Supreme Court Decision 2018Du37700 Decided June 30, 2021【Lawsuit for Claim for Revocation of Corrective Order, etc.】

【Main Issues and Holdings】

[1] Where competitors may be excluded as a market-dominant business entity in the vertically integrated upstream market unfairly supplies goods or services at a lower price than the arm's length price through a margin squeeze conducted in the manner of lowering the retail price of complete products in the downstream market, such act can be deemed as an act of abusing a market-dominant position, which is prohibited under the Act and subordinate statutes relevant to the monopoly regulation and fair trade (affirmative)

[2] Meaning of "the arm's length price" stipulated in Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act

[3] Standard and method for determining the injustice of "an act of making a transaction to exclude a competitor business entity" prescribed in the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act

[4] Matters to be considered when determining whether an act of abusing a position by means of a margin squeeze has injustice as "a transaction which may exclude competitors by unfairly supplying goods or services at the lower price than the arm's length price" stipulated in the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act and Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act

【Summary of Decision】

[1] Where the margin squeeze of a market-dominating business entity is regulated as a type of act of abusing an independent market-dominant position, the inducement to investment or motive for innovation regarding raw materials, etc. in the upstream market may be discouraged. However, if a competitor business entity in the downstream market may be unfairly excluded from competition as a market-dominating business entity in the vertically integrated upstream market engages in a margin squeeze by abusing its position, and thus the basis of fair competition cannot be maintained, viewing that a margin squeeze corresponds to a reasonable method of competition known as the so-called "performance competition" based on market

performance through fair competition is difficult.

Therefore, if a margin squeeze performed by a market-dominant business entity in the manner of lowering the retail price of a complete product in the downstream market can be deemed as “a transaction which may exclude competitors by unfairly supplying goods or services at the lower price than the arm’s length price,” such act needs to be regulated as an act of abusing a market-dominant position, which is prohibited by the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020) and Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act.

[2] Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act materializes “an act of making a transaction to unfairly exclude competitors” stipulated in the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020), corresponding to the provision of the parent law thereof, and the arm’s length price is an instrumental concept of determining an act of abusing exclusion related to the price of a market-dominant business entity, which can appear in various types such as “predatory pricing,” “margin squeeze,” etc. Thus, the meaning thereof should be construed in accordance with the meaning and contents of the provision of the parent law thereof and legislative purpose.

The arm’s length price, as the price which can be generally formed where a transaction is normally made in the market in which free and fair competition is made, more specifically, refers to the price that has been generally formed in a normal transaction where an act of abusing a market-dominant position does not exist as a market-dominant business entity carries out a transaction for the purpose of unfairly excluding a competitor business entity.

[3] The injustice of “an act of making a transaction to exclude a competitor business entity” prescribed in the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020) should be interpreted in terms of legislative purpose such as the promotion of competition in the monopolistic and oligopolistic market. Therefore, when a market-dominant business entity engaged in an act to see that, with the intent or purpose to maintain and reinforce a monopoly in the market, i.e., to artificially affect the market order by restricting free competition in the market, such effect arising from the

restriction on competition may be caused even from the objective perspective, injustice can be admitted. This requires to prove that such act, as an act which can lead to the effect of the restriction on competition such as the price increase of goods, a decrease in output, an impediment to innovation, a reduction in prime competitor business entities, a decline in diversity, etc., had such intention and purpose. Where it is proven that the above effect is actually created due to the above act, it can be actually presumed that the restriction on competition may be caused at the time of the act and the intention or purpose thereof exists. If not, whether such act may lead to the effect of the restriction on competition and had the intention or purpose thereof should be determined after comprehensively considering the various circumstances such as the background leading up to, and motive for, the act, the type thereof, the characteristic of the related market, the existence of imitations or adjacent markets, and any changes in the price and output in the related market, an impediment to innovation and a reduction in diversity, etc. In such a case, injustice ought to be determined in consideration of the type and character of a separate abusive practice.

[4] Examining in light of the concept of margin squeeze and its typical character as an act of abusing a market-dominant position, whether an act of abusing a position by means of a margin squeeze has injustice as "a transaction which may exclude competitors by unfairly supplying goods or services at a lower price than the arm's length price" [the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020) and Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act] should be concretely determined in view of the standard for determining injustice in comprehensive consideration of various circumstances as below.

First, the above determination needs to be made in consideration of the following matters: whether a person who does an act, as a vertically integrated business entity, occupies a market-dominant position in the upstream market; whether it has a market-dominant position even in the downstream market; the degree of market dominance in each market; the character of raw materials, etc. of the upstream market and whether such raw materials, etc. correspond to the elements, or raw materials, etc., essential for the production, supply, and sale of complete products sold in the upstream market, and the degree thereof; functional relevance, comparability, and substitutability between raw materials, etc. and complete products;

the existence and degree of the barriers to legal and institutional or realistic and economic entry with respect to new entry or reentry to both markets; the market share of a market-dominant business entity and a competitor business entity; a relative difference in scale; and the contents of regulations by related public law.

