Fair Trade Commission

# KFTC Announces Draft Amendments to M&A Review Standard and M&A Notification Guidelines

## Easier notification and expedited review of M&A with clear investment purposes

October 17, 2022 M&A Division

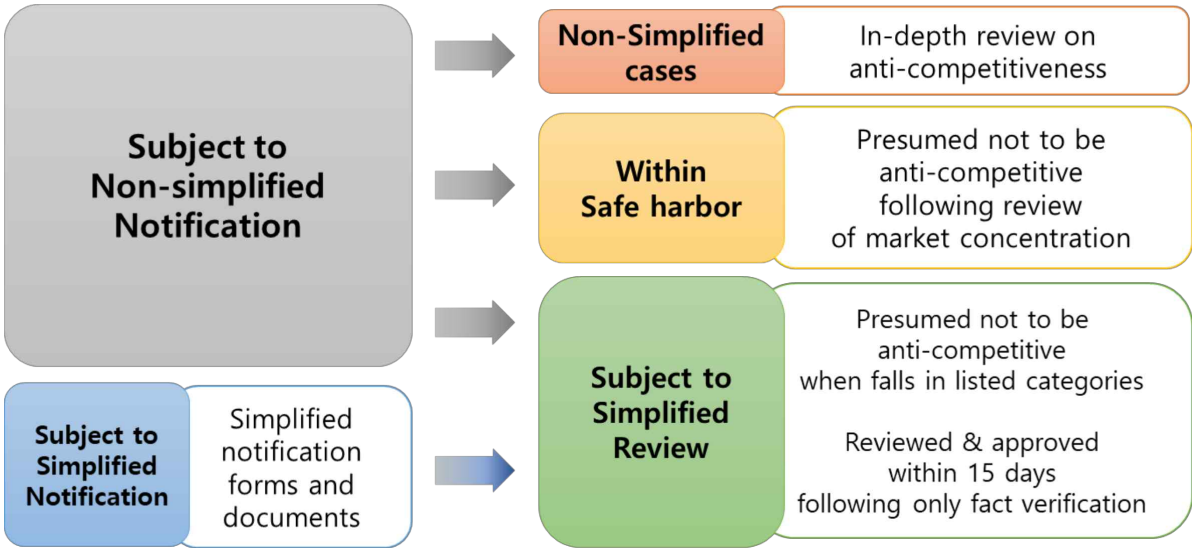
The Korea Fair Trade Commission (led by Chairperson Ki-Jeong Han, hereinafter the "KFTC") announced an administrative notice of draft amendments to the Review Standard for Combination of Enterprises (hereinafter "M&A Review Standard") and Guidelines for Reporting Business Combinations (hereinafter "M&A Notification Guidelines") which will take place for 30 days starting from October 18 to November 17, 2022.

The purpose of the draft is to reduce burden placed on companies for merger notification and efficiently respond to an increasing number of mergers subject to review by adopting simplified review and simplified notification after identifying types of mergers in which in-depth review is less necessary. The draft amendments expand the scope of mergers subject to simplified review and simplified notification*, specifically with regard to mergers with clear investment purposes such as additional investment for private equity funds (PEF) as a new limited partner, concurrent holding of an executive position following investments in venture and startup businesses.

* **Mergers subject to simplified review** are presumed not to restrict competition and are, in principal, reviewed only for its truth and correctness and is quickly approved within 15 days after the due receipt of notification. Among them, types of mergers in which fact verification is easy are subject to **simplified notification,** which means that notification forms and supplementary documents are simplified and notifications can be filed online. .

With regard to vertical and conglomerate mergers, if the market share of the merging parties is less than 10% in each relevant market, it was regarded that the merger was unlikely to restrict market competition and thus, the scope of safe harbor* regulations was expanded.

* Presumed to have no anti-competitive concerns if market concentration, market share of merging parties etc. meet a certain criteria




To produce the draft amendments, the KFTC gathered opinions from experts by holding discussions and forming a Taskforce on Merger Control Regime Reform and is planning to finalize and enforce the amendments after pooling opinion from interested parties during the administrative notice period.

## 1. Major amendments to the M&A Review Standard

The purpose of producing a draft amendment of the M&A Review Standard is to respond effectively to an increasing demand for merger review by boosting efficiency of the M&A review system as well as to support business activities and investment by expediting review of mergers with no anti-competitive concerns.

The draft amendment of the M&A Review Standard improves and expands the scope of mergers subject to simplified review, which reflects the trend of more various forms of mergers being used for investment activities as the capital market becomes more mature. Moreover, the draft amendment of the Standard also includes refined safe harbor regulations for non-horizontal mergers and review standards for foreign mergers which are increasing due to reshuffling of global supply chains.

### A. Expanded scope of simplified review for mergers solely for investment purposes

The draft amendment of the Standard adds additional types of mergers that qualify for simplified review on top of those already enumerated in the regulation and expands the current scope of mergers subject to simplified review.

First, financial investors participating as a new limited liability partner by additionally investing in existing institutional PEFs will be subject to simplified review. The Financial Investment Services and Capital Markets Act (hereinafter “Capital Markets Act”) prohibits the limited liability partner from exerting influence on investee companies. According to the Capital Markets Act, limited partners cannot be involved in the decision-making process regards to selection of investee companies, conditions for divestiture of stocks, or exertion for the voting rights of the stocks which the PEF possesses. Considering these regulations, participating in the PEF as a limited liability partner is regarded as mergers solely for investment purposes. However, cases of investment by strategic investors, such as agreeing to manage an investee company together with managing members of a private equity fund, are excluded.

