International Comparative Legal Guides

Merger Control 2021

A practical cross-border insight into merger control issues

17th Edition

Featuring contributions from:

Advokatfirmaet Grette AS
AlixPartners
ALRUD Law Firm
AMW & Co. Legal Practitioners
AnesuBryan & David
Arthur Cox
Ashurst LLP
Blake, Cassels & Graydon LLP
BUNTSCHECK Rechtsanwaltsgesellschaft mbH
DeHeng Law Offices
Dittmar & Indrenius
DORDA Rechtsanwälte GmbH
Drew & Napier LLC
ELIG Gürkaynak Attorneys-at-Law
Hannes Snellman Attorneys Ltd
L&L Partners Law Offices
Lee and Li, Attorneys-at-Law
LNT & Partners
MinterEllison
Moravčević, Vojnović i Partneri AOD Beograd in cooperation with Schoenherr
MPR Partners | Maravela, Popescu & Asociaţii
MSB Associates
Nagashima Ohno & Tsunematsu
Norton Rose Fulbright South Africa Inc
OLIVARES
Pinheiro Neto Advogados
Portolano Cavallo
PUNUKA Attorneys & Solicitors
Schellenberg Wittmer Ltd
Schoenherr
Shin & Kim LLC
Sidley Austin LLP
URBAN STEINECKER GAŠPEREC BOŠANSKÝ
Zdolšek Attorneys at law

ICLG.com

Expert Chapters

Q&A Chapters

Q&A Chapters Continued

ICLG.com

Korea

John H. Choi

Shin & Kim LLC
Sangdon Lee

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Korea Fair Trade Commission ("**KFTC**") is the relevant merger authority that enforces the Monopoly Regulation and Fair Trade Act of Korea ("**MRFTA**"), which is the primary competition law in Korea.

1.2 What is the merger legislation?

The MRFTA (and in particular, Articles 7 and 12 thereof) and its Enforcement Decree govern "business combinations" (or "mergers"). In addition, these are the following KFTC guidelines and standards for merger control:

- Guidelines for Notification of Business Combination (the "**Merger Filing Guidelines**");
- Guidelines for Review of Business Combination (the "**Merger Review Guidelines**");
- Guidelines for Imposition of Administrative Fine for Violation of Business Combination Notification Provisions (the "**Merger Fine Guidelines**");
- Guidelines for Remedies on Business Combination (the "**Merger Remedies Guidelines**"); and
- Standards for Imposing Administrative Fine to Compel Compliance with Remedies on Business Combination.

1.3 Is there any other relevant legislation for foreign mergers?

The Foreign Exchange Transaction Act and the Foreign Investment Promotion Act would be relevant for foreign mergers as a notification obligation may arise when a foreign company acquires an interest in a Korean company.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Telecommunications Business Act, the Act on Structural Improvement of Financial Industry, and the Financial Holding Companies Act would be relevant for mergers in the telecommunications and finance sectors. Pursuant to these legislations, mergers meeting certain thresholds and requirements would be required to be notified to the Korea Communication Commission (the "**KCC**") or the Financial Supervisory Commission (the "**FSC**"), as applicable, for review.

In the review process, the KCC and the FSC must consult with the KFTC regarding whether the merger restricts competition. If the KCC or FSC has consulted with the KFTC, no separate notification to the KFTC is required.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

Generally, there is no separate national security notification requirement that applies to foreign companies. However, certain restrictions may apply to foreign investment if the investment is viewed as a threat to national security. Whether any foreign investment is considered a threat to national security is reviewed and determined by the Minister of Trade, Industry and Energy, following deliberation by the Foreign Investment Committee, at the request of the competent Minister.

