market intelligence

GETTING THE DEAL THROUGH

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Merger Control

Pre-emptive remedies support growth in Phase I clearances

John Davies leads the global interview panel

Activity levels • Enforcement priorities • Keynote deals • 2017 outlook
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Publisher: Gideon Roberton
Senior business development manager: Adam Sargent
adam.sargent@gettingthedealthrough.com
Business Development Manager: Dan Brennan
dan.brennan@gettingthedealthrough.com
Readership Development Manager: Rosie Oliver
Rose.Oliver@gettingthedealthrough.com
Product marketing manager: Kieran Hansen
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Teya Humphris
Subeditor: Claire Ancell
Senior production editor: Simon Busby

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A note from John Davies, Panel Leader

The past year has been one of the busiest for competition authorities around the world. The very active M&A market saw many large, cross-border transactions such as *AB Inbev/SABMiller*, *Halliburton/Baker Hughes*, *Staples/Office Depot*, *ChemChina/Syngenta*, *LSE/Deutsche Borse*, *Bayer/Monsanto* and *Dow/Dupont* reviewed by multiple agencies. In addition to managing a high merger control case load, competition authorities have also been active in protecting their mandates by investigating companies for gun-jumping and procedural failures within the merger control processes. For example, MOFCOM has shown an increased willingness to sanction companies for failure to file, as exemplified by its recent decision to fine Canon for failure to notify its acquisition of Toshiba Medical Systems Corporation. In another example, the European Commission sent Facebook a statement of objections in December 2016 alleging it provided misleading information in its acquisition of WhatsApp.

While recent political shifts have not yet seemed to chill global M&A, it is clear that merger control is sensitive to such developments. While changing economic dynamics may drive foreign investment, populist movements may bring about, for example, increased protectionism in the form of foreign investment controls and increased intervention in strategically important areas. In the US, a number of recent foreign investment transactions, in particular involving Chinese investors, were blocked on national security grounds or faced extensive reviews. Chinese investments in German technology companies have similarly led to calls for tighter foreign investment controls in key sectors. The French government changed its foreign investment regime following the *GE/Alstom* transaction and the UK government is expected to amend its regime in the near future.

This changing landscape will require stakeholders to keep a close eye on both competition and foreign investment developments. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* provide a good introduction to these developments locally. We hope that this will be helpful for readers operating in this active and dynamic environment.

We are grateful 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.

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In this issue

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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.

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, CMA-CGM, Allergan, Terumo, Activision-Blizzard, Trafigura, Asahi 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 working as a visiting lawyer at Allen & Overy's Paris office.

Yong Woo Lee

Sangdon Lee

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

Yong Woo Lee and Sangdon Lee: According to the Korea Fair Trade Commission (KFTC), the reported number of cases reviewed by the KFTC during 2016 was 646 cases, down 23 cases from the previous year. This phenomenon seems to have occurred because of a slowdown of Korean companies' M&A activities. During this period, the KFTC blocked one merger and cleared two mergers subject to certain remedial conditions. In addition, there was one case where the parties abandoned the deal because the remedies imposed by the KFTC in its examiner's report were too onerous.

Last year, the KFTC continued to focus on global M&A deals that would have an effect on the Korean market. When a proposed merger was found to pose harm to competition in the Korean market, the KFTC did not hesitate to intervene. In fact, in 2016, three out of four cases rejected by the KFTC or subject to certain structural remedies were global M&A deals, partly as a result of the KFTC's seemingly solid cooperation arrangement with foreign competition authorities for multi-jurisdictional deals. One representative example is Lam Research Corp's acquisition of KLA-Tencor Corp (the *Lam/KLA* case), which the KFTC closely discussed with the US Department of Justice (DOJ) and China's Ministry of Commerce (MOFCOM) from the early stages of the review process. In particular, the KFTC is said to have had weekly telephone conferences with the US DOJ discussing the review schedule and remedies suggested by the parties.

In 2016, the KFTC issued sanctions against Hyundai HCN Kyongbuk System Co, Ltd (HCN)'s failure to comply with behavioural remedies ordered by the KFTC in 2013. Apart from the KFTC's previous sanctions against non-compliance of a divestiture order, it was the first case where the KFTC issued sanctions against non-compliance of a behavioural remedy, which is relatively more difficult to monitor. For the violations of such remedial order, the KFTC imposed a fine of US$1.2 million on HCN and reported HCN and its representative directors to the prosecutor's office. It is expected that the KFTC will actively monitor whether or not a behavioural remedy is performed, and will impose strict sanctions against a violation.

