

Merger Control

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Korea

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation consists principally of the Monopoly Regulation and Fair Trade Act (MRFTA), which was first enacted in 1980 and has undergone 37 amendments. Additional legal authority is found in the Enforcement Decree promulgated pursuant to the MRFTA, as well as the guidelines and standards issued pursuant thereto. Enforcement of the MRFTA rests with the Korea Fair Trade Commission (KFTC), an administrative body established under the jurisdiction of the prime minister that, as part of its work, sets standards and issues numerous notices and guidelines regarding its interpretation and implementation of the MRFTA.

2 What kinds of mergers are caught?

The MRFTA prohibits the abuse of market-dominant positions by business enterprises, any excessive concentrations of economic power, improper collaborative acts and unfair trade activities. Specifically, the following transactions, including mergers, are listed as activities that (subject to the jurisdictional threshold set forth below) must be reported to the KFTC pursuant to article 12 of the MRFTA:

- acquisition of 20 per cent (15 per cent in the case of listed companies) or more of the shares of another company;
- acquisition of additional shares by the shareholder who already owns the shares of a company in the ratio set forth above to become the largest shareholder;
- participation in the establishment of a new company as the largest shareholder;
- acquisition of all or a principal portion of the business or fixed assets of another company;
- merger with another company; and
- interlocking directorate, ie, assumption by an officer or an employee of a position as an officer of another company, where such person maintains his or her position in the first company (except for interlocking directorate between affiliate companies).

3 Are joint ventures caught?

There is no provision in the MRFTA exempting joint ventures. Thus joint ventures will be subject to the merger control under the MRFTA if the participants meet the requirements.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of control as such under the MRFTA for the purpose of determining the scope of a merger. However, the MRFTA does provide a definition of control for the purpose of determining the scope of affiliates of a business group. Further, the MRFTA provides

guidelines for determining whether a certain merger needs to be filed with the KFTC. In this sense, one can say that the MRFTA provides, in an indirect fashion, a definition of control for the purpose of determining whether a filing is required in a certain transaction. As noted above, the MRFTA provides that a filing is required in the case of an acquisition of 20 per cent (15 per cent for listed companies) or more of the shares of another company. The assumption by an employee of a position as an officer of another company is a matter that also needs to be filed except for an interlocking directorate between affiliates. Thus, minority and other interests less than control may be caught where such a transaction falls within one of these categories.

5 What are the jurisdictional thresholds?

Starting from 1 July 2008, the scenarios set forth above that trigger a reporting requirement to the KFTC are caught within the scope of the MRFTA where one of the parties to the business combination (including worldwide affiliate companies both before and after the business combination) has total assets or annual turnover in the amount of 200 billion won (2 trillion won in case of interlocking directorate) or more and the other in the amount of 20 billion won or more. There is no reporting requirement if any of the parties involved, together with its affiliates, has total assets and annual turnover less than 20 billion won.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing with the KFTC is a mandatory requirement as long as the parties meet the above-mentioned requirements. There are no exceptions to the filing requirements except the cases where other central governmental body consults with the KFTC regarding the business combination in advance pursuant to other statutes.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Under the Enforcement Decree promulgated pursuant to the MRFTA and M&A Reporting Guidelines, foreign-to-foreign mergers must be notified if the local nexus requirement is met in addition to the requirements in question 5. The local nexus requirement is that both of the foreign parties, together with their affiliates both before and after the business combination, should have annual turnover within Korea of 20 billion won or more. If only the target company is foreign and the acquiring party is domestic, the above local nexus requirement also applies to the target company. Therefore, to be reportable, the foreign target company should meet the local nexus requirement. In contrast, if only the acquiring party is foreign and the target company is domestic, the business combination is regarded as domestic and the local nexus requirement does not apply.

