The Merger Control Review

Fifth Edition

Editor
Ilene Knable Gotts

Law Business Research

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This article was first published in The Merger Control Review - Edition 5
(published in July 2014 – editor Ilene Knable Gotts).

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-10-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 45 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require

that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal). Brazil issued its first 'gun jumping' fine this year. In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales

in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in merger hearings before the Competition Tribunal, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with Chile. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and

insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, International Merger Remedies, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year have imposed a variety of such behavioural remedies (e.g., China, the EU, France, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2014

Chapter 24

KOREA

Sai Ree Yun, Seuk Joon Lee, Cecil Saehoon Chung, Kyoung Yeon Kim and Kyu Hyun Kim[1]

I INTRODUCTION

The Monopoly Regulation and Fair Trade Act (MRFTA) is the primary antitrust statute and governs the merger control process in Korea. Under the MRFTA, the Korea Fair Trade Commission (KFTC) is the government agency that oversees the merger control process in Korea.[2] Article 7(1) of the MRFTA sets forth the types of transactions (i.e., business combinations) for which a merger filing with the KFTC may be required. In addition, Article 12 of the MRFTA sets forth transactions that trigger a pre-merger filing requirement and those that trigger a post-merger filing requirement. In general, whether a merger filing is required under the MRFTA is examined under two jurisdictional tests: the size-of-transaction test and the size-of-party test. Whereas the size-of-transaction test applies only to certain types of transactions, the size-of-party test applies to all transactions. Under the MRFTA, there are five types of transactions:

a interlocking directorate;
b merger;
c share acquisition;
d business transfer (i.e., asset acquisition); and
e formation of a new company (e.g., a joint venture).

Among these five types of transactions, interlocking directorates, mergers and the formation of a new company are not subject to the size-of-transaction test.

1 Sai Ree Yun and Kyoung Yeon Kim are partners, Seuk Joon Lee and Cecil Saehoon Chung are senior foreign counsel, and Kyu Hyun Kim is a senior attorney at Yulchon LLC.

2 The Mergers & Acquisitions Division of the KFTC is in charge of merger control matters. The contact information for the Mergers & Acquisitions Division of the KFTC is: 95 Dasom-3ro, Sejong, Korea; Tel: +82 44 200 4363; Fax: +82 44 200 4399; www.ftc.go.kr.

The size-of-transaction test applies to share acquisitions and certain business transfers. With respect to a share acquisition, the size-of-transaction test is satisfied if:

a the number of shares acquired pursuant to the proposed transaction is 20 per cent (or 15 per cent if the target company is a Korean entity and is publicly traded) or more of the total issued and outstanding voting shares of the target company; or

b the acquirer becomes the largest shareholder of the target company, holding 20 per cent (or 15 per cent if the target company is a Korean entity and is publicly traded) or more of the total issued and outstanding voting shares of the target company, pursuant to the proposed transaction.

A business transfer involving the transfer of only a portion, and not all, of the business at issue is also subject to the size-of-transaction test, which is satisfied if the value of the business transfer is 5 billion won or more, or 10 per cent or more of the total assets of the transferor according to its financial statements at the end of the most recent fiscal year. It should be noted that a business transfer involving the transfer of all of the business at issue is not subject to the size-of-transaction test.

Even if a proposed transaction meets the size-of-transaction test, a merger filing with the KFTC is not required unless each of the relevant parties meets the size-of-party test. The size-of-party test is satisfied if either party to the transaction had consolidated worldwide assets or sales of 200 billion won or more during the most recently ended fiscal year; and the other party to the transaction had consolidated worldwide assets or sales of 20 billion won or more during the most recently ended fiscal year. These two thresholds (i.e., 200 billion and 20 billion won) have been established by the Enforcement Decree of the MRFTA.[3]

In addition, a local nexus test applies to a transaction where both parties to the transaction are foreign entities, or where the party with the filing obligation is a Korean entity and the counterparty is a foreign entity. Where both parties to a transaction are foreign entities (i.e., as in a foreign-to-foreign transaction), the local nexus test is satisfied if each party had Korean sales of 20 billion won or more during the most recently ended fiscal year. Where the counterparty to the party with the filing obligation is a foreign entity, the local nexus test is satisfied if the foreign counterparty had Korean sales of 20 billion won or more during the most recently ended fiscal year. When calculating a foreign entity's Korean sales, inter-group sales between the foreign affiliate and its Korean affiliates are excluded to avoid double counting.

