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KFTC Adopts Amended Merger Review Guidelines for Greater Guidance in Reviewing Mergers in Innovation Industries

I . Amended Merger Review Guidelines

Effective Feb. 27, 2019, the Korea Fair Trade Commission (the “KFTC”) adopted an amended version of its Merger Review Guidelines, three months after it proposed amendments (the “Proposed Amendments”) and requested public comments. Like the Proposed Amendments, the actual amendments add new provisions without deleting or modifying existing provisions. These new provisions all address mergers in the so-called innovation industries. Specifically, they establish the following:

- (i) A definition of “information asset”;
- (ii) A standard for determining the relevant market when reviewing an innovation industry merger;
- (iii) A standard for calculating the market concentration level in an innovation market;
- (iv) A standard for assessing anticompetitive effects when reviewing an innovation industry merger; and
- (v) Factors to consider when reviewing an information asset merger.

A. Definition of “Information Asset”

Under Section II.11, the amended Guidelines introduce and define the term “information asset” instead of “big data,” a key notion used in the Proposed Amendments. Specifically, the provision defines “information asset” as “the aggregation of information that is collected for various purposes and is comprehensively managed, analyzed, and/or utilized.” Under the Proposed Amendments, the same definition was used for “big data,” a term that is not used under the amended Guidelines. This definitional and conceptual shift from “big data” to “information asset” appears to reflect the KFTC’s decision to dispense with the somewhat vague notion of “big data” in favor of a more precise yet general notion of “information asset.”

B. Standard for Determining Relevant Market When Reviewing Innovation Industry Merger

Under Section V.1.c, the amended Guidelines establish the following market definition standard with respect to innovation industries:

If the nature of the industry to which the merging parties belong is such that innovation activity such as R&D is essential or there is continuous innovation competition, and at least one of the merging parties is an important competitor in such competition, then a field with innovation activity in close proximity may be defined separately as an innovation market or as part of a broader market encompassing manufacturing and sales.

As noted in the KFTC's own press release, this new provision is aimed at treating innovation activity as a separate product or service for purposes of merger review when appropriate to do so. The key issue here will be how the KFTC determines in practice whether (i) innovation activity such as R&D is essential in a particular industry, or (ii) industry is characterized by continuous innovation competition. For it is reasonable to view innovation activity, including R&D, as essential in virtually every existing technological industry. If that view is justified, then every technological industry must naturally be characterized by continuous competition based on innovation activity. If so, it remains to be seen how the KFTC defines innovation activity as a separate market in some situations while declining to do in others.

Because of these questions, it is interesting that Section V.1.c was not articulated in greater detail during the public comment period. After all, the KFTC adopted this provision from the Proposed Amendments with only minor changes in wording. At the same time, as noted above, the KFTC omitted a similarly worded provision concerning "big data markets," which is part of the Proposed Amendments. Thus, the KFTC appears to have been more concerned about the difficulties of establishing a market definition standard for "big data" or "information assets" than for "innovation activity." Further, the omission of the proposed provision concerning "big data markets" suggests that "big data" or "information asset" markets are subsumed under the more general classification of "innovation markets" under the amended Guidelines.

C. Standard for Calculating Market Concentration Level in Innovation Market

Under Section VI.1.c., the amended Guidelines establish an alternative standard for calculating the market concentration level in an innovation industry:

In an innovation market, it might not be possible to calculate market shares on the basis of, among others, the revenue generated by the product at issue. Accordingly, in an innovation market, the market concentration level may be calculated on the basis of the size of R&D expenditures, the size of specialized assets and capabilities for innovation activity, the number of patents issued or referenced in the relevant area, and the number of participants substantially participating in innovation competition.

This provision has been carried over without any change from the Proposed Amendments. As clear from its very language, the provision reflects the KFTC's concern that traditional indicators of market shares might not adequately capture the market concentration level in an innovation industry. It will be interesting to see how the KFTC, in practice, will weigh these new market share indicators against one another in calculating the market concentration level in an innovation industry. For instance, will each such indicator be assigned an identical value, i.e., considered equally important, where two or more such indicators are available and used together? Or will the indicators constitute relevant factors under a totality-of-circumstances test?

