Kluwer Competition Law Blog

KFTC Introduces Standards for Reviewing Innovation Market and Big Data Mergers

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On February 26, 2019, the Korea Fair Trade Commission ("KFTC") announced in its official press release that, as of February 27, 2019, a new set of standards for reviewing mergers in R&D-intensive industries and those involving "big data" will be introduced in the Merger Review Guideline ("Amended Guideline"). The Amended Guideline marks one of the most significant progress in the KFTC's announced move toward bringing "innovation market" and "big data" issues within its regulatory purview, and we expect this to have a real impact on companies contemplating potential merger transactions in the relevant industries in terms of the level of scrutiny and review timeline. For your quick reference, we provide below a brief summary of the new review standards in the Amended Guideline.

Market definition

While maintaining its existing analytical framework for market definition, the Amended Guideline adds that a separate "innovation market" can be defined if "the relevant industry can be characterized as an R&D-intensive industry in which R&D capacity is considered as an essential parameter of competition or the relevant market is driven primarily by continuous innovation competition, and at least one of the parties to the relevant transaction can be regarded as a significant innovator."

The Amended Guideline goes on to suggest that such "innovation market" may be defined narrowly to include "all overlapping and adjacent fields of R&D" or more broadly to also encompass the relevant product markets in which the relevant parties are currently active. According to the KFTC's press release, the broad language of the Amended Guideline reflects the KFTC's recognition that the competitive effects of mergers in R&D-driven industries can often extend beyond the R&D pipelines of the parties involved and may lessen effective competition in the relevant product markets as can be seen in takeovers of technology start-ups with significant patent portfolio by larger tech companies who are already active in the relevant product markets.

Criteria for gauging market concentration in innovation markets

The Amended Guideline recognizes that the traditional approach to gauging the level of market concentration in product markets (based primarily on revenue-based market shares) may not be workable in the context of innovation markets. Based on this understanding, the KFTC set forth the following criteria for assessing the level of concentration in innovation markets.

- Size of R&D investments by the relevant parties
- R&D-specific assets owned and operated by the relevant parties
- Overall size of the relevant parties' patent portfolio and the number of significant patents based on number of citations
- Number of competitors who are active in the relevant R&D field

Criteria for assessing the competitive effects of mergers in innovation markets

The Amended Guideline sets forth the following criteria for assessing the competitive effects of mergers in innovation markets.

- Whether the parties are significant innovators in the relevant markets
- Closeness of R&D competition between the parties based on their past/present R&D activities
- Whether there will be a sufficient number of players remaining in the relevant innovation market post-transaction
- The anticipated technology gap between the combined entity and its competitors post-transaction
- Whether the transaction would result in elimination of potential competition in the relevant product market

Standards for reviewing mergers involving "big data"

The Amended Guideline defines "big data" as "an information asset consisting of a set of information which is collected for various purposes and systematically managed, analyzed and/or otherwise utilized." As for mergers involving "big data", the Amended Guideline provides that effective competition in the relevant markets may be restrained if "the combined entity can establish, strengthen or maintain its market dominance based on concentration of information assets," and provides the following criteria for assessing the anti-competitiveness of the merger involving "big data".

- Whether there is no other lesser anti-competitive alternative to acquiring the target information assets through a merger
- Whether the combined entity would have the ability and the incentive to restrict access to its information assets by its competitors post-transaction
- Whether restricting access to the combined entity's information asset would restrain effective competition in the relevant market
- Whether the transaction would reduce the level of non-price competition in the relevant market by reducing the incentive for the combined entity to improve the quality of its services in terms of collecting, maintaining, analyzing and otherwise utilizing its information asset.

While the Amended Guideline is expected to encourage a higher level of scrutiny for future deals in highly R&D-intensive industries, how the KFTC would implement the new regulatory framework in practice is not yet clear. It is possible that the KFTC may refer to the major precedents from other jurisdictions involving innovation market and big data (e.g., *Dow/DuPont* and *Siemens/Alstom*), but the KFTC may eventually establish its own analytical framework as the KFTC reviews more cases involving innovation market and big data.

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