market intelligence

GETTING THE DEAL THROUGH

Merger Control

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2019

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Welcome to GTDT: *Market Intelligence*.

This is the 2019 edition of *Merger Control*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence.

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MERGER CONTROL IN KOREA

Yong Woo Lee and Sangdon Lee are partners at Shin & Kim, one of the top-tier law firms in Korea. Jeannie Y Jeong is a senior foreign attorney at Shin & Kim.

Yong Woo Lee has represented multinational and Korean companies in landmark merger review cases and other antitrust matters, including Seagate as lead counsel before the Korea Fair Trade Commission in Seagate's acquisition of Samsung's HDD business. He also served as advisory counsel to the Korea Fair Trade Commission (KFTC) on competition policies.

Sangdon Lee has significant experience in various antitrust fields, including cartel and merger control. He has represented Linde, Trafigura, Macquarie, Goldman Sachs, Samsung, Google and Cargolux in numerous antitrust cases. Notably, he acted for Google as lead counsel when Google successfully obtained unconditional clearance to acquire Motorola Mobility and Linde as lead counsel when Linde successfully obtained conditional clearance to merge with Praxair.

Jeannie Y Jeong has accumulated experience in merger control cases and the KFTC's investigations over the past decade, covering a broad range of industries such as IT, finance, energy and pharmaceutical. As a member of Shin & Kim's competition and antitrust practice group, she has advised multinational corporations in high-profile antitrust cases, including Linde, Google, Qualcomm, Macquarie, Samsung and many others.

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Yong Woo Lee


Sangdon Lee

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

Yong Woo Lee, Sangdon Lee and Jeannie Y Jeong: According to a press release issued by the KFTC, 702 mergers were approved in 2018, which is the highest number of cases reviewed in the past 10 years (breaking the 2015 record of 669 cases).

In 2017, out of the 668 cases reviewed by the KFTC, 20 mergers (2.9 per cent) were subject to in-depth review. In 2018, out of the 702 cases, 24 mergers (3.4 per cent) were subject to in-depth review. Among the 24 merger cases, remedies were imposed in two of the three mergers that were found to be anticompetitive, and the remaining one case was withdrawn by the parties after an examiner's report was issued. The rate of the KFTC's in-depth review was higher in 2018. Nonetheless, the KFTC's in-depth review remains at a low rate of 3.4 per cent, demonstrating the KFTC's policy to quickly review no-issue cases by distinguishing cases raising anticompetitive concerns from those with no anticompetitive concerns at an early stage of the review process. In addition, in 2018, the KFTC imposed penalties in 23 cases for delayed notification and two cases for closing before the KFTC's clearance.

There was also a noticeable trend towards vigorous remedies for global mega deals and close coordination with foreign competition authorities in 2018. All of the three mergers that were found to be anticompetitive in 2018 were global M&A deals. In those three cases, the KFTC worked closely with competition authorities in the EU, the US and other countries in determining anticompetitiveness and formulating remedies to be imposed. In particular, in the *Linde/Praxair* case (represented by Shin & Kim), the KFTC, based on competition concerns in the global excimer laser gas and helium wholesale markets, ordered divestitures of the parties' excimer laser gas assets and helium sources. This shows the KFTC's intention to aggressively regulate global M&As affecting the global market beyond Korea.

It is also noteworthy that, in the *Linde/Praxair* case, the KFTC continuously monitored the progress of review by competition authorities in the major jurisdictions including the EU, the US, China and Canada, by requesting the parties for copies of materials already submitted to, and engaging in conference calls with, those competition authorities and paying close attention to their determination of anticompetitiveness and remedies.

In addition, effective as of 27 February 2019, the KFTC amended the M&A Review Guidelines to enable efficient review of mergers in the 'technology innovation industries' such as the semiconductor and pharmaceutical industries. First, the amended Guidelines provide for a new term, 'information asset', which is defined as a 'set of information that are gathered for various purposes and managed, analysed and used in an integrated manner'. The KFTC has recognised that in the technology innovation industries where information asset would constitute both the main raw material and core product, monopoly and foreclosure with respect to information industry may result in serious anticompetitive effects. In addition, considering that research and development activities comprise the core of the semiconductor, pharmaceutical and other technology innovation industries, besides price competition, various different forms of competition may take place. Accordingly, the amended M&A Review Guidelines provide for specific standards of defining relevant markets and calculation of market concentration and determination of anticompetitive effects suitable for such technology innovation industries. While the practical impact of the amended Guidelines is yet to be seen, we should be mindful that the KFTC's review period for mergers in the technology innovation industries may be longer owing to the KFTC's requests for a broader range of data and materials required under the amended Guidelines.

