Supreme Court Decision 2020Du36892 Decided November 28, 2024【Lawsuit Seeking Revocation of Correction Order, etc.】

【Main Issues and Holdings】

[1] Meaning of an "act of presenting conditions that are unreasonable in light of normal transaction practices to the other party to a transaction" defined as one of the abusive practices of market-dominant positions in the standards for reviewing "abusive practices of market-dominant positions" publicly notified by the Fair Trade Commission and, in such a case, standard of determining "normal transaction practices"

[2] Where the transaction practices are deemed to be in line with desirable competition order even if the transaction practices are not consistent with actual transaction practices, whether the transaction practices can be recognized as "normal transaction practices," which underlies the constitution of abusive practices of market-dominant positions (affirmative) and in such a case, method of determining what corresponds to normal transaction practices that are deemed to be in line with desirable competition order

[3] Meaning of "acts not recognized as a legitimate exercise of copyright" subject to the application of the above Act under the contrary interpretation of Article 59 of the former Monopoly Regulation and Fair Trade Act and method of determining whether to correspond thereto

Matters to be considered when determining whether a copyright holder's demand for compensation for access to or use of their work corresponds to the act of presenting an unreasonable condition in light of normal transaction practices

[4] Where a vertically integrated market-dominant business entity, who simultaneously supplies essential raw materials and other resources for production activities to downstream market business entities in the upstream market and produces and sells products or services based on those raw materials in the downstream market, sets prices for raw materials in the upstream market at levels high enough to exclude competing business entities in the downstream market or the entry of new business entities is substantially blocked due to such prices, whether the price of the raw materials be considered an unfair condition that is unreasonable

in light of normal transaction practices that are deemed to be in line with desirable competition order (Affirmative)

【Summary of Decision】

[1] An “act of presenting conditions that are unreasonable in light of normal transaction practices to the other party to a transaction,” as the abusive practices of market-dominant positions, refers to the practices of a market-dominant business entity that unfairly make business activities of the business entity difficult by presenting conditions that are unreasonable in light of normal transaction practices to the other party to a transaction. Herein, “normal transaction practices” should be determined based on ordinary transaction practices of the relevant business circle in principle and refer to the practices that are deemed to be in line with desirable competition order according to the specific cases and cannot be seen to be always consistent with actual transaction practices.

[2] An act of presenting unreasonable conditions as abusive practices of market-dominant positions means an act of presenting conditions that are unreasonable in light of normal transaction practices, and where the transaction practices are deemed to be in line with desirable competition order even if the transaction practices are not consistent with actual transaction practices, such transaction practices can be recognized as “normal transaction practices,” which underlies the constitution of abusive practices of market-dominant positions. In such a case, what corresponds to normal transaction practices that are deemed to be in line with desirable competition order should be determined normatively in consideration of the legislative intent of the former Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020), which is to foster creative business activities and ultimately contribute to the balanced development of the national economy by preventing the abuse of market-dominant positions, thereby promoting fair and free competition.

[3] Acts that are not recognized as a legitimate exercise of copyright under the contrary interpretation of Article 59 of the former Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020; hereinafter the “former Fair Trade Act”) shall be subject to the former Fair Trade Act. In this regard, an “act not recognized as a legitimate exercise of copyright” refers to where, even if such act appears to be an exercise of copyright outwardly, the substance of the act

contradicts the fundamental purpose of the system beyond the intent of the copyright system. Whether such act corresponds thereto should be determined in consideration of overall circumstances, such as the purpose and intent of the Copyright Act, the content of the relevant copyright, and the impact of the act on fair and free competition. Therefore, when determining whether a copyright holder's demand for compensation for access to or use of their work corresponds to the act of presenting an unreasonable condition in light of normal transaction practices, the details of the legitimate rights of the copyright holder and the limitations thereof should be sufficiently considered.

