



Update on Simplified Review for Foreign M&A and Safe Harbor for Non-Horizontal Mergers

The amended M&A Review Guidelines (“Amendment”) of the Korea Fair Trade Commission (“KFTC”) took effect on December 30, 2022.

Burden on competition authorities and parties to M&A transactions have been reduced in the Amendment. The most notable changes in the Amendment concerning foreign companies are as follows:

1. More specific criteria for simplified reviews for foreign M&A transactions with no impact in Korea

Under the past M&A Review Guidelines (amended on December 30, 2021), when a target company of an M&A transaction was a foreign company and the M&A transaction had no impact on the Korean market, a simplified review process applied. Compared to the initial 30-day review period under the ordinary review process, the review period under the simplified review process had been shortened to 15 days. The shortened review period was a groundbreaking development and had significantly benefited parties to foreign M&A transactions.

However, a problem with the past M&A Review Guidelines was that it did not provide clear criteria for determining whether the relevant foreign M&A transaction had an impact on the Korean market. As a result, companies were faced with difficulty in assessing which transaction qualified for simplified review process.

The Amendment has shed some light on the issue by providing clarification. The Amendment provides that, factors such as the nationality and business areas of the parties to the foreign M&A transactions, current or future planned business areas of the target company, and revenue of the target company generated in the Korean market must be considered in determining whether there is an impact on the Korean market. According to such criteria, if the target company is a foreign company and does not generate revenue in the Korean market at the time of the M&A transaction or plan to conduct business in the Korean market in the future, it will be subject to simplified review process.

In the past, some KFTC case handlers took a rigid position that a foreign M&A transaction could be subject to simplified review process only when either of the parties could not carry out business in Korea due to the nature of its business, or the business area was limited to a specific



country other than Korea under its articles of incorporation or a shareholders agreement. With the Amendment in effect, the KFTC will no longer take such strict approach in reviewing foreign M&A transactions.

2. Extended safe harbor for non-horizontal mergers

The past M&A Review Guidelines had a safe harbor provision for non-horizontal merger (i.e., vertical merger or conglomerate merger). Under the safe harbor provision, when the market concentration level and market shares of the parties to the M&A transaction in each of the relevant markets fell below a certain level (i.e., Herfindahl-Hirschman Index is less than 2,500 and the market shares of the parties are less than 25%), or when each of the parties was ranked no higher than fourth in each of the relevant markets, the M&A transaction was presumed not to be anti-competitive.

Under the past M&A Review Guidelines, the market concentration level tended to be higher than it should have been when there were competitors ranked first or second with high market shares. In such cases, the safe harbor provision did not apply. Such problems existed even when there were little anti-competitive concerns because the

parties to the M&A transaction had low market shares while the competitors ranked first and second were in a dominant market position.

In order to address the above issues, the Amendment added a provision on a presumption of no anticompetitive effect when each party's market share is less than 10% in each relevant market regardless of the market concentration.

In many cases of vertical mergers or conglomerate mergers between companies that are active in related markets, the safe harbor provision was not applied despite the parties' low market shares, and therefore, the review period was prolonged. The review period of such mergers is expected to be shortened under the Amendment.

3. Forecasts

Due to a sharp increase in the number of M&A transactions recently, the KFTC is making every effort to reduce their workload. The KFTC is reportedly considering various measures, such as raising the business combination

report threshold, expanding the scope of transactions subject to simplified review process, and dividing the review process into two stages to invest more resources for the in-depth review. We believe there will be more visible changes to the merger control activities, and will continue providing updates.

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** The opinions expressed in this article are the author's own and do not reflect the views of KOTRA.*