Sangdon Lee & Yong Woo Lee

MERGER CONTROL IN KOREA

Yong Woo Lee and Sangdon Lee are partners at Shin & Kim, one of the major law firms in Korea.

Yong Woo Lee has represented multinational and domestic companies in landmark merger filing cases and other antitrust matters. He represented Seagate as lead counsel before the Korea Fair Trade Commission in Seagate's acquisition of Samsung's HDD business. He served as advisory counsel on competition policy to the Korea Fair Trade Commission. 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, among others, Samsung, Google, Cargolux, Manuli, ORIX, and Oriental Brewery 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 also advised Korean clients on European merger control while he worked as a visiting lawyer at Allen & Overy's Paris office.

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

Yong Woo Lee & Sangdon Lee: Although the exact statistics have not been published yet, it is generally known that the number of cases reported and reviewed by the Korea Fair Trade Commission (KFTC) in 2014 was similar to that of 2013.

In recent years, the KFTC has become more stringent in reviewing foreign-to-foreign mergers and acquisitions of Korean companies by non-Korean companies.

The most symbolic case in 2014 was the KFTC's decision to block a proposed acquisition of Daemyung Optical Co, Ltd (the second largest optical lens maker in Korea) by Essilor Amera Investment Pte Ltd (a subsidiary of Essilor International SA, the largest optical lens maker in the world) on 29 May 2014. The KFTC explained that the acquisition would lessen the price competition in the domestic optical lens market. This case has significance in that it was the first time the KFTC blocked an acquisition of a Korean company by a non-Korean company. The KFTC reviewed the case for more than a year from 8 March 2013 when the business combination report was first submitted, and after conducting an anti-competitive effects analysis from various aspects, including an on-site investigation of the parties, the interested parties' opinions, and an economic analysis on the probability of price increase, the KFTC finally concluded that the proposed acquisition would likely raise anti-competitive concerns in the domestic market.

There was another case showing how the KFTC has been strengthening its review of large-scale global M&A deals that have a significant influence on the Korean market. The case involved a proposed alliance called the 'P3 Network' among the world's three largest ocean carriers, Maersk Line (Denmark), MSC (Switzerland) and CMA CGM (France) to jointly run routes in Asia, Europe, the Atlantic and the Pacific. The KFTC publicly announced its intention to conduct an in-depth review of the proposed alliance, taking into account its potential anti-competitive effects on the domestic shipping industry. Although the proposed alliance was approved in the US on 25 March 2014 followed by the European Commission's approval, the KFTC continued to review the case until Maersk Line voluntarily withdrew the business combination report filed with the KFTC on 4 July 2014 before the KFTC issued its decision. In fact, Maersk Line had withdrawn the merger filing in China after the Chinese Ministry of Commerce (MOFCOM) had rejected the proposed alliance, and at the time, the KFTC and MOFCOM were known to have closely cooperated with each other in reviewing the P3 alliance.

There was another landmark decision by the Constitutional Court of Korea with respect to the appeal of the KFTC's decisions on mergers. After the KFTC approved the proposed acquisition by a pallet manufacturer of the shares owned by a pallet lender on the basis that the proposed acquisition would not constitute a 'controlling relationship' between the parties, a third-party competitor filed a constitutional complaint on 24 February 2012, disputing the validity of the KFTC's approval by claiming that the KFTC's decision violated the third-party competitor's fundamental rights protected under the Constitution of Korea, such as the right of equality and due process right. On 24 July 2014, the Constitutional Court ruled that the third-party competitor would have the right to dispute the KFTC's merger clearance. However, the Court ruled that the KFTC's decision made based on the lack of a controlling relationship between the parties after the acquisition was valid and lawful, and the competitor's claim was dismissed without prejudice.

Yong Woo Lee

Prior to the Constitutional Court's decision, while the parties to a proposed combination may file an appeal or an administrative lawsuit against the KFTC's non-approval or conditional approval of the proposed combination, it was generally considered that no third party such as a competitor could raise an objection against the KFTC's approval of a proposed combination. However, by allowing a third-party competitor to file a constitutional complaint, the Constitutional Court opened a way for third parties to file an appeal against the KFTC's approval or conditional approval.