Next, the degree of a margin squeeze should be examined on the basis of the difference between the wholesale price and retail price set by a market-dominant business entity and the expenses of the market-dominant business entity in principle and exceptionally the expenses of a competitor business entity only where there are special circumstances. Furthermore, taking into account the following circumstances such as the duration of the act, the feature of complete products subject to the corresponding transaction, the scale of the corresponding transaction or the proportion thereof in the sales, and specific market circumstances at the time of the transaction, the following matters should be mainly examined: where a market-dominant business entity makes a transaction at the corresponding price, whether it is difficult for a competitor business entity in the downstream market to operate its business normally, and thus the chance of the market entry or extension of the prime competitor business entity, who is realistic and potential, is or may be blocked and the degree thereof; whether the competitor business entity may be excluded from competition due to an increase in the expenses thereof in the downstream market and the degree thereof; whether the dominant position of the market-dominant business entity may be reinforced and the degree thereof; and whether the harmful effect may be caused to consumers over the long term due thereto.

The price is the most fundamental means of competition in the market economy system, and free price competition in the market should be generally protected. Where a vertically integrated market-dominant business entity sets the lower retail price of a complete product in the downstream market, distinguishing whether such price corresponds to a fair means of competition from whether such price is a means to exclude competitor business entities through a margin squeeze is difficult.

Where an act of squeezing a margin is performed by setting the lower retail price of a complete product in the downstream market, the last consumers price may come down due to the reduction in the expenses of the other party to a transaction, and thus the enhancement effect of consumer benefits that can be caused in the short term when determining the injustice thereof needs to be also considered.

The concern that a competitor business entity may be excluded due to an act of abusing a market-dominant position, as a type of a margin squeeze, stems from “the difference between the wholesale price and the retail price” based on the structural character of the related market in which the upstream market is connected with the downstream market and the position of the market-dominant business entity as above, and thus injustice does not need to be determined on the premise that this is distinguished as a problem that may arise in the upstream market or the downstream market respectively.

【Reference Provisions】[1] Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act / [2] Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act / [3] Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act / [4] Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act

Article 3-2 of the Monopoly Regulation and Fair Trade Act (Prohibition on Abuse of Market-Dominant Position)

(1) No market-dominant business entity shall engage in any of the following practices (hereinafter referred to as "abusive practices"): <Amended by Act No. 5813, Feb. 5, 1999>

5. Making an unfair transaction to exclude a competitor or substantially undermining consumer interests.

Article 5 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (Types of and Criteria for Abusive Practices)

(5) “Making an unfair transaction to exclude a competitor” in Article 3-2(1)5 of the Act shall be any of the following cases:

1. Unfairly supplying or purchasing goods or services at the lower or higher price than the arm’s length price, thereby likely to excluding competitor

business entities;

【Reference Cases】 [3][4] Supreme Court Decision 2013Du14726, Jan. 31, 2019 (Gong2019Sang, 643) / [3] Supreme Court en banc Decision 2002Du8626, Nov. 22, 2007 (Gong2007Ha, 1940)

【Plaintiff-Appellee】 LG Uplus Corp. (Attorneys Yang Dae-gwon et al., Counsel for the plaintiff-appellee)

【Defendant-Appellant】 Fair Trade Commission (Attorneys Kim Seol-i et al., Counsel for the defendant-appellant)

【Intervenor joining the Defendant-Appellant】 Infobank Corp. (Law Firm Logos et al., Counsel for the intervenor joining the defendant-appellant)

【Judgment of the court below】 Seoul High Court Decision 2015Nu38278 decided Jan. 31, 2018

【Disposition】 The lower judgment is reversed, and the case is remanded to the Seoul High Court.

【Reasoning】 The grounds of final appeal are examined (to the extent of supplement in case of supplemental appellate briefs not timely filed).

1. Case Overview

The reasoning of the lower judgment reveals the following facts.

A. The Plaintiff, as a facilities-based telecommunications business operator who obtained permission from the Minister of Science, ICT, and Future Planning (currently referred to as the Minister of Science and ICT; hereinafter the same shall apply) pursuant to Article 6 of the Telecommunications Business Act (amended by Act No. 14839, Jul. 26, 2017; hereinafter the same shall apply), is a business entity as referred to in Article 2 Subparag. 1 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020; hereinafter “Fair Trade Act”). LG Telecom Corp., which has operated a wireless communications business (hereinafter “Corp.” shall be omitted when referring to the company name), became the current Plaintiff by merging LG Dacom and LG Powercomm, which had operated a wire communications business, on Jan. 1, 2010.

B. An enterprise messaging service refers to a service transmitting text messages to mobile phones of users through the wireless network of a mobile communications business entity from the computers of a company. This is utilized in various areas including financial institutions such as banks, credit card companies, securities companies, etc., public institutions, shopping malls, hospitals, etc. and the examples thereof contain alerting services regarding credit card authorization, bank deposit and withdrawal, securities transaction, shopping order and delivery.

