

Recent Developments to Monopoly Regulation and Fair Trade Act of Korea

Introduction

The Korean Fair Trade Commission (KFTC) reviewed its overall fair trade regime in 2006 and proposed a total of 34 items to amend in the Monopoly Regulation and Fair Trade Act (Fair Trade Act) and its Enforcement Decree. Out of the proposed 34 items, nine items were adopted first, and the Fair Trade Act was amended in April 2007 with effect from July 14, 2007. The Enforcement Decree was accordingly amended on July 3 and put into effect from July 14. The remaining 25 items were included in an amendment to the Fair Trade Act in August 2007 with effect from November 4, 2007. The concomitant amendments to the Enforcement Decree are scheduled to go into effect on November 4.

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Summary of Key Amendments

Key amendments to the Fair Trade Act and the Enforcement Decree can be categorized into four major areas: (i) regulation of large enterprise groups and holding companies, (ii) cartels, (iii) business combination and abuse of market dominant position, and (iv) others.

1. Regulation of Large Enterprise Groups and Holding Companies

Several amendments were made to regulations governing large enterprise groups and holding companies.

Given the relaxation on regulations governing holding companies, the use of a holding company structure for corporate governance purposes may become a more viable option for investors. Prior to the amendment, a holding company was required to hold at least 30% of the shares of a listed company and at least 50% of the shares of a non-listed company, but the April 2007 amendment relaxed these requirements to 20% and 40%, respectively. In addition, the maximum debt-equity ratio for holding companies has been

increased from 100% to 200%. Additional measures to relax requirements on holding companies are expected to be effective from November 4, including the ones mentioned below.

- (a) Amendment to Report of Conversion to a Holding Company during Fiscal Year. Prior to the amendment, if a company became qualified as a holding company under the Fair Trade Act arising from a stock acquisition or change in assets, such company could (and was obligated to) file a report of conversion to a holding company within four months from the end of the fiscal year in which it qualified as a holding company. As a result of the amendment, such qualified company may file a report of conversion to a holding company as of the date of qualification during the fiscal year or at the end of the fiscal year. If such report of conversion is filed during the fiscal year, the qualification as a holding company will be determined based on the balance sheet as of the date of qualification, and if qualified, it may get some tax benefits available for holding companies from the date of conversion.
- (b) Amendment to Requirements for "Holding Company's Grandson-Subsidiary" Status. Prior to the amendment, a subsidiary of a holding company could only have a subsidiary (i.e., a grandson subsidiary of the holding company) if there was a "business relation" between the subsidiary and grandson subsidiary. The amendment has removed this "business relation" requirement for a grandson subsidiary.
- (c) Other Changes in Holding Company Regulations. A holding company may have a great grandson subsidiary, if such great grandson subsidiary is wholly owned by a grandson subsidiary of the holding company. Also, any company that becomes a holding company as a result of merger or spin-off will be granted a one-year grace period from restrictions on holding companies (such as, maximum debt-equity ratio, etc). In addition,

investment by a holding company in a SOC company will be exempted from regulations that prohibit a holding company from owning more than 5% of the shares of non-affiliated domestic companies.

- (d) Amendment to Financial Institutions Subject to "No Payment Guarantee" Rule. The "No Payment Guarantee" rule prohibits a large enterprise group company with total assets of two trillion Won from providing payment guarantees for any loan extended by a bank, insurance company or other financial institution to its affiliate. After the amendment, the scope of financial institutions to which an enterprise group is not permitted to provide a payment guarantee has been redefined to include 38 savings banks, each having total assets of 300 billion Won or more (though the payment guarantees provided to such banks prior to the effective date of the amendment must be removed within two years), and to exclude 23 specialized credit financial companies, each having total assets of less than 300 billion Won.
- (e) Stricter Measures against Evasion of Restrictions on Mutual Investment. After the amendments, the KFTC's right to obtain information on financial transactions has been expanded to include investigations of attempted evasion of restrictions on mutual investments, in addition to the investigations of unfair intra-group transactions.

2. Cartels

Amendments were also made to regulations governing cartels in the areas of auction and bid rigging practices, leniency program, and surcharge ceiling.

The amendments tend to show stricter regulation of cartels as described below, and accordingly, businesses should pay keen attention when engaging in any cooperative or collective actions.

- (a) Amendment to Regulations on Auction and Bid Rigging Practices. These regulations were strengthened so that auction or bid rigging entities would be treated as a type of cartel under the Fair Trade Act. In a bidding or auction process, participants are prohibited from agreeing on a successful bidder, bid price, lowest bid price, order or ratio of

successful bidders, design, construction method or other competitive elements. The KFTC may require a public organization, including national and local governments and state-owned organizations, to submit information related to bids that it conducts.

