PRESS RELEASE
about the Court's Ruling on the Key Issues of
Seoul High Court, Decision of 4 December 2019, 2017Nu48

1. **<u>The KFTC's Definition of the Relevant Market and QC's Market-Dominant Position ⇒ The KFTC's Disposition is Lawful</u>**

○ Cellular SEP licensing-related markets

- Relevant product market: defined as the 'licensing market for the entire SEPs held by QC among the patents included in each telecommunication standard such as CDMA, WCDMA and LTE' (the "**SEP Licensing Market**").

- Relevant geographical market: defined as the world market given that the members throughout the world participate in the SSOs, and that the SEP users do not consider the geographical locations as important when they execute license agreements.

- The court acknowledged QC's market-dominant position.

○ Modem chipset-related markets

- Relevant product market: classified and defined as (i) CDMA standard modem chipset market, (ii) WCDMA standard modem chipset market, and (iii) LTE standard modem chipset market (collectively, "**modem chipset market by standard**").

- Relevant geographical market: defined as the world market in view of the physical characteristics of modem chipsets, easiness in transportation, expanding tendency of single global standard, and transactional relationship involving supply and demand of modem chipsets, etc.

- The court acknowledged QC's market-dominant position: considering market share in each modem chipset market by standard, QC's share in the entire modem chipset sales, entry barrier, and vertically-integrated entity, etc.

2. **<u>Conduct 1: Other Interference with Business Activities among Abuse of Market Dominance ⇒ The KFTC's Disposition is Lawful</u>**

○ <u>The court acknowledged offering of unfeasible terms in light of the normal practice in transactions.</u>

- SEPs are patents for which one must obtain a license in order to manufacture goods or supply services which embody the standard technology → The relevant SSO policies, etc. require the SEP holders to make voluntary commitment (FRAND commitment) that they would grant licenses to willing licenses under the FRAND terms.

- Under the ETSI IPR Policy, a modem chipset is considered as a 'device', and modem chipsets are not excluded from licenses.

- QC made the FRAND commitment also before other SSOs (TIA,[2] ATIS[3]) in addition to the ETSI.

- There has been modem chipset-level licensing practice with other business entities and for other handset components, and QC also engaged in modem chipset-level licensing practice before 2008.

- QC began to refuse licenses to modem chipset manufacturers since the U.S. Federal Supreme Court's *Quanta* decision in 2008.

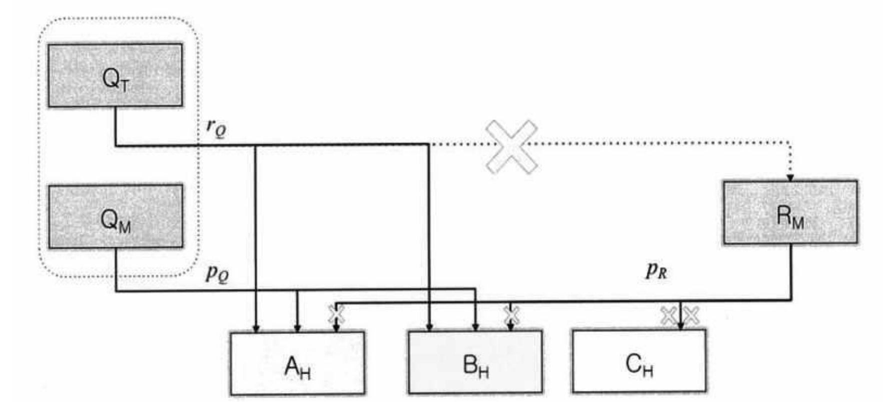
- Competing modem chipset manufacturers substantially need the SEP licenses in question for manufacture/sale, and non-exhaustive licenses QC and modem chipset manufacturers are not sufficient to resolve the risk of QC's patent attack.

- It is practically possible to provide licenses at the modem chipset level, and it cannot be deemed impossible due to being conspicuously inefficient when compared to single handset-level licensing.

- Restriction on vendors added to the non-exhaustive commitment, and obligation to report sales information also constitute offering of unreasonable terms.

○ <u>The court acknowledged unfairness (anti-competitiveness)</u>

- Increase in the cost of competing modem chipset manufacturers due to risk of patent attack (*see* following diagram for basic structure).

