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Cross-border Mergers – Contribution from Korea

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Cross-border Mergers

- Contribution from Korea –

1. Introduction

1. Cross-border mergers and acquisitions involve multiple competition authorities across at least two jurisdictions, as these transactions are likely to impact markets in multiple countries. In the modern economy, businesses and their competition are no longer confined to national borders, and the number of mergers and acquisitions, along with their impact on multiple countries, is gradually increasing.

2. The Korea Fair Trade Commission (hereinafter the “KFTC”) is reviewing an increasing number of cross-border mergers. Over the past three years from 2021 to 2023, the number of cross-border mergers notified to the KFTC increased by 15%, rising from 180 to 207, while the total transaction value grew by 28% from KRW 297.7 trillion to KRW 382.3 trillion.

Table 1.1. Cross-border mergers filed with the KFTC between 2021-2023

	2021	2022	2023
The number of cases	180	162	207
Total transaction value	KRW 297.7 trillion	KRW 268 trillion	KRW 382.3 trillion

3. It is notable that reviewing cross-border mergers presents a challenging task, as they often involve substantial transaction values and impact multiple jurisdictions. Moreover, an increasing number of these mergers are file with the KFTC, as shown in the table above, making its review process more burdensome. To respond to these growing challenges, the KFTC launched the International Merger Review Division in December 2022, specializing in cross-border merger assessments.

4. This paper discusses how cross-border mergers are notified to and reviewed by the KFTC, highlighting high-profile merger cases the agency handled. A brief explanation of the “Remedy Proposal System,” recently introduced to improve alignment with overseas competition authorities, will follow.

2. Cross-border Merger Notification and Review Process in Korea

2.1. The Notification of Cross-border Mergers

5. In Korea’s merger review process, the thresholds that trigger the notification obligation consist of ▲size-based threshold and ▲transaction value-based threshold. According to the size-based threshold, a notification is mandatory when the annual revenues or total assets¹ of one party and the other party are at least KRW 300 billion and

¹ The annual revenues or total assets of a concerned party are determined by aggregating all revenues or total assets generated by its affiliated entities.

KRW 30 billion, respectively, in the preceding year of the notification. In terms of cross-border mergers, another requirement for notification is that the merger is likely to impact the competition in the domestic market—i.e., the transaction could establish a *local effect*.

6. Cross-border mergers can be classified into four types: (i) mergers between foreign firms, (ii) mergers where domestic firms acquire foreign firms, (iii) mergers where foreign firms acquire domestic firms and (iv) mergers between domestic firms that impact foreign markets, thus subject to review by foreign competition authorities.

7. In the case of (i) and (ii), if a foreign firm involved has an insignificant influence in the domestic market, the merger is unlikely to significantly affect the domestic market, and thus, the notification obligation does not need to be imposed. In this regard, the Monopoly Regulation and Fair Trade Act (hereinafter the “MRFTA”) states that mergers classified as cases (i) and (ii) are considered to impact the domestic market when the foreign firm generates at least KRW 30 billion in revenues within the market.

8. In other words, for mergers classified under (i) or (ii), the notification obligation arises when the foreign firm records annual revenues of at least KRW 30 billion in the preceding year of the notification, in addition to meeting the size-based thresholds of the merging parties’ revenues or total assets at KRW 300 billion and KRW 30 billion, respectively.

9. On the other hand, type (iii) mergers naturally impact the domestic market, as a foreign firm enters the domestic market, as is the case with type (iv) mergers. These types (iii) and (iv) mergers, therefore, meet the notification requirements when the merging parties have size of KRW 300 billion and KRW 30 billion, respectively, without additional criteria such as domestic revenue.

10. Next, under the value-based threshold, mergers are subject to merger notification when the transaction value—such as the value of acquired stocks—is KRW 600 billion or higher, and the acquired party has actively engaged in business operations and research and development within the domestic market. Specifically, the acquired party’s business activity is deemed vigorous if, during the period of the three years preceding the premerger notification date, the firm has: ▲ provided goods and services to 1 million customers or more within a one-month timeframe; or ▲ invested KRW 30 billion or more in research and development within a one-year timeframe, while maintaining research facilities or human resource in the Korean territory.

11. Cross-border mergers do not require additional conditions beyond the aforementioned value-based threshold for merger notification. The value-based threshold assumes that the acquired party’s business operations are significantly active in the domestic market, thereby implying the acquisition will impact the domestic market.

12. The notification thresholds differ between domestic and cross-border mergers; however, the timing of notification remains the same. The MRFTA states that merging parties are required to file a premerger notification to the KFTC before the deal is executed, if ▲ a party’s revenues or total assets are at least KRW 2 trillion; or if the merger meets the transaction value-based threshold triggering the notification obligation. Mergers not subject to such premerger notification obligation are supposed to submit a postmerger notification within 30 days of the deal’s closing. This timing identically applies to domestic and cross-border mergers. Parties involved in cross-border mergers typically have a considerable size—with at least KRW 2 trillion revenues—and are subject to premerger notification in most cases.

