

MERGER CONTROL IN KOREA

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Yong Woo Lee has represented multinational and Korean companies in landmark merger review cases and other antitrust matters, including as lead counsel before the Korea Fair Trade Commission in Seagate's acquisition of Samsung's hard disk drive business. He also served as advisory counsel to the Korea Fair Trade Commission on competition policies. In addition to antitrust matters, Yong has extensive experience advising multinational companies on real estate and corporate transactions.

Sangdon Lee has significant experience in various antitrust fields, including cartel and merger control. He has represented Samsung, Google, Linde, Macquarie, Goldman Sachs, Valeo, Cargolux, SK Telecom, CMA-CGM, Allergan, Terumo, Activision-Blizzard, Trafigura and Asahi in numerous antitrust cases. Notably, he acted for Google as lead counsel when Google successfully obtained unconditional clearance from the Korea Fair Trade Commission to acquire Motorola Mobility. He has also advised Korean clients on European merger control while working as a visiting lawyer at Allen & Overy's Paris office.



Yong Woo Lee



GTDT: *What have been the key developments in the past year or so in merger control in your jurisdiction?*

Yong Woo Lee and Sangdon Lee: According to a press release from the Korea Fair Trade Commission (KFTC), 668 mergers were approved in 2017, which is slightly higher than the number of approvals in 2016. Twenty-seven cases out of 646 were subject to in-depth investigation in 2016 and 20 out of 668 cases were reviewed by the KFTC in 2017. Of these, four cases were subject to remedies in both 2016 and 2017. This change, albeit slight, appears to reflect the KFTC's new policy to quickly review cases in order to determine which have anticompetitive concerns and which don't at an early stage of the review process. In line with the KFTC's practice of automatically imposing fines for failed or delayed notification, 28 cases, including foreign-to-foreign deals, were subject to fines for this reason in 2017.

In terms of the 2017 regulation trend of the KFTC, we have frequently seen more aggressive remedies for global mega deals and close cooperation with foreign competition authorities. When a proposed merger was found to pose harm to competition in the Korean market, the KFTC did not hesitate to intervene. In fact, as of February 2018, three out of five cases that were subject to the KFTC's remedies or oppositions

were global M&A deals, partly as a result of the KFTC's seemingly solid cooperation arrangement with foreign competition authorities for multi-jurisdictional deals. Those three global M&A deals were *Dow/DuPont* (2017), *Maersk/HSDG* (2017) and *Qualcomm/NXP* (January 2018). In all cases, the KFTC cooperated closely with the European Commission, China's Ministry of Commerce and Japan's Fair Trade Commission in the course of determining anticompetitiveness and optimal remedies. In *Dow/DuPont*, the KFTC actively issued a divestiture order relating to acid copolymer-related assets based on anticompetitive concerns in the global market, not just the Korean market.

In relation to foreign-to-foreign transactions, the KFTC is currently contemplating imposing a filing obligation with respect to a transaction above a certain size without applying the so-called 'Korea nexus test' by amending the thresholds triggering an obligation to notify in the first half of 2019. Specifically, the KFTC has revealed in its 2018 plan that a filing obligation will be determined on the basis of transaction size only. The KFTC seems to be at the stage of drafting a proposed amendment to the Monopoly Regulation and Fair Trade Act (MRFTA) to implement this change to the filing threshold. This movement indicates the KFTC's intent to actively review global mega deals that may have an effect on the Korean market but will not trigger a filing obligation based on the existing filing threshold relating to the size of parties, as seen in the *Facebook/WhatsApp* transaction, which was excluded from filing in Korea owing to WhatsApp's low domestic sales. Details of the amendment including the precise filing threshold relating to the size of the transaction are yet to be announced. Given the KFTC's firm position to effect such change in the filing thresholds through the amendment to the MRFTA in the first half of 2019, we believe that multinational companies and law firms involved in global M&A deals should closely monitor the progress of the amendment.

As for transactions that do not raise anticompetitive concerns, the KFTC has refined procedures to facilitate a quick review.

First, according to the amendment to the Enforcement Decree of the MRFTA that took effect on 19 October 2017, the thresholds for total assets or annual turnover (including Korean turnover) triggering an obligation to notify were increased to 300 billion won and 30 billion won (from the former thresholds of 200 billion won and 20 billion won).