"Until recently, the rate of the KFTC's imposition of behavioural remedies rather than structural remedies was higher than other competition authorities around the world."

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 & JYJ: Unlike the EU, there is no Phase I and Phase II review process in Korea. The initial review period is 30 days from the date of notification, but the KFTC may extend it by an additional 90 days (ie, up to a total of 120 days) in its sole discretion, if necessary. The vast majority of merger notifications to the KFTC are cleared after the initial 30 days (as demonstrated by the fact that of 668 cases notified to the KFTC in 2018, only 24 cases were subject to in-depth investigations while most of the remainder was cleared within 30 days). However, it is worth noticing that an extension of the review period is not an indication of the KFTC's intention to conduct an in-depth investigation. Even in a case where there is no restriction of competition, it is not rare for the case handler to extend the review period for reasons unrelated to the anticompetitive effects such as the KFTC case team's workload. When the review period is extended, the KFTC simply gives a notice of extension from time to time without any formal decision. Also, unlike in the EU or China, there is no official or unofficial pre-notification consultation in Korea.

As the KFTC may 'stop the clock' by issuing a request for information (ie, suspension of the 30-day or 120-day review period), to shorten the KFTC's merger review period and obtain clearance within the prescribed 30-day review period, the parties should diligently prepare a merger notification in accordance with the KFTC's M&A Review Guidelines, and submit documents and information requested by the KFTC, if any, as completely as possible.

If a transaction will likely raise significant anticompetitive concerns and remedies are thus expected, engaging in remedy discussion with the KFTC at an early stage would help to shorten the overall timeline of the KFTC proceeding. Because the remedy discussion is carried out by informal communications with the case team, it is less predictable than the remedy negotiation process in the EU or the US.

Another way to shorten the KFTC's review period procedurally is to submit a voluntary pre-merger notification for the KFTC's preliminary review based on a draft transaction agreement prior to signing the agreement or after entering into a preliminary non-definitive agreemens such as a memorandum of understanding, letter of intent or term sheet. The main advantages of filing a voluntary pre-merger notification and obtaining the KFTC's preliminary clearance are: to get comfort in advance that the contemplated transaction would ultimately be approved by the KFTC when a formal merger notification is subsequently filed; and 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 in 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 contemplated merger falls under the categories of transactions that are presumed to have anticompetitive effects under the Monopoly Regulation and Fair Trade Act of Korea (MRFTA), 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 a contemplated merger, it would be safe to conclude that the merger would not be subject to the KFTC's remedial order.

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

The majority of KFTC officials efficiently respond to questions or requests for advice based on their expertise and experience. Although it slightly varies from one case to the next, the KFTC frequently communicates with merger parties through written correspondence or verbal communications by telephone or face-to-face meetings. In addition, while most communications with the KFTC 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 a merger would raise potential competitive 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 & JYJ: Generally, transactions that satisfy all of the conditions that trigger a presumption of anticompetitive effects under the MRFTA (as explained above) are the hardest to obtain the KFTC's approval. In an oligopolistic market, four-to-three or three-two mergers fall under this category.

If you look at the recent trends, the KFTC is proactively and aggressively reviewing global mergers affecting Korean market.

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

YWL, SL & JYJ: In cases where anticompetitiveness is an issue, economic evidence is considered important in KFTC hearings. For this reason, the KFTC has its own Economic Analysis Division, although from time to time the KFTC retains outside economists.

In the 2016 *SKT/CJ HelloVision* case, not only the KFTC and the merging parties, but also interested third parties, mainly competitors, used economic analysis to support their positions on the anticompetitiveness issue. 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 the *Essilor/Daemyung* case. In the *SKT/CJ Hello Vision* case, 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 generally conducts an opinion survey on third parties and generally respects these opinions.

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 & JYJ: In the past year, the KFTC issued conditional clearance subject to remedies in two out of three cases that were found to be anticompetitive. The third case, the *Celanese/Blackstone* case, was withdrawn by the parties after issuance of the examiner's report.