However, a transaction that satisfies the jurisdictional and local nexus tests need not be reported to the KFTC if it qualifies for an exemption under the MRFTA. The three most notable exemptions are for an interlocking directorate between affiliates, a share acquisition of which the parties are all specially related persons (i.e., affiliates), and a transaction where either the acquirer or the target is an investment company or a fund that satisfies certain conditions.

3 Under a 2008 amendment to the Enforcement Decree, the thresholds were raised to the current figures to ease regulatory burdens faced by companies undergoing business combinations.

Where a transaction satisfies the jurisdictional and local nexus tests and does not qualify for an exemption, a pre-merger or post-merger filing with the KFTC is required. A pre-merger filing is required for a merger, business transfer, share acquisition or establishment of a new company where either the acquirer or the target has consolidated worldwide assets or sales of at least 2 trillion won. However, in a business transfer transaction, the assets or sales of affiliates are not included in calculating the assets or sales of the target. For all other transactions, a post-merger filing is required. For a tender offer transaction, only a post-merger filing is required, even if the transaction satisfies the pre-merger filing requirement; specifically, the merger filing for a tender offer transaction must be made within 30 days after closing and does not trigger any waiting period.

A pre-merger filing may be made any time between the execution of the transaction agreement and prior to the closing date as long as the KFTC's clearance is obtained prior to the closing date. If the parties to a transaction close the transaction prior to the KFTC's clearance (gun jumping), they may be subject to an administrative fine imposed by the KFTC. Furthermore, the KFTC may also review a transaction on its own initiative even where the transaction does not satisfy the jurisdictional and local nexus tests if it determines that the proposed transaction may have a significant impact on the Korean market.

If the parties to a transaction fail to file a merger notification in violation of the Korean merger regulations, they are subject to a maximum fine of 100 million won under Article 69-2(1) of the MRFTA. The specific amount of a fine imposed by the KFTC is determined in accordance with the Guidelines on Standards of Imposition of Fines for Violation of Rules on Business Combination Notification.

With respect to merger filing and review, the applicable statutes, regulations and guidelines are as follows:

a the MRFTA and the Enforcement Decree of the MRFTA;
b the Guidelines on Methods of Business Combination Notification;
c the Guidelines on Standards of Business Combination Examination;
d the Guidelines on Standards of Imposition of Fines for Violation of Rules on Business Combination Notification;
e the Guidelines on Standards of Imposition of a Corrective Order Regarding a Business Combination; and
f the Guidelines on Imposition of Fines for Non-Performance of a Corrective Order Regarding a Business Combination.

II YEAR IN REVIEW

In 2013, the KFTC reviewed a total of 585 transactions, which represents a 10.1 per cent decrease from 2012. Of these transactions, 434 (approximately 74 per cent) were between Korean entities, while the rest involved foreign entities. Five transactions were granted conditional rather than unconditional clearance:

a Hyundai HCN's acquisition of Pohang Cable Broadcasting;
b the transfer of Incheon Shinsegae Department Store's business from Shinsegae Department Store to Lotte Incheon Development;

c the acquisition of MStar Semiconductor, Inc (MStar) by MediaTek Inc (MediaTek);
d the acquisition of Cymer Inc (Cymer) by ASML US Inc (ASML); and
e the acquisition of Daegu Cable Broadcasting by T-broad Dobong Gangbook Broadcasting.