[4] Where a market-dominant business entity, as a vertically integrated business entity managing a business in two different production stages according to the supply chain, simultaneously supplies essential raw materials and other resources (hereinafter "raw materials, etc.") for production activities to downstream market business entities in the upstream market and produces and sells products or services based on those raw materials in the downstream market, margin squeeze may come into question as a type of abusive practices of market-dominant positions. Therefore, if the price for raw materials, etc. set by a market-dominant business entity in the vertically integrated upstream market is set at levels high enough to exclude competing business entities efficiently operating their businesses equally to a market-dominant business entity in the downstream market, or if the entry of new business entities in the downstream market can be evaluated to be substantially blocked due to the prices of raw materials, etc., set by the vertically integrated market-dominant business entity under the circumstances where the market share of the vertically integrated market-dominant business entity in both the upstream and downstream markets is overwhelming, the price of raw materials, etc. set by the vertically integrated market-dominant business entity in the upstream market can be deemed an unfair condition that is unreasonable in light of normal transaction practices that are deemed to be in line with desirable competition order within the limits thereof.

【Reference Provisions】 [1] Article 3-2(1)3 (*see* current Article 5(1)3) and (2) (*see* current Article 5(2)) of the former Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(3)4 (*see* current Article 9(3)4)

of the former Enforcement Decree of the Monopoly Regulation and Fair Trade Act (Wholly amended by Presidential Decree No. 32274, Dec. 28, 2021) / [2] Article 3-2(1)3 (see current Article 5(1)3) and (2) (*see* current Article 5(2)) of the former Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(3)4 (*see* current Article 9(3)4) of the former Enforcement Decree of the Monopoly Regulation and Fair Trade Act (Wholly amended by Presidential Decree No. 32274, Dec. 28, 2021) / [3] Articles 3-2(1)3 (see current Article 5(1)3) and (2) (*see* current Article 5(2)) and 59 (*see* current Article 117) of the former Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(3)4 (*see* current Article 9(3)4) of the former Enforcement Decree of the Monopoly Regulation and Fair Trade Act (Wholly amended by Presidential Decree No. 32274, Dec. 28, 2021) / [4] Article 3-2(1)3 (*see* current Article 5(1)3) and (2) (*see* current Article 5(2)) of the former Monopoly Regulation and Fair Trade Act (Wholly amended by Act No. 17799, Dec. 29, 2020); Article 5(3)4 (*see* current Article 9(3)4) of the former Enforcement Decree of the Monopoly Regulation and Fair Trade Act (Wholly amended by Presidential Decree No. 32274, Dec. 28, 2021)

Article 3-2 of the former 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>*

1. Unfairly determining, maintaining, or changing the price of goods or services (hereinafter referred to as “price”);
2. Unfairly controlling the sale of goods or the provision of services;
3. Unfairly interfering with the business activities of any other business entity;

(2) Types of and criteria for the abusive practices may be prescribed by Presidential Decree. *<Newly Inserted by Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999>*

Article 59 of the former Monopoly Regulation and Fair Trade Act (Exercising Intangible Property Rights)

This Act shall not apply to any act that is deemed the legitimate exercise of any right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act, or the Trademark Act. *<Amended by Act No. 7289, Dec. 31, 2004;*

Act No. 8631, Aug. 3, 2007>

Article 5 of the Monopoly Regulation and Fair Trade Act (Prohibition of 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"):

3. Unfairly interfering with the business activities of any other business entity;

(2) The types of, and criteria for, abusive practices shall be prescribed by Presidential Decree.

Article 117 of the Monopoly Regulation and Fair Trade Act (Exercising Intangible Property Rights)

This Act shall not apply to any act that is deemed the legitimate exercise of any right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act, or the Trademark Act.

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

(3) "Unfairly interfering with the business activities of any other business entity" in Article 3-2 (1) 3 of the Act means hindering the business activities of any other business entity by doing directly or indirectly any of the following acts: *<Amended by Presidential Decree No. 17176, Mar. 27, 2001>*

4. Hindering the business activities of other business entities in any unfair manner other than those provided for in subparagraphs 1 through 3, which is publicly notified by the Fair Trade Commission.

Article 9 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (Types of, and Criteria for, Abusive Practices)

(3) Unfairly interfering with business activities of any other business entity as prescribed in Article 5 (1) 3 of the Act means an act of hindering business activities of other business entities by directly or indirectly conducting the following acts:

4. Any other acts determined and publicly notified by the Fair Trade Commission, among acts of making it difficult for any other business entity to engage in business activities by other improper means other than those prescribed in subparagraphs 1 through 3.

