NEWSLETTER

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Antitrust & Competition Group

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Changes to KFTC Merger Guidelines Took Effect on December 30, 2021

1. Expanding Scope of Business Combinations Eligible for Simplified Review

The Korea Fair Trade Commission (**KFTC**) amended the KFTC Guidelines on Merger Review (**Amended Merger Review Guidelines**) to expand the scope of business combinations eligible for a simplified review, and the Amended Merger Review Guidelines took effect on December 30, 2021. A simplified review is an expedited merger review process undertaken by the KFTC when the business combination transaction at issue is not likely to raise anti-competitive concerns in the relevant market. The review period for a simplified review is 15 calendar days instead of the review period of 30 calendar days (which may be extended up to 90 calendar days) for a standard merger review.

Prior to the Amended Merger Review Guidelines, the establishment of an overseas joint venture company with no effect on the Korean market was subject to a simplified review among other types of transactions. With the Amended Merger Review Guidelines, the KFTC has expanded the scope to include extraterritorial mergers as eligible for a simplified review. Four other types of transactions (share acquisition, merger, interlocking directorate and business transfer) may now qualify for a simplified review as long as the target company is a foreign company and the transaction does not have an effect on the Korean market.

Also, the Amended Merger Review Guidelines has made it clear that not only those transactions to establish a new joint venture outside of Korea but also to form a joint venture through the acquisition of shares in a company established outside of Korea may now be eligible for a simplified review. Moreover, under the Amended Merger Review Guidelines, acquisition of real property pursuant to a Real Estate Investment Trust (REIT) may be eligible for a simplified review.

2. Changes in Merger Filing Requirements

The KFTC amended the Guidelines on Merger Filing (**Amended Merger Filing Guidelines**) to reflect the amended merger filing requirements set forth in the amended Monopoly Regulation and Fair Trade Act which took effect on December 30, 2021(**Amended MRFTA**), and the Amended Merger Filing Guidelines took effect on December 30, 2021 as well.

Under the pre-Amended MRFTA, regulating mergers involving start-ups (e.g., online platform operators) with high growth potential (based on a large number of users) but with assets or turnover below such thresholds was not possible.

Under the Amended MRFTA and its enforcement decree, a merger filing may now be triggered if the transaction value is at least KRW600 billion and a local nexus has been established to enable the KFTC to monitor mergers involving high growth potential start-ups. To determine local nexus, the test is whether the target entity has performed a "substantial level" of activities in the Korean market based on any one of the following factors within the three fiscal years immediately preceding the notification date:

- Target company sold or provided products or services in the Korean market to at least 1 million persons per month in any month during the above period; or
- Annual budget of target company for leasing R&D facilities or using R&D personnel in Korea is KRW30 billion or more in any year during the above period.

The new thresholds are applied to any transaction consummated (for a post-merger filing) or signed (for a pre-merger filing) after the effective date of the Amended MRFTA.

In line with the Amended MRFTA, the Amended Merger Filing Guidelines outline the details on calculating the transaction value depending on the various types of business combinations (e.g., share acquisition, merger, business transfer or establishment of a new company). The prescribed calculation methods are as follows:

(i) **Share Acquisition**: The sum of the total transaction amount (the acquisition price for the shares) and the book value of the relevant shares (if the acquirer holds shares of the target before the contemplated transaction) plus the assumed liabilities in the case of a share acquisition transaction

> Example: In case Company A, which holds 5% of Company B's stock, acquires an additional 50% shares at KRW590 billion (5% of Company B's stock is valued at KRW4.5 billion and the liabilities of Company B is KRW10 billion).
>
> ➔ Transaction amount is KRW600 billion [(KRW590 billion + KRW4.5 billion + (KRW10 billion x 55%))]

(ii) **Mergers**: The sum of the value of the issued shares (merger price per share multiplied by the number of issued shares) and cash consideration (if applicable), plus the assumed liabilities for the merger

> Example: In case when Company C while merging with Company D issues 59,000,000 shares to Company D's shareholders (merger price per share KRW10,000 and Company D's liabilities is KRW10 billion).
>
> ➔ Transaction amount is KRW600 billion [(KRW10,000 x 59,000,000 shares) + KRW10 billion]

(iii) **Business Transfer**: Business transfer price plus assumed liabilities for a business transfer

> Example: In case when Company E while taking over Company F's business pays consideration of KRW590 billion and takes over related liabilities in the amount of KRW10 billion.
>
> ➔ Transaction amount is KRW600 billion (KRW590 billion + KRW10 billion)

(iv) **Establishment of a New Company**: Investment amount of the investor which will be the largest shareholder for a new joint venture

> Example: In case Company G and Company H while establishing a new joint venture sign an agreement to each invest an amount of KRW600 billion and KRW20 billion, respectively.
>
> ➔ Transaction amount is KRW600 billion

Also, the Amended Merger Filing Guidelines clarify the new local nexus test introduced in the Amended MRFTA. In the case of internet-based services such as social network services, if monthly active users or monthly visitors of the target's internet services are at least 1 million, a local nexus has been established. The Amended Merger Filing Guidelines further clarify that a user's visit or use of the target's internet services multiple times during a single month counts as one visit. Additionally, the Amended Merger Filing Guidelines clarify that the threshold amount of KRW30 billion should be calculated by adding up the annual ordinary R&D costs and development costs (intangible assets) of the target.

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

For more information pertaining to this newsletter, please contact the attorneys identified on the left.

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