



京都大学
KYOTO UNIVERSITY

Environmental Sustainability and Competition Law: Korea

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Guiding Questions shared in advance by the conference organizer

1. Any rules, frameworks, or cases in Korea?:

Any rules?

“Does the competition law of your jurisdiction, including the statute and various guidelines and subsidiary regulations, specifically address the relationship between competition and sustainability? In particular, does it address any potential **conflict between competitive harm and sustainability** benefits in the context of a horizontal agreement?”

Any frameworks for balancing?

“How does the competition law of your jurisdiction address the potential conflict between competition and sustainability? Does the law require some sort of **balancing within an effects-based Rule of Reason-type framework**? If not, how does the law purport to resolve the framework? To the extent there is any specific framework that applies to this potential conflict, please provide as much information about it as possible.”

Any cases?

“Has there been any **court case or authority decision** on the potential conflict between competition and sustainability? If so, please provide details on such cases or decisions.”



Guiding Questions shared in advance by the conference organizer

2. Sustainability benefits, under a more general framework?:

Within the framework for pro-competitive benefits?

“If there is nothing in your competition law that specifically applies to sustainability, how would sustainability benefits be analyzed under the competition law of your jurisdiction? **Would they be analyzed under a more general framework** for pro-competitive benefits? If so, are there any guidelines, court cases, or authority decisions that you think would shed light on how sustainability benefits would be analyzed even though they do not specifically pertain to sustainability? If the answer is in the affirmative, please provide details on such guidelines, cases, or authority decisions.”

Any difficulties?

“If sustainability benefits are to be analyzed under a **general framework** for pro-competitive benefits, are there **any conceptual and practical difficulties** you would foresee in the analysis, such as the difficulty in quantification and the long-term and uncertain nature of many such benefits? If these difficulties do exist, how does the competition law of your jurisdiction resolve them, if at all?”



Guiding Questions shared in advance by the conference organizer

3. Other questions:

What else?

“Most of the above questions are informed by the prevailing approach to pro-competitive benefits under US and EU law. To the extent that this approach has limited application to your jurisdiction, please explain how the competition law of **your jurisdiction** would balance competitive harm and sustainability benefits.”

Investor collaboration and antitrust?

“Have there been any **attempts to challenge collaboration among investors** to promote the pursuit of sustainability through competition law enforcement like we have seen in the US? If so, please provide information about such attempts.”

Any difficulties?

“Do you think there is a potential **overlap or conflict** between sustainability and **abuse of dominance** or **merger review** in the competition law of your jurisdiction? If so, please share information on that.

Presentation Overview

I. Any rules, frameworks, or cases in Korea?

The Authorization System under Article 40(2) MRFTA

The KFTC's Sustainability Guidelines (2024)

The 2023 *German Car Makers' Emission Cartel Case* (2023)

II. Sustainability benefits, under a more general framework?

The 'Not-Unjust' Cartel Exception in Korea

Some Cases: *Freight Transport Operator Cartel* (2009); *Korean Medical Association's Strike* (2021); and *Duck Processing Cartel* (2024)

Sustainability Cartel As A 'Not-Unjust' Cartel

III. Others

The US antitrust challenge against sustainability collaboration among investors:

No Similar Known Case in Korea

Merger Guidelines: 'Improving Environmental Pollution' Consideration

Rules, Frameworks, Cases in KR

- Possible Exemptions by Article 40(2) Authorization
- German Carmakers Emissions Cartel Case (2023)
- KFTC's Sustainability Guidelines (2024)



Exemption via Art. 40(2) Authorization?

- Inquiry and response in Oct 2022 * Submission No. 2AA-2210-0558529.

 답변 내용

답변일시	2022-10-21 09:35:11
처리결과 (답변내용)	<p>1. 안녕하십니까? 공정거래위원회 업무에 대한 관심을 감사드립니다.</p> <p>2. 귀하께서 질의하신 내용은 크게 공동행위 규율과 기업결합 심사에 있어 탄소배출 감소 등 지속가능성 목표를 달성하기 위한 사업자의 자발적인 노력에 대해 별도 연구하거나 가이드라인 제정 등과 관련된 내용이 있는지에 대해 질의하신 것으로 이해됩니다.</p> <p>3-1. 먼저 공동행위 규율과 관련하여, 공정거래법 제40조는‘부당하게 경쟁을 제한하는’ 합의를 금지하고 있기 때문에, 사업자들 간의 합의가 부당하게 경쟁을 제한하지 않는 경우 공정거래법 제40조 부당한 공동행위의 금지에 해당되지 않습니다. 그렇기 때문에 지속가능성 목표를 달성하기 위한 사업자 간의 공동행위가 있더라도 부당하게 경쟁을 제한하지 않는 경우 공정거래법 제40조에 따른 문제는 발생하지 않을 것으로 판단됩니다.</p> <p>3-2. 현재 공동행위 규율에 있어, 지속가능성 목표의 고려에 대한 별도의 연구가 진행되거나 심사지침 개정 등이 진행 중인 사항은 없습니다.</p> <p>3-3. 한가지 부연하여 말씀드리자면, 사업자 입장에서 지속가능성 목표를 달성하는 과정에서 공동행위와 관련된 우려가 존재할 수 있을 것으로 판단됩니다. 첨부해주신 파일 7page에 인가절차를 통해 법적 확실성 확보가 가능하다고 명시되어 있는 것처럼, 공정거래법 제40조 제2항의 인가규정에 따라 사업자가 사전에 인가를 받는다면 부당한 공동행위에 대한 우려 없이 지속가능성 목표를 추진할 수 있을 것이라고 사료됩니다.</p> <p>4. 기업결합 심사와 관련하여, 지속가능성 목표의 고려에 대한 연구, 자문, 혹은 가이드라인 제정은 진행되고 있지 않습니다. 다만 공정위는 수소 등 신·재생에너지, 전기차 등의 분야에서 경쟁을 제한할 우려가 없는 기업결합은 신속히 심사하여 지속가능성 목표 달성에 부응하기 위해 적극 지원하고 있습니다.</p>



Exemption via Art. 40(2) Authorization?

