



MERGER CONTROL IN KOREA Vol. 10 - KFTC to Expand the Scope of Exemptions from Merger Notifications and Invite Companies to Formally Submit Remedy Proposals and Engage in Remedy Discussions

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On February 14, 2023, the Korea Fair Trade Commission (the “KFTC”) announced the proposed amendment to the Monopoly Regulation and Fair Trade Act (the “**Proposed Amendment**”), calling for public comments until March 27. The Proposed Amendment may be implemented as early as the first half of 2023, although the timeline for its implementation will depend on the timing of the National Assembly’s review of the Proposed Amendment.

The Proposed Amendment includes two major changes to the Korean merger control regime: it proposes to (i) expand the scope of transactions that enjoy exemptions from merger filing requirements and (ii) allow companies to submit voluntary remedy proposals to the KFTC and obtain conditional clearance.

1. Expanding the Scope of Exemptions from Merger Notifications

The first change was proposed to reduce companies’ filing burden. Specifically, the following three types of transactions (which are unlikely to give rise to anticompetitive concerns) will enjoy exemptions from merger filing obligations under the Proposed Amendment:

- **M&As between parent and subsidiary** : Under the current merger control regime, transactions between a parent and a subsidiary are subject to merger filing requirements. Under the Proposed Amendment, mergers and business transfers involving the parent and subsidiary will be exempt from merger filing obligations because, by definition under the Korean Commercial Code, the parent already has sole control over its subsidiary by directly holding at least 50% of the interest in the subsidiary (and the merger or business transfers between these two companies are unlikely to raise anticompetitive concerns). It should be noted, however, that not all transactions involving an intra-group restructuring will be excluded from merger filing requirements. It is important to individually determine whether this exemption applies to a specific transaction.

- **Interlocking directorate of less than one-third** : Interlocking directorate of less than one-third of the total number of directors of another company (excluding the representative director) will be exempt from the merger filing requirement because such a level of interlocking directorships is not likely to enable the company to substantially influence key decisions of the other company. Under the current merger control regime, when an executive or employee of a company with total assets or turnover of KRW 2 trillion or more concurrently holds a position as the registered director of another company that meets certain standard, the post-closing merger filing obligation is triggered. The Proposed Amendment will reduce the scope of interlocking directorates that will trigger such filing obligation.
- **Establishment of PEF vehicles** : The establishment of a PEF (a transaction vehicle) will be exempt from merger filing requirements as the establishment itself will not have a substantial impact on market competition. Although a PEF's acquisition of target companies will still be subject to merger filing obligations, this exemption is expected to alleviate procedural burdens associated with setting up a PEF to some extent. One issue we will be monitoring is whether the exemption will apply to PEFs established under non-Korean laws. While it is clear that this exemption applies to PEF vehicles established under Korean laws, we will have to see whether PEFs established under foreign laws will also be eligible for the exemption.

In addition to the foregoing, the KFTC is making continuous efforts to ensure a swifter review and clearance. In particular, the KFTC is seeking measures to facilitate its review process, such as dividing the merger review process into several phases, similar to practices by other competition authorities around the world. The KFTC is also considering raising the merger filing thresholds (from the current threshold of total worldwide assets or turnover of KRW 300 billion or more and KRW 30 billion). We will monitor these developments and provide updates.

It is not yet clear when the exemption will come into effect, but in light of the previous amendments to the Monopoly Regulation and Fair Trade Act, we expect that transactions concluded after the implementation of the Proposed Amendment will be exempt from merger filing requirements.

2. Allowing Companies to Submit Remedy Proposals, Engage in Remedy Discussions to Obtain Conditional Clearance

The second change was proposed in line with global competition law standards. In many other jurisdictions, including in the EU and the US, competition authorities allow parties to transactions with anticompetitive concerns to formally make remedy proposals and engage in remedy discussions. In Korea, under the current regime, the KFTC is the one that devises remedies, either structural or behavioral, and enforces them through remedial orders when the notified merger raises anticompetitive concerns. Even under the current regime, in limited instances, parties can discuss potential remedies with the KFTC. However, such discussions are conducted only informally, which made it difficult for parties to the transaction to predict the outcome and often caused delay in the review process. Under the Proposed Amendment, the KFTC will allow companies to formally propose remedy packages to the KFTC. If the KFTC finds that the remedy proposals sufficiently address anticompetitive concerns, it will grant a clearance (instead of imposing remedial orders) on condition that the remedies are implemented.

The Proposed Amendment is expected to enhance efficiency in the KFTC's merger review process and is in line with the KFTC plans to implement a more simplified approach to reviewing remedy proposals and granting conditional clearance. That said, amendments or enactments of other laws and regulations are expected to follow in connection

with the implementation of the Proposed Amendment, and the overall impact of these changes on Korea's merger control regime remains to be seen.

We will continue to provide updates on Korean merger control issues. Please feel free to contact us at any time should you have any questions concerning Korean merger control regulations.

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