The KFTC amended the Guidelines on M&A Notification to simplify documentation submission requirements for a business combination report if the reported merger raises no substantive anti-

competitiveness concerns. For certain types of deals subject to a simplified review process (such as intra-group transactions and the formation of a private equity fund) or a pure conglomerate merger, the submission of market information required to be submitted by the parties is either waived or simplified, greatly relieving the administrative burden on the parties. Before the amendment, the market status for the top three products of merger parties had to be submitted. After the amendment, parties to certain types of mergers that raise no anticompetitiveness concerns are completely exempt from having to submit market information. In addition, in the case of a pure conglomerate merger, the acquirer and target company are asked to each submit market information for a single highest revenue-generating product only. Through this, the KFTC has estimated that approximately 78 per cent of merger cases to be reviewed by the KFTC (522 cases out of 669 cases) would qualify for an exemption or simplification for submission of market information.

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: Before we start, we would like to note that under the Monopoly Regulation and Fair Trade Act of Korea (MRFTA), there is no clear Phase I and Phase II review process in Korea. The initial review period is 30 days from the date of filing, 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. In general, the KFTC completes the merger review within a prescribed period of 30 days for cases that are not found to have anticompetitive effects. Based on our experience, the review is relatively short compared with other jurisdictions. However, 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, it is worth pointing out that unlike cases in the EU or China, there is no official or unofficial pre-filing consultation in Korea.

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.

One 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 agreement 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 comfort in advance that the contemplated transaction will ultimately be approved by the KFTC when a formal merger notification is subsequently filed; and obtaining 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 a material change 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 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 is 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 the analysis of anti-competitiveness. In particular, the KFTC has often requested both the Korean and global market information for foreign-to-foreign deals, regardless of the relevant geographic market definition. Although legal counsel would attempt to push back such a request in most cases, it seems that the best approach to shorten the investigation period is to submit the requested materials to the extent possible and cooperate with the KFTC.

The majority of KFTC officials respond efficiently to questions or requests for advice based on their expertise and experience. Although this varies slightly from one case to another, the KFTC frequently communicates with merger parties through written correspondence, telephone conversation or face-to-face meetings. In addition, while most of the communications with the KFTC are 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.

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

YWL & SL Generally, the transactions where it is hardest to obtain the KFTC's approval are those that satisfy all of the conditions for the presumption of anti-competitive effects under the MRFTA. Generally, four-to-three or three-to-two mergers fall under this category.

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 anticompetitive 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.

If you look at recent trends, the KFTC is proactively and aggressively reviewing global mergers affecting the Korean market. Until recently, the KFTC has focused on the semiconductor industry, the core part of the Korean economy. The current trend is to gradually expand to the medical and pharmaceutical areas.

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 anticompetitive 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. According to recent media reports, there was suspicion that external political pressure played a role in the *SKT/CJ HelloVision* case. However, nothing has been clearly proven about such an allegation, and the KFTC announced that the decision to prohibit the deal was made independently and in accordance with the procedures specified in the MRFTA, denying the allegation.

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

YWL & SL In cases where anticompetitiveness is at 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 *SKT/CJ HelloVision* case, not only the KFTC and the merger parties, but also interested third parties, mainly competitors, used economic analysis to support their positions on the 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 HelloVision* case, the KFTC

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, to avoid placing 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 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 2016, the most challenging case was clearly the *SKT/CJ HelloVision* case. SKT made every effort to obtain the KFTC's approval and, as counsel for SKT, we presented to the KFTC a plausible rationale and compelling arguments as to why the transaction would pose no anticompetitive concerns during the KFTC's merger review period, which lasted nine months. Meaningful work included preparing an economic analysis with distinguished economists in Korea based on the UPP analysis and submitting to the KFTC an analysis of relevant merger control precedents pertaining to the broadcasting communication sector in the United States and Europe. Although, regrettably, the KFTC decided to block this merger, as Korea's pay-TV sector is in need of a reform in one way or another, we expect that there will be similar types of mergers in the near future. It would be interesting to see how the KFTC's position will change as the pay-TV sector evolves.