【Reference Cases】 [1][2] Supreme Court Decision 2020Du31897 decided Apr. 13,

2023 (Gong2023Sang, 850) / [3] Supreme Court Decision 2012Du24498, Feb. 27, 2014 (Gong2014Sang, 729) / [4] Supreme Court Decision 2018Du37700, Jun. 30, 2021 (Gong2021HA, 1386)

【Plaintiff-Appellee】 ○○○ Co., Ltd. and two others (Attorneys Lee Sang-hun et al., Counsel for the plaintiff-appellee)

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

【Judgment of the court below】 Seoul High Court Decision 2018Nu43110 decided February 6, 2020

【Disposition】 The final appeals are dismissed in their entirety. The costs of the final appeal are assessed against the Defendant.

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

1. Case overview

The reasoning of the lower judgment and the record reveal the following circumstances.

A. The Plaintiffs' status and the market where the Plaintiffs operate their businesses

1) The Plaintiffs are business owners under Article 2(1) of the former Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020; hereinafter the "former Fair Trade Act"). The medical device sales and service business, among the business sectors operated by Plaintiff 1 Company, was demerged into Plaintiff 2 Company on October 1, 2015, and Plaintiff 2 Company transferred comprehensively the above business to Plaintiff 3 Company on January 1, 2018 (hereinafter, when referring to the actions taken by the Plaintiffs related to the medical device sales and service business, they are referred as actions taken by "the Plaintiffs," regardless of the time period).

2) The Plaintiffs sell specifically computed tomography scanners (hereinafter "CT") and magnetic resonance imaging machines (hereinafter "MRI"), which are specialized medical equipment for image diagnosis. Between 2012 and 2015, the

Plaintiffs held the highest market share in the domestic CT and MRI sales markets, respectively.

3) The CT and MRI machines sold by the Plaintiffs require regular quality control inspections, safety checks, and ongoing maintenance services, such as ensuring normal operation and replacing faulty parts. As hospitals that purchase CT and MRI machines cannot perform these tasks on their own, a separate maintenance service market exists, where the maintenance services for the CT and MRI machines sold by the Plaintiffs are outsourced to either the Plaintiffs or third parties.

4) The Plaintiffs also provide maintenance services for the CT and MRI machines they sell. Between 2013 and 2016, the Plaintiffs held a market share of over 95% or close thereto in the domestic maintenance service market for the CT and MRI machines they sold. In addition to the Plaintiffs, independent maintenance service providers (hereinafter “ISOs”) also provide maintenance services for the CT and MRI machines sold by the Plaintiffs. As the above ISOs do not sell CT or MRI machines separately, they are not in competition with the Plaintiffs in the medical device sales market; however, in the maintenance service market for the CT and MRI machines sold by the Plaintiffs, they are in competition with the Plaintiffs.

5) The CT and MRI machines sold by the Plaintiffs are equipped with service software for the maintenance of the devices (hereinafter “service software”), which is classified into levels 1 to 7 depending on access privileges and the scope of available functions. To utilize the technical functions required for the maintenance tasks of the CT and MRI machines sold by the Plaintiffs, access to service software at levels 3 to 4 is required. Service software at level 5 or higher is, in principle, merely utilized internally by the Plaintiffs, and external access is not permitted.

6) To access the service software, a service key, which is a password issued by the Plaintiffs, should be entered. Where a hospital that has purchased CT or MRI machines from the Plaintiffs needs access to service software at levels 3 to 4 for maintenance tasks, the hospital requests the Plaintiffs to issue the service key (hereinafter “the instant service key”). Upon receiving the request, the Plaintiffs issue the service key to the hospital that owns the relevant equipment, allowing the hospital to access the service software at levels 3 to 4.

