

NEWSLETTER

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Antitrust & Competition Group

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KFTC Announces the Proposal for the “Fair Intermediation Transactions on Online Platform Act”

One of the most significant changes brought upon by COVID-19 is the increase in contact-free transactions, which triggered rapid increases in the market concentration of the online platform industry. In response to such changes, the Korea Fair Trade Commission (the **KFTC**) proposed the “Fair Intermediation Transactions on Online Platform Act” (the **Online Platform Act**) to enhance the transparency and fairness in online platform transactions.

The current draft of the Online Platform Act imposes certain obligations on providers of online intermediation services through online platforms (**Platform Operators**). Notably, it requires the Platform Operators to include in their agreements with the business users of their online intermediation services not only the essential trading terms such as service fees, but also the standard for products’ exposures and any self-preferential treatments. It further imposes an obligation to notify the counterparties in advance when modifying the details of the agreement or restricting, suspending, or terminating the Platform Operators’ services. In addition, the draft bill further refines an existing provision of the Monopoly Regulation and Fair Trade Act (the **MRFTA**) that prohibits the abuse of the superior bargaining position, to better accommodate the characteristics of the online platform industry.

I. Major Provisions of the Online Platform Act

1. Scope of Application

Online Platform Act applies when all of the following three conditions are met:

Condition	Details
Transactional Relationship for Intermediation Services	Applicable when a Platform Operator intermediates the transaction for goods or services between consumers and its business users with which the Platform Operator has a contractual relationship (Business Users) ¹ .

① Intermediation services provided in person/via mail/over the phone, non-transactional platforms without transactions involving goods, and B2B/C2C platforms are not subject to the application.

Condition	Details
Size Test	Applicable when the Platform Operators' sales turnover ² or intermediate transaction amount ³ exceeds a certain amount.
Extraterritorial Application	Applicable regardless of the governing law regarding the Platform Operator's establishment and its location, when intermediating transactions between Korean Business Users and Korean consumer.

2. Selected Details

- 1) The Online Platform Act obligates a Platform Operator to draft and execute a written agreement governing its relationship with the Business Users, and further prescribes that important items must be explicitly stated in such agreement. Notably, it requires the Platform Operator to clearly indicate:

- The standard for charging service fees to the Business Users.
- The standard for determining the degree of exposure for Business Users' products on the platform.
- The details of any self-preferencing measures the Platform Operator implements.

Please refer to the list at the end of the Newsletter for items required in the agreement.

- 2) The Online Platform Act also obligates the Platform Operator to give prior notice before commencing certain actions.

Type of Action	Prior Notice Requirement	Consequence for Failure to Provide Prior Notice
When modifying the agreement	At least 15 days' advance notice of the modification.	The effect of the modification would be nullified.
When restricting or suspending part of the service	At least 7 days' notice of restriction/suspension and grounds for restriction/suspension.	A fine equal to or less than KRW 10 million.
When terminating the agreement	At least 30 days' notice of termination and grounds for termination.	The termination would be nullified.

- 3) The Online Platform Act refines the provision regarding the abuse of superior bargaining position (a type of unfair trade practice under Article 23(1)-4 of the MRFTA) as follows, to better accommodate the characteristics of the online platform industry.

② The revenue based on service fees from providing online intermediation service and supplementary services in the previous business year, which is equal to or greater than the amount prescribed by the presidential decree and is less than KRW 10 billion.

③ The total aggregated sales amount of goods or services sold through the online intermediation service in the previous business year, which is equal to or greater than the amount prescribed by the presidential decree and is less than KRW 100 billion.

Prohibited Practice	Details
Forced Purchases	Prohibition on unreasonably forcing the Business User to purchase the goods or services it has no intention of purchasing.
Forced Provision of Economic Benefit	Prohibition on unreasonably forcing the Business User to provide money, goods, services, or other economic benefits for the Platform Operator's own benefit.
Unfair Shift of Loss	Prohibition on unreasonably shifting the loss incurred during the transaction to the Business User.
Imposing Disadvantages	Prohibition on unreasonably setting or modifying the trading terms to the disadvantage of the Business User or providing other disadvantages during the performance of the agreement.
Interference with Management Activity	Prohibition on unreasonably interfering with the management activities of the Business User.

