

December 5, 2019

BKL Legal Update - Antitrust 2019 - 5

1. KFTC Launches a New Task Force to Combat Anticompetitive Behavior in the ICT Sector

The new task force, aimed at regulating unfair trade practices in the ICT sector, is now in full motion

The Korea Fair Trade Commission (KFTC) has launched a special task force in an effort to detect and monitor anticompetitive behavior by companies in the information and communication technologies (ICT) sector.

The new ICT Sector Investigation Task Force is led by Chae Kyu-Ha, KFTC's Secretary-General, and is comprised of 15 members in three subdivisions, i.e., online platforms, mobile services, and intellectual property (IP) rights. According to KFTC's press release, the task force will be dedicated to responding promptly and systematically to unfair acts by platform companies, both domestic and foreign.

On November 15, 2019, the task force held its first official meeting to discuss the progress of ongoing investigations and the enforcement direction regarding issues in the ICT sector. It reportedly discussed online travel agencies' (OTA) use of rate parity (i.e., contract terms used by OTAs to coerce hotels to provide the same or lower rates for the same room, compared to other OTAs or hotel websites), including the implications of such practice and whether any foreign competition authorities have tried to regulate the practice. The task force will hold meetings on a regular basis to report the progress of its monitoring efforts in each subdivision and discuss various competition issues arising in the ICT sector. It will also advise relevant KFTC divisions and lend support in their regulation efforts.

According to KFTC, the major types of anticompetitive behavior subject to the task force's monitoring, among others, are as follows:

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Hyun A KIM

T 82.2.3404.6519

E hyuna.kim@bkl.co.kr

Sanghoon SHIN

T 82.2.3404.0230

E sanghoon.shin@bkl.co.kr

Seong Un YUN

T 82.2.3404.0164

E seongun.yun@bkl.co.kr

Soo Kyung CHUNG

T 82.2.3404.0273

E sookyung.chung@bkl.co.kr

Subdivision	Behavior subject to monitoring
Online platforms	Expansion of a platform company's dominance in a market into adjacent markets through discriminatory acts and/or exclusionary practices
Mobile services	Interference by a monopolistic mobile services company with its competitors' market entry through tying and/or exclusionary practices
IP rights	Conferral of a disadvantage by a standard essential patent holder to its transaction counterparties by delaying competitors' market entry and/or unfairly coercing them to pay royalties for patents

KFTC's launch of the task force is consistent with its annual plan for 2019, the October 2019 annual report at the National Assembly, as well as the statements made by the new KFTC Chairwoman Joh Sung-Wook shortly before her appointment in September 2019. Joh had stated that online platforms and the ICT sector should be strictly regulated to discourage abuse of power, indicating that KFTC should strengthen the intensity of regulation of platform companies.

2. KFTC conditionally approves three telecommunications M&A deals

KFTC's decisions indicate that it expects the deals will boost competition for innovation in a rapidly changing market environment in which emerging content providers are gaining popularity

KFTC has conditionally approved three deals involving convergence of telecommunications and broadcasting, which are expected to impact both industries in Korea: (i) LG U+'s acquisition of a majority stake in CJ Hello, Korea's largest cable TV operator; (ii) SK Broadband's merger with t-broad, Korea's second largest cable TV operator; and (iii) the merger of Oksusu, SK Telecom's video streaming app, and Pooq, a joint video-on-demand platform of three terrestrial broadcasting channels.

The Korean broadcasting market has largely been dominated by various cable TV operators, until the recent rise of content providers such as internet protocol television (IPTV) and over the top (OTT) platforms. Unlike local cable TV operators, IPTV operators such as LG U+ (also a mobile network carrier) and SK Broadband (also a fixed broadband provider) provide nationwide services and are able to reach more consumers; in 2017, IPTV operators' market shares exceeded those of cable TV operators in terms of the number of subscribers. In addition, the Korean market has undergone a significant change with the entry of global OTT service providers such as YouTube and Netflix, whose video content services are provided over the internet and bypass traditional broadcast / cable TV.

