Asia-Pacific Antitrust Review

2023

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Evolving legislation and enforcement tactics continue to transform the landscape, as highlighted by recent amendments to China’s Antimonopoly Law and an uptick in private antitrust cases in Japan; meanwhile, the Korea Fair Trade Commission has updated its Guidelines on Merger Filing to expedite the review process.

Generated: April 2, 2024

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South Korea: KFTC boosts antitrust laws with stronger regulation and pivotal amendments

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Summary
IN SUMMARY
This article explains recent developments in South Korean antitrust law.

DISCUSSION POINTS
- Regulating abuse of market dominance by online platforms
- Changes to merger reviews
- Cartel issues
- Amended procedures protecting rights of investigation targets
- Establishing an efficient case management system

REFERENCED IN THIS ARTICLE
- Monopoly Regulation and Fair Trade Act
- Guidelines for Review of Abuse of Dominance and Unfair Trade Practices by Online Platform Operators
- Amended Merger Review Guidelines
- Amended Merger Filing Guidelines
- Remedy Proposal System
- Prosecutor’s Office’s Leniency Investigation Guidelines for cartel cases
- Korean Fair Trade Commission leniency programme

REGULATING ABUSE OF MARKET DOMINANCE BY ONLINE PLATFORMS
On 6 January 2022, the Korea Fair Trade Commission (KFTC) announced the Guidelines for Review of Abuse of Dominance and Unfair Trade Practices by Online Platform Operators (the Online Platform Guidelines). The final proposal was released on 12 January 2023. The KFTC addressed growing concerns in relation to competition law issues in the online platforms sector, and made its regulation in this sector more reasonable and predictable.

The Online Platform Guidelines apply when the KFTC reviews whether an online platform operator’s conduct constitutes an abuse of dominance or unfair trade practice pursuant to article 5 or article 45 of the Monopoly Regulation and Fair Trade Act (MRFTA). According to the Online Platform Guidelines, online platforms [1] are an emerging sector in South Korea and need to be regulated. Online platform services include:

- online platform intermediary services, which are services that intermediate transactions between different user groups, online search engines, online social networking services, digital content services and operation systems; and
- online advertising services.

Relevant Market Definition
Given the complexities of the platform industry, the KFTC may end up defining the relevant market separately or as one single relevant market that comprehensively covers multiple...
sides of the market. The KFTC is considering various characteristics of the platform industry, including whether the platform directly intermediates transactions between user groups and whether there are different competition threats existing on various aspects of the platform business, while making its determination.

The Online Platform Guidelines also state that, even if a platform provides its services nominally free of charge, the KFTC can still define the market for the service as a relevant market provided that the service is being provided in return for users’ non-financial costs such as interest, attention or personal information, among others. In such instances, the KFTC would be able to consider the quality of the services being provided in exchange for users’ non-financial costs in defining the relevant market.

Further, the Online Platform Guidelines note that the KFTC may focus on the practical and resulting harmful effects from the conduct given the dynamic nature of the online platforms sector, rather than merely focusing on a theoretically accurate market definition.

Assessing Market Dominance

Under the Online Platform Guidelines, the KFTC may consider barriers to market entry due to cross-platform network effects, the platform’s influence as a gatekeeper and ability to collect, retain and use data, and the potential emergence of new products or services when assessing whether the platform business has market dominance. If market share is not available based on sales value, the KFTC may use the number of users, frequency of use, number of visitors and length of stay on the platform as factors in estimating the market share.

Assessing Anticompetitive Effect

The characteristics of the online platform are taken into account when assessing the anticompetitive effect of the online platform’s conduct.

As online platforms usually provide free services, anticompetitive effects in this sector may take forms other than price increases or output decreases. Therefore, when assessing anticompetitive effects, the KFTC may consider not only changes in prices and output but also any decrease in the variety of products or services, deterioration of quality, higher costs for users and inhibition of innovation.

An online platform operator can use the platform’s core services to expand its influence over adjacent products and services. Therefore, the KFTC may also consider whether the platform can leverage its dominance over an existing market to another market of related products and services, and whether the platform can achieve dominance in the related product or services market and then further solidify its dominance in the existing market. Even when separately defining the relevant markets for each aspect of the platform business, the KFTC may consider the mutual and specific relationships between the different aspects.

