NEWSLETTER

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Antitrust & Competition Group

CONTACT

Hwan JEONG

T: +82.2.772.4940
E: hwan.jeong
@leeko.com

Suruyn KIM

T: +82.2.2191.3253
E: suruyn.kim
@leeko.com

Frank S. SHYN

T: +82.2.6386.7846
E: frank.shyn
@leeko.com

KFTC Proposes Revisions to Merger Review Guidelines and Merger Filing Guidelines

The Korea Fair Trade Commission (**KFTC**) proposed revisions to the Merger Review Guidelines and the Merger Filing Guidelines to facilitate merger reviews of certain investments and to expedite their review process. With the number of filings increasing from 701 in 2018 to 1,113 in 2021, the KFTC is seeking to enhance efficiency in the merger review process and to minimize burden on the reporting party. These revisions resulted from input by a task force created by the KFTC (composed of experts on merger filings such as practitioners and academic scholars) and consideration of comments received from the general public which concluded on November 7. These revisions will be subject to further approval before their adoption and implementation.

1. Expanding Scope of Business Combinations Eligible for Simplified Review

A. Expanding Scope of Simplified Merger Reviews to Include Mergers Executed for Pure Investment Purposes

- Under the current Merger Review Guidelines, the initial establishment of a private equity fund invested by only institutional investors (**institutional private fund**) is subject to a simplified merger review (which involves a quicker review process). Under the proposed revisions, investments by a new partner with limited liability in an existing institutional private fund will also qualify for a simplified merger review as long as the new partner is not a strategic investor having joint management rights with an existing partner.

- Under the revised Merger Review Guidelines, an interlocking directorate that is a part of a transaction to acquire or establish a new business venture or a new technology company will qualify for a simplified merger review. Although the acquisition or establishment of a new business venture or a new technology company by venture capital fund or new technology fund is exempt from merger filing, an interlocking directorate carried out as a part of the foregoing transaction was subject to a reporting requirement. With this amendment, the burden of reporting the interlocking directorate is expected to be alleviated.

- A simplified merger review will be permitted for companies (not only "real property investment companies" as is the case under the current Merger Review Guidelines) for transactions to purchase land, warehouses, office buildings, etc., if the purchase is made for the purpose of investing in real property.

B. Simplified Merger Reviews for Foreign-to-Foreign Transactions without Effect on Domestic Market

- Under the current Merger Review Guidelines, although a foreign-to-foreign transaction not expected to have an effect on the Korean market qualifies for a simplified merger review, there is no guidance on the factors to be considered to determine whether the transaction will have an impact on the Korean market. This lack of guidance has created confusion on when overseas transactions are subject to a simplified merger review. As a result, the proposed revision includes a list of specific factors that should be considered to determine qualification for a simplified merger review such as the nationality of the acquirer and target company, sales territory, target company's current and expected sales territory post-acquisition, the target company's Korean sales turnover, etc.

- The revised Guidelines provide examples of such transactions that will qualify for a simplified merger review which include the establishment of a joint venture for developing foreign natural resources, the transfer of fixed assets such as foreign power generation facilities, among others.

C. Expansion of Safe Harbor for Conglomerate and Vertical Mergers (Non-Horizontal)

- As the number of non-horizontal mergers reported in Korea has steadily increased from 396 cases in 2017 to 736 cases in 2021 (increase of 86%), there is the need to consider expanding the current safe harbor provisions.

- Under the proposed revision, if the parties to a non-horizontal merger each has a market share of less than 10% in each respective relevant market, there will be a presumption of no anti-competitive effect. Thus, if this new factor or one of the existing factors ((i) the companies have a HHI of lower than 2,500 with less than a 25% market share in the relevant markets or (ii) the parties are not the top 3 players in the relevant markets) is met, the non-horizontal merger will be presumed to have no anti-competitive effect.

2. Key Revisions to Merger Filing Guidelines

Under the revised Merger Filing Guidelines, additional transactions will qualify for a simplified merger filing (which involves a shorter application and quicker review process). These transactions include (i) the establishment of a project financing vehicle, (ii) investments in existing institutional private funds, and (iii) interlocking directorates accompanied as a part of a venture capital fund investing in a business venture or a the new technology fund investing in a new technology company. In addition, a simplified merger filing will also be available for formal filing (i) if the parties have applied for voluntary preliminary filing and the KFTC found there is no anti-competitive effect in this preliminary filing and (ii) there is no significant change in the transaction or the relevant market situation since the parties received the KFTC's opinion on the voluntary preliminary filing.

3. Conclusion

The KFTC has been vigilant in updating and amending the Merger Review Guidelines and the Merger Filing Guidelines to reflect the economic situation and opinions of the relevant businesses and players. In this regard, the KFTC has proposed to amend these Guidelines to provide guidance on reviewing business combinations that involve the platform industry by taking into consideration the characteristics of the platform industry. Also, in connection with the Merger Review Guidelines, the KFTC outsourced a study on the proposed amendments (expected to be completed by the end of this year) and may incorporate the results thereof into the amendments. The KFTC plans to proceed with the process to amend these Guidelines during the course of next year.

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

Lee & Ko

Seoul Office : Hanjin Building, 63 Namdaemun-ro, Jung-gu, Seoul 04532, Korea
PanGyo Office : Techone Tower, 131 Bundangnaegok-ro, Bundang-gu, Seongnam-si, Gyeonggi-do 13529, Korea
Tel : +82-2-772-4000 | Fax : +82-2-772-4001/2 | E-mail : mail@leeko.com | www.leeko.com