



INTERNATIONAL BAR ASSOCIATION
ANTITRUST SECTION MERGERS WORKING GROUP
SUBMISSION TO THE KOREA FAIR TRADE COMMISSION REGARDING
THE PROPOSED AMENDMENTS TO THE ENFORCEMENT DECREE TO THE
MONOPOLY REGULATION AND FAIR TRADE LAW

14 July 2021

1. INTRODUCTION

- 1.1 This submission is made to the Korea Fair Trade Commission (the **KFTC**) on behalf of the Mergers Working Group (**Working Group**) of the Antitrust Section of the International Bar Association (**IBA**). The IBA Antitrust Section expresses its appreciation to the KFTC to enforce Korea's competition laws fairly and proportionately, and welcomes the opportunity to provide comments to the proposed draft of the amended Enforcement Decree to the Monopoly Regulation and Fair Trade Law (the **Proposed Amendment**).
- 1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession across the world.
- 1.3 The IBA's 50,000-strong membership of individual lawyers from across the world, including Korea, places it in a unique position to provide an international and comparative analysis in the development of commercial laws. Further information on the IBA is available at <http://www.ibanet.org/>.
- 1.4 The Antitrust Section includes antitrust/competition law practitioners and experts with a wide range of jurisdictional backgrounds and professional experience. The Working Group's comments draw on the vast experience of the Section's members in merger control law and practice in jurisdictions worldwide. Further information on the Antitrust Section and its Working Groups is available at: <https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx>.
- 1.5 These comments have been prepared as follows:
 - 1.5.1 the first section addresses some general comments regarding transaction value tests;

1.5.2 the second section addresses proposed new financial thresholds to the business combination reporting obligations (the ***Size of Transactions Test***); and

1.5.3 the third section addresses the local nexus requirements.

2. General Comments

- 2.1 At the outset, the Working Group is concerned that the new Size of Transactions Test could negatively impact competition by targeting acquisitions of innovative start-ups, which may risk chilling effects on the venture capital industry and thereby dampening early-stage investments of start-ups. There is, in fact, evidence from other jurisdictions that have implemented a size-of-transaction threshold that such threshold is ineffective, with the associated costs likely outweighing any purported benefit. For example, since a transaction value threshold was introduced in Germany, approximately 0.6% of all notified transactions between 2017 and September 2020 were made pursuant to this threshold; in Austria, that figure is approximately a mere 4%. Notably, none of these transactions notified under the Austrian and German thresholds led to any remedies or prohibition decision.
- 2.2 The Working Group recalls that the European Commission and the French Competition Authority each considered introducing a 'size-of-transaction' threshold but subsequently decided against this. In particular, the French Competition Authority had concerns on its effectiveness in capturing problematic mergers while imposing a significant burden on transaction parties. The European Commission also determined that the majority of stakeholders surveyed from the public and private sectors stressed difficulties in determining the value of the transaction in practice, entailing risks for effective self-assessment. The European Commission's staff working document further pointed out that purchase price is a subjective matter agreed upon between the parties and does not give any indication of a transaction's possible competitive significance.¹
- 2.3 Evidence from other jurisdictions also suggest that the Size of Transactions Test may not target deals involving innovative start-ups, including those within the tech sector, with accuracy. In January 2021, the German Federal Cartel Office's evaluation report found that only 13% of all notifications under the German 'size-of-transaction' threshold originated from the tech sector, 23% of notifications concerned the real estate sector

¹ See European Commission's working paper, available at https://ec.europa.eu/competition/c consultations/2021_merger_control/SWD_findings_of_evaluation.pdf.

(primarily unfinished properties that did not generate income) and 45% of the notifications originated from the pharmaceutical sector. The report also acknowledged that no 'killer acquisitions' had been captured since the introduction of the threshold.

- 2.4 Finally, the Working Group respectfully reminds the KFTC that even without the Size of Transactions Test, the KFTC is empowered under Article 7 of the FTL to review any and all business combinations that could "practically suppress competition in a particular business area," including any potential "killer acquisitions" which meet the existing thresholds under the FTL.
- 2.5 In conclusion, before implementing the Size of Transactions Test, the Working Group restfully submits that it would be appropriate for the KFTC to conduct a detailed impact assessment to determine whether this new test is justified.

3. **Transaction Value (Article 21 (8) of the Proposed Amendment)**

- 3.1 The Working Group commends the KFTC for setting a transaction value threshold that is sufficiently larger than the existing thresholds to ensure that the Size of Transactions Test can be differentiated from the existing tests and does not cast too broad of a net to capture transactions that would not otherwise be subject to the business combination reporting obligations. That said, the Working Group recommends that the meaning of the "aggregate amount of the value being paid or invested in consideration of a business combination" be more clearly defined and that accompanying guidance be issued on how to evaluate and apply the standard for a particular transaction. It is important that the standards for the transaction value test should be clear and balanced to avoid any uncertainty and to promote foreseeability for businesses.
- 3.2 There can be considerable complexity in interpreting a transaction value threshold, for example when the transaction consideration involves: (i) contingent payments (e.g. earn-out clauses); (ii) consideration that may fluctuate after signing (e.g. share considerations, purchase price adjustments); (iii) non-merger specific or unrelated third-party agreements (e.g. payments to future employees for non-compete covenants, transfer of existing supply relationship agreements, other parallel commercial agreements or transactions between the parties); and (iv) payments for assets that are not competitively significant, such as existing cash in the target. In addition, the valuation of target companies involves the purchaser's subjective assessment, and the range of available valuation methods may lead to the same transaction being valued differently. In light of this, the Working group respectfully submits that it is important to equip the threshold with bright-line tests to provide sufficient legal certainty. This would

be in line with the ICN Recommended Practices for Merger Notification and Review Procedures, which provide that in relation to the modification of notification thresholds to target “*certain high value transactions involving targets with no or low local sales*”, such modifications should ensure that the new thresholds are “*clear and understandable*.”²

