May 14, 2024

THE KFTC ANNOUNCES THE AMENDED MERGER REVIEW GUIDELINES

In response to the growing number of mergers involving digital service providers including online platforms, the Korea Fair Trade Commission (the "**KFTC**") recently announced the amended Merger Review Guidelines (the "**Review Guidelines**") which went into effect as of May 1, 2024. The aim of the Review Guidelines is for the KFTC to sufficiently consider the unique attributes of the digital sector when conducting merger reviews.

We provide below a summary of the Review Guidelines.

I. THE METHOD OF DEFINING THE RELEVANT MARKET

The Review Guidelines now better clarify how to define the relevant market for the following industries/markets: (i) industries in which companies provide free services; (ii) multi-sided markets; and (iii) innovation markets.

A. Definition of relevant market for industries in which companies provide free services

If a service is provided as nominally free, but the service provider receives something of value in exchange (e.g., an online platform operator that generates advertising revenue from receiving certain data including users' personal data), it is difficult to apply the traditional approach to define relevant market where the KFTC considers the consumers' alternatives in the event of a price increase. In this case, the relevant market may be defined by considering the alternative services, while taking into account factors such as any change in the quality of services, rather than defining the market based on the cost incurred by the user.

B. Definition of relevant market for multi-sided markets

For service providers that facilitate transactions between different user groups, and therefore involves multi-sided markets, a single "multi-sided market" may now be defined as the relevant market under the Review Guidelines, rather than defining the market separately by each side. For example, a food delivery platform that facilitates transactions between consumers and restaurants may be defined as the "food delivery platform market", rather than defining the markets separately for platform users, and for restaurants that deliver food through the platform.

C. Definition of relevant market for innovation markets

In case of mergers between businesses actively engaged in innovation activities, including R&D, the relevant market may also include "innovation market" considering that these companies are competing in terms of innovation rather than price. For example, in respect of businesses competing to develop semiconductor manufacturing equipment, a relevant market may be defined as "next-generation semiconductor manufacturing equipment development market".

II. THE CRITERIA FOR EVALUATING THE ANTI-COMPETITIVE EFFECTS

In addressing the concerns that current status of the businesses may not be sufficient to properly assess the anti-competitive effects of a merger during the review, which arises due to the particular characteristics of the digital sector, the Review Guidelines outlines the criteria for evaluating the anti-competitive effects of a merger by (i) considering the network effects; (ii) establishing new criteria for evaluating free services; and (iii) updating the evaluation standards for conglomerate mergers.

A. Considerations of network effects

When reviewing a merger among digital service providers or online platform operators, the network effects of increased combined users or data scale, which could lead to potential market dominance, will now be considered.

B. Criteria for evaluating free services

In cases where services are provided nominally free, and therefore it is difficult to calculate the market share based on sales, the market share may be calculated using alternative variables such as the number of users and frequency of service usage.

For mergers between providers that offer free services, the anti-competitive effects may be evaluated by focusing on concerns unrelated to pricing such as a decline in the quality of service, rather than on concerns regarding potential price increases.

C. Method of evaluating conglomerate mergers

For conglomerate mergers among companies operating in different markets, but with a possibility of tying or bundling products that belong in different markets, the KFTC would now also consider the effects of excluding competitors in less popular product markets as well as any increasing barriers to entry.

III. ADDITIONS TO THE LIST OF EXAMPLES FOR INCREASED EFFICIENCIES

The KFTC also added additional examples of increase in efficiency which the KFTC may consider when assessing the unique characteristics of the digital economy.

Examples
• The increase in service users following the merger may increase the benefits for existing users • The use of additional data obtained from the merger may be used to create innovative services or reduce the costs of the production or distribution

- The merger may broaden the range of services available to users and increase consumer benefits
- For mergers that involve innovative digital tech startups, the ability for the existing investors to exit the original investment may result in creating new startups and promote new market entrants that could encourage a development of the startup ecosystem

IV. MODIFICATION OF STANDARDS FOR SIMPLIFIED REVIEW

For conglomerate mergers involving online platforms, the following transactions would be subject to standard review, and not to simplified review: (i) businesses providing goods or services to an average of more than 5 million people per month in the immediately preceding fiscal year of the date of the merger filing; and (ii) businesses with assets or turnover in Korea exceeding KRW 30 billion. Please note that while the original amendment proposals contemplated setting the requirement at KRW 30 billion spent annually on facilities or personnel for research, or research activities, such language was ultimately not included in the final amendments as adopted.

The following merger types by a private equity fund ("**PEF**") are still eligible for simplified review: (i) an existing limited partner (the "**LP**") participating in the PEF's additional paid-in capital or (ii) acquiring another LP's stake.

V. TAKEAWAYS

With the implementation of the Review Guidelines, we expect that the KFTC will actively and more effectively regulate mergers in the digital sector. Accordingly, any related businesses are advised to carefully review the Review Guideline, and consider whether any proposed transactions would trigger extended review, as well as adjusting timeline expectations as needed.

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