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Antitrust ADVISORY ■

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Businesses with Activities in South Korea and the U.S. Need to Focus on Antitrust Issues in Both Countries

As the global economy becomes more interconnected, companies find themselves not only subject to the antitrust and competition laws of their own country, but also those of countries around the world. Practitioners advising companies active in both South Korea and the U.S. were reminded of this recently when South Korea's competition authority announced new merger guidelines, and decisions were handed down in two U.S. antitrust cases involving the alleged price fixing of goods imported from or sold in South Korea.

A summary of these developments is provided by Jang Hyun Ka, a competition partner at Lee & Ko in Seoul who recently was seconded to Alston & Bird's Washington, DC, office, and Alston & Bird's antitrust team.

KFTC Amends Guidelines for Review of Innovation Mergers and Big Data Mergers

The Korea Fair Trade Commission (KFTC), South Korea's regulatory authority for economic competition, recently amended the KFTC Merger Review Guidelines for "innovation (R&D)" mergers and mergers involving "information assets" such as Big Data, effective February 27, 2019. The guidelines were amended because the KFTC recognized that mergers involving evolving industries and those that possess large amounts of information cannot be reviewed accurately for competitive concerns according to the pre-amendment guidelines.

In order to assess more precisely the anti-competitive effects of innovation mergers and mergers involving information assets, the following provisions were added to the amended guidelines.

On the innovation issue:

- If (1) innovation is essential to the industry of the merging parties, or there is continuing competition on innovation in that industry; and (2) one of the merging parties is a significant competitor on innovation, then the innovation market (where innovative activities occur) may be defined as either a separate market or together with the manufacturing or sales markets.

- An innovation market may be defined even when the merging parties have not yet released their products but are researching and developing products.
- The guidelines provide alternative criteria to calculate market concentration in an "innovation market," such as the size of R&D expenditures, the size of specialized assets, and capabilities for innovation activity.
- The guidelines provide specific factors to assess potential anti-competitive effects of innovation mergers, such as (1) whether the merging parties are important innovators in the relevant area; (2) the proximity or similarity of various innovative activities previously or currently undertaken by the merging parties; or (3) whether there will be sufficient remaining companies that substantially participate in competition to innovate.

And on the information assets issue:

- An information asset is defined as "a collection of information collected, aggregated, analyzed, and utilized for various purposes."
- In addition to existing general factors to assess the anti-competitive effect, the guidelines provide extra factors to assess the competitive effects of a merger involving information assets: (1) whether the information assets being acquired through the merger have substitutes; (2) whether the merger would increase the parties' incentives or ability to restrict their competitors' access to information assets; (3) whether the merger could restrain competition by, for example, restricting access to the merging parties' information assets; and (4) whether the merger may restrain non-price competition by, for example, lowering the quality of services relating to the collection, management, or utilization of information assets.

The amended guidelines illustrate the KFTC's willingness to closely review mergers and acquisitions in innovative industries. Its amendments to the specific innovation market proposals reveal the KFTC's intention to review innovation mergers from a similar perspective to what the U.S. Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) have adopted, given that the DOJ and the FTC have already introduced and implemented the concept of R&D markets. Even in the U.S., however, the FTC is currently holding a series of hearings to assess how its enforcement efforts may be influenced by the rise of companies with transformative technologies, and its Bureau of Competition recently announced the formation of a technology task force to review antitrust-related issues in technology-related sectors of the U.S. economy.

However, the KFTC's amendments concerning mergers involving information assets may be more controversial. The major category of information assets is Big Data, but there is no firm consensus globally on how to assess the anti-competitive effect of Big Data mergers. It is presumed that the KFTC established the criteria by referring to the Big Data merger cases, which were previously handled in the U.S. and the EU, but the criteria appear to be abstract and the KFTC has yet to provide any further explanation on how the criteria will be applied. Furthermore, there are no guidelines on how to weigh the anti-competitive and pro-competitive effects of a merger, such as high-quality search results for consumers. Thus, it is difficult to predict exactly how the criteria will actually affect future merger reviews. Therefore, companies seeking to undertake acquisitions in industries involving significant data accumulation, such as search engines, social media, or financial services, should take particular care during deal preparations and the merger notification process.

Two U.S. Price-Fixing Cases Draw Attention to U.S.-Korean Commerce

Jury Verdict in In Re Korean Ramen Antitrust Litigation, No. 3:13-cv-04115 (N.D. Cal.)

On December 18, 2018, a federal jury in California found that two Korean ramen companies, and their U.S. subsidiaries, had not conspired to fix the prices of Korean ramen noodles following a rare antitrust class action jury trial. The case had its roots in a 2012 investigative report by the KFTC, which found that makers of Korean ramen had colluded, imposed fines of more than $100 million on each competitor, and ordered the companies to stop sharing pricing information. Three years later, in late 2015, the KFTC's order was reversed by the South Korean Supreme Court.

