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# **1st Session:**

## **Regulation of information exchanges and comparison to other jurisdictions**

## Regulation of Information Exchange under the *Current* MRFTA

- Under the *Current* MRFTA:
  - information exchange **does not constitute** a type of cartel conduct; and
  - a **presumption** of cartel conduct **cannot** be made **solely based on** the exchange of information.
- The Korean courts have ruled that a mere agreement to “exchange information” **alone** would not constitute cartel conduct (e.g., cartel cases involving ramen companies or life insurance companies).
  - If prices are determined independent of any exchange of information, such exchange will not be deemed as cartel conduct.
- The KFTC recognizes the existence of an implicit agreement if there is any act of information exchange ***plus*** additional circumstances (such as **external conformity of behavior**).
  - For example, if there was price information exchange among competitors + changes in price either simultaneously or in close proximity to such exchange (external conformity of behavior).

- ▶ Information exchange as a type of cartel conduct in Article 40(1) 9 of the MRFTA

## Article 40 of the Amended MRFTA

- ① An enterpriser shall neither agree to, nor cause another enterpriser to, engage in any of the following acts that unfairly restrain competition, jointly with other enterprisers through contract, agreement, resolution or any other methods (“unfair cartel conduct”).
1. Price-fixing
  3. Output restrictions
  - ⋮
  8. Bid-rigging (existing provisions)
  9. Acts that substantially restrain competition in a certain transaction area by exchanging prices, outputs and other information (new provision).

Inserted an agreement to exchange information as a type of cartel conduct



- ▶ Information exchange as a basis of a presumption of agreement under Article 40(5) of the MRFTA

## Article 40 of the Amended MRFTA

- ⑤ Two or more enterprisers falling into any of the following shall be **presumed** to **agree** that they would jointly engage in any of the cartel conducts prescribed in Paragraph ①.
  1. Where there is a reasonable probability that the enterprisers may be deemed to jointly engage in such act in light of relevant transaction areas, characteristics of products/services, economic reasons and ripple impact of the relevant act, the number/pattern of enterprisers' contact and other circumstances (existing provision);
  2. Where the enterprisers have exchanged information necessary for the cartel conducts under Paragraph ① (new provision)

Added information exchange as an event that gives rise to the presumption of agreement



## Suggested Preparations for Affected Companies

- **Need to closely manage all incoming and outgoing information**
  - ✓ Prohibit any sharing of sensitive information such as price increase plan through fax, e-mails or meetings.
  - ✓ Refuse any proposals from competitors to share information, and leave records of such refusal.
  - ✓ If providing sensitive information such as a price list or price increase plan to a business partner, place appropriate warnings such as “disclosure to other companies is strictly prohibited.”
- **Need to specify the sources of any lawfully obtained competitor information**
  - ✓ Specify the background and source of any competitor information when such information is obtained through lawful means such as market research, public disclosures, or media materials
- **Need to introduce an internal information management system**
  - ✓ Establish a system for prior/post reports regarding meetings attended by competitors (e.g., association meetings).
  - ✓ Systematic information management to ensure that anti-competitive information is not shared
  - ✓ Use the system as evidence supporting the company’s responsible management, in case of any inquiry from the authorities.

# Panel Discussion

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# **2nd Session: Developments in Cartel Enforcement and Criminal Penalties**

## Details of the Amended MRFTA Provisions on Cartel Enforcement

- **Doubled the maximum amount of surcharge**

Pre-amendment		Post-amendment	
Relevant Turnover	Fixed Amount	Relevant Turnover	Fixed Amount
10%	KRW 2 billion	20%	KRW 4 billion

- **Exclusive criminal referral authority remains the same**
  - ✓ The revocation of the KFTC’s exclusive criminal referral authority for hardcore cartel cases (e.g., price fixing or bid rigging) did not pass the National Assembly
- **The KFTC’s obligations to refer criminal prosecution remains unchanged**
  - ✓ At the request of (i) the Prosecutor General, (ii) the Chairman of the Board of Audit and Inspection, (iii) the Minister of SMEs and Startups, or (iv) the Administrator of the Public Procurement Service
  - ✓ If these authorities found there is an obvious and material violation of the MRFTA



## Changes in Enforcement Authorities for Bid Riggings

- Bid riggings could constitute violations of applicable provisions under the Criminal Code/Construction Industry Act as well as a violation of the MRFTA

Type of Cartel Conduct	KFTC's Exclusive Criminal Referral Authority
All types of cartels (including bid rigging)	O
Bid rigging (obstruction of bid under the Criminal Code /Construction Industry Act)	X (possible to prosecute without a criminal referral from the KFTC)