Finally, in the Online Platform Guidelines, there are specific examples showing the standards of unlawfulness for conduct such as restricting multi-homing, demanding most-favoured-nation clauses, self-preferencing and tying. These four types of conduct are representative of conduct in the online platforms sector that the KFTC is aiming to regulate in the future.

It is expected that the KFTC will regulate the online platforms sector more strictly in the near future, while also seeking to foster innovation and growth within the sector.
CHANGES TO MERGER REVIEWS

Merger Filing Procedures

The KFTC recently made two significant changes to the merger filing procedures.

First, it amended the KFTC Guidelines on Merger Review (the Amended Merger Review Guidelines) to expand the scope of business combinations eligible for a simplified review. In effect since 30 December 2021, the Amended Merger Review Guidelines created a simplified review process to expedite the review process for mergers that are not likely to raise anticompetitive concerns in the relevant market. The review period of 30 calendar days (which may be extended by up to 90 calendar days) for a merger review was reduced to 15 calendar days for a simplified review.

Prior to the changes, only a few types of transactions, including the establishment of an overseas joint venture company with no nexus to the Korean market, were subject to a simplified review. The Amended Merger Review Guidelines expanded the scope of the simplified review to include extraterritorial mergers. Four other types of transaction – share acquisitions, mergers, interlocking directorates and business transfers – may now be eligible for a simplified review if the target company is a foreign company and the transaction does not have an effect on the Korean market. The Amended Merger Review Guidelines allow joint ventures through acquisitions of shares in a company established outside of South Korea, as well as acquisitions of real property pursuant to a real estate investment trust, to be eligible for a simplified review.

Second, the KFTC amended the Guidelines on Merger Filing (the Amended Merger Filing Guidelines) to reflect the amended merger filing requirements stipulated in the amendment to the MRFTA, which took effect on 30 December 2021. Before the changes introduced by the Amended Merger Filing Guidelines, it was not possible to regulate mergers of start-ups that had assets or turnover below certain thresholds. Under the amended MRFTA and its enforcement decree, a merger filing must be made to the KFTC if the transaction value is at least 600 billion won and a local nexus is deemed sufficient. The target entity has a substantial level of activities in the Korean market if:

- the target company sold or provided products or services in the Korean market to at least one million persons per month in any month within the three fiscal years immediately preceding the filing date; or
- the annual budget of the target company for leasing research and development facilities, or using research and development personnel, in South Korea is 30 billion won or more in any year during the three fiscal years immediately preceding the filing date.

Furthermore, the Amended Merger Filing Guidelines established clearer guidelines for calculating the transaction value for each type of business combination (e.g., share acquisitions, mergers, business transfers or establishments of new companies).

Establishment Of Global M&A Division

Through shuffling the officers at the KFTC in December 2022 and January 2023, certain case handlers from the previous merger and acquisition (M&A) division with experience in merger reviews were assigned to the newly formed Global M&A Division to secure a level of expertise.
and knowledge for the new division. The Global M&A Division focuses on mergers between multiple foreign entities or mergers between foreign entities and Korean entities (ie, foreign mergers). The Global M&A Division has a total of six officers and is currently operating in full force. The team is led by a director who joined the KFTC in 2004. He previously served in the Anti-monopoly Division of the Anti-monopoly Bureau, and the Franchise Division and the Competition Policy Division under the Competition Policy Bureau. He has also served as the director of the Cartel Investigation Division and the Anti-monopoly Division. Immediately prior to joining the Global M&A Division, he was seconded to the Sejong Institute, a public interest think tank that engages in policy development.

The Global M&A Division was created to:

- establish and implement policies and systems related to, and review merger notifications for, foreign mergers; and
- investigate and impose penalties for non-compliance with merger control regulations for foreign mergers.

In addition, the Global M&A Division will enhance international cooperation by analysing the merger control trends and regulations in other jurisdictions and handling cross-border merger reviews. One of the expected benefits of the establishment of the new division is that foreign mergers without anticompetitive concerns will likely be subject to a speedier review process.

**Legislative System Reforms**

The KFTC created a task force in June 2022 to reform the existing merger control regime, which has not been changed in the past 40 years. Specifically, the KFTC has the following legislative reform plans that reflect the current conditions in the Korean merger control regime.