- Inquiry:

“Is the KFTC currently conducting any studies, preparing consultations, or drafting guidelines regarding businesses' voluntary cooperations aimed at achieving sustainability goals such as reducing carbon emissions (sustainability agreements), either internally or in cooperation with external experts?”

- Response:

No initiatives underway (as of Oct 2022): “At present, there are no ongoing studies or revision works for horizontal cooperation guidelines, regarding the consideration of sustainability goals in concerted practices.”

No special treatment: “First, concerning concerted practices, since Article 40 of the MRFTA prohibits ‘agreements that unjustly restrict competition’, if an agreement between undertakings does not unjustly restrict competition, it does not fall within the scope of unjust concerted practices prohibited under Article 40.

Accordingly, even if undertakings engage in concerted actions to achieve sustainability goals, such actions would not be problematic under Article 40 of the MRFTA as long as they do not unjustly restrict competition.”



Exemption via Art. 40(2) Authorization?

- Response (cont'd):

Possible exemptions via authorization: “Undertakings may have concerns regarding concerted practices in the process of pursuing sustainability objectives. ... If undertakings obtain prior authorization in accordance with the process under Article 40(2) of the [MRFTA](#),* they should be able to pursue sustainability goals without concerns about violating the prohibition on unjust concerted practices.”

Article 40 (2) of the MRFTA “Paragraph (1) shall not apply where illegal cartel conduct is performed for [any of the following purposes](#), meets the requirements prescribed by Presidential Decree, and [has been authorized by the Fair Trade Commission](#):

1. Industrial restructuring to address the recession;
2. [Research and technical development](#);
3. Rationalization of terms and conditions of transactions;
4. Enhancement of the competitiveness of small and medium enterprises.”

However, **since the 2010 authorization** for ready-mixed concrete companies (under which they were allowed to jointly conduct quality control and R&D activities for two years, while being disallowed from joint procurement of raw materials and joint marketing), **no subsequent authorizations have been granted.**

(Source: <https://www.yna.co.kr/view/AKR20100121057800002>).



Exemption via Art. 40(2) Authorization?

- Cartel exemptions for SMEs and certain industries to come?
 - Potential implications for sustainability agreements?



“In February, the Fair Trade Commission commissioned a comparative legal study regarding the exclusion of competition law applications for **small and medium-sized enterprises** and is currently analyzing the feasibility of implementing related systems. This study aims to compare domestic and international legislative examples and law enforcement cases regarding joint actions, including those of small and medium-sized enterprise cooperatives, and to derive policy implications of exceptions to the application of competition law. Joint projects by small and medium-sized enterprise cooperatives include **collective procurement of raw materials** and **joint supply contracts to large demand sources**.”

(Source: <https://biz.chosun.com/en/en-policy/2025/07/03/2TOYXGVHAJCJ3NSXEF7RGP7O34/>)



KFTC's Sustainability Guidelines (2024)

- KFTC's Sustainability Guidelines (2024)
 - In Dec 2024, the KFTC released the *MRFTA Voluntary Compliance Guidelines for Business Activities Related to Environmental Sustainability* ('Sustainability Guidelines')
 - Originally titled, “環境的 持續可能性 關聯 公正去來法 自律遵守 가이드라인”
 - Korean: https://repokr.github.io/doc/KFTC_Sustainability_Guidelines_2024.pdf
 - English: *<https://docs.google.com/document/d/1g9V5rPPamdCuXHpnHlcGPeWsGcVesahTDNlYQsjjbDo/edit?usp=sharing>
- * Unofficial AI-translation; for reference purposes only.





KFTC's Sustainability Guidelines (2024)

- Legal context

Related legal provisions (for reference; not a direct legal basis)

Article 35 (1) of the [Constitution](#)*

“All citizens shall have the right to a healthy and pleasant environment.

The State and all citizens shall endeavor to protect the environment.”



Constitutional Court [2020Hun-Ma389](#) and consolidated cases, August 29, 2024**

“Article 35(1) of the Constitution imposes an obligation on the State and the citizens to ‘endeavor to protect’ the environment ... This obligation includes the **State’s duty to respond to the climate crisis by mitigating climate change through reducing its causes and taking adaptive measures in response to its consequences**, against the risk that climate change may undermine the overall environment that forms the basis of daily life and threaten life and bodily integrity.” (author's own translation)

* English translations, offered by KLRI, are available at https://elaw.klri.re.kr/kor_service/main.do.

* In this case, the Constitutional Court found that Article 8(1), Carbon Neutrality Act (see below) was not in conformity with the Constitution for violating the environmental right by failing to specify any quantitative reduction targets for the years 2031 to 2049. Article 8(1) remains valid but must be amended by Feb 28, 2026.



KFTC's Sustainability Guidelines (2024)

- Legal context

Related legal provisions (cont'd)

Article 9, the [Framework Act on Environmental Policy](#)* (first enacted in 1990)

“(Comprehensive Consideration of Environment and Economy)

- (1) The Government shall develop methods by which **the environment and economy can be evaluated in a comprehensive manner** and shall utilize those methods when it formulates different types of policies.
- (2) The Government shall assist in minimizing any harmful impacts on the environment through consultations between industries, regions and businesses within the environmental capacity.” (since the [2011 amendment](#))

Article 2(1), the [Framework Act on Sustainable Development](#)* (enacted on Jan 4, 2022)

“The terms used in this Act are defined as follows:

1. The term "**sustainability**" **means** using economic, social, and environmental resources in a harmonized and balanced way without wasting those resources or deteriorating the quality thereof which are to be used by future generations to meet the needs of present generations;”

* English translations, offered by KLRI, are available at https://elaw.klri.re.kr/kor_service/main.do.



KFTC's Sustainability Guidelines (2024)

- Policy context

Korea's Nationally Determined Contribution (NDC):

40%↓ (from 2018 levels **by 2030**) and **Net Zero by 2050**

- On Oct 28, 2020, then-President Moon announced the government's commitment to achieving carbon neutrality (net zero) by 2050 (see [European Parliament, 2021](#)).
- On Sep 24, 2021, the [Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis](#)* ('Carbon Neutrality Act') was enacted.
- On Mar 25, 2022, the Act* and its Enforcement Decree entered into force (see [Ministry of Environment, 2022](#)).
- The Act sets out Korea's NDC:
 - [Art 8](#)(1) of the Act provides that the emission reduction target from **2018 levels by 2030** shall be set by Presidential Decree within a range of at least 35 percent, and
 - [Art 3](#)(1) of the [Enforcement Decree](#) sets **the target at 40 percent**.



