The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

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Sixth Edition

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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. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

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 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year's edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. 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 vest exclusive authority to review transactions in one agency. 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). In France, for instance, the Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. 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; Serbia and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the 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., Greece, Portugal, Ukraine and the US). 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 addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun jumping' fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

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 EU 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 to be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also 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 some jurisdictions (including Canada, the EU and the US), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the Authority.

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. The Korean Fair Trade Commission has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. 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 the Chilean authority. 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 the 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., the 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 at 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. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, 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. Multijurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the US and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, 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 the 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 few years have imposed a variety of such behavioural remedies (e.g., China, the EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, France's decision in the *Numericable/SFR* transaction). 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
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Chapter 20

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).

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1 Sai Ree Yun, Kyoung Yeon Kim and Kyu Hyun Kim are partners and Seuk Joon Lee and Cecil Saehoon Chung are senior foreign counsel at Yulchon LLC. The authors would like to thank Tae Yong Kim, foreign attorney, and Ye Seul Yoo, associate at Yulchon LLC for their valuable assistance in preparing this chapter.

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.

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.

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. On the other hand, 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

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.

a transaction where either the acquirer or the target is an investment company or a fund that satisfies certain conditions.

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 2014, the KFTC reviewed a total of 571 transactions, which represents a 2.4 per cent decrease from 2013. Of these transactions, 451 (approximately 79 per cent) were Korean entities' acquisitions of Korean or foreign entities, while the remaining 120 transactions involved foreign entities' acquisitions of Korean or foreign entities. Of these 120 transactions, 44 were foreign companies' acquisitions of Korean entities, while the remaining 76 were foreign-to-foreign transactions that affected the Korean market, thus requiring merger filing in Korea.

In two transactions, the KFTC either blocked the transaction in its entirety or granted conditional clearance: the acquisition of Daemyung Optical (Daemyung) by Essilor Amera Investment Pte Ltd (Essilor) and the *Item Bay/IMI* transaction.

In the *Daemyung/Essilor* case, the parties had agreed to the proposed transaction in 2013. In May 2014, the KFTC blocked the transaction in its entirety. Under the MRFTA, the KFTC presumed that the transaction would result in 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 because in each of the two relevant markets, the parties' combined market share was substantially larger than the next leading competitor's. Upon further investigation, 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, the KFTC decided not to grant clearance for the transaction. This KFTC decision to block a proposed transaction in its entirety was its first since its October 2009 decision to deny Lotte Hotel's proposed acquisition of Paradise Global's duty-free retail business.

In the *IMI/Item Bay* case, the parties were the largest and second-largest companies in the online game items intermediary market in Korea, a market in which intermediaries such as the merging parties match buyers and sellers of online game items, including virtual characters, equipment and game money, that online game players use to play online games better. Online game items intermediaries charge commissions for each trade. The total trading volume is reportedly 1 trillion won and the total commissions approximately 40 billion won. This transaction was a post-merger notification transaction because neither party had assets or sales in excess of 2 trillion won. The parties consummated the transaction and filed a post-merger notification with the KFTC in June 2012. The KFTC was concerned that the transaction would create a *de facto* monopoly with a combined market share of up to 95.2 per cent and with increases in commission fees likely. However, at the same time, the KFTC acknowledged that, given the dynamics of the online game and online game items markets, the anti-competitive effect might be mitigated with an appropriate type of conditional clearance: the online game items market is an ancillary market to the online game market, which itself may be susceptible to rapid changes; and online games themselves may offer alternatives by allowing game players to trade game items directly with each other through an auction or bulletin sub-site within a particular online game site itself. In July 2014, instead of blocking the transaction outright, the KFTC announced its decision to grant conditional clearance. The KFTC prohibited fee increases in excess of consumer price increase rates and unfavourable changes to the user point accumulation system for three years. It also required the combined company to establish and implement a system to protect personal information and compensate the victims of a data security breach. Finally, the KFTC imposed an annual compliance report obligation. However, in its July 2014 decision, the KFTC also allowed the combined company to request modification of the corrective measures based upon any changes in the market conditions that occur after 1 January 2015. This case is significant because the KFTC applied the dynamics of the online game market to its analysis of the anti-competitive effect anticipated in this online game items intermediary market.

