
CHAMBERS GLOBAL PRACTICE GUIDES

Merger Control 2024

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South Korea: Law & Practice

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SOUTH KOREA



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.6

- 1.1 Merger Control Legislation p.6
- 1.2 Legislation Relating to Particular Sectors p.6
- 1.3 Enforcement Authorities p.6

2. Jurisdiction p.6

- 2.1 Notification p.6
- 2.2 Failure to Notify p.7
- 2.3 Types of Transactions p.8
- 2.4 Definition of "Control" p.8
- 2.5 Jurisdictional Thresholds p.8
- 2.6 Calculations of Jurisdictional Thresholds p.10
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.10
- 2.8 Foreign-to-Foreign Transactions p.11
- 2.9 Market Share Jurisdictional Threshold p.11
- 2.10 Joint Ventures p.11
- 2.11 Power of Authorities to Investigate a Transaction p.11
- 2.12 Requirement for Clearance Before Implementation p.12
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.12
- 2.14 Exceptions to Suspensive Effect p.12
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.12

3. Procedure: Notification to Clearance p.12

- 3.1 Deadlines for Notification p.12
- 3.2 Type of Agreement Required Prior to Notification p.13
- 3.3 Filing Fees p.14
- 3.4 Parties Responsible for Filing p.14
- 3.5 Information Included in a Filing p.14
- 3.6 Penalties/Consequences of Incomplete Notification p.14
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.14
- 3.8 Review Process p.15
- 3.9 Pre-notification Discussions With Authorities p.15
- 3.10 Requests for Information During the Review Process p.15
- 3.11 Accelerated Procedure p.15

4. Substance of the Review p.16

- 4.1 Substantive Test p.16
- 4.2 Markets Affected by a Transaction p.17
- 4.3 Reliance on Case Law p.17
- 4.4 Competition Concerns p.18
- 4.5 Economic Efficiencies p.18
- 4.6 Non-competition Issues p.18
- 4.7 Special Consideration for Joint Ventures p.18

5. Decision: Prohibitions and Remedies p.19

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.19
- 5.2 Parties' Ability to Negotiate Remedies p.19
- 5.3 Legal Standard p.20
- 5.4 Negotiating Remedies With Authorities p.20
- 5.5 Conditions and Timing for Divestitures p.20
- 5.6 Issuance of Decisions p.21
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.21

6. Ancillary Restraints and Related Transactions p.21

- 6.1 Clearance Decisions and Separate Notifications p.21

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.21

- 7.1 Third-Party Rights p.21
- 7.2 Contacting Third Parties p.21
- 7.3 Confidentiality p.22
- 7.4 Co-operation With Other Jurisdictions p.22

8. Appeals and Judicial Review p.22

- 8.1 Access to Appeal and Judicial Review p.22
- 8.2 Typical Timeline for Appeals p.22
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.22

9. Foreign Direct Investment/Subsidies Review p.23

- 9.1 Legislation and Filing Requirements p.23

10. Recent Developments p.23

- 10.1 Recent Changes or Impending Legislation p.23
- 10.2 Recent Enforcement Record p.23
- 10.3 Current Competition Concerns p.24

Lee & Ko is one of the largest and most well-established law firms in South Korea, with approximately 890 professionals in offices in South Korea, China and Vietnam. The antitrust and competition practice group consists of lawyers fully dedicated to advising on antitrust and competition law matters, in-house economists, former judges and prosecutors, and one of the strongest teams of former Korea Fair Trade Commission officials and lawyers in Korea. This group also has unparalleled experience in handling all aspects of the merger control process,

from transaction structuring, formulating market definitions and analysing anti-competitive effects to developing legal, economic and political arguments and rationale for clearance. Lee & Ko has recently worked on some of the most high-profile transactions to receive clearance in South Korea, such as the Novozymes A/S-Chr. Hansen Holding A/S and Raytheon-United Technologies mergers, Danaher's acquisition of the GE Biopharma business and the LGES-Stellantis and LGES-Honda joint ventures.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

In South Korea, the relevant merger control legislation is the Monopoly Regulation and Fair Trade Act (MRFTA) and the Enforcement Decree of the MRFTA. Additional guidelines and standards for merger control established by the Korea Fair Trade Commission (KFTC) include:

- Guidelines for Notification of Business Combinations;
- Guidelines for Review of Business Combinations;
- Guidelines for Imposition of Administrative Fines on Business Combinations for the Violation of Notification Provisions;
- Guidelines for Imposing Corrective Orders on Business Combinations; and
- Standards for Imposing Enforcement Fines to Compel Compliance with Corrective Orders on Business Combinations.

1.2 Legislation Relating to Particular Sectors

There are no other relevant laws within the authority of the KFTC for foreign transactions or investments related to particular sectors. However, the MRFTA provides that the merger filing requirement with the KFTC will not be applicable or required if the head of another central administrative agency consults with the KFTC in connection with such agency's merger control review of a certain transaction pursuant to other laws. In this regard, there are finance and broadcasting/telecommunications laws that mandate the review of business combinations in these sectors by the relevant regulatory agencies in lieu of the KFTC, such as the Structural Improvement of the Financial Industry Act, the Financial

Holding Companies Act and the Telecommunications Business Act.

The Financial Supervisory Commission (FSC) and the Minister of the Ministry of Science and ICT (MSIT) are granted the authority to review business combinations in their respective sectors but are required to consult with the KFTC as part of the review. Therefore, although it will not be making the final determination on clearance for these business combinations, the KFTC will participate in the review process. Once the FSC or the MSIT makes a final decision on clearance, there are no separate merger notification requirements to be satisfied with the KFTC.

1.3 Enforcement Authorities

The KFTC is the administrative authority responsible for enforcement of the MRFTA and related laws. However, as explained in **1.2 Legislation Relating to Particular Sectors**, the FSC or MSIT is responsible for merger control review of business combinations in the finance and broadcasting/telecommunications sectors. Such review includes the requirement to consult with the KFTC on the potential anti-competitiveness of the business combination under review.