**Expanding The Scope Of Transactions Not Subject To Merger Control**

There are some discussions for exempting the following types of mergers that do not have a substantial impact on the market:

- a merger between a parent company and a subsidiary when the acquiring company already holds at least 50 per cent interest, and thereby sole control, in the acquired company;
- the establishment of a private equity fund (including the stipulations in the Amended Merger Filing Guidelines for confirming the participation of a strategic investor); and
- an interlocking directorate that constitutes less than one-third of the total number of directors in the target company.

These changes are projected to reduce the number of merger notifications in South Korea by approximately 40 per cent.

**Introducing A System For Companies To Make Voluntary Remedy Proposals**

The KFTC intends to implement a formal system (the Remedy Proposal System) in which a company uses its own resources (workforce and industry-related information, among others) to submit a voluntary remedy proposal that promptly and effectively resolves the anticompetitive concerns of a merger, which the KFTC will review and grant clearance for if
it believes the plan is appropriate and sufficient. Currently, voluntary remedy proposals are accepted on an ad hoc basis.

The Remedy Proposal System is expected to be useful in not only resolving anticompetitive concerns of proposed transactions but also developing remedies that are more enforceable and appropriate. It is also likely to reduce the KFTC's merger review timeline, increasing the efficiency of the reviews. Foreign competition authorities, including in the United States and European Union, have already implemented and are actively utilising systems similar to the Remedy Proposal System.

**Introducing Formal Review Phases During The Review Process**

The KFTC may reform the current review system by modelling it on the two-phased systems of competition authorities in other countries. This means that the KFTC will introduce a formal phase to its merger review process, which would allow the KFTC to efficiently utilise its limited resources in reviewing mergers. Currently, the KFTC has a review period of 30 days starting from notification, which may be extended by up to 90 days, without any distinction for a formal phase. If introduced, the KFTC will clear most of the cases in Phase I and the Phase II review would be initiated only for cases with anticompetitive concerns, subject to an in-depth review. The KFTC plans to conduct further discussion before finalising the details of such a change.

**Abolishing Post-closing Notifications And Revising Merger Notification Thresholds**

South Korea's current merger notification standard requires post-closing notification except where a party to the transaction is a large company with assets or turnover of 2 trillion won or more, in which case a pre-closing notification is required. As a long-term plan, the KFTC intends to:

- abolish the post-closing notification requirement and require only pre-closing notifications; and
- review the need to raise the merger notification thresholds that better reflect current global economic standards.

**CARTEL ISSUES**

A somewhat unique feature of the Korean competition legal regime is the criminal penalty for certain violations of the MRFTA. However, criminal prosecution for violations of the MRFTA by the Prosecutor’s Office was possible only upon referral of the matter to the Prosecutor’s Office by the KFTC. Accordingly, the KFTC’s ability to broadly regulate the market, including inducing leniency from investigation targets, depended in part on this exclusive right, as one of the benefits of filing for leniency with the KFTC was being exempt from further criminal prosecution. Such a regime naturally led to certain complaints from the Prosecutor’s Office, which believed that criminal prosecution should fall under its exclusive jurisdiction.

Although there were some recent discussions about abolishing the KFTC’s exclusive referral rights, including a proposal to remove the relevant provision in the recent amendments to the MRFTA, the proposal was ultimately dropped at the last moment at the National Assembly. However, there continues to be growing pressure from the Prosecutor’s Office to intervene in the KFTC’s investigation process, and there are discussions and directives in progress that aim to expand the rights of the Prosecutor’s Office in relation to cartel investigations. For example, investigations prior to indictment may still be conducted by the Prosecutor’s
Office and the Prosecutor’s Office may request the KFTC to refer the case to it if there is an acknowledgement of the charges by the investigation subject during an investigation on other matters. If there is compelling evidence found in the Prosecutor’s Office’s investigation phase, such evidence would be presented to the KFTC during its investigation and review phases. Utilising such processes, the Prosecutor’s Office aims to increase its involvement in regulating cartel cases, and there have been recent instances where the Prosecutor’s Office engaged in the search and seizure of companies for potential cartel violations, as well as arrests made in the process of prosecuting cartel violations by the Prosecutor’s Office. These developments reflect the recent attitude of the Prosecutor’s Office, which also reflects the stance of South Korea’s current president (who previously served as the Prosecutor General) that the KFTC is too lenient on antitrust matters and the Prosecutor’s Office wants to play a larger role in enforcing competition law. To bridge the gap between the two institutions, there are efforts to facilitate information sharing and introduce a consultation phase during which the two institutions can reach a consensus on important matters before actively proceeding with the investigation.

