The Merger Control Review

Seventh Edition

Editor
Ilene Knable Gotts

Law Business Research

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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 within the next year or so. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well.

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. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-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 such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 41 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 media, pharma and high-technology companies, we have included chapters that focus on the 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 that discusses 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 a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States 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 United Kingdom). 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, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on 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 United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and their participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. 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 competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine, the competition authority focused its efforts on discovering consummated transactions that had not been notified, and imposed fines in 32 such cases in 2015 alone.

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 of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. 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, Indonesia, 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., Austria, Canada,

China, Greece, Portugal, Ukraine and the United States). 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 Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the EC and the United States in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun-jumping' fine in 2014 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 or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction nonreportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

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 EC model than the United States 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 Japan 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 processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC 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 must 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 EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), 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 United States 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, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. 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 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 European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multijurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe, and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, it is becoming the norm for coordination among the jurisdictions in multinational transactions that raise competition issues.

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 EC 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 stand-alone 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. Multi-jurisdictional 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 United States 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 enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. 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 EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, 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*, and 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 19

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).

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 and Hye Yeon Park, associates at Yulchon LLC for their valuable assistance in preparing this chapter.

2 The mergers and 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 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 2015, the KFTC reviewed a total of 669 transactions, which represents a 17.2 per cent increase from 2014. Of these transactions, 534 (approximately 79.8 per cent) were Korean entities' acquisitions of Korean or foreign entities, while the remaining 135 transactions involved foreign entities' acquisitions of Korean or foreign entities. Of these 135 transactions, 32 were foreign companies' acquisitions of Korean entities, while the remaining 103 were foreign-to-foreign transactions that affected the Korean market, thus requiring merger filing in Korea.[4]

4 KFTC press release (29 February 2016), available in Korean at http://www.ftc.go.kr/common/download.jsp?file_name1=/news/report/2016&file_name2=160229.

In contrast to 2014, the KFTC did not block any transactions in their entirety in 2015. However, it rendered several decisions imposing structural remedies such as divestiture: *Bayer/Merck* and *NXP/Freescale*.

In the *Bayer/Merck* case, 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. The transaction 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 not already handling Bayer Korea's oral contraceptives. Moreover, Bayer Korea is prohibited from having the third-party divestiture purchaser of the MSD Korea's oral contraceptive business, or a distributor already distributing of MSD Korea's competing oral contraceptives, also distribute Bayer Korea's competing oral contraceptives pills. The KFTC did not find any competitive concerns for the other three OTC drugs at issue, and granted unconditional clearance.[5]

In the *NXP/Freescale* case, the global semiconductor manufacturer NXP entered into an agreement to purchase all of Freescale's outstanding shares. On 5 June 2015, NXP notified this transaction to the KFTC. There were overlaps between the parties in six product markets: general micro-controller unit (MCU), general digital signal processor (DSP), automobile MCU, automobile DSP, automobile analog-power integrated circuit (IC) and radio frequency (RF) power transistor. For the RF power transistor market in particular, the KFTC found that the transaction would likely restrain competition because the parties' combined market share would amount to 61.7 per cent, creating a significant gap with the second-biggest competitor. The KFTC granted clearance conditioned on the divestiture of NXP's RF power transistor business.

In the *Microsoft/Nokia* case, Microsoft initially filed a pre-merger notification with the KFTC in 2013. 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 in 2014. On 4 February 2015, the KFTC granted the request. This marked the very first time that the KFTC decided to use a consent order in merger cases. On 19 May 2015, the KFTC announced a proposed consent order. After a public comment period, the KFTC finally adopted the consent order. [6]

In addition, the KFTC also imposed behavioural remedies in several other cases, including Hanwha Chemical's share acquisition of Samsung General Chemicals and Lotte Shopping's asset acquisition of Daewoo Department Store. In the first case, Hanwha Chemical and its affiliate Hanwha Energy entered into an agreement to purchase 27.6 per

5 This matter was previously addressed in the 6th edition (2015) of this publication. However, because this is one of the more important merger control cases of 2015, it is discussed again in this 7th edition.

6 See footnote 5.

cent and 30 per cent, respectively, of Samsung General Chemicals' outstanding shares. On 16 December 2014, Hanwha Chemical notified the transaction to the KFTC. After defining the relevant product market as four polyethylene (PE) products including ethylene vinyl acetate (EVA), the KFTC found that the transaction would likely restrain competition because the parties' combined share in the EVA market would amount to 68 per cent, creating a significant gap with the second-biggest competitor. Therefore, the KFTC limited the parties' EVA price increase and decrease rates in Korea to export price increase and decrease rates.

In the second case, Lotte Shopping acquired the two department stores, one located in the greater Changwon area and the other in Busan, operated by Daewoo International. Because the acquisition of the Changwon store would raise Lotte Shopping's market share in the department stores in the region to 64.2 per cent, the KFTC found that the transaction would likely generate vertical anticompetitive effects with respect to brands and suppliers operating mainly in the greater Changwon area. Hence, the KFTC prohibited Lotte Shopping from raising, for three years, lease or commission fees charged to brands with stores in the Changwon department store and its suppliers. This is the first case in which the KFTC restricted commission fees charged to stores within a department store or its suppliers.