KFTC's Sustainability Guidelines (2024)

- Domestic and international context

[Domestic] Lack of public discussion and substantial research before the Guidelines.

- No real cases have been identified in Korea where voluntary cooperation for environmental sustainability has triggered any enforcement conflicts.*

*  Such as the NL's [coal power plants closure](#) case (2013)

- No substantial studies explore any actual legal difficulties Korean businesses face in pursuing sustainability initiatives under the current legal framework in Korea.
 - While some academic studies* on this issue have been conducted, they largely draw on foreign developments, particularly from the EU, and tend to make normative claims that ‘sustainability should be considered.’
- * Existing literature: Jeongmin Kim (2022, 2023, 2025); Jongwook Park (2022); Hye-Shin Cho (2023, 2024, 2025).

[Global] In the KFTC's [press release](#), two jurisdictions' initiatives are referenced.



EU: On Jun 1, 2023, the EC [adopted](#) the new [Horizontal Guidelines](#), which includes a chapter on sustainability agreements (Chapter 9).



JP: On Mar 31, 2023, the JFTC [published](#) the *Green Guidelines*; [revised](#) on Apr 24, 2024.



KFTC's Sustainability Guidelines (2024)

- Existing literature (Korean articles)

KIM, Jeongmin (2022). '[The Possibility of Considering the Sustainability of Domestic Competition Policy from the Perspective of Law and Economics](#)' 19(3) Korean Journal of Law and Economics 433

KIM, Jeongmin (2023). '[The Method for Considering the Sustainability of Domestic Competition Policy Enforcement -Focusing on Cartel Regulation](#)' 64 JURIS 753

KIM, Jeongmin (2025). '[International development of sustainable competition policy after 2024 and its Implications for Competition Policy in Korea](#)' 47(1) Environmental Law Review 143

PARK, Jongwook (2022). '[A Study on the Cooperation Prospect of sustainable Competition Policy between Korea and EU in the Post-COVID19 Era](#)' 6(3) Korea and Global Affairs 237

CHO, Hye-Shin (2023). '[Responses of EU and Member States' competition authorities on the issue of 'Sustainability' under the Competition Law](#)' 47 Journal of Korean Competition Law 400

CHO, Hye-Shin (2024). '[Acceptability of Environmental Sustainability Values under the Fair Trade Act](#)' 23(3) Korea Economic Law Review 289

CHO, Hye-Shin (2025). '[Judgment of Sustainability Benefits in Cartel Regulation under Competition Law : Analysis of the EU's Revised Horizontal Agreement Guideline](#)' 24(1) Korea Economic Law Review 243



KFTC's Sustainability Guidelines (2024)

- Adoption of the Sustainability Guidelines: Timeline and Process
 - Jul-Aug 2024: The KFTC surveyed domestic companies on environmental sustainability-related business activities.
 - Nov 1-20, 2024: The KFTC held public [hearings](#) to gather opinions from stakeholders on the draft guidelines (draft released Nov 1, 2024).
 - Dec 4, 2024: KFTC officially [issued](#) the final *Sustainability Guidelines*.
- The whole process proceeded smoothly, without controversy or opposition.

기후테크 등 친환경 사업이 경쟁법에 저촉되지 않도록 공정거래법 자율준수 가이드라인 마련했어요~!

불공정거래행위 중 탄소·온실가스 배출 감축, 재활용 촉진 등 환경적 지속가능성 제고를 주 목적으로 한 행위에 대해 적용

환경적 지속가능성을 목적으로 부당성이 낮은 행위 유형 사례

- ① 공동연구개발·기술제휴 유형
단독 연구개발이 어렵고, 가격·생산량 등 경쟁 요소 합의나 정보교환을 하지 않은 경우
- ② 자율적 표준 유형
환경적 지속가능성 사업을 위해 업계의 자율적 표준을 설정하고, 개발·채택 과정이 투명한 경우
- ③ 거래거절 유형
환경적 지속가능성을 위해 설정한 기준에 맞지 않는 불특정 다수 사업자와의 거래를 거절하는 경우
- ④ 거래상지위 남용 유형
상품·서비스의 환경적 개선을 위해 거래 상대방에게 친환경 소재나 환경보호 자료 제출을 요구하는 경우

공정위는 가이드라인 및 적용 사례 등을 제시하여 기업들이 법적 불확실성을 해소하고 친환경 경영활동을 적극 추진할 수 있도록 하겠습니다.

공정거래위원회

(Source: [KFTC's official Facebook page](#))



KFTC's Sustainability Guidelines (2024)

- Overview of the *Sustainability Guidelines*
 - **No serious shift** in the direction of competition policy and law
 - **Narrow focus** on 'climate tech'-related activities
 - **Clarification** of how the existing framework applies to the climate change issues (rather than introducing a new approach for the objective)
 - Considering whether **efficiency-enhancing effects** outweigh **anti-competitive effects**
 - **Subsidiary nature** – other relevant guidelines take precedence
 - **Alignment** with developments in other jurisdictions (seemingly, modelled after Japan's Green Guidelines)
 - This assessment is based on the following considerations:
 1. **Lack of actual cases** raising conflicts or field-level concerns about sustainability, which resulted in limited prior public discussion on the issue (*i.e.*, no strong demand from the field; no strong motivation from the authority to invest substantial effort);
 2. **A very short timeline**: only 3–4 months, from stakeholder survey (Jul-Aug) to the draft release and finalization (Nov-Dec);
 3. **Close similarity** in format with **Japan's** Green Guidelines. *
- * For a similar view, see [Kim \(2025\)](#), pp.168-169.