An enterprise messaging service corresponds to any telecommunications service, other than facilities-based telecommunications services according to Article 2 of the Telecommunications Business Act, and any person who intends to operate such business shall file a report thereon to the Minister of Science, ICT, and Future Planning in accordance with Article 22 of the same Act. However, as any facilities-based telecommunications business operator who intends to operate the value-added telecommunications business shall be deemed to have filed a report on the value-added telecommunications business, the facilities-based telecommunications business operator can operate the business without any separate report. The Plaintiff and KT, except SK Telecom, among three facilities-based telecommunications business entities who perform mobile communications business (SK Telecom, KT, and the Plaintiff; hereinafter the same shall apply) are producing and selling an enterprise messaging service.

C. The market for an enterprise messaging service has been formed as the Intervenor joining the Defendant (hereinafter “Intervenor”) started to provide customers with various financial alerting services regarding credit card authorization, bank statements, etc. through financial institutions such as banks, credit card companies, etc. in the early 2000s. As the market has low awareness of an enterprise messaging service at the time of the initial formation of the market, such service was merely used in some areas such as the prevention of financial accidents, marketing, etc. The sudden rise in demand for financial information, personal information, and text message marketing thereafter led to the rapid growth of the market. In this process, LG Dacom, which was the corporation before the merger of the Plaintiff, KT, Standard Networks, Daou Office, Samsung Networks (currently referred to as Samsung SDS), SK Telink, etc. joined the market.

The market for an enterprise messaging service can be classified as “enterprise message transmission service (hereinafter “transmission service”) transactions between a mobile communications business entity and an enterprise messaging business entity” and “enterprise messaging service transactions between an enterprise messaging business entity and a business customer” according to the step of the transaction. A mobile communications business entity enters into a contract for a transmission service with an enterprise messaging business entity and provides a transmission service, sending a text message to customers who signed up for the mobile communications network through a wireless communications network. As only the corresponding mobile communications business entity can send a text message to users who signed up for a certain mobile communications service, unless a business customer intends to send a text message only to those who registered on a certain mobile communications network, an enterprise messaging business entity should conclude a contract for a transmission service with all mobile communications business entities in the country.

D. Enterprise messaging business entities are largely divided into two categories such as those who own a wireless communications network and those who do not. Among business entities related to an enterprise messaging service, there are resale business entities, purchasing and reselling products produced by an enterprise messaging business entity, and business entities, purchasing and reselling products produced by another enterprise messaging business entity while directly producing and selling an enterprise messaging service by concluding a contract for a transmission service with a mobile communications business entity.

Consequently, enterprise messaging business entities are categorized as: ① those who operate an enterprise messaging service while providing a transmission service by owning a wireless communications network such as the Plaintiff and KT; ② those who produce and sell an enterprise messaging service by concluding a contract for use with the above three mobile communications business entities similar to Daou Office, Standard Networks, and SK Networks Service; and ③ those who resell products of another enterprise messaging business entity while producing and selling an enterprise messaging service like the Intervenor, SureM, Samsung SDS, and SK Telink. (Business entities, including CJ Systems, Lotte Data

Communication, CJ Hello Vision, etc., which merely operate a resale business, do not directly produce and sell an enterprise messaging service, and thus they are not included in an enterprise messaging business entity.)

E. The nation's three mobile communications business entities including the Plaintiff, as facilities-based telecommunications business operators, should stipulate the usage fees for a transmission service in the terms and conditions of use in accordance with the Telecommunications Business Act and file a report thereon to the Minister of Science, ICT, and Future Planning. According to the above terms and conditions of use, all three mobile communications business entities are adopting the terraced payment system that the unit price per each transmission becomes cheaper in line with the increase in transmissions. The unit price for a transmission service for a section is different depending on a business entity, but the three business entities all have the fixed lowest unit price except the basic rate as follows: SK Telecom charges the fixed lowest unit price of KRW 9 for each transmission service over 30 million services; KT requires the fixed lowest unit price of KRW 9 for each transmission service over 20 million services; and the Plaintiff charges the fixed lowest unit price of KRW 10 for each transmission service over one million services. The Plaintiff is selling a transmission service using its wireless communications network at a price ranging from KRW 10 to KRW 20 for each to other enterprise messaging business entities and purchasing a transmission service at a price ranging from KRW 9 to KRW 20 for each from SK Telecom and KT to sell its enterprise messaging service.

F. The Plaintiff sold its enterprise messaging service to a number of business customers at a lower price than that in the current status table below showing the average minimum usage fees for each transmission service (hereinafter "instant act") from Jun. 2010 to Dec. 2013. In other words, the Plaintiff is selling the enterprise messaging service at the unit price of not less than KRW 8, which is lower than the usage fees of the transmission service that it purchases from SK Telecom and KT and cheaper than the unit prices of the minimum usages fee of the transmission service that it provides for other enterprise messaging business entities.

The average minimum usage fee for each transmission service by period (hereinafter "the minimum unit sales price of a transmission service") indicated in the table below is the amount equivalent to a weighted average of the minimum usage fee of each of the three mobile communications business entities in accordance with the share of the subscribers (5:3:2) by each mobile communications business entity based on the idea that an enterprise messaging business entity should simultaneously use the wireless communications networks of the three mobile communications business entities to provide business customers with a service.

