10% of the relevant sales.[85)]

Furthermore, those who commit unfair joint acts or those who caused participation in such act are subject to a sentence of not more than three years imprisonment or a fine not exceeding KRW 200 million under Article 66 of the

83) Ibid, pp. 14-15.
84) Ibid, p. 19.
85) Tae Hi Hwang, op. cit, p. 74.

Fair Trade Act. This may be imposed on the operator, the company, or the individual according to the joint and severable punitive provisions. An indictment by the KFTC is the condition for prosecution, to which where the KFTC is under the duty to indict to the Prosecutors' Office in the event that the KFTC determines that the degree of the violation of the law is objectively clear and grave and that the competition order is significantly undermined (Article 71 Fair Trade Act).

However, if the exemption criteria are satisfied, the KFTC may reduce or exempt the voluntary reporting party from corrective action or fine, or criminal charges (Article 22-2(1)). If criminal charges are exempted, the actual criminal penalties (according to Article 66 Fair Trade Act, imprisonment not exceeding three years or a fine not exceeding KRW 20 million) are exempt as well. The Fair Trade Commission has full authority to indict those in violation of the Fair Trade Act, as such, the possibility of prosecution by the Prosecutors' Office is nil without an indictment by the KFTC.[86)]

As to whether the principle of subjective indivisibility applies to an indictment by the KFTC for unfair joint acts, the Supreme Court ruled that there was no explicit stipulation, and that Article 233 of the Criminal Procedure Act, which stipulates the principle of subjective indivisibility of an indictment concerning a crime subject to indictment, has no basis to be considered for the application of prosecution under Paragraph 1 of Article 71 of the Fair Trade Act. The court continued by stipulating that, in the light of the principles of criminal justice, to extend the scope of criminal punishment to those who are not indicted by the Fair Trade Commission was not recognized, and thus, those who violate the Fair Trade Act that has not been indicted by the KFTC cannot effectively have the effect of indictment placed on those operators who participated in the unfair joint act, but were not indicted.[87)]

However, for exemption from the indictment, unless the violation of law was grave and sufficiently clear to incite the indictment duty of the KFTC, the discretion for exemption is with the KFTC. Furthermore, even if a voluntary reporting party obtains a reduction from corrective actions or fines, criminal charges may not be exempted, reiterating the point that the KFTC can impose

86) Doo Jin Kim, op. cit, p. 93.
87) See Supreme Court of Korea, Decision of 28 July 2011, 2008Do5757.

administrative sanction concurrently with criminal punitive actions.[88]

For a voluntary reporter, fines and corrective action are exempted; while cooperators in investigations will receive an exemption from fines, but reduction or exemption for corrective actions (Article 35(1) and (2) of the Enforcement Decree of the Act).

C. Procedure of the Leniency Program

1) Application for Exemption

Business operators shall submit an application for exemption and evidence necessary to prove that the law is violated. At this time, the application for reduction can be submitted directly, by fax, by email, or by an oral application if a written submission is impossible. In the case of an oral application for exemption, the inspector shall preserve the contents in a recording or video.

According to Article 10 of the examinations of a public notice, KFTC shall promptly issue a receipt stating the date and ranking of the application.[89] Voluntary-reporting persons shall immediately cease their unfair joint acts after applying for a reduction unless they are necessary for investigation.

In addition, if there are special circumstances that require a long time to collect evidence, the evidence data can be posthumously corrected after submitting a simplified application. The simplified application is similar to that of the United States and the European Union, and the applicant should state his identity and an outline of the unfair joint action. In principle, the post-mortem correction is 15 days, and it is allowed to extend the correction of evidence to up to 75 days in exceptional cases, such as applying for exemption from the international cartel case to other competition authority.[90]

Meanwhile, the degree of reduction varies greatly depending on whether the voluntary-reporting person is the first or the second, and the seniority relationship

88) Doo Jin Kim, op. cit, pp. 93-94.
89) Hang Lok Oh, op. cit, p. 107.
90) Ibid, p. 107.

of the ranking is very important at the time of reporting. Article 9 of the examinations of the public notice shall determine the ranking based on the date of reception and shall allow the next ranked person to succeed in the event that some of the applicants fail to receive status confirmation. The above date of reception is that the report that arrived first should take precedence according to the principle of reaching Article 111 of the Civil law, but if KFTC is responsible for the reasons attributable to the delay in reception, it seems necessary to make a different judgment. Therefore, it would be fair to draw up a rule to judge the sequence.[91)]

2) Ranking Confirmation

The Fair Trade Commission may decide not to grant the position of the voluntary declarant to certain decisions while determining the position of the voluntary declarant.

3) Final Decision

KFTC makes a final decision on the reduction of corrective actions and fines. In case of making a decision that is less beneficial than the one listed in the position confirmation, the procedure for canceling the position confirmation first is required.

4) Confidentiality

KFTC shall not provide the identity and related data of the voluntary-reporting party to a third party unless they have the consent of the submitter or these are necessary to perform relevant litigation. In addition, parties that may be identified during the internal audit of the Fair Trade Commission shall be deleted and shaded, and other necessary measures shall be taken. Moreover, the voluntary-reporting party shall be listed under an assumed name.

This confidentiality procedure is designed to facilitate investigation by the Fair Trade Commission as it is highly likely that other participating businesses will conduct activities such as damage or conceal related data to prepare for the investigation by the Fair Trade Commission and prevent retaliation against voluntary-reporting parties. In the end, confidentiality is a key element that must

91) Tae Hi Hwang, op. cit, p. 79.

be secured to revitalize the leniency program.[92]

5) Objection Procedure

Those who wish to disobey the Fair Trade Commission's actions may file an objection with the Fair Trade Commission within 30 days from the date of the notification of disposition. Upon objection, the Fair Trade Commission shall make an adjudication within 60 days, and, in the event of unavoidable circumstances, the period may be extended within 30 days. Although there may be differences, the objection is usually arbitrary pre-process, and the adjudication on it is considered to be an administrative decision. In addition, the principle of the Administrative Procedure Act applies to the rule of initial administrative action.[93] In addition, the rule of initial administrative action is applied based on the principle of the Administrative Procedure Act. Therefore, an administrative suit can be filed against the Fair Trade Commission, or an administrative suit can be filed immediately without filing an objection or filing an administrative suit against the original disposal or adjudication to make an objection.[94]

6) Administrative Litigation

Article 54 Paragraph 1 of the Fair Trade Act stipulates that when an appeal is sought against the disposition of the Fair Trade Commission, it shall be brought forward within 30 days from the date of the notification of the disposition or the date of receipt of the original version of the written adjudication on the objection. This requires that the complaint against the disposition of the Fair Trade Commission is an administrative suit. Meanwhile, the above case is subject to the Seoul High Court, which governs the location of the Fair Trade Commission.

92) Hang Lok Oh, op. cit, p. 108.
93) FTC (2009), "A Study on Leniency Program of ECm," p. 11.
94) Ibid, p. 14.

4
Chapter

Relevant Issues Related to the Leniency Program

1. Treatment of an Initiator and Coercer
2. Scope of the Recognition of Second Subsequent Voluntary Reporter
3. Validity of the Exemption from Criminal Charges
4. Violation of the Principle of Cumulative Punishment
5. Strengthening Sanctions against False Information Providers
6. Regulating the Possibility of the Abuse of the Program

Chapter 4

Relevant Issues Related to the Leniency Program

1 Treatment of an Initiator and Coercer

During the introductory phase of the leniency program, operators who initiated an unfair joint act or coerced other business operators were excluded from the scope of the exemption. However, there was a debate as to the uncertainty of the concept of "initiator" to which the response was to omit an initiator and coercer from the scope of exclusion from the exemption provisions in the 2005 amendments. Then, in the 2007 amendments, as concerns were raised to the issue of fairness, a coercer was reinstated into the scope of exclusion from the exemption provisions. This meant that according to Article 35(1) of the Enforcement Decree of the same Act, the benefits of exemption would be provided to initiators, but a coercer would not be able to acquire such benefits.[95)]

The underlying reason for the continued amendments was because consensus in academia and practice could not be effectuated as to whether it was appropriate or beneficial to exclude a coercer from the exemption provisions.[96)] This was a comparative issue that arose as to the questions of whether there was validity in providing exemptions to an initiator or coercer of cartels, from the perspective of justice, and whether there was an imperative to induce voluntary reporting to

95) Hyun-Jin Cho, op. cit, p. 174.
96) Myung Su Hong, op. cit, p. 57.

ensure the effectiveness of the system.[97]

As the current scope in the law of an initiator and coercer is differentiated, discussions of the two are also categorically separated.[98]

First, the non-recognition of exclusion from the exemption for the initiator must be addressed in the current system. One cannot deny that if an initiator obtains any exemption benefits, there will be negative repercussions for other business operators. However, the effectiveness of the leniency program will be substantiated. Nonetheless, the derived definition of unfair joint acts is the "agreement" between business operators. In essence, there is difficulty in recognition of a particular operator as an initiator. Even if the circumstance warrants the recognition of an initiator, because of the considerable difficulty in justifying such initiator, excluding the initiator from the exemption provision is deemed reasonable for the sake of transparency and certainty of the leniency program.[99]

Moreover, as the concept of "initiate" is uncertain and difficult to distinguish from "undue influence" during the agreement, thus including this requirement would decrease the transparency of the program. As such, the exclusion is an endorsement of the current program. Furthermore, when examining the foreign operations of a leniency program, there is difficulty in ascertaining examples of the exclusion from exemptions for the sole reason of being an initiator. In 2002, the European Union omitted the initiator from the recognition of exclusion for exemptions, to which the amended Korean Fair Trade Act referenced.[100] It should be noted, however, that to effectively diminish trust among cartel actors, providing the initiator with exemptions may be beneficial.[101]

On the other hand, a coercer who castigates other business operators in the participation of cartel activities is relatively uncontroversial. Unlike "initiator," the

97) Hang Lok Oh, op. cit, p. 112; Hyun-Jin Cho, op. cit, p. 174; Hyeon Soo Kim, Jae Hyun Nahm, "Several Topics in Cartel Leniency Program Implementation," Korea Review of Applied Economics, vol. 12, no. 2, 2010, pp. 39-40.
98) Tae Hi Hwang, op. cit, pp. 81-82.
99) Sung Eyup Park, "Articles: Legal Issues on Leniency Program," Journal of Korean Competition Law, vol. 16, 2007, p. 120.
100) Hang Lok Oh, op. cit, p. 112.
101) Hang Lok Oh, op. cit, p. 114.

meaning of coercion is relatively irrefutable, an expected course of action can be contemplated. Furthermore, against the intention of other business operators and after the realization of a cartel, if exemptions can be attained for voluntarily reporting, this act would be in contravention of the intention of the law. In particular, where a company with the largest market share (dominates the market) coerces other business operators to participate in a cartel and then voluntarily reports such cartel, the imposition of sanctions is necessitated in light of the fact that Korea is an oligopolistic market.[102] In addition, this issue has been thought of because most countries provide a complete exemption for the initiators while denying a reduction in the exemption for coercers.[103]

Even if no changes are legislatively provided for, the purpose of voluntary reporting needs to be reflected in the interpretation and application of the existing regulations. Namely, the exclusion of application to a coercer resulted from the perception that any reduction for a person who exerted undue influence in the formation and operation of a cartel was inequitable. While it is not feasible to focus on behavioral aspects, such as assault, intimidation, undue influence, and sanctions, as provided in the current Notice, if limited to such aspects, there are questions as to whether there will be satisfactory inclusion of the circumstances of actual influence. Therefore, understanding coercion from the perspective of the objective market condition and structure is necessitated.[104]

In the amendments of the Enforcement Decree in 2012 and the revision of the Act in 2016, where voluntary reporting occurs for the relevant unfair joint act and where a new unfair joint act is performed, exemption benefits are precluded. There are arguments regarding this. An argument that has been proposed is that the amendments have the effect of constraining iterative unfair joint acts, and opponents to this argument have stated that detection of iterative unfair joint acts will be more difficult as those business operators will be more reticent and cautious in the undertaking of such acts.[105]

102) Semin Park, op. cit, p. 314.
103) Hang Lok Oh, op. cit, pp. 113-114.
104) Myung Su Hong, op. cit, pp. 61-62.
105) Hyun-Jin Cho, op. cit, pp. 174-175.

2 Scope of the Recognition of Second Subsequent Voluntary Reporter

Studies show that while the effects of the detection and inhibition of cartels achieved by these regulations are minimal, excessive benefits for those in violation of the law will decrease the effectiveness of the leniency program. As such, not providing second subsequent voluntary reporters any reduction benefits will impede on the effectiveness of the program itself.[106] Therefore, rather than the automatic provision of reductions for the second subsequent reporter, it is necessary to distinguish the requirement for reduction considering the qualitative and quantitative aspects of the material confiscated by the KFTC at the time of reporting.

Continued discussions have been undertaken to grant second subsequent voluntary reporters exemption benefits and effectiveness of such exemptions. While the effectiveness of the exemption system for the initial voluntary reporter is substantiated, in the case of a second subsequent voluntary reporter, cartel detection and elimination may not be significant. In particular, expanding the scope of application to the second subsequent voluntary reporter could have corollary effects that could lead to strategic behavior among business operators, resulting in the reduction of the overall level of sanctions for businesses participating in cartels.[107]

In cases of oligopolistic markets like Korea, if the rate of reduction for second subsequent voluntary reporters is increased, the degree of punishment for cartels may be significantly deficient.[108] Nevertheless, Korea recognizes a 50% reduction for second subsequent voluntary reporters. In the case of a second subsequent party, the KFTC already identified the fact of the performance of an unfair joint act, and even with a guarantee of a 50% reduction, there is a direct correlation between the amount of information and the imposition of the fine—the provision of more information equates to a larger fine. Thus, cooperation is passive.[109] On the

106) Young Don Kim, "An Empirical Analysis of the Effectiveness of Corporate Leniency Programs towards Second Applicants and Ringleaders," Korean Journal of Public Administration, vol. 51, no. 3, 2013, p. 264.
107) Semin Park, op. cit, pp. 308-309.
108) Hyeon Soo Kim, op. cit, p. 326.
109) Semin Park, op. cit, p. 310.

other hand, the scope of the recognition of the second subsequent voluntary reporter is problematic as there are many cases where voluntary reporting occurs immediately after an on-site investigation is undertaken by the KFTC.[110]

Because of the covert nature of unfair joint acts, participating business operators manage to eliminate any relevant evidentiary material as to the unfair joint act in case of an investigation by the KFTC, which contributes to the difficulty to obtain sufficient material through on-site investigation alone by the KFTC. From the long term perspective, if a voluntary reporting party provides the key evidence of the relevant unfair joint act after an on-site investigation, granting the exemption would enhance the effectiveness of the leniency program.[111] Meanwhile, it is necessary to set a time limit for an application for exemption from the leniency program to prevent voluntary reporting by a cartel participant to reduce the expected level of sanctions after verifying the level of evidence obtained by KFTC and other circumstances where the program may be abused.[112]

There has been research that demonstrates that providing a second subsequent voluntary reporter a 50% reduction in exemptions has not been effective.[113] The United States only provides reduction to the initial reporter, while in Europe, the second subsequent reporter is required to provide considerable additional information to receive a reduction. However, in Korea, a second subsequent reporter can receive a 50% reduction immediately after submitting the same amount of evidence as to the initial reporter.

3 Validity of the Exemption from Criminal Charges

Under Article 22-2 of the current Fair Trade Act, satisfying the circumstances provided under Article 71 of the same Act, criminal charges may be exempted.[114]

110) Hyun-Jin Cho, op. cit, p. 178.
111) Ibid, p. 178; Sung Bom Park, op. cit, pp. 8-10.
112) Hyun-Jin Cho, op. cit, p. 178; Hang Lok Oh, op. cit, p. 116.
113) Koh Dong-Hee, "Two Plans to Improve Leniency Program," The Korean Journal of Economics, vol. 24, no. 1, 2017, pp. 10-11.
114) Tae Hi Hwang, op. cit, pp. 83-84.