This merger enforcement action also constitutes the second time that the KFTC has imposed conditions when approving a proposed transaction in the internet sphere since its 2009 conditional approval of eBay's acquisition of Interpark G-Market in which the KFTC required a ban on commission fee increases for three years and a requirement to establish small and medium-sized seller protection plans.

In all other cases that it reviewed in 2014, the KFTC granted unconditional clearance. However, this requires further examination. For example, in the merger between Thermo Fisher Scientific Inc and Life Technologies Corporation, the KFTC granted unconditional clearance on grounds that its concerns over any anti-competitive effect had been resolved by the parties' agreement to abide by the commitments they made to the European Commission. In a different category, the KFTC did not have to render its decision in a proposed P3 shipping company network joint venture because the parties abandoned the transaction and withdrew the KFTC merger filing after MOFCOM's June 2014 decision to block the transaction.

On the other hand, in 2014, the KFTC imposed fines amounting to 570 million won with respect to 38 transactions that were not reported or that were reported late. The figures represent a 138 per cent increase in the number of such cases compared with 2013, when the KFTC imposed 277 million won in fines with respect to 16 transactions that were not reported or that were reported late.

Some noteworthy KFTC merger cases to date in 2015 include the merger between Applied Materials Inc and Tokyo Electron Ltd; Microsoft's acquisition of Nokia's mobile device business; the three-part business swap transaction between GlaxoSmithKline (GSK) and Novartis; and SeAH Besteel's acquisition of Posco Specialty Steel; and Bayer Korea's acquisition of MSD Korea's over-the-counter (OTC) drug business.

In the proposed (but now abandoned) *Applied Materials/Tokyo Electron* merger matter, the parties were the largest and third-largest suppliers of semiconductor manufacturing equipment, respectively. They signed the merger agreement in September 2013 and filed a pre-merger notification form with the KFTC in November 2013. The transaction was also subject to pre-merger notification requirements in other major jurisdictions, including the US, China, Japan and Taiwan. Given the parties' market shares, under the applicable provision in the MRFTA, the KFTC started out with a rebuttable presumption that the merger could have a significant impact on the Korean semiconductor industry, and therefore from an early stage cooperated and coordinated its merger investigation with foreign competition authorities, including the US Department of Justice, China's MOFCOM, the Japan Fair Trade Commission and the Taiwan Fair Trade Commission. The KFTC concluded that the remedies proposed by the parties were not sufficient, and that the merger could generate a substantial anti-competitive effect in the relevant market. Thus, the KFTC staff issued an examiner's report (or statement of objections) recommending to the full KFTC Commission corrective measures including divestitures of overlapping business lines. However, in April 2015, faced with continuing competitive concerns in various jurisdictions, including Korea and the US, the transaction parties abandoned the merger. This was the second global merger case in which the parties abandoned the merger after the issuance of the KFTC examiner's report. The first time this occurred was in 2010, when BHP Billiton and Rio Tinto abandoned their proposed transaction. This case again shows that, despite its occasional differences (e.g., the *Microsoft/Nokia* transaction matter discussed below), the KFTC coordinates its review of cross-border merger transactions much more closely with foreign competition authorities.