Moreover, the acquisition of a business in the defence industry will trigger a separate notification requirement (separate from a merger filing) and be subject to a separate review process by the competent governmental authority.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Under the MRFTA, the following types of transactions constitute "business combinations" and are subject to merger control legislation:

- acquisition of 20% or more (or 15% or more in the case of Korean listed companies) of the total voting shares of another company;
- acquisition of additional shares by a shareholder who already owns 20% or more (or 15% or more in the case of Korean listed companies) of the total voting shares of another company and becomes the largest shareholder of such company through the acquisition;
- participation as the largest shareholder in the establishment of a new joint venture company;
- acquisition of all or a substantial part of the target company's business or fixed assets;
- statutory merger with another company; and
- interlocking directorate, that is, a director or an employee of one company concurrently holding a position as a registered director of another company (interlocking directorates between affiliates are excluded).

Meanwhile, "control" is not a factor that is considered in determining whether a notification to the KFTC is required (please see the answer to question 2.2 below). However, "control" is a factor that is considered in determining whether anticompetitiveness exists. That is, a business combination that does not involve the acquisition of "control" in principle is assumed to be not anticompetitive, and a simplified review process would apply (please see the answer to question 3.9 below).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes. The acquisition of a minority shareholding can amount to a "business combination" if it falls under the definition of a "business combination" under the MRFTA.

2.3 Are joint ventures subject to merger control?

Yes. Establishment of a joint venture company is subject to merger control if the thresholds in the MRFTA are met.

2.4 What are the jurisdictional thresholds for application of merger control?

A transaction is subject to notification if it is a "business combination" as explained in the answer to question 2.1 above and meets the following thresholds: a party to the transaction has total worldwide assets or total worldwide turnover (including those of its affiliates) equal to or greater than KRW 300 billion (approximately EUR 257.1 million, USD 229.7 million) during the immediately preceding business year; and the other party to the transaction has total worldwide assets or total worldwide turnover (including those of its affiliates) equal to or greater than KRW 30 billion (approximately EUR 25.7 million, USD 22.9 million) during the immediately preceding business year.

The total assets or total turnover are calculated by adding the total assets or total turnover of companies that maintain the status of an affiliate before and after the transaction. However, in a business transfer, when calculating the total assets or total turnover of the company that is transferring the assets, the total assets or total turnover of the company's affiliates are not added.

In the case of a foreign-to-foreign merger or Korean-to-foreign merger, the following requirements must additionally be met (it does not apply to a foreign company's acquisition of a Korean company): the Korean turnover of each of the two foreign companies in a foreign-to-foreign merger and the Korean turnover of the target foreign company in a Korean-to-foreign merger (including turnover of affiliates) is equal to or greater than KRW 30 billion (approximately EUR 25.7 million, USD 22.9 million).

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. Regardless of whether there is a substantive overlap, if the thresholds in the answer to question 2.4 above are met, then the transaction is subject to notification.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions would be subject to notification when the thresholds in the MRFTA are met. For specific notification thresholds applied in foreign-to-foreign transactions, please see the answer to question 2.4 above.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions – including certain exemptions from merger notification requirements provided under the MRFTA and available to business combinations of special companies established pursuant to the laws of Korea. That said, those exemptions seldom apply to foreign-to-foreign mergers or foreign-to-Korean mergers, and as such, they will not be discussed in detail here.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

In principle, for a merger that takes place in stages, each stage must be reviewed separately to determine whether it would constitute an independent transaction subject to a notification obligation.

However, (i) where there is a resale immediately after the acquisition of shares or during the notification period, or (ii) where two or more mergers arise from a single agreement, it is possible to consider the various stages as a single transaction and submit a notification for only the main transaction. In these cases, the whole transaction must be specifically explained in detail in the notification.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Where the thresholds are met, notification is compulsory. There are two types of notification: (i) pre-closing notification; and (ii) post-closing notification.

Pre-closing notification is required where one or more of the parties to the merger are large-scale corporations with total worldwide assets or total global turnover (including those of its affiliates) equal to or greater than KRW 2 trillion (approximately EUR 1,714 million, USD 1,531 million) as of the immediately preceding business year. There is no deadline for the pre-closing notification itself – meaning there is no requirement that the pre-closing notification should be submitted within a certain period of signing the agreement. However, the merger may not be closed without the KFTC's clearance.