In the *Mediatek–MStar* merger, MediaTek, the second leading competitor in the global market for system-on-chips (SoC) chips used in digital televisions, acquired 48 per cent of the outstanding shares of MStar, the leading competitor in the same market. As a result, the two companies' market share in the market for SoC chips used in digital televisions amounted to 57.2 per cent. Determining that the parties did not face any real competition in the relevant market, the KFTC concluded that this merger would substantially restrain competition in the relevant market by giving rise to a single dominant entity with the potential to restrict the choice of substitute products available to buyers, particularly Korean television manufacturers. Thus, the KFTC required the parties to lower the prices of their SoC chips within a certain range soon after launching their new SoC chips, and to enter into agreements with buyers providing for certain terms, including price, that are favourable to the buyers.

In the vertical merger between ASML and Cymer, the parties executed an agreement whereby ASML would acquire all outstanding shares of Cymer. At the time of the agreement, ASML had a market share of 83.8 per cent in the market for photolithography systems, which are used to produce semiconductors, while Cymer had a 72 per cent market share in the market for light sources, which are major components of photolithography systems. The KFTC found that this merger would likely foreclose and restrain competition in the relevant markets because alternative sources of supply for photolithography systems and light sources were limited. Thus, the KFTC granted only conditional clearance for the merger, requiring the parties to operate the two business units independently of each other and to deal with upstream and downstream competitors on FRAND terms.

In most of the merger cases that it reviewed in 2013, however, the KFTC granted unconditional clearance. Some notable examples are the merger between Continental Airlines, Inc and United Airlines, Inc, LVMH's acquisition of Loro Piana SpA and the joint venture between POSCO and Air Liquid Korea.

On the other hand, in 2013, the KFTC imposed fines amounting to 277 million won with respect to 16 transactions that were not reported or were reported late. The figures represent a 55 per cent decrease in the number of such cases compared with 2012, when the KFTC imposed 317 million won in fines with respect to 34 transactions that were not reported or were reported late.

The most noteworthy merger review decision issued by the KFTC to date in 2014 is its refusal to grant clearance for the acquisition of Daemyung Optical (Daemyung) by Essilor Amera Investment PTE LTD (Essilor). In January 2013, Essilor, the leading manufacturer of prescription lenses in the global and Korean markets, entered into an agreement with Daemyung whereby Essilor would acquire 50 per cent of Daemyung's outstanding shares. On 8 March 2013, Essilor reported the transaction to the KFTC. Under the MRFTA, the KFTC presumed that the transaction would give rise to an anti-competitive effect because the parties collectively would become the market leader

in the Korean market for short focus lenses with a combined market share of 66.3 per cent, and in the Korean market for progressive lenses with a combined market share of 46.2 per cent; and in each of the two relevant markets, the parties' combined market share was substantially larger than the next leading competitor's. Based on this presumption, the KFTC found that the transaction would likely eliminate competition in the relevant markets and also result in price increases and abuse of dominance by Essilor in the relevant markets. Concluding that no behavioural remedy would sufficiently address the anti-competitive effect of the transaction, on 17 March 2014, the KFTC decided not to grant clearance for the transaction. The KFTC's decision not to grant clearance in this case was the first since its October 2009 decision regarding Lotte Hotel's acquisition of Paradise Global's duty-free retail business.

At present, some of the major merger cases being reviewed by the KFTC are Microsoft's acquisition of Nokia's mobile phone business, the P3 Network joint venture, and Applied Materials' acquisition of Tokyo Electron. The KFTC's decision in the *Microsoft–Nokia* case in particular is eagerly awaited because, while competition authorities in the US and the EU unconditionally approved the merger, China's MOFCOM and Taiwan's Fair Trade Commission cleared the transaction with conditions.

In 2013, there were no amendments to any of Korea's merger-related statutory provisions or regulatory guidelines.