2. Jurisdiction

2.1 Notification

Merger notification is compulsory in South Korea if the jurisdictional thresholds for notification are triggered (see **2.5 Jurisdictional Thresholds**).

The following are exempt from merger filing obligations.

- A venture investment company or venture capital fund (as defined in Article 2 subparagraphs 10 and 11 of the Venture Investment

Promotion Act) that obtains ownership of at least 20% (or 15% for a listed corporation under the Capital Markets and Financial Investment Business Act) of the total number of shares of a start-up enterprise (as defined in Article 2 subparagraph 3 of the Support for Small and Medium Enterprise Establishment Act) issued by another company (excluding non-voting shares under Articles 344-3 (1) and 369 (2) and (3) of the Commercial Act).

- A new technology venture capital or new technology venture fund (as defined in Article 2 subparagraph 14-3 or 14-5 of the Specialised Credit Finance Business Act) that obtains ownership of shares of at least 20% (or 15% for a listed corporation under the Capital Markets and Financial Investment Business Act) of a new technology business (as defined in subparagraph 1 of Article 2 of the Korea Technology Finance Corporation Act), or that becomes the largest investor by participation in the establishment of a new technology business entity, jointly with another company.
- A company that is required to report its business combination and obtains at least 20% (or 15% for a listed corporation under the Capital Markets and Financial Investment Business Act) of shares of any of the following companies, or becomes the largest investor by participating in the establishment of any of the following companies, jointly with another company:
 - (a) an investment company under Article 9 (18) 2 of the Financial Investment Services and Capital Markets Act;
 - (b) a company designated as a concessionaire of a public-private partnership project for infrastructure, pursuant to the Act on Public-Private Partnerships in Infrastructure;
 - (c) an investment company established for the purpose of investing in such a com-

- pany (limited to a company under Article 51-2 (1) 6 of the Corporate Tax Act); or
- (d) a real estate investment company (as defined under subparagraph 1 of Article 2 of the Real Estate Investment Company Act).

Following the implementation of the amended MRFTA, the following types of transactions will also be exempt from merger filing obligations as of 7 August 2024:

- the establishment of a private equity fund, as defined under the Capital Markets and Financial Investment Business Act – ie, where the investor will be the largest shareholder of the PEF (Article 11 (3) 4 of the MRFTA);
- statutory mergers or business transfers between the parent company and a subsidiary, as defined under Article 342-2 (1) of the Commercial Code – ie, a company with shares exceeding 50% of the total number of issued shares (Article 11 (1) 4 of the MRFTA);
- interlocking directorates involving fewer than one-third of directors of the counterparty, except in cases whether the representative director of the counterparty is one of the interlocking directorates (Article 11 (1) 3b of the MRFTA); and
- statutory mergers between affiliates with respective values of less than KRW30 billion (assets and sales of merger entity are calculated on a non-consolidated basis) (Article 9 (5) of the MRFTA).

2.2 Failure to Notify

Under the MRFTA, failure to notify may result in a civil fine (monetary penalty for negligence) of up to KRW100 million for the reporting company, and up to KRW10 million for the responsible officer/employee. If the KFTC becomes aware of a filing requirement in South Korea, through the

media or other means, it may pursue this type of penalty against the delinquent parties.

In 2021 and 2022, the KFTC issued this type of civil fine in an amount totalling KRW425 million in 30 cases, and totalling KRW226 million in 20 cases for failure to notify. In 2023, the KFTC issued this type of civil fine in an amount totalling KRW380 million in 23 cases. The issuance of these civil fines results from formal decisions made by the KFTC. However, only statistical data on these KFTC decisions is published by the KFTC, not the decisions in their entirety.

2.3 Types of Transactions

The KFTC notification is mandatory where the relevant threshold is triggered (see **2.5 Jurisdictional Thresholds**) and any of the transaction parties is engaging in one of the following business combinations.

- Share acquisition type 1: Company A acquires 20% or more (15% or more if the target is a listed company on the Korean stock exchange) of the total outstanding shares (excluding non-voting shares) of Company B, which is not an affiliate of Company A.
- Share acquisition type 2: Company A acquires additional shares of Company B and becomes the largest shareholder of Company B (where Company A already holds 20% or more shares in Company B), but the acquisition of additional shares is not reportable if Company A is already the largest shareholder in Company B.
- Interlocking directorate: where a director, officer or employee of Company A or its affiliates is appointed to concurrently hold the position of both director and another managing position of Company B, when Company B is not an affiliate of Company A.

- Statutory mergers: Company A merges with Company B.
- Acquisition of business or assets: Company A acquires or leases the whole or a substantial part of the business or assets of Company B – eg, if Company A takes over or leases the whole or a substantial part of the business, undertakes the management or takes over all or part of the fixed operating assets of Company B.
- Participation as the largest shareholder in the establishment of a new joint venture: two or more companies with no affiliate relationship establish a corporate joint venture.

2.4 Definition of “Control”

In South Korea, control is not considered when determining whether a merger notification has been triggered, but it is considered when making the determination on whether a business combination is anti-competitive. In that regard, simplified merger reviews are applicable to business combinations that do not involve obtaining control, as these transactions are deemed not to be anti-competitive.

2.5 Jurisdictional Thresholds Foreign Mergers

Business combinations occurring between foreign undertakings (undertakings with a principal place of business in a foreign country or established under foreign laws) or domestic undertakings acquiring foreign undertakings must be reported to the KFTC if:

- the business combination is a share acquisition, interlocking directorate, statutory merger, acquisition of business or assets, or formation of a joint venture;
- one of the relevant undertakings (including all affiliates) has total consolidated worldwide assets or sales revenue during the most

recent completed fiscal year of KRW300 billion or more, and the other party (including all its affiliates) has total worldwide assets or sales revenue during its most recent completed fiscal year of KRW30 billion; and

- consolidated sales revenues in or into Korea in the amount of KRW30 billion or more for both of the relevant undertakings (including all their affiliates), respectively, during the most recent completed fiscal year.