This decision is particularly meaningful because it allows the Constitutional Court to re-evaluate the KFTC's decision on probable competitive harm, and at least in theory, the Constitutional Court may cancel the KFTC's approval of the proposed combination. However, the extent of the Constitutional Court's authority and the procedures to be taken after its cancellation are yet to be discussed. One thing for sure is that the Constitutional Court's cancellation of the KFTC's approval could lead to severe consequences to the parties who proceeded to complete the business combination based on the KFTC's earlier approval.

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: In general, the KFTC completes its review within a prescribed period of 30 days for cases that will not likely have anti-competitive effects. However, the KFTC may extend the 30-day review period by an additional period of 90 days if the KFTC decides at its discretion that a more thorough anti-competitive effects analysis would be required, or sometimes due to the KFTC's caseload. The outcome of the KFTC's review is generally predictable. In order to reduce the review period and obtain clearance within the prescribed review period, the parties should diligently prepare the initial business combination report in accordance with the KFTC's guidelines, and submit documents and information requested by the KFTC, if any, as complete as possible.

Most of the KFTC officials are efficient and clear in responding to questions or requests for advice based on their expertise and years of practical experience. Although it is different for each case, the KFTC may frequently communicate with the parties, which may be through written correspondence or verbal communication by telephone or personal visits.

In the case of a foreign company, it is highly recommended to communicate with the KFTC through local legal counsel. If a foreign company tries to communicate with the KFTC directly without the help of local legal counsel, it may lead to an unnecessary misunderstanding owing to cultural differences and language barriers.

Also, as the KFTC officials are constantly dealing with an excessive caseload, it would be prudent for any notifying party not to directly contact the KFTC asking for a speedy review, which may undermine the relationship with the KFTC official. For the timely completion of a proposed transaction, it would be helpful for local counsel with an amicable relationship with the KFTC to explain that the deal is time-sensitive and to politely ask for a prompt review.

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

YWL & SL: As a part of its plan for 2014, the KFTC publicly announced its intention to closely review global mergers involving sectors that would have a significant impact on the Korean economy, such as the IT, semiconductor and shipping industries. In fact, the KFTC has taken an in-depth review of cases involving IT, semiconductor, shipping and pharmaceutical companies, such as the proposed combination of the P3 Network (shipping), MS-Nokia (mobile device), and Applied Materials-Tokyo Electron (semiconductor equipment).

At the confirmation hearing of the newly appointed chairman of the KFTC, he declared that the KFTC will undertake a more careful review of global M&A deals to protect Korean customers. This shows that the KFTC's announcement to closely review global M&A deals will continue to apply in 2015.

The KFTC's review is conducted based on objective standards and the most important factor is the likelihood of anti-competitive effects on the relevant Korean market. Although political considerations do not generally influence the outcome of the KFTC's review, the KFTC does focus on protecting small and medium-sized local enterprises as well as consumers. With respect to its decision to block the proposed acquisition of Daemyung Optical by Essilor mentioned earlier, the KFTC stated in its press release that, 'The decision enabled the market to maintain the existing competitive structure by preventing a well-established mid-sized domestic company from becoming a mere local sub-contractor of a foreign global company.' The statement confirms the KFTC's inclination to strictly review proposed acquisitions of local medium-sized companies by large foreign companies.

Sangdon Lee

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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 business combinations. They should be able to suggest the most efficient way of reporting a proposed combination in consideration of the notifying party's objective, overall transaction structure and timeline, and give practical advice to increase the likelihood of the KFTC's clearance.

Legal advisers in the field should also have an accurate understanding of and insights on 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 the issues accurately and maintain close communications with the KFTC.

The parties will want to avoid submitting too much information to the KFTC to reduce their workload. On the contrary, to get timely clearance, the notifying party will have to comply with the KFTC's request for additional information as complete 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 interesting case we handled last year was a merger filing with the KFTC by Bosch, ABB and Cisco to establish a joint venture to develop an open software platform for smart home services. Companies from various industries are participating in the market to develop innovative business models, resulting in a large number of M&A and joint venture transactions. We were able to obtain the KFTC's approval within a short time frame by emphasising the emerging nature of the market, and it was a personally rewarding experience as our team took part in the creation of this emerging market.