In the case of a transaction that is subject to post-closing notification, the MRFTA requires the notification within 30 calendar days from the closing date.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are no exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Yes. An administrative fine of up to KRW 100 million (approximately EUR 85,710, USD 76,580) may be imposed if there is a failure to file or if there are misrepresentations in a required notification. The Merger Fine Guidelines address the calculation mechanism for an administrative fine in detail.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

While it is technically possible, the KFTC has negative views about carving out the local completion of a merger to avoid delaying global completion.

3.5 At what stage in the transaction timetable can the notification be filed?

The notification can be filed before or after the closing depending on each case.

In the case of mergers subject to a pre-closing notification, the notification may be filed after the execution of a binding transaction agreement.

The parties may file a voluntary pre-merger notification (which is not a formal merger filing but a request to the KFTC to conduct a preliminary review of the proposed transaction in advance) even before the execution of a binding transaction agreement if the parties to the transaction can demonstrate their intention to enter into such agreement to the KFTC, for example, based on a memorandum of understanding, a letter of intent, or a draft of the transaction agreement.

In the case of mergers subject to a post-closing notification, the MRFTA requires the post-closing notification to be filed within 30 calendar days from the closing date.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The initial review period is 30 calendar days from the date of filing of the notification, but the KFTC may extend it by an additional 90 calendar days, if necessary. Even in a case where there are no anticompetitive effects, it is not uncommon for the case handler to extend the review period for reasons unrelated to anticompetitive effects, such as the case handler's workload. When the review period is extended, the KFTC simply gives notice of extension without issuing any formal decision.

If the KFTC issues a request for additional information (an "**RFI**"), the review period will be suspended until the submission of all requested information.

If the KFTC's Mergers and Acquisitions Division (the "**M&A Division**") determines after its review that the merger raises no anticompetitive concerns, it will issue the notice of clearance within the review period, and the review process ends.

If the M&A Division determines after its review that the merger raises anticompetitive concerns and plans to prohibit the transaction or impose remedies, it will prepare an Examiner's Report ("**ER**") based on its review and submit the ER to the Commissioners. The parties can submit opinions regarding the ER, and the Commissioners will hold a hearing and deliberate before making an ultimate decision (whether to grant unconditional clearance, conditional clearance with remedies, or to prohibit the merger) and notifying the merging entities.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Yes. In the case of mergers subject to a pre-closing notification, closing the transaction before the KFTC's clearance is prohibited. Even if the 30-day review period discussed above in the answer to question 3.6 expires, it is not regarded as an automatic clearance, and the parties may not close the transaction before the KFTC grants clearance. The risks in completing before clearance is received are explained in the answer to question 3.3.

3.8 Where notification is required, is there a prescribed format?

Yes. There is a prescribed format for each type of merger, and a notification must be submitted in accordance with the applicable prescribed format with the required information and relevant documents (e.g., a copy of the agreements, minutes of a board/shareholder meeting, the certificate of incorporation, annual reports, and financial statements).

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

According to the Merger Review Guidelines, a transaction may qualify for a simplified review in the case of (i) an intragroup transaction, (ii) a transaction which does not involve acquisition of control, (iii) a conglomerate merger of companies with total assets or total turnover of less than KRW 2 trillion (approximately EUR 1,714 million, USD 1,531 million), (iv) a conglomerate merger which does not involve any overlap or relevance among the respective products of the parties, or (v) participation in the establishment of an overseas joint venture company that is not likely to affect the Korean market. In principle, a merger qualified for a simplified review will be granted clearance from the KFTC within 15 calendar days from the date of the merger filing.