B. Details of the Defendant’s disposition being disputed in the appeal

1) The Defendant, after verifying whether the hospital was engaged in transactions with ISOs when issuing the instant service key at the request of individual hospitals, ① provided the instant service key for a fee of KRW 1.54 million in the case of the hospitals engaged in transactions with an ISO even though the instant service key is generally provided free of charge (hereinafter the "selective paid provision of the service key"), ② issued the service key immediately upon request for hospitals not engaged in transactions with an ISO, but delayed the issuance of the service key by 20 to 25 days if the hospital was confirmed to be dealing with an ISO, and ③ granted access to service software at level 5 or higher to hospitals not engaged with ISOs, while merely issuing service keys allowing access to service software at levels 3 to 4 for hospitals engaged with ISOs (hereinafter the above actions in ①, ②, and ③ are collectively referred to as the "actions of presenting conditions for issuing the instant service key").

2) The Defendant, by viewing that the actions of presenting conditions for issuing the instant service key correspond to an abusive practice of a market-dominant position under Article 3-2(1)3 and an unfair business practice under Article 23(1)1 of the former Fair Trade Act, imposed corrective orders and notification orders as indicated on Items 1 to 4 in the attached list No. 1 of the lower judgment and imposed a total fine of KRW 6.3 billion on the Plaintiffs on March 13, 2018.

2. Presentation of unreasonable conditions in light of normal transaction practices and judgment on the unreasonableness thereof

A. Specific details of the grounds for disposition in this part

1) The former Fair Trade Act prohibits an abusive practice of a dominant market position by a business owner (Article 3-2(1)) and regulates unfairly interfering with the business activities of any other business entity (hereinafter "business activity obstruction") as an abusive practice of a dominant market position (Article 3-2(1)3). As the former Fair Trade Act delegates the types of or criteria for the abusive practices to a presidential decree in Article 3-2(2), Article 5(3)4 of the former Enforcement Decree of the Monopoly Regulation and Fair Trade Act (wholly amended by Presidential Decree No. 32274, Dec. 28, 2021; hereinafter the "former Fair Trade Act Enforcement Decree") stipulates "an act of hindering the business

activities of other business entities in any unfair manner other than those provided for in subparagraphs 1 through 3, which is publicly notified by the Fair Trade Commission" as a type of business activity obstruction, and, according thereto, Section IV.3.d of the "Standards for Reviewing Abusive Practices of Market-Dominant Positions" (amended by Fair Trade Commission Public Notice No. 2021-18, Dec. 30, 2021; hereinafter the "instant Public Notice") publicly notified by the Fair Trade Commission specifies the "act of presenting conditions that are unreasonable in light of normal transaction practices to the other party to a transaction" (the former part of Parag. (2); hereinafter the "presentation of unreasonable conditions") as a case of Article 5(3)4 of the above Enforcement Decree.

2) The Defendant viewed that, even though it is a normal business practice for the service keys required for accessing the service software at levels 3 to 4, which are necessary for regular maintenance services of CT and MRI machines, to be provided free of charge upon request by each hospital, the Plaintiffs charged approximately KRW 1.54 million for issuing the service key only to hospitals engaged in transactions with ISOs, thereby interfering with the business activities of the ISOs. In other words, the Defendant regarded the plaintiffs' selective paid provision of the service key as an act of presenting unreasonable conditions, which falls under the category of business activity obstruction, among types of the abusive practices of market-dominant positions specified in Article 3-2(1)3 of the former Fair Trade Act, and, consequently, imposed the instant corrective orders, etc. on the Plaintiffs.

B. Meaning of normal transaction practices

1) An "act of presenting conditions that are unreasonable in light of normal transaction practices to the other party to a transaction," as the abusive practices of market-dominant positions, refers to the practices of a market-dominant business entity that unfairly make business activities of the business entity difficult by presenting conditions that are unreasonable in light of normal transaction practices to the other party to a transaction. Herein, "normal transaction practices" should be determined based on ordinary transaction practices of the relevant business circle in principle and refer to the practices that are deemed to be in line with desirable competition order according to the specific cases and cannot be seen to be always consistent with actual transaction practices (*see* Supreme Court Decision 2020Du31897, Apr. 13, 2023).

2) In light of the above legal principles, in determining whether there was a business practice of providing the instant service key free of charge in relation to the Plaintiffs in this case, whether such a practice of providing the service key free of charge actually exists in reality should be examined first, and whether this practice of providing the instant service key free of charge aligns with the desirable competition order should also be determined.