 Notification and clearance timetable

- 8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

In principle, within 30 days after the underlying transactions (such as a merger with another company or the acquisition of shares of another company) take place, the company in question must report such transactions to the KFTC. Effective as of 25 June 2009, if a large company {with total assets or annual turnover of 2 trillion won or more in a consolidated basis} is involved in the business combination (except the interlocking directorate), the pre-merger notification must be filed any time after the date of signing the agreement and before the closing date. Further, the reporting company may not subscribe for the new shares or complete the transfer of the business, nor may it register the business combination pending the KFTC's review. The reporting company may, however, voluntarily request the KFTC to conduct a prior review of the transaction in question even before entering into the agreement. The MRFTA provides that if a merger is not reported, the KFTC may impose an administrative fine of up to 100 million won upon those companies that failed to file. This sanction is enforced without fail as long as the violation is detected.

- 9 Who is responsible for filing and are filing fees required?

The acquiring company (or, in case of the last point in question 2, the company whose officers take up a position in the target company) must report to the KFTC. No filing fees are required in Korea.

- 10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In general, post-merger notification to the KFTC must be filed within 30 days after the underlying transactions giving rise to the business combination take place. In this case, no waiting period is necessary by nature. However, where a large company is involved in the business combination, the pre-merger notification must be filed any time after the date of signing the agreement before the closing date, effective as of 25 June 2009. In addition, there is a 30-day waiting period after the pre-merger notification before the proposed merger or acquisition may be completed. During the waiting period, transactions such as the transfer of stocks, registration of ownership, etc are prohibited. The waiting period may either be shortened or extended by up to 120 days where the KFTC deems it necessary.

- 11 What are the possible sanctions involved in closing before clearance and are they applied in practice?

The KFTC may file actions against companies that close their transactions before clearance. In such cases the KFTC asks the court to invalidate the completed underlying transactions. In practice, the KFTC imposes an administrative fine of up to 100 million won on the company responsible for filing. This sanction is enforced without fail as long as the violation is detected.

- 12 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Since a foreign-to-foreign merger is also subject to a filing requirement, the KFTC will investigate whether the merger will have any anti-competitive impact on the relevant markets in Korea. In this regard, such solutions as a local 'hold-separate' arrangement in exchange with closing before clearance in a foreign-to-foreign merger have never been recognised in Korea.

- 13 Are there any special merger control rules applicable to public takeover bids?

No special merger control rules apply to public takeover bids. However, in the case of a tender offer, the reporting obligation is always post-merger, regardless of whether the parties involved are large companies.

- 14 What is the level of detail required in the preparation of a filing?

The reporting party must provide the KFTC with sufficient information to allow the KFTC to review the underlying transactions. Full details of transactions are required and various forms must be completed and submitted together with supporting documents. The KFTC provides list of necessary documentation relating to the proposed transaction to enable it to determine whether there will be any anti-competitive impact on the market if it is completed. Under this general rule, data or information on the financial statements of the parties, names of the shareholders of the parties, financial statements of affiliate companies (including organisation charts, etc) as well as market conditions in the relevant sector are required. If the KFTC deems it necessary, it may request further data or information.

- 15 What is the timetable for clearance and can it be speeded up?

After submission of the filing to the KFTC, the KFTC must, within 30 days, issue its decision on whether to grant clearance under the MRFTA. The 30-day period may, at the discretion of the KFTC, be shortened or extended by up to 120 days (ie, an additional 90 days). Where such extensions are required, common reasons include the complexity of the potential transaction and the KFTC's requesting additional information (whether due to the incomplete nature of the information filed with the KFTC in the initial report or because the KFTC deems that the complexity of its investigation requires further data to enable it to reach a determination based on sufficient research on the question of clearance). There is no formal mechanism for accelerating the review process, even though the KFTC may do so at its discretion.

- 16 What are the typical steps and different phases of the investigation?

Once it has received the report, accompanied by relevant documents containing information on items such as the current market definition, the KFTC has 30 days (subject to another 90-day extension) to deliver its determination. During this time, the report is circulated internally and officers handling the case are required to investigate the possibility of anti-competitive impact on the market. If there is any material anti-competitive impact on the market arising from the merger or acquisition, the transactions may not receive clearance.

 Substantive assessment

- 17 What is the substantive test for clearance?