Notwithstanding the foregoing, the Prosecutor’s Office also implemented its own Leniency Investigation Guidelines for Cartel Cases (the Criminal Leniency Programme), which was established on 8 December 2020 and came into force on 10 December 2020. It is not yet clear how the Criminal Leniency Programme will interact with the KFTC’s own existing leniency programme. For example, if it is too late for a company to file an application for leniency to the KFTC’s programme, the company is still encouraged to file an application to the Criminal Leniency Programme. There are also efforts under way to create a consular body between the two programmes so that the two institutions can share information on leniency applicants.

AMENDED PROCEDURES PROTECTING RIGHTS OF INVESTIGATION TARGETS

The KFTC recently announced that it is considering ways to provide clearer guidelines during its investigation process to better protect the rights of the entities and individuals subject to investigation. One proposal requires the case handler to include more details in the letter provided to the investigation target prior to any dawn raids. Currently, while KFTC case handlers are required to provide a written document stating the reason for the dawn raid and the potential issue prior to a dawn raid, there is no strict requirement on the level of detail to be included in such a document, which results in unpredictability for the target during the investigation process. Under the proposed changes, the KFTC’s written dawn raid notice will be required to contain the specific charges for the alleged conduct, types and areas of the transactions, and the duration of the dawn raid. If there is a need to extend the period of the dawn raid beyond that stated in the initial notice, the KFTC would have to issue an additional written notice stating the extended investigation period as well as the reason for the extension.

Another initiative is to establish new procedures for allowing investigation targets to file an objection regarding the KFTC’s investigation, in line with standards in other jurisdictions. For example, if materials are collected during the dawn raid that fall outside the scope of what is stated in the KFTC’s written dawn raid notice, the investigated company would formally be able to demand the return of such materials. There is also an effort to create a reviewing committee within the KFTC to determine whether investigations or dawn raids are reasonable and allow the return or destruction of any materials collected during the dawn raid.
The KFTC is also considering the establishment of a formal state-of-play meeting process, similar to that of the European Union. The meeting would be held only if the investigation target requests such a meeting, and would allow the parties to express their opinions regarding the investigation during its early stages as well as clarify basic facts and contested issues.

The KFTC is also considering allowing formal hearings before KFTC commissioners to be held over multiple days for complex cases. Currently, once the case handler concludes the investigation and issues an examiner’s report (similar to the EU statement of objection), a hearing before the commissioners is scheduled, which generally ends in a single day. However, to allow the investigation target ample opportunity to present its defences, the KFTC would be able to hold more than one hearing before arriving at a final decision. The expectation is that such additional hearings would create more opportunities for the defending party to present more evidence and defences during the hearing process.

Finally, the KFTC is seeking to improve its case search infrastructure for third parties. The KFTC plans to revamp its online search engine system so that companies may easily find their own case-related materials and check relevant facts, such as the name of the case handler, current status in the process and other important information.

ESTABLISHING AN EFFICIENT CASE MANAGEMENT SYSTEM

In an effort to become more efficient in its case review process, the KFTC is also seeking to separately manage cases that are long and short term. This would require establishing a new organising scheme for cases, which would create separate categories for long-term cases and cases that are more time sensitive (which can then be further classified depending on the urgency of the case, such as standard, cautionary or highly urgent). Every month, the status of both the long-term and time-sensitive cases would be reported to senior officers at the KFTC to ensure that the cases are being handled in an efficient manner, which would be further reinforced by incorporating such case management efficiency into performance reviews for KFTC officers.

Finally, the KFTC is making significant efforts to speedily resolve all cases and is considering introducing alternative dispute resolution methods in connection with such efforts. The KFTC can also transfer simple cases – such as corrective order violation cases and cases involving omission of essential elements in written documents or not providing necessary information disclosures or franchise agreements – to various sub-branches of local governments to reduce the KFTC’s workload as well as to allow prompt and efficient enforcement of competition laws.

Endnotes

1. Online platforms are ‘electronic systems established using information and communication facilities for interactions such as transactions and information exchange between two or more users’, as defined in the Online Platform Guidelines.
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