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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Korea --

14-15 June 2016

This document reproduces a written contribution from Korea submitted for Item 5 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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KOREA*

1. Notification of business combination that includes a foreign company: Overview

1. A competition authority each has its own jurisdiction, and reviews anti-competitiveness of a business combination that happens in its own country. The Korea Fair Trade Commission (herein after referred to as the KFTC) defines business combination as an acquisition of stocks, a merger with another company, a concurrent holding of an executive's position in another company, an acquisition by transfer, and establishment of a joint venture pursuant to the Article 7 of the *Monopoly Regulation and Fair Trade Act* (herein after referred to as the Act). The KFTC reviews the anti-competitiveness resulting from such actions. However, since it is ineffective to examine all business combinations, the KFTC selects and notifies business combinations that are highly likely to affect the market. In case of Korea, the companies that are conducting business combination notify business combination based on the size of the companies. It is obligatory to report business combination when the total turnover or total asset of the "company subject to notify business combination" exceeds 200 billion won, and the counterpart company's total turnover or total asset exceeds 20 billion won (size requirement). A certain amount of fine shall be imposed when the "companies subject to notify business combination" do not notify.

2. Even when a business combination that occurs abroad such as business combination between multinational companies affects the domestic market, then the KFTC shall review such a business combination. Pursuant to the Fair Trade Act Article 2-2, the relevant act shall be applicable based on the extraterritorial jurisdiction even to the conduct that occurs abroad if it affects the domestic market.

3. Factors that should be taken into consideration when setting the criteria for notification of business combination that includes a foreign firm are whether the criteria for notification is clear and business combination that affects the domestic market can be properly detected. Turnover, total assets, market share in the domestic market and the total value of a business combination can be considered for the notification criteria of business combination that includes a foreign company.

2. Notification criteria of business combination that includes a foreign company

4. General provisions regarding the notification criteria of business combination are stipulated in the Act Article 12, and more detailed criteria is provided in the Enforcement Decree of the Act Article 18.

5. The Enforcement Decree of the Act Article 18 (3) divides business combinations that include a foreign company into two types; a business combination between a foreign company with another foreign company, and a business combination between a domestic company with a foreign company. As for the business combination that includes a foreign company, the notification becomes obligatory when a foreign company's turnover in the domestic market exceeds 20 billion won as well as when the size of the company exceeds the requirement mentioned above. (turnover in the domestic market requirement). Unlike the acquisition of stocks, merger with another company and the acquisition by transfer, in case of the establishment of a joint-venture, the turnover in the domestic market is considered only when the newly established company is a foreign firm. When the joint venture is a domestic company, the domestic turnover is not applied since it undoubtedly affects the domestic market.

* Drafted by Deputy Director Hyunkyu Park of M&A Division.

6. There are various indices to see the impact on the domestic market, and the turnover in the domestic market is the most appropriate index to see the impact. Since a foreign company can influence the domestic market without possessing domestic assets, the total asset in the domestic market is not an appropriate index. Also, the market share in the domestic market becomes certain when the market share is calculated after delimiting the relevant market, it is not a suitable element for notification.

7. The turnover in the domestic market requirement regarding the business combination that includes foreign companies has been added to the Fair Trade Act Enforcement Decree since 2007. Before then, only the size of the “companies subject to notify business combination” was considered, and the KFTC reviewed business combinations following the voluntary notification of the foreign companies. It is just that there is a possibility for the KFTC of not conducting the merger review in a timely manner when carrying out a merger review based on voluntary notification, and uncertainty for “companies subject to notify business combination”. Therefore, the KFTC has newly added this requirement since 2005 OECD Recommendation was created.

3. Review trend of business combinations that include foreign companies

8. Over the past several years, the number of business combinations that the KFTC reviewed is as shown in the box below. The total number of business combination cases that are notified to the KFTC is about 550~650 annually. Among them, the share of business combinations that include foreign companies is around 15%~20%.

Review trend of business combinations that include foreign companies (Unit: Case, %)

Year	Size requirement				Size+turnover in the domestic market requirement				Total
	Korean-Korean		Foreign-Korean		Korean-Foreign		Foreign-Foreign		
	No. of cases	Share	No. of cases	Share	No. of cases	Share	No. of cases	Share	
'11	407	75.0	36	6.6	24	4.4	76	14.0	543
'12	514	79.0	28	4.3	29	4.5	80	12.3	651
'13	434	74.2	41	7.0	17	2.9	93	15.9	585
'14	443	77.6	44	7.7	8	1.4	76	13.3	571
'15	520	77.7	32	4.8	14	2.1	103	15.4	669

9. The major business combination cases that the KFTC reviewed in 2015 that include a foreign company are AMAT-TEL business combination case and NXP-Freescale business combination case.

10. AMAT-TEL business combination case was a business combination between the two semiconductor equipment manufacturers. Since AMAT and TEL were all foreign companies, the turnover in the domestic market was considered when determining whether the notification is obligatory. As of 2012, the turnover in the domestic market of AMAT was approximately 2.2 trillion won, and 800 billion won for TEL, both of which were more than 20 billion won. Therefore, such a business combination was notified to the KFTC. The KFTC delimited the relevant product market by equipment that the “companies subject to notify business combination” were competing for, and the relevant geographic market was delimited to the global market. The KFTC submitted an examination report that says this business combination case has a possibility of being anti-competitive in the relevant market, and AMAT withdrew the business combination.

11. NXP-Freescale business combination case was a business combination between semiconductor chip manufacturers. Since NXP and Freescale were all foreign companies, the turnover in the domestic market was considered when determining whether the notification is obligatory. As of 2014, the turnover in the domestic market of NXP was approximately 590 billion won, and 270 billion won for Freescale, both of which were more than 20 billion won. Therefore, this business combination case was notified to the KFTC. The KFTC decided that this business combination may be anti-competitive in the global RF power transistor market, imposing a divestiture obligation on the relevant assets.