- ✓ In 2019, the KPS investigated bid rigging case by certain Korean pharmaceutical companies for vaccines procured to the government without criminal referrals of the KFTC
- **Most of the investigation power of the KPS was transferred to the police starting 2021**
  - ✓ The police has the investigation power over violation of the Criminal Code/Construction Industry Act
  - ✓ The prosecutors' office still has the investigation power for violation of the MRFTA

## Changes to Leniency Programs

- KPS’s Guidelines on Leniency Program was issued on December 10, 2020
- Comparison of Leniency Programs of the KFTC and the KPS

	KFTC	KPS
Applicants Subject to Leniency Program	1 <sup>st</sup> and 2 <sup>nd</sup> applicants	
Benefits of Leniency Program	Immunity from criminal referral for both 1 <sup>st</sup> and 2 <sup>nd</sup> applicants	1 <sup>st</sup> applicant: non-prosecution
		2 <sup>nd</sup> applicant: 50% reduction in demanding the level of punishment
		Exemption from forced investigation (arrest/search & seizure etc.) for both 1 <sup>st</sup> and 2 <sup>nd</sup> applicants
Individual Applicant	X	O
Relevant Conduct	Cartel conduct in violation of the MRFTA	Obstruction of bid in violation of the Criminal Code/Construction Industry Act (Hardcore cartel conduct in violation of the MRFTA)

# Panel Discussion

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**3rd Session**  
**Civil Remedies:**  
**Expansions in financial liabilities and**  
**equitable relief**

# I. Injunctive Relief

## Background

- There was no clear rule to claim court injunction prohibiting antitrust violation.
- Available civil remedy for antitrust violation was limited to damage suit after the KFTC decision.

## Article 108 of New MRFTA

- Private parties can 'directly seek injunctive relief from courts to enjoin a unfair trade practices.
- Act subject to the court injunction
  - Any unfair trade practices  
(e.g. Refusal to deal, Imposing unfairly disadvantageous terms, Forced sales target)
- Applicants
  - Private parties actually harmed by unfair trade practices
  - 'Potential' victims who are threatened to sustain damage from such unfair trade practices
- The court injunction is available 'even in the absence of a KFTC investigation or decision'.

## Implications

- Small and medium companies may use the injunctive relief as a leverage strategy to amend unfavorable contract terms.

## II. Court Order for a Document Production

### Background

- No discovery procedure in a civil damage suit.
- Under Civil Procedure Act, party may refuse to comply court's order for document production based on trade secret.

### Article 111 of New MRFTA

- In civil damage suits involving cartel or unfair trade practices, at the request of plaintiff, court may issue an order for submission of documents required to prove damages.
- The party subject to the court order will not be allowed to refuse it without legitimate ground .
- The argument that the documents contains trade secret will not constitute the legitimate ground on which the party can refuse to comply with the order, *if they are 'essential in proving damages'*.
- If the party does not comply with the order, the court may deem that what is intended to be proved by the documents is true.

### Implications

- Increased risk for civil damage suits for cartel or unfair trade practices.
- Easier for victims to secure evidence to prove their harms incurred from antitrust violations.
- Documents that even contain trade secrets may be reviewed 'in camera' if they are essential in proving or assessing the amount of damages.

# Panel Discussion

## 4th Session

# Merger control over online platforms: Recent Korean examples



- Killer Acquisitions
  - ✓ A large company acquires start-ups, and then discontinues the development of the targets’ innovation projects and pre-empts future competition.
  - ✓ These transaction would not be captured by the existing jurisdictional thresholds (based on turnover and total assets) although it concerns acquisitions of highly valued targets.  
(e.g.) Facebook-WhatsApp merger

## Current MRFTA

- A party to the merger should have total worldwide assets or annual turnover of KRW 300 billion or more.
- The other party to the merger should have total worldwide assets or annual turnover of KRW 30 billion or more.
- For foreign-to-foreign mergers, the following local nexus requirement should be satisfied as well: the foreign acquiring company and the foreign target company each has turnover in Korea of KRW 30 billion or more.