2.2. The Review Process of Cross-border Mergers: International Cooperation

13. The review process for cross-border mergers by the KFTC is identical to that for domestic ones. The basic framework encompassing consecutive stages—market definition, assessment of potential anticompetitive effects, and imposition of remedies—also applies to cross-border merger reviews.

14. As cross-border mergers are reviewed by multiple competition authorities simultaneously or consecutively, close coordination between these authorities is commonly observed. Individual competition authorities typically conduct their reviews independently; thus, cooperation among them does not necessarily entail direct alignment of their conclusions. Generally, this cooperation includes sharing information they obtained, progress updates on their assessments, market definitions, assessments of identified competition concerns, and remedies considered. Conference calls are frequently used as a tool for information sharing. Director-level staff usually participates in the calls, while director general- or higher-level staff may attend meetings depending on the importance of the merger in question. The exchange of information is based on cooperation agreements between governments or competition authorities. As of October 2024, there are 22 agreements between Korea and 22 different countries, as well as 13 agreements between the KFTC and 13 foreign competition agencies, with international cooperation officially included in these arrangements.

15. Competition authorities' information sharing is necessary for two main reasons. First, it helps prevent discrepancies in merger review conclusions across jurisdictions. As each country's market conditions differ from country to country, the authorities' conclusions are likely to vary, reflecting the independence of each competition authority. However, significant discrepancies and incompatible remedies across authorities may undermine the legitimacy of their review assessments, also posing challenges to merging parties in the merger process. By facilitating information exchange, authorities can align their conclusions to some degree, thereby avoiding these discrepancies.

16. Second, information sharing contributes to the greater effectiveness and efficiency of the review process. It provides valuable reference points for authorities to understand the theories of harm and remedies considered by their overseas counterparts. The more reference points authorities have, the more effective and faster process their assessment process can be. The KFTC has leveraged the findings of its foreign counterparts in its review process, as discussed below.

17. A noteworthy element in information sharing is the practical difficulty that can arise from exchanging confidential information submitted by merging parties. Article 117 of the MRFTA specifies that public officials of the competition authority shall not disclose business entities' confidential information obtained during the enforcement process. Under this law, the KFTC is prohibited from sharing the information submitted by merging parties with foreign counterparts, which creates an obstacle to international cooperation. To address this problem, the KFTC encourages merging parties to submit a waiver of confidentiality at the initial stage of the review process, allowing their information to be shared with other competition authorities. The submission of a confidentiality waiver is a standardized procedure commonly adopted in cross-border merger review process of most competition authorities.

18. To guide officials engaged in merger reviews on international cooperation methods, the KFTC published the "International Merger Review Cooperation Manual" in 2011. The manual elaborates on how the KFTC cooperate with foreign counterparts in detail—such

as the importance of international cooperation, practical tasks involved, and the concept and submission process of a confidentiality waiver. The KFTC has since collaborated with foreign competition authorities following the guidelines in this manual.

3. Cross-border Merger Review Cases in Korea

3.1. Korean Air-Asiana Merger Review

19. A landmark merger case reported to and assessed by the KFTC—according to the process explained in Section 2 (Cross-border Merger Notification and Review Process in Korea)—is the acquisition of Asiana by Korean Air. Although both parties are domestic firms, the merger is regarded as a typical cross-border merger due to its impact on the jurisdictions where the two airlines fly. A total of fifteen jurisdictions reviewed this merger.

20. The merger was notified to the KFTC in January 2021, indicating that Korean Air would acquire approximately 64% of Asiana’s stocks. In May 2022, the KFTC imposed remedies, determining that the transaction could raise multiple competition concerns, including potential increase in airfares. Specifically, issues were identified on 40 air routes—26 out of 87 routes operated internationally, and 14 out of 40 routes operated solely domestically. To address them, the KFTC imposed the structural remedies requiring the parties to transfer its slots and traffic rights to potential market entrants in order to reduce their combined market share to 50% or below. To supplement the structural remedies, the behavioral remedies were also applied, such as prohibiting airfare increases on the affected routes before the structural ones are fully implemented.

21. During the review process, the KFTC held conference calls with eight overseas counterparts including the authorities in the US and UK, to share their assessment status and applicable theories of harm. This exchange of information helped the KFTC conduct the merger review effectively.

22. The Korean Air-Asiana case marked the first review of merger between full service carriers (FSCs) by the KFTC, which has not previously handled similar cases. Against this backdrop, information sharing provided valuable opportunities for the KFTC to gain insights from the US and EU authorities in reviewing FSC-FSC mergers. For example, analyzing the possible anticompetitive effect in passenger air transport, the KFTC defined relevant markets by origin-destination pairs, a method the KFTC referred to from these foreign competition authorities.