Interlocking directorates occurring in business combinations between foreign corporations must be reported to the KFTC if:

- the appointing entity (including all its affiliates) has total consolidated worldwide assets or sales revenue of KRW2 trillion or more, and the target (including all its affiliates) has total consolidated worldwide assets or sales revenue of KRW30 billion or more; and
- the appointing entity (including all its affiliates) and the target (including all its affiliates) have consolidated sales revenue into Korea of KRW30 billion or more.

Domestic Mergers

Domestic mergers are business combinations that involve a domestic or offshore acquirer and a domestic target. Domestic mergers must be reported to the KFTC if:

- the business combination is a share acquisition (type 1 or type 2), interlocking directorate, statutory merger, acquisition of business or assets, or formation of a joint venture; and
- the acquirer (including all its affiliates) or the target (including all its affiliates) has total consolidated worldwide assets or sales revenue of KRW300 billion or more and the other party (including all its affiliates) has total consoli-

dated worldwide assets of sales revenue of KRW30 billion or more.

Interlocking directorates occurring in domestic mergers must be reported to the KFTC if the appointing entity (including all its affiliates) has total worldwide consolidated assets of KRW2 trillion or more, and the target (including all its affiliates) has worldwide assets or sales of KRW30 billion or more.

Relevant Undertakings

The relevant undertakings based on the type of transaction are as follows:

- share acquisition: the acquirer and the target (but please note that the seller's turnover would be relevant if the seller remains an affiliate of the target post-transaction);
- statutory mergers: the merging companies;
- acquisition of business or assets: the acquirer and the seller; and
- participation as the largest shareholder in the establishment of new joint ventures: the largest shareholder and any one of the other shareholders.

Please note that, for merger filing purposes, "affiliates" means companies that are affiliates prior to the transaction and remain as such post-transaction.

Size of Transaction Test

Business combinations must submit a merger filing if all of the following requirements for the Size of Transaction Test are met:

- the value of the business combination is KRW600 billion or more;
- the acquirer meets the current assets or turnover thresholds; and

- the target that does not meet the current assets or turnover thresholds has significant business activities in South Korea.

Under the Enforcement Decree, the requirement for “significant business activities” is met if the following occurs during the three immediately preceding fiscal years:

- the target company sold or provided products or services in the Korean market to at least 1 million persons (the number of persons for internet-based services, such as social media, is calculated based on the number of monthly active users or visitors) per month in any month during this period; or
- the annual budget of the target company for leasing R&D or the fee for R&D personnel in Korea is KRW30 billion or more in any year during this period, assessed by aggregating the amount treated as annual ordinary R&D costs and development costs (intangible assets) of the acquired company.

The KFTC provides the following guidance on calculating the transaction value for the Size of Transaction Test:

- in share acquisitions, this is calculated by the sum of the total transaction amount and the book value of the relevant shares plus the assumed liabilities;
- in statutory mergers, the value of the transaction is the aggregate amount of the price of the shares issued as consideration in return for the merger and assumed liabilities;
- the transaction value for the acquisition of a business is the addition of the price of the acquisition of a business plus the assumed liabilities; and
- the transaction value for joint ventures is the investment amount by the investor that will

be the largest shareholder of the new joint venture.

2.6 Calculations of Jurisdictional Thresholds

The turnover of an entity and all its affiliates (remaining affiliates post-transaction) as listed on the consolidated financial statement from the immediately preceding fiscal year must be included in calculating the turnover or assets of said entity, to determine if the jurisdictional threshold is satisfied (see **2.5 Jurisdictional Thresholds**). For foreign entities, all companies that are included in such entity’s group consolidated financial statements are typically considered to be affiliates.

Foreign currency is converted to KRW, applying the exchange rate at the end of the fiscal year immediately prior to the year of the merger when calculating total assets, paid-in capital and total shareholders’ equity. The average exchange rate for the immediately preceding fiscal is applied when calculating the total turnover and net profit.

If the thresholds are asset-based, this is also determined based on the consolidated financial statements. For finance and insurance companies, operating income is also viewed as turnover.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The MRFTA defines an “affiliate” as a member of an enterprise group, which is in turn defined as “a group of companies controlled by the same ultimate controlling person”. In that regard, “control” for determining whether a shareholder is the ultimate controlling shareholder means that:

- the shareholder holds 30% or more of the shares in a company and is the largest shareholder of the company, based on its own shareholdings combined with those of specially related parties; or
- the shareholder has a controlling influence over the company's business operations, directly or through a specially related party.

With respect to foreign corporations, companies included in the consolidated financial statements of a foreign entity, over which the foreign entity has ultimate control, would typically be considered affiliates. Thus, the foregoing should be used in determining the relevant businesses or corporate entities for calculating jurisdictional thresholds in South Korea.

In a merger filing context, affiliates are defined as companies that are affiliates prior to the transaction and remain affiliates post-transaction. As such, if a seller remains an affiliate of the target post-transaction, then its turnover would be included with the target's turnover.

If new shares or bonds are issued during the fiscal year in which the business combination is reported, the sum of the total amount of assets disclosed on the balance sheet of the immediately preceding fiscal year and the increase resulting from the new shares and bonds should be calculated. In addition, if shares in another company are acquired during the fiscal year in which the business combination is reported, the sales and total assets of the acquired company must be calculated if it becomes an affiliate.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger filing if both parties to the transaction meet the threshold requirements (see 2.5 **Jurisdictional Thresholds**) and have KRW30 billion

or more in Korean sales revenue. However, the KFTC has discretion to require merger control review of a foreign-to-foreign transaction triggering no sales and/or assets thresholds in South Korea if there is concern it may give rise to potential anti-competitive effects (see 2.11 **Power of Authorities to Investigate a Transaction** for more details).