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

YWL & SL: In July 2005, the KFTC established an Economic Analysis Division and has been increasing the number of experts within the organisation. The Division provides economic analysis to overall legal matters that the KFTC deals with, but the bulk of its workload has been concentrated on the review of merger filings. Although the KFTC case handler has discretion to determine whether to ask for an economic analysis or not, if a case requires a precise definition of the market, or if a third party or a customer raises an issue of potential competitive harm and the potential harm to competition is in fact likely under the Monopoly Regulation and Fair Trade Act of Korea (MRFTA), the case handler would request an economic analysis. Also, the KFTC is known to engage in an economic analysis not only through its internal team but also through external experts in the field.

Third parties may participate in the merger review process by responding to the KFTC's pre-approval survey for third-party opinions. In particular, when the KFTC believes that there may be a high likelihood of competitive harm, the KFTC seeks the opinions of third parties, which often involves the competitors, but may also involve customers, if necessary. The survey on third-party opinions is usually done through 'tapping' (referring to a casual telephone conversation) or a written questionnaire, and the collected third-party opinions are used as reference materials in determining the likelihood of competitive harm, and the answers to the questionnaire may be used as evidence for the finding of competitive harm. However, as the KFTC has no obligation to survey third-party opinions, there are no set rules or procedures to carry out the survey. Nonetheless, third parties may actively submit an opinion or a petition to the KFTC showing the likelihood of competitive harm even before a business combination report for a proposed transaction is filed or during the KFTC's review process, and the KFTC is generally known to carefully review such opinions or petitions submitted by third parties.

On the other hand, the MRFTA does not provide any legal procedure through which a third party may raise an objection or file an appeal against the KFTC's approval of a proposed transaction. However, as mentioned above, the Constitutional Court of Korea has held that a third-party competitor may file a constitutional complaint to dispute the validity of the KFTC's approval.

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: As mentioned, the KFTC blocked a proposed acquisition of shares in Daemyung Optical Co, Ltd, a medium-sized Korean company, by Essilor International SA, a multinational company, due to the high likelihood of lessening price competition in the market.

In this case, the KFTC defined the relevant markets as one for short-focus lenses and the other for multi-focal lenses within the geographic perimeter of Korea. The KFTC then found that the collective market shares post-acquisition would trigger a presumption of likely competitive harm under the MRFTA. More specifically, the KFTC's decision to block the proposed acquisition was also based on the KFTC's finding of (i) Daemyung Optical's position as the price leader in the domestic market, (ii) the likely disappearance of price competition in the market based on the consumer survey conducted as part of the KFTC's economic analysis, and (iii) the high likelihood of the acquirer's abuse of dominance as the only firm offering the full-line of optical lens by price increases or product tying. Furthermore, considering the shareholding structure of the acquirer, the KFTC concluded that behavioural remedies such as a restriction on price increases during a stipulated time period would be insufficient, and decided to simply block the proposed acquisition.

In our view, Essilor could have applied for a 'commitment decision' to obtain clearance from the KFTC by including both behavioural remedies and structural remedies, as the KFTC concluded that behavioural remedies alone would not be sufficient to remedy the potential harm to competition. Since the adoption of the commitment decision system in 2011, companies whose cases are under review or investigation by the KFTC may propose their own solutions to settle their cases with the KFTC without a finding of wrongdoing.

Apart from the *Essilor* case, 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 the 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 the parties evaluate potential anti-competitive effects of the proposed transaction with local counsel at the early stage of planning the transaction structure, and if there is any doubt that the transaction may potentially harm competition, the parties (through local counsel) should engage in close communication with the KFTC before filing a business combination report in order to propose a structure that is less likely to cause harm to competition.

Furthermore, if the parties negotiate with the KFTC with a possibility of a divestiture, the KFTC's review period will likely be at least three to four months, which may be extended depending on the review process of the KFTC.

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: The National Assembly of Korea is currently reviewing a proposed amendment of the MRFTA, which would provide exemption from the merger filing obligation for certain types of business combinations with relatively low anti-competitive concerns. Examples of such cases would be a business combination involving interlocking directorate of less than one-third of the total number of directors or officers of the target company and the establishment of a private equity fund.

A large-scale M&A deal between multinational companies often consists of multiple local transactions in various jurisdictions. In Korea, the merger filing requirement to report a proposed combination has been determined by analysing each individual transaction separately. Such interpretation of the law has allowed some of the global transactions with a potential effect on the domestic market to be exempted from the reporting requirement. As the KFTC officials are aware of the practical consequences of this approach, we may see some changes in the law to address such concern down the road.