In the intervening time, however, direct and indirect U.S. purchasers of Korean ramen brought class action lawsuits in the U.S. District Court for the Northern District of California against Nong Shim Co. Ltd. and Ottogi Co. Ltd., and their American subsidiaries Nongshim America Inc. and Ottogi America Inc. The lawsuit claimed that as a result of the defendants' alleged price fixing, any person or entity in the U.S. that purchased Korean ramen directly or indirectly from any defendant between spring 2003 and January 2010 paid a higher price than they would have otherwise paid in a competitive market. The plaintiffs sought damages and attorneys' fees of $500 million.

In 2017, the court denied a motion for summary judgment from the defendants, finding "ample (although hotly disputed) evidence of a conspiracy by the defendants to fix the price of Korean ramen in South Korea that was fraudulently concealed from consumers." Instead, the court allowed the case to continue to trial because it found that there were too many factual disputes in the case to be resolved without a trial, especially as to whether the alleged conspiracy impacted ramen prices in the U.S.

After nearly five and half years of litigation and a five-week trial, the jury deliberated for just three hours before returning its unanimous verdict finding no conspiracy and therefore no U.S. antitrust liability for the defendants. While the defendants are no doubt pleased by the conclusion to the case, the cost of litigating was significant. Despite having the KFTC's investigative report as a roadmap, proceedings in the U.S. included nearly 100 depositions of fact witnesses – mostly in South Korea – and experts, examinations in South Korea of witnesses pursuant to letters rogatory issued under the Hague Convention, and a host of other pretrial proceedings.

This case likely will be held up as proof that even after a foreign antitrust enforcement agency imposes fines for collusion, private U.S. plaintiffs still face a significant burden to prove that they were impacted by the collusion. But companies engaged in cross-border commerce should also remember that this case is also an example that even if companies ultimately prevail in litigation, the time and money expended defending themselves against antitrust allegations can be significant. And, though it might not have avoided the allegations and burdens here, many companies utilize antitrust compliance programs to help prevent and identify activities that could lead to allegations of antitrust misconduct.

After initially requesting a new trial on March 6, 2019, both the direct and indirect purchaser plaintiff classes withdrew their motion and accepted the jury's verdict, effectively ending the litigation.

Guilty Pleas, Fines, and Civil Damages for Rigging Bids on U.S. Fuel Supply Contracts in South Korea, No. 2:18-cv-01456 (D.D.C.)

On November 14, 2018, the DOJ announced that South Korea-based companies SK Energy Co. Ltd., GS Caltex Corp., and Hanjin Transportation Co. Ltd. had agreed to plead guilty to criminal charges and pay a total of approximately $236 million in criminal fines and civil damages for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea.

The DOJ's complaint alleges that the three companies met and communicated in secret with other large Korean oil refiners and logistics companies, and pre-determined which conspirator would win each fuel supply contract. The conspirators then fraudulently submitted coordinated bids to the U.S. military and received far higher profit margins on the fuel they supplied to the U.S. military than on the fuel they sold to the South Korean military and to private parties, according to the complaint.

The guilty pleas and fines were the result of a multiyear investigation by the DOJ, Federal Bureau of Investigation, Department of Defense's Defense Criminal Investigative Service, U.S. Army Criminal Investigation Command, Defense Logistics Agency Office of the Inspector General, Air Force Office of Special Investigations, and other investigative partners. The guilty pleas and $82 million of the fines settled the allegations of criminal violations of Section 1 of the Sherman Act, while the remaining $154 million resolved the allegations of civil antitrust violations and False Claims Act violations because the U.S. government was the victim of the alleged conduct. In addition to the payments, SK Energy, GS Caltex, and Hanjin have all agreed to cooperate with the DOJ's ongoing civil investigation of other alleged co-conspirators and to institute robust antitrust compliance programs.

In seeking damages against the three Korean companies, the DOJ invoked a powerful, yet historically under-used, enforcement tool in Section 4A of the Clayton Act that empowers the DOJ to obtain treble damages for the anticompetitive conduct because the government itself was the victim. As a result, the DOJ was able to recover $90.4 million from SK Energy, $57.5 million from GS Caltex Corp., and $6.2 million from Hanjin, all of which exceeded the individual overcharges from each company.

These guilty pleas and payments serve as a reminder that U.S. antitrust laws can reach companies and individuals around the world who engage in bid rigging and other forms of anticompetitive behavior, even if they are operating entirely outside the U.S., if the activities impact the U.S. economy or its government.

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