III THE MERGER CONTROL REGIME

The waiting period for the KFTC merger control review varies depending on the type of merger filing method employed. The Guidelines on Standards of Business Combination Examination provide a 15-day waiting period, in principle, for the following types of transactions that may qualify for the simplified review process:

a transactions between affiliates;
b transactions that do not form any controlling relationship (within the target);
c conglomerate mergers by small or medium-sized companies (i.e., companies that do not belong to a business group whose consolidated total assets or turnover amount to 2 trillion won or more);
d a conglomerate merger where no product or service substitutability exists between the parties due to the particular nature of the relevant market; or
e participation in the establishment of a private equity fund or transaction involving an asset-backed securitisation company

The waiting period for the ordinary pre-merger filing is 30 days from the date of filing of notification, but the KFTC may, on its own initiative, extend the waiting period for an additional 90 days, if necessary. The current practice of the KFTC is that, if it views the case as having no effect of restraining competition, it usually clears the transaction within one month (or two months in certain cases) from the date of filing of the notification.

With respect to confidentiality issues, the materials submitted at the time of filing of the notification and thereafter to the KFTC are protected from disclosure to third parties. If a third party requests access to or a copy of such materials, the KFTC

must obtain the prior consent of the submitting parties. The submitting parties are recommended to insert a statement in the notification to such effect.

The KFTC is permitted to impose several remedies if it determines that the transaction restrains competition. Under Article 16(1) of the MRFTA, the KFTC may:

a prohibit the relevant transaction altogether;
b order the total or partial disposal of assets, shares, or both;
c restrict the scope or method of operation of the relevant entity;
d order the resignation of relevant directors;
e order the transfer of business;
f order the relevant parties to disclose the fact that they have received the corrective order; and
g any other necessary measures.[4]

If the parties fail to comply with the corrective measures, the KFTC may impose a penalty of not more than 0.03 per cent of the relevant amount of transaction per day[5] pursuant to Article 17-3 of the MRFTA. Further, under Article 67(6) of the MRFTA, failure to comply with corrective measures is punishable by a prison sentence of up to two years or a criminal fine not exceeding 150 million won.

In certain cases, the parties may apply for reconsideration of the KFTC's decision to the KFTC or appeal the KFTC's decision (or reconsidered decision if the parties had applied for reconsideration) to the Seoul High Court. Both options may be instituted simultaneously. The application for reconsideration must be made within 30 days from the issuance of the KFTC's written decision. The KFTC is required to reconsider its decision within 60 days from the date of receipt of application pursuant to Article 53 of the MRFTA. The relevant parties may also file an appeal before the Seoul High Court within 30 days from the issuance of the KFTC's written decision or reconsidered decision. The Seoul High Court's decision may be appealed to the Supreme Court.

Where the transaction falls under the ambit of responsibilities of other government agencies, such as the Korean Communications Commission or the Financial Services Commission, under the relevant statutes, such as the Electrical Communications Business Act or the Financial Industry Structure Improvement Act, Article 12(4) of the MRFTA provides that the merger filing requirements under Article 12(1) of the MRFTA are not applicable to the relevant transaction.[6] These transactions do not, however, entirely avoid the review of the KFTC, because those other government agencies are still required,

4 On 22 June 2011, the KFTC announced its standard for merger remedies, in which it highlighted its preference for structural remedies over behavioural remedies in merger cases.

5 For example, the value of the relevant business combination refers to the aggregate amount of value of acquired shares and debts in the case of a share acquisition, and the value of the relevant businesses in the case of a business transfer.

6 Article 12(4) of the MRFTA reads as follows: 'The provisions of Article 12(1) shall not apply if the head of the [other government] administrative agency concerned has consulted in advance with the KFTC regarding the business combination under the relevant statutes'.

under Article 12(4), to discuss and consult with the KFTC regarding the potential competition-restraining effect of the relevant transaction during the review process.