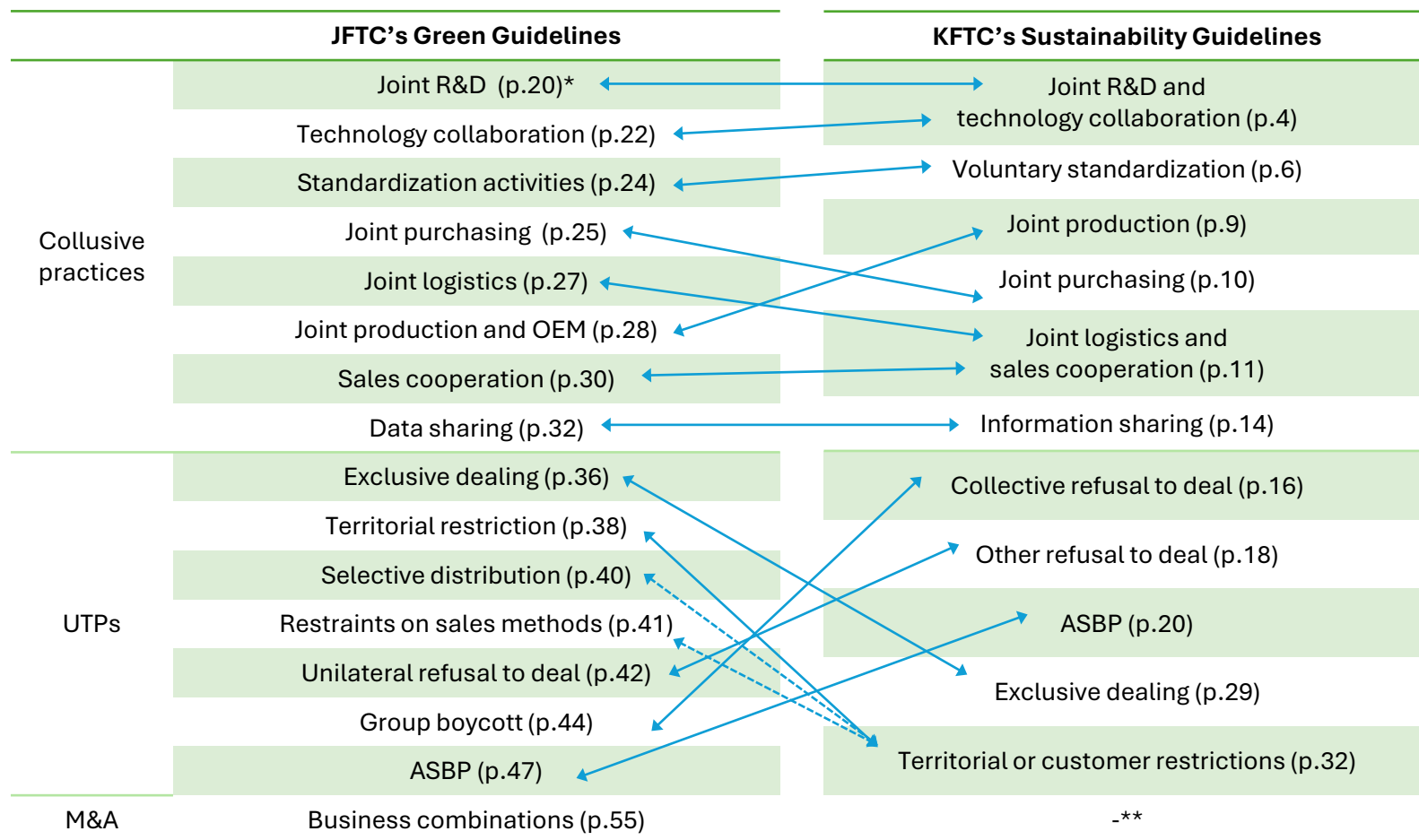


KFTC's Sustainability Guidelines (2024)

- Overview of the *Sustainability Guidelines* (cont'd)

- Key contents: in comparison with Japan's Green Guidelines

Based on Kim (2025), p.169



* Page numbers: Those for Japan refer to the English version, while those for Korea refer to the original Korean version.

** Instead, the Korean [Merger Guidelines](#) (VIII.1.A.(3)(e)) state that a very significant contribution to improving environmental pollution can be considered as one of the efficiency-enhancing effects of anti-competitive mergers. 19



KFTC's Sustainability Guidelines (2024)

- Overview of the *Sustainability Guidelines* (cont'd)
 - In the case of **collusive practices** (including decisions of trade associations), the following factors are considered (for example):
 - The combined **market share** of the collusion participants;
(The *de minimis* rule applies where the combined market share is below 20%.)
 - The **stage** of collaboration (e.g., the greater tolerance at the stage of basic research);
 - Whether the **scope and duration** of the collusion are limited to what is necessary;
 - Whether the exchange of **competitively sensitive information** is effectively prevented;
 - (In cases of joint R&D, standardization, or shared logistics) whether the arrangement **restricts the independent business activities** of other undertakings;
 - (In cases of cross-licensing or patent pooling) whether **FRAND** (Fair, Reasonable, and Non-Discriminatory) terms are ensured;
 - (In cases of standardization, joint production, purchasing, logistics, sales cooperation) whether **participation is open** and non-discriminatory;
 - (In the same cases) the proportion of costs from joint activity to the total costs.
 - Commonly considered factors; **no sustainability-specific factors are found.**



KFTC's Sustainability Guidelines (2024)

- Overview of the *Sustainability Guidelines* (cont'd)
 - In the case of collusive practices (cont'd),
What do the **efficiency gains** (“efficiency-enhancing effects”) mean?
 - The guidelines do **not** mention any **sustainability-specific** efficiencies
 - The general framework* appears to apply in the same manner.

