Korea Communications Commission Announces "Guidelines on Fair Internet Network Use Agreement"

On December 26, 2019, the Korea Communications Commission (the "**KCC**") announced its "Guidelines on Fair Internet Network Use Agreement" (the "**Guidelines**") to prevent unfair discrimination between large companies and SME's (small and medium-sized enterprises) in Korea and abroad, and to minimize risk of potential damage to users at the conclusion of Internet network use contracts. The Guidelines will become effective on **January 27, 2020.**

Although the Guidelines are not legally binding, they may serve as a practical basis or reference for any disputes that may arise over a network use agreement or a relationship with a user.

Accordingly, businesses should consider reviewing the Guidelines closely, as it relates to the execution of network use agreements going forward, and to ensure that **adequate user protection measures are in place.**

1. Key Provisions of the Guidelines

- **Scope of Application:** The Guidelines are applicable to agreements on the use of Internet between an Internet Service Provider (ISP) and a Content Provider (CP) or between an ISP and a Content Delivery Network (CDN)[1] service provider.

- **Principle of Agreement:** Each party to a network use agreement must not unfairly restrict the other party's legitimate benefits by using its superior position. Further, <u>except in extraordinary situations, each party must endeavor to carry out such agreements in writing, and on a non-discriminatory basis, if they are similar to one another in terms of size, details, among other important factors.</u>

- <u>Provision of Information</u>: If a party to a network use agreement demands an increase in the price of using the Internet, the demanding party must present the other party with a justification for the price increase. If the demanding party fails to do so, the other party may request a reason for the price increase.

- **Unfair Conduct:** Under the Guidelines, a network use agreement falling under any situation described in the below subparagraphs shall be deemed to constitute an agreement that unfairly restricts the other party's rights.

> 1. If a party to an agreement coerces the other party into accepting certain terms only without justification, using its superior position;
> 2. If a party to an agreement unreasonably delays or refuses to execute the agreement as presented by the other party;
> 3. If a party to an agreement demands the other party to conclude, or refuse to conclude, an Internet network use agreement with a third party without justification; or
> 4. If a party to an agreement presents the other party with terms, which unfairly restricts competition with a third party.

  - <u>A party to a network use agreement must not demand any terms of use that are much less favorable to the other party when compared to the terms of its other network use agreements.</u>

1. A Content Delivery Network (CDN) is a globally distributed network of web servers or Points of Presence (PoP) whose purpose is to provide faster content delivery of the content providers' digital contents by using the Internet service provider's networks.

- A party must not refuse to enter into a network use agreement (including the all matters agreed upon), or establish any terms that place the other party at an unfair disadvantage (including a demand for a side agreement).

- A judgment on whether there was any unfair conduct at the conclusion of an Internet network use agreement must be made after comprehensively considering all relevant factors. These relevant factors include: (i) the network's composition and cost-sharing structure; (ii) market conditions, including the competitiveness of content and business strategies; (iii) discount rates based on bulk/long-term purchasing, among others; and **(iv) if there is any third network use agreement with similar terms, factors considered in the calculation of the price, and the calculation method.**

- **Protection of Users:** The ISP must take the required measures for the installation/ operation of telecommunications facilities to provide Internet users with reliable Internet services. Additionally:

  - <u>If a change in Internet traffic channels, traffic surge, etc. under the CP's responsibility is expected to have a considerably negative impact on the Internet users' access and use of contents, the CP must provide the ISP with relevant information in advance.</u>

2. Potential Implications

- The Guidelines are not **legally binding,** and a business cannot be punished directly for a violation of the Guidelines.

  - However, in any dispute over a relationship under a network use agreement, the Guidelines may affect such a dispute as it can serve as a practical **basis or a reference** for the court or an administrative agency in rendering a decision on whether there was any unfair conduct, or whether any protective measures were taken for the Internet users.

- The Guidelines do not include any provision that directly govern the terms and conditions of a network use agreement. Most of their provisions provide for general principles on the network use agreement, and specify the types of unfair conduct under the "Monopoly Regulation and Fair Trade Act." Thus, the Guidelines are not expected to bring about significant changes on the enforcement of the law.

- However, **as the Guidelines emphasize the comparison with the "terms of other use agreements executed by a party to the relevant agreement,"** the CP (ISP) that executes the agreements with multiple ISPs (CPs) is advised to ensure that the prices under its different use agreements are not considerably different from one another.

- In addition, the Guidelines state that if a change in the channel of Internet traffic, traffic surge, etc. under the CP's responsibility is expected to have a considerably negative impact on Internet users' access and use of contents, the CP must provide the ISP with relevant information in advance. Further, **the CP is advised to establish procedures to check for any circumstance that may necessitate the provision of such information and to give notice thereof if necessary.**

About Shin & Kim's TMT Practice Group

Shin & Kim's TMT practice provides both Korean and foreign-based entities with comprehensive legal advice across all areas of the information and communications technology ("ICT") field. This includes identifying & analyzing key regulatory issues trends, related government, legislative affairs & corporate strategy consulting. Our market-leading professionals possess unparalleled expertise, experience and network within the sector (**including former Vice Minister of the Public Administration and Security, Mr. Young-Ho KIM, and former Vice Minister of the Science, ICT and Future Planning, Mr. Jae-You CHOI).**

Should you have any questions or comments about the contents of this newsletter, or if we can be otherwise helpful, please do not hesitate to contact us.

Contacts

Sinook Kang
Partner
+82-2-316-4059
sokang@shinkim.com

Juneyoung Jang
Partner
+82-2-316-4410
jyojang@shinkim.com

Sang-Woo Lee
Expert Advisor
+82-2-316-1716
swolee@shinkim.com

Junghyun Hwang
Associate
+82-2-316-1775
jhhwang@shinkim.com

Claudia Chong-Ah Hong
Foreign Attorney
+82-2-316-4487
cahong@shinkim.com

SHIN & KIM
법무법인(유)세종