23. Information sharing was also instrumental in designing remedies. As of 2021, while the review was in progress, the KFTC’s approach was to design remedies on its own rather than requiring merging parties to propose solutions to resolve competition concerns.² This approach, however, works effectively only when a competition authority has sufficient knowledge to formulate appropriate remedies. Through conference calls, the KFTC was able to learn foreign counterparts’ experiences and opinions regarding ▲remedies applied in FSC-FSC mergers in their jurisdictions and ex-post evaluations, and ▲the remedies proposed by Korean Air and Asiana. The information played a crucial role in the KFTC’s formulation of remedies.

24. Among the jurisdictions that assessed the deal as potentially anticompetitive, the KFTC was the first to complete its merger review and imposed remedies. This raises the

² As discussed below, the KFTC revised the MRFTA, and as of October 2024, the “Remedy Proposal System” is in place, under which merger parties can propose remedies.

possibility that its remedies may come in conflict with remedies that will be imposed by other authorities. To avoid this issue, the KFTC has explicitly stated in its written resolution that its remedies can be adjusted for the alignment with those from other jurisdictions. Currently, it is expected that the ongoing merger reviews in other jurisdictions will reach conclusions by November 2024. The KFTC will closely analyze what remedies are imposed by other countries and determine whether adjustments to its own remedies are necessary.

3.2. Microsoft-Activision Blizzard Merger Review

25. Another high-profile case is Microsoft's (MS) acquisition of Activision Blizzard (AB), which involves obtaining 100% of AB's shares. Though the merger involves two US firms, it was reported to the KFTC in April 2022 because they both generate over KRW 30 billion in revenue in the domestic market. The transaction was notified to authorities across various jurisdictions, including the US, EU, UK and Japan as well as Korea.

26. The KFTC particularly focused on the risk of downstream foreclosure in the ▲domestic console³ and ▲cloud gaming⁴ markets, as MS's competitors in the downstream markets might be denied access to AB's games. However, it concluded the risk was not considerable and granted clearance in May 2023. Collaboration with other jurisdictions was undoubtedly instrumental in the decision making process.

27. Reviewing the case, the KFTC considered markets defined and competition problems identified by overseas counterparts through several conference calls. For example, with regard to market definition, most jurisdictions, except the EU, defined the geographic scope of the game distribution market within their respective countries. Since game services are typically released in specific regions and are not accessible in every country, the KFTC took the same approach by defining the relevant market as the domestic gaming market, aligning with the practices of other jurisdictions. During the process, the KFTC comprehensively examined how foreign counterparts defined their relevant markets and what factors were considered in their assessments.

28. The MS-AB deal highlights how cross-border merger review conclusions may vary across competition authorities, depending on their market conditions. As of May 2023, when the KFTC completed its review, the authorities in the US, EU and UK concluded that the merger would restrict competition. In these regions, particularly in the US and UK,

29. In these regions—particularly in the US and UK—*Call of Duty*, one of the AB's flagship titles, was highly popular, and MS's gaming console, Xbox, had a significant presence. Consequently, these authorities determined the merger between key game supplier and a leading console maker posed a threat to competition.

30. On the other hand, the KFTC came to a different conclusion. In the Korean market, *Call of Duty* was not in high demand, and AB's market share was below 5%. Similarly, MS had limited presence in the domestic console market, which was dominated by Sony's PlayStation. For these reasons, the assessment outcomes varied between Korea and the US, UK and EU. Notably, Japan reached the same conclusion as the KFTC, as its market conditions and consumer preferences are similar to those of Korea.

³ A console is a mechanical device used to play video games—e.g., X-Box from Microsoft and PlayStation from Sony.

⁴ Cloud gaming services allow users to play games via a cloud service, without installing them on physical devices such as PCs, smartphones and consoles. Major cloud gaming service providers include MS, Sony and Nvidia.

4. The Introduction of the “Remedy Proposal System”

31. As discussed above, the KFTC has closely coordinated with other competition authorities in reviewing cross-border mergers, striving to maintain consistency in its review outcomes with overseas jurisdictions. On August 7, 2024, the “Remedy Proposal System” took effect under the amended MRFTA, reflecting the KFTC’s continuous efforts.

32. Previously, the KFTC designed remedies on its own to address competition concerns arising from mergers. By contrast, in most countries, remedies are typically proposed by merging parties to authorities, who then impose those remedies on them. The inconsistency in systems across jurisdictions not only cause confusion for merging parties but also has been identified as a source of incompatible remedies between jurisdictions⁵.

33. The KFTC introduced the “Remedy Proposal System” to address these issues, under which remedies will now be imposed following these procedures: (i) the KFTC informs the merging parties of potential competition concerns; (ii) the merging parties propose remedies to resolve the concerns identified; (iii) the KFTC evaluates the submitted remedies and requests adjustments as necessary; and (iv) the KFTC imposes remedies based on the submitted (and adjusted) proposals from the merging parties.

34. Building on these efforts, the KFTC will continue sharing its conclusions with international competition authorities, conducting its review process under the new system. Going forward, the KFTC will remain committed to fostering international cooperation throughout the merger review process.

⁵ Incompatible remedies have not occurred in practice.