<table>
<tr><td>Cellular SEP holders
* Q_T: QTL</td><td rowspan="3">
</td></tr>
<tr><td>Modem chipset manufacturers
* Q_M: QCT
* R_M: Competing modem chipset manufacturers</td></tr>
<tr><td>Handset manufacturers</td></tr>
<tr><td colspan="2">* A_H/B_H: Handset manufacturers licensed by QC
* C_H: Handset manufacturers not licensed by QC
* r_Q: Royalties between QC and handset manufacturers under patent license agreements
* p_Q: Cost of purchasing modem chipsets from QC
* p_R: Cost of purchasing modem chipsets from competing modem chipset manufacturers</td></tr>
</table>

[2] Telecommunication Industry Association.

[3] Alliance for Telecommunications Industry Solution.

- Asymmetric cross-grant which increase the cost of competing modem chipset manufacturers.

- Combination of unfair terms such as restriction on vendors and obligation to report sales information, resulting in market blockade and interference with business activities of competing modem chipset manufacturers.

- Restriction on entry by competing modem chipset manufacturers, and reduction in diversity due to being forced out of the market.

- Considering factors such as relativity in fluctuation of modem chipset price/output, and transfer of competitive effect, etc.

- QC's anti-competitive intention and purpose acknowledged through QC's internal documents, inducement to restrict competition, recognition of FRAND commitment, and ambivalent attitude toward modem chipset licensing, etc.

3. Conduct 1: Abuse of Market Dominance through Restriction on Use of Indispensable Elements ⇒ The KFTC's Disposition is Lawful

○ QC's cellular SEPs constitute essential facilities under Article 5(3)3 of the Enforcement Decree of the MRFTA.

○ However, even if QC establishes the business model of refusing exhaustive licenses to modem chipset manufacturers, they manufacture and sell modem chipsets by using or accessing QC's cellular SEPs without entering into license agreements with QC. The modem chipset manufacturers maintain production, supply or sale of modem chipsets despite the constant risk of patent infringement actions at the arbitrary decision of QC; therefore, this cannot be deemed to constitute 'denying, interrupting, or limiting use of or access to essential facilities' prohibited under Article 5(3)3 of the Enforcement Decree of the MRFTA.

4. Conduct 2: Abuse of Market Dominance through Forcing of Disadvantages ⇒ The KFTC's Disposition is Lawful

○ Constitutes coercion of disadvantageous transactions by forcing the counterparty handset manufacturers to execute and perform patent license agreements through abuse of market-dominant position in the modem chipset markets by standard.

- QC coerced execution of patent license agreements through tying with modem chipset supply agreements (LGE, Samsung, Sony, Huawei cases, etc.)

- QC coerced execution of patent license agreements by combining with the Conduct 1.

- Risk of unilateral suspension of supply is far more threatening than an injunction claim in a lawsuit.

- Although the handset manufacturers cannot be deemed to have infringed on QC's patent rights since the patent rights substantially embodied in the relevant modem chipset are exhausted once QC sells them to handset manufacturers according to the patent exhaustion doctrine, QC still coerced execution and performance of license agreements on patents, including those exhausted upon sale of modem chipsets.

○ The court acknowledged unfairness (anti-competitiveness)

- QC coerced execution of patent license agreements while avoiding good faith negotiations required under the FRAND commitment.
- Risk of excluding competing modem chipset manufacturers through refusal to supply to or injunction claims, etc. against handset manufacturers which receive modem chipset supply from competing modem chipset manufacturers.
- Creation of structural disadvantage for competing modem chipset manufacturers.
- Decline in the number of competitors.
- Strengthening of QC's influence in the SEP Licensing Market.
- QC's anti-competitive intention and purpose acknowledged through QC's internal documents, recognition of violation of the MRFTA, exceptional business method different from NFC chips and Wi-Fi chips, utilization of direct means for exclusion of competitors, and inducement to restrict competition, etc.

5. Conduct 3: Abuse of Market Dominance through Forcing of Disadvantages ⇒ The KFTC's Disposition is Lawful

○ Portfolio licensing: the court did not acknowledge coercion of transactions or conducts disadvantageous to handset manufacturers

- When the patent portfolio subject to license negotiations is extensive, it is difficult to generalize that the provision of claim chart, etc. is required at the same level as the preliminary procedures for the SEP holder's injunction claim, and in some cases, materials necessary for assessment of patent value had been provided.
- In some cases, license agreements restricted to cellular SEPs or certain cellular SEPs had been executed at the request of handset manufacturers.
- There may be instances where it is also advantageous to the counterparty handset manufacturers, so it could not be generalized as being disadvantageous to the licensee handset manufacturers.

