



「Proposed Amendments to the Act on Monopoly Regulation and Fair Trade」

1. Amendment Bill to the Fair-Trade Act Submitted to the National Assembly

An amendment to the Act on Monopoly Regulation and Fair Trade (the "Fair Trade Act"), known as the "Fair Trade Act Amendment Bill," was approved by the Cabinet on June 20, 2023, and has been subsequently submitted to the National Assembly Standing Committee. The primary objective of the Fair Trade Act Amendment Bill is to expedite the merger review process and enhance its overall effectiveness.

With a notable lack of disagreement between the ruling and opposition parties, the Fair Trade Act Amendment Bill is expected to smoothly pass through the National Assembly. This consensus is particularly promising, given the frequent criticism of inefficiencies in the current merger review process. The positive impacts of the Fair Trade Act Amendment Bill on the M&A market and investment activities and practices have garnered significant attention.

2. Highlights of the Fair-Trade Act Amendment Bill

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- ② Introduction of an electronic submission and delivery system for

document submission in proceedings of Korea Fair Trade Commission (“KFTC”).

- ③ Granting the reporting company the opportunity to present its views in the KFTC

Additional specifics of the Fair-Trade Act Amendment Bill, along with its anticipated effects and implications for the market, are outlined as follows.

3. Exemption from reporting obligations for types of business combinations that are unlikely to restrict competition

Pursuant to Article 11 of the current Fair Trade Act and Article 18 of the Enforcement Decree thereof, companies participating in a merger are required to file a merger reporting if their total assets or sales in the immediately preceding business year exceed 300 billion won for the reporting company and 30 billion won for the target company

Compared to the current law as above, the Fair-Trade Act Amendment Bill exempts the following types of business combinations from the obligation to report.

- ① **In the case where the size of the the target company itself is less than 30 billion won in the case of a merger between affiliated companies** (amendment to Article 9(5) of the Fair-Trade Act and adding new subparagraph (1))

The current Fair-Trade Act stipulates that the size of affiliated companies must be combined to calculate the size of the merging companies (Article 9(5)). As a result, in the case of a merger between affiliated companies, the size of the affiliates is duplicated in calculating the size of each of the companies, which results in a higher level of merger reporting obligation (than other cases), where there is a lower risk of competition restriction as it is a case of a merger between affiliated companies. The Fair-Trade Act Amendment Bill provides the target company to determine whether it is obligated to report by calculating its own size without adding up the size of its affiliates.

- ② **Case where executive officers serve as executives at another company that is not an affiliate** (subparagraph (3) of Article 11 (1) of the Fair Trade Act Amendment Bill).

If an executive officer or special-related party of a company serves as an executive officer for another company, there is a high risk of competition restriction due to the fact that the same person is involved in the decision-making of both companies. Thus, in principle, holding executive officers at both companies is subject to business combination reporting obligation, when the companies are above a certain size.

However, where executives of a company (“Company A”) serve as executives at another company (“Company B”) holding less than 1/3 of the total number of executives of Company B that is not an affiliate and serving only as executives but not the CEO of Company B, it will not be subject to the reporting obligation under the Fair Trade Act Amendment Bill. This is because those executives of Company A serving at Company B will not consist of a majority of the board of Company B and not have the authority to represent the company as not being the CEO, which makes it difficult to exert influence on the major decisions of Company B., not increasing the

risk of competition restriction.

In actual M&A cases where a large-scale investment is made, it is often the case that the investor company requires the right to appoint directors only for the internal control of the investee company but not for the purpose of controlling the business decisions of the investee company and the related parties of the investor company are appointed as executives of the investee company. In such a case, the current Fair-Trade Act imposes the obligation to report for examination of competition restriction, which may constrain active investment in the market. The Fair Trade Act Amendment Bill is expected to address such concern over unnecessary regulations over the investment market.

③ **Merger or business transfer between parent and subsidiary companies** (amendment to Article 11 (1) (4) of the fair trade act)

A parent company under the Korean Commercial Code is a company that solely controls its subsidiary and the interests of the two companies are practically aligned, and the subsidiary's decisions are inevitably subordinated to the decisions of the parent company. Thus, mergers and business transfers between the parent company and its subsidiary under the Korean Commercial Code are unlikely to cause an additional restriction on competition in the market.

While the current Fair-Trade Act stipulates that mergers and business transfers between a parent company and its subsidiaries are subject to simplified notification obligation, the Fair-Trade Act Amendment Bill provides an exemption of this type of merger and business combination from the notification obligation.

④ **Establishment of Private Equity Funds (PEFs) under the Capital Markets Act** (Article 11(3) Para 4 of the Fair Trade Act Amendment Bill)

Article 11(3) of the current Fair Trade Act exempts certain investment transactions from the merger reporting obligation, where such investment activities of a purely capital nature are unlikely to restrict competition in the market.

The Fair Trade Act Amendment Bill establishes a new category of this type exemption from merger reporting obligation applicable to a company which is participating in establishment of a private equity fund ("PEF") and becomes the largest shareholder thereof, pursuant to Article 9, Paragraph 19 of the Act on Capital Markets and Financial Investment Business ("Capital Markets Act").

A PEF under the Capital Markets Act is an aggregation of investment funds so the act of establishing a PEF by itself may not have substantial impact on the market, thus exempted from the merger reporting obligation. However, it should be noted that when a PEF acquires a stake in another company through actual investment activities or acquires, or merges with, another company, the obligation to report such merger transaction will be triggered as it may have a restrictive effect.

