The Role of Competition Law and Competition Policy in the Financial Industry

Abstract

Keyword(s):competition law, antitrust law, competition policy, industrial policy, financial regulation, financial stability, prudential regulation, financial industry, fintech, financial consumers, payment platform, two-sided market, cluster market

After the global financial crisis of 2007-2008, the financial markets of various countries have significantly changed, due to the consolidation of financial institutions during the crisis, changes in financial regulation, and the impact of financial technology. Therefore, in order to better understand these changes, this study conducted a review of relevant literature and cases in Europe and the United States on competition law issues of and competition policies on financial industry, and explored legal reforms promoted by the financial or competition authorities in response to fintech, such as open banking or open finance. The study also analyzed domestic financial regulations that have a significant impact on domestic financial market competition. Then based on the legal system and existing practice of competition law, the study summarized competitive law research, literature analyses, and case studies, and made suggestions at the conflict and reconciliation between domestic financial regulation and competition policy, competition policy in the financial industry, and the application of the Fair Trade Law (“FTL”). The main findings and recommendations of the study are as follows:

1. Financial regulation shall not be a surrogate for competition policy, and competition authorities should continue to implement competition policy in the financial industry. A competitive financial market, with appropriate financial regulation, can help improve efficiency, innovation, and enhance consumer welfare, while also maintaining financial stability. Financial prudential regulation and competition policy are both essential for ensuring a competitive and stable financial market. The pursuit of large scale for financial institutions and the concentration of financial markets may lead to financial institutions taking risks

due to their size or their "too big to fail" status, which can harm financial stability. Although financial authorities and competition authorities are independent, they should coordinate and cooperate with each other.

2. With regards to the market definition and the determination of market power in the financial industry, the existing definition and division of domestic financial business financial laws and regulations can provide a basis for the concept of the cluster market, but Fair Trade Commission (hereinafter referred to as "FTC") should not be constrained by this concept. FTC may consider defining the relevant market by starting from the type of business legally operated by the financial institution under the existing financial regulations, and then examining reasonable substitutes for the relevant goods or services under the financial business based on available data. If FTC intends to adopt the cluster market concept in individual cases, especially merger cases, it should also examine, in terms of substitution effect on demand, whether there is consumer preference for the convenience of grouping goods and services or the economy of providing a cluster of goods or services, i.e. network effects augmented by economy of scope on the demand side, or whether the provision of the cluster of goods or services by competitors has become a market entry barrier. In the future, based on the development of domestic digital financial platforms, FTC may also consider examining, by the cluster market concept, the demand and supply of goods or services on digital financial platforms to define the relevant markets. Traditional platforms for financial services or goods, and various emerging digital financial platforms, including payment platforms, are mostly two/multi-sided transaction platforms so it is necessary to apply two/multi-sided market theory in order to accurately evaluate the characteristics and market power of these platforms. In the event that FTC defines the entire two-sided market for the two-sided transaction platform as a single relevant market, FTC should carefully prove that the platform’s vertical restraint in one side of the market will result in the anticompetitive disadvantages outweighing its overall procompetitive benefit.

3. In terms of horizontal, vertical, or conglomerate mergers between financial institutions (including those involving financial holding companies), FTC has

long placed importance on the pursuit of economies of scale and scope, and internationalization by domestic financial industry. However, compared to the United States, the regulatory framework for financial institution mergers neither adequately considers competition factors, nor has caps on the size and concentration of depository institutions or non-depository institutions in order to address the issue of "too big to fail". The relevant financial regulations also have few restrictions on exemption concerning financial institutions in distress from merger filing with FTC, and FTC has no mechanism for involvement before or after exemption. Therefore, in reviewing mergers between financial institutions, FTC should prioritize competitive effects and efficiency, and consideration about industrial policy should be evaluated by the Financial Supervisory Commission (“FSC”) according to the relevant financial regulations. In terms of the benefits of financial institutions achieving economies of scale or scope economies, only those that can increase the overall consumer welfare should be regarded as overall economic benefit of the mergers under Article 13 of the FTL.