- (b) Amendments to the Leniency Program for Cartels. To encourage cartel members to inform on their cohorts, the Fair Trade Act allows the KFTC to reduce surcharge penalties on such informers. After the amendment, the Fair Trade Act will clearly provide that the KFTC must not disclose or divulge information given in voluntary reports of informants or notice to any third party, except when the informant agrees to the disclosure or when it is necessary to deal with a legal action related to the case in question.

In addition, surcharge to a second priority voluntary reporter will be reduced by 50%, as opposed to the current 30%. No reduction in surcharge will be permitted, however, to any informant (even a first or second priority voluntary reporter) if the informant was the party forcing others to form the cartel activity. An informant will be deemed to have forced the cartel activity if it compelled others to participate in or continue the unfair collective act in question against their will. Moreover, faithful cooperation until the end of investigation will be added as a requirement to be eligible under the leniency program.

- (c) Amendments Imposing a Higher Surcharge against Cartels. Prior to amendment, a uniform maximum surcharge of 5% was applied to all cartels that began before April 1, 2005 and have been in existence since then. After the amendment, the 5% ceiling will apply to those cartels that began before April 1, 2005 and have been in existence since then until or before November 3, 2007. A new surcharge ceiling of 10% will apply to those cartels that exist after such date.

3. Business Combination and Abuse of Market Dominant Position

Amendments made in this category include changes to and relaxation of business combination notification system and additional considerations in determination of price abuse by market dominant companies.

- (a) Amendment to Criteria for Notification of Business Combination Report. Prior to amendment, if any company with total assets or annual turnover of at least 100 billion Won acquires a target company with the total assets or annual turnover of at least three billion Won, the acquiring company was required to submit a business combination to the KFTC. After the amendment, the target company's total assets or annual turnover has been increased to at least ten billion Won.

In addition, for overseas business combinations, each company involved in the combination had to have a minimum of three billion Won of annual turnover in Korea (on a consolidated basis including the Korean turnover of its affiliated companies) as one of the elements triggering a report to the KFTC. After the amendment, the minimum annual Korean turnover amount has been increased to ten billion Won.

- (b) Amendment to Business Combination Notification System. Other changes to the business combination notification system mandate that if an acquiring party becomes the largest shareholder of the target company through additional stock acquisition, it should file a business combination notification with the KFTC even if it did not file a notification at the time of the initial stock acquisition. Also, upon incorporation of a joint venture company, the largest investor alone will be obligated to file a report; and no business report will be required for acquisition of stock in a SOC company or a REIT.
- (c) Additional Considerations in Determination of Price Abuse by Market Dominant Company. Prior to amendment, a "price significantly higher than change of costs" was regarded as price abuse, but the amendment broadens the definition of price abuse to include the additional considerations of whether the price is significantly higher than costs without justifiable reasons and whether the profit margin is significantly higher than normal without justifiable reasons.

Because of these new criteria increasing the scope of price abuse, market dominant businesses should pay even more attention when setting their prices.

4. Others

In addition to the amendments made in the above three major areas, changes were made to the mediatory procedures in unfair trade practices and the surcharge ceiling.

The new mediatory system will enable prompt settlement of dispute in some types of unfair trade practices as described below. In addition to the consent decree system to be introduced in the near future, the violator will be given an opportunity to use its efforts to remedy the violation with minimal intervention by the KFTC.

- (a) Amendment to Mediatory Procedures. The amendment will cause the establishment of the Korea Fair Trade Mediation Board (Board) and the Fair Trade Dispute Mediation Council (Council) under the supervision of the Board. Any person suffering damages due to an unfair trade practice within the meaning of Article 23(1) of the Fair Trade Act will be entitled to file an application for mediation by the Council, unless the practice involves unfair support, collective refusal to transact, discrimination in favor of an affiliate, collective discrimination or continuous predatory pricing. In addition, if a settlement is reached between the parties concerned according to the Council's recommendation or mediation, the KFTC will not impose any separate corrective measures.
- (b) Amendment to Surcharge Ceiling. The surcharge ceiling will be changed from "n% of the average turnover for the immediately preceding three fiscal years" to "n% of relevant turnover for the period of violation."

This update is intended as a summary news report only, and not as advice. For legal advice, please inquire with your contact at Bae, Kim & Lee LLC, or the following attorneys of our firm:

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