The first case was the widely publicised *Qualcomm/NXP* case. The KFTC determined that an acquisition by Qualcomm, a strong player in the global baseband chipset market, of NXP, the top player in the global NFC chips, security element chips and security element operating systems market, would restrict competition in that market. Accordingly, the KFTC imposed structural remedies with respect to the NFC patents held by NXP and behavioural remedies with respect to the NFC patents held by Qualcomm. This transaction, however, was not consummated owing to the delay in obtaining clearance from the Chinese competition authority.

The next case was *Linde/Praxair* involving a merger of Linde (No. 2 player) with Praxair (No. 3 player) in the global industrial gases market. The KFTC closely coordinated with competition authorities around the world and aggressively imposed structural remedies in this global M&A deal. The KFTC concluded that the combined entity following the transaction would become the No. 1 company in the Korean tonnage and bulk supply markets for oxygen, nitrogen and argon, as well as the global excimer laser gases and helium retail market, resulting in a significant gap in market share with the No. 2 player. Accordingly, the KFTC determined that the merger would give rise to significant anticompetitive concerns and imposed structural remedies ordering the parties to divest: the tonnage and bulk oxygen, nitrogen, and argon supply business in Korea; all of the excimer laser gases related assets owned by Linde in New Jersey (USA) or Praxair in Korea; and certain global helium wholesale assets owned by the parties.

The most notable development in the KFTC's practice trends is that in determining appropriate remedies to be imposed, the KFTC now tends to consider structural remedies first before considering any behavioural remedies available. The KFTC's M&A Remedy Imposition Guidelines provide for a principle that a structural remedy should take precedence over any behavioural remedy. However, until recently, the rate of the KFTC's imposition of behavioural remedies rather than structural remedies was higher than other competition authorities around the world. This trend was more evident in cases where the combined entity's market share was relatively low. In other words, the KFTC previously imposed structural remedies only when: a combined entity's market share was fairly high (usually over 50 per cent); and a gap in market share with the No. 2 player was considerable (usually over 20 per cent).

In contrast, the combined entity's market share in the *Linde/Praxair* case was only in the range of approximately 37.2 per cent to 42.8 per cent, and the market share gap with the No. 2 player was approximately 13.6 per cent at maximum. The KFTC nevertheless concluded that structural remedies

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, merging parties should avoid submitting too much information to the KFTC, so as not to put an unnecessary administrative burden on the case handler. On the contrary, to get timely clearance, 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 requiring a balancing of the client's administrative burden and a need to provide the KFTC with all necessary information in a timely manner. 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?

The most challenging deal in the past year was the *Linde/Praxair* merger, the world's largest merger in 2018. Although persuading the KFTC was challenging owing to complex competition landscapes in numerous sub-segmented markets, we tactfully guided the parties on antitrust strategies and succeeded in limiting remedies to a reasonable scope and obtaining conditional approval before the global closing.

Another challenging deal was the acquisition by KCC, Wonik and SJL, three domestic companies, of Momentive, a leading important player in the silicone markets. Based on our analysis that horizontal and vertical overlaps in relevant product markets would not give rise to anticompetitive concerns, we successfully obtained unconditional clearance from the competition authorities in all of the seven relevant jurisdictions.

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were required. It is thus expected to continue to adopt the principle, under the M&A Remedy Imposition Guidelines, that structural remedies takes precedence over behavioural remedies for global deals in future.

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 & JYJ: The KFTC submitted a proposed amendment to the MRFTA to the National Assembly of Korea on 30 November 2018 that is still under review by the National Assembly. This is the KFTC's first major overhaul of the MRFTA in 38 years after the enactment of the MRFTA, covering amendments to various provisions of the MRFTA from mergers to cartel and unfair trade practices, as well as investigation procedures.

In addition to the current size-of-parties test, the proposed amendment to the MRFTA introduces a new transaction-value test, triggering a notification obligation if the transaction value exceeds a certain threshold amount. This amendment is intended to address the situation where even a merger with a substantial deal value taking place in a market with a high growth potential could avoid notification if revenues of the parties involved do not meet the applicable threshold amount. In the case of a foreign acquirer in a transaction that satisfies the transaction-value test, a notification obligation would be triggered only if the foreign acquirer has significant activities in the Korean market. It would be worth keeping an eye on what the transaction-value test and foreign acquirer's significant activities in Korea precisely mean after these new tests are incorporated into the Enforcement Decree of the MRFTA.

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