

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Korea****27 November 2018**

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More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Abstract

The Korea Fair Trade Commission (hereinafter referred to as the “KFTC”) imposes administrative fines in both cases where merging parties fail to fulfill the obligation to notify their transactions and where merging parties violate the obligation not to consummate a proposed M&A until clearance has been granted. Between 2016 and 2018, the KFTC imposed administrative fines on 65 cases for violating the obligation to notify, and on 1 case for violating the obligation not to consummate a deal during the waiting period. The KFTC always makes its efforts to actively monitor non-notified transactions where notification is mandatory through the annual general inspection.

1. Overview of Korea’s M&A notification thresholds

1. In order for the KFTC to effectively enforce M&A regulations, the Korea’s Monopoly Regulation and Fair Trade Act (hereinafter referred to as the “MRFTA”) stipulates that merger transactions meeting the filing thresholds shall be notified. When a company¹ with total assets or turnover of 300 billion KRW or more², or a specially related natural or legal person of such a company acquires shares of; holds the position of interlocking directorates of; acquires assets of; or merges with a company³ with total assets or turnover of 30 billion KRW or more; or establishes a new company with other companies including a company with total assets or turnover of 30 billion KRW or more, the company or person shall notify thereon to the KFTC.

2. The MRFTA stipulates that in principle, a combination of businesses is subject to ex-post notification which shall be notified within 30 days after the consummation of the concerned transactions. However, if the combination of businesses in the form of share acquisitions, mergers, asset acquisitions, or joint venture establishments involves a company with total assets or turnover of 2 trillion KRW or more⁴, such transactions are subject to ex-ante notification. If companies or business associations fail to fulfil such obligations, they shall be punished by an administrative fine not exceeding 100 million KRW; when executives, employees or other related parties violate such obligations, they shall be punished by an administrative fine not exceeding 10 million KRW.

3. Upon receipt of notification, the KFTC shall review the case within 30 days from the filing date of the notification, and give notice of the results thereof to merging parties. The KFTC may extend the review period by up to 90 days beginning on the date following the expiration of such 30-day period, where deemed necessary. If business entities consummate their transactions subject to ex-ante notification during the review period,

¹ A notifying company.

² In the case of interlocking directorates, only a company with total assets or turnover of 2 trillion KRW or more is subject to notification.

³ A target company.

⁴ A large business entity.

companies or business associations shall be punished by an administrative fine not exceeding 100 million KRW and executives, employees or other interested parties shall be punished by an administrative fine not exceeding 10 million KRW.

4. The KFTC's procedure to compute and impose administrative fines against a failure to notify and pre-closing conduct in violation of standstill obligations, recent cases where administrative fines were imposed, and the results of the KFTC's general inspection will be described below.

2. Imposition of administrative fines against the violation of the notification and standstill obligations

2.1. Computation of administrative fines

5. Administrative fines are computed in the following four steps. First, a base amount of administrative fines shall be determined. For the computation of a base amount, merging parties' total assets or turnover, whichever is larger, shall be used as follows.

Table 1. Base amount of fines: In the case of violation of ex-ante notification obligation or standstill obligation

Category		Total assets or turnover of the target company (whichever is larger)		
		Less than 200 billion KRW	Greater than or equal to 200 billion KRW or less than 2 trillion KRW	Greater than or equal to 2 trillion KRW
Total assets or turnover of the notifying company (whichever is larger)	Less than 200 billion KRW	15 million KRW	20 million KRW	30 million KRW
	Greater than or equal to 200 billion KRW or less than 2 trillion KRW	20 million KRW	24 million KRW	36 million KRW
	Greater than or equal to 2 trillion KRW	30 million KRW	36 million KRW	40 million KRW

Table 2. Base amount of fines: In the case of violation of ex-post notification obligation

Category		Total assets or turnover of the target company (whichever is larger)		
		Less than 200 billion KRW	Greater than or equal to 200 billion KRW or less than 2 trillion KRW	Greater than or equal to 2 trillion KRW
Total assets or turnover of the notifying company (whichever is larger)	Less than 200 billion KRW	4 million KRW	4.8 million KRW	8 million KRW
	Greater than or equal to 200 billion KRW or less than 2 trillion KRW	4.8 million KRW	6 million KRW	10 million KRW
	Greater than or equal to 2 trillion KRW	8 million KRW	10 million KRW	12 million KRW

6. Second, using the base amount, a standard amount shall be computed as follows. Where a merger notification is filed after passing the notification deadline, an amount equivalent to 0.5% of a base amount per day shall be added to the base amount from the day following the date on which the deadline date passes. Where violation of M&A notification obligation occurred on at least one occasion during the past five years, an

amount equivalent to 20% of a base amount per each case of violation shall be added to the base amount.