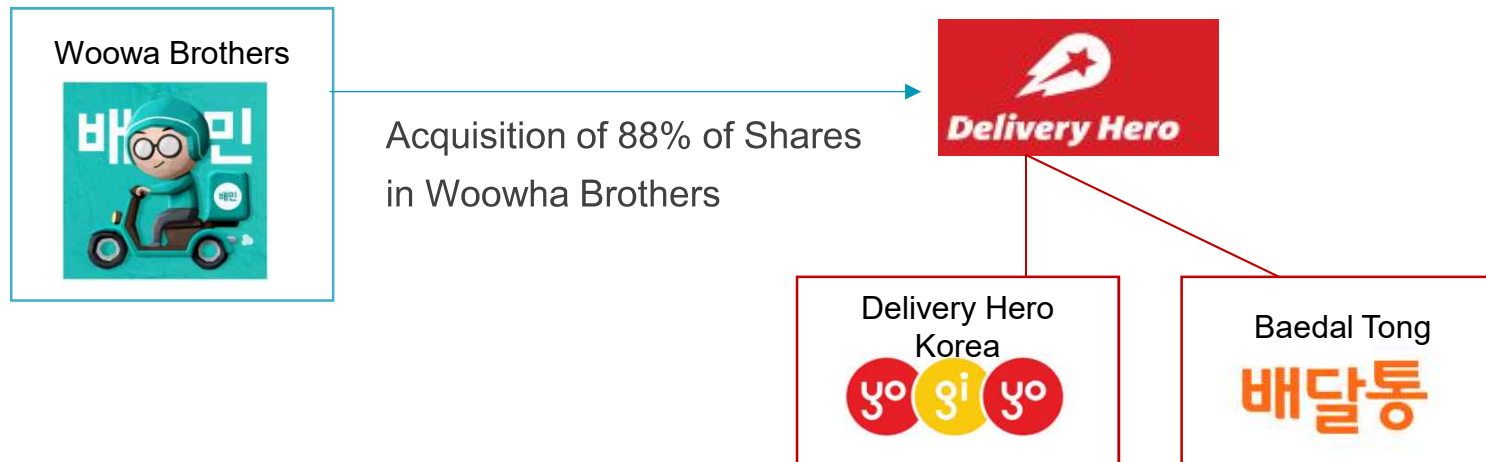
## New MRFTA :Introduction of “Size-of-Transaction Test”

- The new MRFTA introduces a “*size-of-transaction test*” to impose a filing obligation when (i) the acquisition price is above a certain level and (ii) the target company has significant presence in the Korean market, even if the target company’s turnover or total assets is short of the current threshold for filing.
- The specific criteria to determine whether a filing obligation is triggered will be prescribed in the expected amendment of the Enforcement Decree of the MRFTA.

## II. Merger cases between online platforms

### Delivery Hero's takeover of Woowa Brothers

- Deal Structure



- Background

- ✓ Delivery Hero SE (“**DH**”), headquartered in Germany, operates a global food ordering platform with South Korean subsidiaries of Delivery Hero Korea (“**DHK**”, operating Korea’s No. 2 food ordering app “Yogiyo”) and Baedaltong (operating Korea’s No. 3 food ordering app “Baedaltong”).
- ✓ Woowa Brothers (“Woowa”) operates Korea’s No. 1 food ordering app “Baedal Minjok (“**Baemin**)”.

## II. Merger cases between online platforms

### Delivery Hero's takeover of Woowa Brothers (continued)

- Relevant Market Definition
  - Product market: Food ordering application market
  - Geographic market: Domestic (Korean) market
- Market Share Post-Merger

	Based on Transactional amount over the App	Based on Revenue	Based on Number of User	Based on Number of App Download
<b>Combined Market Share of the Parties</b>	99.2%	99.3%	89.5%	98.2%
<b>Other players</b>	0.8%	0.7%	10.5%	1.8%
<b>Total</b>	100.0%	100.0%	100.0%	100.0%

## II. Merger cases between online platforms

### Delivery Hero's takeover of Woowa Brothers (continued)

- Competitive Assessment: There is a high risk of anti-competitive effects such as a reduction in consumer benefits and increase in fees to be paid by restaurants based on the following reasoning.
  - Based on the combined market share for the last 5 years, the proposed transaction is presumed to cause anti-competitive effects
  - The food ordering app business requires significant efforts and capital to secure consumers and restaurants at the early stage. It is unclear whether there would be other new entrants that are able to put sufficient competitive pressure on the merging parties in the near future.
  - There has been no new player which succeeded in achieving market share of 5 % or more despite many new entrants' attempts.
- Remedies Imposed by the KFTC
  - DH was ordered to divest Yogiyo (No. 2 player operated by DHK) within 6 months

# Panel Discussion

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# Q&A



**THANK YOU**

**bkl**