



South Korea

Global merger control handbook – update

APRIL 2020

Merger control legislation updates since 1 July 2018

- The Guidelines for Merger Review (the “Guidelines”) were amended on February 27, 2019 to address particular issues relating to “innovation markets” and “big data”. The Korea Fair Trade Commission (“KFTC”) will consider these issues during its review of mergers within R&D intensive (i.e. innovative) industries. Big data is defined as Information Assets, which are data sets consisting of data collected for varying purposes and managed, analyzed or utilized in a systematic and integrated manner. An innovation market may be defined as a separate market if innovation is essential to, or there is continuous innovation competition in, the industry in which the merger parties operate, and one of the merger parties is a significant innovator. The innovation market encompasses the area of innovation alone or the area of innovation together with the relevant products/services to which that innovation relates.
- The KFTC sets out special criteria it will consider when assessing the level of concentration in innovation markets, the competitive effects of mergers in innovation markets and the competitive effects of merger involving big data.

Criteria for Assessment of Market Concentration in Innovation Markets	The degree of market concentration in an innovation market will be determined based on criteria such as amount of R&D expenditure, size of R&D assets and capacity, patent portfolios (number of patents or utilization thereof), and the number of competitors competing in the relevant R&D
Criteria for Assessment of Competitive Effects of Mergers in Innovation markets	<ul style="list-style-type: none"> • Whether one of the merger parties is a significant innovator in the relevant industry • The proximity or similarity of the merger parties' previous or current R&D activities • Whether a sufficient number of innovators actually competing will remain post-merger • The gap in innovative capacity that may result between the combined entity and remaining competitors • Whether the merger is a means of eliminating potential competitors from the relevant product market
Criteria for Assessment of Competitive Effects of Mergers involving Information Assets	<ul style="list-style-type: none"> • Whether the merger is the only available means of acquiring the Information Assets • Whether the combined entity would have the ability or incentive to restrict competitors' access to its Information Assets • Whether restricting access to the combined entity's Information Assets would restrict competition • Whether the merger may restrict non-price competition due to a reduced incentive of the combined entity to improve its quality of services relating to the collection, management or utilization of its Information Assets

Landmark cases since 1 July 2018

The KFTC issued remedies in two global merger reviews during 2018.

- The first case was the acquisition of NXP by Qualcomm. In that case, the KFTC was concerned with potential anti-competitive effects arising from: (i) Qualcomm possibly changing NXP's licensing practices and (ii) bundling of Qualcomm's baseband chipsets with NXP's near-field communication (NFC) and secure element chips, either by technology or contact. The KFTC's remedies included the divestiture of NXP's standard-essential patents and system patents for NFC and a prohibition on degrading of interoperability of Qualcomm/NXP's baseband chipsets, NFC and secure element chips with those of competitors, amongst others. The KFTC has closely cooperated with the European Commission and the Japan Fair Trade Commission in its evaluation of probable anti-competitive effects and the remedial measures.
- The second case involved merger among global industrial gas manufacturers Linde and Praxair. The KFTC in this case ruled that the merger may have anti-competitive effects in six gas-related markets, including the Korean nitrogen tonnage market. As a result, the KFTC required the divestiture

of Linde or Praxair assets in each of such markets. During its review process, the KFTC collected opinions from competitors and other interested parties, and collaborated with the U.S. FTC in reviewing the anti-competitive effects of the merger and determining the appropriate remedies.

The KFTC issued remedies in five merger reviews during 2019. All five mergers were between Korean companies.

- The most notable among them is the merger between the Over The Top ("OTT") business jointly operated by three Korean national broadcasting companies and a competing OTT business. There is a limited number of cases where the KFTC issued remedies for the foreclosure effect that may arise in relation to a vertical merger. In this case, the KFTC issued behavioral remedies on the basis that the combined entity may refuse to provide or discriminatorily provide broadcasting contents to competitors. The behavioral remedies required the three national broadcasting companies to provide broadcasting content to competitors on reasonable and non-discriminatory terms. With respect to the horizontal aspects of the merger, the KFTC defined the relevant market as the OTT market centrally providing ready-made contents and paid services for subscription video on demand,

while limiting the application of the above market definition to this specific merger case, given the changing nature of the market. The KFTC further determined that the anticompetitive concerns do not arise from the proposed merger although the merged entity would be a No.1 player of the market with a combined market share of 44.7%, considering the high possibility of consumers diverting to competing products and global OTT businesses' entry into the Korean market. Through such determination, the KFTC demonstrated that, aside from the market share, the dynamic nature of the market is also sufficiently taken into consideration in determining the anti-competitiveness in the market where market conditions rapidly change in accordance with the development of technology.

- Another interesting decision to note is the KFTC's approval of Jeju Air's acquisition of shares in Eastar Jet, both prominent low-cost airlines of Korea. The KFTC granted unconditional clearance for the proposed merger, accepting the failing firm defense, given Eastar Jet's unstable financial status. In reaching such a decision, the KFTC took into consideration the detrimental effect the COVID-19 outbreak had on the airline industry.

- A case that has been making headlines in Korea is a merger between food delivery businesses. The KFTC is currently reviewing the acquisition of Woowa Brothers which owns Korea's No. 1 food delivery online platform by Delivery Hero, which owns Korea's No. 2 and 3 food delivery online platforms. If the relevant market is defined as the 'domestic food delivery application market', the combined market share of the merged entity would be nearly 100%, which raises anti-competitive concerns. As the proposed merger is the first merger case between food delivery online platforms which results in high market concentration, but also occurs in the fast developing industry where dynamic competition takes place, it is a merger review worth keeping an eye on.

Web link to the national competition authority

Competition Authority: <http://www.ftc.go.kr/eng/index.do>

Your merger contacts in South Korea

Lee & Co



Hwan Jeong

+82 2 772 4940

hwan.jeong@leeko.com



Suruyn Kim

+82 2 2191 3253

suruyn.kim@leeko.com