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Implications of KFTC's Procedural Rules and Guidelines on Return or Destruction of Materials

2023.07.04

The Korea Fair Trade Commission (the "**KFTC**") implemented (i) the amended Rules of KFTC's Investigation Procedure (the "**Investigation Procedure Rules**"), (ii) the amended Rules of KFTC's Meeting Operation and Case Procedure (the "**Case Procedure Rules**"), and (iii) the newly enacted Guidelines on the Request for Return or Destruction of Materials (the "**Guidelines for Filing Objections**") on April 14, 2023. This came up as a follow-up to the KFTC's announcement of the "Plan to Enhance the Law Enforcement System" on February 16, 2023, and significant efforts have been made to prepare and amend specific procedures and standards to establish a solid foundation for improving the law enforcement system. The newly implemented rules and guidelines encompass the following key aspects (for more information on the implications of the KFTC's announcement of a plan to improve the law enforcement system, please refer to our newsletter dated March 7, 2023).

1. Clarification on the details and scope of investigation rights for on-site investigation

A. Detailed description of the alleged law violation in the official investigation notice

In order to reduce uncertainty regarding the scope of investigation, the KFTC now requires the specification of both (i) duration of investigation and (ii) the transaction area or specific type of conduct subject to investigation, when stating the alleged violation in an on-site investigation notice (Article 10(2) of the amended Investigation Procedure Rules). Under the amended Investigation Procedure Rules, it is now required that on-site investigation notices specify both the duration and transaction area to be investigated, e.g., "the period covered by the investigation is from 2018 to the present," and "whether the business operator subject to investigation engaged in the [...] conduct in the field of online shopping" Previously, it was sufficient for the notices to include only relevant legal provisions.

B. Establishment of investigation criteria for the compliance office

The KFTC has made amendments to the Investigation Procedure Rules, in an effort to eliminate the longstanding practice of prioritizing the investigation of compliance offices during on-site investigations for the sake of convenience. These amendments establish the principle that investigators should not select the compliance office as the primary target for investigation, with only a few exceptions: (i) the compliance office is directly involved in the relevant violation of law or evidence tampering, (ii) the compliance office directly handles affairs related to violation of law, (iii) there are grounds to suspect that the compliance office was involved in denying or obstructing an on-site investigation, and (iv) any other similar event occurs (Article 11(2) of the amended Investigation Procedure Rules).

C. Requirement to state the reason for extension in the notice of on-site investigation extension

In order to guarantee the procedural rights of the investigation subject, the KFTC now mandates that the supplementary official notice issued for an extension of an on-site investigation includes both the extended period and the reason for the extension (Article 12(2) of the Amended Investigation Procedure Rules). For example, the reason for extension will be specified such as "Extension needed to obtain additional information for transaction verification in the online shopping sector and conduct supplementary investigations."

2. Preparation of internal/external review procedure for materials collected and submitted during on-site investigations

A. Introduction of a right for investigation subjects to request the return or destruction of irrelevant materials

The KFTC has implemented a procedure to review the materials provided by the investigation subject during an on-site investigation to determine if they fall within the scope of the investigation as specified in the investigation notice. If they do not, the investigation subject has the option to formally request the return or destruction of materials (“formal objection process”) that are not within the scope of the investigation (The amended Case Procedure Rules).

Item	Description
Subject	• Cases of violation of the Monopoly Regulation and Fair Trade Act (the “MRFTA”) • Excluding the conduct of unfairly taking advantage of the bargaining position (Article 45(1)6 of the MRFTA.
Method of initiating the formal objection process	• The subject under investigation ("investigation subject”) may submit a written request ("objection letter") for the return or disposal of materials collected or submitted during on-site investigation within seven (7) days from the date of material submission if they determine that irrelevant information has been submitted, not aligned with the investigation purpose stated in the investigation official letter.*

	• Date of submission: For paper documents, the date on which the on-site investigation is completed; For digital documents, the date on which all relevant digital data have been selected
Request for review and examination of materials	• The examiner must review the objection letter and return or dispose of any materials deemed irrelevant to the investigation purpose within 30 days (which may be extended for up to 30 days for good cause) from the date of receiving the objection letter from the investigation subject. • The examiner must request examination by the Submission Examination Committee (the "examination committee") within 30 days (which may be extended for up to additional 30 days for good cause) from the date of receiving the objection letter for materials deemed relevant for the purpose of the investigation.
Decision-making by the examination committee	• The examination committee, composed of three internal members (one chairperson and two policy directors) will determine whether to return or dispose of the materials requested for examination through the objection letter.
Notification of the result	• The examiner must promptly return or dispose of materials deemed irrelevant to the investigation purpose in accordance with the decision of the examination committee. They should also provide the investigation subject with a list of materials (including a list of returned or disposed materials, and a newly prepared list of collected and submitted materials that are kept by the KFTC after the return or disposal).

B. Introduction of a review process by the investigator

Even when the investigation subject does not raise any objections, the investigating officer may, within 14 days after the completion of the on-site investigation, selectively return or dispose of materials that are deemed irrelevant to the investigation purpose (Article 14-2(1) of the amended Investigation Procedure Rules). However, in such case, the case manager (director) must supervise this process to ensure that materials favorable to the investigation subject are not arbitrarily returned or disposed of.