By Period	Minimum Usage Fee for Each Transmission Service
Oct. 1, 2009 - Sep. 30, 2011	KRW 10 per each transmission service (SKT KRW 10 X 50% + KT KRW 10 X 30% + LGU KRW 10 X 20%)
Oct. 1, 2011 - Oct. 30, 2011	KRW 9.5 per each transmission service (SKT KRW 9 X 50% + KT KRW 10 X 30% + LGU KRW 10 X 20%)
Nov. 1, 2011 onward	KRW 10 per each transmission service (SKT KRW 9 X 50% + KT KRW 9 X 30% + LGU KRW 10 X 20%)

G. The Defendant issued a corrective order and penalty surcharge payment order to the Plaintiff as indicated on the attached list of the lower judgment by Resolutions by Plenary Sessions No. 2015-49 on Feb. 23, 2015 (hereinafter “instant disposition”) on the grounds that the Plaintiff’s act, corresponding to where the Plaintiff, who is a market-dominant business entity of the market for an enterprise messaging service through the nation’s wireless communications network, which is the instant related market (hereinafter “enterprise messaging service market”), “may exclude competitor business entities by unfairly supplying goods or services at the lower price than the arm’s length price,” can be seen to be included in the act of abusing a market-dominant position in accordance with Article 3-2(1)5 of the Fair Trade Act and Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (hereinafter “the Enforcement Decree of the Fair Trade Act”).

2. Lower court’s determination and main issues

A. The lower court viewed the instant disposition as illegal for the following reasons and thus revoked the instant disposition.

Viewing the arm’s length price as referred to in Article 5(5)1 of the Enforcement Decree of the Fair Trade Act as “the practical price formed when an efficient competitor makes the general choice in consideration of the economic and business conditions, the structure of the corresponding market, uncertainty of the future prediction, etc. at the time of a transaction" is reasonable. The Defendant calculated the arm's length price based on the minimum unit sales price of a transmission service, which can be deemed as a method of calculating the arm's length price of "a transmission service," but can be hardly seen as a method of calculating the arm's length price of "an enterprise messaging service." Even if the calculation method as above can be recognized, the arm's length price calculated by the Defendant does not properly reflect the principle of forming market price and the cost structure of the Plaintiff and is based on the rough approximation without necessary investigation and analysis and thus is unjustified.

Furthermore, even from the preliminary perspective, the Plaintiff's act does not correspond to any act that may unfairly exclude a competitor business entity objectively on the sole basis of the evidence submitted by the Defendant. It is also difficult to see that the Plaintiff had any intention or purpose to maintain and reinforce monopoly at the time of the instant act, and thus the Plaintiff's act cannot be seen to "be likely to exclude a competitor business entity by unfairly supplying goods or services at the lower price than the arm's length price."

B. The main issues are ① whether the Plaintiff's act, selling enterprise messaging services at a lower price than the minimum unit sales price of transmission services, corresponds to "an act of supplying at the lower price than the arm's length price" and ② whether the injustice of such act may be admitted as an act of abusing a position by a market-dominant business entity by means of a margin squeeze.

3. Supreme Court's determination

A. The concept, and need for regulation, of a margin squeeze as a type of an act of abusing a market-dominant position

Where a market-dominant business entity, as a vertically integrated business entity operating its business at two different stages of production according to the supply chain, products and sells goods or services based on raw materials, etc. in the downstream market while supplying raw materials or input elements (hereinafter "raw materials, etc.") essential for the production activities of business entities belonging to the downstream market (also referred to as "superordinate market") in the upstream market (also referred to as “subordinate market”), a margin squeeze, as a type of an act of abusing a market-dominant position, can be a problem.

A margin squeeze refers to an act that makes it difficult for competitor business entities to effectively compete and may exclude them from competition as a vertically integrated market-dominant business entity in the upstream market as above reduces the difference between the sale price of raw materials, etc. of the upstream market (hereinafter “wholesale price”) and the sale price of complete products of the downstream market (hereinafter “retail price”).

Where a vertically integrated business entity, who owns a market-dominant position as a supplier of raw materials, etc. in the upstream market, also carries on a complete products business, it can have more favorable conditions than its competitor business entities in the downstream market with respect to the provision of raw materials, etc. in general. On the other hand, competitor business entities in the downstream market should be supplied with raw materials, etc. necessary to manufacture complete products from the market-dominant business entity, and thus a structural dependency relationship that their production costs can be directly different depending on the wholesale price of raw materials, etc. set by the market-dominant business entity can be formed.

A market-dominant business entity can reduce the difference between the wholesale price and retail price by increasing the wholesale price of raw materials, etc., decreasing the retail price of complete produces, or simultaneously executing both methods in the structure of related market as such. In such a case, ① the wholesale price set by a vertically integrated market-dominant business entity is higher than the retail price, and thus the difference between the wholesale price and retail price becomes a negative number, or ② if the difference between the wholesale price and retail price is extremely small to the extent that the market-dominant business entity cannot appropriate even its costs in the downstream market, competitor business entities in the downstream market, which should be supplied with raw materials, etc. from the market-dominant business entity as above, cannot effectively compete while appropriating the costs necessary for production and obtaining reasonable profits in the downstream market, and if such pressure continues for a certain period, they may be excluded from the market.