C. Whether a practice of providing the service key free of charge can be seen to actually exist in reality

1) The lower court determined that viewing that the practice of providing the instant service key free of charge actually exists in reality is difficult for the following reasons.

A) The standard equipment sales contract of the Plaintiffs stipulates that a licensing fee should be paid to use the service software after the warranty period. Therefore, individual hospitals that purchased CT and MRI machines from the Plaintiffs would have been aware that the right to use the service software installed on those devices is reserved for the Plaintiffs, the copyright holders, and that there is a paid licensing policy for such use authorization.

B) The standard maintenance service contract for hospitals owning the Plaintiffs' CT and MRI machines specifies that the maintenance fee paid by each hospital to the Plaintiffs includes compensation for the use rights of the service software. Therefore, even if hospitals receiving maintenance services from the Plaintiffs, rather than from an ISO, did not pay a separate fee for the issuance of service keys in this case, as long as the maintenance fee paid by the hospital to the Plaintiffs can be seen to include the cost for the issuance, readily concluding that there was a practice of providing the service keys for free is difficult.

C) It has been confirmed that the Plaintiffs issued service keys free of charge to individual hospitals 52 times between November 2012 and December 2016. However, the above 52 cases were either the cases where large hospitals, such as △△△ Hospital and □□□ Hospital, intended to perform maintenance with their own staff or the cases where the service keys were issued for the purpose of measuring maintenance items that could be performed by the hospitals' own personnel without the need for service keys. It is insufficient to see that there was a general practice of providing the instant service keys free of charge for the maintenance services of the CT and MRI machines sold by the Plaintiffs, based on these exceptional cases.

D) There is also insufficient evidence to see that access to the software for maintenance services of CT and MRI machines sold by the Plaintiffs' competitors is provided free of charge.

2) Examining in light of the record, the lower judgment is just, and, in so determining, the lower court, as otherwise alleged in the grounds of appeal, did not err and adversely affect the conclusion of judgment by misapprehending the facts regarding the meaning of normal practices and verification method (ground of appeal No. 1).

D. Whether a practice of providing the instant service key free of charge is consistent with desirable competition order

1) Related legal principles

A) An act of presenting unreasonable conditions as abusive practices of market-dominant positions means an act of presenting conditions that are unreasonable in light of normal transaction practices, and where the transaction practices are deemed to be in line with desirable competition order even if the transaction practices are not consistent with actual transaction practices, such transaction practices can be recognized as "normal transaction practices," which underlies the constitution of abusive practices of market-dominant positions. In such a case, what corresponds to normal transaction practices that are deemed to be in line with desirable competition order should be determined normatively in consideration of the legislative intent of the former Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020), which is to foster creative business activities and ultimately contribute to the balanced development of the national economy by preventing the abuse of market-dominant positions, thereby promoting fair and free competition (*see* Supreme Court Decision 2020Du31897, Apr. 13, 2023).

B) Acts that are not recognized as a legitimate exercise of copyright under the contrary interpretation of Article 59 of the former Monopoly Regulation and Fair Trade Act (wholly amended by Act No. 17799, Dec. 29, 2020; hereinafter the "former Fair Trade Act") shall be subject to the former Fair Trade Act. In this regard, an "act not recognized as a legitimate exercise of copyright" refers to where, even if such act appears to be an exercise of copyright outwardly, the substance of the act contradicts the fundamental purpose of the system beyond the intent of the copyright system. Whether such act corresponds thereto should be determined in

consideration of overall circumstances, such as the purpose and intent of the Copyright Act, the content of the relevant copyright, and the impact of the act on fair and free competition (*see* Supreme Court Decision 2012Du24498, Feb. 27, 2014). Therefore, when determining whether a copyright holder's demand for compensation for access to or use of their work corresponds to the act of presenting an unreasonable condition in light of normal transaction practices, the details of the legitimate rights of the copyright holder and the limitations thereof should be sufficiently considered.