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold in South Korea.

2.10 Joint Ventures

Joint ventures are subject to merger control if they trigger the jurisdictional threshold (see 2.5 **Jurisdictional Thresholds**).

2.11 Power of Authorities to Investigate a Transaction

The KFTC may conduct an ex officio review of business combinations with potential anti-competitive effects even in the absence of a merger filing. Merger filings are submitted to inform the KFTC of the details of a business combination in advance, and the notification obligation is to provide the relevant information for the KFTC's review and assessment. In practice, the majority of cases are reviewed by the KFTC after it receives the filed notification, and it is uncommon for the KFTC to conduct an ex officio review of a business combination.

Please note that there is KFTC precedent on ex officio reviews. For example, in 2023, in Adobe's proposed acquisition of Figma, the KFTC requested the parties to submit a voluntary filing over concerns of potential anti-competitive effects on innovation, even though the jurisdictional threshold for acquisitions was not met. Accordingly, the parties submitted the filing

in September 2023, but withdrew the filing in December of the same year as they subsequently backed out of the transaction.

The statute of limitations for violations of the MRFTA is seven years from the cessation of the prohibited conduct. For example, if a company failed to report a transaction, the KFTC has the right to investigate a transaction up to seven years after the transaction's closing. However, in cartel cases, the statute of limitations is seven years from the cessation of the prohibited conduct or five years after the KFTC initiates an investigation. This would be relevant in cases where the KFTC determined that collusion occurred, such as during the establishment of a new joint venture company.

2.12 Requirement for Clearance Before Implementation

Business combinations that require pre-notification (see 3.1 Deadlines for Notification) must be suspended until KFTC clearance is obtained.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The implementation of a transaction prior to clearance (gun-jumping) may result in a civil fine (monetary penalty for negligence) of up to KRW100 million. In 2013, the KFTC issued this type of civil fine in the amount of approximately KRW30 million in the Lotte-Shinsegae merger for gun-jumping. Gun-jumping may also result in cartel enforcement (similar to the EU) under Korean competition law, but there has yet to be a reported case where such enforcement action was taken.

Based on the disclosed decisions published by the KFTC up to 2015, there has not been a case of a foreign-to-foreign transaction having received penalties for gun-jumping (ie, a case

when the parties notified the transaction but closed the transaction prior to receiving clearance). On the other hand, there have been cases when the KFTC did impose penalties for failing to notify the transaction subject to merger control review. Since the KFTC has not published decisions on this type of civil fine for gun-jumping since 2016, it is uncertain whether there have been more recent cases involving penalties for gun-jumping. However, the KFTC's position on gun-jumping has been to enforce violations when detected.

2.14 Exceptions to Suspensive Effect

In South Korea, post-closing filings are an exception to the suspensive effect (see 3.1 Deadlines for Notification).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

In the case of a pre-merger notification, closing prior to obtaining KFTC clearance is not permitted; there are no exceptions.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

Pre-merger notification is required if total assets or turnover of one of the relevant undertakings exceeds KRW2 trillion. A pre-closing filing should be submitted as soon as practicable in order to obtain clearance prior to the desired closing date; there is no deadline.

A post-closing filing is required if the jurisdictional thresholds for notification are triggered and none of the transaction parties trigger the KRW2 trillion threshold. Business combinations requiring a post-closing filing must be reported within

30 calendar days from implementation. The following are always subject to a post-closing filing, irrespective of triggering the pre-closing requirement:

- the acquisition of shares by competitive trading in the stock market, pursuant to Article 9, Paragraph 13 of the Financial Investment Services and Capital Markets Act – however, this shall not apply to the acquisition of shares by determining the quantity, price, etc, in accordance with a contract or agreement between the parties to the transaction and settling the transaction through the stock market;
- the ownership ratio of shares increases due to forfeited shares or as a result of a paid-in capital increase;
- the ownership ratio of shares increases due to the retirement or reduction of shares through the resolution of the board of directors or general shareholders' meeting of another company, irrespective of the intention;
- tender offer;
- bequests;
- business combinations that require notification to another administrative agency based on a different law, and subsequent notification to such administrative agency is made in accordance with that law;
- the enforcement of a security interest;
- the restoration of voting rights for non-voting shares; and
- the acquisition of shares in another company through capital conversion, in accordance with the Debtor Rehabilitation and Bankruptcy Act.

Failure to notify may result in a civil fine (monetary penalty for failure to file) being imposed by the KFTC; decisions on such fines have not been published since 2016.

3.2 Type of Agreement Required Prior to Notification

To initiate the formal review process of the proposed business combination, an executed version of a definitive agreement is required in pre-merger filings. However, a letter of intent, memorandum of understanding or near final draft form of an agreement may be used as a basis for voluntary preliminary filing.

Under the MRFTA, a voluntary preliminary filing is a formal process that may be initiated during the early stages of a transaction (eg, term sheet or memorandum of understanding stages). This process involves the same level of scrutiny by the KFTC as a formal filing, but with the starting point of the KFTC's review being moved forward to the earlier stage of the transaction. The voluntary preliminary filing is essentially the same as a formal filing and has the same review period (30 calendar days, which may be extended by up to 90 additional days).

If the final agreement is executed prior to the KFTC issuing its preliminary decision, a formal filing may be submitted on the basis of the final agreement to reset the review period to commence from the date of this submission. A shorter review period may be possible in such cases, as the KFTC would in effect be continuing its review rather than starting from the beginning.

On the other hand, if the KFTC issues the preliminary decision on merger clearance for the voluntary preliminary filing prior to the submission of a formal filing, a formal filing will still be required after the final agreement is executed. In such cases, the KFTC will review the formal filing, and the parties may implement the business combination only after obtaining official clearance for the formal filing (in the case of a pre-merger notification). As such, filing and clear-

ance obtained in a voluntary preliminary review will not exempt the notifying party from filing a formal notification. Nonetheless, if the formal filing does not contain any substantive changes from the preliminary voluntary filing, the KFTC would be required to issue a formal decision on clearance within 15 days of the formal filing.