According to the Merger Filing Guidelines, a simplified notification form may be used in any of the following circumstances: (i) an intragroup transaction; (ii) an interlocking directorate where the number of interlocking directors in the counterpart company is less than one-third of the total number of directors in the counterpart company; and (iii) the establishment of a special purpose vehicle of a special type under Korean law. It should be noted that there is a slight difference in the subjects to which a simplified review process applies and the subjects that may use the simplified notification form.

Meanwhile, it is possible to shorten the review period by filing a voluntary pre-merger notification to the KFTC before signing a transaction agreement (please see the answer to question 3.5 above).

Also, the KFTC may decide to process the review more quickly if the parties are able to persuasively present the absolute necessity for closing to occur by a certain time to the KFTC. However, it is totally up to the KFTC's discretion and may not always be effective.

3.10 Who is responsible for making the notification?

The acquiring company is responsible for submitting the notification to the KFTC. In the case where a transaction vehicle is used, the transaction vehicle – which would be the direct acquiring entity – bears the notification obligation, not the ultimate acquiring company. When a joint venture is established, its largest shareholder is responsible for making the notification.

3.11 Are there any fees in relation to merger control?

No. There are no fees for filing the notification.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

In the case of a public offer for a listed business, even if one of the parties to the transaction is a large-scale corporation with total worldwide assets or total worldwide turnover (including those of its affiliates) equal to or greater than KRW 2 trillion (approximately EUR 1,714 million, USD 1,531 million) as of the immediately preceding business year, the transaction would be subject to a post-closing notification. This exception does not apply to all public offers under foreign laws and applies only to a public offer that is recognised as being similar to a tender offer under Korean law.

3.13 Will the notification be published?

No. The KFTC does not publish all or part of the notification. However, the KFTC may publish its decision or distribute a press release in certain circumstances. For example, if the KFTC does not grant clearance or imposes remedies, then the KFTC decision will be published. In addition, even when the KFTC grants unconditional clearance, the KFTC may distribute a press release, although it would only occur in a case where the transaction is of substantial importance in Korea.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

According to the MRFTA, a horizontal merger between competitors is presumed to be anticompetitive when all of the following conditions are met: (i) the combined entity has a market share of 50% or more (or the top three market players, including the combined entity, have an aggregate market share of 75% or more); (ii) the collective market share of the combined entity is the largest in the relevant market; and (iii) the market share difference between the combined entity and the second largest company is equal to or greater than 25% of the collective market share of the combined entity. If a merger is presumed to be anticompetitive because all of the conditions above are met, the relevant parties must rebut the presumption and prove that the merger will in fact not be anticompetitive. If the KFTC does not accept such an argument, the KFTC will likely prohibit the merger or impose remedies on the parties.

Pursuant to the Merger Review Guidelines, a horizontal merger between competitors is presumed not to be anticompetitive in any of the following cases: (i) the Herfindahl-Hirschman Index ("**HHI**") of the relevant market is less than 1,200; (ii) the HHI of the relevant market is 1,200 or more and less than 2,500 and the increase in such HHI as a result of the proposed merger is less than 250; or (iii) the HHI of the relevant market is 2,500 or more and the increase in such HHI as result of the proposed merger is less than 150. If a merger falls under a "safe harbour" based on its HHI value, the KFTC is highly likely to end its review without raising any particular anticompetitive concerns.

If the question of whether a contemplated merger will be anticompetitive cannot be clearly determined based on the two types of analysis noted above, then, the KFTC will review and determine whether the merger is anticompetitive based primarily on the following factors: (i) whether the combined entity can unilaterally increase prices ("**Unilateral Effects**"); and (ii) whether a possibility of concerted practices will increase after the closing of the merger ("**Coordinated Effects**").

The KFTC determines whether a merger is presumed to be anticompetitive under the MRFTA upon the commencement of its merger review. Such presumption of anticompetitiveness may be rebutted if, upon review of other factors, it can be proved that the contemplated merger does not give rise to Unilateral Effects and Coordinated Effects in the relevant markets.