7. Third, a discretionarily adjusted amount shall be computed by multiplying a standard amount by a rate which is obtained by deducting the aggregate of each reduction rate from the aggregate of each increase rate. Increase rates for adjustment are 1) where a violation is committed to avoid the application of restrictive provisions of the MRFTA or any other Acts: a rate not exceeding 30%; 2) where the KFTC becomes aware of the fact of the relevant company's violation of the notification obligation through means other than the delayed notification of the relevant company: a rate not exceeding 20%; 3) where a relevant M&A is judged as illegal as the result of examination of anti-competitive effects: a rate not exceeding 30%; 4) other grounds equivalent to those prescribed in 1) through 3) above: a rate not exceeding 10%. Reduction rates for adjustment are 1) where a relevant M&A is subject to the simplified notification: a rate not exceeding 20%; 2) where the obligation to notify occurs due to the increase of stockholding ratio caused by capital reduction or stock retirement, or other causes: a rate not exceeding 20%; 3) where notifying company does not belong to the business group⁵ subject to limitations on cross shareholding and its total assets are less than 20 billion KRW: 30%; greater than or equal to 20 billion KRW, or less than 60 billion KRW: 20%; greater than or equal to 60 billion KRW, or less than 100 billion KRW: 10% 4) where a violating enterprise has no past experience of M&A notification: a rate not exceeding 20%, provided that where a specially related natural or legal person to the violating enterprise has experience in M&A notification, the rate shall not exceed 10%; 5) where at least two natural or legal persons violate the obligation to notify in the same merger and the violators are mutually related to each other: a rate not exceeding 30%; 6) other grounds equivalent to those prescribed in 1) through 5) above: a rate not exceeding 10%.

$$\text{Discretionarily adjusted amount} = (\text{aggregate of each increase rate} - \text{aggregate of each reduction rate}) \times \text{standard amount}$$

8. Fourth, a final administrative fine to be imposed shall be determined by aggregating a standard amount at the second step and a discretionarily adjusted amount at the third step. However, if such amount determined is deemed excessive taking into account the violating entrepreneur's actual ability to pay, nature and circumstances of the violation, etc., the KFTC may decrease the amount of the administrative fine by up to 50% of the original amount.

$$\text{Final administrative fine} = \text{standard amount} + \text{discretionarily adjusted amount} - \alpha^6$$

2.2. Recent imposition of administrative fines

9. The KFTC imposed administrative fines on a total of 66 cases between 2016 and 2018 that violated the notification and standstill obligations. Out of the 66 cases, 65 cases

⁵ If a business group's aggregate asset of all affiliated companies' total assets is greater than or equal to 10 trillion KRW, the business group is subject to limitations on cross shareholding.

⁶ Out of 66 cases, there were only 3 cases where the amounts of administrative fines decreased at the last step taking into account the violating party's actual ability to pay.

were related to the failure to notify, and only 1 case was related to the violation of the standstill obligation.

Table 3. Violation types (66 cases in total, between 2016 and 2018)

Violation of notification obligation	Violation of standstill obligation
65 cases	1 case

10. The KFTC imposed administrative fines on the 66 cases above in order to punish the violation of notification and standstill obligations. The fines were imposed on 19 cases in 2018⁷, 28 cases in 2017 and 19 cases in 2016 respectively.

Table 4. Administrative fines imposed (66 cases in total)

	2016	2017	2018 ⁸	Total
No. of violations	19 cases	28 cases	19 cases	66 cases
No. of cases notified	646 cases	668 cases	570 cases	1,884 cases
Ratio of violation ⁹	2.94%	4.19%	3.33%	3.50%
Amount of fines	385.6 million KRW	577 million KRW	219.38 million KRW	1.18198 billion KRW

2.3. Cases where administrative fines were imposed

2.3.1. Cases related to the violation of the notification obligation

11. The cases where administrative fines were imposed due to the violation of the notification obligation between 2016 and 2018 were mostly the result of simple mistakes, miscalculation of notifying dates, and negligence of duties, etc. By types of M&As, administrative fines were imposed on 19 cases of share acquisition, 13 cases of interlocking directorates, 14 cases of merger, 5 cases of asset acquisition, and 14 cases of establishment of joint venture; a total of 65 cases that violated the notification obligation.

2.3.2. A case related to the violation of the standstill obligation

12. Company A¹⁰ signed a contract to purchase 100% of shares of company B, and notified the transaction to the KFTC. However, company A consummated the deal prior to the regulatory clearance of the KFTC, thus was punished by an administrative fine of 26.4 million KRW. Company A insisted that after reading news article saying that the KFTC had completed the relevant M&A review, the company misunderstood that it was allowed to consummate the transaction prior to the notice of clearance from the KFTC. However, such grounds could not justify the company's violation of standstill obligation, thus 26.4 million KRW of fine was imposed.

⁷ As of Oct. 23, 2018

⁸ As of Oct. 23, 2018

⁹ Ratio of violation = number of violations / number of cases notified

¹⁰ Notifying company.

3. The KFTC's general inspection

3.1. Methods of the general inspection

13. In order to actively detect the violation of the M&A notification obligation, the KFTC conducts general inspection every year. Companies subject to the inspection are those¹¹ included in the business group¹² subject to disclosure. The inspection is conducted based on M&A related disclosures¹³ of the business group subject to disclosure on the disclosure system¹⁴ of Korea Exchange and the Financial Supervisory Service.

3.2. Results of the general inspection

14. The KFTC detected 1 case of violation in 2018, 3 cases in 2017 and 2 cases in 2016 through the general inspection. The cases detected through the general inspection were all related to the violation of the notification obligation. One of the 2 cases detected in 2016 in violation of notification obligation was related to share acquisition and the other was related to interlocking directorates; the cases detected in 2017 and 2018 in violation of notification obligation were all related to interlocking directorates.

Table 5. Results of recent general inspection

Category	2016	2017	2018
Cases detected	2 cases	3 cases	1 case
Administrative fines	46.64 million KRW	31.4 million KRW	12 million KRW

¹¹ There are 1,990 companies as of 2017.

¹² If a business group's aggregate of each company's total assets is greater than or equal to 5 trillion KRW, the business group is subject to disclosure.

¹³ There are 2,281 disclosures as of 2017.

¹⁴ Korea Exchange discloses matters related to listed companies and the Financial Supervisory Service discloses matters related to unlisted companies.