

South Korea Enacts the National Defense Science and Technology Innovation Promotion Act

- Opening the pathway to private ownership of intellectual property rights in the defense industry -

As the 4th Industrial Revolution unfolds, the need to revitalize the research and development of national defense science and technology has sparked a new legislative undertaking. On 1 April 2021, the National Defense Science and Technology Innovation Promotion Act ("**Act**") and the Enforcement Decree and Enforcement Rules thereof became effective, paving the way towards greater collaboration between the public and private sectors in the research and development of national defense science and technology.

The Act offers a number of incentives for private companies to assume risks and invest in the research and development of new weapons systems. In particular, the Act (1) widens the opportunity for private companies to invest in the research of basic science and technology even in situations where the military requirement for the development of new weapons has not been determined yet; (2) expands the eligibility criteria for obtaining relief as a conscientious researcher from liability for research failures, encouraging the private companies to invest aggressively into uncharted territory; (3) allows private companies to own intellectual property rights in the products which have been jointly developed; and (4) enables private companies to enter into administrative contracts with the government when taking part in the research and development, allowing them to avoid liability for breach of contract in case the research fails.

Yoon & Yang's national defense practice group is the designated consultant of the Research Institute of Defense Industry and Technology Promotion for arms exports. Moreover, Yoon & Yang works closely with the Research Institute of Defense Management at Kookmin University, and provides legal advice to the Institute for Basic Science, and the Korea Institute for Advancement of Technology. Yoon & Yang provides legal advice regarding the protection of intellectual property rights of defense technology and offers advisory and litigation services.

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1. The National Defense Science and Technology Innovation Promotion Act

The Act will operate as the legal framework for Korea's National Defense Research and Development (R&D) going forward. The details of the Act are explained below.

① R&D of weapons systems whose requirements for military units are yet unknown or unascertainable

The Act gives authority to the Minister of the Defense Acquisition Program Administration to conduct R&D of new weapons systems whose requirements for military units are yet unknown or unascertainable. The Act also authorizes the Minister to conduct research into core technology, emerging technology for use in the research and development, and technology for the force support system.

② Expanding the scope of relief for research failures

The Act expands the type of R&D activities eligible for obtaining relief from liability for research failures as recognition for conscientious performance. Previously, the recognition was only given to R&D of core technology. Now, the recognition can be given to R&D activities pertaining to the entire defense industry, including the R&D of core technology, new weapons systems, and the New Frontier Defense Technology. Those who receive the recognition are waived from having to pay liquidated damages or from facing restrictions on qualification for participation in any future biddings (Article 9(1), Enforcement Decree Article 9).

③ Joint ownership of intellectual property rights

The Act permits participating private companies (institute in charge of R&D, or a participating institute) to jointly own with the government the intellectual property rights in the products researched and developed. This is a shift from the past when intellectual property rights could only be subject to government ownership (Article 10(2)).

Joint ownership of intellectual property rights is permitted if (1) the private company has partially borne the expenses, or (2) the intellectual property rights transfer agreement has been executed; and (a) the institute in charge of R&D is unwilling to take ownership of the intellectual property rights; (b) the intellectual property right was in fact produced by the participating institute; and (c) delegating ownership to the institute in charge of the R&D would be improper (Enforcement Decree Article 13).

④ Administrative contract of R&D in the defense industry

The Act enables the participating private companies to enter into administrative contracts with the government to conduct R&D (Article 8(1)). This allows the private companies to avoid liability for breach of contract in case the research does not succeed. The following R&D projects can now be conducted on the basis of administrative contracts:

| R&D Project | Before the Act | After the Act |
|--|----------------|---------------|
| Core Technology and New Frontier Defense Technology | No | Yes |
| Investigatory Phase Weapons Systems | No | Yes |
| Weapons Systems Development with a value of less than KRW 50,000,000,000 where part of the expense has been borne by the participating private company | No | Yes |

2. Implications for the Defense Industry

With the enactment of the Act, the private sector will be encouraged to invest in the research and development of national defense science and technology. The risks are lower thanks to the expansion of the scope of relief for liability arising from research failures and the adoption of administrative contracts, while the benefits are higher given the opportunity to secure joint ownership of intellectual property rights.

When the parties enter into administrative contracts of R&D in the defense industry, the nature of the legal relationship will no longer be governed by private law. Prior to the Act, R&D contracts were subject to the rules of private contracts, executed pursuant to the Act on Contracts to which the State is a Party between the private companies and government agencies such as the Defense Acquisition Program Administration and the Agency for Defense Development. As a result, disputes arising from the contract were subject to the jurisdiction of the civil courts.

By contrast, an administrative contract will establish a legal relationship governed by the public law (Article 8(2) and (3)). As such, any disputes arising from the agreement will be subject to the jurisdiction of the administrative tribunal (Supreme Court ruling dated 9 November 2017, *2015Da215526*).

There are several legislations currently being revised or under review by the Defense Acquisition Program Administration which will provide the additional legal framework for resolving disputes involving the research and development of national defense science and technology. They include the Prescribed Rules of the Defense Acquisition Program, the Guideline to the Administration of Intellectual Property Rights, the Public Notification of the Procedural Rules concerning the Selection and Collection of National Defense Science and Technology Fees, and the Guideline to the Research and Development of Core Technology.

The enactment of the Act will grant additional rights to the private companies who participate in the research and development of national defense science and technology. This is in step with the Korean government's agenda to modernize its weapons systems, including its efforts to automatize the K9 Thunder Self-Propelled Howitzer and the K1 Main Battle Tank, the development of remote-controlled unmanned air weapons systems, the deployment of artificial intelligence in the information control room, and the development of new materials technology and the application of research findings deriving from basic science and technology.

Foreign private companies, however, will not be subject to the application of the Act. Therefore, as before, they will continue to take part in the research and development of national defense science and technology by way of participating in the National Defense Research and Development Project which is initiated by the Korean government's International Joint Research

and Development Project. The International Joint Research and Development Project is put into operation when the Korean government enters into a memorandum of understanding with the countries of participating foreign companies, allocates the tasks amongst the participating foreign companies, and establishes a joint ROC. The nature of the legal relationship between the Korean government and the foreign companies is determined by the terms of the memorandum of understanding. By contrast, the purpose of the Act is to strengthen the economy of Korea and enable domestic private companies to participate in the research and development of national defense science and technology. The Act is a prescription of government expenditures dedicated for the advancement of a particular industry – in this case, the defense industry. For this reason, the Act does not extend its benefits to foreign private companies.

Yoon & Yang's national defense practice group and public contracts practice group are dedicated to providing legal services for the defense industry, and among them, the purchase of weapons systems. As the designated consultant of the Research Institute of Defense Industry and Technology Promotion for arms exports, Yoon & Yang provides legal advice and litigation services to private companies who participate in the research and development of national defense science and technology. Please feel free to contact Yoon & Yang if any assistance is required concerning the R&D projects in the defense industry.

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