4.2 To what extent are efficiency considerations taken into account?

In principle, even if anticompetitiveness is recognised, if a party to the contemplated merger successfully proves that efficiency gain is greater than potential anticompetitive harm, the merger may be permitted. That said, in practice, there are almost no cases where the KFTC permitted an anticompetitive merger based on the grounds that there are potential efficiency gains.

4.3 Are non-competition issues taken into account in assessing the merger?

In principle, the KFTC does not consider non-competition issues (including public interest) when assessing mergers. The KFTC's review is generally based on objective standards, and one of the important factors that are considered by the KFTC is the likelihood of anticompetitive effects of the transaction on the relevant market in Korea. The KFTC decision is generally not influenced by politics, but the KFTC does try to protect small and medium-sized local enterprises and consumers. In addition, our understanding is that the KFTC conducts a more thorough review of foreign mergers that would have significant effects on the Korean industries.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

When the KFTC recognises the necessity, it may consider the opinions of interested parties. In the case of a merger with anticompetitive concerns, the KFTC often inquires about opinions of third parties (including competitors, customers, suppliers, and experts) and takes their opinions into consideration.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

If a merger notification and/or supporting evidence filed by the notifying party is incomplete or inadequate, the KFTC can order the notifying party to supplement. If the notifying party fails to submit the supplementary documents without any good reason or submits false information, the KFTC has the authority to impose an administrative fine of up to KRW 100 million (approximately EUR 85,710, USD 76,580).

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

There is no specific provision in the MRFTA for the protection of commercially sensitive information, but even if the relevant party has not made a request for the protection, the KFTC considers the notification and related submissions as business secrets and does not disclose them to the public. Even if the KFTC decision is published because the transaction is prohibited or subject to remedies, all sensitive information would be deleted if such a request is made by the relevant party before the KFTC decision is disclosed publicly.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Please refer to the explanation of the regulatory process in the answer to question 3.6. The KFTC will issue a written notice of its decision. In principle, unless a contemplated merger is prohibited or cleared with conditions, the KFTC does not publish or publicly announce the notice of clearance.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes. It is possible, and from our experience, the parties can propose and negotiate the remedies at any time before the KFTC holds a hearing and renders its decision. The KFTC will review the proposed remedies submitted by the notifying parties, and if the KFTC determines that they are insufficient for eliminating all of the anticompetitive concerns, the KFTC may request the parties to revise or supplement the proposed remedies. This is not an official process, and it happens through unofficial negotiations between the parties and the M&A Division of the KFTC.

In addition, while the MRFTA officially provides for the consent decree process, in practice, it is not often used.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The KFTC imposes remedies in foreign-to-foreign mergers by applying the same standards used for other non-foreign-to-foreign mergers.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties may commence the negotiation of remedies by submitting proposed remedies or an application for commencement of the consent decree process any time before the KFTC holds a hearing and renders a decision (please see the answer to question 5.2).

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Yes. Regarding a divestment remedy, the Merger Remedies Guidelines specifically address the assets that are subject to divestment, the buyer in the divestment transaction, the divestment agreement, the time period for performing the divestment remedy, and the accompanying obligations, among other things.

Particularly, when the parties that receive the divestiture order select the buyer in the divestment transaction, they should reach an agreement with the KFTC in advance. In principle, the time period for performing the divestment remedy is within three to six months; however, it can be extended once when necessary for another three to six months. To receive such an extension, a party must prove its best efforts to divest within the initial period.

5.6 Can the parties complete the merger before the remedies have been complied with?

Yes. Under the MRFTA, the KFTC cannot impose the so-called "fix-it-first" remedy or the "up-front buyer" remedy. That is, the KFTC can only order the divestment of assets within a certain period of time from the date that the remedies are imposed (please see the answer to question 5.5 above) and cannot demand that divestment be completed or that the transaction agreement for divestment be executed before it grants clearance.

5.7 How are any negotiated remedies enforced?

The KFTC can have the parties report, or independently take necessary measures to confirm (e.g., RFIs or on-site investigations), the status of performance of the remedies.