The recent conditional approvals are viewed as KFTC's willingness to adapt to such transformation. Back in July 2016, KFTC disapproved the proposed merger between SK Telecom (a mobile network carrier and IPTV operator) and CJ Hello, reasoning that the merger would allow SK Telecom, a major mobile carrier in Korea, to encroach on the broadcasting market and engage in unfair trade practices. In its recent conditional approvals, however, KFTC indicated that the proposed deals would allow broadcasting service providers to respond to the rapidly changing technology and market environment, and that the proposed remedial measures would minimize any concerns about potential restrictions on competition and protect consumers' right to choice. Moreover, as the competition between global media service providers has intensified and there has been an increase in mergers between media service providers, it is understood that KFTC has taken such trends into consideration in providing its conditional approvals.

Further details regarding the three M&A deals are as follows:

(i) LG U+'s acquisition of a majority stake in CJ Hello

As the first step in assessing any potential impact on competition, KFTC examined the impact of the acquisition on several relevant product and geographic markets related to the broadcasting and telecommunications industries. In particular, KFTC defined separate product markets for paid digital cable service and 8-level vestigial sideband service ("8VSB") (i.e., service that enables watching digital cable TV with no additional subscription fees beyond the fees paid for analog TV). KFTC also defined the relevant geographic markets as each of the service areas in which CJ Hello provides its broadcasting services, taking into account that channels, market shares and subscription fees differ for each service area.

Moreover, KFTC used various surveys and economic analysis in its anticompetitiveness assessment. A notable development in KFTC's assessment methodology was its application of the upward pricing pressure (UPP) analysis to estimate the likelihood of the merging parties increasing the subscription fees for their broadcasting services after the acquisition. UPP is an economic analysis tool used often by major competition authorities around the world to estimate the risk of a merger giving rise to anticompetitive effects.

Based on the above, KFTC determined that a risk of restriction on competition exists with respect to the 8VSB market and issued a conditional clearance decision containing several behavioral remedies. Among other remedies, KFTC ordered that LG U+ must not raise subscription prices for cable TV above Korea's headline inflation until the end of 2022 and, in order to protect consumers in the 8VSB service market, that LG U+ must not unilaterally reduce the number of cable TV channels they provide or force customers to switch to expensive subscriptions or to digital cable TV. Given the rapidly changing nature of the pay TV industry, however, KFTC agreed to re-examine the remedies if such request is made one year after the completion of the acquisition.

(ii) SK Broadband's merger with t-broad

With respect to the merger of SK Broadband and t-broad, KFTC defined and examined relevant markets similar to those defined for LG U+'s acquisition of shares in CJ Hello (with the exception of markets related to the mobile telecommunications sector, which is not relevant to the merger at hand).

As a result of its analysis, KFTC concluded that competition concern arises in the markets for paid digital TV and 8VSB services, and conditionally approved the merger while imposing the similar behavioral remedies imposed on LG U+ and CJ Hello.

(iii) Oksusu's merger with Pooq

With respect to the launch of a new OTT platform by SK Telecom and three terrestrial broadcasters, KFTC defined the relevant market as the market for subscription-based OTT service in Korea. KFTC noted that this market definition would be limited to the Oksusu-Pooq merger and that each merger involving OTT platforms should be reviewed on a case-by-case basis given that the OTT market is rapidly evolving.

KFTC concluded that there is a possibility of other OTT providers losing access to the programs produced / supplied by the terrestrial broadcasting channels as a result of the merger. In light of such concern, KFTC issued behavioral remedies in respect of the supply of content by the broadcasting channels for three years following the merger. For example, KFTC determined that the broadcasting channels must not terminate or modify the terms and conditions of the contracts entered into with other third-party OTT service providers without reasonable cause. Moreover, the broadcasting channels were ordered to negotiate in good faith under reasonable and nondiscriminatory conditions when such other OTT service providers request the channels to supply video-on-demand content.

Taking into account the rapid changes in the market, however, KFTC noted that it would consider shortening the three-year period for remedies if such request is made one year after the completion of the merger.