The existing MRFTA applies to other forms of the Platform Operator's abuses of superior bargaining position and anti-competitive unfair trade practices, such as refusal to deal, exclusive dealing, and discriminatory treatment. The MRFTA also applies to the abuses of superior bargaining position by small-scale Platform Operators who do not meet the size test and therefore would not be subject to the proposed Online Platform Act.

- 4) The Online Platform Act prohibits the Platform Operators from imposing disadvantages as retaliatory measures against the Business Users who apply for dispute mediation, report violations, submit materials for the KFTC's industry surveys, and cooperate with governmental investigations, in each case against or adverse to the Platform Operator.
- 5) *Sanctions*: The maximum amount of the administrative fine is twice the 'amount in violation of the law'⁴, with the maximum fixed fine (in situations where calculation of the 'amount in violation' is difficult) being KRW 1 billion. However, there are no criminal penalties contemplated under currently proposed draft of the Online Platform Act for unfair trade practices.

Method of Sanction	Details
Administrative Fine	<ul style="list-style-type: none"> ■ Violation of the obligation to draft and distribute the agreement. ■ Violation of the prohibition on unfair trade practices. ■ Violation of the prohibition on retaliatory measures.
Criminal Penalty (Fine or Imprisonment)	<ul style="list-style-type: none"> ■ Violation of the prohibition on retaliatory measures. ■ Failure to comply with corrective order.

⁴ There is no clear KFTC or court precedent yet on how to calculate such amount for different circumstances.

II. Implications

We expect the KFTC to submit the bill to the National Assembly around the end of 2020 or early 2021, upon sufficiently taking into consideration the opinions from various parties that may be affected, such as the relevant government ministries and third parties during the pre-announcement period from September 28 to November 9, 2020. Should the bill pass the National Assembly in the first half of 2021, it may come into effect as early as the first half of 2022, one-year from the date of its promulgation.

As the Online Platform Act is likely to be mainly applied to the Platform Operators that provide online platform services such as open market platforms, delivery applications, and price-comparison websites, we believe that it would be necessary for the Platform Operators to respond and provide their feedbacks as needed to the draft bill. More specifically, the KFTC intends to regularly carry out written surveys on the unfair trade practices in the online platform market. As such, Platform Operators should prepare in advance to avoid any legal issues by reviewing its existing agreements and transactional relationships with their Business Users.

We hope you find the above useful in carrying out your business, and please contact Lee & Ko's Antitrust & Competition Group for further legal advice or assistance.

Required Items in the Agreement

1. Details of the online intermediation services provided to the Business User and the standard and process for applying service fees in exchange.
2. Period of the agreement, renewal of the agreement and process for modifying the content, process and grounds for termination of the agreement.
3. Standard and process for initiating, restricting, suspending the online intermediation service.
4. Standard and process for returning, refunding, and exchanging the goods sold.
5. Method of settling the sales payment, including the process, method, and timing.
6. Whether the Business User's use of other online platforms is restricted and the details of the restriction, if any.
7. Whether the sales price, sales method, sales amount, delivery method, and payment method, etc. are restricted and the details of the restriction, if any.
8. Items regarding the standard, process, and allocation of cost for executing sales promotion events such as issuance of discount coupons.
9. The standard for allocating any losses suffered during the sales process.
10. How the information on goods is exposed on the online platform and the standard for determining the order of exposure (including the effect of the service fee on the method and order of exposure; however, it is not required to include the algorithm for the order of exposure).
11. Whether the Business User's goods are treated differently from the goods of the Platform Operator, its affiliates, or entities whose business activities are controlled by the Platform Operator (if the Platform Operator is the franchise headquarter, then the franchisee of the Platform Operator), as well as the standard and details of such discrimination, if any.
12. Whether the Business User may be provided with the information generated in the process of the Business User or the consumer's use of the online platform, the scope of the information that may be provided, and the method and terms of the provision (if consumer information, then the consumer's consent is a condition to the provision of information).

Required Items in the Agreement

13. Details of the use of another service or purchase of specific goods or services necessary for the use of the online intermediation service, if applicable.
14. Other items related to the contracting parties' rights and obligations prescribed by the presidential decree.

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