Previously discussed, as an indictment by the KFTC is a requirement of prosecution, in effect in practice exemption of criminal punitive measures.[115]

If criminal punitive measures are instated for voluntary reporting, the proliferation of the leniency program can be hindered. The reduction of administrative sanctions on a business operator and the criminal punitive measures placed upon the individual, who is an employee of such business operator, is in contradiction with one another. As such, a choice exists with the individual to deny the fact that there was any violation of the law. Therefore, the exemption of criminal charges is necessitated for the operation of the leniency program.[116]

Unlike the United States, where criminal enforcement on cartels is the first course of action, Korea and Japan conduct administrative sanctions first. In Korea, principally, the resolution is approached administratively, and if the KFTC determines that the purpose cannot be achieved by administrative sanctions alone, an indictment can be additionally provided to impose criminal sanctions.[117]

4 Violation of the Principle of Cumulative Punishment

As the number of administrative fines imposed on unfair joint acts increases, the relationship with punitive measures as a criminal punishment can be problematic. In short, it is a question of whether there is scope for cumulative penalties. The issue is whether a fine is a "punitive measure" and thus the issue is the legal character of a fine.

Precedent in Korea stipulates that while the fine for an unfair joint act is administrative, the purpose is to additionally recover the unjust enrichment.[118] However, in the case of unfair joint acts, whether the principle of cumulative punishment is violated has not been determined.

115) Seong Un Yun, Jun Hyun Song, "Summer Competition Conference: Practical Issues of the Current Leniency Program," Journal of Korean Competition Law, vol. 20, 2009, p. 286.
116) Hang Lok Oh, op. cit, pp. 114-115.
117) Hang Lok Oh, op. cit, pp. 115-116.
118) See Supreme Court of Korea, Decision of 4 September 2014, 2012Du22256; Seoul High Court of Korea, Decision of 21 December 2000, 98Nu12651.

Fines for Cartel Activities Case

Company A was fined by the Fair Trade Commission for cartel activities. Company A was not the only company that acquired profit from cartel activities, but Company B and Company C, who sold the manufactured products of Company A, also shared in the gains. Therefore, it was argued that the order for the payment of the fine for this incident did not reflect the degree of such unjust enrichment, and thus in contradiction to the principles of equity and proportionality.

The Supreme Court stated, regarding an unfair joint act, that the purpose of fines does have not only the purpose of restitution of unjust enrichment but also a punitive nature. Thus, it was determined that as long as Company A was deemed a participant in the concerned cartel that the Court would not accept, Company A's claim that the relevant order for the payment of the fine was in violation of the principles of equity and proportionality (Supreme Court September 4, 2014 case reference number 2012Du22256).

In Japan, as the fine to cartels is a means to prohibit violators from retaining and maintaining economic benefit, which the state collects, such fines were established as an administrative sanction to ensure the effectiveness of regulations prohibiting cartels by seeking to restrict violations as fines are considered divestitures of unjust enrichment. Thus, the issue of cumulative punishment would not occur even if a penalty and criminal sanctions were imposed collectively. With the amendments to the Antitrust law in 2005, Japan introduced a new regulation that deducts half the amount of the fine if criminal sanctions and fines are collectively imposed.[119)]

Based the perception of the Supreme Court of Korea to the nature of a fine being an administrative sanction for the restitution of unjust enrichment and on the matter being resolved in Japan, the issue of whether cumulative penalties in Korea are in violation of the principle of cumulative punishment seems to allude to the fact that the principle will not be violated.

119) Young-Hoa Son, op. cit, p. 287.

5 Strengthening Sanctions against False Information Providers

More so than the provision of false information, exaggerating or supplementing the facts may be identified as being more serious as the KFTC is prevented from assessing whether the facts are actually distorted. Especially, as the covert nature of unfair joint acts is intensified, the identification of key evidentiary material becomes unattainable, and the KFTC, as a matter of practice, may be dependent on the statements of executives, employees, and witnesses. In addition, considering that a person who makes the statement is likely to be subjective, emphasis will be placed on aspects that are more favorable to such person, and unintentionally and consequently, the probability for the exaggeration or supplementation of a statement increases exponentially. As such, these issues cannot be resolved only through sanctions that exist, but an urgency to strengthen appropriate sanctions is necessitated.

According to Article 12(1) Exemption Notification, for those who intentionally reported false information, the only sanction applicable is the cancellation of status as a person eligible for exemption. For example, where a business operator has been exposed by the KFTC and where the avoidance of sanctions is difficult, the prospect of providing false information as a means to inspect competitors is highly probable and is capable of being abused. Considering this aspect and according to foreign legislation (in the EU, EC Regulation 1/2003, Article 23(1) stipulates that where the total turnover is less than 1%, the fine may be disposed of), measures, such as the imposition of a separate fine, should be taken in addition to the cancellation of the status of a person eligible for exemption.[120)]

120) Hyeon Soo Kim, op. cit, p. 336.

6 Regulating the Possibility of Abuse of the Program

No controversy persists as to the fact that the leniency program contributes significantly to enhancing the effectiveness of regulations for unfair joint acts. However, a high risk of abuse is founded through the use of false reporting as a means of retribution on voluntary reporters who exploited other business operators. Particularly unsettling is the fact that an initial voluntary reporter is fully exempted and that no concern will be given as to whether a competitor suffers adverse consequences.[121)]

With the advent of cases where companies with monopoly status in the relevant market acquire the benefits of exemption, there is a need to carefully examine the program as the possibility for abuse is prevalent.[122)] No specific regulation is provided to exclude the benefits of reduction from those businesses that dominate the market share, and under the current law, there is no basis to take issue with it unless such companies coerce operators to engage in unfair joint acts. Thus, in the application of the law, this aspect is not an error in the leniency program. However, benefits from exemptions that are provided to these dominant companies could be a question as to whether such benefits, from the perspective of competition in the relevant market, are inequitable.

In Korea, the market formation comprises mainly of monopolies and oligopolies, especially for those business operators that have market-dominate status, and in the formation and subversion of cartels, such operators hold prominent status as they are in a position to facilitate preparations for law enforcement by the KFTC. In addition, the leniency program is a program where the interests of the individual consumer are validated by detecting and regulating unfair joint acts rather than providing immunity to those operators participating in unfair joint acts. If the indemnity loses fairness, the legitimacy of the program would be unrecognizable.[123)] To this end, it is necessary to harmonize the two conflicting implications. However, with the current leniency program, it has been opened that the application, and not the regulations itself, tilts toward immunity and, as such,

121) Sung Eyup Park, op. cit, p. 123.
122) Myung Su Hong, op. cit, p. 56.
123) Ibid, p. 57.

necessitate legislative improvement.[124]

To resolve this issue, it is necessary to actively review compensation for victims as a condition to obtain the benefits of exemption. In the United States, "Corporate Leniency Policy" provides a condition that for the benefits from the exemption to be applied, compensation to victims is required. This policy can be used as a basis for comparative analysis. While these types of policies run contrary in meaning to exemptions for voluntary reporters, it can be said that such policies promote equity in that a balance is attained between the effectiveness of regulations for unfair joint acts and sanctions against violators.[125]

124) Ibid, p. 61.
125) Ibid, pp. 61-62.

5
Chapter

Comparison of the Leniency Programs

1. The United States
2. European Union (EU)
3. Japan
4. Leniency Program of Surrounding Nations of Vietnam

Chapter 5

Comparison of the Leniency Programs

Among the 100 countries that have adopted competition law, more than 60 countries have implemented a similar liability exemption policy.[126] In most countries, a competition authority administers the leniency program.[127] Similarly to Korea, each country has reorganized their respective programs to enhance the incentives for voluntary reporting by improving transparency and predictability of its procedures, to which such efforts yielded sizable effects. However, there are specific differences founded based on the judicial system and the social background of the respective country.[128]

〈Table 5-1〉 Comparison of key programs[129]

	US	EU	Japan	Korea
Benefit for persons who cooperate in investigation	○ (Automatic exemption)	○ (Automatic exemption)	○ (Discretionary reduction)	○ (Automatic exemption)
Exemption for initiators	X	○	○	○
Operation of individual reduction program	○	X	X	X
Compensation for individual reporters	X	X	X	○

126) Nan Sul Hun Choi, "Articles: Problems of Leniency Programs in International Cartels and the Direction to Improve the Programs," Journal of Korean Competition Law, vol. 28, 2013, p. 93.
127) Jae Sin Kim, "Report: Evaluation and Proposed Solutions for the Leniency Program," Journal of Korean Competition Law, vol. 26, 2012, p. 382.
128) Nam Hoon Kwon, op. cit, p. 45.
129) Hyeon Soo Kim, Jae Hyun Nahm, op. cit, p. 22.

1 The United States

A. History

In 1978, while the leniency program was first designed, until 1993, voluntary reporting occurred on an average of one report per year. As the rate of use was minimal, in 1993, by enhancing the predictability and transparency of the program, progress was attained. According to the US Department of Justice, USD 1.5 billion out of a total of USD 2 billion in fines for detecting cartels from 1997 to 2002 was prompted through the leniency program,[130] and more than 90% of the detection for international cartels was possible because of the program. Meanwhile, the United States has introduced Amnesty Plus (an additional exemption program) in 1993 where among the international cartels that were detected, 50% were uncovered because of Amnesty Plus.[131]

Currently, the US leniency program is administered through categorization of which are: "Corporate Leniency" and "Leniency Policy for Individuals."[132] In 2004, the government revised the directionality of the leniency program by increasing the level of punitive measures for cartels and strengthening the incentives for the leniency program by providing voluntary reporters, who cooperated in civil tort litigation, a reduction of damages from treble to one time the number of damages.[133]

〈Table 5-2〉 Comparative analysis of the US leniency program[134]

	Before	After
Improvements	① A person subject to reduction: The initial reporter before the commencement of investigations ② Competition authority considered the nature of the cartel, the role of the cartel participants, and whether coercion was a factor in the participation of cartel activities, and then determined ③ Payment or intention to pay for damages	① A person subject to reduction: The initial reporter or the initial cooperator before the beginning of the investigation ② No substantive fact that coercion was a factor for the tort and not an initiator of unfair joint acts ③ If possible, payment of damages

130) Seong Un Yun, Jun Hyun Song, op. cit, p. 267.
131) Hyeon Soo Kim, op. cit, p. 317.
132) Hyun-Jin Cho, op. cit, p. 168.
133) Hyeon Soo Kim, op. cit, p. 317.
134) Hang Lok Oh, op. cit, p. 98.

B. Requirements and Effect of Reduction and Exemption

1) Corporate Leniency

The initial voluntary reporter and the initial individual who cooperated are exempted, however, dependent on when such individual cooperated, and the requirements are different.[135)]

Before investigations: ① the competition authority must not have information about the unfair joint acts reported at the time of voluntary reporting, i.e., initial reporter; ② the voluntary reporter must promptly and effectively desist from the act; ③ the voluntary reporter must truthfully report all facts as to the violation and cooperate with the investigation continuously; ④ a voluntary reporter must not report from the status of an individual but rather as a representative of a business operator; ⑤ if possible, provide compensation to economic players who have suffered damage from cartels; and ⑥ for the relevant unfair joint act, a reporter must not have initiated or coerced other business operators in the commissioning of the unfair joint act.[136)]

After investigations have commenced, in addition to the above requirements, the competition authority is required to, considering various factors, determine whether providing leniency to the relevant business operator is fair. Furthermore, a voluntary reporter who participated as an individual will not automatically receive exemptions but will have to rely on the Leniency Policy for Individuals to see whether exemptions may be sought.[137)]

With respect to the above ① requirement, where the competition authority has some information about the unfair joint action, but the competition authority does not possess the evidentiary material provided by the reporter, such reporter may be deemed to be an initial reporter. However, the requirements provided in ② to ⑤ must be satisfied and additionally, for the relevant unfair joint act, considering the character of the act and the role of the voluntary reporter, etc., the provision of exemption benefits to be provided must not, in relation to other business operators, be unfair.[138)]

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135) Seong Un Yun, Jun Hyun Song, op. cit, p. 267.
136) Hyun-Jin Cho, op. cit, p. 168; Hang Lok Oh, op. cit, p. 98.
137) Hang Lok Oh, op. cit, p. 99.

2) Leniency Policy for Individuals

Excluding any individual who receives exemptions from Corporate Leniency, any other individual, satisfying the following requirements, upon the discretion of the competition authority, may be exempted from criminal punitive measures. ① Before the commencement of investigations, voluntary reporting must occur, regardless of the number of reporters and position to those reporters. ② At the time of voluntary reporting, the competition authority must not obtain any information regarding the misconduct. ③ The reporter must truthfully, and in its entirety, provide a statement about the violation and continuously cooperate in investigations. ④ Moreover, the reporter must not have initiated the unfair joint act or coerced other business operators in the commissioning of such act.[139]

3) Procedure

In addition to an express application for exemption, other means in which an application can be provided for is a "marker" or a verbal application. Employees who receive exemption applications will report to the Deputy Assistant Attorneys General, in charge of criminal enforcement under the Anti-Trust Act, when the determination is made that the applicant has satisfied relevant requirements. In the event that the employee in the application collections department determines that the requirements are not met, the applicant may make an appeal to the Deputy Assistant Attorneys General. Meanwhile, an exemption for a voluntary reporter is provided through a conditional exemption agreement between the Ministry of Justice and the reporting person, and under the Antitrust Law, the Deputy Assistant Attorneys General will initiate the conditional exemption agreement.[140]

4) Amnesty Plus and Penalty Plus

The United States introduced the Amnesty Plus and Penalty Plus systems to resolve all related cartels at once with one voluntary report. ① Amnesty Plus means that a reporter who has been excluded from exemption because such reporter was not an initial reporter can still obtain an exemption, for the relevant cartel activity which such reporter has participated in, for a specified amount where such reporter provides information about another cartel. ② Penalty Plus, on

138) Hyun-Jin Cho, op. cit, pp. 168-169.
139) Hang Lok Oh, op. cit, p. 99.
140) Ibid, p. 99.

the other hand, adds sanctions to a business operator who is under investigations for participation in a cartel when such operator does not provide information of other cartels. and it is found, during investigations the competition authority, that such operator was aware.[141]

2 European Union (EU)

A. Overview

In the European Union, the introduction of the leniency program occurred in 1996, and to revitalize the leniency program, substantial amendments were made in 2002. The overall directionality of the EU leniency program almost completely corresponds to the amendments undertaken by the United States in 1997. Ultimately, to increase the predictability and transparency of the program, clarification of requirements for the exempted party were provided and, at the discretion given to the competition authority, decreased.[142] In 2006, to improve the efficacy of the program: ① the types and contents of the information to be provided were specified; ② for the requirements for duty to cooperate in investigations, details were provided; ③ marker application was introduced; and ④ new regulations to protect the confidential information of the reporter was established.[143]

Analyzing the use of the leniency program, from 1996 to 2002, before the amendments, there were approximately 80 instances where the exemption was applied for. However, most of these applications were induced from unofficial investigations undertaken by the competition authority, and of those that applied for exemption, only three business operators received a complete exemption. Since the amendments in 2002 to 2005, there were 167 instances where an application for exemption was made, of which the majority of applications were provided before the commencement of investigations; and for those applicants, most received a full exemption.[144]

141) Ibid, p. 100.
142) Ibid, p. 100.
143) Hyeon Soo Kim, op. cit, pp. 319-320.
144) Ibid, p. 319.

