

NEWSLETTER

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KFTC Proposes to Enhance Investigation and Deliberation Procedures

- • • KFTC issues advance administrative notice on amendments to Investigation and Case Handling Procedures and on enactment of Guidelines for Filing Objections

The Korea Fair Trade Commission (KFTC) issued an advance administrative notice on a set of the proposed amendments to the Rules of KFTC's Investigation Procedure (**Investigation Procedures**) and the Rules on Operation of KFTC Deliberation and Case Handling Procedure, etc. (**Case Handling Procedures**), and on the enactment of the Guidelines for Filing Objections to Evidence Collected or Submitted during On-site Investigations (**Guidelines for Filing Objections**) (collectively, the **Proposed Amendments**). There is a public notice period from March 14, 2023 to April 3, 2023 for the KFTC to collect opinion on the Proposed Amendments.

The Proposed Amendments present a number of significant changes. For example, the extent of the KFTC's authority to investigate will be identified more specifically to enable the Examinee to understand more clearly the subject matter and scope of the investigation. Also, procedures for reviewing the relevance of materials collected or submitted during an on-site investigation and opportunities for the Examinee/Respondent to express opinion during the investigation and deliberation process will be expanded and strengthened to protect the procedural rights of the Examinee or the Respondents.

Certain key measures under the Proposed Amendments are described below in greater detail.

1. Clarification on extent of authority to investigate (Amendments to Investigation Procedures)

Proposed Amendments	Details
Stating details of suspected violations in official notice of on-site investigation (Amendment to Investigation Procedures, Article 10 (2) and (3))	<ul style="list-style-type: none"> ■ The KFTC shall state (i) the scope of the period subject to the investigation, (ii) the type of transaction and (iii) the type of conduct regarding suspected violations in the official notice of an on-site investigation, along with the relevant statutes or regulations.

<p>Preparing criteria for investigating compliance department (Amendment to Investigation Procedures, Article 11 (2))</p>	<ul style="list-style-type: none"> Investigating first the compliance department (e.g., legal and compliance teams) simply for convenience of conducting investigations will be prohibited. However, when a strict investigation is required*, the compliance department may be subject to investigation. <p>* Cases where a strict investigation is required:</p> <ul style="list-style-type: none"> ① When a compliance department is directly involved in the violation of the law or the destruction of evidence ② When a compliance department directly performs the duties related to the alleged violation of the law ③ When the Examinee is suspected of refusing or obstructing the investigation during the process of the KFTC entering the investigation site ④ Other grounds equivalent to the above
<p>Providing reasons for extension of on-site investigation period in official notice of extension (Amendment to Investigation Procedures, Article 12 (2))</p>	<ul style="list-style-type: none"> The investigator shall state the reasons for the extension of the on-site investigation period in the additional official notice of extension. <p>(Example) Extension of the investigation period is needed for further investigation, such as securing additional materials to examine transactions in online shopping and investigating related parties.</p>

2. Preparation of internal and external procedures for reviewing materials collected or submitted during on-site investigation

1) Implementation of procedures for the Examinee to request the return or disposal of the materials collected or submitted during an on-site investigation (Amendment to Case Handling Procedures and Enactment of Guidelines for Filing Objections)

New procedures for the Examinee to file objections have been proposed. Under the Proposed Amendments, the Examinee may (i) review whether the materials submitted in an on-site investigation fall under the scope of the purpose of the investigation as stated in the official notice and (ii) submit an official request for the return or disposal of the materials falling outside the scope of the investigation.

Proposed Amendments	Details
Applicable Cases	<ul style="list-style-type: none"> The Proposed Amendments will target cases pertaining to violations under the Monopoly Regulation and Fair Trade Act (hereinafter MRFTA). However, cases involving abuse of superior bargaining position under the MRFTA (Article 45(1)6 of the MRFTA) will be excluded.

Method for Filing Objections	<ul style="list-style-type: none"> ■ The Examinee may file an objection within 7 days from the submission date* if the Examinee believes that the submitted materials are unrelated to the purpose of the investigation as stated in the official notice. * Submission date: For written materials, the date when an on-site investigation is completed; for digital forensic materials, the date the relevant screening process is completed.
Request for Review and Examination of Materials	<ul style="list-style-type: none"> ■ The Examiner shall review the objection and return or dispose of materials unrelated to the purpose of the investigation within 30 days (if approved by the Examiner, this period may be extended by 30 days). ■ Regarding materials the Examiner finds to be relevant to the purpose of the investigation, the Examinee shall submit a request to the Objection Review Committee within 30 days (if approved by the Examiner, this period may be extended by 30 days).
Decision of Objection Review Committee	<ul style="list-style-type: none"> ■ The Objection Review Committee, which will be composed of three members*, will decide whether to return or dispose the materials requested for review. * The three-member committee will be comprised of the bureau chiefs of the Deliberation Bureau (or Deliberation Management Divisions) and the relevant Policy Bureau.
Notification of Results	<ul style="list-style-type: none"> ■ The Examiner shall immediately return and dispose of materials found to be unrelated to the purpose of the investigation following the Review Committee's decision and issue the list of evidence to the Examinee.