In case the remedies are not performed within the time period given, certain administrative fines to compel compliance with the remedies may be imposed, not exceeding 0.03% of the total transaction amount for each day of delay. Also, the KFTC may impose imprisonment of up to two years or a fine of up to KRW 150 million.

5.8 Will a clearance decision cover ancillary restrictions?

There are no provisions on this issue under the MRFTA, nor are there any relevant KFTC precedents. That said, even if a merger with ancillary restrictions is cleared, it does not mean that the KFTC approved those restrictions as lawful. Accordingly, we cannot completely rule out the possibility that another government agency or a division of the KFTC other than the M&A Division (e.g., Cartel Division) may raise an issue later after the clearance decision.

5.9 Can a decision on merger clearance be appealed?

Yes. A decision on merger clearance can be appealed by the parties to the merger (to the KFTC for reconsideration or to the Seoul High Court) or a third party (through the submission of a constitutional complaint to the Constitutional Court of Korea).

5.10 What is the time limit for any appeal?

If a party wishes to appeal the KFTC decision and decides to appeal to the KFTC itself (the first option in the answer to question 5.9), that appeal must be filed within 30 calendar days of receiving the notice of the KFTC's measures. If a party wishes to appeal the KFTC decision by filing an appeal with the Seoul High Court, the appeal must be filed within 30 calendar days of receipt of the notice of the KFTC's measures or receipt of an official copy of the KFTC's decision after the KFTC's reconsideration of the appeal.

5.11 Is there a time limit for enforcement of merger control legislation?

Yes. Even if a merger notification obligation was not carried out, if five years have passed since the date of the violation of the obligation, the KFTC may not impose an administrative fine. Also, even if a merger is later determined to be anticompetitive, if seven years have passed from the date of closing of the merger, then the KFTC may no longer impose remedial measures.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The KFTC has been actively cooperating with foreign competition authorities in reviewing mergers of global companies.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

In 2019, the KFTC examined a total of 766 merger cases, 168 of which involved foreign entities, accounting for approximately 21.9% of all merger cases. The KFTC imposed remedies in five out of the 766 cases for being anticompetitive.

From 2019 until now in August 2020, major cases in which the KFTC imposed remedies on mergers involving foreign companies are as follows:

- In February 2020, the KFTC imposed structural remedies on Danaher Corporation's acquisition of General Electric Company's BioPharma business assets.
- In May 2020, the KFTC imposed behavioural remedies on Borealis AG and DYM Solution Co., Ltd.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The KFTC prepared a proposal for the overall amendment of the MRFTA and gave advance notice of proposed legislation on 24 August 2018. In the proposal, the following was included in connection with merger filing: (i) abolishing criminal penalties for anticompetitive business combinations; and (ii) imposing a notification obligation when a specific transaction amount is met, regardless of the current thresholds for total assets and turnover. Thereafter, the KFTC submitted the proposal to the National Assembly in November 2018; however, due to the expiry of the term of the 20th National Assembly, the proposal was automatically abolished, and only some of the procedural legislation thereof (not related to merger control) was reflected as a partial amendment and was approved on 29 April 2020. Thereafter, on 11 June 2020, the KFTC gave another advance notice of legislation of the overall amendment of the MRFTA, which contains the same details as the 2018 proposal noted above. The legislative notice period ended on 21 July 2020, and it seems that the KFTC will likely submit the proposal to the National Assembly soon.

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as of 27 August 2020.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

The KFTC amended the Merger Review Guidelines (effective from 27 February 2019). In the amended Merger Review Guidelines, the KFTC proposed new criteria for examining mergers' potential hindrance of competition on innovation within research and development ("**R&D**") intensive (innovative) industries. In particular, mainly, the following are discussed in the amended Merger Review Guidelines in connection with digital mergers: (i) additional criteria for assessing the level of market concentration in the innovative market (considering the amount of R&D expenditure, the size of assets and capabilities specific to innovative activities, and the number of players actually participating in the competition on innovation); and (ii) additional criteria for determining anticompetitiveness (whether the access to non-substitutable information assets is foreclosed due to mergers; and whether mergers impede non-price competition, such as through deterioration in service quality concerning information assets).