4. In accordance with Article 13 of the FTL, FTC may, in financial industry merger cases, impose conditions as structural remedies, such as the sale or disposal of assets and business, including appropriate terms and conditions for qualified purchasers and related purchases or licenses, which may require the approval of FSC. As for the competitive impact on regional finance arising from the consolidation of branches involved in the mergers between financial institutions (including how to assess the importance of branches under the impact of fintech), and how to assess the impact of online/mobile banking, fintech, or various digital financial services on the relevant geographical market definition in individual case, the key is whether there are clear data available on the pertinent users’ physical residences and locations, and not incurring an excessive burden on provision of information by enterprises.

5. In addition, financial industry mergers involving non-financial businesses are mainly conglomerate mergers of financial and non-financial businesses establishing new joint ventures to engage in digital financial services or financial information services, where these joint ventures also operate digital platforms in

two/multi-sided markets. In such cases, FTC considered the market shares, numbers of customers, and network effects of the participating businesses in the relevant non-financial markets, the trend of ecosystems established by non-financial businesses cooperating with financial institutions, and competition between ecosystems, the impact of users' multi-homing and switching costs, data-related market power, and non-price competition in personal data protection. In the future, if in such merger cases there are anticompetitive concerns that involve digital financial information services or the possession of specific databases by participating businesses and may require structural remedies to correct, data silos, data access, and interoperability may be essential for remedies instead of traditional assets disposal.

6. FSC has advocated the policies of "separation among banking institutions" and "separation of banking and commerce" and imposed prohibition against interlocking directorates in financial regulations for financial holding companies, banks, and insurance companies. This helps address the weaknesses that Subparagraph 2 and Subparagraph 5 of Paragraph 1 of Article 10 of the FTL are hardly able to define interlocking directorates as mergers and therefore make the FTL difficult to evaluate the competitive effects therefrom. These policies and regulations from the FSC may strengthen the merger control for domestic financial industry.

7. Financial regulations, based on the purpose of prudential supervision and control over the financial institutions' financial and business operations, etc., may restrict rates or constrain specific market competitive behaviors. Moreover, financial industry associations' self-regulatory rules required by FSC or resolutions adopted by financial industry associations may also affect the competition of financial product/service rates. Whether these regulations, rules, or resolutions are exempted from the FTL, especially the prohibition of concerted actions, is one of the traditional issues related to competition policy on and the application of Article 46 of the FTL to the financial industry. FSC may, to the extent necessary, promote legislation or amend financial regulations to exempt the insurance industry from the FTL in order to maintain the soundness of

insurance companies or strengthen consumer protection. In order to enhance the certainty of legal compliance by domestic insurance industry, FTC may set forth and demonstrate the principles, types, and examples of the safe harbor related to non-concerted actions for the insurance industry in the guideline. If whether any concerted action falls into the safe harbor is in doubt, FTC may suggest that the enterprises should apply for approval under Article 15 of the FTL.

8. When reviewing vertical restraints of payment platforms, FTC should focus on market definition in order to determine whether a payment platform has dominant market power, and it is legitimate to require the payment platform to license or accept data access under essential facility doctrine. However, in the event that the payment platform is not a monopolist, FTC may also invoke Paragraph 2 or Paragraph 5 of Article 20 of the FTL to intervene in related vertical restraints, but FTC is also required to elaborate and show the anticompetitive disadvantages of the vertical restraints on one side of the platforms outweigh their benefits of promoting competition.

9. The issue of standardized contracts between financial service providers and financial consumers covered by the Financial Consumer Protection Act ("FCPA") should be regulated by the FCPA and handled by the Financial Ombudsman Institution. However, if fintech companies or third-party payment companies, which are not covered by the FCPA, conceal material trading information from or use asymmetry information against the users of their financial services, as set forth in the Fair Trade Commission Guidelines on the Application of Article 25 of the Fair Trade Law, FTC may invoke Article 25 of the FTL to rectify such violations.

10. FTC and the FSC may consult and exchange information on the following matters under Paragraph 2 of Article 6 of the FTL: (1) approval of FSC related to structural remedies in merger control, data access to or interoperability of digital financial information services, and the necessity of structural remedies; (2) the data needed for determining relevant product or geographic markets; (3) the restrictions on interlocking directorates in financial industry and their impact on financial market competition; (4) the proposed amendment of financial

regulations, such as insurance industry regulations, to exempt the FTL to the necessary extent; (5) principles, types, or examples to demonstrate the safe harbor of non-concerted actions for the insurance industry in the guideline, and financial institutions' applications for approval under Article 15 of the FTL; and (6) assistance in financial institutions' legal compliance with both financial regulations and competition law.