IV OTHER STRATEGIC CONSIDERATIONS

When making worldwide merger filings in various countries, including Korea, parties need to consider the specific merger filing thresholds and waiting periods for each country. For example, as explained above, Korea imposes the merger filing obligation for the establishment of a joint venture company if it satisfies the jurisdictional and local nexus tests. As a result, where both parents of the joint venture are foreign entities, if they satisfy not only the size-of-transaction and size-of-party tests but also the local nexus test, which requires both foreign entities to achieve turnover or sales in Korea of 20 billion won or more, the transaction must be filed with the KFTC.

The KFTC in principle reviews the reportability of each transaction in a series of transactions that may constitute a 'single transaction' in other jurisdictions. As a result, an ancillary transaction (e.g., parties' joint establishment of a paper company or an acquisition vehicle) preceding a main transaction may require a separate merger filing in Korea even though it is exempt from merger filing obligations in other jurisdictions. Thus, parties to a series of transactions should check at the very outset whether any of the transactions requires a separate merger filing in Korea.

With respect to foreign-to-foreign transactions, in December 2011, the KFTC issued a manual on cooperation with foreign competition authorities in reviewing cross-border mergers subject to notification in multiple jurisdictions. It provides for a greater degree of cooperation with major competition authorities around the world, including the establishment of a cooperation system and the exchange of relevant information and opinions on market definition, analysis of anti-competitive effects and proposed corrective measures regarding the transaction at issue among the concerned jurisdictions.

The parties to the transaction are recommended to submit as much relevant information as possible regarding the proposed transaction and the relevant market at the time of filing in order to reduce the waiting period. If the parties wish to find out the KFTC's position on the competitive effect of the proposed transaction earlier than the typical notification period, they may apply for the discretionary advanced filing procedure under Article 12(8) of the MRFTA. Under this procedure, the parties may be permitted to make a merger filing even prior to the execution of the relevant agreement as long as they submit sufficient information about the proposed transaction. Under the procedure, the relevant parties will be required to make a formal re-notification after the execution of the agreement. However, such re-notification only needs to be brief, and the KFTC usually takes about a week to review the formal re-notification and confirm that no material change has been made to the details of the proposed transaction explained in the discretionary advanced filing. This procedure would be useful for parties wishing to close the proposed transaction shortly after the execution of the agreement.

Finally, the failing firm defence is available in Korea, and the parties may request an expedited review if the filing specifies that the relevant target entity is facing bankruptcy. However, the requirements to avail oneself of such defence are very strict.

V OUTLOOK AND CONCLUSIONS

In May 2013, the KFTC revised its handbook on merger filings, which was first issued in March 2012 and subsequently revised in June 2012. In the revised handbook, the KFTC clarifies merger filing obligations and requirements, and provides more answers to frequently asked questions to enhance the transparency of its merger review process.

Furthermore, in a February 2014 report to the President of Korea, the KFTC formulated two important policy goals pertaining to mergers. First, the KFTC will ease its merger regulation to promote corporate innovation and merger activities. To that end, the KFTC plans to propose by the end of 2014 an amendment to the MRFTA that provides merger filing exemptions for the establishment of certain types of companies with little anti-competitive effect, namely private equity funds, special purpose vehicles, shipping investment companies and companies engaged in offshore natural resource development; and minor-scale interlocking directorates. The proposed amendment, if enacted, is expected to reduce the KFTC's merger review caseload by approximately 17 per cent.

Regarding the second policy goal, the KFTC will engage in greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industry structures, to reinforce its merger review efforts with respect to global transactions with substantial impact on the Korean market. Such inter-jurisdictional cooperation appears to already be under way, as the KFTC is cooperating with foreign competition authorities with respect to recently announced major transactions, including the Microsoft–Nokia merger, the P3 Network joint venture and the Applied Materials–Tokyo Electron merger. Therefore, parties to global transactions triggering merger filings in multiple jurisdictions including Korea should expect the KFTC to be in possession of some of the information provided to other competition authorities by the parties.