The Fair Trade Act was enacted to protect fair and free competition (see Article 1), and, particularly, in the market in which a market-dominant business entity exists, the original function of competition can work extremely well only when free competition of other market participants should be substantially guaranteed.

Where the margin squeeze of a market-dominating business entity is regulated as a type of act of abusing an independent market-dominant position, the inducement to investment or motive for innovation regarding raw materials, etc. in the upstream market may be discouraged. However, if a competitor business entity in the downstream market may be unfairly excluded from competition as a market-dominating business entity in the vertically integrated upstream market engages in a margin squeeze by abusing its position, and thus the basis of fair competition cannot be maintained, viewing that a margin squeeze corresponds to a reasonable method of competition known as the so-called "performance competition" based on market performance through fair competition is difficult.

Therefore, if a margin squeeze performed by a market-dominant business entity in the manner of lowering the retail price of a complete product in the downstream market can be deemed as "a transaction which may exclude competitors by unfairly supplying goods or services at the lower price than the arm's length price," such act needs to be regulated as an act of abusing a market-dominant position, which is prohibited by the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020) and Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act.

B. Whether such act corresponds to an act of supplying at the lower price than "the arm's length price" (the Defendant's ground of appeal No. 1 and the Intervenor's ground of appeal Nos. 1 and 2)

(1) Meaning of "the arm's length price"

The former part of Article 3-2(1)5 of the Fair Trade Act stipulates "making an unfair transaction to exclude a competitor business entity" as an act of abusing a position of a market-dominant business entity, Article 5(5)1 of the Enforcement Decree of the Fair Trade Act provides "the case of being likely to exclude competitor business entities by unfairly supplying or purchasing goods or services at the lower or higher price than the arm's length price" as a type of such practice.

Article 5(5)1 of the Enforcement Decree of the Fair Trade Act was previously viewed as a provision to regulate "predatory pricing," referring to an act of a market-dominant business entity who is likely to exclude competitor business entities by selling goods or services at a lower price than the expense invested by it. However, the arm's length price is a kind of "price" distinguished from the expense, and thus if it is deemed as "expense," such interpretation is contrary to the language and text of the law. This is more explicit in contrast to regulating "selling at unfairly low prices," a kind of unfair trade practices, as "an act of continuously supplying at a remarkably lower price than the expense required for the provision without any justifiable grounds in supplying goods or services or by unfairly supplying goods or services at a lower price, thereby likely to exclude its competitor business entities or those of its affiliate companies" in Article 23(1)2 of the Fair Trade Act and in the attached Table 1-2 stipulated in Article 36(1)3(a) of the Enforcement Decree of the Fair Trade Act.

Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act materializes "an act of making a transaction to unfairly exclude competitors" stipulated in the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020), corresponding to the provision of the parent law thereof, and the arm's length price is an instrumental concept of determining an act of abusing exclusion related to the price of a market-dominant business entity, which can appear in various types such as "predatory pricing," "margin squeeze," etc. Thus, the meaning thereof should be construed in accordance with the meaning and contents of the provision of the parent law thereof and legislative purpose.

The arm's length price, as the price which can be generally formed where a transaction is normally made in the market in which free and fair competition is made, more specifically, refers to the price that has been generally formed in a normal transaction where an act of abusing a market-dominant position does not exist as a market-dominant business entity carries out a transaction for the purpose of unfairly excluding a competitor business entity.

The meaning and details of the term "arm's length price" can be fully understood through a systematic and teleological interpretation based on the provision of the parent law within the ambit of the language and text as above. Moreover, a person who should obey the law is a market-dominant business entity and thus is highly likely to predict an act subject to regulation in a relative sense. Even if an act of a market-dominant business entity of making a transaction formally corresponds to an act of supplying goods or services at a lower price than the arm's length price stipulated in Article 5(5)1 of the Enforcement Decree of the Fair Trade Act, an act of abusing a market-dominant position can be constituted only when the injustice of such act is admitted. Therefore, considering that the arm's length price prescribed in Article 5(5)1 of the Enforcement Decree of the Fair Trade Act, directly regulating the price set by a market-dominant business entity, can be a formal requirement constituting administrative punitive dispositions such as a corrective order or imposition disposition of penalty surcharge, viewing the arm's length price as above is not contrary to the principle of strict interpretation regarding the applicable provision for administrative intrusive dispositions.

The Fair Trade Commission is obliged to prove the legality of dispositions such as a corrective order, etc., and thus should prove whether competitor business entities may be excluded unfairly as the certain prices of supply or purchase set by a market-dominant business entity in a reasonable way are lower or higher than the arm's length price prescribed in Article 5(5)1 of the Enforcement Decree of the Fair Trade Act in comprehensive consideration of the following circumstances such as the typical character or details of an act of abusing a market-dominant position, the structure of the related market, the method of determining the price and the trend, supply or purchase volume and period, the character of the corresponding good or service and supply and demand situation, etc.

(2) Adjudication of the instant case

Examining in light of the legal doctrine regarding the arm's length price as above, the Plaintiff's instant act can be seen to correspond to "an act of supplying goods or services at a lower price than the arm's length price." The reasons are as follows.