C) Meanwhile, where a market-dominant business entity, as a vertically integrated business entity managing a business in two different production stages according to the supply chain, simultaneously supplies essential raw materials and other resources (hereinafter "raw materials, etc.") for production activities to downstream market business entities in the upstream market and produces and sells products or services based on those raw materials in the downstream market, margin squeeze may come into question as a type of abusive practices of market-dominant positions (*see* Supreme Court Decision 2018Du37700, Jun. 30, 2021). Therefore, if the price for raw materials, etc. set by a market-dominant business entity in the vertically integrated upstream market is set at levels high enough to exclude competing business entities efficiently operating their businesses equally to a market-dominant business entity in the downstream market, or if the entry of new business entities in the downstream market can be evaluated to be substantially blocked due to the prices of raw materials, etc., set by the vertically integrated market-dominant business entity under the circumstances where the market share of the vertically integrated market-dominant business entity in both the upstream and downstream markets is overwhelming, the price of raw materials, etc. set by the vertically integrated market-dominant business entity in the upstream market can be deemed an unfair condition that is unreasonable in light of normal transaction practices that are deemed to be in line with desirable competition order within the limits thereof.

2) Judgment

Comprehensively considering the following circumstances in light of the reasoning of the lower judgment and the record, viewing the Plaintiffs' practice of providing the instant service key free of charge as a normal transaction practice consistent with desirable competition order is difficult.

A) The Defendant, by viewing the free issuance of the instant service key as a normal transaction practice consistent with desirable competition order, instructs the Plaintiffs to issue the instant service keys at the minimum administrative cost required for the issuance (the part on correction order stated in Parag. (2) in the attached list No. 1 of the lower judgment). As the Plaintiffs can receive payment for it by including access rights to the service software when selling CT and MRI machines, even if the instant service keys are provided free of charge, it does not force the copyright holders to provide their copyrighted service software free of charge. However, as previously noted, in the case of CT and MRI machines already sold by the Plaintiffs, the sales contract does not include the right to the use the service software and stipulates that after the warranty period, a paid license must be obtained for use of the service software. In this situation, if the free provision of the instant service keys is considered a business practice consistent with desirable competition order, it would practically result in forcing the Plaintiffs to provide their copyrighted service software free of charge for the CT and MRI machines already sold.

The right of a copyright holder to receive payment for the use of their work is a fundamental right, and thus, viewing that the Plaintiffs' receipt of payment for the issuance of the instant service keys exceeds the scope of the copyright holder's legitimate rights is difficult. As noted earlier, in that the scope of the copyright holder's legitimate rights should be considered when judging whether to correspond to a normal business practice in line with desirable competition order, viewing the free provision of the instant service keys as a normal business practice in line with desirable competition order is difficult.

B) However, if it can be assessed that the issuance fee for the instant service keys set by the Plaintiffs has a high likelihood of excluding ISOs from competing efficiently in the maintenance service market on equal terms with the Plaintiffs, or there is a significant risk that it would effectively block the entry of new ISOs into the maintenance service market, such practice of imposing the issuance fee, as exceeding the legitimate rights of the service software copyright holder, may be viewed as presenting an unreasonable condition in light of normal business practices in line with desirable competition order.

This is because the Plaintiffs, as market-dominant business owners that vertically integrated both the upstream service software license market and the downstream maintenance market for CT and MRI machines they sell, hold an overwhelming market share of nearly 95% in the downstream maintenance market, while acting as a monopolistic operator in the upstream market by monopolistically supplying the service software license used in the maintenance market.

C) However, as the Defendant argues, in order for the free provision of the instant service keys to be recognized as a normal business practice in line with desirable competition order, it should be proven that the paid provision of the instant service keys, regardless of the amount charged, can result in such effects as excluding ISOs from competing efficiently on equal terms with the Plaintiffs or blocking the entry of new business entities into the market. Even if whether the amount, equivalent to approximately KRW 1.54 million, set by the Plaintiffs for a single issuance of the instant service key is excessively high and thus constitutes an unreasonable condition in light of normal business practices is a separate matter, viewing that it has been proven that the mere provision of the instant service keys for a fee *per se* may lead to such effects as excluding ISOs from competing efficiently with the Plaintiffs or blocking the entry of new business entities into the market is difficult. Ultimately, the free provision of the instant service keys cannot be seen to correspond to a normal business practice in line with desirable competition order.