4. Electronic submission and delivery of documents in KFTC proceedings

The current Fair-Trade Act does not provide for an electronic document management system. As a result, inefficiencies and inconveniences may arise as reports and various supporting materials need to be submitted in paper documents to meet various reporting obligations and for the examination proceedings of the KFTC. Thus, disruptions in the transaction schedule set by the statutory deadline by the Korean Commercial Code may occur by the delay in the merger reporting process, for example, in M&A transactions which often require a timely and efficient process.

To address this issue, the Fair-Trade Act Amendment Bill introduces an electronic system for submission and delivery of documents to reduce costs and inconvenience in the KFTC review process and improve the overall efficiency thereof (Article 98(2) and 98(3) of the Fair-Trade Act Amendment Bill). Under the Fair Trade Act Amendment Bill, ① documents required for review may be submitted electronically through an electronic information processing system of the KFTC, ② with the consent of the reporting company, the KFTC will be able to deliver or notify review-related documents such as its resolutions electronically through its electronic information processing system, and ③ the reporting company may have an access to the documents electronically anytime and anywhere.

The introduction of such an electronic information processing system is expected to dramatically reduce the cost and time currently required for the reporting companies to visit the KFTC or mail paper documents under the existing system, thereby shortening the time required for the entire reporting and review process.

5. Participation of Reporting Companies in KFTC Examination Process

Under the current Fair-Trade Act, parties of a merger are granted the right to request a preliminary review before proceeding with the merger (Article 11, Paragraph 9 of the Fair-Trade Act), but not allowed to participate more actively in the merger examination process. Instead, merger parties could only passively wait for the KFTC's decision upon its examination of the case and have to accept the decisions of the KFTC. The Fair-Trade Act Amendment Bill introduces a system that allows companies involved in M&A transactions to propose, in the KFTC review/examination process, voluntary remedies to address such concerns over restriction of competition in the market, as the merger parties themselves may have much information about the competition in the market and know best how to resolve the risk of the restriction of competition.

To address these issues, the proposed amendments to the FairTrade Act establish a system that allows companies involved in M&A to submit voluntary remedies to resolve competition. In detail, ① a provision has been included for corporate mergers to allow the reporting companies to present measures to alleviate concerns about competition restrictions in writing (Article 13-2, paragraphs 1 to 2, in the Fair Trade Act Amendment Bill); ② In cases where the voluntary corrective measures are deemed insufficient to effectively address concerns about competition restrictions, the KFTC is empowered to request their modification (Article 13-2, paragraphs 3 to 5, in the Fair Trade Act Amendment Bill); and ③ If the KFTC finally imposes corrective measures, it may consider the voluntary corrective measures submitted by the reporting companies (Article 14, paragraph 2, in the Fair Trade Act Amendment Bill).

If the Fair Trade Act Amendment Bill is passed by the National Assembly, it is anticipated that the corrective measures by KFTC will be more effective and the likelihood of successful implementation will increase, as companies will be able to utilize their abundant market information in the adoption of these measures. Furthermore, the introduction of voluntary corrective measures, which is already operational in major competitive markets like the United States, the European Union, and the United Kingdom, is expected to enhance the alignment and compatibility between M&A review system of KFTC and overseas regulations.

6. Conclusion: Evaluation of the Fair-Trade Act Amendment Bill

According to the KFTC's assessment, the types of cases that will be exempted from the reporting obligation through the Fair Trade Act Amendment Bill accounted for approximately 42% of the merger cases reported in 2022. With the actual enactment of the Fair Trade Amendment Bill, it is expected that there will be substantial reductions in the time and cost required for companies to report their mergers, and the number of merger filings with the KFTC is also projected to decrease significantly.

Furthermore, the Fair Trade Act Amendment Bill that institutionalizes the submission of voluntary corrective measures, which have been informally conducted in the past, can be seen as an official channel for companies to communicate with the KFTC during the merger review process. This also reflects a policy stance of conducting stricter scrutiny when concerns about competition restrictions exist and restricting mergers if efficient measures to address competition concerns are not provided.

The Fair Trade Team at Lin has a wealth of experience in M&A and antitrust matters. We have recently represented "S" Limited Company in a merger with total assets of more than KRW 2 trillion, in its obtaining a corrective measure remedy without a full and lengthy review process of the KFTC in a business transfer transaction in which "S" Limited Company, which is subject to pre-reporting obligation for a merger with total assets of more than KRW 2 trillion, acquired the fixed assets of "C" Corporation and successfully completed the merger with the necessary organizational change. If you need expert assistance with a wide range of fair trade and antitrust matters, including the complex merger filing process, our highly skilled Fair Trade Team is here to serve you with professionalism and efficiency.

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If you have any inquiries regarding the above, please do not hesitate to contact Mr. Jong Sik Kim (Tel. +82-2-3477-8695) of the Fair Trade Team at LIN.

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Related Members



Jong Sik KIM

Attorney

T. 02-3477-8695

E. jskim@law-lin.com



Shin Min KANG

Senior advisor

T. 02-3477-8500

E. smkang@law-lin.com



Duk Ho KIM

Attorney

T. 02-3477-8686

E. dhkim@law-lin.com

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3F #306 G5 Central Plaza 27, Seochojungang-ro 24-gil, Seocho-gu,
Seoul, Republic of Korea

Tel: (+82) 2-3477-8695 Fax: (+82) 2-3477-8694