



MERGER CONTROL IN KOREA Vol. 8 – Update on Simplified Review for Foreign M&A and Safe Harbor for Non-Horizontal Mergers

2022.11.04

On October 17, 2022, the Korea Fair Trade Commission (the “KFTC”) announced the proposed amendment to the KFTC’s M&A Review Guidelines (the “**Proposed Amendment**”). The KFTC is accepting opinions on the Proposed Amendment, which is expected to take effect in November 2022 at the earliest.

The Proposed Amendment seeks to reduce the burden on competition authorities and parties to M&A transactions. As far as foreign companies are concerned, the most notable changes in the Proposed Amendment are as follows:

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

According to the current M&A Review Guidelines, which were amended on December 30, 2021, if a target company of an M&A transaction is a foreign company and the M&A transaction has no impact on the Korean market, a simplified review process is applied. Compared to the initial 30-day review period under the ordinary review process, the review period under the simplified review process has been shortened to 15 days. As far as the review period is concerned, it was a groundbreaking development ([see our newsletter dated January 3, 2022](#)), and has significantly benefited parties to foreign M&A transactions.

However, the current M&A Review Guidelines do not provide clear criteria for determining whether the relevant foreign M&A transaction has an impact on the Korean market, and accordingly it has caused difficulty, to a certain degree, in assessing which transaction qualifies for simplified review process.

Under these circumstances, the Proposed Amendment has clarified such criteria, albeit in a limited manner. The Proposed Amendment provides that, when determining whether there is an impact on the Korean market, 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, etc. should be considered. 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, it will be subject to simplified review process as long as it does not have a plan to conduct business in the Korean market in the future.

In the past, some KFTC case handlers took a rigid position that a foreign M&A transaction is not subject to simplified review process unless either of the parties cannot 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. We hope that, in line with the Proposed Amendment, the KFTC will no longer take such strict approach in reviewing foreign M&A transactions.

2. Extended safe harbor for non-horizontal mergers

The current M&A Review Guidelines have a safe harbor provision for non-horizontal merger (*i.e.*, vertical merger or conglomerate merger). Under the safe harbor provision, in case the market concentration level and market shares of the parties to the M&A transaction in each of the relevant markets are 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 if each of the parties is ranked no higher than fourth in each of the relevant markets, the M&A transaction is presumed to be anti-competitive.

Under the current M&A Review Guidelines, the market concentration level tends to be higher than it should be when there are competitors ranked first or second with high market shares. In such case, the safe harbor provision does not apply. Such problems exist even when there are little anti-competitive concerns because the parties to the M&A transaction have low market shares while the competitors ranked first and second are in a dominant market position.

In order to address the above issues, the Proposed Amendment added a provision presuming that there are no anticompetitive effects if each party's market share is less than 10% in each relevant market regardless of the market concentration.

In the case of vertical mergers or conglomerate mergers between companies that are active in related markets, there have been many instances where the review period was prolonged because the safe harbor provision was not applied despite parties' low market shares. We expect that the review period will be further shortened as a result of the Proposed 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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