Next, the KFTC amended its M&A Review Guidelines effective as of 20 December 2017 to shorten the statutory review period for the formation of a foreign joint venture company, which does not have an effect on the Korean market, to 15 calendar days. With this simplified review procedure, clearance would, in principle, be granted within 15 days after the date of

submission of a merger notification. Shin & Kim played a role in the KFTC's implementation of the amendment to the M&A Review Guidelines: in a recent case involving the formation of a joint venture by three Korean terrestrial broadcasters for the purpose of distributing broadcasting contents in the US market, as counsel to the Korean broadcasters, Shin & Kim persuaded the KFTC to grant clearance on an expedited basis, comparable to the simplified review procedure, considering that the transaction would not give rise to an effect on the domestic market, which led the KFTC to adopt the amendment to its M&A Review Guidelines.

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

YWL & SL: Unlike the EU, there is no Phase 1 and Phase 2 review process in Korea. The initial review period is 30 days from the date of filing and may be extended by 90 days (ie, up to 120 days in total) at the KFTC's sole discretion, if deemed necessary. In the vast majority of cases, the KFTC issues clearance within the initial 30 days (as demonstrated by the fact that of 668 cases notified to the KFTC in 2017, only 20 cases were subject to in-depth investigation while the rest were cleared within 30 days). Nonetheless, it is relatively common for the KFTC to extend the review period in cases where the transaction does not raise anticompetitive concerns, simply because of its case team's workload and other reasons not directly relevant to the analysis of anticompetitiveness. When the review period is extended, the KFTC gives a notice of extension from time to time without any formal decision. An extension of the review period is not an indication of the KFTC's intention to conduct an in-depth investigation. Also, unlike the EU or China, there is no official or unofficial pre-filing consultation in Korea.

As the KFTC may 'stop the clock' by issuing a request for information, the parties should diligently prepare a merger notification in accordance with the KFTC's guidelines, and submit any documents and information requested by the KFTC, as completely as possible, so as to obtain clearance within the prescribed 30-day or 120-day review period.

Meanwhile, in a case where remedies are anticipated owing to anticompetitive concerns, it would be possible to shorten the period of review by proactively engaging in discussions with the KFTC regarding a feasible remedy plan at an early stage after the submission of a merger notification. As there are no prescribed rules or procedures on the appropriate timing of remedy discussions, merger parties may begin such discussions with the KFTC at a suitable point in time as desired by the parties. In the recent *Esmeralda/DS Power* and *Maersk/HSDG* cases, the KFTC determined



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remedies based on similar precedents in the EU and US. Given the KFTC's tendency to give weight to foreign precedents, we believe that making references to relevant foreign precedents would be valuable in developing a remedy proposal and persuading the KFTC to accept the proposal.

In addition, it is possible to shorten the KFTC's review period procedurally through a voluntary pre-merger notification, requesting the KFTC's preliminary review based on a signed preliminary non-definitive agreement such as a memorandum of understanding, letter of intent or term sheet, or a draft of the relevant definitive agreement prior to signing. Main advantages of filing a voluntary pre-merger notification and obtaining the KFTC's preliminary clearance would be (1) to get reassurance in advance that the contemplated transaction will ultimately be approved by the KFTC when a formal merger notification is subsequently filed and (2) to obtain the KFTC's official clearance for the transaction on an expedited basis (within 15 days) upon submission of the formal notification, unless there have been any material changes to the details of the transaction after the filing of the voluntary pre-merger notification.

The outcome of the KFTC's merger review is generally predictable. If a merger falls under the categories of transactions that are presumed to have anticompetitive effects under the MRFTA,

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it is highly likely that the KFTC would issue a remedial order. On the other hand, if the safe harbour provision under the KFTC’s M&A Review Guidelines is applicable to the transaction, it would be safe to conclude that it would not issue a remedial order with respect to the transaction.

Recently, we have seen a high number of instances where the KFTC issued requests for information not directly relevant to the analysis of anticompetitiveness. In particular, it has often requested both Korean and global market information for foreign-to-foreign transactions, regardless of the relevant geographic market definition. Although legal counsel would attempt to push back such a request in most cases, it seems that the best approach to shorten the investigation period is to submit the requested materials to the extent possible and cooperate with the KFTC.