The substantive test for clearance has no clear contours, but essential to tests for clearance is the question of whether a proposed merger or acquisition has an anti-competitive effect on the relevant markets. In this regard, the definition of the relevant markets and the market concentration ratio in such markets after the business combination are important starting points in determining whether there is any such effect. Especially, if the combined market share of the parties meets all the elements stated below, the business combination is presumed to have anti-competitive effect on the relevant market and the burden of proof shifts to the parties under the MRFTA:

- whether the combined market share of the company resulting from the merger in question results in monopoly status. The test for monopoly status is whether the market share of a single company is 50 per cent or more in the relevant market or the

aggregate market share of three companies or fewer is 75 per cent or more in the relevant market (except a company whose turnover is less than 4 billion won in the relevant market);

- whether the combined market share of the post-merger company is the largest in the relevant market; and
- whether the combined market share of the post-merger company exceeds that of the company holding the second-largest market share by not less than 25 per cent of the combined market share of the parties.

In addition, if a large company is involved in a business combination through which the large company gains market share of 5 per cent or more in relevant market in which the combined market share of small- or medium-sized companies defined under the Basic Act on Small and Medium Enterprises is two-thirds of the entire market or more, such business combination is also presumed to have anti-competitive effects on the relevant market.

Recently, in the current economic crisis, the KFTC has tended to be more lenient in its substantive review of business combinations, in that it considers the possibility of new entry, foreign competition and dynamic aspects of competition in ways more favourable to the parties.

18 Is there a special substantive test for joint ventures?

No. Normal review procedures for merger and acquisition would also apply to joint ventures. However, some joint ventures formed by competitors in the relevant market may be considered as falling within one of the unfair collusive activities under the MRFTA. The Merger Review Guidelines also require the KFTC to take into consideration a possibility of collusion by competitors.

19 What are the 'theories of harm' that the authorities will investigate?

Generally, the KFTC may consider various theories of harm depending upon the nature of the transaction involved. In most cases, unilateral and coordinated effect due to the business combination in question is one of the key considerations in the review of a horizontal merger, but other factors may also be considered depending on the transaction.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Certain exemptions are available notwithstanding the fact that a particular transaction may appear to fall within the definition of prohibited or regulated activity. Thus, the MRFTA provides some exceptions in cases: where efficiency-enhancing effects, which are deemed difficult to achieve without the contemplated merger, outweigh potential adverse effects of restricting competition; or, where the merger involves a failing company whose paid-in capital has been less than its total assets on the balance sheet for a considerable period, and whose revitalisation is therefore deemed impossible without the business combination in question, and which at the same time meets the conditions set forth under the Enforcement Decree to the MRFTA. Conditions set forth under the Enforcement Decree cover situations in which it is difficult to continue to use the company's production facilities in the relevant market without a merger; and it is difficult to form a business combination that is less restrictive of competition than the contemplated one.

In addition, in the review of efficiency-enhancing effects, factors such as increase of employment, economic development of non-metropolitan areas, stable provision of energy and improvement of environmental pollution should be comprehensively considered.

21 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is one of the two exceptions under which the KFTC can allow merger transactions even though they result in some degree of anti-competitive effect. In Korea, the efficiency argument is often presented, but has been accepted only in a few cases.

When considering the efficiency exception, the KFTC normally looks into the issue of whether a merger transaction will result in economies of scale, cost reduction, contribution to employment, and regional economic development, etc. In addition, for an efficiency argument to be successful, such merger transaction must be the last resort (ie, there must be no substitute measures that could be used to achieve the same result).

