

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Korea --

25 February 2014

This note is submitted by Korea to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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– Korea –

1. Merger notification regime

1.1 Mergers subject to mandatory notification

1. The Article 7-1 of the Monopoly Regulation and Fair Trade Act (hereinafter “the MRFTA”) stipulates that no person shall not engage in the combination¹ of enterprises that substantially restricts competition in a certain line of trade. Also the Article 12 of the MRFTA requires that a company having an amount of total assets and sales turnover falling under a certain scope shall notify its merger transactions to the Korea Fair Trade Commission (hereinafter “the KFTC”).

2. Based on the bigger amount between total assets and sales turnover, when one party of the companies involving in the merger has its assets or sales of more than 200 billion won and the other party has assets or sales more than 20 billion won, the parties shall notify the merger to the KFTC. In case of when acquiring or acquired companies are foreign corporations and have sales exceeding 20 billion won (about 20 million dollars) in the Korean market, those companies shall notify their merger transactions to the KFTC.

1.2 Mandatory period of merger notification

3. Merger notification is divided into pre-merger and post-merger notifications on the basis of a merger. The MRFTA requires pre-merger notification, in principle, within 30 days from the date of a merger, in turn reducing the burden of mandatory report.

4. However, an exception applies to a case in which one or more of companies involved in a merger are large scale corporations with total assets of more than 2 trillion won as of an immediate preceding business year before the date of a merger, unless holding a position as an officer of other company by an officer of employee (hereinafter “Interlocking Official”), the merger is subject to pre-merger notification within a period from the date of concluding merger contract to the date of merger². In case of large enterprises, it is almost impossible to reverse the situation as it was before, except for interlocking Official, when anti-competitiveness was found after consummating a merger and it can affect the third party. Therefore it is needed to review the merger case before its consummation through pre-merger notification.

¹. The Article 7 of the MRFTA considers the following conducts mergers: i) acquisition or ownership of stocks of other company; ii) holding a position as an officer of other company by an officer of employee; iii) merger with other companies; iv) transfer of operation; v) participation in establishment of a new company.

². The date of the combination of enterprises means as follows: when acquiring the ownership right of another firm’s stocks, the date the share certificate is delivered; the date the ownership right ratio increase is confirmed; in case of an interlocking directorate, the date officers are elected during a general shareholders’ or a members’ meeting; in the case of asset acquisition, the date the payment for business transfer is completed; in the case of a merger with another corporation, the date of merger registration; when participating in the establishment of a new company the day immediately following the date the payment for the allocated share is made. (the article 18-8 of the enforcement decree of the Act).

1.3 *Period of banning merger implementation*

5. Implementing a merger falling under the threshold of a pre-merger notification is banned before companies involved in the merger receive the review result from the KFTC, and the date on which the review result is received means the submission date of the final written resolution. The KFTC should review mergers within 30 days from the date of notification and notice the results, but the period can be extended up to additional 90 days in case it is needed. However when the KFTC found that notified contents are insufficient and orders those companies to add more in a certain period, the entire period of banning the implementation can exceed 120 days as the above period is not included.

6. If the implementation ban was violated, the KFTC should impose administrative monetary fines and can file a suit for annulment of the merger or establishment of the company.

2. *Review of previously consummated mergers subject to post-merger notification*

2.1 *Review of mergers subject to post-merger notification*

7. For companies subject to post-merger notification which obliges companies to notify after the date of a merger, there is no other way but to review after consummation of the merger. Regarding cases reported, when the KFTC sees anti-competitiveness in cases subject to post-merger notification, the Commission can review the cases and impose remedies. Through reviewing mergers subject to post-merger notifications, remedies can be imposed according to the Article 16³ of the MRFTA, same applies to the merger cases subject to pre-merger notification.

8. Therefore the KFTC can impose a remedy against a consummated merger or establishment of a company to eliminate anti-competitiveness such as selling stocks of acquired or established companies, and the Commission also can file a suit for annulment of the merger or establishment of the company.

2.2 *Enforcement prescription on execution of sanctions against consummated mergers*

9. The Article 49-4 of the MRFTA stipulates that the KFTC shall not impose measures and surcharge on any conduct in violation of this Act if five years passed after the termination date of the conduct in violation of this Act. Same applies to merger cases, so after five years termination date from the date of a merger, no measures can be imposed.

2.3 *Examples of reviews on consummated mergers*

2.3.1 *Merger between Media Tek Inc. and MStar Semiconductor Inc. (2013): behavioral remedies were imposed*

10. A case where Media Tek, the world's second largest seller of System on Chip (SoC; System-on-chips) for Digital TV, acquired 48% of MStar Semiconductor's stocks and merge it. After acquiring the stocks Media Tek notified the transaction to the KFTC. The Commission, after reviewing the case, concluded that the merger has a possibility to restrict competition in the market of SoC for Digital TV, therefore approved the merger with obligations including banning price increase for three years; using

³. According to the Article 16 of the MRFTA, remedies can be imposed as follows: i) discontinuance of the practice concerned, ii) disposition of all or part of stocks, iii) designation of officers, iv) transfer of business, v) cancellation of debt guarantees, vi) public announcement of receipt of a remedies, vii) restrictions on the business method or business scope, viii) performance of duty to notify or correction of notification content, ix) other necessary measures to correct such a violation.

written contracts (which include information on price and technical support, and warranty for flaws, etc.) between companies taking part in the merger and demanders (companies).

2.3.2 *Merger between Muhak Co., Ltd and Daesun Co., Ltd (2003): the merger was not approved by the KFTC*

11. After Muhak Co., Ltd acquired 42.21% of Daesun Co., Ltd's stocks, Muhak notified the fact to the KFTC. The Commission concluded that the case has huge anti-competitiveness as the companies involving in the merger will have a de facto monopolization over the soju market in Busan through the merger. Therefore the KFTC imposed a structural remedy, which resulted in banning the merger that orders Muhak to sell off all the Daesun's stocks it owns to a third party.

