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VIA EMAIL at coolkjh@korea.kr

Competition Policy Division
Fair Trade Commission
Sejong Government Complex
Building 2, 95 Dasom 3-ro
Sejong Special Self-Governing City
Republic of Korea

Re: **Proposed Amendment to the Enforcement Decree of the Monopoly Regulation and Fair Trade Act**

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The Group provides these comments regarding merger notification thresholds in the proposed amendment to the Enforcement Decree of the *Monopoly Regulation and Fair Trade Act* ("MRFTA").

The Group was founded in 2001. The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Recommended Practices for Merger Notification Procedures* ("Recommended Practices") of the International Competition Network ("ICN").[2] As you know, the Korea Fair Trade Commission ("KFTC") is a longstanding member.

The Group's work to date has included submissions to the KFTC as well as to competition agencies and governments in more than twenty other jurisdictions (*e.g.*, Australia, Brazil, Canada, Chile, China, France, Germany, India, Italy, Japan, Russia, Spain, the United Kingdom, the United States, and many others). The Group previously provided three submissions to the KFTC regarding merger notification thresholds, including one in October

[1] Accenture, BHP, Chevron, Cisco Systems, Danaher, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf >.

2018 regarding the draft bill to amend the MRFTA (the "October 2018 Submission").

The Group appreciates the opportunity to provide these comments regarding Articles 21(8) and (9) of the proposed amendment to the Enforcement Decree. We understand these provisions will require notification of a proposed merger to the KFTC if the transaction value of the merger is KRW 600 billion or more and the target meets a certain local Korean nexus test defined in reference to the number of Korean customers and R&D activities in Soth Korea.

I. General Comments

In our October 2018 Submission, the Group raised concern that there is limited evidence of an "enforcement gap" regarding review of large-value acquisitions of start-up companies with small sales or total assets. As a result, the introduction of a notification threshold based on transaction value would be of limited enforcement benefit while imposing unnecessary burdens on merging parties as well as the KTFC. The Group continues to be of this view.

Notification thresholds based on transaction value were first introduced in Germany (and Austria) in 2017. The experience of the German Federal Cartel Office has so far confirmed the Group's concerns.

As of January 2021, the FCO has dealt with a total of 60 notifications under the transaction value threshold, of which 34 were informal notifications (typically to gain additional legal certainty). Of the informal notifications, FCO informed parties that no formal filing was required in 29 cases – mostly due to a lack of local nexus – and recommended a formal notification in the remaining five cases.

A total of 31 cases (including the five referenced above) were formally notified. This resulted in 19 clearance decisions, 10 withdrawn filings (including 6 cases without a local nexus and one referral application to the EU Commission) and two pending cases.

Notably, almost half of the cases related to the pharmaceutical sector and only four cases to the technology sector, the purported focus of transaction value threshold. Seven related to large real estate properties that were not yet generating rent income and six to other sectors. No case was referred to an in-depth (Phase II) investigation and the FCO explicitly confirmed that it did not identify any "killer acquisition".

Germany's experience provides two important lessons:

- There does not appear to be any significant enforcement gap that is being addressed by the transaction value threshold. The FCO has not taken any enforcement action on any transaction notified due to the transaction value threshold. However, the regime imposes significant compliance burdens on parties that must determine whether filings are required and incur the time and cost of such reviews, as well as corresponding impacts on enforcement agency resources to assess these matters.

- Almost half of transactions notified due the transaction value threshold did not actually fulfill the requirement of local nexus to Germany. Notwithstanding extensive guidance the FCO provided about the local nexus requirement, for example, there remains significant uncertainty on the part of merging parties on this issue (as can be seen from the high number of informal notifications).

The Group respectfully submits that the KFTC must keep Germany's experience in mind when setting its transaction value threshold and designing the associated local nexus test, to ensure that they do not create undue burden and uncertainty for merging parties.

II. Proposed Transaction Value Threshold

In its October 2018 Submission, the Group recommended that "the Transaction Value Threshold applicable to acquisitions of assets, shares or entities outside Korea should be sufficiently high to account for the fact that Korea is likely to represent a very small portion of the sales of the acquired company". On this issue, the Group observes that a reasonably significant transaction value threshold is being adopted.

