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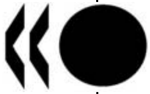

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Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Korea

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Korea --

1. Overview of merger control regime

1. The Monopoly Regulation and Fair Trade Act (MRFTA), Korea's competition law, provides in Article 7 (1) that anyone shall not conduct a merger that substantially lessen competition in a particular business area. Also, Article 12 of the MRFTA stipulates that a merger transaction where turnover or total asset of merging firms falls under certain criteria should be notified to the Korea Fair Trade Commission. In the case where a company that is required to make notification does not notify, fails to notify within the designated time or makes a false notification, it shall face administrative fines under Article 69-2 of the MRFTA. And there is no need to pay notification fee when making notification.

2. When one of the merging firms has total asset or turnover of KRW 200 billion (about $200 million) or more and the other company's total asset or turnover is KRW 20 billion (about $20 million) or more, the acquiring company is required to notify the KFTC of the transaction. When both of the merging firms are based in foreign countries, notification on the transaction is required to be made only when each company's turnover in the Korean market is KRW 20 billion ($ 20 million) or more.

3. Merger notification can be made either before or after a merger deal depending on the size of merging companies. If one of the merging firms is classified into a large company, i.e. a company having total asset or turnover of KRW 2 trillion (about $2 billion), the merging parties are subject to pre-merger notification and shall not complete the deal before the KFTC's review is finished. When neither of the merging firms is a large company, the merger can be notified after the transaction is completed.

2. Cooperation with other competition authorities

4. The KFTC signed MOU (Memorandum of Understanding) for cooperation in competition law enforcement with other competition authorities like Australian Competition and Consumer Commission (2002), Mexico's Federal Competition Commission (2004) and Canadian Competition Bureau (2006). Recently, the Korean government signed an agreement with the European Community concerning cooperation on anticompetitive activities (2009).

5. However, there have not been many cases so far where the KFTC sought cooperation based on those bilateral agreements in the review process of a cross-border merger. But it has actively notified other competition authorities on its merger enforcement based on the agreements. The cooperation agreements commit the signatories to give notice to each other when they prolong a review period or produce an Examination Report on a merger that is relevant to their counterparts' jurisdiction. Accordingly, when a foreign company is under a merger review by the KFTC or a Korean company's merger goes through a review by a foreign authority, and the transaction raises anticompetitive concerns, the authority reviewing the transaction informs the other on the fact. Such cooperation based on the bilateral agreements was shown when the KFTC handled a merger between Rio Tinto and BHP Billiton which intended to establish joint venture for co-production of iron ore in the Western Australia. The KFTC gave notice to competition

authorities of Australia and EU immediately after delivering the merging firms an Examination Report[1] which concluded that the proposed deal would cause anticompetitive effect.

6. Competition agencies give notice on their merger enforcement even where there is no bilateral agreement in place. Particularly, OECD member countries have been actively giving such enforcement notice following the 1995 OECD recommendation[2]. Competition authorities of the U.S. and EU inform other OECD member countries in many cases when their law enforcement including merger review targets companies within the jurisdiction of those countries. In line with this, the KFTC also has received notice from them. For example, when the EU DG Comp announced its initiation of in-depth review on acquisition of Aker Yards by STX, a Korean shipbuilding company in December 2007, the KFTC received notification by the EU DG Comp at the same time.

7. When it comes to a merger case which is under concurrent review by several competition authorities, the KFTC has rarely engaged in substantial cooperation with its foreign counterparts in the manner of, for example, exchanging opinions on potential anticompetitive effect of the deal. Exceptionally for the Rio Tinto-BHP Billiton joint venture, however, it actively shared information and opinions throughout the review process through e-mails and face-to-face meetings with other competition authorities including the Japan Fair Trade Commission (JFTC) and the EU DG Comp.

8. The KFTC actively participates in discussion on merger regulations of international organizations like OECD and ICN with strong commitment to following best practices or recommendations developed as a result of the discussion. For instance, the KFTC introduced local nexus thresholds in 2003 based on the ICN Recommended Practices for Merger Notification Procedures[3], under which a merger between foreign companies was required to be notified when each company's turnover in the Korean market was KRW 3 billion ($3 million) or more. The threshold was revised upward to KRW 20 billion ($20 million) or more to satisfy materiality requirement imposed by the ICN Recommended Practices. In 2009, it once again tried to harmonize its merger control regime with the ICN recommended practices by abolishing pre-merger notification time limit[4]. As a result, pre-merger notification, which had to be made within 30 days after the date of contract, can now be made at any time before the deal is completed.

3. Experience of reviewing cross-border mergers

9. Since 2004, the KFTC has been reviewing at least 50 mergers between foreign companies every year. In several cases, the KFTC imposed administrative fines on foreign companies for failing to meet the notification requirements. However there have been just a few cases where it has imposed remedies for cross-border mergers on the grounds of potential anticompetitive effect. Here are two merger transactions of foreign companies on which the KFTC practically imposed remedies.