B. Requirement of Leniency

The requirements of the EU's leniency program are as follows: ① the first evidence provider; before the investigation begins, evidence should be sufficient for the competition authority to conduct a target investigation, and evidence that can prove it is an unjust joint act after investigation begins, ② continuous cooperation with investigation, ③ ceasing unfair joint acts, ④ no unfair joint action imposed on other businessmen,[145] ⑤ he/she would not have destroyed, manipulated, or concealed evidence, and ⑥ he/she must not have leaked the fact of the application for exemption to anyone other than the competition authority.[146]

Concerning the obligation to cooperate with the investigation, the case of disclosing the fact of the exemption to other operators before a full-scale investigation is started after the operator who participated in the unfair joint act received a conditional exemption. In this situation, the European Commission has withdrawn a conditional exemption for breaching the investigation cooperation obligations but has reduced the fine by acknowledging only the portion that has actually contributed to proving the unfair joint act.[147]

C. Effect

Any operator who satisfies the above requirements shall be completely exempted. Unlike the United States, the European Union does not limit the number of voluntary-reporting people to be reduced, and it differentials the reduction in that order.[148] Therefore, even if a business owner who fails to provide initial evidence ceases the unfair joint act, and if the submitted evidence has substantial additional value in the light of information already held by rival authorities, the fine may be reduced to 30% to 50% for the first voluntary-reporter, 20% to 30% for the second, and less than 20% for the third and subsequent voluntary-reporters.[149]

Meanwhile, according to Article 23(3) of the EU rules and the EU's guidelines

145) Hyun-Jin Cho, op. cit, p. 169.
146) Hyeon Soo Kim, op. cit, pp. 320-321.
147) Hyun-Jin Cho, op. cit, p. 179.
148) Hang Lok Oh, op. cit, pp. 100-101.
149) Hyun-Jin Cho, op. cit, p. 169.

on fines, the European Commission shall determine fines by considering specific circumstances and details of violations in individual matters, and the reduction or exemption because of voluntary-reportation shall be reflected after the final penalty has been calculated by applying all other weighting and reducing reasons. In other words, reasons for the reduction of voluntary-reporting persons in the calculation of fines are not considered separately. This is a similar attitude to Korea, which uses fines after arbitrary reduction as a criterion for voluntary-reporting.

D. Procedure

The business operator shall apply for an exemption to the Directorate General for Competitiveness of the Committee and can apply for a formal or simple application. In addition, a procedure is provided to check whether or not the reduction is possible through anonymous application. The competitive office that receives the application shall issue the notice sheet for the application. The commission shall notify in writing of a conditional exemption if it deems that the exemption requirements have been met. Moreover, if the conditions for reduction are met, the scope for reduction shall be notified in writing.[150]

3 Japan

A. Overview

With the revision of the Anti-Trust Act in 2005, the leniency program was implemented since 2006. Differentiating between the beginning and the subsequence of the investigation is similar to other countries, but there is a big difference in the degree of leniency.[151] Contrary to the prediction that the nature of the leniency program cannot achieve great success because it is against Japanese sentiment in terms of betrayal,[152] the program actively operates as more than 150 cases were solved through voluntary-reporting from 2006 to 2008.[153]

150) Hang Lok Oh, op. cit, p. 101.
151) Ibid, p. 102.
152) Hyeon Soo Kim, op. cit, pp. 324-325.

B. Requirement of Leniency

Voluntary-reporting requirements are the same before and after the commencement of the investigation, in general, ① violations shall be discontinued after the commencement of the investigation, ② from the time of initial application, the report or submission shall be made at the request of the Fair Trade Commission and the contents shall not be false, ③ he/she did not force others to commit or obstruct the joint act from stopping.[154]

C. Effect

In the case of voluntary-reporting before the commencement of the investigation, the first voluntary-reporting party shall be exempted from both fine and charge, the second voluntary-reporting party's fine shall be reduced by 50% and the third voluntary-reporting by 30%. On the other hand, the fine will be reduced by 30% only to the third cooperator of the investigation after the commencement of the investigation. Criminal penalties for the second voluntary-reporting persons and the second investigation cooperator shall be judged separately.[155] Meanwhile, Japan's competition authority, like Korea, has full authority over criminal charges.[156]

D. Procedure

In the case before the commencement of the investigation, business operators can check whether there are any voluntary-reporting persons who ranked first before filing for exemption. The application for exemption will be performed in the process of submitting an application for exemption with a brief description and a detailed report and related data within the period specified by the competition authority. The authority, who has received the report, should notify that it has been submitted. In practice, the notice of reception has been used virtually similar to the confirmation of conditional reduction. There is a difference that after the investigation is initiated, business operators must file a reduction to the competition authority within 15 days of the on-site investigation and submit detailed reports and

153) Na Young Kim, Yung San Kim, op. cit, p. 82.
154) Hang Lok Oh, op. cit, p. 102.
155) Ibid, p. 102.
156) Jae Sin Kim, op. cit, p. 393.

data immediately without any easy application procedures.[157)]

As the amount of fines imposed in connection with the penalty system has grown, the issue of so-called criminal penalties and double punishments with fines has recently become a hot topic of interest. Depending on how the legal nature of the fine is determined, it is believed that the question of double punishment and the measure to avoid the issue of double punishment will be changed. In Japan, the fine system, a collection of economic benefits from cartels by the state, was created as an administrative measure to ensure the effectiveness of the cartel ban by securing social processes, allowing violators not to keep and maintain it. Hence, the fine is simply a deprivation of unjust enrichment, so even if it is imposed at the same time as the punishment, the problem of double punishment does not arise. However, the revision of the Anti-Trust Law in 2005 would deduct one-half of the fine from the penalty if the fine and the penalty were to be imposed simultaneously. It is believed that it is worth referring to the operation of the fine system in Korea.

4 Leniency Program of Surrounding Nations of Vietnam[158)]

A. Singapore

1) Overview

The Competition Law (Chapter 50B) is Singapore's main legislation on competition, but the Competition Law does not expressly provide for a leniency program. According to Article 61 of the Competition Law, the Competition Committee of Singapore (CCS) provides that the Commission is responsible for publishing guidelines as a way to interpret and effectuate the provisions of the Competition Law. Accordingly, the CCS published guidelines in 2016, detailing the

157) Hang Lok Oh, op. cit, p. 102; Young-Hoa Son, op. cit, p. 287.

158) As for the system in Vietnam's neighboring countries, we summarized "researching the present state of laws and sub-regulations of the leniency program in neighboring countries of Vietnam and opinions on the course for making sub-law draft of the leniency program," which was written by lawyer Tran Thanh Huyen, co-researcher of Vietnam.

voluntary reporting system.

In April 2016, the CCS announced in a press release that it was investigating more than 10 cartel cases and that during this process, there were more than 35 leniency applications, and that the leniency was also in place for an international cartel, indicating that the leniency program was active in Singapore.

2) Leniency Requirements and Effect

The leniency program operated by the CCS provides that complete exemption from administrative sanctions is granted to leniency applicants where the following requirements are satisfied: ① where the applicant reports and submits evidence before the commencement of investigations; ② where the applicant has not organized or coerced the participation of other operators for the relevant cartel act; and ③ where the CCS does not have sufficient information to substantiate the relevant cartel act.

The investigation shall be deemed to have been initiated when the commission exercises its authority to investigate pursuant to Articles 63 to 65 of the Competition Law. For such instances, all applicants for leniency must satisfy the following requirements.

① The applicant must immediately provide the CCS with all useful information, documents, evidence, and sufficient grounds to initiate an investigation into cartel activities. ② The applicant must acknowledge the relevant violating act without any conditions, and the relevant act must affect competition, such as obstructing, restricting, or distorting competition in Singapore. ③ The applicant must provide full cooperation until the relevant investigation is completed and the CCS has made a decision. ④ If there are no further instructions from the CCS, the applicant must refrain from discussing the relevant cartel activities after the cartel activities have been reported.

While the CCS may grant up to 100% exemption from financial sanctions to the applicant, where the CCS has already commenced an investigation and where the applicant cannot be granted a full exemption, full exemption to the applicant may be granted if the following conditions are satisfied:

① Where the applicant is the initial voluntary reporter once investigations has commenced, ② where the applicant sufficiently provides the necessary information so that the CCS can make a decision that the act is in violation before the CCS securing such information, ③ where the applicant provides sufficiently valuable information for investigations by the CCS, ④ where the applicant is not an organizer of a cartel or has coerced other business operators to participate in cartel activities, and ⑤ where the applicant satisfies other general requirements.

If an applicant for leniency is not deemed the initial reporter, up to 50% reduction of the sanctions will be granted where valuable information is provided to the CCS before a decision and where the applicant is not deemed as an active participant or an organizer of the cartel. However, the extent of the reduction is at the discretion of the CCS, and the rate of reduction is to be determined by considering the following: ① the timing of the applicant's report, ② whether the CCS has already secured the necessary information, and ③ the nature of the information provided by the applicant.

In Singapore, the leniency plus program is under establishment to provide a basis for cartel participants to cooperate with the investigations of the CCS and to provide a means for such participants to report such activities in the market.

3) Procedures

There are four ways to submit an application for leniency to the CCS. ① Online submission, ② email submission of the application and related materials, ③ postal delivery of the application and related documents to the CCS, and ④ upon scheduling an appointment vis-a-vis a meeting.

The CCS is in development of a provisional marker system for initial reporters. Where the initial applicant is unable to provide the CCS with all evidence related to the offense at the time of application, the applicant may request a provisional marker for the leniency application. To maintain the provisional marker, an applicant is required to complete the submission of the relevant information and evidence upon which, once submitted the provisional marker, terminates, and priority ranking is given.

B. Malaysia

1) Overview

Article 41 of the Competition Act (2010) of Malaysia provides that "if an applicant acknowledges a violation of Article 42 of the Competition Act, such applicant may be exempted from the imposition of administrative sanctions, and such applicant shall provide information and cooperation to the Competition Authority."

Malaysia's Competition Commission has issued guidelines for the leniency program, to which the guidelines and Competition Act are similarly phrased. The guidelines provide that, "the policy of the competition authority for leniency is where the voluntary reporter, before the detection of a cartel by the competition authority, acknowledges participation in a cartel and provides the information and cooperation, such reporter may be provided up to 100% reduction on financial sanctions to be imposed."

2) Requirements for Leniency

The guidelines for the Competition Act and Leniency Program provides that, "The applicant for leniency shall provide information related to the act in violation of the Competition Act and fully cooperate. Reduction may be provided if the applicant satisfies and implements all of the following requirements."

The requirements are:

① Article 41: The applicant must acknowledge the prohibited violating act under Article 41(4)(4) and must significantly participate in the leniency procedures.
② Discontinuance and Cessation: Unless the Commission instructs the applicant to maintain participation for future investigations, the voluntary reporter that has acknowledged participation in a cartel and the related violation must discontinue and cease such participation.
③ Full disclosure: The voluntary reporter must disclose completely and truthfully his/her participation in the cartel, including any submission of documents, and, such reporter cooperates in any other violation, disclose the contents of such violation.
④ Continued cooperation: A voluntary reporter shall promptly provide requested

information or other assistance at their own expense upon request by the Commission, such as the support of workers, supervisors, or directors related to the cartel.

⑤ Document: The voluntary reporter agrees not to destroy the relevant document and ensure that the document is not destroyed before or during the period where the conditional reduction is provided.

⑥ Coercion and intimidation: The voluntary reporter who has acknowledged participation in a cartel must not have coerced or intimidated other participants in the cartel.

⑦ Confidentiality: A voluntary reporter shall not disclose any information as to the leniency application or exemption status without the permission of the commission, except in cases related to the cartel or legal advice concerning compliance with court orders to which disclosure shall be permitted and, for such cases, the competition authority must be promptly informed.

⑧ Cancelation of a conditional reduction: The Commission shall provide a notice of the cancellation of provisional reduction to the voluntary reporter where such reporter has not satisfied the requirements.

3) Effect

The Competition Act of Malaysia on the effect of the leniency programs under Article 41(2)(a) provides that, "The reduction rate for the leniency program may be applied differently to the relevant company under the following circumstances: a) whether the company is the initial reporter from among those who have committed the offense or b) during the investigation phase: i) acknowledge participation in a violating act and ii) provide information and cooperation." In other words, the Competition Act does not explicitly provide the eligibility requirements and effects for which leniency may apply. In addition, the guidelines do not specify the requirements and effects in detail.

Similarly, Section 2.7 of the guidelines provides that, "Persons who have organized cartels or coerced the participation of other companies in cartel activities shall not be provided with a 100% exemption from financial sanctions. However, such companies who provide voluntary reporting may be subject to leniency."

4) Procedures

In Malaysia, those persons who intend to apply for leniency may inquire of the

competition authority to determine the applicability of leniency.

According to the guidelines, a person who intends to apply for leniency may apply for a provisional rank to secure the time required to prepare for voluntary reporting and be given a temporal advantage over other applicants. In addition, potential applicants may inquire about the requirements of the leniency program. The applicant must submit the company's name subject to leniency as well as sufficient details to determine the violation. Moreover, the applicant has up to thirty days from the date the provisional rank was indicated to complete voluntary reporting.

6
Chapter

A Proposal on the Leniency Program in Vietnam

Chapter 6

A Proposal on the Leniency Program in Vietnam[159)]

1 History of the Vietnam Competition Act and Recent Amendments to the Law

A. Vietnam: 2004 Amendments to the Competition Act and Key Provisions

1) Amendment Process and Purpose

In the late 1990s, the Vietnamese economy had experienced significant progress, thanks to new policies and economic management mechanisms. However, the market competition also intensified, and anticompetitive conduct, which harmed the economy and legitimate interests of other undertakings and consumers, appeared more often. In this context, conscious of the fact that competition is indispensable and a drive behind economic growth, Vietnam took the initiative to build a competition law to control and adjust anticompetitive behavior, thereby creating a legal framework for competitive activities and ensuring a fair, competitive environment.[160)]

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159) This chapter is based on the findings of local Vietnamese researchers who participated in this study.
- Le Van Binh (Professor, School of Law, Vietnam National University, Hanoi)
- Tran Quang Hong (Legal Researcher, Institute of Legal Science, Ministry of Justice)
- Tran Thi Thanh Huyen (Legal expert and Consultant at IDVN Law firm)

160) Le Van Binh, "Researching the analysis of the present status of the competition law enforcement, such as cartel restrictions," p. 6: "In 2004, Vietnam adopted a comprehensive competition law in connection with (but not required by) its accession to the WTO. The

On December 2, 1998, at the fourth session, the 10th National Assembly issued Resolution No. 19/1998/QH10 on the law and ordinances program of 1999, assigning to the Ministry of Trade (now the Ministry of Industry and Trade) the task of supervising the drafting of the Law on Competition and Anti-Monopoly. After a four-year drafting exercise, which involved drawing experiences from countries around the world and collecting comments from the public, the community of businesses and legal and economic experts both home and abroad, on December 3, 2004, the Law No. 27/2004/QH11 on competition ("Law on Competition 2004") was passed by the 11th National Assembly at the sixth session and took effect from July 1, 2005.[161]

The introduction of the Law on Competition 2004[162] was aimed at:
- Regulating behavior that restrains or potentially restrains competition, especially when the domestic market opens and integrates into the global economy;
- Protecting the legitimate entrepreneurial rights of businesses, combating unfair competitive activities, protecting the consumers' interests; and
- Creating and maintaining a fair entrepreneurial environment for all businesses regardless of ownership form.

2) Main Provisions and Evaluation of the Competition Act 2004

The Law on Competition 2004 comprises six chapters and 123 provisions regulating competition-restraining behavior, unfair competitive behavior, the procedures for resolving competition cases, and measures to deal with the violations of competition law. As such, the 2004 law combines the provisions of both substantive and procedural laws.

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primary purpose of adopting competition law was primarily to demonstrate to the world that Vietnam was committed to a market-based economic system that is interconnected internationally."