2) Implementation of procedures for the Examiner to return or dispose of materials collected during an on-site investigation (Amendment to Investigation Procedures).

After an on-site investigation is completed, the Examiner may return or dispose of materials collected after reevaluating and selecting what is not relevant to the purpose of the investigation. (Amendment to Investigation Procedures, Article 14-2)

3. Expanding opportunities to express opinion during investigation and deliberation process (Amendments to Investigation and Case Handling Procedures)

Proposed Amendments	Details
Implementation of 'Preliminary Meeting': Expanding opportunities for Examinee to express opinion during investigation process (Amendment to Investigation Procedures, Article 22-2)	<ul style="list-style-type: none"> ■ In cases where it is necessary to clarify the basic facts and issues related to suspected violations, the bureau chief and director of the department overseeing the investigation will hold a formal face-to-face Preliminary Meeting* to directly hear the opinion of the Examinee.

	<ul style="list-style-type: none"> ■ The main contents of the Preliminary Meeting will be recorded, organized, and managed as part of the case record. <div> <p>* Cases when a formal face-to-face Preliminary Meeting is held:</p> <ul style="list-style-type: none"> ① When it is necessary to clarify the basic facts related to suspected violations ② When the facts are complicated or there are many issues ③ When KFTC and judicial precedent on the main issues are not established ④ When a plenary session or subcommittee meeting is expected to be held </div>
<p>Multiple deliberation: Expanding opportunities to express opinion during deliberation process (Amendment to Case Handling Procedures, Article 37 (7))</p>	<ul style="list-style-type: none"> ■ In cases with a significant impact on the market, such as those where the maximum expected administrative fine is high or where there are multiple Examinees/Respondents*, the KFTC shall hold more than two deliberations in principle upon the request of the Examinee/Respondent, as long as there are no special circumstances. <div> <p>* Cases where the maximum expected administrative fine (the maximum standard base fine stated in the Examiner's Report) is KRW100 billion or more (KRW500 billion or more, for cartel cases) or cases where the number of target Examinees/Respondents is 5 or more (15 or more for cartel cases)</p> </div>
<p>Enhancing fairness in deliberation process (Amendment to Case Handling Procedures, Articles 29 (3) and 32 (4))</p>	<ul style="list-style-type: none"> ■ The Presiding Member of the Committee and other committee members shall receive information through the assistant officer, and will be prohibited from contacting or otherwise approaching the Examiner/Respondent in any manner other than during the opinion hearing. ■ The opinion hearing will be operated separately so that the Examinee/Respondent may freely exercise the right to defense without the burden of the Examiner's presence.

4. Reorganization of KFTC to improve law enforcement system (Amendments to Investigation and Case Handling Procedures)

The Proposed Amendments will also reflect the KFTC's reorganization, which has now (i) divided the current Secretariat into the Policy Division and the Investigation Division and (ii) required the Secretary General to be in charge exclusively of policy functions and the Investigation Manager to be in charge exclusively of investigative functions.

5. Considerations

With the adoption of the Proposed Amendments, it is anticipated that (i) the KFTC and the Examinee will actively express opinion on the appropriate scope of the materials collected or submitted during an on-site investigation by utilizing the proposed objection filing procedures and (ii) the Examiner's discretionary authority to investigate will be exercised more reasonably going forward. In addition, the Examinee should take advantage of the Preliminary Meeting to secure the opportunity to exchange opinion and discuss issues in advance with the KFTC even before the Examiner's Report has been issued. Moreover, as the KFTC will allow multiple deliberation dates in principle, there should be careful review on developing a plan that effectively delivers the opinion of the Examinee/Respondent and maximizes direct exchanges with the Examiner given the increased number of hearings in the deliberation process.

Lee & Ko's Antitrust & Competition Group provides strategic legal advisory services on MRFTA related issues. With our group's extensive experience and unparalleled expertise, we are uniquely positioned to handle and address all of your legal needs in Korea. If there are any questions relating to the Proposed Amendments or if we may be of any assistance on MRFTA related issues, please contact us and we would be pleased to discuss them further as well as any potential legal solutions specific to your needs.

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