The Fundamentals of East Asia Merger Control Regimes (China, Japan & South Korea)

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On February 11, 2025, the International Committee of the American Bar Association's Section of Antitrust Law hosted a webinar on the mechanics of the merger control process in China, Japan, and South Korea. This was the sixth of a seven-session "Crash Course in Global Merger Control," organized by the International Committee and co-sponsored by the section's Mergers and Acquisitions Committee. The series, which will run through the end of February 2025, is designed for junior lawyers and economists interested in international merger control and tackles the basics of merger control and review process in general, as well as outlines information specific to various jurisdictions around the globe.

This session explored the details of the merger control regimes in China, Japan, and South Korea, including the conditions under which a transaction must be submitted to and reviewed by the competition authority, the merger review procedure, and the consequences of failing to notify the competition authority of a transaction subject to mandatory antitrust review. Moderated by Ildikó Magyari of Cornerstone Research in New York, the panel featured three speakers: Alexander Wang of Covington & Burling LLP's Beijing, China and Washington, D.C. offices; Masayuki Atsumi of Miura & Partners in Tokyo, Japan; and Eun Sun Jang of Kim Chang in Seoul, South Korea.

China

Mr. Wang provided an overview of the merger control regime in China, discussing the legal framework, notification requirements, filing process, and legal liabilities associated with non-compliance.

Mr. Wang explained that China's antitrust regulatory regime for mergers and acquisitions is modeled after the one of the European Union, in that it is mandatory—any transaction subject to jurisdiction must be submitted to the Chinese competition authority—and suspensory—while the clearance is pending, parties cannot take any steps towards implementing the transaction. The Chinese merger review regime is also extraterritorial, potentially applying to transactions that occur outside of China if the parent company group of the parties to the transaction has operations in China or has Chinese-related revenues that meet the notification threshold. The Chinese competition authority enforces the competition regime (including merger reviews) under the Anti-Monopoly Law (AML). Clients considering merger transactions must assess whether to file based on thresholds specific to global and/or domestic revenues, but also must consider below-threshold transactions that may have adverse impacts on competition in China. In addition, transactions involving relatively low market shares of the parties, extraterritorial business, or change from joint control to sole control by one shareholder, etc. can be eligible for the simplified (i.e., fast track) procedure with an expedited review process.

The relevant pieces of legislation governing merger control in China are the *Anti-Monopoly Law* (AML) enacted in 2007 (and amended in 2022) as well as the *Provision on the Notification Thresholds for Notification of Concentration of Undertakings* ("*Filing Threshold Regulation*"), which was enacted in 2008 and amended in 2024 to feature, among other changes, an increase in filing threshold resulting in a 20—30% decrease in the number of filings in 2024. As of 2025, the Chinese competition authority is a centralized administrative body called the State Administration for Market Regulation (SAMR), which has a similar role to the European Commission's Directorate-General for Competition (DG Comp). Within SAMR, of three competition related departments, the

Department for Anti-Monopoly Enforcement No. 2 is in charge of merger control. This department is composed of several divisions responsible for different industries, and it can delegate some of its duties to certain provincial agencies, particularly with regard to simplified procedure and relatively straightforward and easy cases.

For the merging parties, the first criterion to assess in deciding whether to file is whether their annual turnover meets the filing threshold. In case of uncertainty over whether to file or not, firms can also request to schedule a pre-notification consultation. This service used to be offered by a dedicated division within the Anti-Monopoly Bureau of Ministry of Commerce (MOFCOM), a predecessor of SAMR, while it is now embedded in each industry-specific division within the Department for Anti-Monopoly Enforcement No. 2.

Mergers are not the only type of transactions subject to SAMR's jurisdiction of merger control. Increases in market concentration, such as acquisitions of control (through an equity deal, asset deal, or contractual arrangement) as well as joint ventures, are subject to review. SAMR's review considers various forms of control, including a legal controlling interest (*de jure*), practical controlling interest (*de facto*), or decisive influence. The acquisition of "decisive influence" could be achieved even through contractual arrangement, but even an equity ratio of the acquiring firm over the target of no more than 50% could warrant scrutiny by SAMR and prompt the legal requirement to file.