E. Sub-conclusion

Unless the free provision of the instant service keys can be viewed as a normal business practice, accepting the reason for the disposition rendered by the Defendant that the Plaintiffs unfairly hindered the business activities of ISOs by presenting conditions that are unreasonable in light of normal business practices is difficult. The judgment of the lower court, which reached a conclusion as such is just, and, in so doing, the lower court, as otherwise alleged in the grounds of appeal, did not err and adversely affect the conclusion of judgment by misapprehending the legal principles regarding the meaning of normal practices and verification method (ground of appeal No. 2), the relationship between intellectual property rights and the former Fair Trade Act (ground of appeal No. 4), or the anti-competitive intent and nature of an abusive practice of a dominant market position (ground of appeal Nos. 1 & 5).

3. Judgment on unfair discrimination

A. The former Fair Trade Act prohibits business activity obstruction as an abusive practice of a dominant market position by a business owner (Article 3-2(1)3). As the former Fair Trade Act delegates the types of or criteria for the abusive practices to a presidential decree in Article 3-2(2), Article 5(3)4 of the former Fair Trade Act Enforcement Decree stipulates "an act of hindering the business activities of other business entities in any unfair manner other than those provided for in subparagraphs 1 through 3, which is publicly notified by the Fair Trade Commission" as a type of business activity obstruction, and, according thereto, Section IV.3.d of the instant Public Notice specifies the "act of unfairly discriminating against the other party to a transaction in terms of price or terms and conditions of the transaction" (the latter part of Parag. (2); hereinafter the "unfair discrimination") as a case of Article 5(3)4 of the above Enforcement Decree. The Defendant viewed that the Plaintiffs' act of presenting conditions for issuing the instant service key corresponds to unfair discrimination.

B. The lower court ruled that: ① as long as viewing the Plaintiffs provided the instant service keys free of charge is difficult, the Plaintiffs cannot be seen to have unfairly discriminated them by offering the instant service keys for a fee only to hospitals that transact with ISOs; ② the Plaintiffs cannot be seen to have discriminated against hospitals transacting with ISOs in terms of terms and conditions of the transaction by delaying the issuance of the instant service keys during the relevant period on the sole basis of the two cases cited by the Defendant; and ③ while there were cases where the Plaintiffs issued service keys granting access to service software at level 5 or higher when individual hospitals intended to access the service program with their own personnel, the Plaintiffs cannot be seen to have unfairly discriminated against some hospitals in terms of the level of access to the service software based solely on a few such cases.

C. In light of the relevant legal principles and the records, the lower judgment as such is just, and, in so determining, the lower court, as otherwise alleged in the grounds of appeal, did not err and adversely affect the conclusion of judgment by misapprehending the legal principle, or by mistake of fact, concerning whether there was unfair discrimination as an abusive practice of a dominant market position (ground of appeal No. 3), the relationship between intellectual property rights and the

former Fair Trade Act (ground of appeal No. 4), or the anti-competitive intent and nature of an abusive practice of a dominant market position (ground of appeal Nos. 1 & 5).

4. Judgment on unfair transaction practices

The lower court, on the same grounds as indicated in its reasoning, determined that viewing that an act of presenting conditions for issuing the instant service key corresponds to “an act that is likely to hinder fair trade as an act of unfairly discriminating against the other party to a transaction,” as prescribed in Article 23(1) of the former Fair Trade Act, is difficult.

Examining in light of the relevant legal principles and the record, the lower judgment is just, and, in so determining, the lower court, as otherwise alleged in the grounds of appeal, did not err and adversely affect the conclusion of judgment by misapprehending the legal principle concerning the relationship between intellectual property rights and the former Fair Trade Act.

4. Conclusion

Therefore, the final appeals are dismissed in their entirety, and the costs of the final appeal are assessed against the losing parties. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Oh Kyeong-mi (Presiding Justice)
Kim Sang-hwan (Justice in charge)
Park Young-jae