* Collusive Practices Guidelines (amended on Dec 28, 2021), V. 3. (A) – (E):

- A. “**Economic efficiencies**”,
including: “economies of scale and scope, risk-sharing, accelerated innovation through shared knowledge and experience, and cost savings through the reduction of duplicative efforts”;
- B. excluding: “cost savings resulting from reduced output, market allocation, or mere exercise of market dominant power,” and those “**achieved at the expense of consumer interests**, such as through the degradation of product or service quality”;
- C. that are **certain to be realized**;
- D. that are **specific to the conduct** in question;
- E. that are supported by sufficient evidence **from the undertakings** involved.
(author's own translation)



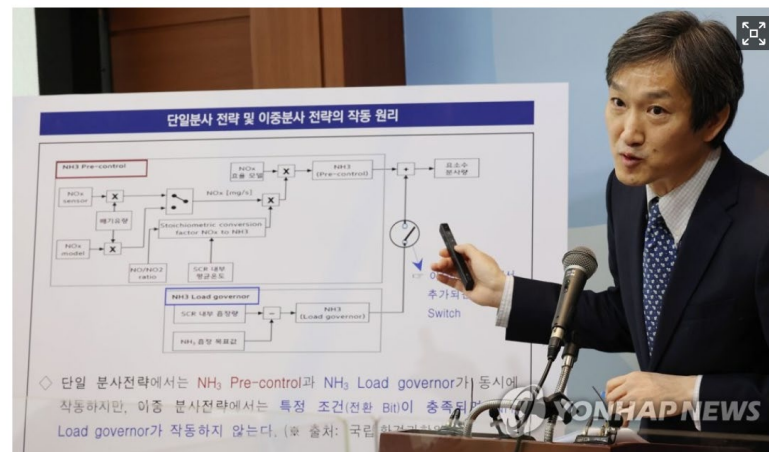
KFTC's Sustainability Guidelines (2024)

- Overview of the *Sustainability Guidelines* (cont'd)
 - For **UTPs** as well, the Guidelines repeat general considerations commonly used.
 - Any **new or sustainability-specific elements** are **not** identified.
 - [Refusal to deal and restrictive dealings]
 - In addition to anti-competitive effects, “**justifiable reasons**” are assessed.
 - These include: the **legitimacy of the objective**, **appropriateness (proportionality) of the means used**, and **the necessity of the restriction (i.e., least-restrictive means)**.
 - **Efficiency gains** that outweigh anti-competitive effects are considered
 - [Abuse of Superior Bargaining Position]
 - “**Legitimate reasons**”, similar to the ‘justifiable reasons’, are considered.
 - Efficiency gains can be weighed against the unfairness of the conduct (“efficiency enhancing effects” vs “**negative impacts on fair trade**”)*
 - * However, as a general rule, in ASBP cases, for its nature, efficiency gains are **only narrowly, restrictively interpreted**.
See, [UTPs Guidelines](#) V. 6. (4).



German Carmakers Emissions Cartel Case (2023)

- No conflicts have been identified so far (research in progress).
 - **Lots of cases** where the KFTC enforced competition rules in relevant fields.
 - But **no cases** have been found (so far) where the pursuit of sustainability conflicts with the established approach under Korean competition law.
 - * This research excludes consumer protection cases, like greenwashing cases.
- That said, the 2023 *German car makers' emission cartel* case is noteworthy.
 - In this case, the KFTC's pursuit of **sustainability** conflicts with **consumer benefits**.



공정위, 독일 승용차 제조사들의 배출가스 저감기술 담합 행위 제재

(세종=연합뉴스) 김주형 기자 = 신동열 공정거래위원회 카르텔조사국장이 9일 오전 세종시 정부세종청사에서 독일 승용차 제조사들의 배출가스 저감기술 담합 행위 적발·제재와 관련해 브리핑하고 있다. 2023.2.9 kjhpress@yna.co.kr

(Source: [Yonhap News](https://www.yna.co.kr))



German Carmakers Emissions Cartel Case (2023)

- 2023 *German Car Makers' Emission Cartel Case*

Case Info: KFTC's Decision [No. 2023-056](#), Decided on April 5, 2023.

- Facts: Car makers **agreed not to compete for a better gas emission reduction tech.**
 - * Specifically, Mercedes-Benz, BMW, Audi, and Volkswagen agreed to limit the use of the full potential of Selective Catalytic Reduction (SCR) systems, which use AdBlue to reduce harmful NOx emissions, by jointly limiting AdBlue dosing levels (single-dosing → dual-dosing).
- Decision: Violation of the cartel prohibition (then Art. 19, now Art. 40)
 - * This follows the European Commission's enforcement action in 2021 (AT.40178).
- Implication: For the first time, R&D conduct was sanctioned as a cartel, and **pro-environmental performance** was recognized as a “**key competition parameter**” (a phrase used in the [KFTC's press release](#)).

Cf. Emission Standards were met: The SCR system was developed in response to the strengthened emissions regulations for diesel passenger vehicles (e.g., the Euro 6 standards in Europe), and the level of emissions adjusted still met the thresholds.



German Carmakers Emissions Cartel Case (2023)

- 2023 *German Car Makers' Emission Cartel Case* (cont'd)
 - **BUT** the KFTC's pursuit of **sustainability** conflicts with other **consumer benefits**.
 - Question: Was it necessarily or entirely bad for consumers?
 - The undertakings argued: “**efficiency gains such as improved fuel efficiency and cost savings**” (Decision, para 153)

Rationale: ‘Reducing the AdBlue injection volume → enabled the installation of smaller AdBlue tanks → and reduced vehicle weight → thereby **contributing to improved fuel efficiency**’ (Decision, para 159)

- Also, a reporter's question during the press conference:
“From a consumer's standpoint, one could say that **reduced urea-water consumption brings certain benefits, such as improved fuel efficiency and longer refill intervals**. What I'd like to ask is: on what basis did the KFTC decide that **the benefit of reducing NOx emissions** outweighed the **consumer benefits**?” (* Source: <https://www.korea.kr/briefing/policyBriefingView.do?newsId=156551576>)





German Carmakers Emissions Cartel Case (2023)

- 2023 *German Car Makers' Emission Cartel Case* (cont'd)
 - The KFTC's answer to the question of balancing ([Decision](#), paras 158-159):

1. (No reasonable grounds for limiting urea-water injection volume. Para 149)
2. (Anti-competitive intent and objective. Paras 150-153)
3. (Reducing efforts toward innovation and new technology development. Paras 154-157)
4. "Fourth, due to the agreement at issue, despite lacking reasonable grounds, the opportunities to produce and sell diesel passenger vehicles capable of further reducing NOx emissions were restricted, and accordingly, **the right of consumer choice was infringed**. That is, due to the agreement ... ultimately, **competition on performance aspects, such as the environmental performance** of diesel passenger vehicles, **was eliminated, and in turn, the right of consumer choice was infringed.**" (para 158)
5. "Fifth, the efficiency-enhancing effects claimed by the respondents cannot be accepted, and even if they were to be acknowledged, **they cannot be deemed to outweigh the anti-competitive effects identified above. The improvements in fuel efficiency and cost savings** alleged by the respondents **were achieved at the expense of reduced vehicle performance in NOx emission reduction and diminished consumer benefits**, and **they were not effects that could be attained only through the agreement at issue.*** Thus, they **cannot** be recognized as efficiency-enhancing effects." (para 159)
(author's own translation)

* See, Collusive Practices Guidelines, V. 3. (A) – (E), explored above.