Cases can be classified in two categories: "simplified procedure" and "regular procedure." Eligibility for a simplified procedure depends on various case characteristics, such as whether the parties involved in the transaction are based or conduct business in China and whether the respective market share of the parties to the transaction meet certain thresholds (e.g., the market share should be under 15% for each of the parties which are horizontal competitors and under 25% for vertically related or conglomerate scenarios).

To determine the exact filing threshold, the *Filing Threshold Regulation* lays out two alternative scenarios: the first criterion relies on the global revenue of the merging parties in the preceding fiscal year, while the second scenario relies on the companies' turnover in the preceding fiscal year within China. In the first scenario, if global turnover of the involved parties exceeds RMB 12 billion and the turnover in China of each of at least two undertakings exceeds RMB 800 million, then the parties are required to file. In the second scenario, if the combined turnover in China of the undertakings exceeds RMB 4 billion and the turnover of each of at least two undertakings exceeds RMB 800 million, then they are required to file. As mentioned above, irrespective of these thresholds, SAMR reserves a call-in power to review below-threshold mergers that may affect competition.

Failing to file a reportable transaction and "gun jumping" can result in substantial legal liabilities, penalties, and fines. The 2022 amendment to the *Anti-Monopoly Law* increased possible fines from a maximum of RMB 500 thousand to RMB 5 million. The penalty is aggravated in cases in which SAMR determines the transaction raises substantive competitive concerns, and in the most egregious cases, with fines up to 10% of the parties' turnover in the preceding year. In addition to pecuniary penalties, SAMR can impose further remedies to address the substantive competitive concerns, including ordering the cessation of concentration, the unwinding of the transaction, the disposal of shares and assets, or the transfer of the business entity within a limited timeframe.

Japan

Mr. Atsumi offered an overview of merger control under Japan's Anti-Monopoly Act (AMA), enforced by the Japan Fair Trade Commission (JFTC). Much like China, Japan's merger control regime is mandatory and disallows closing until clearance is granted following a statutory waiting period.

However, Japan applies a more formalistic approach, focusing on specific ownership thresholds and turnover criteria to determine whether a transaction triggers a filing obligation. According to Japan's regime, a reportable transaction generally arises if an acquiring entity's shareholding in a target crosses a prescribed threshold—20% or 50% of voting rights—provided that the acquirer's corporate group has domestic turnover exceeding JPY 20 billion and the target's group exceeds JPY 5 billion. The JFTC also reviews other forms of consolidation such as business transfers, and corporate splits under similar turnover thresholds. However, in the case of business or asset transfers where only a part of the business or asset is transferred to another company, the threshold figure differs. In such cases, the acquirer needs to have more than JPY 20 billion in Japan, and the target business or assets need to generate more than JPY 3 billion.

In addition to the mandatory filing requirement, the JFTC established a voluntary filing regime to address "killer acquisitions." This regime is designed for cases where an entity, such as a startup, has significant assets or technology but does not yet generate revenue. For such situations, the JFTC recommends making voluntary filings.

Mr. Atsumi discussed the common use of a special purpose company (SPC) in M&A deals, particularly so-called 'triangle mergers.' In these transactions, the acquiring parent establishes an SPC that merges with the target, resulting in the parent ultimately owning 100% of the target. Under the AMA's formalistic approach, this may trigger two separate filings with the JFTC: one for the statutory merger between the SPC and the target, and another for the post-merger share acquisition by the parent company. This is one of the unique features of the Japanese regime.

Once the parties gather the necessary information, they must notify the JFTC and observe a 30-day waiting period (Phase I), during which closing is prohibited. If no competitive concerns are identified, the JFTC clears the deal, often before the end of the 30 days. If concerns arise, the JFTC may initiate a Phase II review lasting up to 90 days from the moment the parties respond to all of the JFTC's request, during which more extensive investigations occur. Although gun-jumping enforcement in Japan is not enforced vigorously, the JFTC issued a warning in a past case, suggesting that closer scrutiny of early closings may be on the rise. JFTC also periodically makes the filings public.

South Korea

Ms. Jang provided an in-depth look at the key features of South Korea's merger control regime, primarily governed by the Monopoly Regulation and Fair Trade Act (MRFTA) and enforced by the Korea Fair Trade Commission (KFTC). She noted that the KFTC has recently established a specialized Global M&A Division to handle cross-border deals, particularly those requiring coordination with other jurisdictions. KFTC also provides key administrative guidelines regarding merger control. These are the guidelines on business combination reports, to cover procedural aspects of merger filing; guidelines of review of business combination, which provide details of antitrust analysis, similar to merger review guidelines in other jurisdictions; the guidelines on fine for non-compliance, specifying penalties in when the parties fail to properly notify mergers; and the guidelines regarding corrective measure providing details of remedies for transactions that raise antitrust concerns.