The market price is not determined on the sole basis of the expense. Viewing that an enterprise messaging business entity, which is a competitor business entity in the enterprise messaging service market, which should be supplied with a transmission service from the Plaintiff, should supply an enterprise messaging service at a price calculated by adding other expenses such as personnel expenses, sales management expenses, etc. and reasonable profits to the usage fees for a transmission service equivalent to the expense of purchasing necessary raw materials, which is the basic way of a company's economic activities, accords with the common practices of transaction or empirical rules.

As seen above, considering a special structure of transaction in the market related to this case that unless an enterprise messaging business entity intends to send a text message only to those who signed up for a certain mobile communications network, an enterprise messaging business entity should conclude a contract for a transmission service with all mobile communications business entities in the country, the arm's length price of the enterprise messaging service in this case is presumed to exceed at least the cost of purchasing transmission services, which are necessary raw materials used by enterprise messaging business entities, which are competitor business entities of the Plaintiff, in the market for an enterprise messaging service.

According to the reasoning of the lower judgment, the Defendant viewed that the minimum unit sales price of a transmission service calculated by assuming other expenses and reasonable profits except usage fees for a transmission service as zero at the time of the instant disposition corresponds to the lowest level of the arm's length price, which can be objectively assumed in the market for an enterprise messaging service.

Meanwhile, according to the reasoning of the lower judgment and the record, the three mobile communications business entities including the Plaintiff have controlled the supply market for transmission services for an extended period without any particular change in the instant market for an enterprise messaging service. Hence, the Defendant viewed that the sale price of an enterprise messaging service supplied by the Plaintiff is lower than the arm's length price by calculating the lowest level of the arm's length price which can be objectively assumed on the basis of a weighted average of the usage fee for a transmission service of each mobile communications business entity based on the percentage of subscribers of the mobile communication business entity, not the actual market share or the number of text messages, during the period when the instant act has been conducted at the time of the instant disposition, which cannot be readily concluded as unreasonable.

Eventually, the Plaintiff's instant act can be seen to correspond to "supplying goods or services at the lower price than the arm's length price" prescribed in Article 5(5)1 of the Enforcement Decree of the Fair Trade Act.

Nevertheless, the lower court determined that the grounds for the instant disposition are not recognized and thus are illegal by viewing that the arm's length price was miscalculated in the instant disposition on the grounds that the meaning of the arm's length price was interpreted unlike the foregoing legal principles and, on the premise thereof, the Defendant did not examine and consider the practical market price, etc. formed in the market.

The lower court erred and adversely affected the conclusion of the judgment by misapprehending the legal doctrine regarding the interpretation and application of "the arm's length price" prescribed in Article 5(5)1 of the Enforcement Decree of the Fair Trade Act, thereby exceeding the bounds of the principle of free evaluation of evidence or failing to exhaust all necessary deliberations.

C. Whether injustice may be recognized (the Defendant's ground of appeal Nos. 2 and 3 and the Intervenor's ground of appeal Nos. 2 through 4)

(1) Standard for determining the injustice of a margin squeeze

The grounds for the instant disposition is that the Plaintiff's act, corresponding to where competitors may be excluded by unfairly supplying goods or services at a lower price than the arm's length price, violates Article 3-2(1)5 of the Fair Trade Act and Article 5(5)1 of the Enforcement Decree of the Fair Trade Act, and, herein, "an act of supplying goods or services at the lower price than the arm's length price" can include a marge squeeze as well as predatory pricing as seen above.

Even if a market-dominant business entity conducted "an act of supplying goods or services at the lower price than the arm's length price," such transaction cannot be seen to correspond to an act of abusing a market-dominant position on the sole basis of such fact, and, to constitute such act, injustice which may "exclude competitors" by "unfairly supplying goods or services at the low price" should be recognized.

Fully considering the details indicated in the instant disposition, related Act and subordinate statutes, and the whole process leading up to the instant disposition, the Defendant issued the instant disposition on the grounds that the Plaintiff's act satisfied the requirements for injustice based on the fact that the instant act has a typical character as a margin squeeze that sets the lower retail price of an enterprise messaging service than the wholesale price of a transmission service of the Plaintiff.

<u>The injustice of "an act of making a transaction to exclude a competitor business entity" prescribed in the former part of Article 3-2(1)5 of the Monopoly Regulation and</u>

Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020) should be interpreted in terms of legislative purpose such as the promotion of competition in the monopolistic and oligopolistic market. Therefore, when a market-dominant business entity engaged in an act to see that, with the intent or purpose to maintain and reinforce a monopoly in the market, i.e., to artificially affect the market order by restricting free competition in the market, such effect arising from the restriction on competition may be caused even from the objective perspective, injustice can be admitted. This requires to prove that such act, as an act which can lead to the effect of the restriction on competition such as the price increase of goods, a decrease in output, an impediment to innovation, a reduction in prime competitor business entities, a decline in diversity, etc., had such intention and purpose. Where it is proven that the above effect is actually created due to the above act, it can be actually presumed that the restriction on competition may be caused at the time of the act and the intention or purpose thereof exists. If not, whether such act may lead to the effect of the restriction on competition and had the intention or purpose thereof should be determined after comprehensively considering the various circumstances such as the background leading up to, and motive for, the act, the type thereof, the characteristic of the related market, the existence of imitations or adjacent markets, and any changes in the price and output in the related market, an impediment to innovation and a reduction in diversity, etc. (*see, e.g.,* Supreme Court en banc Decision 2002Du8626, Nov. 22, 2007; Supreme Court Decision 2013Du14726, Jan. 31, 2019). In such a case, injustice ought to be determined in consideration of the type and character of a separate abusive practice.