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1 According to the Regulation on Operation of KFTC Meetings and Case-handling Procedures, an Examiner produces an Examination Report based on results of an investigation into a case. Once the Examination Report is submitted to the Committee, the commissioners make a final decision through deliberation.

2 Recommendation of the Council of the OECD Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, as revised July 1995

3 Section I-B of the ICN Recommended Practices for Merger Notification Procedures states that "merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification."

4 ICN Recommended Practices for Merger Notification Procedures Section III-B states that "jurisdictions should not impose deadlines for pre-merger notification."

10. In 2007, the KFTC conducted a review on Owens Corning's acquisition of Saint-Gobain Vetrotex glass fiber reinforcements business (the U.S and French companies, respectively) and ordered the target company to divest its Korean production facilities of glass fiber reinforcements[5]. As in this case, where production facility operates within the jurisdiction of a competition agency and the relevant geographic market is clearly defined to include the domestic market, there is little need to cooperate or coordinate review results with other competition authorities in the course of the review process. As both of the merging parties had production facilities in the Korean market, the KFTC was able to receive necessary documents or secure compliance with the imposed remedies without any particular difficulties.

11. But the BHP Billiton-Rio Tinto merger case reviewed by the KFTC in 2010 was different. The two companies entered in to an agreement to set up a joint venture to combine their Western Australian iron ore operations. The problem here was that neither of the merging firms had a sales branch or assets in Korea. In this situation, even if the KFTC decides that the concerned transaction would cause anticompetitive effect, it would not be easy to draw up effective remedies or ensure implementation of the imposed remedies. To resolve this problem, the KFTC engaged in close coordination with competition authorities in other jurisdictions like Japan and EU which shared similar interests. The KFTC actively exchanged opinions with them through e-mails and, when necessary, face-to-face meetings. During the process, the KFTC realized that other competition officials had similar views on the proposed transaction. Based on the strong cooperation with its counterparts, the KFTC produced an Examination Report which concluded that the proposed joint venture would significantly lessen competition in the global market for seaborne iron ore, and served it to the merging parties on October 1, 2010[6]. The merger review was closed as the two companies decided to terminate their joint venture agreement on October 18 based on the consideration that the transaction would not get approvals from competition authorities around the world including the KFTC.

12. When reviewing an M&A of foreign companies which have no sales office in the domestic market, obtaining documents from merging firms or collecting opinions of interested parties is often found to be difficult. In the review on the BHP Billiton-Rio Tinto merger, the KFTC experienced such difficulties in several occasions, but the review proceeded without serious disruption as a whole, since the companies hired a Korean law firm as their legal representative and offered full cooperation by submitting necessary documents throughout the process. The KFTC requested other iron ore suppliers and buyers to present opinions on the proposed joint venture, considering that the deal would have far-reaching impact on the global market. As the request was based entirely on voluntary cooperation of those companies, collecting their opinions was not an easy task. Many of the companies responded to the request and sent opinions, but, for some, it took a very long time to present opinions, and some did not even respond at all.

4. Challenges for developing and emerging economies

13. The KFTC has 30-year-history of M&A enforcement, but it was not until the late 1990s that it started to control anticompetitive M&As actively. In particular, it has been just a few years since it conducted review on M&As of foreign companies in earnest which affect the domestic market. The KFTC will strengthen enforcement capacity for cross-border M&As which have impact on domestic market, and ensure effectiveness of law enforcement by increasing the number of staffs with enhanced M&A enforcement skills and expanding cooperation with foreign competition agencies down the road.

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5 However, in 2008, as the merging firm failed to divest the production facility, the KFTC imposed behavioral remedies instead.

6 The JFTC expressed concerns on potential anticompetitive effect and requested the merging companies to submit plans to address potential anti-competitiveness at a similar time to the KFTC. And after the mid October, it was known through media coverage that the EC DG Comp was preparing a Statement of Objection for the transaction.

14. Review of global M&A cases requires more resources than domestic cases. The KFTC has yet to secure abundant M&A enforcement experience and human resources specialized in international M&A cases. It is believed that most developing countries and young authorities are currently experiencing or will encounter such problems down the road. It is highly likely, therefore, that these countries cannot adequately control international M&As that adversely affect the domestic markets. As for now, only a few large jurisdictions like U.S. or EU have full control over large scale international M&As. However, because such large competition authorities tend to impose remedies focused on anticompetitive effect on their own domestic markets, adverse impact developing countries might suffer is not adequately controlled.

15. Nevertheless, each authority's separate effort to strengthen its own cross-border merger control cannot be a good solution. Such way is also unrealistic in that it takes a very long time for all the young authorities to individually enhance their capacity to the level required for international M&A enforcement. If all the competition authorities try to control international M&As, it could create a problem of excessive enforcement. In this sense, a better solution would be encouraging competition authorities of developing economies to actively participate in international organizations including the GFC and the ICN so that they can improve their enforcement capacity based on technical support provided by advanced authorities.