There are different types of transactions that trigger a filing. First type is regarding share acquisition, which is triggered if at least 20% of voting shares of the target company are acquired. This threshold is 15% for the case of public companies. Second type considers asset acquisitions, which is triggered if the transaction value exceeds 10% of total assets of the seller. Third type is interlocking directorships, which is notifiable if the applicant has at least KRW 2 trillion in worldwide assets or sales. The filing is triggered for mergers and establishment of new joint ventures based on test regarding the size of the parties.

South Korea generally follows a two-pronged approach. First the "size of parties" test looks at whether one party's global turnover exceeds KRW 300 billion and the other party's global turnover exceeds KRW 30 billion. There is an additional threshold for transactions involving foreign target where the party must have at least KRW 30 billion in local revenue. Second, a newer "size of transaction" threshold was introduced in 2021 that comes into play even if the test regarding size of parties is not met. This is meant to address "killer acquisitions" and applies to deals valued above KRW 600 billion when the target has substantial business activities in Korea with more than 1 million local users or notable research and development spending.

In South Korea, the merger control regime primarily follows a post-closing filing approach, meaning notifications are typically submitted after a transaction has been completed. However, pre-merger filing is required if at least one of the parties exceed the KRW 2 trillion in assets or revenue. In addition, there are two proactive mechanisms that parties can utilize to initiate the KFTC process ahead of time. The first is the voluntary pre-filing option, which, while not replacing the required formal filing, ensures that the KFTC's later formal review is completed within 15 days, providing a quicker resolution. The second mechanism is the recently introduced pre-consultation system, designed for complex transactions. This system allows parties to engage with the KFTC early on, providing an overview of market definitions and other relevant dynamics. It is anticipated that the pre-consultation system will see increased use for large-scale transaction, similar to pre-consultation systems in the EU, Japan, or China.

Ms. Jang explained the expected process and timelines for both simple and complex deals under South Korea's merger control regime. Simple deals, which have no anti-competitive effects and do not involve high value or high-tech industries like semiconductors or renewable batteries, are typically cleared within five to eight weeks. These may involve one or two RFIs, although the review clock stops when KFTC issues an RFI and until parties respond back; thus, the overall timeline can be affected by how quickly parties respond to RFI. A distinctive feature of Korea's system is the technical filing requirement for joint ventures, which can be triggered even for ventures with no operations in Korea, as the local nexus is determined by local revenues of the JV partners. Despite this requirement, such filings are largely procedural and may receive clearance swiftly, sometimes within a few days.

High-profile cases in South Korea with significant competition concerns can take between 5 to 18 months due to the KFTC's thorough process, which may include market surveys involving key competitors and customers, as well as economic analysis. Also, for cases requiring remedies, the KFTC has an extensive backend process before a final written decision is issued. This process involves the issuance of an examiner's report by case teams to which the involved parties need to respond, followed by case hearings. This has significant implications for global filing strategies, as delays in engaging with the KFTC on remedies can arise if parties wait for resolutions from other jurisdictions. Ms. Jang suggested that while the strategy for each case should be different, global counsel is advised to consider starting the process with the KFTC early, since the KFTC does not automatically accept remedies approved by other regulators.

Ms. Jang also highlighted several unique features of the KFTC merger filing process. First, filing is mandatory, and failure to comply can result in administrative fines. Second, unlike in the U.S. or EU, there is no requirement to submit internal documents in the initial filing. Third, there is no filing fee in Korea. Fourth, the pre-closing filing comes with a suspensory effect, necessitating that parties remain on hold and obtain written approval before proceeding, even if the statutory deadline has passed. This contrasts with practices in the U.S. or Canada, where clearance can be presumed after the waiting period. Fifth, the standard review timeline is 30 days – without counting the time required to respond to RFIs – but can be extended to 90 days at the discretion of the case handler, which does not necessarily indicate competition concerns and may simply reflect the handler's backlog. Lastly, control is not required to trigger a filing obligation.
