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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Korea --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- KOREA --

1. Introduction

1. The Korea Fair Trade Commission (hereinafter referred to as “KFTC”) examines an average number of 600 merger cases a year. Of them, around five cases are subject to remedies and some proposed transactions are blocked all together, on the ground of anti-competitiveness. For the mergers that can lead to competitive harm, it is essential to design remedies (i.e. selecting types of remedies, setting the appropriate time period and the scope for remedies). Given the significance of the process, the KFTC uses market tests and cooperates with other authorities worldwide to craft appropriate remedies for a merger.

2. This paper will delve into the relevant regulations and principles on which the KFTC bases its decisions, and merger cases either rejected or approved with remedies.

2. Relevant regulations

3. The KFTC has adopted and implemented guidelines on merger remedies (enacted by the Fair Trade Commission Established Rule. No. 2011-3, 22 June 2011, hereinafter referred to as "Guideline") in order to improve the predictability in the design and choice of remedies. The purpose of the Notification is to provide guidance on how to design the remedies that can effectively address competitive concerns but ensure the efficiency gains to the fullest extent. (Guideline I.)

4. Under the Notification, remedies are divided into two types: structural and behavioral. Structural remedies are corrective measures that force the merging parties to make modifications to their assets or ownership structure. On the other hand, behavioral remedies refer to measures designed to constrain the behavior of the merging parties such as business conditions, business practices, business scope and/or internal management.

2.1 Structural remedies

5. Structural remedies are classified as full prohibition, divestiture of assets, and Intellectual property (IP) remedies. (Guideline IV. 2.)

6. Structural remedies are designed to prevent a proposed transaction from being put into effect or undo the transaction if it is already completed. Full prohibition may be appropriate when prohibition is the only possible way to address the competitive concerns or divestiture is infeasible as the assets of the merging parties are inseparable.

7. Divestiture of assets means separating certain assets from the merging parties and selling them off to an independent third party. In case divestiture of certain assets alone is sufficient to eliminate competitive concerns, the KFTC should not choose prohibition but divestiture as a remedy, based on the general principle of proportionality.

8. IP-based remedies require the merging parties to sell off or license intellectual property rights to a third party, which is designed to regulate and constrain the possession or use of intellectual property rights. IP remedies are usually imposed when competitive concerns arise from a concentration of IP rights.

2.2 Behavioral remedies

9. Behavioral remedies involve enabling measures and controlling outcomes. (Guideline IV. 3.)

10. Enabling measures aim to improve a position of the parties' competitors or aims to stimulate competition in the market. These measures may limit the parties' ability to require their customers to enter into long term or exclusive contracts. If the merging parties control essential inputs required by other firms, then enabling measures may require the parties to ensure a stable supply of the inputs to competitors.

11. Some types of behavioral remedies are employed to control or restrict the outcomes of the parties' business activities. These types include price caps, supply commitments and service or quality controls.

3. Key considerations in selecting full prohibition

3.1 Possibility of eliminating competitive concerns in an effective way

12. In choosing an appropriate remedy for a particular merger, the KFTC, first and foremost, assesses whether the remedies can effectively resolve competitive concerns. When determining the effectiveness of the remedies, the following factors are taken into consideration; whether the remedy can eliminate all the likely concerns, whether the remedy is enforceable and enables monitoring of implementation, and whether the remedy is expected to act quickly in addressing the concerns.

13. In this context, the KFTC can simply reject the transaction in case most part of the target company's business is likely to raise competitive concerns. This is mainly because ordering divestiture of the assets where the concerns arise is equivalent to prohibition.

14. Even in the case where the transaction can raise competitive concerns only in some part of the parties' business, prohibitive measures can be imposed if the assets are turned out to be inseparable. If that is the case, it is almost impossible to identify the scope of assets that can possibly raise competitive concerns. Furthermore, due to the inseparability of the assets, divestiture of certain assets cannot guarantee a complete elimination of competitive concerns.

3.2 Merger-specific efficiencies

15. The potential efficiency gains from the merger are another important consideration in determining whether to block the transaction. In other words, the KFTC does not jump to a conclusion that the proposed deal should be blocked just because the transaction raises any competitive concerns. The KFTC tries to strike a balance between anti-competitiveness and efficiencies in determining whether to block the deal. Accordingly, the KFTC allows the parties to obtain their claimed efficiency gains by imposing appropriate remedies instead of prohibition, as long as it is clear that the proposed merger can yield considerable efficiencies.

4. Cases

16. The following cases are among the most prominent cases in the recent years that the KFTC either rejected or imposed remedies. The first two, in particular, are the recent cases prohibited by the KFTC.

4.1 Prohibition

4.1.1 SKT-CJH

17. The KFTC received notification of a proposed acquisition of Korea's top cable TV operator CJ Hellovision (hereinafter referred to as "CJH") by the nation's largest mobile carrier SK Telecom (hereinafter referred to as "SKT") on 1 December 2015.

18. The merging parties have engaged in a broad range of business activities within the broadcasting and telecommunications markets. Based on the businesses that the parties are involved in, the KFTC defined separate product markets as follows: Pay TV markets in the respective 23 coverage areas, TV broadcasting channel market, TV commercial market, retail telecom market, wholesale telecom market, high-speed internet access market, landline telephone service market, and international calling market.

