GETTING THE DEAL THROUGH

market intelligence

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Merger Control

John Davies leads the global interview panel

'Market transformational' deals on the rise

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A note from John Davies, Panel Leader

A global trend towards consolidation of markets is visible in the increased volume of transactions, as well as in the proliferation of 'market transformational' deals – four to three or three to two mergers, where the transaction could be the last major consolidation possible in the relevant sector. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* show that such mergers are likely to face more intense scrutiny by competition authorities, not least because of the heightened attention they may draw from third parties and from political spheres. Consequently, competition authorities are also likely to take a closer look at the kind of remedies they find acceptable.

In particular, mergers in fields as diverse as healthcare, food retail as well as media and telecoms have faced challenges in several jurisdictions. For example, in Germany, the Bundeskartellamt blocked a merger between two of the country's largest food retail chains, Edeka and Kaiser's Tengelmann (later cleared by governmental intervention). In the US, the FTC required the divestment of 330 Family Dollar stores as a condition of closing its investigation into *Dollar Tree/Family Dollar Store*. In China, MOFCOM cleared the acquisition of Alcatel Lucent by Nokia subject to conditions related to the licensing of standard-essential patents – notably after the transaction had already received unconditional clearance in the US and the EU.

In this environment, it is more essential than ever to have up-to-date advice on current trends from local experts who also understand the international landscape. This issue of *GTDT: Market Intelligence – Merger Control* presents views and observations from leading competition practitioners around the world, offering valuable insight into the evolving legal and regulatory landscapes in their respective jurisdictions.

We would like to express our gratitude to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

Freshfields Bruckhaus Deringer LLP
March 2016

In this issue

Yong Woo Lee

MERGER CONTROL IN KOREA

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

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 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, Cargolux, SK Telecom, Allergan, Activision-Blizzard, Trafigura 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 has also advised Korean clients on European merger control while working as a visiting lawyer at Allen & Overy's Paris office.

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 Korea Fair Trade Commission (KFTC) has not yet published statistics for the number of cases it has reviewed during 2015, based on the reported number of cases reviewed by the KFTC during the first half of 2015, the KFTC appears to have reviewed a greater number of cases in 2015 than in 2014. In particular, the KFTC issued an unusually high number of remedial orders in 2015: seven in total.

As part of its enforcement strategy for 2015, the KFTC announced its intention to closely review global mergers involving sectors that would potentially have a significant impact on the Korean economy, such as the IT and semiconductor sectors. In 2015, two out of three cases that were subject to the KFTC's structural remedies or oppositions were in fact mergers involving foreign entities in the semiconductor industry. We believe that this enforcement trend will continue into 2016 as the KFTC has revealed its plan to cooperate with other foreign competition authorities to share information on global M&A trends and deals, including deals in progress that involve foreign entities engaging in IT and semiconductor (electricity or electronics) businesses, ahead of time so as to conduct pre-merger reviews and take appropriate measures with respect to large-scale global M&A deals with a potentially significant impact on the Korean economy.

As mentioned, the most notable enforcement trend in 2015 was the high number of remedial orders issued by the KFTC. Compared to 2014, during which the KFTC issued only two remedial orders, in 2015 the KFTC issued remedial orders in seven cases (including one case withdrawn by the parties concerned), three of which involved structural remedies such as divestiture of operating assets or business divisions to third parties. These three cases were (i) the acquisition by Applied Materials of Tokyo Electron (No. 1 and No. 3 players in the global semiconductor manufacturing equipment market); (ii) acquisition of the consumer care business of Merck's Korean subsidiary by Bayer's Korean subsidiary (global pharmaceutical companies); and (iii) acquisition of Freescale Semiconductors by NXP Semiconductors (semiconductor manufacturers). All of these were large-scale foreign-to-foreign M&A transactions, potentially having a significant impact on the Korean economy.

In the *AMAT-TEL* case, AMAT withdrew its merger notification before the KFTC issued the final decision. The case is meaningful in that the KFTC actively cooperated with other foreign competition authorities to assess the potential anti-competitive effects of the merger and decided to object to the merger. The *Bayer-Merck* case was the first case in which the KFTC imposed a remedial order on the local part of the global M&A transaction between multinational companies.