Appendix 1

ABOUT THE AUTHORS

SAI REE YUN

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Mr Yun, a founding partner of Yulchon, is the managing partner of the firm. Mr Yun practises primarily in the areas of corporate (with an emphasis on mergers and acquisitions (M&A)), antitrust, tax and governmental relations. Before founding Yulchon, Mr Yun was a prosecutor with the Pusan District Prosecutor's Office, an associate with the law firms of Lee & Ko and Baker & McKenzie (Chicago and New York), and a partner at Yoon & Partners.

Mr Yun has written many articles for various publications, including 'Regulation of Business Combinations under the Antimonopoly and Fair Trade Act with Emphasis on Case Law', *Journal of Korean Law* (2002), 'Tax Aspects of Derivative Financial Instruments' for the 49th Congress of the International Fiscal Association (1995) and 'Transfer Pricing for South Korea' published in CCH *International Transfer Pricing Laws* (1994).

Mr Yun has given lectures at both the Judicial Research and Training Institute and Seoul National University Law School. He has served as outside legal adviser to various government agencies such as the Korea Fair Trade Commission (KFTC) and the Ministry of Trade, Industry, and Energy, and was a member of the Competition Policy Advisory Board for the KFTC. In addition, Mr Yun has been on the Legal Advisory Committee of the Korean Broadcasting Commission, and was a technical adviser for the Tax Policy Review Council for the Ministry of Finance and Economy.

In recent years, Mr Yun was selected as one of the world's leading M&A lawyers by the *International Financial Law Review*, as a practical law company cross-border M&A leading lawyer, as a *Chambers Global* leading banking and finance/corporate lawyer, as a *Global Competition Review* leading (competition) lawyer and as one of Asia's leading (competition) lawyers by AsiaLaw. He has been selected by *Who's Who Legal* as a leading competition lawyer every year since 2004. Additionally, Mr Yun has received a Prime Minister's Award for antitrust administration and a Deputy Prime Minister's

Award for tax administration. Mr Yun was also chosen as a leading lawyer of 2009 by the *International Financial Law Review 1000*.

Mr Yun has successfully represented numerous major corporations, including AMD, Bridgestone Corporation, the Carlyle Group, Citigroup, Daum Communications, GE, Goldman Sachs, Hyundai Capital, Hyundai Merchant Marine, Hyundai Motors, LG Philips LCD, Lotte Shopping, LVMH, RealNetworks, Samsung Electronics, Samsung Life Insurance, SK Corporation and SK Telecom.

SEUK JOON LEE
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Mr Seuk Joon Lee is a senior foreign counsel and co-vice chair of the antitrust practice group at Yulchon, and primarily practises in the areas of antitrust, medicine and pharmaceutical, and broadcasting and telecommunications. At Yulchon, Mr Lee has handled antitrust matters in all practice areas including cartels, merger reviews, abuses of market dominance and unfair trade practices. For example, Mr Lee has successfully represented many companies in domestic and international cartels involving products and services such as LPG, air cargo, marine hoses, copy paper, beverages, life insurance and credit rating services. He has also successfully represented many international and domestic companies in merger review cases, including Texas Instrument's acquisition of National Semiconductor and Lotte Shopping's acquisition of GS Mart.

As the head of Yulchon's health care practice team, Mr Lee has also successfully represented many prominent Korean and international pharmaceutical companies regarding antitrust issues, including unfair trade practices.