161) Tran Quang Hong, "The history of Vietnam's competition law, reasons for recent law amendments, and the background of introduction of the leniency program," p. 1; Le Van Binh, Ibid, pp. 5-6, 8: "Provisions related to competition restriction agreements are in those competition laws: Competition Law 2004 (Law on Competition No. 27/2004/QH11); Decree no. 116/2005/ND-CP on detailing for implementation of a number of articles of the Competition Law 2004; Decree no. 71-2014-ND-CP implementing the Competition Law on dealing with breaches in the competition sector."

162) Tran Quang Hong, op. cit, p. 1: "Regulating behavior that restrains or potentially restrains competition, especially when the domestic market opens and integrates into the global economy; protecting the legitimate entrepreneurial rights of businesses, combating unfair competitive activities, protecting the consumers' interests; and creating and maintaining a fair entrepreneurial environment for all businesses regardless of ownership form."

Subject to the Law on Competition 2004 is mainly business organizations and individuals (collectively referred to as "undertakings"), including undertakings manufacturing and providing public goods and services, undertakings operating in state-owned industries and sectors, and foreign enterprises operating in Vietnam. Furthermore, the Law on Competition 2004 also applies to professional associations operating in Vietnam.

Regarding the application of the law, Article 5 of the Law on Competition 2004 provides that the 2004 law takes priority over other laws on competition restrictions and unfair competitive behaviors.

In addition, bearing in mind that competition is an activity of undertakings, and that actions of State regulatory bodies, which may adversely affect the competitive environment may lead to undertakings, carrying out anticompetitive behavior rather than directly engaging in competition, Article 6 of the Law on Competition 2004 stipulates a number of prohibited acts for state regulatory bodies.[163)]

The substantive provisions of the Law on Competition in 2004 have much in common with many competition laws around the world in that they regulate all potentially anticompetitive behavior, including cartels; abuse of market dominance and monopoly position; economic concentration; and unfair competitive behavior.

Regarding the procedural law, the 2004 Law on Competition specifically sets out the prosecuting agency, the prosecutor and the order, and procedure for resolving competition cases.

The Vietnam Competition Authority and the Competition Council are two independent agencies with their own functions and missions. The Vietnam Competition Authority

163) Article 6. Acts that state management agencies are prohibited from performing State management agencies are prohibited from performing the following acts to prevent competition on the market:
1. To force enterprises, organizations, or individuals to buy, sell goods, and provide services to enterprises, which are designated by these agencies, except for goods and services in the state-monopolized domains or in emergency cases prescribed by law;
2. To discriminate between enterprises;
3. To force professional associations or enterprises to align with one another with a view to precluding, restricting, or preventing other enterprises from competing on the market; and
4. Other acts that prevent lawful business activities of enterprises.

("VCA") is responsible for investigating anticompetitive behavior as well as investigating and handling unfair competitive activities. The Competition Council is responsible for handling anticompetitive behavior after the VCA concludes their investigation.[164]

The Law on Competition 2004 was positively received by the public and evaluated by international friends as being relatively modern because it regulates virtually all fundamental issues affecting competition as well as being applicable to all business organizations and individuals regardless of ownership form, and does not exclude state-owned enterprises. The introduction of the Law on Competition 2004 was thus a milestone in the process of economic renovation, and its implementation plays a crucial role in ensuring the efficient operation of the market economy.[165]

Perceived as the constitution of the market economy, the Law on Competition 2004 was expected to create a legal corridor to ensure a fair business environment and that the market economy operates effectively as well as a useful tool to protect the legitimate rights and interests of undertakings and consumers. The implementation of the Law on Competition 2004 across all industries and sectors is consequently of utmost importance.[166]

B. Necessity for the Amendments to the Competition Law

The introduction of the Law on Competition 2004 was a milestone in the

164) Le Van Binh, op. cit, pp. 6-7: "In 2004, Vietnam adopted a comprehensive competition law in connection with (but not required by) its accession to the WTO. The primary purpose of adopting competition law was primarily to demonstrate to the world that Vietnam was committed to a market-based economic system that is interconnected internationally. That law established two competition authorities – the Vietnam Competition Administrative Department (VCAD), which was renamed the Vietnamese Competition Authority (VCA), and the Vietnamese Competition Council (VCC). The VCA had a broad range of functions covering competition law and advocacy, consumer protection, and trade remedy functions, while the VCC had functions only in the area of competition law enforcement. In August 2017, the VCA was split into two agencies—the Vietnam Competition and Consumer Authority (VCCA), which inherited the competition and consumer protection functions of the VCA, and the Vietnam Trade Remedies Authority (VTRA), which inherited the VCA's trade remedies function. Because this occurred, much of the data and historic information in this report concerns the VCA as an entity rather than the VCCA."

165) See to Ibid, p. 7

166) Tran Quang Hong, op. cit, pp. 1-2.

process of creating a formal and unified legal framework for competitive activities in the Vietnamese market. However, after more than twelve years of implementation, and in the light of socioeconomic changes, international integration as well as limitations and shortcomings in the substantive content,[167] the Law on Competition 2004 needs to be amended and supplemented to enhance implementation efficiency and meet practical requirements.[168] In particular, the new Law on Competition must:

1) Meet the demands of economic integration and be consistent with international commitments

Vietnam is in the process of deeply integrating into the global economy. All of the new generation Free Trade Agreements, to which Vietnam is a party, contain rules aimed at building institutions that uphold fair competition and nondiscriminatory treatment between economic participants, and enhance efficiency, effectiveness, and transparency in the enforcement of competition law. The Law on Competition 2004 needs to be revised in a way that is consistent with international commitments and exploits the opportunities that free trade agreements bring.

Many countries around the world consider competition law to be an effective tool for the state to regulate the economy, rectify market imperfections or the adverse effects of the business, and trade liberalization. Competition and other economic policies, especially industrial and trade policies and policies to regulate industries, are closely linked and inter-influential. The effective implementation of competition policy instruments, mainly through competition law enforcement, will complement other policies, making an important contribution to the improvement of national competitiveness.[169] This is particularly important given the predictions of global economic complication and the rising trend of protectionism in some countries, which may adversely affect the domestic economy.

2) Ensure adaptation to the business environment

167) Le Van Binh, op. cit, p. 7: "However, a number of features of the current system have significantly constrained, curtailed, and slowed the contributions that competition policy could have made to the economy."

168) Ibid, pp. 6-7.

169) Tran Quang Hong, op. cit, p. 3: "The effective implementation of competition policy instruments, mainly through competition law enforcement, will complement other policies, making an important contribution to the improvement of national competitiveness."

The business environment, both home and abroad, has changed since the Law on Competition 2004 was researched, drafted, and promulgated. Global value chains connecting various economies have been formed, and manufacturing stages and service provision are conducted in many different countries and regions. Furthermore, the Fourth Industrial Revolution brings with it technologies that are widely applied in many fields and industries. These changes in the business environment have facilitated the emergence of many new competitive behaviors and business methods, which the 2004 Law on Competition could not have predicted. These new competitive behaviors and business methods have been changing the structure of many important markets and directly affecting market subjects. Thus, it is necessary to amend and supplement the Law on Competition 2004.[170]

3) Overcome the limitations and shortcomings of the Law on Competition 2004

a) Necessity to establish a legal basis for extraterritorial application of the Competition Act

Given the trend of economic globalization and market opening, undertakings are increasingly expanding their scope of operation to many different countries. There will emerge anticompetitive behaviors, which take place extraterritorially, but which have an impact on the domestic competitive environment (so-called effective doctrine). In response to this situation, many countries have extended the scope of application of their competition law on the principle of the impact of the behavior in question to regulate cross-border anticompetitive conduct and protect the domestic market. A few behaviors that have arisen in recent years can be mentioned here, such as price fixing, market division, or M&A transactions, which are performed outside Vietnam, but which have a certain impact on the Vietnamese market. Therefore, it is necessary to amend the 2004 Law on Competition in the direction of expanding the scope of application to cover anticompetitive behaviors, which take place extra-territorially but which restrain competition in the Vietnamese business environment.

b) Complete provisions regulating cartels

The Law on Competition 2004 has no provision that defines the nature of cartels; a list of eight cartels is provided instead. The law also describes the

170) Ibid, pp. 3-4.

behaviors in the list in terms of their external display without going into economic nature. Using a closed list and not describing behaviors based on their nature have led to the omission of acts that have a competition-restraining impact in practice, or vice versa, to the prohibition of agreements, which have no significant impact on competition.

The Law on Competition 2004 prohibits cartels in two ways: (i) absolute prohibition; and (ii) prohibition based on the combined market share of cartel participants in the relevant market, including behaviors in the group of serious cartels (price fixing, market division, and output control).[171] The failure to absolutely prohibit several serious cartels is not reasonable and inconsistent with the development trend of competition laws around the world.

c) Change the approach to economic concentration regulations

In respect of controlling economic concentrations, according to Article 18 of Law on Competition 2004, economic concentrations shall be prohibited if the combined market share of undertakings participating in the economic concentration is more than 50% of the relevant market (unless excepted under Article 19). At the same time, if the combined market share is 30% to 50%, the participating undertakings shall notify the competition authority before conducting economic concentration. This approach is unreasonable because assessing and prohibiting economic concentration on the sole basis of market share does not fully and accurately reflect market reality and the impact of the behavior on the competitive environment, leading to the omission of acts that restrain competition in practice, or vice versa, to the prohibition of agreements, which have no significant impact on competition.

Furthermore, the use of the criterion of market share in the relevant market has also made it difficult for undertakings to determine the obligation to notify economic concentration.[172] In practice, since undertakings can only know and take responsibility for their revenue and turnover but cannot know the precise revenue and turnover of their competitors, they cannot determine their market share in the relevant market. Thus, it is difficult to tell whether they are in the case of

171) Ibid, p. 4.

172) Ibid, pp. 4-5: "In practice, as undertakings can only know and take responsibility for their revenue and turnover but cannot know the precise revenue and turnover of their competitors, they cannot determine their market share in the relevant market; it is difficult to tell whether they are in the case of prohibition or must give notice of the economic concentration."

prohibition or must give notice of the economic concentration.

d) Perfect regulations on unfair competition

There are several legal documents, such as Intellectual Property Law and Advertising Law, which contain provisions on unfair competitive behavior. That unfair competition is regulated in different legal documents and enforced by different state authorities have led to either overlap in the jurisdiction or the possibility to push responsibilities to other law enforcement agencies. Therefore, the current law needs to be revised.

e) Overcome the limitations in the current model and legal status of competition authorities

According to the Law on Competition 2004, Vietnam currently has two competition authorities, namely the VCA and the Competition Council (assisting the Competition Council is the Office of the Competition Council). The former is responsible for accepting and investigating competition restraining cases, which will then be transferred to the Competition Council for the final decision. However, the reality of the 12-year implementation of the Law on Competition 2004 shows that the current model and legal status of the competition authorities do not guarantee operational independence, effectiveness, and efficiency, and are a waste of resources not in line with international practice.

The legal nature of every competition agency worldwide is that of a bi-functional agency, that is, both an administrative body and simultaneously a judicial body (through investigating and handling competition restraining cases). Given this legal nature, the utmost important principle for a competition authority must be organizational and operational independence: there must not be any interference from any other agency if the competition authority were to be able to perform its functions fairly for protecting competition in the market. The independence of the competition authority helps guarantee and promote its concentration of expertise, integrity, transparency, and accountability.[173)]

However, the current legal position of the VCA does not ensure independence yet. Consequently, the implementation of several functions of the competition

173) Ibid, p. 6.

authority is fraught with difficulties: investigating and handling acts of state management agencies, which obstruct competition (such as issuing documents and policies that restrict competition in the market); consulting, handling conflict, overlap, and the legal distance between competition law and specialized law.

Neither has the position of the Competition Council in the state apparatus been clarified. Given that the Office of the Competition Council belongs to the organizational structure of the Ministry of Industry and Trade despite being a "permanent advisory" agency, its independence cannot be guaranteed. Members of the Competition Council are ministerial and departmental representatives who hold multiple roles, which can lead to conflicts of interests, and compromise independence and objectivity in decision making, especially in cases involving the ministry or department, which the council member represents.[174)]

The bi-agency model, together with unreasonable procedural regulation on competition prosecution, have delayed the resolution of competition cases, with the effect that the resolution outcome always lags behind market developments and the State's role of timely intervention to correct market imperfections does not come through. According to the current law, the Resolution Council is only formed after the case file is transferred from the management agency, and the former only has 30 days to consider and make a decision on the case. Cases of competition-restraining behavior are, however, often complicated with case file containing thousands of documents, and the VCA had taken up to 300 days to investigate. Coupled with the informational limitation because of the lack of a periodic reporting mechanism, the time limit for assessing the case makes it difficult for the Resolution Council to hand down a decision on the case at hand. Therefore, the reality of returning the case for further investigation, suspending the settlement of competition cases, or prolonging the process is an inevitable consequence. Over 12 years of implementation, the VCA and the Competition Council have investigated and prosecuted six competition-restraining cases, four of which had been returned by the Resolution Council for further investigation.[175)]

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174) Ibid, p. 6: "Members of the Competition Council are ministerial and departmental representatives who hold multiple roles, which can lead to conflicts of interests, and compromise independence and objectivity in decision making, especially in cases involving the ministry or department, which the council member represents."

175) Ibid, pp. 6-7.

Furthermore, allowing members of the Competition Council to hold multiple roles has led to a lack of focus in resolving competition cases. Almost all Competition Council members are ministerial and departmental heads and incumbent officials who have been appointed to concurrently hold legal roles in the Competition Council. The Competition Council members, therefore, have to balance their commitments and ensure the efficiency of work both at their incumbent office and the Competition Council. Given the complicated nature of competition that restrains cases, this multiple role mechanism is inappropriate, leading to a lack of focus and timeliness in resolving competition restraining cases.

As a result of the abovementioned limitations and shortcomings of the Law on Competition 2004:[176)]

- The provisions of the Law on Competition 2004 have not really come to life or be able to fulfill the mission of protecting a fair competition environment, acting as a driving force for economic growth.
- The number of competition cases detected, investigated, and dealt with is still limited despite the fact that there are many behaviors in the Vietnamese competitive environment, which have the potential to adversely affect the market, especially large-scale sectors and fields, which play an important role in the economy such as energy, pharmaceuticals, distribution, retail, transportation, logistics, tourism, and technological application industries.
- The process of investigating and handling competition cases as well as regulating economic concentration has faced many difficulties because of the rigid regulations of the Law on Competition 2004, which have led to errors, omissions of violations, and difficulties in proving violations. Neither are there specific mechanisms and criteria for the competition authority to assess the competition-restraining impact of the behavior in question, especially cartels and economic concentrations, such as to enable them to prevent and handle violations, thereby ensuring and promoting effective competition.

176) Ibid, p. 7.

2 Important Changes in the Law on Competition 2018

Aiming to rectify limitations and shortcomings in the Law on Competition 2004 as well as meet the practical requirements of the competitive environment and the general development trend of competition laws around the world, the Law on Competition No. 23/2018/QH14 passed on June 12, 2018 ("Law on Competition 2018") has been built upon an integration of economic and legal thinking, emphasizing the enhancement of enforcement effectiveness. The important amendments and supplementations are as follows:

A. Extending the scope and subjects of application

The Law on Competition 2018 regulates both anticompetitive behaviors and economic concentrations, which restrain or have the potential to restrain competition in the Vietnamese market regardless of whether the conduct takes place within or outside the territory of Vietnam. The extended scope serves the following objectives. First, create a legal framework to investigate and handle all competitive behaviors, which have or may have a negative impact on the Vietnamese market regardless of where they occur, thereby helping stabilize the domestic economy. Second, create a legal basis for Vietnamese competition authorities to cooperate with their overseas counterparts in investigating and handling competition cases, thereby facilitating the fulfillment of bilateral and multilateral trade agreement commitments. The Law on Competition 2018 also allows the National Competition Commission to cooperate with foreign competition authorities in the prosecutorial process to timely detect, investigate, and handle behaviors, which show signs of violating the law on competition. The scope of cooperation includes consultation, exchange of information, documents, or other forms of cooperation according to the laws of Vietnam and international treaties to which the Socialist Republic of Vietnam is a party.[177]

The Law on Competition 2018 also adds to the subjects of application "relevant domestic and foreign agencies, organizations, and individuals" to encompass all

177) Ibid, p. 8. The scope of cooperation includes consultations, information, and document exchanges as well as other forms of cooperation under the Vietnamese law and international treaties to which Vietnam is a member.

subjects that can violate competition laws. Such extension is according to the objectives and general economic development strategy of the government, encouraging creativity and start-ups, and promoting a healthy, equal, and nondiscriminatory business environment.

