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Legal Update

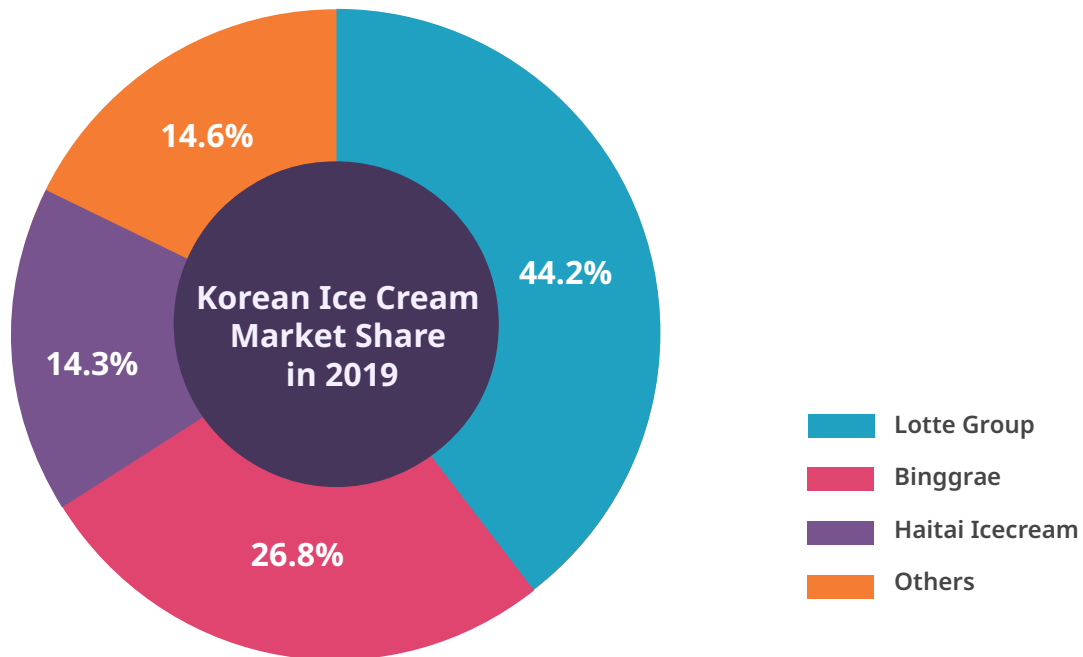
Merger Control in Korea _Vol.01

- KFTC's Unconditional Approval on 3-to-2 Merger in Take-Home Ice Cream Segment -

On September 28, 2020, the Korea Fair Trade Commission (the "KFTC") unconditionally cleared Binggrae's acquisition of 100 percent shares in Haitai Icecream.

This transaction is notable in that it concerns the take-home ice cream segment - which is a significantly concentrated segment with only three leading players, along with a few small businesses - and is between the second and third largest players in the segment. According to the public information, Lotte Group (Lotte Confectionery and Lotte Foods), which is the largest market player in 2019, and the combined entity's market shares amount to 44.2% and 41.1%, respectively.

Korean Ice Cream Market Share in 2019



(Source: News articles)

Although this transaction is not subject to the presumption of anticompetitive effects(*) under the Monopoly Regulation and Fair Trade Act (“MRFTA”), the KFTC conducted an in-depth investigation into the transaction, and only after 170 days of review (which is an unusually extensive review period for a merger that is eventually unconditionally cleared) did the KFTC determine that the transaction would not lead to anticompetitive effects. As the basis for its decision, the KFTC suggested that (i) Lotte Group would maintain its position as the largest player in the segment even post-transaction and (ii) after detailed upward pricing pressure analysis, the conclusion was reached that the transaction would not give the combined entity an incentive to increase prices.

(*) According to Article 7(4) of the MRFTA, a merger is presumed to have anticompetitive effects when all of the following conditions are met: (i) the combined entity has a market share of 50% or more (or the top three companies, including the combined entity, have an aggregate market share of 75% or more); (ii) the collective market share of the combined entity is the largest in the relevant market; and (iii) the market share difference between the combined entity and the second largest company is equal to or greater than 25% of the collective market share of the combined entity.

The KFTC did not impose remedies in this transaction where the combined entity would not become the largest company in the relevant segment (notwithstanding that the transaction is, in essence, a 3-to-2 merger and that the market concentration would markedly increase). However, this cannot be interpreted to mean that the KFTC has taken a position that it will not impose remedies in transactions where a combined entity does not become the largest company in the relevant market. That is because the fact that the KFTC conducted an in-depth investigation and review of the transaction for 170 days shows that the KFTC conducted the review on the premise that it may impose remedies, considering concerns that the transaction may restrain competition and reduce consumer welfare.

Hence, in other future merger cases, even if a merger would not result in the combined entity becoming the company with the largest market share, if the merger happens in a highly concentrated market, the parties to the merger should be fully prepared for the possibility of the KFTC imposing remedies. As part of this, it may be advisable for the parties to mergers, particularly in the case of mergers in the B2C market that could directly affect consumer welfare, to prepare economic analysis, such as upward pricing pressure analysis, like what the parties to the Binggrae-Haitai Icecream acquisition did.

For reference, there is no published opinion of the KFTC that addresses its concrete position as to how the relevant product market in the ice cream segment should be defined, i.e., whether to limit the market to the take-home ice cream market or to broaden the market to include impulse ice cream products.

Shin & Kim successfully achieved the best result in this case on behalf of the seller.

We will continue providing updates on Korean merger control issues. Please feel free to contact us anytime should you have any questions concerning Korean merger control.

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