Sustainability Benefits Under a More General Framework

- The ‘Not-Unjust’ Cartel Exception in Korea
- **Cases:** *Freight Transport Operator Cartel* (2009)
Korean Medical Association’s Strike (2021)
Duck Processing Cartel (2024)
- **Sustainability Cartel As A ‘Not-Unjust’ Cartel?**



‘Not-Unjust’ Cartel Exception in Korea

- Cartel prohibition and its exceptions in Korea

Article 1 of the [MRFTA](#)*

“The purpose of this Act is to prevent the abuse of market dominance by business entities and excessive concentration of economic power and to promote fair and free competition by regulating illegal cartel conduct and unfair trade practices, thereby [encouraging creative business activities](#), [protecting consumers](#), and [promoting the balanced development of the national economy](#).”

Article 40 (formerly, Art. 19)

“(1) No business entity shall agree to engage in any of the following conduct that **[unjustly] restricts competition** jointly with other business entities by contract, agreement, resolution, or any other method or cause other business entities to do so:”

- “unjustly restricts competition” (since 1999 amendments)
 - The Court treats the ‘unjustness (不當性)’ as a distinct element from the ‘restriction’ part.
 - Under this framework, **naked, hardcore cartels are unjust in principle**, unless [as an exception, they do not substantially conflict with the ultimate goal\(s\) of the law](#).

* English translations, offered by KLRI, are available at https://elaw.klri.re.kr/kor_service/main.do.



‘Not-Unjust’ Cartel Exception in Korea

- Cartel prohibition and its exceptions in Korea (cont’d)



SUPREME COURT
OF KOREA

Supreme Court Decision [2012Du17773](#) Decided on Nov 28, 2013 (*Digital Music Price-Fixing* case)

“Whether a collaborative act **restricts competition** as provided by Article 19(1) of the [MRFTA] should be determined independently upon considering various circumstances such as the uniqueness of the relevant product, consumers’ standards in decision-making, and how the relevant act will influence the market and competition, then examining whether the relevant collective act will affect or has a risk of affecting decisions on price, quantity, quality, and other trade conditions (see Supreme Court Decisions 99Du6514, Mar. 15, 2002; 2010Du10471, Jun. 14, 2012, etc.).

And **whether a collaborative act is [unjust]** should be determined after considering the competition-restricting consequence that may be caused by the relevant collaborative act, and **how the act will affect the effectiveness of the overall economy, and other specific influences in light of the ultimate purpose of the [MRFTA], which is in protecting the rights of consumers and promote balanced development of national economy** (Article 1), etc..”

- The English translation follows the official translation provided by the Korean Supreme Court. Some minor modifications have been made in square brackets []. Article 19(1) is now stipulated in Article 40(1). <https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=1007&pageIndex=1&mde=6&searchWord=> .



‘Not-Unjust’ Cartel Exception in Korea

- Sustainability cartels and the ‘unjustness (不當性)’ assessment
 - The balancing can be conducted in the ‘unjustness’ assessment.
 - Then, a hypothetical question is raised:
In the case of sustainability cartels, i.e., **anti-competitive** but **eco-friendly** cartels),
Can these agreements be justified under the ‘unjustness’ assessment?





Case: *Freight Transport Operator Cartel* (2009)

- Sustainability cartels and the ‘unjustness’ assessment
 - The courts’ precedents (where cartels were found to be ‘not unjust’)
- Ex 1. *Freight Transport Operator Cartel Case* (2009)
(Supreme Court Decision 2007Du26117 Decided on Jul 9, 2009)
- **Freight truck drivers’ nationwide strike** in May 2003, demanding higher fees.
(It was triggered by a truck driver's suicide due to harsh economic conditions in April.)



2003년 5월 노동절 집회에 참가한 화물 운송 노동자들

©〈노동자 연대〉 자료 사진



2003년 4월 30일 정부과천충합청사 앞 결의대회

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* Source: <https://ws.or.kr/article/29329>



Case: *Freight Transport Operator Cartel* (2009)

Ex 1. *Freight Transport Operator Cartel* Case (cont'd)

- The government intervened and, through administrative guidance, urged transport companies to **negotiate with truck drivers (on the subcontracting fees)**.
- The transport companies allegedly went beyond the scope of that guidance and colluded to **raise freight rates and introduce a new transportation management fee** charged to self-transporting shippers..
- The KFTC & Seoul High Court: '**opportunistic behavior**' (violation of Art. 19(1))
- The Supreme Court overturned: '**Anticompetitive, but not unjust**' given that:
 1. **Strong administrative guidance** was issued;
 2. Higher freight charges may have been **necessary to raise subcontracting fees**;
 3. Joint decision on subcontracting fees was not addressed; and
 4. **Dumping of freight rates, directly causing the reduction of truckers' income, may trigger social costs** that may outweigh consumer welfare from price competition.