Prior to joining Yulchon in 2006, Mr Lee spent over 21 years working for government agencies such as the Korea Fair Trade Commission (KFTC), the Economic Planning Board and the Ministry of Information and Communication. At the KFTC, he held major positions, including as Director of the Investigation Division, the Labelling and Advertising Division, the Business Group Division, the Competition Promotion Division and the Monopoly Regulation Division. He also took a leading role in investigating many historically important antitrust cases in Korea, including abuse of market dominance cases involving Microsoft, Intel and Qualcomm. In addition, Mr Lee took a prominent role in the development of fair trade policies and the revisions of the Monopoly Regulation and Fair Trade Act (MRFTA) and relevant regulations, in particular as they relate to large Korean conglomerates (i.e., *chaebols*).

Mr Lee has published many articles, including 'Comparative Study on Regulation of Market Dominance in the US and EU' (*Competition Journal* No. 129, 2006), 'Analysis of Settlement System of Competition Law Cases' (*Competition Journal* No. 133, 2007), 'Study on Improvement of Holding Company System under the MRFTA' (Competition Journal No. 134, 2007), 'Comparative Analysis of Court Rulings and the KFTC's Decisions Concerning Business Combinations in the Retail Industry' (*Competition Journal* No. 141, 2008), 'Relationship between Cartel Damage Claim Suits and Leniency Status' (*Competition Journal* No. 142, 2009), 'Recognition of Leniency Status for Companies under the Common Control' (*Competition Journal* No. 143, 2009), 'Comparative Study on the US and EU Regulation Concerning Price Squeezes of Vertical Integrated Companies' (*Competition Journal* No. 144, 2009) and 'Review on

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Mr Lee received his JD from Syracuse Law School in 1999 and a master's degree in accounting from Syracuse University Graduate School of Management in 2000. He is licensed as a lawyer in New York (2000) and an AICPA in New York (2001).

CECIL SAEHOON CHUNG

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Mr Cecil Saehoon Chung is a senior foreign counsel at Yulchon. As co-vice chair of the antitrust practice group and head of the international antitrust team, Mr Chung handles all aspects of antitrust, consumer protection and trade regulation litigation and counselling matters covering diverse industries, with a particular emphasis on international antitrust.

Mr Chung has practised law for more than 20 years, primarily focusing on antitrust, trade regulation, consumer protection and intellectual property. In his antitrust practice, Mr Chung has handled numerous criminal grand jury investigations, civil class action cases, regulatory merger and non-merger investigation and litigation matters, and consumer protection matters. Mr Chung also has extensive experience in handling intellectual property issues, both straightforward patent infringement litigation and licensing matters and also in the context of the antitrust and IP interface.

Prior to joining Yulchon in 2012, Mr Chung was an antitrust partner at two global law firms (Pillsbury Winthrop and Greenberg Traurig) in Washington, DC, where he handled numerous multibillion dollar merger transactions, 'bet-the-company' litigation matters and various counselling matters involving antitrust, trade regulation, consumer protection, intellectual property and other legal issues in diverse industries. For example, Mr Chung has handled merger matters such as Chevron's US$43 billion acquisition of Texaco, SBC Communications Inc's (now AT&T) US$17 billion acquisition of Pacific Telesis, and Chevron Chemical's US$7 billion joint venture with Phillips Chemical. In non-merger antitrust areas, among other matters, Mr Chung handled the DRAM matters (both civil and criminal), vitamin C antitrust litigation and brand-name prescription drugs antitrust litigation.

From 1988 to 1995, Mr Chung was a litigation attorney in the Bureau of Competition at the US Federal Trade Commission (FTC), where he investigated and challenged numerous merger transactions and non-merger antitrust violations in the energy, chemical, food, telecommunications and IT industries. During this time, he handled matters such as KKR's LBO of RJR Nabisco, Phillip Morris's acquisition of Kraft, Adobe's acquisition of Aldus, Panhandle and Texas Eastern's natural gas pipeline merger and ConAgra's acquisition of Beatrice. In addition, he was a principal member of the FTC's trial team that successfully challenged BAT's acquisition of American Tobacco in the federal district court.