- 3.3 As for the transaction value itself, while the Working Group supports the efforts of the KFTC to set a value threshold that is sufficiently greater than the existing thresholds, the basis of KRW 600 billion as a threshold value remains unclear and the group therefore urges the KFTC to set a value based on empirical evidence. In relaying these comments, the Working Group specifically refers to the KFTC’s 2019 Commissioned Study (the **2019 Commissioned Study**),³ as it appears that the KRW 600 billion threshold was set by (i) doubling the size of the threshold test for the applicant to a business combination report (i.e., KRW 300 billion), and (ii) drawing from the thresholds set in Germany of EUR 400 million (approx. KRW 530 billion).
- 3.4 As clarity is critical in setting new threshold values, the Working Group also respectfully recommends that the reference date for determining the value of consideration should be clarified with specificity. As currently drafted, the reference date could refer to the value at the time of closing, the signing date, or something else. These ambiguities could result in fluctuating transaction values, particularly where the transaction consideration is denominated in a foreign currency. Further, fixing the reference date close to or at closing rather than signing will create significant uncertainty. For example, if mandatory notification and standstill obligations could still be triggered at the closing date, this would negatively impact financing, tax planning, accounting and other factors that drive transaction timing. Indeed, the Working Group notes that the 2019 Commissioned Study also addressed these concerns, pointing out that “the reference date” for determining the value of consideration could mean (i) the execution date of the agreement, (ii) submission date of notification, or (iii) execution date for business combination.
- 3.5 In conclusion, defining the methodology for determining transaction value in more specific/detailed terms, ideally by issuing accompanying guidance, will, in the Working

² See ICN’s Recommended Practices for Merger notification Procedures, available at <https://www.sipotra.it/wp-content/uploads/2017/06/RECOMMENDED-PRACTICES-FOR-MERGER-NOTIFICATION-AND-REVIEW-PROCEDURES.pdf>

Group's respectful opinion, provide for better understanding and certainty to the notifying parties.

4. **Local Nexus Test (Article 21 (9) of the Proposed Amendment)**

4.1 General Comments

4.1.1 The Working Group welcomes the introduction of a local nexus component to the Size of Transactions Test as it ensures that transactions that bear limited or no impact on the Korean market are not unduly captured. That said, the Working Group also respectfully recommends that this limb of the threshold test be further revised to avoid the potential risk that notifying parties misidentify the relevant measure of calculation, which could, in turn, misrepresent the level of domestic activity of the target company. The Working Group notes that some of these concerns were also addressed by the National Policy Committee's review report on the proposed amendment in March 2019 (the **NPC Report**), which found that some terms in the local nexus limb of the test to be unclear, for example, "sale and provision of goods and services in the Korean market."

4.2 Item 1. User numbers measurement

4.2.1 In addition to the above general comments, the Working Group respectfully recommends that sufficient guidance be provided to Item 1 of the Local Nexus Test to ensure that the businesses across varying entities understand how to interpret the requirements. From the collective experience of the Working Group, Item 1, as currently drafted, could mean, among others, the number of (i) new subscribers or new customers, (ii) unique users or people who visited the websites or digital platform during a month-period, or (iii) monthly active users (e.g., registered user who logged in and visited a company's websites or digital platform in the 30-day period). It is also unclear how businesses should interpret the requirement if the number of consumers purchasing their products fluctuates within the three preceding fiscal years. In light of these uncertainties, the standard should be more specifically defined to increase the predictability and clarity of the provision.

4.2.2 A more appropriate reference period should also be used to ensure legal certainty, for example, the "last full three calendar years". This would be consistent with the relevant periods used for calculating a company's turnover for the purposes of determining if the relevant jurisdictional turnover thresholds are met. Further, unlike revenue numbers which an acquirer would likely obtain as part of the due

diligence process over several financial years, the acquirer is unlikely to have ready access to information about the target's user numbers in "real time" as at time when determining whether the notifiability threshold is triggered.

4.3 Item 2. Removal of R&D nexus criteria

4.3.1 The Working Group respectfully proposes removing Item 2 of the Local Nexus Test. Pinning the Local Nexus Test on, among others, domestic R&D activities as a measure of domestic activity is potentially fraught with questions and uncertainties. In particular, R&D activities developing products for possible marketing in the future are not sufficiently market oriented to constitute an appropriate local nexus criterion. There is a further risk of confusing current domestic effects and potential future effects which triggers a high level of uncertainty.

4.3.2 Moreover, it is the respectful view of the Working Group that setting the local nexus test based on the target's lease of domestic R&D facilities or use of domestic research personnel or budget is inappropriate, such R&D-related criteria do not necessarily equate to domestic market potential, particularly where products or services developed are marketed to consumers outside Korea.

4.4 Item 3. Adding a new *de minimis* threshold

4.4.1 Finally, the Working Group respectfully recommends adding a *de minimis* domestic turnover threshold, which also accounts for factors such as: (i) the size of Korea's economy; and (ii) the average transaction value of deals that meet the Local Nexus Test. In supplementing the existing Local Nexus Test with a new *de minimis* threshold will help narrow the scope of transactions caught by the Size of Transactions Test and ensure that the new threshold narrowly captures the acquisition of companies with high economic and competitive potential.