January 20, 2023

THE KFTC ANNOUNCES NEW MEASURES TO EXPEDITE MERGER REVIEWS

The Korea Fair Trade Commission (the "**KFTC**") recently established a new division dedicated to reviewing merger cases involving foreign parties ("**Foreign Mergers**"), and is continuing to make various systematic reorganization efforts to effectively respond to the increasing need for more efficient merger reviews. In 2021, the KFTC reviewed approximately 1,100 merger cases, experiencing about a 150% increase compared to 2018. Korea's current merger review system and the limited number of case handlers (eight in total), made it difficult to provide timely support for the innovative growth of the companies and effectively respond to large-scale Foreign Mergers. As a result, the KFTC expects to implement various systematic changes as follows:

I. Establishment of the Global M&A Division in December 2022

A. Background

Through the establishment of the new Global M&A Division, the KFTC aims to more effectively respond to Foreign Mergers (between foreign entities or cross-border M&As between foreign entities and Korean entities) and strengthen international cooperation with foreign competition authorities. The existing M&A Division within the KFTC was established in 1996 and has been operating as a single division until now, but the size and the number of the M&As both in and outside of Korea subject to review by the KFTC have significantly increased in the past 20 years.

- The number of merger notifications nearly doubled, from 602 cases in 2002 to 1,113 cases in 2021, with the total deal size of such transactions increasing by approximately 23 times, from KRW 15.3 trillion in 2002 to KRW 349 trillion in 2021.
- In particular, the number of Foreign Mergers notified to the KFTC also doubled from 90 cases in 2002 to 180 cases in 2021, with the total deal size of such transactions increasing by 228 times, from KRW 1.3 trillion in 2002 to KRW 297 trillion in 2021.

Due to the growth of the digital economy, the number and complexity of merger reviews involving online platforms and IT companies are increasing, which also require in-depth legal and economic analysis. Furthermore, the recent increase in large-scale Foreign Mergers led by Korean companies in the aviation, semiconductor, and shipbuilding industries has also further strengthened the need to cooperate with foreign competition authorities.

- Such changes are in line with the efforts by other competition authorities to enhance international cooperation in global merger reviews, to minimize discrepancies in their decisions and remedies, as well as burdens on merging parties.

B. Organization

The Global M&A Division is comprised of six KFTC officers, including a Director-level senior officer.

- Through internal shuffling in December 2022 and January 2023, certain case officers from the previous M&A Division that are experienced in conducting merger reviews joined the newly formed Global M&A Division. Accordingly, the Global M&A Division was able to seamlessly begin reviewing merger cases involving foreign entities.
- The team is led by a Director who has been with the KFTC since 2004. He previously served in the Anti-Monopoly Division of the Anti-Monopoly Bureau, the Franchise Division, and the Competition Policy Division under the Competition Policy Bureau. He has also served as the Director of the Cartel Investigation Division and the Anti-Monopoly Division. Immediately prior to joining the Global M&A Division, he was seconded to the Sejong Institute, a public interest think tank that engages in policy development.
- Three of the team members also have previous merger-related experiences.

C. Work Scope

The Global M&A Division will be engaging in the following activities: (i) establishing and implementing policies and systems related to, and reviewing merger notifications for, Foreign Mergers; and (ii) investigating and imposing penalties for non-compliance with merger control regulations for Foreign Mergers.

In addition, the Global M&A Division will also be carrying out international cooperation efforts, analyzing the merger control trends and regulations in other jurisdictions, and handling cross-border merger reviews.

D. Expected Effects and Implications

The expansion in the number of officers dedicated to handling Foreign Mergers will allow the KFTC to conduct a more in-depth review of the notifications and thereby enhance the credibility of the KFTC's decisions.

In addition, Foreign Mergers without anti-competitive concerns will likely receive quicker review due to better resources.

However, the KFTC may conduct a more in-depth review of mergers with anti-competitive concerns as its collaboration with foreign competition authorities further strengthens. As such, for Foreign Mergers that also pose potential anti-competitive concerns, it may require a more in-depth analysis and discussions with the KFTC, as well as clearance time, and it is advisable to better prepare and plan in advance to obtain a prompt merger clearance.

II. Announcement on Legislative Reform for Merger Controls

The legislative system for merger controls in Korea has not experienced any significant changes in the last 40 years. Accordingly, there has been constant criticism that the current system does not comply with the merger review standards of major countries, and is unable to effectively deal with the increasing number of notifications. In order to solve this problem, the KFTC formed a dedicated task force in June 2022 and engaged in a comprehensive discussion of legislative reforms to the existing merger control regime. As a result, the KFTC prepared the following short-term and mid- to long-term legislative reform plans that take into consideration the current conditions in Korean merger control regime.