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

As noted above in the answer to question 7.1, the amended Merger Review Guidelines took effect from 27 February 2019.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

No. We are not aware of any cases that have highlighted the difficulties of dealing with digital mergers.

John H. Choi has been at the forefront of many of the leading antitrust cases, including major international cartel cases and abuse of market dominance cases. Mr. Choi was also an adjunct professor of law at Seoul National University, College of Law, Korea's top undergraduate school of law, and has been ranked as band 1 by *Chambers Asia* and *The Legal 500 Asia*. Mr. Choi has been a non-government advisor for the International Competition Network ("**ICN**").

Mr. Choi's recent notable speaking engagements include: speaking at the ICN 2016 annual meeting on Refusal to Supply; speaking at the 2016 International Bar Association Annual Conference on IP and Antitrust; speaking at the ICN 2015 annual meeting on Making Efficiency Assessments More Effective; lecturing at Korea University on conglomerate mergers; speaking at various *Global Competition Review* ("**GCR**") conferences; speaking at the European Chamber of Commerce in Korea ("**ECCK**") luncheon on "Competition Law 2015 – Panorama of anti-trust enforcement in Europe and Korea"; and presenting on the US and EU Enforcement Practices at a cartel workshop hosted by the KFTC. Mr. Choi is also a prolific writer.

Shin & Kim LLC
23rd Floor, D-Tower (D2)
17 Jongno 3-gil, Jongno-gu
Seoul 03155
Korea

Tel: +82 2 316 4232
Email: jhchoi@shinkim.com
URL: www.shinkim.com

Sangdon Lee has been involved in approximately 60 to 70 merger filing cases each year, and is one of the attorneys handling the largest number of merger control cases in Korea (considering that the average number of merger filing cases handled by the KFTC per year is approximately 600 to 800). Mr. Lee has represented clients in the most complex cases that the KFTC has recently handled or is handling, including *Google/Motorola Mobility*, *Applied Materials/Tokyo Electron*, *Linde/Praxair*, and *SK Broadband/T-Broad*. Notably, he acted for Google as lead counsel when Google successfully obtained unconditional clearance to acquire Motorola Mobility, and for Linde as lead counsel when Linde successfully obtained conditional clearance to merge with Praxair. Given the foregoing, he is one of the top-ranked antitrust lawyers with the highest track record in advising clients on merger filings in Korea.

Mr. Lee has published numerous articles on merger control issues in the academic journals widely known and highly regarded among the Korean legal academics and professional practitioners.

Shin & Kim LLC
23rd Floor, D-Tower (D2)
17 Jongno 3-gil, Jongno-gu
Seoul 03155
Korea

Tel: +82 2 316 4638
Email: sdlee@shinkim.com
URL: www.shinkim.com

Established in 1981, Shin & Kim is a full-service law firm with over 400 top-level professionals providing comprehensive services in all major areas of law. Based on our specialised expertise in each area of law, Shin & Kim has been one of Korea's leading law firms.

Shin & Kim's Antitrust & Competition Practice Group has been consistently recognised as one of the best in Korea by many international law firm ranking organisations. Shin & Kim's Antitrust & Competition Practice Group draws upon the expertise of our attorneys of various backgrounds, including a former chair, former officials, and committee members of the KFTC, and a former administrative court judge. Also, our Practice Group is the largest group of dedicated antitrust specialists in Korea with over 40 full-time specialists, committed entirely to the antitrust practice. This unique organisational structure enables our antitrust attorneys to collectively have much deeper knowledge of the intricate Korean antitrust law than any of our rivals.

www.shinkim.com

SHIN & KIM

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

@ICLG_GLG

The International Comparative Legal Guides are published by: glg global legal group