Case: Korean Medical Association's Strike (2021)

Ex 2. Korean Medical Association's Strike Case (2021)

(Supreme Court Decision 2016Du36345 Decided on Sep 9, 2021)

- In late 2013, the government announced bills
 - (1) to legalise real-time doctor-to-patient **tele-medicine** and
 - (2) to allow **hospitals to run for-profit** subsidiaries.
- To protest the government's push, the Korean Medical Association staged a one-day strike on May 10, 2014.
- KFTC: Association's conduct that unjustly restricts competition.
(then-Art. 26(1)(1), now-Art. 51(1)(1), MRFTA)



* Source: Health Joong Ang
<https://jhealthmedia.joins.com/news/articleView.html?idxno=12022>



Case: *Korean Medical Association's Strike* (2021)

Ex 2. *Korean Medical Association's Strike* Case (cont'd)

- Seoul High Court and Supreme Court: 'Neither anticompetitive nor unjust'.
(The Supreme Court's considerations are as follows)
 - **No object:** Not to restrict competition, but to against the government's policy (**Noerr-Pennington-like consideration**)
 - **No impacts:** It was only a one-day strike, actual participation was modest (e.g., 10-20%), emergency rooms and ICUs (intensive care units) were exempt; and
 - **No “unjustness”:** Considering the purpose, factual context, and degree of competitive restriction as a whole, it's not substantially in conflict with the ultimate goal(s) of the MRFTA.



Case: *Duck-Meat Processing Cartel* (2024)

- Sustainability cartels and the ‘unjustness’ assessment (cont’d)
 - The “not-unjust” justification → only in extremely exceptional circumstances.
 - However, the latest *Duck Processing Cartel Case* (2024) takes a different stance.
(A sign of change begins to emerge?)

Duck-Meat Processing Cartel Case (2024)

(Seoul High Court Decision [2022Nu61146](#) Decided on Sept 26, 2024)

- Several duck meat producers engaged in collusive practices through their association, including agreements to reduce production, in 2012 and 2016.
- There was a sectoral regulation that allowed collective production controls under certain conditions, **but the required legal procedures were not followed.**
Also, the Minister’s administrative **guidance was illegitimate.***



* Then–Art. 58 (now Art. 116) of the MRFTA: “The provisions of this Act shall not apply to any lawful acts done by business entities or business entities’ organizations in accordance with other Acts and orders issued under such Acts.”
(While the existence of guidance has often been considered, this provision has not been directly applied to cartels.)




Case: *Duck-Meat Processing Cartel* (2024)

- Sustainability cartels and the ‘unjustness’ assessment (cont’d)

Duck Processing Cartel Case (cont’d)

- Seoul High Court ruled that there’s **no legitimate legal basis**, and it’s **anti-competitive**. But it fell within the ‘**not-unjust**’ exception. Because:

- 
- **Articles 123(4)-(5) of the Constitution** emphasize the State’s duty to protect farmers and fisheries’ interests and foster their voluntary cooperative organizations.
 - **Where such organizations’ activities are consistent with the constitutional principles, they may be exempted from the principle of free competition.**
 - The Korean Duck Association is a Constitutionally protected organization.
 - The production restriction agreement at issue was carried out as part of the activities of the constitutionally protected organization, aiming to sustain the duck meat processing business.
 - **The conduct’s effect of protecting consumers and promoting balanced development of the national economy outweighs its anti-competitive effect.**
 - Therefore, it does **not substantially conflict** with the ultimate goal(s) of the law.



Case: *Duck-Meat Processing Cartel* (2024)

- Sustainability cartels and the ‘unjustness’ assessment (cont’d)

Duck Processing Cartel Case (cont’d)

Article 123 of the [Constitution](#)*

- (1) The State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries.**
- (2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.
- (3) The State shall protect and foster small and medium enterprises.
- (4) In order to protect the interests of farmers and fishermen, the State shall endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems.**
- (5) The State shall foster organizations founded on the spirit of self-help among farmers, fishers and business persons engaged in small and medium industry and shall guarantee their independent activities and development.**

* English translations, offered by KLRI, are available at https://elaw.klri.re.kr/kor_service/main.do.



Case: *Duck-Meat Processing Cartel* (2024)

Seoul High Court Decision [2022Nu61146](#) Decided on Sept 26, 2024

“[Article 123(4) of the Constitution and several protective provisions in livestock-related laws] are to promote price stability by allowing supply and demand adjustment of agricultural and livestock products, to protect the economic interests of those engaged in agriculture and livestock industry, and to protect the interests of the entire nation who are the final consumers of agricultural and livestock products. ...

... [Article 123(1) and (5) of the Constitution] are to improve the social and economic status of farmers and fishermen by guaranteeing the activities of organizations composed of farmers and fishermen (refer to the purport of Constitutional Court Decision 99Hun-Ma553, decided June 1, 2000). Since such voluntary cooperative organizations essentially involve conducting certain acts together to improve the social and economic status of farmers and fishermen, they may accompany joint actions. **Therefore, when the activities of farmers' and fishermen's voluntary cooperative organizations do not contradict the constitutional spirit of specially protecting such activities, allowing them as exceptions to free competition should be an interpretation that conforms to the economic order under our Constitution that seeks to guarantee the autonomous activities of the voluntary cooperative organizations.”**

(author's own translation)



Case: *Duck-Meat Processing Cartel* (2024)

“Considering the Duck Association's composition, its establishment purpose and activity contents, decision-making, and financial support for the association, the **Duck Association can be viewed as a voluntary cooperative organization that Constitutional Article 123, Paragraph 5 seeks to protect.** Therefore, regarding the joint actions conducted through the Duck Association, in light of the spirit of our nation's Constitution that seeks to protect agriculture and guarantee the activities of farmers' and fishermen's voluntary cooperative organizations, the purpose and resulting effects should be considered. **The production limitation acts in this case was all carried out through the Duck Association, and so they should not be viewed as acts that unjustly restrict competition merely because they are acts that limit production. ...**

... **The production limitation acts in this case** appear to have been conducted for the purpose of preventing duck fresh meat market prices from falling at least below production costs in order **to sustain and maintain the duck fresh meat business**, and do not appear to have been conducted for the purpose of unjustly raising duck fresh meat market prices by using market dominance.” (author's own translation)



Case: *Duck-Meat Processing Cartel* (2024)

“Therefore, the production limitation acts in this case were conducted as activities of a voluntary cooperative organization of duck fresh meat producers and sellers **for the purpose of maintaining and sustaining the duck fresh meat production and sales business**, and it is difficult to see that there was concern that duck fresh meat prices would unjustly rise due to the production limitation acts in this case, thereby undermining fair competitive order. If so, it is appropriate to view that the production limitation acts in this case correspond to exceptional cases where **the effect of ultimately protecting consumers and promoting balanced development of the national economy is greater compared to the degree to which competition is restricted by such acts, and thus do not substantially contradict the purpose of the MRFTA.**” (author’s own translation)



Case: *Duck-Meat Processing Cartel* (2024)

“In the case of agricultural and livestock products, if only large-scale operators who can bear production costs remain in the market, market dominance will rather be concentrated in such operators, and if inexpensive agricultural and livestock products are subsequently imported to cope with price increases, domestic food supply may be influenced by external factors such as changes in international circumstances. **Therefore, in a situation where duck fresh meat market prices approached production costs, the production limitation acts** in this case conducted by the plaintiffs and other operators to prevent duck fresh meat market prices from falling below production costs **can ultimately benefit consumers**, so they cannot necessarily be viewed as cases that only produce competition-restricting effects.” (author’s own translation)



Sustainability Cartels & ‘Not-Unjust’ Cartel Exception

- Back to the question: Can the ‘sustainability cartels’ still be justified?