One other important case in 2015 was Microsoft's acquisition of Nokia's handset business, which was approved by the KFTC with conditions. The *Microsoft-Nokia* case was the first case where the KFTC applied its consent decree process to settle objections to the merger. The consent decree process allows merger parties to voluntarily propose remedies to the KFTC in order to expedite the KFTC's review process. Upon expiry of the applicable public comment period, if the KFTC approves the proposed remedies, it would close the case without raising competitive concerns regarding the merger. Thus, a consent decree process could be considered as an alternative means for the parties to a merger, which is likely to be subject to the KFTC's in-depth review to effectively obtain the KFTC's 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 a merger review within a prescribed period of 30 days for cases that are not found to have anti-competitive effects. Based on our experience, we believe that the KFTC's review process is relatively short compared with prescribed merger review periods in other jurisdictions. In particular, unlike cases in the EU or China, there is no official or unofficial pre-filing consultation. However, the KFTC may extend the 30-day review period by an additional period of 90 days (ie, up to a total of 120 days) by its sole discretion, if the KFTC determines that the transaction concerned would require a more thorough competitive analysis, or sometimes due to the KFTC case team's caseload.

To shorten the KFTC's merger review period and obtain clearance within the prescribed 30-day or 120-day review period, the parties should diligently prepare a merger notification in accordance with the KFTC's guidelines, and submit documents and information requested by the KFTC, if any, as completely as possible. Another way to shorten the KFTC's review period 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 agreements 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 (i) to be assured in advance that the contemplated transaction would ultimately be approved by the KFTC when a formal merger notification is subsequently filed; and (ii) 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 has been any material change in the details of the transaction after the filing of the voluntary pre-merger notification and before the filing of the formal 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. According to the MRFTA, a merger would be presumed to have anticompetitive effects if all of the following conditions are met: (i) the combined entity has a market share of 50 per cent or more (or the top three companies, including the combined entity, have an aggregate market share of 75 per cent 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 per cent of the collective market share of the combined entity. On the other hand, a horizontal merger would fall under a safe harbour provision if (i) the post-merger market concentration (HHI) is less than 1,200; (ii) the HHI is between 1,200 and 2,500 but the resulting increase in the HHI is less than 250; or (iii) the HHI is 2,500 or more but the resulting increase in the HHI is less than 150.

Most of the 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 correspondences 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.

If a notifying party is a foreign entity, it would be advisable to communicate with the KFTC through local legal counsel since contacting the KFTC directly without the help of local legal counsel may cause unnecessary misunderstanding on the part of the KFTC due to cultural differences and language barriers.

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

YWL & SL Generally, transactions that satisfy all of the conditions for the presumption of anti-competitive effects under the MRFTA (as explained above) are those where it is most difficult to obtain the KFTC's approval. The KFTC tends to define the relevant market as the Korean market, and even if it defines the relevant market as the global market, the KFTC takes into account the competitive environment in the Korean market in analysing potential anti-competitive effects of the transaction concerned. Therefore, if merger parties proceed with a global deal by defining the relevant market as the global market and find out about the possibility of having a high combined market share in the Korean market later in the process, the merger parties may experience an unexpected delay in consummating the transaction.

The KFTC is also known for its stringent review of M&A deals in the semiconductor industry. In 2015, the KFTC conducted an in-depth analysis of several mergers between global semiconductor companies (*AMAT-TEL* case and *NXP-Freescale* case) and imposed structural remedies such as divesture of a business division to a third party due to potential anti-competitive effects of those transactions. The KFTC also imposed remedies with respect to the acquisition of Cymer, Inc by ASML US Inc and the acquisition of MStar Semiconductor by MediaTek, Inc in 2013. The KFTC has been taking a more rigorous approach towards mergers involving semiconductor companies, largely because (i) the semiconductor industry is a very concentrated market and has a high entry barrier; and (ii) other industry sectors have a high demand for semiconductors (ie, smartphones and consumer electronics, etc), and together with the semiconductor industry take up a significant portion of the overall Korean market across all industries.

The KFTC's merger review is conducted based on objective standards, and the most important factor considered by the KFTC during merger review is the likelihood of causing anti-competitive effects on the relevant Korean market. Although political considerations do not generally influence the outcome of the KFTC's merger review, the KFTC does focus on protecting small and medium-sized local enterprises, as well as consumers.

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

YWL & SL: An Economic Analysis Division was created within the KFTC in July 2005, with an increasing number of experts added to the

Sangdon Lee

Division. Although this Division was created for the purpose of providing economic analysis required for the KFTC's antitrust investigations and review of various types of competition issues, the bulk of its workload has been concentrated on economic analysis for merger review. While a case handler generally has discretion to decide whether an economic analysis would be necessary for merger review, if a particular merger under review requires a precise definition of the relevant market or potential anti-competitive effects alleged by a third party or a customer are in fact likely to occur under the MRFTA, the case handler would request an economic analysis. The KFTC is known to engage in an economic analysis not only through the Economic Analysis Division internally but also through external experts.

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 opinions of third parties, which often include customers but may also include competitors, if necessary. The survey is usually done through a written questionnaire, and the collected third party opinions are used as reference materials in determining the likelihood of competitive harm. However, as the KFTC has no obligation to survey third-party opinions, there

are no prescribed rules or procedures to carry out the survey. Nonetheless, a third party may actively submit an opinion or a petition to the KFTC showing the likelihood of competitive harm even before a merger notification for a proposed transaction is filed or during the KFTC's merger review process.