B. Amending and supplementing prohibited behaviors for state agencies

Inheriting previous regulations, the Law on Competition 2018 continues to regulate while simultaneously amending and supplementing prohibited behaviors for state agencies. Accordingly, state agencies are prohibited from engaging in many conducts, which obstruct competition in the market. This regulation is absolutely essential because state agencies have the potential of abusing their state-granted powers to commit conducts, which obstruct competition in the market. State agencies are special entities and are thus specifically regulated by the Law on Competition 2018.[178)]

C. Perfecting regulations on cartels and introducing a leniency program to improve enforcement effectiveness

Regulations on cartels have been amended and supplemented in the direction of expanding and amending the approach to cartel prohibition. Instead of relying on the combined market share of cartel participants, the Law on Competition 2018 looks at whether the behavior in question causes or has the potential to cause significant competition-restraining impact to determine whether to prohibit certain

178) Ibid, p. 8.
Article 8. Prohibited acts related to competition
1. State agencies are prohibited from performing the following acts to prevent competition on the market:
   a) Forcing, requesting, and recommending enterprises, organizations, or individuals to or not to buy, sell specific products, and provide services from/to specific enterprises, except for products and services in state-monopolized domains or in emergency cases prescribed by law;
   b) Discriminating among enterprises;
   c) Forcing, requesting, and recommending industry associations, social-occupational organizations, or enterprises to associate with one another to restrain competition on the market; and
   d) Taking advantage of their positions and powers to illegally intervene the competition.
2. Organizations and individuals are prohibited from providing information, mobilizing, encouraging, coercing, or enabling enterprises to engage in anticompetitive practices or unfair competition.

cartels, including vertical cartels, except for serious cartels that are automatically prohibited. The Law on Competition 2018 regulates both horizontal and vertical cartels, which cause or have the potential to cause a significant competition-restraining impact on the market. Furthermore, the introduction of a leniency program in the Law on Competition 2018 is intended to make it easier for the competition authority to detect and investigate cartels that are increasingly becoming more implicit.

D. Adding criteria to determine significant market power to serve as a basis to identify undertakings and groups of undertakings holding a dominant or monopoly position

The Law on Competition 2018 provides additional factors other than market share to identify undertakings and groups of undertakings that are considered to hold a dominant market position. This is appropriate as it ensures accurate identification of the market power of the enterprise and reflects the true competitive reality of the market. In addition, prohibited abuses of market dominance or monopoly positions are amended to clearly reflect the nature of such acts by emphasizing their consequences and impact.

E. Fundamentally changing the approach to perfecting regulations on economic concentration

The approach to economic concentration control in the Law on Competition 2018 undergoes a fundamental change whereby economic concentrations are considered to be a business right of undertakings, which in turn are associated with the freedom of business. The law does not rigidly prohibit economic concentration based on more than 50% combined market share of the relevant market of undertakings participating in economic concentrations, but instead only prohibits undertakings from partaking in economic concentrations, which causes or potentially causes a significant competition-restraining impact on the market. The undertakings shall be allowed to take part in economic concentrations if such concentrations do not have a negative impact on the market.

Through such regulations, the Law on Competition 2018 has demonstrated a progressive viewpoint, which always respects and allows undertakings to develop

business, through economic concentration activities. The state exercises control through the law to ensure that economic concentrations do not negatively affect the competitive environment and only intervenes when economic concentrations pose the risk of harming the competitive environment.[179]

F. Perfecting regulations on unfair competition practices

To ensure consistency in the legal system, the Law on Competition 2018 ceases to stipulate the acts of unfair competition, which are specified in other laws, and, at the same time, add new unfair competition practices. Concurrently, the 2018 Law requires that where the regulations on unfair competition in other laws are different from those of the Law on Competition 2018, then such provisions in those laws shall apply.[180]

G. Reorganizing the competition authority to enhance enforcement

The Law on Competition 2018 provides the establishment of the National Competition Committee based on reorganizing the former competition agencies, namely the VCA and the Competition Council. This is an important new point aimed at enhancing the performance of the competition authority. The model of a single competition agency, that is the National Competition Committee, is in line with the current global trend, and at the same time, helps to centralize, streamline the organizational structure, and ensure an effective performance that is according to the economic situation and the state's current guidelines and policies of improving the socialist-oriented market economy.

The Law on Competition 2018 specifies the model, functions, tasks, and powers of the National Competition Commission to ensure its position and independence in

179) Ibid, pp. 9-10: "Enterprises that satisfy the conditions prescribed by the law on Competition 2018 must notify economic concentrations before participating in such activities. The National Competition Commission shall exercise control through ex ante appraisals and is empowered in assessment exercise to promptly prevent the anticompetitive effects that economic concentrations can create. After reviewing and evaluating, the National Competition Committee shall allow an economic concentration if it does not or has no potential to cause significant competition-restraining impact on the market, or if the economic concentration is conducted under certain conditions (with appropriate remedies)."

180) Ibid, p. 10.

conducting competition proceedings, thereby enhancing its performance. The National Competition Commission is highly regarded for its role with increased responsibilities and is ensured to have sufficient authority to enforce competition laws. In competition proceedings, the National Competition Commission is the agency that conducts all activities from discovery and investigation to handling violations of competition law and resolving complaints regarding the decision on the competition case.[181)]

H. Perfecting regulations on processes and procedures in competition proceedings

The regulations on processes and procedures in competition proceedings in the Law on Competition 2018 have been completed in a simpler way, i.e., shortening the time and clearly defining the stages in the process of resolving competition cases from discovery, investigation, to handling and resolving complaints. The specific responsibilities of the proceeding agencies and officials at each stage are specified. At the same time, the Law on Competition 2018 clearly defines the functions, tasks, and powers of the proceeding agencies and officials as well as the rights and obligations of participants in the procedure. This shall ensure that the competition proceedings are clear and transparent so that all individuals, organizations, undertakings, and the whole society can monitor and supervise.[182)]

3 Cartel Regulation in Vietnam

A. Enforcement results of cartel regulations in the Law on Competition 2004

Since its promulgation, the Law on Competition 2004, in general, and the laws regulating cartel behaviors are expected to be a legal basis to help ensure an equal business environment and efficient operation of the market economy. So far, after

181) Ibid, p. 10: "In competition proceedings, the National Competition Commission is the agency that conducts all activities from discovery and investigation to handling violations of competition law and resolving complaints regarding the decision on the competition case."
182) Ibid, pp. 10–11.

more than 12 years, it can be said that the enforcement of cartel regulations in the Law on Competition 2004 has achieved some initial results.

Among the cartel regulations, the act of "agreeing to directly or indirectly fixed prices of goods or services" in Clause 1, Article 8 of the Law on Competition 2004, the prohibited act provided in Clause 2, Article 9 of the same, as well as regulations on handling violations, processes, and procedures for investigation and handling of the price-fixing cartels, are implemented quite effectively. In more than 13 years of enforcing the Law on Competition 2004, six cases of competition restriction had been dealt with, two of which related to cartels, including (1) the competition case relating to the act of fixing car insurance premiums between 19 non-life insurance companies and (2) the competition case involving the pupil insurance premium cartel between 14 branches of non-life insurance companies in Khanh Hoa province.

In terms of evidence that constitutes violations, the general characteristics of these two cases lie in the fact that the parties became involved in the anticompetitive acts because of their lack of awareness of competition laws. Therefore, after entering into an agreement in the form of signing a written agreement, these companies even publicly announced the agreement on the Internet and the website of the Vietnam Insurance Association to ensure that the participants must honor their commitments in reality.

The two cases above were investigated and handled by the Vietnamese competition authorities from 2009 to 2011. The public announcement of the results of the investigation and the handling of the above cases on the information portals of the competition authorities and mass media have helped undertakings and the general public to be better aware of cartels. However, the awareness of the possibility of being legally liable for violating cartel regulations may create incentives for undertakings that are currently engaged in or attempting to involve in cartels to conceal evidence of violations, especially cartel evidence.

Since 2011, there have been no further competition cases relating to investigated cartels. However, that does not mean there is no other cartel on the market. In fact, in recent years, the mass media have repeatedly reported on the allegations of handshake cartels among undertakings in several sectors and fields such as gas,

block calendar, cement, sugarcane, etc. to increase selling prices or divide the market, thereby violating the Law on Competition 2004. They even asked the VCA to investigate. Given the public interest, the VCA also actively conducted a market review to detect evidence of violations. According to preliminary statistics, by the end of 2017, the VCA had conducted a total of 92 pre-procedural investigations, of which 44 were related to signs of cartels, amounting to about 48% of the total number of pre-procedural investigations.

The enforcement of many cartel regulations already had a positive impact on the competitive environment of relevant markets in the three cases investigated and, at the same time, the undertakings' perception of competition laws has also been significantly improved. Specifically, in the above cases, after the competition authority issued an investigation decision, associations had sent dispatches requesting their members to cease the implementation of price-fixing cartels. Some major undertakings had demanded agents and subsidiaries to stop applying new rates. There were even some undertakings compensating customers the discrepant amount between the prices before and after the [price-fixing] cartel was formed. In addition, recognizing that cartels are violating competition laws [and therefore] shall be investigated and strictly dealt with, and undertakings and associations have had a better cooperative attitude in providing information and evidence for the investigation process.

However, in addition to the achieved results, the situation in reality also shows some shortcomings arising from legal regulations that make it difficult for both the competition authority and the business community to comply, limiting the number of cartel cases to be investigated and dealt with. As a result, it has yet to reflect business and competition practices of undertakings.[183)]

B. Difficulties and challenges arising from provisions in the Competition Law 2004

1) Regarding Definition and Classification

Currently, the Vietnam Competition Law does not have any definition or general clause on the acts of competition restriction agreement. The current provisions only

183) Ibid, pp. 12-13.

aim at external forms rigidly but do not embrace all new forms of businesses with a higher degree of complexity of enterprises. For example, floor and ceiling price fixing agreement; agreement to increase or reduce prices (not only at a specific level) are agreements with the nature of restricting competition but have not yet been regulated. While business practices and strategies of enterprises (including acts of agreement) change in a more and more complex degree with many different forms, the current "hard" approach will make it difficult to enforce agencies in the investigation and handle specific cases.

2) Regarding Prohibitions

(a) The grouping of the acts of competition restriction agreement under two levels of prohibitions specified in Article 9 of Competition Law is not entirely appropriate.

Specifically, some acts of price-fixing, output restriction, market allocation, and bid-rigging always have anti-competition nature, seriously violate competition principles, and have a direct impact on market factors such as price, output, and distribution areas. According to the approach of many competition agencies in the world, these agreements are prohibited in all cases without considering the impact factor or specific cases and are not exempted in general.

However, as stipulated in Clause 2, Article 9 on prohibited competition restriction agreements, the acts of price-fixing, market allocation, and output restriction (regulated in Clause 1, 2, 3, Article 8 of Competition Law and Article 14, 15, 16, Decree 116/2005/ND-CP) are only prohibited when the combined market share of the parties participating in the agreement in the relevant market makes up of 30% or more.

This provision reveals inadequacies in some serious competition restriction agreement cases, such as price fixing agreement is not prohibited if the combined market share in the relevant market of participating parties is below 30%. Meanwhile, these agreements still have impacts on commodity and service price increase in the market. In these cases, market share does not reflect market power completely and accurately, or in other words, the ability to restrict competition of participating enterprises in the agreement.[184)]

(b) Market share, as the only basis to distinguish two levels of prohibition, also cause inadequacies in the enforcement and control process of competition restriction agreements.

The differentiation of the levels of prohibition for the acts of competition restriction agreement must be based on the nature of competition restriction of the acts and the nature and degree of direct or indirect impact to competition factors in the market. Market share is just one of many criteria used to evaluate the ability to restrict competition in the relevant market, which indirectly reflects the degree and scope of the impact to the market if the act of agreement takes place. The evaluation of the market power or the ability to restrict competition in the relevant market, besides market share, depends on many other factors such as market structure, the excessive capacity of competitors, barriers to market entry, the purchasing power of customers, and so on.

In addition, each field has a separate market structure, and the number of enterprises engaged in the business operation in each sector and field is also different. The setting of a threshold of 30% combined market share for all markets, sectors, and fields to identify the market power of enterprises participating in the agreement is unreasonable. Therefore, if we just based on the threshold of 30% combined market share of enterprises participating in the agreement in the relevant market to differentiate the level of prohibition for the acts of agreement, this is not comprehensive, and it makes the evaluation of the prohibited acts of agreement rigid and inconsistent with reality.

3) Regarding Exemptions

(a) The scope of the types of agreements that are exempted as the current regulations is not reasonable.

As analyzed above, price-fixing, market allocation, and output restriction agreements always have the nature of restricting competition and seriously violate competition principles. These agreements must be strictly prohibited and are not exempted. However, according to Vietnam Competition Law, these agreements are within the scope of agreements that can be exempted for a certain period if they meet the conditions stipulated in Clause 1, Article 10 of Competition Law.

184) Ibid, pp. 13-14.

(b) Provisions on exemption have not mentioned the principles to determine the time limit for the exemption of competition restriction agreements.

(c) Provisions on the exemption for prohibited competition restriction agreements are in contradiction with agreements on price.

As stipulated in Article 10 of Competition Law, the exemption of competition restriction agreements is within a period. Exemption for a period for competition restriction agreements is entirely reasonable because, over time, these arrangements tend to not meet the conditions required for exemption anymore. Competent agencies and individuals taking over the dossier and making a decision on the exemption of competition restriction agreement can propose and decide the time limit for the exemption. However, the lack of stipulations on the time limit of exemptions in Competition Law leads to the lack of basis to determine the period for the exemption of competition restriction agreements.[185)]

4) Regarding Sanctions

(a) The fine level based on total revenue is not reasonable.

The actual practice of investigation and handling of competition restriction cases show that all claims or lawsuits against the decision on the handling of competition cases are related to the point that the basis for determining the fine level is total revenue. Although the contents of the claims can be rejected by competition authorities or courts since that is the stipulation of the law, however, we can see that the determination of fine level based on total revenue, in many cases, is not equivalent to the degree of impact of the act of agreement. Because of this judgment, competition authorities have applied a very low penalty of the total up to 10%, for example, 0.0x% of the total revenue of the fiscal year preceding the year when the violation was committed. The issue is that, for the acts sanctioned at 5%-10% of the total revenue, sanctions must be at least 5%. In some cases, companies may even go bankrupt because of the decision on the handling of competition case and of course, that is the case that no competition authorities in the world would expect as it goes against the objective of protecting competition that all competition laws aim at. Based on the viewpoint of proportionality, many countries have adopted the principle of sanctioning based on the turnover in the relevant market or affected market. Besides, for competition

185) Ibid, pp. 14-15.

restriction acts taking place in a certain period, for example, the act of agreement took place in five years, competition authorities may take the turnover of the enterprise in the relevant market to be the basis to determine penalty level. In addition, many countries have provisions to restrict the turnover in the relevant market within a maximum of three continuous years (like Japan) or the maximum fine in all cases not exceeding 10% of the total revenue of the enterprise in a fiscal year. [186)]

(b) There is a lack of basis to determine the specific fine level for enterprises that violate the provisions on competition restriction agreements.