The majority of the KFTC officials respond efficiently to questions or requests for advice based on their expertise and experience. Although it can vary from one case to the next, the KFTC frequently communicates with merger parties through written correspondences or verbal communication by telephone or face-to-face. In addition, while communications with the Commission are usually handled by a case handler assigned to a particular case, a notifying party may request a meeting with the director of the KFTC’s M&A Division, as well as the case handler, in cases where the transaction concerned would give rise to anticompetitive concerns or has become highly publicised in Korea.

GTDT: What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

YWL & SL: Recent trends demonstrate that the KFTC has been proactively and aggressively reviewing global M&A deals affecting the Korean market. While the semiconductor industry has always been of interest to the KFTC, we expect

that it will be one of the main sectors that the Commission will focus on, considering its consistently advanced position among Korea’s other industries. The KFTC has also been closely monitoring the maritime transport and petrochemical sectors, which comprise the core part of the Korean economy.

In addition, according to the KFTC’s recent announcement regarding a proposed amendment to the M&A Review Guidelines, new restrictions on competition, including a restriction resulting from concentration of big data, will be introduced and incorporated into the Guidelines in the second half of 2018. We believe that the KFTC will start conducting a closer review of transactions with issues related to big data even before the amendment.

GTDT: Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?

YWL & SL: In cases where anticompetitive effects are found, economic evidence is considered important in KFTC hearings. For this reason, the KFTC has its own economic analysis division, although from time to time it employs economists from outside the division. In the 2016 *SKT/CJ HelloVision* case, not only the KFTC and the merger parties, but also interested third parties (mainly competitors), used economic analysis to support their positions on the issue of anticompetitive effects. The economic analysis was actually used as the most compelling and conclusive evidence. The KFTC is known to have applied the upward pricing pressure (UPP) analysis for the first time in 2014 in *Essilor/Daemyung*. In *SKT/CJ Hello Vision*, the KFTC relied upon UPP analysis as the basis to develop an important theory of harm. In the case of a merger that would raise anticompetitive concerns, the KFTC often seeks the opinions of interested third parties and generally respects these opinions.

In 2017, there was no noticeable development in the evidence used in the KFTC’s assessment of mergers. In the 2017 *Maersk/HSDG* case, the KFTC solicited opinions of domestic competitors and customers, as well as foreign competitors.

GTDT: Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.

YWL & SL: The KFTC issued conditional clearance with remedies in five cases during 2017 to February 2018.

Among them, the most widely known case would probably be *Dow/DuPont*. The KFTC determined that the merger of DuPont, the top player in the global acid copolymer market, with Dow, another important player, would restrict

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

Legal advisers need to have a broad perspective on mergers and acquisitions based on professional knowledge and know-how accumulated through dealing with different types of mergers. They should be able to suggest the most efficient way of reporting a proposed merger in consideration of the notifying party's objective, overall transaction structure and timeline, and give practical advice to increase the chance of obtaining the KFTC's clearance.

Legal advisers in the field should also have an accurate understanding of and insights into the relevant industries and markets, which may be cultivated through persistent efforts to learn and analyse the relevant markets.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

The key is to analyse issues accurately and maintain close communications with the KFTC. In addition, merger parties should not submit too much information to the KFTC to avoid putting an unnecessary administrative burden on the case handler. To get clearance in a timely manner, a notifying party will have to comply with the KFTC's request for additional information as completely as possible. Here, legal advisers may sometimes face very delicate situations that require a balancing of the client's administrative burden with a need to provide the KFTC with all necessary information. That is why the legal counsel in this field must be good communicators.

What were the most interesting or challenging cases you have dealt with in the past year?

We are currently acting for Linde in connection with the notification in Korea of its merger with Praxair. As the transaction is still under review by the KFTC, we cannot say much about it at the moment.

The most challenging case in 2017 was the formation of a torque converter joint venture between Valeo Bayen and Kapec. The transaction entailed the merger of the respective torque converter businesses of Valeo and Kapec, where the combined entity became the largest torque converter manufacturing enterprise globally. The KFTC and China's Ministry of Commerce issued requests for information on numerous occasions in the course of conducting in-depth investigations. As global counsel, Shin & Kim exerted significant efforts to liaise with the parties and their local counsel in China and Japan to respond the competition authorities' requests for information in an efficient and consistent manner.

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competition in that market. On that basis, as mentioned, the KFTC imposed a divestiture order for the sale of acid copolymer-related assets globally and not just in Korea. This case is noteworthy in that the KFTC proactively imposed a structural remedy in a global M&A deal, and it is therefore expected to apply this proactive approach for global mega deals in future.