Examining in light of the concept of margin squeeze and its typical character as an act of abusing a market-dominant position, whether an act of abusing a position by means of a margin squeeze has injustice as “a transaction which may exclude competitors by unfairly supplying goods or services at a lower price than the arm’s length price” [the former part of Article 3-2(1)5 of the Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020) and Article 5(5)1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act] should be concretely determined in view of the standard for determining injustice in comprehensive consideration of various circumstances as below.

First, First, the above determination needs to be made in consideration of the following matters: whether a person who does an act, as a vertically integrated business entity, occupies a market-dominant position in the upstream market; whether it has a market-dominant position even in the downstream market; the degree of market dominance in each market; the character of raw materials, etc. of the upstream market and whether such raw materials, etc. correspond to the elements, or raw materials, etc., essential for the production, supply, and sale of complete products sold in the upstream market, and the degree thereof; functional relevance, comparability, and substitutability between raw materials, etc. and complete products; the existence and degree of the barriers to legal and institutional or realistic and economic entry with respect to new entry or reentry to both markets; the market share of a market-dominant business entity and a competitor business entity; a relative difference in scale; and the contents of regulations by related public law.

Next, the degree of a margin squeeze should be examined on the basis of the difference between the wholesale price and retail price set by a market-dominant business entity and the expenses of the market-dominant business entity in principle and exceptionally the expenses of a competitor business entity only where there are special circumstances. Furthermore, taking into account the following circumstances such as the duration of the act, the feature of complete products subject to the corresponding transaction, the scale of the corresponding transaction or the proportion thereof in the sales, and specific market circumstances at the time of the transaction, the following matters should be mainly examined: where a market-dominant business entity makes a transaction at the corresponding price, whether it is difficult for a competitor business entity in the downstream market to operate its business normally, and thus the chance of the market entry or extension of the prime competitor business entity, who is realistic and potential, is or may be blocked and the degree thereof; whether the competitor business entity may be excluded from competition due to an increase in the expenses thereof in the downstream market and the degree thereof; whether the dominant position of the market-dominant business entity may be reinforced and the degree thereof; and whether the harmful effect may be caused to consumers over the long term due thereto.

The price is the most fundamental means of competition in the market economy system, and free price competition in the market should be generally protected (*see*

Supreme Court Decision 2013Du14726, Jan. 31, 2019). Where a vertically integrated market-dominant business entity sets the lower retail price of a complete product in the downstream market, distinguishing whether such price corresponds to a fair means of competition from whether such price is a means to exclude competitor business entities through a margin squeeze is difficult.

Where an act of squeezing a margin is performed by setting the lower retail price of a complete product in the downstream market, the last consumers price may come down due to the reduction in the expenses of the other party to a transaction, and thus the enhancement effect of consumer benefits that can be caused in the short term when determining the injustice thereof needs to be also considered.

The concern that a competitor business entity may be excluded due to an act of abusing a market-dominant position, as a type of a margin squeeze, stems from "the difference between the wholesale price and the retail price" based on the structural character of the related market in which the upstream market is connected with the downstream market and the position of the market-dominant business entity as above, and thus injustice does not need to be determined on the premise that this is distinguished as a problem that may arise in the upstream market or the downstream market respectively.

(2) Adjudication of the instant case

(A) The reasoning of the lower judgment reveals the following circumstances.

The Plaintiff is the No. 1 business entity in the market for an enterprise messaging service, and the total market share of the top three business entities including the Plaintiff amounts to nearly 79% in the market for an enterprise messaging service in 2013. The market share of the Plaintiff reaches about 20% in the market for a transmission service that has the nature as raw materials necessary for an enterprise messaging service, and the total market share of three mobile communications business entities including the Plaintiff and KT amounts to 100%. The expenses related to the use of a transmission service, corresponding to raw materials, account for a considerable proportion of the sale price of an enterprise messaging service.

In the market for an enterprise messaging service, which is the related market, the Plaintiff and KT are holding the advantage in terms of the requirements for the procurement of raw materials, and there have already been competitor business entities equipped with relevant technologies and workforce while engaging in the market for an enterprise messaging service for a considerable period. The Plaintiff has a considerable advantage over the major competitor business entities in the market for an enterprise messaging service except KT in terms of funding power, economic size, market share, the provision of raw materials, etc.

During the period when the instant act has been done, the market share of an enterprise messaging service of the Plaintiff and KT, which own the wireless communications network, increased, while the market share of enterprise messaging business entities, which do not own the wireless communications network, such as the Intervenor tends to decrease in spite of the expansion of the market for an enterprise messaging service.