Second, concurrent holding of an executive position that follows mergers which is currently exempt from obligations to notify under the Monopoly and Regulation and Fair Trade Act (MRFTA)*, will now be subject to simplified review.

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**** Article 12 (Reporting on Business Combination)***

*No report is required in any of the following cases:*

*1. Where a small and medium enterprise establishment investment company or a venture capital fund under subparagraph 10 or 11 of Article 2 of the Venture Investment Promotion Act holds shares of a business starter, as defined in subparagraph 2 of Article 2 of the Support for Small and Medium Enterprise Establishment Act (hereinafter referred to as "business starter"), or a startup in excess of the percentage specified in paragraph (1) 1, or becomes the largest shareholder by participating in the establishment of the business starter or the startup jointly with another company;*

*2. Where a new technology venture capitalist or a new technology venture capital fund established under the Specialized Credit Finance Business Act holds shares of a new technology business entity, as defined in subparagraph 1 of Article 2 of the Korea Technology Finance Corporation Act (hereinafter referred to as "new technology business entity") in excess of the percentage specified in paragraph (1) 1, or becomes the largest shareholder by participating in the establishment of the business starter or the venture business jointly with another company;*

*3. Where a company required to report its business combination holds shares of any of the following companies in excess of the percentage specified in paragraph (1) 1, or becomes the largest shareholder by participating in the establishment of any of the following companies jointly with another company:*

*(a) An investment company subject to the Financial Investment Services and Capital Markets Act;*

*(b) A company designated as a concessionaire of a public-private partnership project for infrastructure pursuant to the Act on Public-Private Partnerships in Infrastructure;*

*(c) An investment company (limited to a company provided for in Article 51-2 (1) 6 of the Corporate Tax Act) established for investing in a company, as referred to in item (b);*

*(d) A real estate investment company subject to the Real Estate Investment Company Act.*

Cases in which venture capital funds invest in venture businesses etc. are commonly followed by concurrent holding of an executive position for monitoring purposes. Although investments are exempt from merger notification, notification is required for mergers following concurrent holding of an executive position and thus, this limited investment. Therefore, the proposed amendment eases the burden of merger notification as concurrent holding of an executive position following aforementioned cases will be subject to simplified review and simplified notification.

Third, cases where companies acquire real estate, such as land, warehouses, office buildings etc., for investment purposes will be subject to simplified review. As the real estate is a fragmented market, it is difficult to assume that a particular individual or group could restrict competition. Under the current regulation, only mergers pursued by real estate investment companies are subject to simplified review.

Lastly, the draft amended Standard additionally includes mergers with clear investment purposes on top of those already enumerated, such as cases of exertion of voting rights for stocks being prohibited, which can act as a basis for carrying out simplified review.

B. Refined simplified review standards for foreign mergers that do not affect the domestic market

The current M&A Review Standard stipulates that mergers in which the acquired company is a foreign company without any influence on the domestic market are subject to simplified review. Thus, the KFTC made amendments to the M&A Review Standard by providing factors* that can be used to determine whether a merger has influence on the domestic market and also included cases to refer to so as to enhance the predictability of companies and carry out thorough review.

*Nationality and business region of the acquired/acquiring firm, acquired company's current or future business areas, turnover rate of the acquired company in the domestic market etc.

C. Expanded scope of safe harbor regulations for non-horizontal (vertical, conglomerate) mergers

As non-horizontal mergers including vertical mergers pursued to secure a stable supply chain and conglomerate mergers pursued to new industries showed an upward trend due to reshuffling of global supply chains and the 4th Industrial Revolution, there was increasing need to revise relevant safe harbor regulations.

The current safe harbor criteria for non-horizontal mergers are based on (1) market concentration

(HHI) and market share of the merging parties, and also stipulates that (2) respective merging parties should rank 4th or lower.

Regarding cases in which there are powerful competitors with higher market share than the merging parties in the relevant market, although it could be presumed that such cases would raise few anti-competitive concerns when considering the merging parties' weak market position and strong competitive pressure from competitors, they did not fall under the safe harbor criteria because market concentration was deemed high according to current regulations.

Thus, by refining the current safe harbor criteria, the KFTC provided a basis for presuming there are no anti-competitive concerns regardless of market concentration when the share of the merging parties in each relevant market was less than 10%.

## 2. Major amendments to the M&A Reporting Guidelines

The M&A Reporting Guidelines lists mergers subject to simplified notification, a system that allows businesses to conveniently notify mergers by submitting simplified notification forms and documents as well as using an online system. There is a need to enhance convenience of businesses by ensuring mergers which qualify as cases with no anti-competitive concerns under clear and objective criteria to be subject to simplified notification.

The draft amendment of the Guidelines adds four types of M&A subject to simplified notification. First, establishment of project financing vehicles (PFV) will additionally be included as mergers subject to simplified notification. Establishment of PFV is an example of M&A involving a special-purpose company that is established solely for a specific project and liquidated upon termination of the business (subject to simplified review under current regulations) and thus are eligible for simplified notification as there are clear supporting laws and leave no room for subjective judgement.

Moreover, through the amendment of the Review Standard, additional investment after establishing institutional PEF as well as concurrent holding of an executive position following investments in venture businesses by venture capital funds will be subject to simplified notification. In addition, when businesses file a formal notification after being informed during the voluntary pre-merger review process that no anti-competitive concerns are raised, and when there are no substantial changes in facts or in the market, the proposed merger can be subject to simplified notification.