



The Supreme Court of Mongolia's Interpretation of Cartel Principles and Contractual Freedom

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The main purpose of Competition law is to protect against unfair competition and to prevent, prohibit, and restrict any activities that are detrimental to fair competition. Unfair competition may manifest in various forms, one of which is anti-competitive agreements or arrangements (cartels). Consequently, the legal framework governing fair competition imposes prohibitions and restrictions on such agreements and arrangements.

In 2020, the Supreme Court of Mongolia issued a decision regarding anti-competitive agreements and arrangements (cartels) in relation to the principle of freedom of contract under civil law. The Court clarified that any agreement, regardless of whether it was primarily intended to restrict competition or whether it has been implemented, shall be considered anti-competitive if it meets the formal requirements. Therefore, a summary of the Supreme Court of Mongolia's interpretation is presented below.

What happened?

Company A and M ("co-claimants") entered into a cooperation agreement. Authority for Fair Competition and Consumer Protection ("AFCCP") determined that the agreement constituted an anti-competitive agreement under Article 11 of the Competition Law, as it involved market territories and product prices. As a consequence, Company A was penalized with a fine of MNT 113,196,980, and Company M with MNT 13,265,110.

The AFCCP imposed these penalties based on the following clauses and the nature of the cooperation agreement, which were found to restrict competition:

- Clause 2.2.2: The parties shall adhere to a unified pricing policy for retail sales.
- Clause 3.3: The retail price is mutually agreed to be set at 14,000 MNT (excluding VAT), establishing a fixed price for sales.
- Clause 1.6: The coal supply market is divided in a 60:40 ratio (60% for Company M, 40% for Company A).

The co-claimants argued that the cooperation agreement was executed within the requirements set forth by the Civil Code and was not intended to restrict competition. They contended that the cooperation agreement did not contain any elements that would restrict competition based on the following grounds:

- The price specified in the agreement aligns with the amount determined by Resolution No. 233 of December 2014 by the Energy Regulatory Commission. The inclusion of the price of goods in the contract is not a violation of the law but a fundamental requirement for contract formation. According to the Civil Code, a contract is deemed invalid if the price is not specified.



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- The cooperation agreement encompasses the provisions of the Civil Code related to the work-for-hire agreements and sale and purchase agreements /Company M, a license holder for the mining area, engaged Company A coal extraction and sold the extracted coal to the Company A/. The 60:40 ratio was included since it was impossible to predetermine the total amount of coal to be sold at that time. Thus, the parties merely confirmed their agreement to buy and sell coal in that proportion.

Supreme Court's analysis

Upon review, the Supreme Court reached the following conclusions:

Aim of Restricting Competition: Any form of agreement that aims to restrict competition, or results in such restriction, including pre-arranged price fixing of goods, whether explicitly intended to restrict competition or not, falls under the category of “unfair” and is prohibited.

Limitations of Contractual Freedom: While enterprises have the right to enter into agreements as provided by the Civil Code, the content of these agreements must not infringe upon public interests protected by law. In particular, agreements that violate public interests safeguarded by Competition Law are impermissible. In such instances, the legal relations are governed by public law rather than private law. The agreement in question fixed prices in a way that undermined the conditions of a free market, which would have otherwise led to lower prices due to competition. The legislature has specifically identified this as “unfair competition.” Therefore, the appeal arguing that the agreement falls within the scope of the Civil Code and does not aim to restrict competition is not admissible.

Market Allocation: According to Article 10.7, Section 1.3 of the Law on Infringement, the misconduct of entering into an agreement (cartel) is considered complete upon the formation of the agreement, regardless of whether material harm occurred, or the outcome differed from expectations. Thus, the complaint that there is no written evidence from the respondent on how the provision to divide the coal market in a 60:40 ratio was implemented is dismissed.

What is the significance?

The Court further addressed whether an agreement not intended to restrict competition, but resulting in such restriction, as well as whether unfulfilled provisions of an agreement that restrict competition, constitute unfair competition. In summary:

- Contracting parties may freely enter into any agreement or transaction based on the principle of contractual freedom. However, if such agreement or transaction infringes upon public interest protected by Competition law and creates conditions that restrict competition, it shall be deemed as unfair competition.
- Even if the parties did not intend to directly or indirectly restrict competition when entering into the agreement, if the result of such agreement or transaction leads to a restriction of competition, it shall be deemed as unfair competition.
- Misconduct of concluding agreements or transactions aimed at restricting competition constitute a “per se” violation. Therefore, regardless of whether the agreement or transaction and its provisions have been executed, it shall be deemed as unfair competition.



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Important considerations for businesses

The Supreme Court of Mongolia's decision on anti-competitive agreements and arrangements (cartels) has significant implications for businesses operating in Mongolia, as it clarifies the legal framework and criteria for determining unfair competition. This means that businesses must carefully review their contracts and transactions to ensure that they do not contain any provisions that may be construed as anti-competitive, such as price fixing, market allocation, output restriction, or bid rigging. Therefore, businesses must be aware of the potential risks and liabilities of engaging in or being accused of unfair competition and seek professional advice on compliance with competition laws and regulations.

If you wish to read the full court decision, please click [here](#).

Let's talk!

For a deeper discussion on compliance with competition laws or any advice related to anti-competitive practices and activities, please contact us.

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