3.3 Filing Fees

There are no filing fees in South Korea.

3.4 Parties Responsible for Filing

The filing responsibility of the parties is as follows.

- Share acquisitions: the acquirer would be responsible for the filing.
- Interlocking directorates: the company with interlocking directorates is responsible for filing (ie, the company with worldwide assets or consolidated sales revenue exceeding KRW2 trillion).
- Statutory mergers: the surviving entity is responsible for filing, but both parties bear the obligation to file if a new entity is created through the merger.
- Participation as the largest shareholder in the establishment of a new joint venture: the largest shareholder would be responsible for filing. However, if there are two or more shareholders that equally possess the largest shareholdings (eg, the shareholding ratio of two shareholders of the joint venture is equally 50%), such shareholders are obliged to file. If one of the largest shareholders were to file merger notification with the KFTC, the other shareholders would also be determined to have filed notification with the KFTC.

3.5 Information Included in a Filing

The reporting company must submit a merger filing form provided by the KFTC based on the

type of transaction, along with additional supporting documents as required. The merger form requires information on the notifying party and counterparty, including financial information, Korean sales, information on affiliates, and detailed information on and a competitive assessment of the relevant market. Other documents that must be submitted to the KFTC include transaction documents, each of the parties' audit reports and a certified copy of the corporate registry.

While the merger filing form itself must be submitted in Korean, the other documents do not need to be submitted in Korean. However, with respect to transaction documents, the KFTC may request Korean translations of the material terms of the agreements during its review. Documentation submitted to the KFTC does not require certification, notarisation or apostilles.

3.6 Penalties/Consequences of Incomplete Notification

If the KFTC deems the information in the merger filing to be incomplete, it will request the notifying party to provide the required supplemental information and stop the clock on the merger review period until the requested information is provided to the satisfaction of the KFTC. During the course of the merger review, it is common for the KFTC to issue requests for information when supplemental information is required.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The KFTC may impose a civil fine (monetary penalty for negligence) if misleading or inaccurate information is provided. As the KFTC has not published data on this type of violation since 2016, it is uncertain if there have been recent violations, but the KFTC's position has been to enforce this type of violation.

3.8 Review Process

There are two phases to the merger review process in South Korea.

- Phase I: the timeline for Phase I is 30 calendar days. If the deadline for the review period falls on a weekend or holiday, the deadline for Phase I is automatically extended to the next business day. If the KFTC issues a request for information (RFI), the clock is stopped on the review period until the reporting company submits a response to the RFI that meets the satisfaction of the KFTC. In other words, the time between the RFI being issued and the response being submitted by the reporting party is not included in the calculation of the 30 calendar days.
- Phase II: the initial 30-day period may be extended up to 90 additional calendar days (total of 120 calendar days). As in Phase 1, if the RFI is issued by the KFTC, the clock is stopped from the issuance date until the day after the reporting party submits responses that are deemed satisfactory to the KFTC.

The KFTC commonly issues around one to three RFIs, even for cases that do not raise anti-competitive concerns, which may further extend the merger review period. As such, the parties should typically expect a KFTC decision in business combinations that do not have significant competitive concerns within four to six weeks after the submission date.

In cases where there are significant anti-competitive concerns regarding a business combination, the actual review period may be much longer than 120 days. For example, in 2023, the KFTC's review of the Hanwha Aerospace-Daewoo Shipbuilding and Engineering and Broadcom-VMware business combinations took approximately five months and 13 months,

respectively; the KFTC's review of the Korean Air-Asiana Airlines business combination (notification filed in 2022) took nearly 16 months to complete.

3.9 Pre-notification Discussions With Authorities

There are no pre-notification discussions in South Korea. However, the parties may engage in pre-notification discussions as needed, and the KFTC is amenable to such discussions. Furthermore, the KFTC has recently recommended conducting pre-notification discussions for business combinations with concerns over potential restrictions on competition.

3.10 Requests for Information During the Review Process

It is common for the KFTC to issue RFIs during the course of its review. The review clock is stopped when the RFI is issued and will resume when the responses to the RFI are submitted to the KFTC's satisfaction. Even in transactions without anti-competitive concerns, the KFTC typically issues between one and three RFIs, but it will issue more in cases where there are concerns on competition restraints. It is difficult to predict the average number as the outcome is case-specific.

The burden to respond to the RFIs varies, with some questions being straightforward and relatively simple to answer, and others involving the definition or information on the relevant market or assessments on the restriction of competition being significantly more difficult to answer (these types of questions require a strategic approach when drafting the response).

3.11 Accelerated Procedure

The KFTC has a short-form filing, which is also subject to the simplified review procedure. The

following transactions qualify for the short-form filing:

- business combinations between affiliates;
- interlocking directorates involving fewer than one third of directors of the counterparty, except in cases where the representative director of the counterparty is one of the interlocking directorates;
- participations in the establishment of an institutional private equity fund under Article 9, Paragraph 19 (1) of the Financial Investment Services and Capital Markets Act;
- business combinations involving a special purpose company under Article 2, subparagraph 5 of the Asset-backed Securitisation Act;
- participations in the establishment of a ship investment company under the Ship Investment Company Act;
- participations in the establishment of a project financial investment company by meeting the requirements of Article 104-31 (1) of the Act on Restriction on Special Cases Concerning Taxation;
- new limited partners making investments in an already established institutional private equity fund (excluding those jointly participating in the management of the business that the institutional private equity fund invests, such as those prescribed in Article 271-19 (2) 2 of the Enforcement Decree of the Financial Investment Services and Capital Markets Act);
- an executive concurrently holding an executive position under a contract or agreement identical or continuous with the acquisition of shares or the establishment of a joint venture, which is exempt from the obligation to file under the MRFTA; and
- formal notification of a business combination that has been approved through the request

for a voluntary preliminary filing (except in cases where there has been a significant change in facts or market conditions).