○ Royalties based on the handset price: the court did not acknowledge coercion of transactions or conducts disadvantageous to handset manufacturers, the court did not acknowledge effect or possibility of restriction on competition

- There are cases where royalty rates have been individualized; so this cannot be deemed to be unilateral determination of royalties.
- The KFTC failed to demonstrate that QC's royalty rates were excessive beyond the

reasonable level when they were based on the price of handsets. The KFTC failed to present any specific reason or evidence to support that such royalty rates exceeded the burden of costs to handset manufacturers or that the burden of cost transferred to modem chipset manufacturers exceeded the reasonable level, besides the assertion that it is unfair to calculate the royalties at a certain percentage of handset price, or to maintain the royalty rates at a fixed level despite the development into multi-function smartphones.

- The KFTC failed to demonstrate whether the royalty rates collected from the handset manufacturers exceed the FRAND royalty rates (tax incidence doctrine is not sufficient to demonstrate exclusion of competitors).

- Under the royalty collection scheme at fixed percentage, both the patent holder and the licensee end up proportionally sharing the profit generated from increase in the licensee's sales, which contributes to establishment and maintenance of mutual cooperation relationship. Therefore, the fixed percentage scheme cannot be concluded outright as a disadvantageous transactional structure under which excessive royalties are collected from handset manufacturers.

○ <u>Cross-grant terms: the court did not acknowledge forcing of transactions or conducts disadvantageous to handset manufacturers</u>

- The phrase 'fully-paid and royalty-free' under the license agreement between QC and handset manufacturers simply means that QC did not pay any royalties based on the mutual settlement method since the 'consideration has been fully-paid' as a whole; therefore, this cannot lead to the conclusion that the licenses on the handset manufacturers' patents were obtained without any assessment of value nor payment of consideration.

- There is no demonstration of conspicuous imbalance or non-existence of consideration.

- There is reasonable basis to execute cross-license agreements.

- The cross-grant terms themselves cannot be deemed to be disadvantageous merely based on the correlation between the cross-grant terms and royalty rates.

○ <u>unfairness (anti-competitiveness) of the Conduct 3: not acknowledged</u>

- The Conduct 2 involves the execution of agreements through tying of licenses and modem chipset supply under the modem chipset supply agreements between QC and handset manufacturers / Conduct 3 is a part of the patent license agreement between QC and handset manufacturers itself.

- The court did not acknowledge restriction on competition against handset manufacturers: this does not constitute coercion of disadvantageous transactions or conducts; QC is not a competitor of handset manufacturers in the market in question; QC is not a dominant entity in the handset market; and the KFTC did not issue the Disposition based on exploitative abuse against the handset manufacturers.

- The court did not acknowledge restriction on competition against competing modem chipset manufacturers: this does not constitute coercion of disadvantageous transactions or conducts; the KFTC did not sufficiently demonstrate exclusion of competitor effect arising from royalty terms based on the handset price; and it is difficult to recognize independents effects of the cross-grant terms themselves, which resulted from the Conducts 1 and 2, and are in themselves not quite disadvantageous to handset manufacturers.

- The key of the corrective order is rectifying the Conducts 1 and 2 through the corrective orders 1 through 4 pertaining to the Conducts 1 and 2, and the Conduct 3 is merely the details of agreements which reflect the consequences of the Conducts 1 and 2. No emphasis shall be placed on the corrective orders 5 and 6, which may mislead to the conclusion that the rectification of the royalty level or the license agreements between QC and handset manufacturers is the intended purpose of the corrective order. Even after due consideration of the effects of the Conduct 3 which is tied to the Conducts 1 and 2, and strengthening of the Conducts 1 and 2 based on the consequences such as the Conduct 3, the Conduct 3 itself can hardly be deemed to be a disadvantageous conduct, nor is there much necessity to acknowledge the independent effects or possibility of restriction on competition unique to the Conduct 3, and even in light of its relationship with the corrective orders 1 through 4, the corrective orders 5 and 6 can hardly be deemed to be appropriate.

6. <u>Conducts 2, 3: Unfair practice by abuse of position in transaction ⇒ The KFTC's Disposition for Conduct 2 is Lawful but its Disposition for Conduct 3 is Unlawful</u>.

○ The court acknowledged QC's position in transaction against the handset manufacturers

- QC is a market-dominant company and a vertically-integrated entity in each of the SEP Licensing Market and the modem chipset markets by standard, and has substantial influence on the major handset manufacturers who have relied on QC in securing substantial part of modem chipsets or have been locked-in by continuous transactional relationship through supply of modem chipset from QC or its licensing policy on cellular SEPs.