2.3.3 *Merger between Samick Musical Instrument Co., Ltd. And Young Chang Musical Instrument (2004): the merger was not allowed by the KFTC*

12. Samick Musical Instrument Co., Ltd. and its subsidiary company, Samsung Co., Ltd, acquired 48.58% of Young Chang Musical Instrument's stocks and then Samick purchased some of core mechanic facilities of Young Chang Musical Instrument. After conducting post-merger review, the Commission found anti-competitiveness in the domestic piano market and took a measure of not allowing the merger by ordering Samick to resell the entire mechanic facilities it acquired back to Young Chang and dispose all its shares of Young Chang to a third party.

3. Review of mergers falling below notification thresholds

3.1 *Review of non-notifiable mergers*

13. The Article 7-1 of the MRFTA demands that no one shall substantially minimize competition in a particular business area by conducting practices falling under the combination of enterprises. Based on the provision, the Commission can review merger transactions which fall below notification thresholds or are exempt from review, and no other law provisions are dealing with the review of the mergers not subject to mandatory notification.

14. In such cases, measures which can be imposed include orders to sell off shares, transfer of business, and resignation of officers according to the article 16 of the MRFTA. Although mergers are falling below notification thresholds or are exempt from notification, applicable measures are not different from those imposed on mergers exceeding the thresholds.

3.2 *Detection of mergers falling under the notification thresholds*

15. As mergers falling under the notification thresholds are not reported by corporations, it is hard for the KFTC to identify whether merger transactions occurred in the market or not. Those mergers are recognized through public announcement by enterprises, indiscriminate checking through KIND⁴, and voluntary report from corporations. Even though those mergers are not subject to mandatory notification, reasons why those mergers were notified are mainly because those companies had misinterpreted the

⁴. KIND of the Korea Exchange is an electronic disclosure system that protects investors and increases efficiency in resource allocation by thoroughly disclosing information such as business performance, financial health, and mergers or a capital increase of listed companies to investors and other persons concerned by enabling those companies to notify those particulars stipulated in "the Financial Investment Services and Capital Market Act" to both the Financial Supervisory Service and the Korea Exchange.

notification requirements or they hadn't been sure of whether such mergers are falling below the notification thresholds.

16. Currently, many of merger transactions that the KFTC is now reviewing are reported by companies concerned themselves, even though those cases are not meeting the notification requirements. If the KFTC concludes those mergers would restrict competition, the commission will impose remedies.

3.3 *Examples of review of mergers falling under the notification thresholds*

17. Up to now, there has been no case in which the Commission sanctioned on consummated mergers which falls under the notification thresholds. However due to possible anti-competitiveness, the KFTC had ever conducted an ex-officio review on DuzonBizon's acquisition of Kicom⁵'s stock in 2011, which is recognized by indiscriminate checking through KIND and is not subject to mandatory notification. However the case was cleared in a deliberation conducted by Plenary Session as it is concluded that the case does not substantially restrict competition.

4. Review of mergers that should have been notified but were not

4.1 *Sanctions imposed when notification obligation was violated*

18. When mergers exceeding the notification thresholds are unreported or reported late or falsely reported, administrative monetary fines are imposed according to the Article 69-2 of the same Act, and the KFTC has the power to conduct review on anti-competitiveness resulted from violations of notification obligations or a combination of enterprises.

19. The KFTC periodically checks disclosures listed in KIND of the Korea Exchange to detect mergers violating the notification obligation. In 2012, 22 out of 34 mergers imposed administrative monetary fines due to its violation of notification obligation were recognized through such ex-officio investigations and in 2013 2 out of 16 mergers subject to administrative monetary fines due to failing to notify were detected by ex-officio investigations.

4.2 *Enforcement prescription on execution of sanctions against mergers violating notification obligation*

20. The Article 49-4 of the MRFTA requires that the KFTC shall not impose remedies or surcharges on any conducts in violation of this Act if five years passed after the termination date of the conduct in violation of this Act. No measures can be imposed on unreported mergers if five years passed after the date of consummating the mergers.

⁵. A case in which DuzonBizon Co., Ltd, the largest business operator in the domestic tax accounting software market, acquired 72% of stocks of Kicom, the second largest company in the market. The merger does not exceed the notification thresholds (total assets of more than 200 billion won), but the Commission recognized the transaction through disclosure and press release of the companies concerned and concluded that the merger would reduce competition in the market, therefore with its official authority the KFTC requested for notification and received reports.

- **DuzonBizon Co., Ltd** total assets : 88.4 billion won / sales turnover : 112.4 billion won (as of 2009).
- **Kicom Co., Ltd** total assets : 11.4 billion won /sales turnover : 4.1 billion won (as of 2009).

4.3 *Measures which can be imposed against consummated mergers violating notification obligations*

21. As for other mergers, measures to review and lessen concerns over anti-competitiveness can be applied to mergers violating notification obligation. According to the Article 16 of the MRFTA, applicable measures include disposal of shares, resignation of officers, transfers of business, and restrictions on operation methods. In addition, when a company is established or a merger finished registration, the Commission can file a suit for annulment of the merger or the establishment.

22. Up to now, the KFTC has not imposed any remedies on mergers violating the notification obligation and having anti-competitiveness.

5. *Subsequent review of previously consummated mergers*

23. There is no explicit legal ground that empowers the KFTC to re-review a merger which has been approved by the Commission after concluding that the merger does not reduce competition. Therefore, without getting re-notification from companies concerned, it is impossible to go on with administrative works of reversing approval of the merger and re-reviewing the transaction thus infringing benefits.