The KFTC also has a simplified review procedure for business combinations that are not expected to have any effect on the Korean market. This streamlined process requires the KFTC to complete the simplified review within 15 calendar days. In addition to transactions that qualify for short-form filing, the following transactions are subject to the simplified review procedure:

- acquisitions of real estate by real estate investment companies or by ordinary companies for investment purposes;
- transactions where the target is a foreign company and such transaction is not expected to have any impact on the Korean market;
- transactions without the creation of control;
- conglomerate mergers where the acquirer fails to satisfy the threshold of KRW2 trillion in worldwide consolidated assets or sales revenue, or where the relevant products are not complementary or substitutes – certain mergers involving online platforms are excluded from simplified review following the implementation of the revised merger guidelines on 1 May 2024 (see **10.1 Recent Changes or Impending Legislation**); and
- transactions that are clearly for investment purposes.

4. Substance of the Review

4.1 Substantive Test

The substantive tests used by the KFTC are not very different from those used by the competition authorities in the US and the EU. The KFTC considers:

- unilateral and co-operative effects for horizontal mergers;
- foreclosure and co-operative effects for vertical mergers; and
- potential anti-competitive effects, the exclusion of competitors, increased barriers to entry and network effects for conglomerate mergers.

Bundling or portfolio effects are considered as types of exclusionary effects. The KFTC also considers the effects of a business combination on innovation markets and information assets.

Furthermore, the amount of foreign competition, potential for new market entrants, the existence of neighbouring markets and strong buyers are considered to be mitigating factors to restrictions on competition. Efficiency gains that are specific to a particular business combination are also considered, and the failing firm defence may also be used.

4.2 Markets Affected by a Transaction

The market share is the basis for determining whether there is a restriction on competition. Under the MRFTA, there are safe harbours and presumptions of anti-competitiveness based on market share.

Safe Harbours

These apply to horizontal mergers that meet any of the following conditions (although not if there is a presumption of anti-competitive effect, as explained below):

- when the Herfindahl-Hirschman Index (HHI – the sum of the squares of the market shares of each competitor in a given market) is less than 1,200;

- when the HHI is between 1,200 and 2,500 and the increase in the HHI is less than 250 points; or
- when the HHI is 2,500 or more and the HHI increase is less than 150 points.

They apply to vertical or conglomerate mergers that meet any of the following conditions:

- when the HHI in the relevant market of the parties is less than 2,500 and the market share of the parties is less than 25%; or
- when the parties' position is 4th or lower in the relevant market or the market share of the parties is less than 10%.

Presumption of Anti-competitive Effects

Such a presumption exists if:

- the combined market share satisfies the criteria for dominant market position (ie, one company has a market share of 50% or more, or the top three players in the relevant market have a combined market share of 75% or more);
- the combined market share ranks first in the relevant market; or
- the difference between the combined market share and the market share of the second-largest company (other than the parties) is at least 25% of the combined market share.

4.3 Reliance on Case Law

The KFTC references certain decisions of major foreign competition authorities, such as those of the US and the EU. The KFTC has well-established channels of communications with these foreign competition authorities, and is more likely to contact them in foreign-to-foreign transactions that give rise to substantial anti-competitive concerns. The KFTC may also opt to wait until the US or EU competition authorities

issue their final decisions before rendering its own decision.

4.4 Competition Concerns

Please refer to 4.1 Substantive Test.

4.5 Economic Efficiencies

The Merger Review Guidelines state that the KFTC will consider:

- efficiency gains in production, sales and R&D;
- efficiency gains arising from the nature of online platforms, as recently included in the KFTC's amendment to the Merger Review Guidelines to consider the nature of the digital economy (particularly online platforms) when reviewing business combinations; and
- overall efficiency gains in the national economy.

In order for efficiency gains to be recognised, they must be unique to the business combination and must outweigh the anti-competitive effects. In practice, however, the KFTC rarely approves business combinations that are presumed to be anti-competitive simply based on significant efficiency gains. The KFTC does consider the effect of efficiency gains when determining the degree and substance of corrective measures.

4.6 Non-competition Issues

Separate from merger filings, additional regulatory filings under the Foreign Investment Promotion Act and Foreign Exchange Transactions Act may be required for a foreign direct investment. Depending on the type of domestic business being acquired, further regulatory filings under the Act on Prevention of Divulgence and Protection of Industrial Technology and the Act on Special Measures for Strengthening and Protecting the Competitiveness of National High-Tech Strategic Industries may also be necessary.

As discussed in 4.5 Economic Efficiencies, the Merger Review Guidelines require the consideration of the overall efficiency gains in the national economy. The following criteria are considered, as set forth in the Merger Review Guidelines:

- whether it significantly contributes to increasing employment;
- whether it significantly contributes to the development of the local/regional economy;
- whether it significantly contributes to the development of related upstream and downstream industries;
- whether it contributes to the stability of the national economy and livelihood of citizens;
- whether it significantly contributes to the reduction of pollution to the environment; or
- if a start-up is a party to the business combination, whether the business combination significantly contributes to the revitalisation of the domestic start-up ecosystem by enabling the recovery of the capital invested into the start-up, leading to the creation of a new start-up and market entry.

However, the KFTC rarely considers the efficiencies in the overall national economy during merger reviews, and there is only one case where it approved a business combination on this basis (conditional approval of the Hyundai-Kia merger in 1999 during the IMF crisis). Recently, there have been cases when the KFTC has approved business combinations where one of the reasons for approval was that the transaction would significantly contribute to the reduction of pollution to the environment.