A. Short-Term Plans: Pre-Announcement of Legislation in Early 2023 and Submission to the National Assembly During the Second Half of 2023

1. Expanding the scope of transactions not subject to merger control

To efficiently respond to the increasing demand for merger reviews, the KFTC intends to reduce the number of merger notifications received by expanding the scope of exempted mergers.

Based on the latest discussions, the following types of mergers, which are generally regarded not to pose substantial impact on the market, will be considered for exemption:

(a) mergers between a parent company and a subsidiary (when the acquiring company already holds at least 50% interest, and thereby sole control, in the acquired company);

(b) establishment of a private equity fund (including amendments to the Merger Filing Guidelines for confirming the participation of a strategic investor); and

(c) interlocking directorate that constitutes less than 1/3 of the total number of directors in the target company.

Such changes will likely reduce the number of merger notifications in Korea by approximately 40%, based on the number of filings made in 2021.

2. Introducing a system for companies to make voluntary remedy proposals

The KFTC intends to implement a formal system where a company uses its own resources (manpower and industry-related information, among others) to submit a voluntary remedy proposal that promptly and effectively resolves the anti-competitive concerns of a merger, which the KFTC will review and grant clearance if it believes the plan is appropriate and sufficient ("**Remedy Proposal System**"). Currently, voluntary remedy proposals are accepted on an *ad hoc* basis.

The Remedy Proposal System is expected to be useful in not only resolving anti-competitive concerns of proposed transactions, but also in developing remedies that are more suitable and implementable. It is also likely to reduce the KFTC's merger review period, increasing the efficiency of the reviews. Foreign competition authorities, including in the U.S. and E.U., have already implemented and are actively utilizing such Remedy Proposal Systems.

B. Mid/Long-Term Plans: Undertaking Further Researches Regarding the Future of Merger Control

1. Introducing formal review phases during review process

In line with practices by other competition authorities, the KFTC plans to introduce formal phases to its merger review process, which would allow the KFTC to efficiently utilize its limited resources in reviewing mergers. Currently, the KFTC is generally required to conclude its review within 30 days from notification, which may be "extended" by up to 90 days, without there being a formal phase distinction. Once introduced, the KFTC will clear most of the cases in Phase I, and the Phase II review would be initiated only for cases with anti-competitive concerns, subject to an in-depth review. The KFTC plans to conduct further discussion before finalizing on the details of such change.

2. Abolishing post-closing notifications and revising the merger notification thresholds

   Korea's current merger notification standard requires post-closing notification except where a party to the transaction is a large company with assets or turnover in the amount of KRW 2 trillion (approximately USD 1.6 billion) or more, in which case a pre-closing notification is required. As a mid- to long-term plan, the KFTC intends to (i) abolish the post-closing notification requirement and require only pre-closing notifications, and (ii) review the need to raise the merger notification thresholds that better reflect the current global economic standards.

   Such contemplated changes aim to enhance Korea's merger control regime, to be better in line with the global standard. The specific plans for implementation and the timing of application will be confirmed by the KFTC upon further discussions with the public and private sectors.

The KFTC's establishment of the Global M&A Division and various legislative reforms discussed above are measures to expedite the merger review process, and adjust the KFTC's procedures in line with global standards. In light of such efforts by the KFTC, it is advisable to continually monitor such changes in potentially preparing merger notifications in Korea. Further, until the changes are successfully implemented, we would advise companies to closely communicate with the KFTC and work to minimize any potential delays for the proposed transaction.

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BKL's Recent Highlights

BKL has successfully guided many companies in large-scale merger projects, and is currently involved in merger filing matters for multiple global M&As.

We share below some of the notable merger filing cases BKL handled in the fourth quarter of 2022.

Case	Details
Merger (by absorption) in the Korean OTT service market *Unconditional clearance	BKL represented the reporting party in a merger (by absorption) in the Korean OTT service market and obtained unconditional clearance from the KFTC in accordance with the deal timeline. Despite the vertical overlap between a content provider and an OTT services provider, and views from interested third parties against the merger, BKL proactively conducted economic analysis* countering such arguments, which significantly contributed to the favorable outcome.
Merger (by acquisition) between companies in the glass-manufacturing industry *Conditional clearance	BKL represented the reporting party in its acquisition of shares in a glass-manufacturing company and obtained clearance with minimal conditions that do not affect the purpose and goal of the proposed transaction. Despite the horizontal overlap in the coated architectural glass market, BKL prepared voluntary remedy proposal together with detailed economic analysis that resulted in clearance based on the voluntarily submitted remedy proposal.

* BKL's Antitrust & Competition Group operates a Center for Law and Economics (CLE) where we conduct economic analysis for merger cases in-house.

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