Another interesting case in 2017 was *Maersk/HSDG*, which involved an acquisition by Maersk, a major player in the container liner carrier market, of shares of HSDG, its competitor. While analysing the anticompetitive effects of the acquisition based on the respective market share of Maersk and HSDG, the KFTC also considered the acquisition to be a merger between Maersk and a consortium to which HSDG belongs taken as a single competition unit, and analysed the anticompetitive effects of that merger. The KFTC determined that the acquisition would give rise to anticompetitive concerns on the basis that the combined entity after the transaction would become the leading player in the relevant market or would otherwise belong to the leading consortium. Accordingly, the KFTC imposed

remedies ordering the combined entity to withdraw from the consortium for the routes where anticompetitive concerns could arise or not to extend the duration of the existing consortium contract for such routes; prohibiting re-entry into the consortium for the next five years; and prohibiting the exchange of sensitive information with members of the consortium. This case was the first case in which the KFTC imposed remedies on a horizontal merger in the container liner shipping market by conducting a competitive analysis based on market shares at the consortium level and not at the relevant entity level.

In *Esmeralda/DS Power*, the transaction involved a horizontal overlap in the waste heat supply market in Osan City (Korea) and a vertical overlap between the upstream waste heat supply market and downstream collective energy supply market, both within Osan City. Because Esmeralda and DS Power were the only two companies engaged in the waste heat supply business in Osan City, the KFTC assessed whether monopoly in the upstream market would affect the downstream market as a result of the transaction. Specifically, the KFTC determined that the combined entity

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could raise prices in the upstream market, which could, in turn, lead to an increase in raw material costs in the downstream market in which DS Power supplies products, ultimately leading to an increase in supply prices charged to consumers. On that basis, the KFTC imposed behavioural remedies restricting price increases. In addition to the typical review of foreclosure and coordinated effects, the KFTC raised concerns about the possible transfer of the increased price in the upstream market to consumers in the downstream market considering the distinctive characteristics of that market. In determining the anticompetitive effects of the transaction and remedies imposed, the KFTC relied on the Federal Trade Commission’s *Entergy/Koch Industries* case in 2011. The KFTC does refer to foreign precedents even in the course of reviewing local deals.

Apart from the above cases, it should also be noted that in reviewing divestitures, the KFTC has maintained a firm position not to recognise that the sale has taken place merely based on the execution of a divestiture agreement and to consider that competitive harm would be alleviated or resolved only after the completion of the sale. In complex global M&A deals, because the divestiture of a certain part of the business division may change the overall structure of the proposed transaction or could pose a completion risk, it is recommended that merger parties evaluate potential anticompetitive effects of a proposed transaction with local counsel at an early stage of planning the transaction structure, and if there is any doubt that the transaction may raise potential competitive concerns, the parties

(through local counsel) should engage in close communication with the KFTC before filing a merger notification in order to propose a structure that is less likely to raise anticompetitive concerns.

GTDT: Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?

YWL & SL: As briefly mentioned, the KFTC is contemplating an amendment to the MRFTA to impose a filing obligation if a transaction amount (share acquisition price, etc) is above a certain threshold amount. It is difficult to predict the precise threshold amount to be included in the amendment. The KFTC aims to have the amendment come into effect in the first half of 2019.

The KFTC recently announced its plan to amend the M&A Review Guidelines in the second half of 2018 by incorporating new types of restrictions on competition, including those resulting from concentration of big data. According to the Commission, it is currently anticipated that new review guidelines on anticompetitive effects of a horizontal overlap between two or more companies in possession of big data and a vertical overlap between big data and other related products will be added. In this regard, there is a mix of concern and high expectations regarding the KFTC’s effort to adopt such review guidelines for the first time when explicit review guidelines or standards are yet to be established by competition authorities in other jurisdictions.

Finally, the National Assembly of Korea is reviewing a proposed amendment to the MRFTA, which would provide an exemption from a filing obligation for certain types of mergers that are relatively unlikely to raise anticompetitive concerns. For example, the proposed amendment would exempt from the merger notification requirement under the MRFTA a merger involving an interlocking directorate of less than one-third of the total number of directors or officers of the target company, the establishment of a private equity fund and capital contribution to a private equity fund through a share acquisition. This is to promote investment in and acquisition of innovation and technology and venture companies that have been subjected to the KFTC’s fast-track review and are deemed not to raise significant anticompetitive concerns.