The provisions on the handling of the violations of competition restriction agreements only mention two fine levels, which are 0%–5% and 5%–10% of the total revenue for the fiscal year preceding the year of the act of violation was committed, but do not provide principles to determine a specific fine level within the frame of penalty. That makes it difficult for VCA and VCC in determining the specific fine level for enterprises that violate the provisions on competition restriction agreements and even cause controversies in the decisions on the sanctioning of violations. On the other hand, the lack of legal basis in determining the specific fine level will lead to concerns of enterprises about the transparency in the handling of violations, and enterprises also find it difficult to determine the sanction level for their violations.[187)]

(c) There are no provisions on the forms and levels of sanction for individuals in violations.

The provisions on the handling of the violations of competition restriction agreements have not considered the forms of sanction for individuals in violations (monetary fine and/or imprisonment). In fact, the idea of competition restriction agreement is often from the leader of the enterprise, such as management board members, leaders, business managers, and others. If only applying severe sanctions for enterprises, this can lead to bankruptcy after paying fine, directly affecting the lives of workers and employees who are working at the enterprise, while the violating individual is not responsible under the law. [188)]

186) Ibid, p. 15.
187) Ibid, pp. 15–16.
188) Ibid, p. 16.

(d) The provisions on the handling of the violations of competition restriction agreements have not considered the sanctions for professional associations.

In Vietnam, there are currently thousands of professional associations with large and small scales. As social, professional organizations, in reality, associations serve as advocates in building agreement ideas and organizing meetings, exchanging information among enterprises, and mobilizing enterprise members to participate and implement the agreement. Although professional associations are within the regulation scope of Competition Law under Article 2 of the Law, however, there has not been a legal basis for applying sanctions for the violations of associations in competition restriction agreement cases. In the context where the awareness of enterprises and associations on Competition Law is still low, not applying sanctions for violations of associations in competition restriction agreement cases will have no warning and deterrence effect as well as encouragement to associations to commit the violations of Competition Law.[189)]

(e) Additional sanctions and remedy measures may not reflect the purpose of deterrence and education for enterprises in violations.

Under the current provisions of Vietnam Competition Law, additional sanctions and remedy measures for the violations of competition restriction agreements include: (1) confiscation of exhibits and means used for the commission of violations, including confiscation of all profits earned from commission of violation acts, and (2) force to remove illegal provisions from business contracts or transactions. Because of the specific characteristics of competition restriction agreement cases, enterprises may agree orally or in written documents under many different forms such as telephone, email, commitments, agreements, and so on. Therefore, the additional sanctions and remedy measures mentioned above seem not to be suitable and widely-applied in reality. Meanwhile, additional sanctions and remedy measures are important contents that international competition law enforcing agencies aim at.

C. The need to revise cartel regulations and introduce the leniency program

As stated above, although the enforcement of the cartel provisions in Law on

189) Ibid, p. 16.

Competition 2004 has achieved initial results, the number of cases of cartels that have been investigated and resolved is still very limited and not reflecting the business and competition practices of undertakings. In addition to the objective reasons and reasons related to the model, legal status, and human resources of the competition authority, the fundamental cause of the abovementioned situation is that cartel regulations have their own shortcomings. Therefore, the amendment and improvement of cartel regulations in the 2004 Law on Competition are inevitable.

One of the essential requirements when revising and finalizing cartel regulations is the leniency program. Stemming from the enforcement of the Law on Competition 2004 in practice, there are cases where it is easy to see signs of competition restriction agreements such as concurrently increasing selling prices and reducing buying prices for certain goods and services or dividing markets, limiting the production and trade of goods and services. Yet, the VCA still lacks the basis and evidence of "concerted practices" among undertakings in the market to initiate an investigation (for example, written agreement between parties; directing the implementation of the agreement, evidence that undertakings meet and agree on contents related to price, output, distribution market and product consumption, etc.).

While many competition authorities around the world are empowered to conduct on-site inspections or implement the leniency program to detect and collect evidence on cartels among undertakings, the tools and authority to collect these evidence by the VCA under the Competition Law 2004 are relatively limited.

Leniency is the granting of exemption or reduction of penalties for undertakings that violate competition laws but later cooperated with the competition authorities. Accordingly, the core element of such policy is to exempt or significantly reduce the fines for organizations and individuals participating in the leniency program, which would otherwise be imposed on them. From this perspective, the leniency policy is similar to the amnesty regime from criminal liability in Vietnamese criminal laws. However, such leniency policy has a broader scope of application, including full immunity and partial reduction of fines.[190)]

The leniency policy applies to undertakings that participate in cartels, which proactively report to the competition authority their violations and provide the

190) See Ibid, p. 19 regarding the two distinctions.

authority with evidence of significant value. In fact, a majority of cartel cases are discovered through leniency.[191]

The current competition laws in Vietnam do not have regulations on leniency yet. Cartels investigated by the competition authority are based mainly on self-reported information or assistance from many third-party agencies such as media outlets and newspapers. Currently, there are provisions on extenuating circumstances applicable to enterprises in certain cases under the Law on Competition 2004. However, in over 10 years of enforcement, it is clear that the provisions on extenuating circumstances did not help to detect many cases of violations because of the lack of motivation and great pressure for enterprises that participate in a cartel to report and provide information about the cartel they take part in. Therefore, it is necessary to introduce regulations on leniency policy to enhance the effectiveness of competition law enforcement.

D. Major revisions of the Law on Competition 2018 on cartels

1) Regarding Definition and Classification

In the Competition Law of 2018, the concept of "competition restriction agreement" has been supplemented and stipulated in Clause 4 Article 3 interpretation of terms.

4. "Anticompetitive agreement" means arrangements made by parties in any form that causes or may cause anticompetitive effects.

"A competition restriction agreement is an act of agreement between the parties in any form that has an impact or is likely to exert a competitive restriction effect."

3. "Anticompetitive effects" means the effect of eliminating, reducing, distorting, or deterring competition on the market.

In particular, "competition restriction effect" is explained as "the effect of eliminating, reducing, distorting, or deterring competition on the market."

191) See Ibid, p. 18 regarding FTC's operating performance of the leniency program.

2) Classification

The specific acts of restricting competition agreements are stipulated in Article 11 of the Competition Law of 2018, including the following acts:

1. Agreements on directly or indirectly fixing goods or service prices;
2. Agreements on distributing customers, consumption market, sources of supply of goods, and provision of services;
3. Agreements on limiting or controlling the quantity and volume of produced, purchased, sold goods, or provided services;
4. Agreements for one or more parties to the agreements to win tenders when participating in tenders for the supply of goods or services;
5. Agreements on preventing, restraining, and disallowing other enterprises from entering the market or developing a business;
6. Agreements on abolishing from the market enterprises other than the parties to the agreements;
7. Agreements on restricting technical or technological development and investments;
8. Agreement on imposing on other enterprises conditions for the signing of goods or services purchased or sale contracts or forcing other enterprises to accept obligations, which have no direct connection with the subject of such contracts;
9. Agreements on not trading with enterprises other than the parties to the agreements;
10. Agreements on restricting consumption market and sources of the supply of goods and services from enterprises other than the parties to the agreements; and
11. Other agreements that cause or may cause anticompetitive effects.

3) Regarding sanctions

According to Clause 1 Article 110 of Competition Law 2018, any entity committing a violation of the competition law (including competition restriction agreements) shall, depending on the nature and seriousness of their violations, be disciplined, incur penalties for administrative violations, or face criminal prosecution. In the case of damage to the interests of the state and legitimate rights and interests of organizations and individuals, compensation must be paid according to the provisions of the law.[192)]

192) Ibid, p. 21: "According to Clause 1 Article 110 of Competition Law 2018, any entity committing a violation of competition law (including competition restriction agreements) shall, depending on

Article 110. Rules and forms of sanctions against violations and remedial measures for violations of competition law

1. Any entity committing violation of competition law shall, depending on the nature and seriousness of their violations, be disciplined, incur penalties for administrative violations or face a criminal prosecution; in case of damage to the interests of the State, legitimate rights and interests of organizations and individuals, compensation must be paid according to the provisions of law.
2. For each violation of competition law, the violator shall be subject to one of the following primary penalties:
   a) Warning
   b) Fines

3. Depending on nature and severity of the violation, the violator may be subject to one of the following additional penalties
   a) Revocation of enterprise registration certificates or equivalent, deprivation of licenses and practicing certificates
   b) Confiscation of the exhibits and means used for violations of competition law
   c) Confiscation of the profit earned from the violations of competition law

4. Apart from penalties prescribed in Clauses 2 and 3 hereof, the violator may be subject to the application of one or more of the following remedial measures
   a) Restructure the enterprises having abused their dominant position on the market or abused their monopoly position
   b) Remove illegal provisions from business contracts, agreements or transactions;
   c) Divide, split or sell a part or all paid-in capital, assets of the enterprise which is established after economic concentration
   d) Subject to the control of competent authority related to purchase prices and sale prices of goods, services or other transaction conditions in contracts of the enterprise which is established after economic concentration
   dd) Make public correction

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the nature and seriousness of their violations, be disciplined, incur penalties for administrative violations, or face a criminal prosecution. In the case of damage to the interests of the state and legitimate rights and interests of organizations and individuals, compensation must be paid according to the provisions of the law."

e) Other necessary measures to overcome anti-competitive effects of the violation.

5. The Government shall provide guidelines for penalties and remedial measures for each violation prescribed in competition law.

- The main sanctioning form, including: Warning and fine (a fine of up to 10% of the total turnover of the enterprise, which committed violations in the relevant market in the preceding fiscal year preceding the year of the violation, but lower than the lowest fine level applicable to violations, are provided in the Criminal Code).

- Additional penalties: Revocation of enterprise registration certificates or equivalent as well as deprivation of licenses and practicing certificates; confiscation of the exhibits and means used for violations of competition law; and confiscation of the profit earned from the violations of competition law.

- Remedial measures: Remove illegal provisions from business contracts, agreements, or transactions; make a public correction; and other necessary measures to overcome the anticompetitive effects of the violation.

According to the Penal Code 2015, the offense of violating competition regulations is stipulated in Article 217 and amended and supplemented in the law on amendments and supplements to some articles of the Penal Code No. 100 / 2015 / QH13 (Penal Code 2017), accordingly.

1. A person who commits any of the following acts and causes damage assessed at from VND 1,000,000,000 to under VND 5,000,000,000 for another person or obtains an illegal profit of from VND 500,000,000 to under VND 3,000,000,000 shall be liable to a fine of from VND 200,000,000 to VND 1,000,000,000 or face a penalty of up to two years of community sentence or three to four months of imprisonment:
   a) Reaching an agreement on preventing another enterprise from participating in the market or developing its business;
   b) Reaching an agreement on eliminating another enterprise, which is not a party to such agreement from the market;

c) Reaching an agreement on limited competition while the parties to such contract has a total market share of ≥ 30%, including an agreement on: directly or indirectly pricing goods/services; division of market and goods/services supply; restriction or control of quantity of goods/services; restriction on technological development or investment; and imposition of conditions upon other enterprises for the conclusion of sale contracts or forcing other enterprises to assume obligations that are not related to the contracts.

2. This offense committed in any of the following circumstances carries a fine of from VND 1,000,000,000 to VND 3,000,000,000 or a penalty of one to five years of imprisonment:
   a) The offense has been committed more than once;
   b) The offense involves the use of deceitful methods;
   c) The offender takes advantage of its dominant position or monopoly on the market;
   d) The illegal profit earned is ≥ VND 3,000,000,000;
   dd) The damage incurred by other enterprises is ≥ VND 5,000,000,000.
3. The offenders may also be subject to paying a fine of from 50,000,000 VND to 200,000,000 VND, not holding certain posts, practicing certain occupations, or doing certain jobs for one to five years.
4. Commercial entities offense defined in this article shall be penalized as follows:
   a) Committing a crime in the cases prescribed in Clause 1 of this article, a fine of between VND 1,000,000,000 and 3,000,000,000 shall be imposed;
   b) Committing a crime in cases specified in Clause 2 of this Article, a fine of between VND 3,000,000,000 and 5,000,000,000 shall be imposed, or the operation terminated for a period of between six months and two years;
   c) The violating corporate legal entity might also be liable to a fine of from VND 100,000,000 to VND 500,000,000, be banned from operating in certain fields, or raising capital for one to three years.

E. Leniency program provisions in the Amended Competition Act

The leniency program is stipulated in Article 112 of the Competition Law of

2018 to enhance the effectiveness of detection and investigation and handling of competition restriction agreements. The specific content of this regulation is as follows:

1. Enterprises that voluntarily inform to help the National Competition Commission detect, investigate, and handle anticompetitive agreements prohibited prescribed in Article 12 of this law might receive full or partial immunity from fines under the leniency policy.
2. The president of the National Competition Commission shall decide the granting of full or partial immunity from fines according to the leniency policy.
3. Full or partial immunity from fines prescribed in Clause 1 hereof shall be granted if the enterprise meets the following conditions:
   a) It has engaged in the anticompetitive agreement as a party as prescribed in Article 11 of this law;
   b) It voluntarily gives notice of the violation before competent bodies make an investigation decision;
   c) It honestly provides all information/evidence that it has on the violation, which is of great help for the National Competition Commission to detect, investigate, and handle the violation; and
   d) Fully cooperate with competent bodies during the investigation and handling of the violation.
4. Regulations in Clause 1 hereof shall not apply to enterprises that force or arrange other enterprises to participate in the agreement.
5. This leniency policy is applicable to no more than the first three enterprises that apply for leniency to the National Competition Commission and meet all the conditions specified in Clause 3 of this Article.
6. Criteria for determining the enterprises entitled to leniency:
   a) Order of the notification;
   b) Time of notification submission; and
   c) Fidelity and values of the provided information/evidence.
7. Full or partial immunity from fines shall be granted as follows:
   a) The first enterprise applying for leniency and meeting the conditions specified in Clause 3 of this Article might receive full immunity from fines; and
   b) The second and third enterprises applying for leniency and meeting the

conditions specified in Clause 3 of this Article might receive 60% and 40% of immunity from fines, respectively.

4 Proposal on the Effective Enforcement of Leniency Program in Vietnam: System Settlement and Phased Reinforcement

Vietnam is in the process of introducing a new system, and it is necessary to design the system to gradually improve it at the introduction stage. For this, it is preferable to establish a large framework rather than providing a complicated system. Furthermore, in the operations of the system, phased reinforcement of the system is necessary. Through phased reinforcements, the lack of enforcement or the burden placed on the violating companies can be accounted for and assist in promoting the settlement of the system itself.

Of course, in a situation where the direction and level of Vietnamese law enforcement cannot be precisely predicted, it is impossible and undesirable to establish definitives for phased reinforcement. However, it is necessary to reconsider the perception of market participants to the direct distortion of competition created by cartels and to formulate the system to realize the original purpose of the leniency program. From this perspective, the suggested approach for the operation and reinforcement is as follows:

A. Premise of the Initial System Settlement

Fundamentally required is an explanation of the value of "free and fair competition" and to spread understanding about the importance of preparing a "competition policy" and the normal operation of a market economy. In particular, Vietnamese competition authorities need to present specific details on the functions and roles of the competition authorities under the revised Competition Act to market participants, particularly to businesses.

To enhance the understanding of participants in the market, there is a need to

provide an explanation of regulatory matters, such as the purpose and key provisions of the revised Vietnamese Competition Act 2018. As such, explanatory meetings provided by the competition authority for domestic companies and foreign companies operating in Vietnam is advantageous.