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Once a business combination is notified, the KFTC may have a 30-day waiting period in the case of pre-closing transactions, and the KFTC may file actions against companies which close their transactions before clearance. In the case of post-closing transactions, however, the KFTC may issue corrective orders. Such orders include disposition of all or part of the shares acquired, transfer of business, etc. If the parties do not comply with the corrective measures, the KFTC may impose coercive fines for implementation which may be imposed based on the number of days of non-compliance until the parties effectively comply with the corrective measures.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The KFTC may issue a corrective order to the extent that such order rectifies the anti-competitive effect. Such corrective orders can include prohibition of the merger transaction, disposition of all or part of the shares acquired, resignation of an officer, transfer of business, cancellation of debt guarantees, public announcement of the fact that certain corrective measures were imposed, restriction on the types or scope of management that may produce anti-competitive effects on given business combinations, and any other corrective measures necessary to remedy the violation of law. For example, the KFTC ordered the acquiring company to dispose a part of its production lines to a third party in various cases.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestment has not been a remedy generally imposed in Korea. However, in more and more cases recently, the KFTC ordered the acquiring companies to divest certain businesses to third parties upon finding that the acquisition of those businesses by the acquiring companies would result in a substantial market concentration and thus restrain competition in the relevant market. The types of remedy ordered by the MRFTA will depend on the degree of the anti-competitive effect of the particular transaction, the nature of the relevant market and the number of competitors, etc. Recent cases involving divestment allowed six months to one year to complete the divestment.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been instances where the KFTC has only imposed fines against foreign companies that did not file or failed to file the report by the prescribed deadline. However, in 2007, there was the first corrective measure in connection with a foreign-to-foreign merger. In addition, in 2008 while the KFTC was reviewing a foreign-to-foreign merger, the parties gave up the transaction because of the

anti-competitive concerns raised by various competition authorities including the KFTC.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The KFTC has never recognised these situations.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

Yes, depending upon the case and the circumstances. In particular, in cases where conditions in a market could be affected by a merger, the KFTC may ask competitors or customers to provide data or information to enable it to determine whether there is any direct impact on the market that specifically relates to competition. However, there is no general procedure as regards asking the customers or competitors to provide their views on the merger. Any interested party to a merger and acquisition transaction may file its opinion with the KFTC in its review process.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The MRFTA provides that anyone in the KFTC who deals with confidential business information must not reveal, publish or otherwise use such information other than for the purpose of enforcing the MRFTA. However, in clearance process, it should be noted that part of such information may be revealed in the course of the KFTC's market survey on various interested parties, such as competitors, consumers and industry experts.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The KFTC has played a major role in the International Competition Network (ICN) for merger control issues. Further, the KFTC also actively participates in many forums on competition issues in the Doha Development Agenda and Organisation for Economic Cooperation and Development. In addition, the KFTC has been involved in many bilateral discussions with other antitrust authorities in other jurisdictions including the US, EU, Japan, Germany and Russia.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no particular provisions of note beyond those discussed above.

Judicial review

31 What are the opportunities for appeal or judicial review?

If the parties are dissatisfied with the KFTC's original decision or disposition of its appeal, an application for judicial review may be made to the Seoul High Court. In the event that the High Court upholds the applicant's complaint, the KFTC's decision will be reversed according to the terms of that court order.

32 What is the usual time frame for appeal or judicial review?

Any party engaged in a merger and acquisition transaction may file a complaint with the KFTC or court if it is dissatisfied with a ruling or order issued by the KFTC. A complaint must be filed with the KFTC within 30 days of receipt of the decision that is being challenged. The appeal is then reviewed by other divisions of the KFTC. The review by the KFTC must be over within 60 days of receipt of the appeal. The KFTC will then issue a decision regarding the appeal. If the complainant remains dissatisfied with the results of the KFTC's investigation and ruling, judicial review is open to them. An application to the courts for judicial review must be filed within 30 days of receipt of the KFTC's original decision or the decision on appeal. The Seoul High Court, an intermediate level court, has exclusive jurisdiction over any appeal arising from decisions of the KFTC. Also, the complainant may choose to directly file a complaint with the Seoul High Court within 30 days of receipt of the decision that is being challenged, without filing a complaint with the KFTC.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

Since the new regulation for foreign-to-foreign M&A transactions became effective on 1 July 2003, the KFTC has not found many cases in violation of the MRFTA. However, in December 2003 the KFTC fined a foreign company involved in a foreign-to-foreign merger for a delay in filing and for violating the MRFTA. Since then, there have been some cases in which the KFTC has imposed fines against foreign companies for a delay in filing. In addition, in 2007, the KFTC ordered a foreign company the first corrective measure in connection with its foreign-to-foreign merger affecting Korean markets.

34 What are the current enforcement concerns of the authorities?

There are no enforcement concerns specific to any industry or sector.

35 Are there current proposals to change the legislation?

There are no current proposals to change the legislation with regard to merger control.

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