

KFTC Launches Optional Pre-Filing Consultation System and Operational Guidelines

On August 16, 2024, the Korea Fair Trade Commission (KFTC) officially launched its pre-filing consultation system for merger reviews by issuing the Operational Guidelines for Pre-filing Consultations (the “**Operational Guidelines**”), which detail the specific procedures and methods for conducting these consultations.

The objective of the pre-filing consultation system is to enable the KFTC to conduct more thorough and efficient reviews based on a solid understanding of the merging parties’ status, relevant market conditions, and potential anticompetitive effects of reportable transactions. The KFTC hopes that it will enhance the efficiency of merger reviews following formal filings and improve predictability of the timing of approvals, thereby increasing reporting convenience.

The following is an overview of the pre-filing consultation system, including its legal basis and the key elements of the Operational Guidelines.

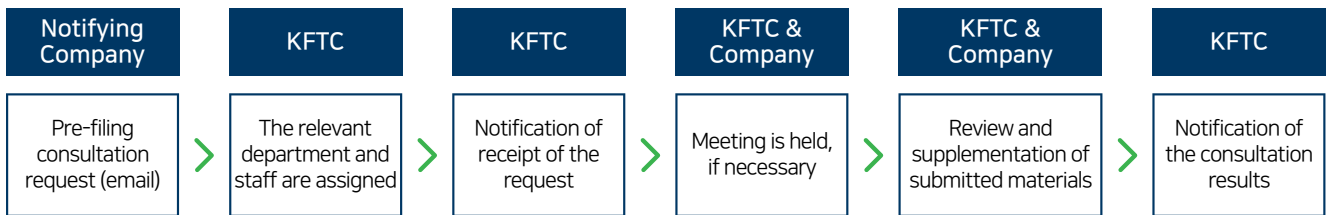
1. Legal Basis and Overview of the Pre-Filing Consultation System

The legal basis for the pre-filing consultation system is found in Section III of the amended Merger Notification Guidelines, which became effective on August 7, 2024. Section III provides that if a merger is expected to be complex—such as when multiple relevant markets are involved, or the transaction structure is intricate—parties may request a pre-filing consultation via email at merger@korea.kr.

The pre-filing consultation system enables merging parties to provide preliminary explanations to the KFTC regarding their relevant industries and the potential impacts on competition of their reportable transactions ahead of submitting a formal merger notification. This, in turn, facilitates more thorough and expedited reviews, since the pre-consultations will provide the KFTC with a comprehensive understanding of the parties involved, the relevant market conditions, and the potential for anticompetitive effects, ahead of the formal notification.

2. Pre-Filing Consultation Procedures Under the Operational Guidelines

The following are the procedures for the pre-filing consultation system, as outlined in the Operational Guidelines:



3. Key Aspects of the Pre-Filing Consultation System Under the Operational Guidelines

A. Applicability

The Operational Guidelines broadly delineate the scope of the pre-filing consultation to include both simplified and standard merger filings. As a result, parties to reportable transactions that are unlikely to raise anticompetitive concerns may also apply for pre-filing consultation if they think their proposed transactions are complicated and can benefit from an extra review time ahead of the formal filing.

B. Timing and Duration

The Operational Guidelines provide that pre-filing consultation requests be made at least two (2) weeks before the formal filing date, with no additional timing constraints. There is also no fixed timeframe for the pre-filing consultation period, allowing the merger parties to move to a formal filing at any point they choose.

C. Procedure

The pre-filing consultation process is initiated when a request and relevant materials are submitted via the designated email address (merger@korea.kr). If the KFTC views that an in-person meeting is necessary, it may be scheduled within five (5) days of the consultation request, with company representatives permitted to attend. The option to use video conferencing is also available, to enhance convenience for both domestic and foreign parties.

D. Documentation Requirements

Documents that are not directly relevant to assessing anticompetitive effects (e.g., financial documents) or require extensive preparation time (e.g., market condition reports) may be excluded or deferred for later submission. Under the current “provisional” merger notification system (available when the parties have a signed MOU or LOI but do not yet have a signed definitive agreement), the documentation requirements are basically as extensive as those for a formal filing, which often means longer preparation times. In contrast, the pre-filing consultation system is expected to facilitate discussions with a more streamlined set of documents.

E. Notice of Consultation Results

The initiation, conclusion, and outcome of the consultation will be communicated via email. This email-based notification process is expected to enhance the overall transparency and credibility of the pre-filing consultation system while also improving the predictability of the formal review's outcome. However, if the merging parties proceed with a formal filing before the KFTC finalizes the consultation results, the consultation results may merely be communicated verbally or may not be separately provided.

F. Implications

It is hoped that the use of the pre-filing consultation system will help minimize the need for unnecessary supplemental submissions after the formal filing, leading to a shorter review period. Moreover, to ensure consistency between the pre-filing consultation and the formal review, the process will be designed so that—absent any significant changes in facts or market conditions—the results of the consultation will guide the formal review, even if there is a change in the case handler.

As with any new system, it remains to be seen how the new optional pre-filing consultation system will play out in practice. In particular, it will be worth monitoring whether for the most part the new system will indeed help reduce the overall review time by engaging in discussions early and ahead of the formal filing or may end up simply adding an extra review time before the formal filing without any corresponding reduction of the post-filing review time or offsetting efficiencies. Of course, when a proposed transaction is truly complicated and raises a multitude of legitimate issues, no amount of pre-filing consultation will likely reduce a lengthy and extensive post-filing review time.

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Antitrust/Competition

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