4.7 Special Consideration for Joint Ventures

There is no separate section in the Merger Review Guidelines on anti-competitiveness in the formation of joint ventures. However, in practice,

the KFTC focuses on the relationship between the parent company and the joint venture, and considers possible co-ordination issues regarding exchange of information between the parent companies.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The KFTC has the ability to impose both behavioural and structural remedies (corrective measures) in accordance with the MRFTA, including:

- blocking the deal or post-closing filing to restore pre-merger status;
- the divestiture of businesses;
- behavioural restrictions to prevent potential negative effects on competition (prohibition of price increases during a certain time period, etc); and
- other remedies deemed necessary to correct MRFTA violations.

In order to impose remedies, the KFTC is first required to draft an Examiner's Report detailing the violations of the MRFTA. The parties then have the option to file a response to the Examiner's Report. Thereafter, the KFTC will hold a plenary hearing to decide on the issuance of remedies.

As the MRFTA prohibits business combinations that substantially restrict competition in the relevant market, the KFTC must prove that the transaction substantially restricts competition in the relevant market.

The KFTC's general perspective is that a business combination presumed to be anti-com-

petitive under the MRFTA substantially restricts competition. Even though there is no statutory presumption regarding vertical and conglomerate mergers, the KFTC generally perceives that a vertical merger substantially restricts competition if there is a high market share in both the upstream and downstream markets, or in conglomerate mergers if there is a high market share in neighbouring markets of both markets. However, the KFTC does not solely rely on the statutory presumption, but also refers to qualitative evidence to support the assertion that various characteristics of the relevant markets restrict competition.

5.2 Parties' Ability to Negotiate Remedies

Under the amended MRFTA, which will take effect from 7 August 2024, official commitment procedures will be implemented to boost the efficiency and effectiveness of KFTC merger reviews. Prior to the amendment, the KFTC imposed remedies on transactions based on the limited information it received from the parties to the transaction, including information in the merger filing and unofficially submitted remedies, among others. After the amended MRFTA takes effect, the parties may officially submit proposed remedies for KFTC consideration.

The stipulations regarding commitment procedures under the amended MRFTA are as follows:

- proposed remedies to address anti-competitive concerns may be officially submitted to the KFTC in writing during the course of the merger review process (Article 13-2 (1) and (2) of the MRFTA);
- the KFTC may request the revision of the proposed remedies when they fail to resolve anti-competitive concerns or cannot be

implemented in an appropriate period of time (Article 13-2 (3) of the MRFTA); and

- proposed remedies may be considered by the KFTC during its determination of appropriate remedies.

In horizontal mergers, the typical remedy is a corrective order for the divestiture of the business in the relevant market at issue. For vertical mergers, corrective measures requiring the relevant products to be offered on non-discriminatory terms are typically issued. As for conglomerate mergers, the remedies may vary based on the type of business.

It is exceptionally rare for remedies to be issued to address non-competitive issues. However, a recent merger between food delivery apps resulted in a corrective order prohibiting the unfavourable treatment of delivery drivers post-transaction. This remedy could be viewed as being implemented to address labour rather than competition issues.

5.3 Legal Standard

The KFTC refers to the Guidelines on the Imposition of Corrective Measures, the main contents of which are as follows.

- In principle, when issuing corrective measures, structural remedies should generally be imposed, and any behavioural remedies issued should be complementary to the effective implementation of structural remedies. However, in cases where structural remedies are not possible or effective, only behavioural remedies may be imposed.
- Priority in divestitures shall be given to business units that can be easily separated from other assets, have been operating independently prior to the business combination, and

have the proven ability to survive and compete in the relevant market.

- Divested assets should include not only tangible assets but, to the extent possible, also assets required for the efficient production and distribution of relevant products, such as distribution networks, key employees, contracts for product transactions, supply contracts for raw materials, management of infrastructure and intangible assets.
- The period of implementation for the divestment of assets shall be determined, in principle, within three to six months, and take into consideration the size and complexity of the assets subject to divestment, the overall economic situation and standard industry trade practices.

5.4 Negotiating Remedies With Authorities

Notwithstanding the 7 August 2024 amendment to the MRFTA, the KFTC may unilaterally impose its own corrective measures even if the parties do not propose any corrective measures. This is also applicable if the parties first propose corrective measures and an agreement cannot be reached.

Regardless of whether the parties first propose corrective measures or the KFTC imposes its own remedies, the KFTC must follow the procedures detailed in **5.1 Authorities' Ability to Prohibit or Interfere With Transactions** when imposing remedies.

5.5 Conditions and Timing for Divestitures

Following the KFTC's issuance of a formal written decision on the remedies, the parties may close the transaction even if the remedies have yet to be implemented. For example, if the KFTC imposes a corrective order for a divestiture, the

parties can close the transaction and fulfil the obligations under the corrective order thereafter. If the parties fail to implement the remedies, the KFTC may impose a separate non-performance penalty, and criminal sanctions may also be imposed (up to two years' imprisonment or a criminal fine not exceeding KRW150 million).

5.6 Issuance of Decisions

If no remedies are issued, the parties are issued a letter of clearance. Such letters of clearance are not published, but in cases the KFTC deems to have a high profile, a press release will be issued stating that the KFTC cleared the deal without conditions and the reason therefor. However, if the KFTC imposes remedies or blocks the business combination, then a formal written decision is provided to the parties following the completion of the KFTC's review, and the KFTC then publishes the non-confidential version of the decision. The KFTC will also issue a press release.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The KFTC imposes remedies on business combinations that raise competition concerns in the Korean market, irrespective of whether or not they are foreign-to-foreign transactions. The KFTC also aligns with competition authorities from other jurisdictions (particularly those in the US and EU) when other jurisdictions have also received notification and the relevant market is global. One example is Danaher's 2020 acquisition of the Biopharma business of General Electric Life Sciences, where a corrective order for the divestiture of General Electric Life Sciences' bioprocessing facilities was issued.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

There is no separate reporting system for ancillary restraints. However, the KFTC may examine the effects of ancillary restraints during its review of the business combination, although this is dependent on the case handler and is not mandatory. Even when the KFTC issues clearance, it is difficult to assume it has approved an ancillary restraint. However, in practice, there has yet to be a case where the KFTC has conducted a separate investigation or issued sanctions on an ancillary restraint for an agreement as anti-competitive.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

In South Korea, third parties are not permitted to have an active role in the merger review process but may submit information and their opinions regarding a proposed business combination.