Mr Chung is ranked as a leading antitrust lawyer by numerous international publications, including the GCR *International Who's Who of Competition Lawyers*, *Chambers Asia*, *Chambers Global* and Euromoney's *Expert Guides*. In addition, Mr Chung has a rare distinction of being ranked as both a US antitrust law expert based abroad (Korea) and foreign (US licensed) expert on Korean antitrust law by *Chambers Global*.

Mr Chung has written and lectured extensively on various antitrust, consumer protection and other legal issues. He regularly provides antitrust compliance counselling and training to clients in various industries. Furthermore, since 1997 he has advised and assisted the Korea Fair Trade Commission to modernise its antitrust and consumer protection enforcement programme. Mr Chung's recent articles (both solo or co-authored) include 'On Anticompetitive Effects of Exclusive Dealing: In re McWane, Inc.', *Journal of Competition*, Vol. 174 (2014); Chapter on Korea, *The Cartels and Leniency Review*, 2nd Edition, Law Business Research; 'Abuse of Dominance by Standard-Essential Patent Holder: Huawei v. InterDigital in China', *Journal of Competition*, Vol. 172 (2014); 'Ballooning Definition of Cartel and Information Exchange in Korea', Competition Policy International's Antitrust Chronicle (December 2013); 'Third Party's Access to Leniency Application Files: A Recent EU Decision and Implications', *Journal of Competition*, Vol. 169 (2013); Chapter on Korea, 'The Merger Control Law,' 4th Edition, Law Business Research (2013); Chapter on Korea, *The Private Competition Enforcement Review*, 6th Edition, Law Business Research (2013); 'Enforcement Gets Stronger, Korea Annual Review', *Asialaw & IFLR* (2013); 'Korea Amends Privacy Law and Limits Use of Residents Registration Numbers', ABA Section of International Law, *The International Lawyer Year in Review 2012*; 'Recent Korean Supreme Court Decisions on *Per Se* Illegality and Noerr-Pennington in Korea', ABA Section of Antitrust Law, *Cartel & Criminal Practice Committee Newsletter* (Fall 2012); 'Revamped Korean Leniency Regime: No More Cheap Way Out for Repeat Cartelists and Second-in-Line Confessors', ABA Section of Antitrust Law, International Committee, *International Antitrust Bulletin*, Vol. 3 (October 2012).

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Ms Kim also worked on secondment at Cleary Gottlieb Steen & Hamilton's Hong Kong office from 2007 to 2008.

Ms Kim has published many articles including 'Analysis on the Unfair Subsidization of Person Controlling Group Companies' (*Competition Case Law Review*, Vol. 4, 2007), 'Legal Review on the Plan for Establishment of Holding Company' (*Holding Company and Law*, edited by Kon Sik Kim and Hyeok Joon Roh, 2005, co-authored), 'M&A Review Guidelines under Korean Competition Law' (*Journal of Korean Competition Law*, Vol. 11, Korean Competition Law Association, 2005, co-authored) and 'Legal Issues Relating to the Mergers between Financial Institutions' (*Business Finance Law*, Vol. 7, Business and Finance Centre in Seoul National University, 2004, co-authored).

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Mr Kyu Hyun Kim is a senior attorney at Yulchon who practices primarily in regulatory areas, including antitrust and media and communications; he also advises on intellectual property issues. He joined Yulchon as an associate in 2007 and was made a senior attorney in 2013. Before joining Yulchon, Mr Kim served as a judge advocate in the Korean Army.

Mr Kim's representative matters include Qualcomm's abuse of dominant market position, Honam Petrochemical's acquisition of Titan, and the global photocopy paper manufacturers' cartel case.

Mr Kim has published many articles, including the Korean chapter of *Getting the Deal Through, Telecoms and Media* (Law Business Research, 2008–2010, co-authored).

Mr Kim received his LLB from Seoul National University in 2001 and his LLM from University of Michigan Law School in 2012. He is a member of the Korea and New York Bars.

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