Efforts by the competition authorities for the effective functioning of the leniency program require: i) strong sanctions against cartels and high probability of detection; ii) predictability so that voluntary reporters know the advantages and disadvantages of reporting; and iii) transparency in the case of management procedures by the competition authority.

B. Phased Reinforcement during the Operation of the Leniency Program

Phased discussion on the following items to reinforce the system in the process of the system's operation can be expected. Certainly, discussions on these issues should be preceded by a preliminary assessment of law enforcement in Vietnam.

Whether to expand the scope of sanctions for leniency: currently, leniency is centered around the fine reduction. However, discussions have to be provided as to whether to expand leniency to "Additional penalties," "Remedial measures," and "criminal penalties" for individuals, etc.

Whether to adjust the standard of leniency and fine reduction rate for the third subsequent reporter under the amended Competition Act

Whether to adjust the leniency application procedures that are more suitable for the situation of Vietnam

Whether to introduce the Amnesty Plus System or a reporting reward system

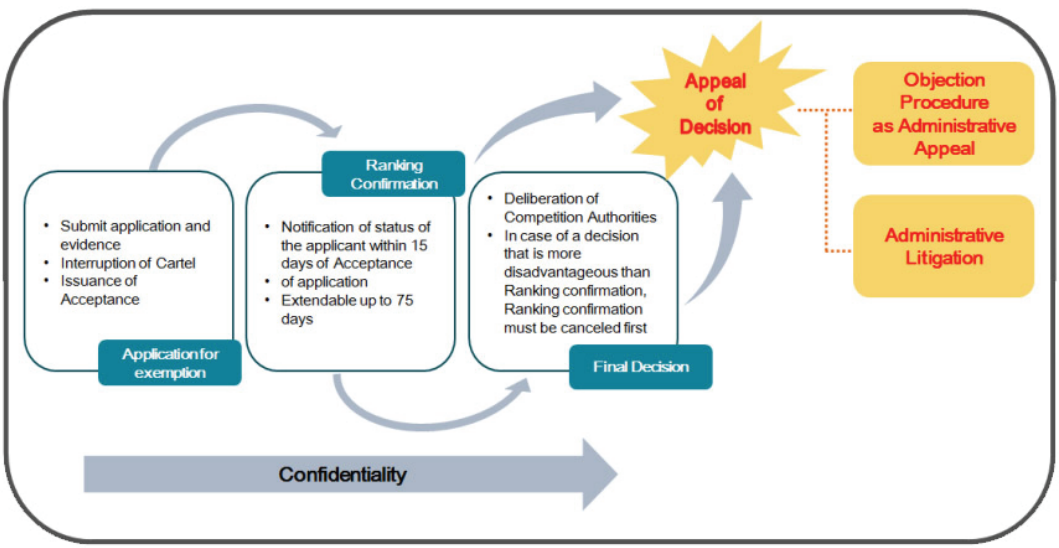
Whether restrictions on leniency will apply to repeat offenders

Whether to abolish verification of rank in the investigatory phase to induce proactive cooperation

Other necessary matters to adjust the system dependent on law enforcement of the competition authority of Vietnam.

5 General Procedures for the Operation of the Leniency Program

Considering the context of the amended Competition Act of Vietnam and the situational background, the following general procedures for the operation of the system are proposed. However, an application for objection and administrative litigation are not related to the general rule of the appeal of the disposition and decision of the competent authority but are included in the regulation to facilitate procedural understanding.



A. Application of Reduction (or Exemption)

① The business operator shall submit an application for exemption and evidence necessary to substantiate a violation of the law.

② Applications for reduction can be submitted directly, by fax, or by email, or orally if a written submission is difficult.

③ The CIA must issue an application card with the date and ranking of the application immediately upon receipt. Voluntary-reporting persons and others shall immediately cease to engage in illegal joint acts after applying for reduction or exemption except for needs for the investigation.

④ The applicant should state his identity and an outline of the unjust joint act. At this time, necessary evidence may be submitted together.
In exceptional cases, evidence data may be corrected postmortem after the submission of a simplified application if there are special circumstances that prolong the collection of evidence.
In principle, the ex post facto correction of evidence is 15 days, but in exceptional cases, such as applying for an exemption to other competition authorities because of the international cartel incident, it can be extended to up to 75 days.

⑤ If, at the time of receipt, some of the applicants fail to receive a status confirmation for ranking, the next ranked person may succeed.
In this case, the first arrival at the time of receipt shall be ranked first. If the Vietnamese competition authority's fault changes the ranking, the ranking can be corrected.
If, through the mistake of the CIA, the receipt order was incorrectly indicated, the CIA is permitted to correct the order of receipt.

B. Confirmation of Ranking

① The CIA, within 60 days after the application is received, the competition authority shall, in principle, notify the applicant in writing of a "ranking confirmation of reporting party" that indicates whether the applicant is eligible for a reduction. Vietnam is the first to start the lineage system, and because of the lack of workforce and experience, it requires sufficient time after receiving applications.

② If there are circumstances where time is required by the CIA to determine whether the reduction requirement has been met, the applicant may be

notified in advance of the extension of the time limit and the reason for it, and the date of issuance of the status confirmation can be extended within 120 days.

③ The status verification of the CIA, ① in the event that he/she does not faithfully cooperate until the committee's deliberations are over, including not stating all facts relating to unfair joint acts and not submitting relevant materials; ② in the case of intentionally submitting false data; ③ in case the joint act is not stopped immediately after the application for exemption or the end of the period prescribed by the examiner, or the suspension of the joint act is not maintained; ④ in case it is found that another operator has been forced to participate in the unfair joint act against that intention or not to stop such misconduct; and ⑤ in case the submitted evidence is not recognized as proving the fact of the joint act, cannot be canceled except as above.

C. Final Decision

The NCC makes the final decisions on the reduction of corrective actions and fines through deliberation. In case of making a decision that is less beneficial than the one listed in the position confirmation, canceling the position confirmation first is required.

D. Confidentiality and Restrictions to Indictment

① Those who intend to challenge disposition of the NCC may file an objection with the competition authority within 30 days from the date of notification of disposition.

② Upon the receipt of a challenge for a disposition, the NCC shall provide for adjudication within 90 days, and, in the event of unavoidable circumstances, the period may be extended within 30 days.

③ The NCC shall not indict a business to the Prosecutors Office that has been granted status under the regulation.

E. Objection Procedure

① Those who intend to challenge the disposition of the NCC may file an objection with the competition authority within 30 days from the date of notification of disposition. (Those who intend to challenge the disposition of the NCC may file an objection to the NCC within 30 days from the date of the notification of the disposition.)

② Upon the receipt of a challenge to the disposition by the NCC, the NCC shall provide for adjudication within 90 days, and, in the event of unavoidable circumstances, the period may be extended within 30 days.

F. Administrative Litigation

① When an appeal is sought against the disposition of the Fair Trade Commission, it shall be brought forward within 30 days from the date of the notification of the disposition or the date of receipt of the original version of the written adjudication on the objection. At this time, it would be better to give full jurisdiction to Hanoi and Ho Chi Minh courts. As Vietnam is a long country between the north and south, I think it is necessary to set up a court that will be subject to full control even if there is an additional court in the middle region.

6 Vietnam: Draft Regulations for the Reduction and Exemption of Fines for Voluntary Reporting of Unfair Joint Acts

With exception to Article 112 of the revised Competition Act of Vietnam, there are no regulations to the directionality of operations or specific procedures of the leniency system. In addition, as the Enforcement Decree of the same act is in the process of amendments, there are difficulties with confirming the specificities of the amendment. Considering these factors, the draft regulations are provided for

within the possible interpretive scope of Article 112 of the act.

Thus, with the advent of the implementation of the amended Competition Law, proposing operational regulations at the level where the core purpose of the system can be demonstrated, considering the implementation of the system and the clarity of related regulations is advantageous. While differences exist in the contents of regulations, notices and guidelines of countries where the experience of the enforcement of competition laws have been accumulated, including Korea, a framework has been proposed to which adjustments may be provided by the competition authorities of Vietnam to provide for effective system operability specific to the situational context of Vietnam.

Vietnam: Draft Regulations for the Leniency of Fines for Voluntary Reporting of Cartel Conducts

Chapter I: General Provisions

Article 1 (Objective) This regulation aims to provide the detailed procedures and extent of exemption and reductions of fine[193] for voluntary reporters.

Article 2 (Definitions) The definitions of terms used in this regulation are as follows:

1. The term "voluntary reporter" pursuant to Article 112 of the Competition Act (hereinafter referred to as the "Act") means a business operator who has participated or is involved in a cartel conduct that provides the Competition Investigation Agency (hereinafter referred to as "CIA") with necessary evidence to prove the cartel conduct before the commencement of an investigation[194] by the CIA for the cartel conduct.
2. The term "cartel conduct" refers to a competition restricting agreement that satisfies any of the subsections of Article 11 of the Act in which a business operator is participating or has participated in.
3. The term "substantial governance" at the time of an application of joint

exemption refers to, in the determination to voluntarily report, the relationship between operators that satisfy any of the following:

A. An operator who retain all shares of another business when applying for exemption and reduction.

B. An operator, at the time of application for exemption and reduction, considering the share ownership ratio, the perception of the concerned operator, whether such operator is concurrently a director of the affiliate company, whether the accounting is consolidated, whether such operator can direct daily operations, and whether such operator has sole decision-making of purchase terms, etc., is in actual control of the affiliate company and that such companies cannot be perceived as being independently operated, respectively. Provided, That such operator shall be excluded where such affiliated companies are considered to be in a competitive relationship considering the actual conditions of the respective market, the perception of competitors, and the activities of the business concerned.

Article 3 (Commencement of Investigation by the CIA) ① In the application of Article 2 of this regulation, investigations shall be deemed commenced when the CIA requests verbally, by telephone, written, etc. the submission of documentation, factual verification, request for attendance, on-site investigation, etc. to one operator or more who participated in a cartel conduct.

② Where the request for information under Paragraph 1 is in writing, investigations shall be deemed to have commenced at the time such written request is dispatched.

II: Determination for Leniency Requirement, Etc.

Article 4 (Evidence to Substantiate a Cartel Conduct) ① A voluntary reporter under Article 112 of the Act for the reduction or exemption shall submit "the necessary evidence for the 'Verification of Status of the Reporter'of the CIA to substantiate the cartel conduct." Whether such evidence substantiates, the cartel conduct shall be determined in consideration

of the evidence submitted by the applicant as a whole. Provided, That such evidence submitted shall be deemed to substantiate the cartel conduct where such evidence submitted satisfies any of the following:

1. Agreements between operators who have participated in the cartel conduct, minutes, internal reports, etc. providing the contents of the agreement, the process of establishment, or the practice or materials that can directly substantiate implementation
2. Materials that provide details of the fact that discussions, participation, or implementation of the cartel conduct were undertaken such as a written statement by the participating operator of the cartel conduct or executives or employees of such operator; and detailed materials that substantiate such facts
3. Where detailed materials to substantiate concerned facts are not available, materials that can sufficiently substantiate the fact of application such as a written statement, etc.

② Evidence under Paragraph 1 includes, but is not limited in form or type, written documents, voice recordings, computer files, etc.

Article 5 (Deliberation of Continuous Full Cooperation) ① The requirement to receive leniency for voluntary reporting according to Article 112 of the Act is "until investigations and a decision is made" means the conclusion of deliberations by the National Competence Commission (hereinafter referred to as the "NCC"); whether "full cooperation" is undertaken shall be determined by comprehensive consideration of the following:

1. Whether the voluntary reporter revealed all facts about the cartel conduct known to such reporter without delay;
2. Whether the voluntary reporter promptly submitted all evidentiary materials in possession or that can be collected for the cartel conduct without delay;
3. Whether the voluntary reporter responded promptly and cooperated to the request for the verification of facts by the CIA;
4. Whether executives and employees of the voluntary reporter (including former executives and employees, if possible) provided continuous and full cooperation throughout the investigations and deliberations;
5. Whether the voluntary reporter destroyed, manipulated, damaged, or concealed evidence and information related to the cartel conduct; and

6. Whether the cartel conduct is ceased.

② Where a voluntary reporter discloses the fact of applying for leniency to any third party without the consent of the NCC before the termination of deliberations undertaken by the NCC, such reporter shall be deemed to have not provided full cooperation. Provided, that the foregoing shall not apply where it is mandatory to disclose the fact of submitting an application for leniency under any statutory instrument or where notice is to be provided to a foreign government.

Article 6 (Determination of Cessation of a Cartel Conduct) ① In determining whether voluntary reporting is made pursuant to Article 5 of this regulation, whether the "cartel conduct is ceased" shall be determined as to whether any act commissioned based on the agreement has ceased, and the declaration of intention to withdraw from the agreement shall be deemed as the cessation of the cartel conduct. Provided, That for bid-rigging, the act being committed shall be deemed to have ceased if the relevant bidding is completed.

② Cartel conduct shall cease immediately after an application for exemption and reduction is submitted. Provided, That where an investigator provides a specified period necessary to further investigate, cessation shall be at the expiry of such specified period.

Article 7 (Treatment of Coerced Operators, Etc.) ① Where an operator has coerced the participation or organization of other business operators in the commission of the cartel conduct pursuant to Article 11 of the Act, such operators shall not be exempted from fines.

② Whether "an operator has coerced another business operator to participate or continue to engage in the cartel conduct in contravention of the intention of such other operator" shall be determined in careful consideration of the following:

1. Whether the operator has exercised physical force, threatened, or committed any relevant act to another business operator with the intent to coerce such other operator to participate in the cartel conduct or continue such cartel conduct against the intention of such other operator;
2. Whether an operator compelled or imposed any sanctions or committed

any relevant acts to such other operator to the extent that such compulsion or sanction causes difficulties to such other business operator in conducting normal business activities in the relevant market with the intent to coerce such other operator to participate in the cartel conduct or continue such cartel conduct in contravention of the intention of such other operator.

III: Application for Leniency

Article 8 (Application for Leniency) ① A person who intends to apply for fine exemption and reduction shall submit an application for exemption and reduction to the CIA in-person or by email or fax of the following matters:

1. Name of the voluntary reporter, etc. and company, name of the Chief Executive Officer, address, business registration number (or resident registration number), and contact number; and the name, department of employment, and contact number of the person who submits the application;
2. Summary of the participating cartel conduct of voluntary reporters, etc.;
3. Necessary evidentiary materials to substantiate the cartel conduct and a table of contents of such evidentiary materials;
4. A statement that the applicant discloses that full cooperation shall be provided to the NCC until deliberations by the NCC on the cartel conduct is concluded; and
5. A statement as to whether the cartel conduct is ceased.

② Where two or more operators intend to apply for "joint exemption and reduction," considering the requirements for "actual governance structure" under Article 2(3) of this regulation, such operators, in addition to the information provided in Article 8(1) of this regulation, shall supplement the application with the following:

1. Whether the joint applicants satisfy the requirements for joint fall under the requirement for joint exemption and reduction and the grounds such satisfaction;
2. A written document that substantiates the particulars of Subsection 1; and
3. The order of succession that would be provided to joint applicants if each

joint applicant is individually ranked.

Article 9 (Exemptions to the Application for Leniency) ① An applicant of Article 8 of this regulation may submit an application in which some of the information to be provided may be omitted where considerable time is necessary to collect evidentiary materials or where any exigent circumstances prevent such applicant from submitting the necessary evidentiary materials with the application. Provided, That the information to be provided under items 1 and 2 of Article 8(1) of this Regulation shall be required.
② For those cases subject to Article 9(1), the applicant shall specify the period required for the supplementary submission of evidentiary materials.
③ The supplementary period under Subsection ② shall not exceed 15 days. Provided, That the CIA may grant a period of no more than 75 days for supplementary submission where a legitimate request from the applicant is provided with prima facie proof of a reasonable cause, such as where the acquisition of evidentiary materials requires sufficient time.
④ Notwithstanding subsection ③, where the CIA deems necessary for the acquisition of evidentiary material and to secure statements, the supplementary submission period may be granted over 75 days.
⑤ The summary of the cartel conduct under Article 8(1)(2) provided for in the initial application may be supplemented during the supplementary submission period. Provided, That supplementation shall not be permitted where the initial cartel conduct reported is intentionally or gross negligently falsely reported.