In the *Microsoft/Nokia* case, Microsoft initially filed a pre-merger notification with the KFTC. After easily obtaining clearance in the US and Europe, and securing conditional clearance in some other jurisdictions, in response to continuing difficulties and delays in Korea, the merging parties restructured the transaction to render it a non-reportable transaction in Korea and promptly consummated the transaction. Unfazed, the KFTC continued its investigation, but this time as a post-consummation merger investigation. To resolve the matter, Microsoft, the acquiring party, formally requested that the KFTC open consent order proceedings. On 4 February 2015, the KFTC granted the request. This constitutes the very first time that the KFTC has decided to use a consent order in merger cases. On 19 May 2015, the KFTC announced a proposed consent order. Regarding standard essential patents (SEPs) for smartphone and tablets, it requires Microsoft, *inter alia*:

a to license its SEPs for smartphones and tablets on fair, reasonable and non-discriminatory terms;

b to refrain from seeking injunctions on SEPS both in Korea and abroad;

c not to demand its SEP licensees to cross-license their non-SEPs to Microsoft in return for licences to Microsoft's SEPs; and

d not to transfer its SEPs to a third-party purchaser unless the third-party purchaser agrees to abide by the same SEP licensing conditions of the consent order (i.e., conditions (a), (b) and (c)) and, if the third-party purchaser wants to retransfer the SEPs it purchased from Microsoft to yet another subsequent third-party purchaser, the initial third-party purchaser agrees to demand that the subsequent third-party re-transfer purchaser also agrees to the same licensing conditions of the consent order.

Regarding non-SEPs for smartphones and tablets, the proposed consent order requires Microsoft:

a to maintain the pre-acquisition (of Nokia's handset business) per-device (i.e., smartphone or tablet) royalty rates or the current rates in the existing licences;

b to maintain the same or realistically similar non-pricing licensing conditions;

c not to transfer its non-SEPs to a third-party purchaser for five years;

d after the five-year period, not to transfer its non-SEPs to a third-party purchaser unless the third-party purchaser agrees to abide by the same non-SEP licensing conditions of the consent order and, if the third-party purchaser wants to retransfer the non-SEPs it purchased from Microsoft to yet another subsequent third-party purchaser, the initial third-party purchaser agrees to demand that the subsequent third-party re-transfer purchaser also agrees to the same licensing conditions of the consent order; and

e not to seek injunctions on non-SEPs unless the potential licensee does not faithfully negotiate with Microsoft.

This proposed consent is to last for seven years (except for the provision on the transfer and retransfer of non-SEPs). Microsoft may petition the KFTC to modify or terminate the consent order, in part or in its entirety, if changed circumstances warrant it. Finally, the proposed consent order requires Microsoft to submit an annual compliance report setting forth how it has complied with the terms of the order in the preceding year. The consent order explicitly applies to device (both smartphone and tablet) manufacturers whose corporate headquarters are in Korea. The 'no injunction' provision applies to injunctions in both Korea and abroad. After a 40-day public consultation period, the KFTC will decide in a plenary session whether to finally adopt the proposed consent order.

In the merger between GSK and Novartis, the parties agreed to a three-part transaction whereby GSK would acquire Novartis' vaccine business; Novartis would acquire GSK's cancer drug business; and GSK's would form and obtain control of a newly created consumer health-care joint venture with Novartis. This global transaction was reported to 18 competition authorities around the world, and generated much scrutiny as one of the largest and most important global pharmaceutical mergers of the year. The KFTC, after carefully investigating the potential anti-competitive effect of the merger, issued unconditional clearance in January 2015.

In December 2014, SeAH Besteel agreed to acquire 52.16 per cent of Posco Specialty Steel and reported the planned acquisition to the KFTC. In March 2015, the KFTC found that the transaction would give rise to an anti-competitive effect in the Korean specialty steel market. Therefore, the KFTC imposed behavioural remedies on SeAH, namely limiting price increases of carbon steel bar, billet and round billet for three years, requiring it to supply a specific quantity of products to its competitor-buyers and prohibiting discrimination against competitor-buyers.

