



MERGER CONTROL IN KOREA Vol. 06 - Administrative Pre-Announcement of Proposed Amendment to KFTC’s M&A Notification Guidelines Concerning New “Size-of-Transaction” Test (Effective December 30, 2021)

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This is an update to [Merger Control in Korea Vol. 05 – Details of New “Size-of-Transaction” Test Effective December 30, 2021](#) issued on June 8, 2021.

On September 8, 2021, the Korea Fair Trade Commission (the “KFTC”) announced the proposed amendment to the KFTC’s M&A Notification Guidelines (the “**Proposed Amendment**”). The Proposed Amendment provides further details on the size-of-transaction test that was newly introduced in the latest amendments to the Monopoly Regulation and Fair Trade Act (the “**MRFTA**”) and its Enforcement Decree. The MRFTA and its Enforcement Decree were fully amended on December 29, 2020 and June 3, 2021, respectively.

Specifically, the Proposed Amendment lays out each factor considered in applying two sub-tests that make up the new size-of-transaction test that will affect mergers and acquisitions of smaller companies: (i) the transaction value test and (ii) the Korean activities test. The details are as follows:

Test	Amended Enforcement Decree	Proposed Amendment
Transaction Value Test	– The transaction value of <u>KRW 600 billion or more</u> (approximately USD 540 million/EUR 442 million)	<ul style="list-style-type: none"> – Share Acquisition The transaction value will be determined based on the sum of (i) the purchase price for the shares to be newly acquired and the book value of the shares already owned and (ii) the amount of liabilities of Target multiplied by the purchaser’s shareholding ratio after the share acquisition. – Statutory Merger The transaction value will be determined based on the sum of (i) the value of shares to

		<p>be issued as consideration for the merger plus any cash consideration for the merger, if any and (ii) the amount of liabilities of Target</p> <p>– Business or Assets Transfer The transaction value is determined based on the sum of (i) the purchase price for business or assets and (ii) the amount of liabilities to be assumed by the transferee</p> <p>– Establishment of a Joint Venture Company The transaction value is determined based on the amount of investment to be made by the largest shareholder</p>
Korean Activities Test	– Target’s sale or provision of products or services to at least <u>1 million people per month</u> in the Korean market over the immediately preceding three years; or	– If Target’s services to be provided in Korea are Internet-based services, such as social networking services, the number of monthly customers that purchase those services is determined based on the number of monthly active users or visitors (MAU)
	– Target’s (i) lease of research and development facilities or use of R&D personnel in Korea and (ii) annual R&D budget of <u>at least KRW 30 billion</u> (approximately USD 27 million/EUR 22 million) for the Korean market over the immediately preceding three years; or	– The annual R&D budget is determined based on the sum of Target’s (i) annual ordinary R&D expenses and (ii) other R&D costs accounted as intangible assets.
	– Matters equivalent to the above two (the details of which are to be announced by the KFTC)	– N/A (No details in relation to this were provided in the Proposed Amendment)

As of today, the enforcement date of the Proposed Amendment has not been set. The KFTC is accepting opinions on the Proposed Amendment for 20 days until September 28, 2021. The KFTC will review and reflect any opinions received during this period, and finalize and enforce the Proposed Amendment. We will closely monitor the development and provide another update on this.

As noted in [Merger Control in Korea Vol. 05 – Details of New “Size-of-Transaction” Test Effective December 30, 2021](#) issued on June 8, 2021, the size-of-transaction test was introduced to capture the acquisition of a target which does not yet have significant assets or turnover (e.g., killer acquisitions involving smaller but promising start-ups in various industries, including ICT and pharmaceutical). For details on the MRFTA and its Enforcement Decree, please see the said newsletter.

For reference, the Proposed Amendment also added a provision that makes online filing through the KFTC website a

default filing method for transactions subject to simplified review (i.e., intra-group transactions). Until now, the KFTC has required all submissions to be made by mail in principle. We will see how this mandatory online submission rule will play out in future filings; in particular, whether foreign companies will be able to use it in their filings in practice.

We will continue providing updates on Korean merger control issues. Please feel free to contact us anytime should you have any questions concerning Korean merger control.

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