7.2 Contacting Third Parties

The KFTC usually contacts third parties, except in cases that are subject to a simplified merger review or where it is clear that the business combination will have a minimal impact on the Korean market. The KFTC usually contacts third parties by sending written questionnaires.

To date, the KFTC has not conducted market tests for remedies as it imposes corrective orders for remedies unilaterally, but the KFTC is expected to conduct market tests, as required, after the implementation of the amendment of

the Merger Review Guidelines allowing parties to formally propose remedies.

7.3 Confidentiality

Information obtained by the KFTC during the course of merger reviews is generally kept confidential. However, the KFTC may seek the opinions of third parties regarding the business combination and disclose information regarding the business combination in connection therewith. During such inquiries, the KFTC strives not to disclose business secrets to third parties, to the extent possible. Also, the fact that a notification has been made to the KFTC and a description of the business combination subject to review are generally not published.

However, if a business combination is determined to be anti-competitive, leading the KFTC to impose remedies or block the business combination, the KFTC will issue a press release of its decision and publish a non-confidential version. Please note that the KFTC may even issue a press release on the decision to clear a business combination without conditions if it is deemed to be of public interest.

7.4 Co-operation With Other Jurisdictions

The provision of the MRFTA on international co-operation (Article 56) permits the KFTC to:

- enter into co-agreements with foreign governments that do not conflict with the laws or interests of Korea;
- assist the enforcement efforts of foreign governments; and
- provide assistance for foreign government enforcement requests if the foreign government requesting assistance guarantees to provide the same or similar assistance.

In practice, the KFTC does co-operate with foreign governments in establishing general policies (memorandum of understanding, etc) and when reviewing the same business combination in South Korea. In cases where business combinations are reported to foreign competition authorities (particularly in the US or the EU), the KFTC will discuss with and, if necessary, align on the definition of the relevant market, theories of harm and remedies. The KFTC requires permission from the parties (ie, waiver) prior to sharing information in a specific merger filing with a foreign competition authority.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Any party to a business combination has the right to:

- file an appeal with the KFTC;
- forego appealing to the KFTC and directly file an appeal with the Seoul High Court; or
- first file an appeal with the KFTC, and thereafter file an appeal with the Seoul High Court if the party disagrees with the KFTC's appeal decision.

8.2 Typical Timeline for Appeals

Appellants must file an appeal with the KFTC within 30 days of receiving the KFTC's written decision on the merger filing, or with the Seoul High Court within 30 days of receiving the KFTC's written decision on the merger filing or on the appeal, as the case may be.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties to merger clearance decisions do not have the right to appeal under the MRFTA.

However, in 2015, a competitor filed a complaint against the KFTC's decision in a business combination case with the Constitutional Court of Korea, which examined whether the KFTC violated the competitor's constitutional basic rights. In that regard, it may be possible for a third party to file a complaint with the Constitutional Court opposing the KFTC's decision in a business combination on the ground that the decision violated the third party's constitutional rights.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Please refer to 4.6 Non-competition Issues.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

On 7 August 2024, the following changes under the amended MRFTA will become effective:

- formal commitment procedures (see 5.2 Parties' Ability to Negotiate Remedies) that permit the transacting parties to submit officially proposed remedies to the KFTC for consideration in addressing anti-competitive concerns will be introduced – the KFTC will be drafting detailed guidelines on the implementation of these commitment procedures; and
- certain transactions will become exempt from merger filing obligations, as described in 2.1 Notification.

The KFTC implemented amendments to the Merger Review Guidelines on 1 May 2024 to improve the merger review process and reflect the current trend of increasing transactions

involving digital service suppliers, including online platforms. The amended merger review guidelines will establish the following:

- a method for providing a market definition for industries where entities provide free services;
- methods for determining the restriction of competition by online platforms, such as the consideration of network effects and the evaluation of the restriction on competition through the provision of free services and in conglomerate mergers;
- the use of direct evidence and examples for determining restrictions by online platforms – this will include past examples in the same or similar markets of business combinations or new market entry resulting in changes in the market, the results of economic analysis that concludes the possibility of price increase without an analysis of the market concentration (upward pricing pressure analysis and merger simulation, etc), examples of prior responses from companies during past business combinations and the opinion of interested third parties and experts;
- additional examples of increased efficiencies that take into account the unique characteristics of the digital economy; and
- the exclusion of transactions involving online platforms from a simplified merger, even those which involve conglomerate mergers, if an online platform acquires a target exceeding the prescribed threshold of an average of more than 5 million monthly users or exceeds KRW30 billion in expenditures on R&D activities during the immediately preceding fiscal year.

10.2 Recent Enforcement Record

In January 2023, the KFTC established the International M&A Division to review business combi-

nations between foreign entities. Since establishment, the division has conducted more in-depth reviews of business combinations involving foreign entities that may restrict competition. Thus far, the division seems to be more active in seeking the opinions of interested third parties, conducting economic analyses and communicating with foreign competition authorities. For example, in the 2023 Adobe-Sigma case, which did not meet the jurisdictional threshold requirements for merger notification, the KFTC monitored the review status of foreign competition authorities and requested the parties to submit a voluntary filing.

10.3 Current Competition Concerns

The KFTC has received criticism for failing to strictly review business combinations involving online platforms, resulting in the uncontrolled expansion of online platforms. In May 2024, the KFTC responded by revising the criteria for reviewing business combinations involving the digital economy. Going forward, the KFTC is expected to more actively review business combinations involving online platforms.

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