Bayer AG agreed to acquire the global OTC drug business of Merck & Co, Inc. In October 2014, Bayer Korea notified the planned transaction to the KFTC, which involved acquiring the related rights and assets of four different drugs (oral contraceptives, nasal allergy medicine, nasal spray and steroidal dermatological medicine) from MSD Korea as part of the overall global merger. In March 2015, after concluding that the merger would likely eliminate competition in the Korean oral contraceptive pill market, the KFTC required Bayer Korea to divest the oral contraceptive pill assets and rights it would acquire from MSD Korea to a pre-approved buyer who was not already handling Bayer Korea's oral contraceptives. Moreover, Bayer Korea cannot have the third-party divestiture purchaser of the MSD Korea's oral contraceptive business, or a distributor who is already a distributor of MSD Korea's competing oral contraceptives, also distribute Bayer Korea's competing oral contraceptives pills. The KFTC did not find any competitive concerns regarding the other three OTC drugs at issue, and granted unconditional clearance.

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 KFTC's current practice 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 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

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.

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, 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 or step 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 may be 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

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.'

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(9) 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 file 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 or two 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 a February 2014 report to the President of Korea, the KFTC formulated two important policy goals pertaining to mergers. First, the KFTC announced that it will ease its merger regulation to promote corporate innovation and merger activities. To that end, the KFTC stated that it plans to propose by the end of 2014 an amendment to the merger control portion of the MRFTA. Then, in December 2014, the State Council of Korea passed the KFTC's proposed amendment to the MRFTA. The proposed amendment provides for merger filing exemptions for:

a the establishment of certain types of companies with little anti-competitive effect, namely private equity funds, special purpose vehicles and shipping investment companies;

b a merger or business transfer between affiliates whose assets or sales are less than 2 trillion won; and

c 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 merger enforcement policy goal, the KFTC has stated that it will engage in even 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 be well under way, as the KFTC has cooperated with foreign competition authorities with respect to recently announced major transactions, including the *Microsoft/Nokia* merger, the *P3 Network* joint venture, the *GSK/Novartis* transaction 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 has been a member of the New York Bar since 2000 and AICPA in New York since 2001.

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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.

He has practised law for more than 25 years, primarily focusing on antitrust, trade regulation, consumer protection and intellectual property. In his antitrust practice, he has handled numerous criminal grand jury investigations, civil class action cases, regulatory merger and non-merger investigation and litigation matters, and consumer protection matters.

Prior to joining Yulchon in 2012, he 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, he 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. From 1988 to 1995, he 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. 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, he 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 Korean, US and EU 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. Recent articles he has written or or co-authored) include: Korea chapter, *Competition Law in Asia Pacific – A Practical Guide*, Wolters Kluwer (2015); Korea chapter, *The Cartels and Leniency Review*, 3rd Edition, Law Business Research (2015); 'Restriction by Object', *Journal of Competition*, Vol. 178 (2015); 'Korea's Aggressive Antitrust Enforcement in Financial

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Mr Chung received his BS in economics from the Wharton School, University of Pennsylvania in 1985 and JD from Cornell Law School in 1988. He is a member of the California and District of Columbia Bars.

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

Some of the major projects she participated in are the sale of Hyundai Merchant Marine's terminal, the sale of Hynix Semiconductor's display division, Crown Confectionery's acquisition of Haitai Confectionery & Foods, the joint venture of Samsung Electronics and Samsung SDI for AMOLED business, and the incorporation of Samsung LED, the merger case of KED Korea, the merger case of Lotte Shopping Co, Ltd and GS Retail Co, Ltd, and the merger case of Lotte Shopping Co, Ltd and HiMart Co, Ltd.

Ms Kim's articles (both solo or co-authored) include 'Establishing the regulatory foundation for Big Data 2', *Data Protection Law & Policy*, Vol. 12, Issue 5 (2015); Korea chapter, 'Competition Law in Asia Pacific – A Practical Guide', Wolters Kluwer (2015); Korea chapter, *The Cartels and Leniency Review*, 3rd Edition, Law Business Research (2015); 'Korea's Aggressive Antitrust Enforcement in Financial Product Markets', *Asian-*

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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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