- QC holds a dominant position in the business size and revenues in comparison with over 200 small and medium-sized handset manufacturers.

○ The court acknowledged provision of unfair disadvantage in Conduct 2

- Taking the intention and purpose, practices of the relevant industry, contents and degrees of disadvantage, effects on the competition order, the court acknowledged that Conduct 2 would likely harm fair transactions by granting disadvantage to the other parties in light of normal trade practices.

- If QC determines that a handset manufacturer has breached the license agreement, QC may unilaterally discontinue supply of modem chipsets to the handset manufacturer → since the handset manufacturer relies on QC's supply of modem chipsets, the risk of discontinued supply of modem chips linked with the license agreement would lead to the risk of suspension of handset business.

○ The court did not acknowledge provision of unfair disadvantage in Conduct 3

- The court could not conclude that the Conduct 3 was disadvantageous to the handset manufacturers only based on the terms of portfolio license, terms of royalty based on the handset price, and terms of cross-grant themselves.

- In its Order, the KFTC failed to present prerequisites to assess degree of disadvantage or imbalance of benefits.

- We could not conclude that without considering the detailed terms and conditions of Conduct 3, all of the terms and conditions of agreements entered into through Conducts 1 and 2 were forced or coerced or disadvantageous.

- The KFTC failed to prove QC's abuse of its position in transaction individualized against each handset manufacturer as the counterparty.

7. Whether the KFTC's Disposition has procedural unlawfulness ⇒ The KFTC's Disposition is Lawful

○ Although there were documents that the KFTC did not provide QC during the examination/deliberation, it was not so serious to determine that it actually interfered with QC's exercise of the right to defense and as a result, the examination/deliberation by the KFTC lost the procedural justification.

  - Opportunities to attend and the right to speak granted to QC; contents and importance, nature of documents not provided; the document providers' opinion of refusing to provide by reason of trade secrets; the KFTC's confidentiality obligation under the laws; effects on the KFTC's Disposition; weighing and balancing the interests protected by refusing QC's inspection/copying and the contents and degrees of the right to defense prejudiced thereby.

8. Whether the Corrective Order is unlawful ⇒ The Corrective Order related only to the Conduct 3 is Unlawful

○ Corrective orders 1-4: Lawful

  - The court did not grant all of QC's arguments regarding the principle of clarity and the principle of proportionality, etc.

○ Corrective orders 5 and 6: Unlawful

  - Since the court determines that the corrective order for Conduct 3 is unlawful, the corrective orders 5 and 6 are unlawful without necessity of separately determining the contents.

○ Corrective orders 7 and 8: The part related to the corrective orders 5 and 6 are unlawful.

○ Corrective orders 9 and 10: Lawful

  - The geographical scope of the SEP Licensing Market and the modem chipset markets by standard, which are the relevant markets for Conducts 1 and 2, is the world market, and QC's conducts have anti-competitive effects on the world market and the domestic market which is included in the world market, wherever QC's place of conduct is. As a result, it is possible to reasonably expect that QC's conducts will have effects on the Korean market as well.

- We can hardly say that the requirements for honoring foreign laws, etc., under the remaining corrective orders other than the corrective orders 5 and 6, are significantly predominant in comparison with the requirements for regulation by application of the MRFTA (they are in consistence with the 1st Ruling of the U.S. District Court for the Northern District of California, the European Commission's decision, the NDRC's decision, JFTC's decision, and the Taiwanese Intellectual Property Court's decision on settlement agreement).

9. Whether the Order for Payment of Penalty Surcharge is Lawful ⇒ The KFTC's Disposition is Lawful

○ It is possible to maintain the Order for Payment of Penalty Surcharge only based on Conducts 1 and 2.

- Conduct 3 is nothing but detailed terms of the agreement that reflected the effects under Conducts 1 and 2.

- Even if Conduct 3 is not acknowledged, it does not affect determination on unlawfulness of the Order for Payment of Penalty Surcharge calculated on the basis of Conducts 1 and 2.

○ It is hard to consider that the penalty imposed by NDRC and the Order for Payment of Penalty Surcharge are dual sanctions or overlapping.

○ The date of signing the agreement with MediaTek, i.e., November 1, 2009, should be restrictively used only as starting point for calculation of the relevant revenues.

○ There is no deviation/abuse of the KFTC's discretionary power in not applying the exemption clause for the cooperation of investigation.