More specifically, strong opposition by third parties, particularly semiconductor companies in their capacity as customers of semiconductor equipment manufacturers, is known to be the major reason for the objection against the AMAT-TEL merger by the KFTC. In addition, it has been reported that the KFTC is currently reviewing opinions submitted by competitors of SK Telecom in opposition of the acquisition by SK Telecom (the primary player in the mobile communications industry) of CJ Hellovision (the primary player in the cable TV industry).

On the other hand, the MRFTA does not provide any procedures through which a third party may raise an objection or file an appeal against the KFTC's approval of a proposed merger. However, 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 briefly mentioned above, the KFTC issued a higher number of remedial orders in 2015.

In the *AMAT-TEL* case, the KFTC issued its examiner's report ordering the divestiture of the overlapping business assets, and the merger was subsequently terminated when AMAT withdrew its merger notification. The KFTC concluded that in the case of a horizontal market, upon completion of the merger, most of the relevant markets would be turned into monopolistic markets by the combined entity, or oligopolistic markets. Therefore, the merger would cause substantial anti-competitive effects on the semiconductor equipment market, such as price increases and suspension of after-sale service. In addition, the KFTC found that in the case of a conglomerate merger, the combined entity would highly likely engage in activities that would exclude its competitors, such as tying arrangements, by covering almost the entire front-end manufacturing of semiconductor products. As a result, the KFTC concluded that the merger would likely delay the development of next

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 avoid submitting too much information to the KFTC, so as not to put an unnecessary administrative burden on the case handler. However, 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?

In the *AMAT-TEL* case, Applied Material and Tokyo Electron proposed to the KFTC and the other competition authorities that they would comply with the remedial order by selling the assets related to semiconductor manufacturing equipment with a high market share to a third party (the 'mix and match' method), and we represented a third party (identity undisclosed for confidentiality reasons) interested in purchasing the assets. While we presented a strong argument based on reasonable evidence that the third party had the capacity to compete independently after the completion of the transaction, the KFTC and the other competition authorities declined to accept our position.

Yong Woo Lee and Sangdon Lee
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generation equipment and hinder competition for technology innovation.

Applied Material and Tokyo Electron then proposed to the KFTC and competition authorities in the other relevant jurisdictions that they would comply with the remedies imposed by selling the assets related to semiconductor manufacturing equipment with a high market share (the 'mix and match' method) to third parties. However, such commitment was rejected. As the KFTC and the other competition authorities expressed their negative stance on the mix and match method due to the low prospect of realisation and effectiveness, it was necessary to come up with a different type of commitment. Since there was no other alternative that the parties could suggest, they had to withdraw their merger plan.

The *Bayer-Merck* case involved a global-scale business transfer of Merck's consumer care business to Bayer, and potential anticompetitive effects of the business transfer between their respective Korean subsidiaries on the Korean market became an issue. As Bayer and Merck had duopoly in the Korean oral contraceptive market, the remedial order imposed related to the sale of the oral contraceptive business transferred by Merck to Bayer. As the number of M&A deals between multinational pharmaceutical companies has been increasing in the recent years, it is important to observe the competition environment in the local pharmaceutical market, starting from the early stage of the transaction, and plan on how to respond to the competition authorities' reaction to avoid any unnecessary delay in the transaction schedule.

In the *Microsoft-Nokia* case, where Microsoft acquired Nokia's handset business, Microsoft submitted to the KFTC a behavioural remedy plan, together with an application for a consent decree. As a result of the merger, Microsoft, a holder of a number of patents related to mobile phones, is now able to produce mobile phones on its own. The KFTC reasoned that, through the merger, Microsoft may abuse its patent rights in relation to its competitors such as the Korean smartphone companies, and the business collaboration agreement between Microsoft and certain smartphone companies may have anti-competitive effects on the market due to the exchange of sensitive business information. Following the commencement of the consent decree process, the KFTC conducted an in-depth review of the anti-competitive effects; gathered opinions from experts, other interested parties

and the prosecutor's office for possible solutions; and issued a revised remedial order in its final decision. More specifically, the KFTC approved the merger with a condition that Microsoft should not excessively increase patent licence fees, unfairly file infringement claims against Korean smartphone manufacturers or exchange sensitive business information through the business collaboration agreement.

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 the potential anti-competitive effects of a proposed transaction with local counsel at the 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.

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

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 reviewing a proposed amendment to the MRFTA, which would provide an exemption from the merger notification obligation for certain types of mergers with a relatively low likelihood of raising anti-competitive concerns. For example, the proposed amendment would exempt from the merger notification requirement under the MRFTA a merger 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.

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