- The ‘not-unjust’ exception under Korean law is certainly a possibility.
- Given that constitutional grounds for sustainability exist (2020Hun-Ma389), the Seoul High Court’s approach may be applicable.



- The separation of ‘unjustness’ from ‘anti-competitiveness’ itself is contestable.
- The direct reliance on constitutional provisions is novel and experimental. It remains uncertain whether the Supreme Court will ultimately endorse it.

- Further question for Korea: Is it necessary to relax the cartel control?
 - The ‘relaxing cartel control’ may be equivalent to ...
allowing firms to restrict competition, outside the scope of lawful frameworks, like the authorization (Art. 40(2)) & legitimate conduct per other rules (Art. 116).
 - In Korea (differently from Europe), clear consumer demand or genuine business commitment to sustainability is not verified.
- Should Korea necessarily take the risk of false negatives*?
 - * *i.e.*, mistakenly allowing cartels disguised as sustainability initiatives?



Other Questions



Other questions



“Most of the above questions are informed by the prevailing approach to pro-competitive benefits under US and EU law. To the extent that this approach has limited application to your jurisdiction, please explain how the competition law of your jurisdiction would balance competitive harm and sustainability benefits.”



As discussed, sustainability benefits may (at least theoretically) be considered in the ‘unjustness’ assessment.



“Have there been any attempts to challenge collaboration among investors to promote the pursuit of sustainability through competition law enforcement like we have seen in the US? If so, please provide information about such attempts.”



No known case in Korea so far (based on current research).

* Maybe due to the Korea-specific corporate governance and ownership, shareholding structure?



Other questions



“Do you think there is a potential overlap or conflict between sustainability and abuse of dominance or merger review in the competition law of your jurisdiction? If so, please share information on that.”



As for merger review, the Korean Merger Guidelines (VIII.1.A.(3)(e)) state that a very significant contribution to improving environmental pollution can be considered as one of the efficiency gains in the assessment of anti-competitive mergers.

However, beyond this statement, there appear to be no known cases where the factor has been actively considered in merger cases.

In the response to the inquiry in 2022, the KFTC indicated that it promotes sustainability by expediting the review of climate tech-related mergers that do not raise competitive concerns. See the next slide.



Other questions

- In the KFTC's response to the inquiry in 2022 * Submission No. 2AA-2210-0558529.

Quick clearance of non-problematic green mergers: “Regarding merger assessments, there are currently no studies, consultations, or guideline development efforts underway concerning the consideration of sustainability goals. That said, the KFTC is actively supporting the achievement of sustainability objectives by expediting its assessment of mergers that do not raise competition concerns in areas such as hydrogen, renewable energy, and electric vehicles.”

보도 참고 자료	
보도 일시	2022. 1. 26.(수) 10:00
배포 일시	2022. 1. 26.(수) 08:30
담당 부서	시장구조개선정책관
담당자	책임자 과 장 민세영 (044-200-4363)
기밀등급	기밀등급
담당자	사무관 김현우 (044-200-4367)
친환경 전기차 시장, 기업결합(M&A) 활발히 전개 - 특히, 전기차 핵심부품인 '리튬이온전지' 공급망 내 인수합병 증가 -	
1 전기차 시장 기업결합(M&A) 동향	
<input type="checkbox"/> 공정거래위원회(위원장 조성욱, 이하 공정위는) 최근 전기차 시장에서 이루어지는 기업결합(이하 'M&A')을 신속히 심사·승인해왔다.	
<input type="checkbox"/> 세계적으로 친환경·저탄소 정책의 강화로 전기차 시장이 급속히 성장하고 있는 가운데, 관련 기업들이 전기차 체제로 사업을 전환하고 전 세계적으로 공급망을 확보하는 등 급변하는 시장에 발빠르게 대응하고 있다.	
<input type="checkbox"/> 이러한 추세를 반영하여 전기차 시장에서는 원재료 공급시장(Up Stream)에서부터 부품 및 완성차 제조시장(Down Stream)에 이르기까지 전기차 생산을 위한 전 과정에서 M&A가 활발히 전개되었다.	
<input type="checkbox"/> 특히, 전기차 핵심부품인 리튬이온전지와 관련한 M&A가 다수를 차지하며, 버스·트럭 등 상용차 시장에서도 전기차 생산을 위한 구조 개편 등이 이루어지고 있다.	
<input type="checkbox"/> 전기차 제조사가 해외에서 전기차 생산에 필요한 배터리(리튬이온 전지)의 안정적 공급을 위해 배터리 제조사와 합작을 추진한 사례	

Press release on M&A Trends in the EV sector (Jan 26, 2022)

KFTC pledges *quick* approval of non-problematic deals.

① Hyundai Motor Group & LG Energy Solution JV

- Released: May 25, 2021, Approved: Jul 19, 2021 (2 months)

② LG Chem Acquisition of 50% Stake in Toray Hungary

- Announced: Oct 27, 2021, Approved: Jan 3, 2022 (2 months)

* Also, M&As between battery component makers and raw material suppliers (approved in 2019, 2021) and BYD Auto & Hino Motors JV (announced: Oct 22, 2020, Approved: Oct 21, 2021) ...

* Source: https://repokr.github.io/doc/press20220126_E-vehicle_M&As.pdf.

Thank You

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