Yong Woo Lee and Sangdon Lee
Shin & Kim
Seoul
www.shinkim.com

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 makes an inquiry about the opinions of third parties and generally respects these opinions. In the *Lam/KLA* case, the KFTC inquired about the opinions of domestic and foreign customers and competitors. In the *SKT/CJ HelloVision* case, even before the KFTC requested opinions, competitors actively stated their opinions. The KFTC carefully considered and gave weight to these opinions in reviewing the *SKT/CJ HelloVision* case.

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.

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

YWL & SL The KFTC blocked one case and proposed remedial measures in three cases, two of which were approved in 2016, subject to certain remedial conditions.

The *SKT/CJ HelloVisio*n case involved a business combination between SK Telecom Co, Ltd, which operates a wire and wireless communication business and IPTV business, and CJ HelloVision Co, Ltd, which operates a cable TV and MVNO business. This was the first business combination of pay-TV and telecommunications businesses, involving Korea's largest wireless mobile phone service provider and largest provider of cable TV and MVNO services. Because both SKT and CJ HelloVision operated various types of business in the pay-TV and telecommunications sectors and the transaction involved various types of horizontal and vertical business combinations, it was a large and complex case and there was a fierce exchange of arguments on all points, including the relevant market definition, analysis of anticompetitiveness and the level of remedial measures. In summary, the KFTC prohibited the business combination itself on the ground that anticompetitiveness was recognised due to overlap in the horizontal pay-TV market and overlap in the horizontal and vertical wireless communication market and that it was impossible to fundamentally cure the anticompetitive concerns with a mere divestiture of certain assets or a behavioural remedy alone.

The KFTC seems to have reviewed the case rather strictly, focusing on the structure of the business combination between the primary player in the wireless communication market and the primary player in the cable TV and MVNO markets. However, as the telecommunications and pay-TV markets are changing rapidly, it is questionable whether this conservative position of the KFTC is appropriate and will be appropriate going forward. In this case, as counsel for SKT, Shin & Kim developed a compelling and plausible reasoning to demonstrate no anticompetitiveness in the transaction, including the widening of the relevant geographic market, although it was regrettably not accepted by the KFTC.

The *Boehringer/Sanofi* case was a business swap where Boehringer Ingelheim International GmbH acquired Sanofi's animal health business and at the same time transferred its consumer healthcare business to Sanofi. The KFTC recognised anticompetitiveness in the domestic porcine circovirus vaccine market and the domestic non-steroidal anti-inflammatory drugs for pets market. The KFTC imposed a structural remedy requiring either of the merger parties to sell all its assets related to Korean sales for the above products. This is the first case where the KFTC imposed remedial measures for a business combination in the animal pharmaceutical products sector.

The *Abbott/SJM* case was a transaction where Abbott Laboratories acquired the stocks of St Jude Medical, Inc. The combined market share of the merger parties in the Korean vascular closure device market was 98.92 per cent, and the KFTC determined that the transaction would have an effect of restricting competition in the Korean vascular closure device market. The parties proposed a divestiture plan to the KFTC and to other competition authorities, which entails selling the vascular closure device business to Terumo Corporation. The KFTC accepted the proposed divesture plan and imposed the remedial measure requiring the divesture of assets of the vascular closure device business. Terumo Corporation successfully acquired such assets, and Shin & Kim acted as counsel for Terumo Corporation in all stages of the transaction.

Following the *AMAT/TEL* case in 2015, the KFTC blocked a business combination between Lam Research Corporation, a global semiconductor manufacturing equipment business, and KLA-Tencor Corporation. As mentioned earlier, the KFTC, after close review of an economic analysis and in consideration of third party opinions, issued its examiner's report ordering a divestiture of overlapping business assets. The merger was subsequently terminated when the merger parties withdrew the merger notification. Notably, the KFTC closely cooperated with competition authorities in major jurisdictions, including the US DOJ. The KFTC had regular telephone conferences with the US DOJ discussing the review schedule and the remedies suggested by the parties, among other things. The KFTC also discussed with China's MOFCOM the merger review schedule and issues related to anti-competitiveness of the transaction. We have been witnessing more instances of close cooperation between merger control regulators on multinational deals, which will soon be carried out routinely so that the regulators convey a consistent position to merger parties.

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

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 relatively low likelihood of raising anticompetitive 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, the establishment of a private equity fund and acquisition of the stakes of a private equity fund.

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