D. Standard for Assessing Anticompetitive Effects When Reviewing Innovation Industry Merger

Under Section VI.2.d., the amended Guidelines explain how to assess potential anticompetitive effects for innovation competition:

Post-merger, the merged firm may substantially suppress innovation competition if it has the incentive and ability to reduce innovation activity including R&D. To assess such competitive effects, the following factors should be comprehensively considered:

- (i) Whether the merging parties are important innovators in the relevant field;
- (ii) Proximity of, or similarities in, past and present innovation activity by the merging parties;
- (iii) Whether, post-merger, there will be a sufficient number of remaining companies that substantially participate in innovation competition;
- (iv) Differences in innovation capabilities between the merging parties and their competitors; and
- (v) Whether a merging party, via innovation activity, is a potential competitor of the other merging party in the latter's product market

This provision has likewise been carried over without any meaningful change from the Proposed Amendments. Here, the KFTC addresses the risk, as clear once again from the very language of the provision, that a company, after a merger, might suppress innovation competition if it has the incentive and ability to reduce innovation activity including R&D. Thus, the enumerated factors – under a totality-of-circumstances test as noted in the provision – serve to identify whether a company will have that incentive and ability.

E. Factors to Consider When Reviewing Information Asset Merger

Under Section VI.5., the amended Guidelines similarly establish factors to be considered in an information asset merger:

Post-merger, the merging parties may substantially suppress competition in a relevant market if they gain, strengthen, or maintain market power by utilizing information assets. In that case, in addition to assessing the competitive effects of the merger depending on its type, the following factors should be considered:

- (i) Whether the information assets acquired through the merger cannot easily be acquired otherwise;
- (ii) Whether the merging parties will have the incentive and ability to limit competitors' access to the data;
- (iii) Whether any anticompetitive effects are expected after the merger due to, among others, limited access to information assets; and
- (iv) Whether [post-merger] the merging parties are more likely to suppress non-price competition, such as by reducing the quality of services concerning the collection, management, analysis, and/or utilization of information assets.

Here again, the KFTC addresses the risk that a company might suppress competition in a relevant market, in this case by utilizing information assets. In this context, the KFTC focuses on two issues: first, whether a merger might result in limiting access to the information assets at issue, and second, whether that merger could reduce the quality of services concerning those information assets.

In that sense, the new provision is similar to the corresponding provision in the Proposed Amendments. Although the latter provision is framed in terms of "big data" rather than "information asset," it likewise addresses the risk of limited access to information, i.e., big data, and the risk of reduced quality of services concerning that information.

On the other hand, consistent with the use of the more general term "information asset" throughout the amended Guidelines, Section VI.5 adopts a more general approach compared to the corresponding provision in the Proposed Amendments, which is the following:

Post-merger, the merging parties may substantially reduce competition in a relevant market if they gain, strengthen, or maintain market power by utilizing big data. In that case, in addition to assessing the competitive effects of a merger involving big data depending on the type of the merger, the following factors should be considered:

- (i) Differences in big data collection, management, analysis and utilization capabilities between the merging parties and other competitors;
- (ii) Whether the merging parties will have the incentive and ability to limit competitors' access to the data;

- (iii) Whether new entry will become more difficult due to the network effect based on the size or scope of the data; and
- (iv) Whether the merging parties are highly likely to reduce the quality of personal information-related services such as reducing the level of privacy protection.

II. Conclusion

The amended Guidelines represent a noteworthy attempt by the KFTC to better identify and assess the effects of innovation mergers including those involving information assets (or “big data”). However, it remains to be seen how the KFTC will apply the amended Guidelines in practice. Of particular interest in this regard is how the KFTC will – inevitably with some degree of discretion – (i) define an “innovation market” at a time when R&D is essential in arguably every technological industry and (ii) calculate the market concentration level of a given innovation market when the relevant factors the KFTC lists are in essence “qualitative” factors that cannot be easily converted into quantitative market share figures.

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