(B) Examining the factual basis seen in 1. above and the circumstances mentioned in 3.D.(2)(A) above in light of the legal doctrine in 3.D.(1) above, the instant act, as a margin squeeze, can be seen to correspond to a transaction that may exclude competitors by “unfairly” supplying goods or services at the lower price than the arm’s length price. The reasons are as follows.

① The Plaintiff, as a vertically integrated business entity, has a market-dominant position in the markets for both a transmission service and an enterprise messaging service even in light of the reasoning of the lower court. The Plaintiff, as a facilities-based telecommunications business operator under the Telecommunications Business Act, can be seen to have the legal and institutional entry barriers to the transmission service market and realistic and economic entry barriers to the market for an enterprise messaging service at the time of the instant disposition.

② Where, as in an act of the Plaintiff, a vertically integrated market-dominant business entity continuously sells an enterprise messaging service at a price of less than the minimum unit sales price of a transmission service, when an ordinary competitor business entity, which does not own an independent wireless communications network, is assumed to purchase a transmission service at the minimum unit sales price of a transmission service as above, properly supplying an enterprise messaging service without any loss is difficult, and thus a price competition itself is structurally difficult in the market for an enterprise messaging service.

Moreover, where a vertically integrated market-dominant business entity, which owns a wireless communications network in the upstream market, as with the Plaintiff, sets the wholesale price of raw materials, etc. in the upstream market at a higher price than the retail price of complete products in the downstream market, and thus the difference between the wholesale price and retail price becomes a negative number, ordinary competitor business entities, which do not own an independent wireless communications network, in the market for an enterprise messaging service are difficult to efficiently compete in the market under the above price terms unless there are special circumstances and thus can be seen to be highly likely to be excluded from competition by being eventually withdrawn from the market or converted to resale business entities. The expenses of the Plaintiff in the downstream market do not need to be separately analyzed unlike the case where the difference between the wholesale price and retail price becomes a positive number for such determination. Even if competitor business entities in the market for an enterprise messaging service carry on a business on an equal footing with, or even more efficiently than, the Plaintiff, the result will not change.

As such, where the difference between the wholesale price and retail price becomes a negative number, the Plaintiff, which is a vertically integrated business entity with a market-dominant position in both upstream and downstream market, can fully predict that competitor business entities are highly likely to be excluded from the market for an enterprise messaging service due to a margin squeeze arising from the difference between the wholesale price and retail price, and thus the Plaintiff's act itself can be generally presumed to have the intention and purpose to limit competition.

③ Any competitive disadvantage incurred from the expenses that competitor business entities of the Plaintiff face in the market for an enterprise messaging service merely stems from the structure and character of the related market in which a vertically integrated market-dominant business entity such as the Plaintiff or KT, which owns a wireless communications network, exists. The market for an enterprise messaging service started to be originally formed as the Intervenor developed technologies for the first time in the early 2000s. Even in view of such circumstances, an enterprise messaging business entity who owns no wireless communications network cannot be deemed as an "inefficient competitor" in supplying an enterprise messaging service, and thus regulating the Plaintiff's act cannot be seen to correspond to the price protection for any inefficient competitor.

④ Even if the price for an enterprise messaging service decreased and the market grew in size while the Plaintiff was conducting the instant act, when comparing the price increase, the deterioration in product quality, etc., which may be shown as competitor business entities are excluded from the market for an enterprise messaging service in the medium and long term, an impediment to innovation arising from the reduced diversity, which may be caused as the prime competitor business entities, which are realistic or potential, are excluded from the market, and the restrictions on the choices imposed upon the other party to a transaction due thereto, it cannot be readily concluded that the enhancing effect of consumer benefits, which can be caused by the instant act in the short term, may offset the effect of limiting competition of the instant act.

(C) Therefore, the lower court should determine whether the grounds of the instant disposition exist through further deliberations in regard to whether the Plaintiff's act, as a margin squeeze of a market-dominant business entity that a vertically integrated market-dominant business entity in the upstream market sets the retail price at the lower price than the wholesale price, may be recognized to have injustice according to the legal doctrine regarding the standard for determining the injustice of a margin squeeze as seen above.

Nonetheless, the lower court determined that the instant act cannot be seen to correspond to an act of supplying goods or services at a lower price than the arm's length price on the premise of the legal doctrine unlike the above and, preliminarily, the injustice of the instant act is not also recognized.

The lower judgment erred and adversely affected the conclusion of the judgment by misapprehending the legal doctrine regarding the injustice of the requirements constituting an act of abusing a market-dominant position in accordance with the former part of Article 3-2(1)5 of the Fair Trade Act and Article 5(5)1 of the Enforcement Decree of the Fair Trade Act, thereby failing to exhaust all necessary deliberations. The grounds of appeal assigning this error are justifiable.

4. Conclusion

As the final appeals of the Defendant and Intervenor are all with merit, the lower judgment is reversed, and the case is remanded to the lower court for further proceedings consistent with this Opinion. It is so decided by the assent of all participating Justices on the bench.

Justices Ahn Chul-sang (Presiding Justice)
Kim Jae-hyung (Justice in charge)
Noh Jeong-hee

* This translation is provisional and subject to revision.

* The published English version of the Supreme Court Decision will be made available at the end of the year