Article 10 (Verbal Application for Leniency) ① Where an applicant has difficulty submitting a written application for leniency with the CIA, such applicant may verbally submit an application for exemption and reduction. However, a verbal application by telephone shall be excluded from the application of this provision.
② Upon receipt of a verbal application for exemption and reduction, the investigating civil servant shall record or transcribe the questions and answers and retain such recording or transcription.

Article 11 (Order of Succession) ① Whether an applicant or the initial reporter (or the second or third subsequent reporter) to satisfy all the requirements of Article 112(3) of the act and Article 4 of these regulations shall be determined by the time of receipt of an application for leniency under Article 8 of these regulations.

② Where an executive officer or employee of a voluntary reporter provides necessary evidentiary material to substantiate the cartel conduct by a letter of confirmation or statement, etc. before an application for leniency by the voluntary reporter, in contravention of the foregoing section, such voluntary reporter shall be deemed to have submitted the application for leniency as at the time the evidentiary material is submitted.

③ Where two or more applications have been submitted, and where some of the applications are withdrawn or where an applicant is disqualified for leniency or for failing to satisfy the requirements for leniency for voluntary reporting, the applicant next in the order of priority shall be the next in succession for the order of receipt of the disqualified applicant.

④ An applicant who is next in the succession of order for the receipt of the disqualified applicant pursuant to Section 3 shall satisfy the requirements for leniency for voluntary reporting that corresponds to the succession order.

⑤ Where a joint application for leniency pursuant Article 8(2) of this regulation has submitted the order of receipt shall be granted according to the following:

1. Joint applicants shall be granted equivalent rank but may be indicated with a provisional ranking.
2. The order of receipt of each person who submits an application for leniency after a joint application is submitted shall be provided with the rank applicable where the joint application is accepted as a valid application, and the rank applicable where the joint application is not accepted as a valid application.

Article 12 (Receipt of an Application for Leniency, Etc.) ① Upon receipt of a leniency application for voluntary reporting under Articles 8 and 9 of these regulations, a civil servant, etc. in receipt of the application shall immediately provide the filing date, the order of receipt, and the signature of such servant,

and affix a seal to the application and issue a duplicate to the applicant.
② Upon the receipt of a verbal leniency application under Article 10 of this regulation, the investigating civil servant, etc. shall separately prepare, sign, and affix a seal to a document that provides a summary of the cartel conduct reported, date and order of receipt, and a duplicate to the applicant.
③ The time of receipt to be provided according to Sections 1 or 2 shall mean either of the following. Provided, That where the time of receipt satisfies two or more of the following subsections, the earliest time or receipt shall be provided for:

1. An on-site application submission: The date, hour, and minute when the application was submitted to the investigating civil servant;
2. An application submitted by email: The date, hour, and minute when the application arrived at the relevant email address;
3. An application submitted by fax: The date, hour, and minute the application was received by the relevant fax machine; and
4. A verbal application submission: The date, hour, and minute the verbal application commences.

Chapter IV: Determination of Leniency

Article 13 (Leniency Evaluation Report Preparation, Etc.) The CIA shall separately prepare an evaluation report (hereinafter referred to as the "evaluation report") for a leniency application and voluntary reporter, etc. for the determination of status, and shall submit such report to the NCC. This report shall not be disclosed unless the concerned voluntary reporter provides consent to the disclosure.

Article 14 (Voluntary Reporter Status Determination) ① The NCC shall deliberate and provide resolutions on matters concerning leniency. Provided, That the NCC may extend the period upon providing notice to the applicant stipulating the period of extension and reason for extension in exigent circumstances; and may extend the issuance of status confirmation.
② The NCC shall not assign a marker to the voluntary reporter where any

of the following is satisfied:

1. Where an applicant does not fully cooperate with the NCC until the completion of deliberations, such as withholding facts in relation to cartel conduct, failure to submit relevant materials, etc.;
2. Where an applicant intentionally submits false materials;
3. Where an applicant does not cease the cartel conduct immediately upon filing a leniency application or upon the expiry of the specified period provided for by the investigator; or where the cessation of the cartel conduct is not maintained;
4. Where an applicant coerces another operator to participate in the concerned cartel conduct or continue such cartel conduct contrary to the intention of such operator; and
5. Where the evidentiary material submitted does not substantiate the cartel conduct.

③ Where the NCC does not acknowledge status, any evidentiary materials submitted shall not be recoverable, and such evidentiary materials may be used as necessary materials to substantiate cartel conduct.

④ Where the NCC has adopted a resolution to the status of a voluntary reporter, etc., the NCC shall prepare a written resolution and issue such resolution to such voluntary reporter stating the following:

1. The name of the applicant, the name of the representative, and the address;
2. Title of the cartel conduct case; and
3. Details to the effect that the applicant is considered a voluntary reporter, etc. and a marker as to the rank for leniency (where leniency is not recognized, details to the effect that the applicant does not satisfy the requirements for leniency and relevant reasons).

Chapter V: Supplementary Provisions

Article 15 (Confidentiality, Etc.) ① The investigating civil servant or other competent civil servants shall use the personal information, contents of a report, evidentiary materials of the voluntary reporter, etc. solely for the relevant case and shall not disclose the identity of a voluntary reporter, etc.

to any person other than the civil servants of the CIA that are concerned with the relevant case, except where permitted by statutory instrument.
② The CIA shall provide an anonym for a voluntary reporter, etc. and redact the relevant parts in an evaluation report and in evidentiary materials that supplement the examination report, and provide for voice scramblers or any other necessary measure to prevent disclosing the identity of the voluntary reporter.
③ The NCC for deliberations and resolutions may take measures to prevent the disclosure of the identity of a voluntary reporter, etc. through the provision of separate evaluation reports and written resolutions for each relevant applicant for the concerned case, and separate the examination of each relevant applicant for the concerned case in the hearings, etc.
④ The NCC shall exercise due care to prevent the disclosure of the identity of the beneficiaries excluded from liability from media coverage.
⑤ Notwithstanding the provisions of section 1, the NCC may submit materials that contain the personal information of a voluntary reporter, etc. to the court when an administrative claim is filed with the court for the relevant case.

Article 16 (Indictment) The NCC shall not file an indictment with the prosecution against an operator that has been granted leniency status under this regulation.

Addendum

Article 1 (Enforcement Date) This regulation shall enter into force on the date of its publication.

193) Although the current law provides exemption for fine only, it is necessary to discuss whether to extend the range of exemption to corrective measures in the future revision of the law.
194) Article 112 of the revised Competition Act stipulates that exemptions should be applied only if voluntary reporting are made before the commencement of the investigation. However, it is desirable to amend the law to voluntarily report after the commencement of the investigation.

[Appendix] Application Form (Related to Article 8 of the Regulation)

<table>
<tr><th colspan="7">Application for the reduction of fine for voluntary declaration of the cartel conduct</th></tr>
<tr><td rowspan="7">Applicant (Attach supplementary application for Joint Leniency Applications)</td><td>Company Name</td><td colspan="2"></td><td rowspan="2">Business Registration Number</td><td colspan="2" rowspan="2"></td></tr>
<tr><td>Name of CEO/Representative</td><td colspan="2"></td></tr>
<tr><td>Address</td><td colspan="5"></td></tr>
<tr><td rowspan="2">Contact information</td><td>Telephone</td><td></td><td>Mobile</td><td colspan="2"></td></tr>
<tr><td>Fax</td><td></td><td>Email</td><td colspan="2"></td></tr>
<tr><td rowspan="2">Applicant</td><td>Name</td><td></td><td>Department</td><td colspan="2"></td></tr>
<tr><td>Telephone</td><td></td><td>Email</td><td colspan="2"></td></tr>
<tr><td rowspan="4">Cartel Conduct Overview</td><td colspan="6">※ Please fill out the following completely and attach specific details to this application.</td></tr>
<tr><td>Description of Goods for the Agreement</td><td colspan="5">Please enter items such as goods or services subject to the agreement.</td></tr>
<tr><td>Contents of the Agreement</td><td colspan="5">Please specify the details of the agreement.
e.g., ○○ to ○○ agree to raise prices by ○%</td></tr>
<tr><td>Participants of the Cartel Conduct</td><td colspan="5">Enter the names of all business operators who participated in the cartel conduct.</td></tr>
</table>

	Actual Participants of the Meeting	*Indicate the name, company, position, and contact number of the persons who attended the meeting related to the cartel conduct.*
	Cartel Conduct Period	*Indicate the commencement of the cartel conduct, duration of the cartel conduct, and when the joint action ceased.* *e.g., January 1, 1999 – December 31, 2006*
	Date and Place of Meetings	*List completely the date and location of the meetings where participants met in connection to the cartel conduct.* *e.g., October 1, 2006 ○○ restaurant in Seoul*
	Method of Communication and Meeting Procedures	*Indicate the method of communication taken with other operators (e.g., email, telephone, fax, etc.) to discuss matters related to cartel conduct and the mode of the meeting (e.g., organizing a ○○ meeting, regular meetings, etc.).*
	Number of Meetings	*Indicate the number of times the participants met.* *e.g., 10 times a month from ○○ to ○○*
	Implementation and Procedure of the Agreement	*State whether the agreement was implemented and how.* *e.g., The standard price list was prepared and implemented with compliance regularly monitored and penalties imposed if the price deviates from the standard price and later readjusted.*
List of Evidentiary Materials	*Evidence list to substantiate cartel conduct* *Example of an evidentiary list:* • *Materials that can directly prove the agreement, such as minutes of the meetings in which the cartel conduct was agreed upon, any internal documents stating the results of agreement, etc.;* • *Statements, confirmation, and any other materials that demonstrate that the cartel conduct was discussed or conducted;* • *Email, phone records, number of faxes, correspondence records, details of business notebooks, etc. that can prove communication between business operators demonstrating intention;* • *Records demonstrating the use of space to conduct meetings and credit card receipts; and* • *Other materials, internal documents, reports, etc. to compare the management status before and after the cartel conduct.* *The evidence listed must be attached to this application. However, if special circumstances exist, additional attachments can be submitted at a later date (provided as annexed supplementary materials).*	

Cessation of Cartel Conduct and Relevant Evidence List	*Indicate the circumstances and timing of cessation from cartel conduct such as price reduction, termination of the agreement, resuming regular transactions, etc. and a list of evidence that substantiates cessation.* *The list of evidence must be attached to this application. However, if special circumstances exist, additional attachments can be submitted at a later date (provided as annexed supplementary materials).*	
Supplementation Period	*If any of the above materials are missing, provide the required time frame required to supplement this application. This period cannot exceed 15 days from the date this application is submitted. However, if necessary, the supplementation period can be extended up to 75 days after consultation with the CIA.*	
Joint Leniency Applications	Reasons for joint leniency application	• Actual governance relationship with the affiliate company • Company in division or acquisition of operations ※ Please √ in the relevant box, upon providing and explanation of the relevant reason, provide evidentiary materials to substantiate the claim and attach such materials to this application.
	Ranking among applicants for leniency where the requirements are not satisfied	*If joint leniency applicants fail to satisfy the requirement for joint exemption, the equivalent ranking will not be granted, and such applicants will be ranked individually. For these circumstances, indicate the rank granted among the applicants for the joint leniency.*
Determination of Leniency with a Foreign Government	Indicate whether you have applied for leniency with a foreign government before applying for leniency with the NCC and if so, the name of the relevant foreign authorities with which a leniency application was filed and the date of such application.	
Nota Bene (N.B.)	1. The applicant must fully cooperate until the completion of deliberations by the NCC by providing a complete and accurate statement regarding the joint act and the submission of all relevant evidentiary materials in such applicants possession. a. The voluntary reporter, etc. shall provide all facts regarding the concerned cartel conduct without delay. b. All materials in possession or collected in connection with the concerned cartel conduct shall be submitted promptly. c. The applicant must respond promptly and cooperate with the request for fact-finding by the NCC. d. The applicant shall endeavor the full and continuous cooperation of executives and employees (including former executives and employees) in the investigation and deliberation (including attendance). e. The applicant shall not intentionally destroy, tamper with, damage, or conceal	

	evidence and information in connection with the cartel conduct. f. The applicant shall not disclose any relevant facts to the act or the application for leniency to any third party without the consent of the NCC (except where disclosure is required according to a statutory instrument or to notify a foreign government). 2. The material submitted shall not be false. 3. Upon submitting an application for leniency, the act shall immediately cease or immediately after the expiry of the period provided for by the investigator; and shall continue to cease. ※ If any of the above N.B. is violated, benefits according to leniency application may not be provided.

As the business involved in the abovementioned cartel conduct, I pledge to fully cooperate with the investigation until the end of deliberations by the NCC and submit this application pursuant to Section 112 of the "Vietnam Competition Law" and Article 8 of the "Regulation on the Implementation of the Leniency Program of Illegal Cartel Conduct in Vietnam."

[Year] [Month] [Date]

Applicant: (Signature or Date)

7
Chapter

Conclusion

Chapter 7

Conclusion

Rapid social and economic changes domestically and internationally have required the recalibration to competition rules to support the normal operations of the market economy. In response, Vietnam has undertaken to completely amend its competition law for the first time since the revision of the law in 2005, and at the threshold of implementation. However, various efforts will be necessary to effectively implement the law, apart from the actual preparation of the regulation.

The successful implementation of competition law cannot be solely achieved by the efforts of competition authorities alone. Preceding the efforts of competition authorities is a consensus by society, and the dispersion of the concept of "fluid and fair competition." Additionally, continued and diverse efforts and attempts by competition authorities will be required in the implementation of a balanced approach of the Competition Law for the abuses of market dominance, business combinations, cartels, and the regulation of unfair trade practices.

Of course, the enactment of the Vietnam Competition Act, in 2005, and the complete amendment of the law, in 2018, deserve to be evaluated in itself. However, as the implementation of the Competition Act depends on the performance of the competition authorities as well as the convergence of the rules, the establishment of appropriate regulations and the enforcement experience of foreign authorities have important implications.

Addressing this perspective, the experience of Korea in establishing the

voluntary reporting system and providing policy and laws for Vietnam through this economic cooperation project effectively illustrates this perspective.

In particular, the support in the development of the regulation in consideration of the social, economic, and regulatory circumstances in Vietnam was provided to directly assist competition authorities in Vietnam in the development of secondary legislation through a draft regulation that was able to interpret the scope of cartels and the voluntary reporting system that interlinked with the amended 2018 Competition Law.

Although this research is limited to areas related to the leniency program as a means to regulate cartels, the overall economic cooperation project is noteworthy as collaboration and academic exchange were undertaken between the competition authorities and practitioners and researchers for Vietnam's Competition Law.

Furthermore, as discussions continued to the issues and anticipated issues in the interpretation and implementation of the Competition Laws of Vietnam, a consensus was provided for the need for further statutory adjustment in the future.

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Le Van Binh

(Professor, School of Law, Vietnam National University, Hanoi), "Researching the analysis of the present status of the competition law enforcement, such as cartel restrictions"

Tran Quang Hong

(Legal Researcher, Institute of Legal Science, Ministry of Justice), "The history of Vietnam's competition law, reasons for recent law amendments and the backgroud of introduction of the leniency programme"

Tran Thi Thanh Huyen

(Legal expert and Consultant at IDVN Law firm), "Researching the present state of laws and sub-regulations of the leniency program in neiboring countries of Vietnam and opinions on the course for making sub-law draft of the leniency program"