10. Linkage of Each Conduct in this Case and Anti-competiveness and the Effects of the Corrective Order (Key Points of the Decision)

○ For Conduct 3, i.e., coercion of disadvantages to the handset manufacturers by restricting competition in the modem chipset markets by standard using Conducts 1 and 2 as leverage, to constitute abuse, it should be proved that QC collected excessive monopolistic profits to constitute exploitative abuse or to be at least unfairly above-FRAND. The KFTC concluded that the terms and conditions of the agreements between QC and handset manufacturers were disadvantageous and forced to the handset manufacturers only by reason that the agreement was entered into through Conducts 1 and 2 or its terms were determined by QC unilaterally or uniformly or QC did not go through due process for calculation of consideration, based on which the KFTC argues that the effect of exclusion of competing modem chipset manufacturers is acknowledged. However, we cannot deem that Conduct 3 constitutes an independent abuse of a market dominant position or abuse of position in transaction.

- Even though QC is said to get enormous profits by realizing the royalty terms based on the handset price in the Conduct 3 through Conducts 1 and 2, and in turn, to hold a dominant position in price/production volumes/quality, etc. over other modem chipset manufacturers by investing in R&D of SEPs and modem chipsets by standard with such enormous profits, if Conduct 3 itself may be a means to promote competition on the merits but not artificial means aimed at market foreclosure or exclusion of competitors (Conducts 1 and 2), and if Conduct 3 cannot be deemed to be any of the types of conducts that the KFTC made a prerequisite for its disposition, that is, unfair practice by coercion or provision of disadvantages, we cannot conclude that a business operator's realization of a considerable amount of profits just constitutes abuse or should be subject to the corrective order.

- But for Conduct 2, QC may require the handset manufacturer, who buys modem chipsets from the competing modem chipset manufacturer in accordance with Conduct 1, to enter into the patent license agreement or file an injunctive claim against the handset manufacturer but shall not force the handset manufacturer who buys modem chipsets from QC to enter into and perform the patent license agreement. But for Conduct 1, even if QC tries to force the handset manufacturer, who buys modem chipsets from QC in accordance with Conduct 2, to enter into and perform the patent license agreement, the handset manufacturer may avoid the burden to pay QC the royalty for the patent substantially implemented in the modem chipset, by buying the modem chipset from the competing modem chipset manufacturer, who has already obtained the license for QC's own cellular SEP. In the end, Conducts 1 and 2 constitute a 'handset-single level licensing policy', under which QC increases the cost of competing modem chipset manufacturer and forecloses the market by limiting the trading counterparties, thereby solidifying its market-dominant position in the modem chipset markets by standard.

- If QC grants the license consistent with FRAND terms to the modem chipset manufacturers in accordance with Paragraphs 1 and 2 of the corrective order for Conduct 1, the competing modem chipset manufacturer can engage in competition on the merits without risk of business interruption due to the license. If the competition in the modem chipset markets by standard gets back in a normal way, the risk of discontinued supply of modem chipset, which requires the handset manufacturer to enter into the license agreement, will be reduced, which in turn, will operate as an effect of deterring Conduct 2. Even if the effect of deterring Conduct 2 through Paragraphs 1 and 2 of the corrective order is weak and QC can still engage in Conduct 2, if QC does not force the handset manufacturer to enter into or perform the license agreement linked with the supply of modem chipsets in accordance with Paragraphs 3 and 4 of the corrective order for Conduct 2, it could deter execution of license agreement against the handset manufacturer's intention as claimed by the KFTC. If Paragraphs 1 through 4 of the corrective order are performed in this way, QC's position that enables it to coerce disadvantageous practices or deals against the handset manufacturer through Conducts 1 and 2 will cease to exist. Even if Paragraphs 5 and 6 of the corrective order are cancelled, once Paragraphs 1 through 4 of the corrective order are complied with, it can remove the prerequisite under Paragraphs 5 and 6 of the corrective order, that is, such circumstance where the license agreement is entered into against the handset manufacturer's intention, even though the license agreement between QC and the handset manufacturer includes the terms of portfolio license, royalty based on the handset price, and cross-grant.

- Moreover, the relevant product market where QC is abusing its market dominance is the SEP Licensing Market and the modem chipset markets by standard but not the handset market; QC's competitors in the relevant product market are modem chipset manufacturers but not the handset manufacturers; it is most consistent with the purpose of the MRFTA applicable to the Disposition to remedy the circumstance where the competing modem chipset manufacturers are abusively excluded through Conducts 1 and 2; and we do not think that the market order the KFTC intends to rectify through Paragraphs 5 and 6 of the corrective order is for the KFTC to directly correct QC's exploitative or unfair profits receivable from the handset manufacturers.