3. Enhanced opportunities for expressing opinions during investigation and examination

A. Enhanced opportunities to express opinions during investigation

Similar to ensuring an opportunity to face-to-face statements through an opinion hearing process before the formal hearing during the examination phase, the KFTC has established a “preliminary opinion hearing process” during the investigation phase. This process allows the investigation subject to formally express their opinions to the responsible division/ department director in cases where it is necessary to clarify the underlying facts or contentious issues (Article

22-2 of the amended Investigation Procedure Rules).

In a case where the investigation subject or any of its officers or employees wishes to directly submit or state their opinions to the examiner or the head of the relevant department regarding an ongoing case, the KFTC has stated that it will conduct a preliminary opinion hearing under the following circumstances: (i) when it is necessary to clarify the underlying facts; (ii) when the facts are complex or there are multiple contentious issues; (iii) when no established case law or precedent exists regarding the relevant key issues; (iv) when it is anticipated that the case will be presented to the plenary session or subcommittee; or (v) in other necessary situations. The KFTC plans to record and manage the main contents of the preliminary opinion hearing process as part of the case records, aiming to ensure transparency and fairness in the procedure.

B. Enhanced opportunities to express opinions during the examination phase

To ensure more comprehensive deliberation for cases that have a significant impact on the market, the KFTC has amended the Investigation Procedure Rules to provide a deliberation period of at least two days for (i) cases with five or more respondents who are business operators (or 15 respondents in a cartel cases) or (ii) cases for which the anticipated maximum amount of the fine before mitigation or aggravation exceeds 100 billion KRW (or 500 billion KRW in cases of unfair concerted actions) upon the request of the respondents unless there are exceptional circumstances such as concerns regarding the expiration of the statute of limitations (Article 37(7) of the amended Case Procedure Rules).

C. Enhanced fairness in the examination process

To enhance the fairness of the examination process, the KFTC has amended the Case Procedure Rules to introduce the following provisions: (i) The presiding examiner is prohibited from directly receiving opinions or reports from the examiner or a respondent through any means other than the hearing process (Article 29(3) of the amended Case Procedure Rues), (ii) the presiding examiner must request materials from the examiner or a respondent through the assistant examiner (Article 28(4) of the amended Case Procedure Rules), and (iii) if either the examiner or the respondent requests a hearing without the presence of the other party, they may be separated during the hearing process if necessary to ensure the respondent's right to a fair defense or for the efficient conduct of the hearing (Article 30(4) of the amended Case Procedure Rules).

4. Reorganization to separate policy and investigation departments

The KFTC has implemented a reorganization to separate the policy department and investigation department with an aim to strengthen responsibility and professionalism in case handling. The investigation responsibilities previously held by the Secretary General for Policy will be transferred to the Secretary General for Investigation. Going forward, the Secretary General for Policy will have no involvement in any aspect of the duties carried out by the Secretary General for Investigation.

5. Implications

In our February newsletter regarding the KFTC's plan to enhance the law enforcement system, we mentioned that the KFTC has actively gathered public opinions on law enforcement and developed a comprehensive plan for system-wide improvements. Notably, measures such as the requirement to provide detailed information about alleged law violations in on-site investigation notices, establishing investigation criteria for compliance offices, and implementing a review process for materials collected during on-site investigations are anticipated to greatly assist investigation subjects in mounting a stronger defense. Furthermore, the introduction of a hearing procedure during the investigation stage, an increase in the number of hearings, and efforts to ensure fairness in the hearing process are expected to empower companies to effectively present their cases and bolster their procedural rights.

Undoubtedly, there will be additional matters and issues to address when implementing the aforementioned new rules and guidelines. For example, although the amended rules stipulate that on-site investigation notices should include specific information about the duration and types of behavior being investigated, as well as the criteria for investigating compliance offices, there may be practical considerations to take into account. These could include potential remedies if materials are collected in violation of these rules during an actual investigation and how such a complaint would affect the investigation. Other potential issues include whether the investigation subject has a right to file an administrative lawsuit against a decision by the examination committee regarding the scope of investigation for collected and submitted materials, and how the outcome of such a lawsuit would impact the KFTC’s examination of the merits of the case. In addition, certain restrictive conditions based on practical reasons, such as the seven-day limit for filing a request for the return or destruction of materials, or the prohibition on objecting to conduct unfairly leveraging a bargaining position, may need to be gradually lifted or eased.

With an expanded range of options available to protect the defense and procedural rights of the investigation subjects during the investigation and examination phases, the KFTC’s adjudication proceedings are anticipated to become more dynamic. Consequently, the roles of law firms and attorneys participating in these proceedings will gain even greater significance. Also, given the absence of established business cases under the new or revised rules and guidelines, it will be important for companies to engage in close consultation with their law firms and attorneys on how to effectively utilize these new provisions to formulate an effective response to future KFTC investigations.

We will consistently keep you informed about the institutional changes and developments within the KFTC aimed at enhancing the law enforcement system. Leveraging our extensive experience in responding to KFTC’s investigations, we will provide valuable guidance and advice on the practical issues that may arise in the future.

[Korean version] 조사절차규칙 및 사건절차규칙 개정, 이의제기 업무지침 제정 및 시행과 그 시사점

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