Among the cases for which the KFTC granted unconditional clearance in 2015, the *Daum Communications/Kakao* transaction was notable. In this case, Daum, the second-biggest internet portal service provider, absorbed and merged with Kakao, the overwhelmingly leading player in the mobile messenger market. During the KFTC's review, the parties showed that:

a there were no real overlaps between the parties as Daum and Kakao focused primarily on PC-based portal services and mobile-based messenger services, respectively;

b the transaction would in the long term create a competitive pressure capable of curbing anticompetitive unilateral conduct by Naver, the formidable leader in the internet portal service market; and

c the transaction would enhance efficiencies by enabling new services such as Kakao Taxi, an Uber-like cab service, and thereby also providing consumers with greater choice.

In 2015, the KFTC imposed fines amounting to 336 million won with respect to 16 transactions that were not reported or that were reported late. The figures represent a 58 per cent decrease in the number of such cases as compared with 2014, when the KFTC imposed 570 million won in fines with respect to 38 transactions that were not reported or that were reported late.

Some noteworthy KFTC merger cases to date in 2016 include the merger between Dell Inc and EMC. In this transaction, Dell Inc announced its plans to acquire EMC in 2015 and filed a merger notification in Korea in December 2015. Touted as the largest-ever M&A in the technology sector, the *Dell/EMC* transaction raised questions on (1) potential anticompetitive effect in the external enterprise storage systems market where both parties overlap horizontally; and (2) the potential anticompetitive effect in the vertical relationship between Dell's server business and server virtualisation Software of VMware (EMC's subsidiary). Given the merging parties' extensive worldwide presence, the *Dell/EMC* transaction was notified in over 20 jurisdictions globally. At least partially due to the high-profile nature of the transaction, the KFTC conducted an extremely thorough investigation before granting unconditional clearance in April 2016.

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

In addition, the KFTC revised the Guidelines so that the 15-day waiting period rule also applies when the acquiring party files a formal merger notification after the KFTC's review and provisional clearance of the parties' provisional merger notification,[7] provided that the facts and the market conditions have nor materially changed since the KFTC's provisional clearance.

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.[8]

7 As described more fully below, the acquiring party may file a provisional merger notification form to obtain provisional clearance when there is not yet a binding merger agreement.

8 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.

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[9] 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.[10] 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.

Meanwhile, the recently enacted statute commonly referred to as the 'One Shot Act,' which allows for pre-emptive business reorganisation before insolvency, contains special provisions concerning mergers. For instance, Article 9(5) of the Act simplifies the filing burden on businesses undergoing reorganisation as it allows a business filing for reorganisation to file a reorganisation plan including, where applicable, a merger notification, which the government agency at issue must then forward to the KFTC. Furthermore, the KFTC under Article 10(7) of the Act must consider the views submitted by the government agency on any enhanced efficiencies resulting from the contemplated reorganisation or merger. However, the Act does not modify the substance of the merger control regime in any appreciable way.

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,

9 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.

10 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.'

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 anticompetitive 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 or provisional 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 as explained above, the newly revised Guidelines on Standards of Business Combination Examination provide that a shorter 15-day waiting period applies to review of the formal re-notification. This procedure would be useful for parties wishing to close the proposed transaction shortly after the execution of the binding merger 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 September 2015 report to the National Assembly of Korea, the KFTC stressed that it has been, and will be, carefully monitoring, reviewing and imposing appropriate corrective measures against global M&A transactions that will likely have a significant anticompetitive effect on the domestic Korean market. To that end, the KFTC actually imposed structural remedies in the *Bayer/Merck* and *NXP/Freescale* cases, and also imposed behavioural remedies in several cases including the *Microsoft/Nokia* case. Meanwhile, the proposed amendment to the MRFTA, which would have provided for wider merger filing exemptions, has not passed the National Assembly.

Furthermore, the KFTC has previously 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. Indeed, such inter-jurisdictional cooperation is well under way, as the KFTC has cooperated with foreign competition authorities with respect to a number of recent major global transactions, including the *Microsoft/Nokia* merger, the *P3 Network* joint venture, the *GSK/Novartis* transaction, the *Applied Materials/Tokyo Electron* merger, and the *FedEx/TNT* merger. Therefore, parties to global transactions triggering merger filings in multiple jurisdictions including Korea should expect the KFTC to be in closer contact with other competition authorities that are also reviewing the same transaction.

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 *IFLR 1000*.

Mr Yun has successfully represented numerous major corporations, including AMD, Bridgestone Corporation, the Carlyle Group, Citigroup, Daum Communications,

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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 healthcare 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.

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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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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 GCR's *Who's Who Legal: Competition*, *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 Product Markets', *Asian-Mena Counsel*, Volume 12 Issue 5 (2014–15); 'Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet', *Competition Policy International's Antitrust Chronicle* (2014); 'Comment on US FTC's Recent 'Invitation to Collude' Matter', *Journal of Competition*, Vol. 176 (2014); Antitrust and international commerce (Korea, China, Taiwan and India) chapter, 2013 *Annual Review of Antitrust Law Developments*, ABA Section of Antitrust Law (2014); 'On Anticompetitive Effects of Exclusive Dealing: In re McWane, Inc.', *Journal of Competition*, Vol. 174 (2014); Korea chapter, *The Merger Control Review*, 5th Edition, Law Business Research (2014); 'Abuse of Dominance by Standard-Essential Patent Holder: *Huawei v. InterDigital* in China', *Journal of Competition*, Vol. 172 (2014); 'Ballooning Definition of

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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.

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Mr Kim's representative matters include Dell's acquisition of EMC, 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 Korea chapter, *The Merger Control Review*, 5th Edition, Law Business Research (2014, co-authored); Korea chapter, *Getting the Deal Through, Telecoms and Media*, Law Business Research (2008–2010, co-authored).

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