19. The proposed transaction would have resulted in numerous forms of vertical and horizontal integration, raising competitive concerns in horizontal integration between Pay TV markets in 23 coverage areas and retail telecom markets in addition to vertical integration between SKT's activities in the wholesale telecom market and CJH's MVNO services. With respect to the Pay TV markets, the combined market share of the merging parties would likely reach 46.9-76% in 21 coverage areas out of the 23 areas in total. As for the retail telecom market, SKT held 46.2% market share while CJH acted as a maverick in the market as provider of MVNO services. Additionally, since CJH took up 38.1% of the total purchases of wholesale telecom services, the proposed merger was likely to foreclose its competitors' access to a sufficient customer base.

20. The KFTC came to a conclusion to block the merger agreement, considering the following factors.

21. First, as the proposed transaction would likely give rise to the vertical and horizontal integration that could restrict competition in different broadcasting and telecommunications markets, the competitive concerns from the merger were so diverse and intertwined that it was practically impossible to disentangle them and design separate remedies for each of those concerns.

22. Second, Within the Pay TV markets, the planned merger was found to be anti-competitive in almost all of the 23 coverage areas. Therefore, asking the parties to divest all the anti-competitive businesses within the market was no different from prohibition.

23. Third, CJH's acquisition by SKT could mean that the nation's No. 1 MVNO that had promoted competition in the retail telecom market would disappear. In addition, it was almost impossible to find an appropriate purchaser of the divested assets which will be competitive as CJH in the relevant market.

24. In conclusion, the KFTC decided to block the merger agreement since the proposed acquisition would likely lead to competitive concerns in most part of the target's business (CJH) and divestiture of certain assets were not available and sufficient to address the concerns.

4.1.2 Essilor-Daemyung Optical

25. The KFTC received notification of a proposed acquisition of Daemyung Optical Co., Ltd (hereinafter referred to as "Daemyung Optical") by Essilor Amera Investment PTE. LTD ("Essilor") on 8 March 2013. The merging parties—Essilor and Daemyung optical—are respectively the largest corrective optical lens maker both in the world and Korean domestic markets, and the second largest manufacturer in the Korean domestic market.

26. The KFTC defined relevant product markets as the single vision lens market and progressive multifocal lens market and determined that the geographical market was limited to the Korean domestic market. The KFTC's market investigation suggested that the parties' combined market share amounted to 66.3% in the market for single vision lens and 46.2% in the market for progressive multifocal lens. Furthermore, the merged entity, post-transaction, would have become the largest manufacturer in each of the relevant markets, thus presenting competitive concerns.

27. The KFTC decided to block the proposed merger agreement, considering the following factors. First, the merging parties can simply get away with behavioral remedies such as price caps by introducing a new product. Plus, effectiveness of behavioral remedies was in question since the remedies are imposed only for a specified period of time.

28. Second, even if the merging parties are required to hold their businesses separate and run the two businesses separately, it would not restore competition to pre-merger levels without a clear sell-off of the business at issue.

29. In conclusion, the proposed acquisition would likely lead to competitive concerns in most part of the target's business. Based on the assessment, the KFTC decided to block the deal.

4.2 Remedies other than prohibition

4.2.1 NXP-Freescale

30. The KFTC received notification of a proposed acquisition of Freescale semiconductor LTD. (hereinafter referred to as "Freescale") by NXP semiconductors N.V. ("NXP") on 5 June 2015. Both the merging parties were non-memory semiconductor manufacturers.

31. As NXP and Freescale manufactured various types of non-memory semiconductors, the KFTC defined separate product markets as general-purpose microcontroller(MCU), general-purpose digital single processing (DSP), automotive MCU, automotive DSP, automotive analogue power IC, RF Power transistor, focusing on the competing products supplied by the merging parties. The KFTC found that the proposed acquisition would be anti-competitive as the merging parties collectively claimed 61.7% in the RF Power transistor market.

32. The KFTC required the merging parties to divest the RF Power transistor business for the following reasons;

33. First of all, structural remedies are preferable to behavioral remedies in order to address the likely competitive harm in the RF power transistor market. Additionally, considering that the proposed transaction would significantly restrict competition in the RF power transistor market and that the RF power transistor was considered as viable and competitive on its own (i.e. the purchaser of the standalone business was expected to become a viable competitor in the relevant market), the KFTC decided to require the parties to sell off the business instead of blocking the deal.

34. In conclusion, the KFTC imposed structural remedies, not prohibitive measures since it found that divestiture of the affected business alone adequately would address the identified concerns.

4.2.2 ASML-CYMER

35. The KFTC received notification of a proposed acquisition of Cymer Inc. ("Cymer") by ASML US Inc. ("ASML") on 13 December 2012. ASML is a lithography system maker and Cymer is a light source supplier.

36. The KFTC determined that the relevant markets are semiconductor lithography system market and light source market. Since light sources are important components of the lithography system, the proposed acquisition would give rise to vertical integration between a light source supplier (upstream market) and a lithography system maker (downstream market). ASML held a market share of 83% in the market for lithography systems and Cymer had a market share of 72% in the market for light sources, suggesting that both the parties were the largest supplier in each of the relevant markets. This raised the concerns that the proposed transaction might lead to input or customer foreclosure with regard to the sale of light sources for lithography makers.

37. The KFTC imposed behavioral remedies, after considering the following factors.

38. ASML was in the process of developing next-generation lithography systems. As part of the effort, the merger agreement was pursued to use the target company's assets for the development of a new lithography system. Therefore, the KFTC considered that prohibition or structural remedies such as divestiture could ease the competitive concerns but such remedies, in turn, would make it impossible for the merging parties to generate the claimed efficiencies.

39. In conclusion, the KFTC selected behavioral remedies, not prohibition, considering the proposed acquisition was likely to generate considerable efficiencies.