

NEWSLETTER

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Antitrust & Competition Group

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KFTC Issues Advance Notice on Proposed Guidelines Related to Cartel Issues

1. Introduction

With the amended Monopoly Regulation and Fair Trade Act (**amended MRFTA**) taking effect on December 30, 2021, the Korea Fair Trade Commission (**KFTC**) recently issued an advanced notice on proposed guidelines related to cartel issues. Specifically, the KFTC issued the proposed Guidelines on Review of Unfair Concerted Conduct Involving Information Exchange between Businesses (**Guidelines for Information Exchange**). Also, the KFTC advance notice covers proposed amendments to seven existing cartel-related administrative guidelines, including the Guidelines on Operating the System on Reducing Sanctions for Voluntary Disclosure of Unfair Concerted Conduct (**Leniency Guidelines**).

There are major changes resulting from the Amended MRFTA with respect to cartels. First, exchange of commercially sensitive information between competitors such as price that would substantially restrict competition in the relevant market is prohibited as a type of collusion. Under the pre-Amended MRFTA, information exchange by itself does not constitute a cartel, but could only serve as circumstantial evidence for proving the cartel. Second, there is a new legal basis for presuming the existence of an agreement if there is parallel behavior among competitors and if there is an exchange of necessary information. For the advance notice, the KFTC collected opinion from various stakeholders and related ministries, and the KFTC plans to finalize and implement the amendments on December 30, 2021. We summarize below notable developments set forth in the advance notice.

2. Guidelines for Information Exchange

■ Illegal Information Exchange

Under the Amended MRFTA, in order to determine a finding of an illegal agreement on information exchange, three requirements must be satisfied.

Requirements for Illegal Information Exchange

- ① There must be an agreement among competitors on exchanging 'commercially sensitive information.'
 - When there is an explicit or implicit agreement between competitors to exchange commercially sensitive information, an information exchange agreement has been established.
 - Types of information that may constitute illegal information exchange:
 - price and production volume
 - cost of products or services
 - quantity of products delivered, quantity of products in inventory or quantity of products sold
 - terms and conditions of products, services or payment
 - Exceptions are made for the following cases:
 - an association of businesses collecting information from a member business that is not disclosed to the other member businesses
 - disclosing and publishing information in a medium that any person may access without restriction
 - if a business expressly rejects the receipt of information, reports the competitor having sent such information to the KFTC or if the information exchange took place against the will of the business, the KFTC will find that the relevant business did not participate in an agreement on information exchange or that the business has withdrawn from the agreement
- ② The information exchange should substantially restrict competition in the relevant market.
 - Whether competition is substantially restricted may be determined by comprehensively considering the following factors: market conditions, structure of the market, characteristics of goods, market share of participants in the information exchange agreement, characteristics of the information, pattern of the information exchange, and purpose of the information exchange
- ③ There should be no efficiency enhancement effect.
 - Information exchange will not be found illegal if (i) the information exchange creates efficiency enhancing effect, (ii) the information exchange is necessary for such efficiency enhancing effect and (iii) if the efficiency enhancing effect offsets the anticompetitive effect

■ Presumption of Agreement for Information Exchange

Under the Amended MRFTA, to presume the existence of an agreement, there

should be (i) parallel behavior of competition factors among competitors (such as price) and (ii) information exchange necessary for such parallel behavior.

Even if the agreement is presumed, a business may still rebut the existence of an agreement by (i) demonstrating that there was no parallel behavior, (ii) proving that there was no exchange of necessary information or the information exchange is not related to the parallel behavior or (iii) proving that the parallel behavior was not a result of the agreement.

Requirement	Details
<p>① Parallel behavior</p>	<ul style="list-style-type: none"> ■ The likelihood of parallel behavior between competitors increases in proportion to how closely their movements converge in terms of key competitive parameters and the timing of such convergence. ■ However, the parallel behavior does not need to be aligned perfectly if the agreement were to ‘collectively raise prices’ without specifying the target price or when the difference is small enough not to have any appreciable effect on consumer choice. <ul style="list-style-type: none"> ■ In such case, the KFTC will recognize parallel behavior based on a less-than-perfect convergence of the key competitive parameters.
<p>② Information exchange necessary</p>	<ul style="list-style-type: none"> ■ As for the existence of information exchange necessary for parallel behavior, such existence may be established in the following three cases: (i) information exchanged is commercially sensitive information such as price and output, (ii) exchange occurred just prior to making the relevant decision or (iii) content of information exchanged matches the subject matter of parallel behavior.

3. Proposed Amendments to Leniency Guidelines

With the proposed amendment to the Leniency Guidelines, the joint leniency application process will be stricter. Thereunder, in order to add another company as a joint applicant, the leniency applicant seeking to amend its application must do so within 75 days from the filing date of the initial application.

Also, the provision with regards to the succession rule for leniency applications will be made clearer.

4. Conclusion

As the Amended MRFTA targets information exchange of information such as price between competitors, the KFTC’s procedures on cartel law enforcement and the compliance risk of companies will change significantly. In recent years, the KFTC has been increasing its efforts to combat cartels. For example, the KFTC introduced harsher criminal and administrative sanctions, such as introducing treble damages and doubling the upper limit on administrative fines. Thus, the KFTC has been

taking a more aggressive stance against cartels by adopting stricter elements from other competition law regimes, such as from the US and the EU. Although this direction of the KFTC may change in the future depending on the outcome of the upcoming election for the next President of Korea (in March 2022), it is likely that the changes currently in place may remain.

Because of the changes under the Amended MRFTA, it would be advisable to examine the current trends of the KFTC's law enforcement activities and conduct compliance training sessions within the company with specific guidelines on information exchange/contact with competitors to minimize the potential risk of violations. Also, extra caution should be exercised when there is an exchange of or an agreement to exchange information. In that regard, terms such as 'agreement' or 'agree' should be used carefully even in the context of informal meetings.

If there are any questions and/or legal assistance is required, please contact Lee & Ko's Antitrust and Competition Group.



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