As one of its most important components, ICN's *Recommended Practices* recommends that notification thresholds should be objectively determinable:

> Notification thresholds *should be based exclusively on objectively quantifiable criteria*. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are more judgmental may be appropriate for later stages of the merger control process (such as determinations relating to the amount of information required in the parties' notification and to the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction is notifiable.[3]

[3] *See Recommended Practice* II-B, Comment 1 (emphasis added). See also Comments 2 and 3:

> The specification of objective criteria will require a jurisdiction to explicitly identify several elements. First, the jurisdiction must identify the measurement tool -- e.g., assets or sales. Second, the jurisdiction must identify the scope of the geographic area to which the measurement tool is applied -- e.g., national or worldwide. Third, the jurisdiction must specify a time component. In the case of certain measurement tools, such as revenues, sales, or turnover, the time component will be a period over which the measurement should be taken -- e.g., a calendar year. In the case of other measurement tools, such as assets, the time component will be a particular date as of which the measurement should be taken. In either case, the above- referenced criteria

However, the Group remains concerned that the proposed transaction value threshold appears to assume that the value of consideration in a transaction is always objectively determinable, when this is often not the case. There are numerous situations in public-market transactions where the value of consideration may not be self-evident (for example, in transactions where consideration is paid partially or wholly in shares of the acquirer, which themselves fluctuate in value on a daily basis, or in the case of joint ventures where the parties make various contributions of cash, assets, IPRs etc. and enter into ancillary commercial agreements). Similarly, in private-company M&A transactions there may be "earn-out" arrangements to compensate vendors, purchase-price adjustment mechanisms and other provisions that may affect the overall consideration value and make it difficult to quantify with precision *ex ante*. Moreover, transaction value could further fluctuate daily if the consideration is denominated in another currency. These complications introduce significant uncertainty for merging parties when assessing whether they are subject to a mandatory notification obligation. The proposed transaction value threshold in Article 21(8) of the proposed amendment to the Enforcement Decree does not provide sufficient clarity as to how such complications should be addressed when merging parties self-assess their notification obligation.

Therefore, the Group respectfully submits that it is vitally important that the KFTC provide specific rules or guidance regarding the wide range of issues that can arise in valuing the consideration exchanges in public and private merger transactions. The Group suggests that it would be useful for such rules and guidance to be published for public consultation before implementation.

III. Proposed Local Nexus Test

The ICN *Recommended Practices* state that a jurisdiction's notification regime "*should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory*."[4] The "local nexus" threshold should be sufficiently high so that transactions which are unlikely to have a potentially material effect on the domestic economy do not require notification.[5]

> may be defined by reference to pre-existing, regularly-prepared financial statements (such as annual statements of income and expense or year-end balance sheets).
>
> The specified criteria should be defined in clear and understandable terms, including appropriate guidance as to included and/or excluded elements, such as taxes and intra-company transfers (as to sales), depreciation (as to assets), and material events or transactions that have occurred after the last regularly-prepared financial statements. Guidance should also be given as to the proper geographic allocation of sales and/or assets. To facilitate the merging parties' ability to gather multi-jurisdictional data on a consistent basis, jurisdictions should seek to adopt uniform definitions or guidelines with respect to commonly used criteria.

[4] *Recommended Practice* I.B, Comment 1.

[5] *Recommended Practice* I.B, Comment 1 and *Recommended Practice* I.C, Comment 2.

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The Group understands that, under the proposed amendment to the Enforcement Decree, where the proposed KRW 600 billion transaction value threshold is exceeded, a merger notification to the KFTC is required even if the standard local nexus threshold of KRW 30 billion is not met, provided that the following proposed new local nexus test is met in the three years before the merger notification date:

- the Target has sold goods or supplied services in the Korean market to 1 million customers or more per month; or

- the Target has leased a domestic Korean R&D center or facility or utilized R&C personnel and has had a related annual R&D budget of KRW 30 billion a year.

In its October 2018 Submission, the Group recommended that "[i]n order to remove uncertainty for both private parties and the KFTC, a clear definition of activities in Korea, for both products and services, should be included either in the Presidential Decree or in guidance documents from the KFTC." The Group commends the KFTC for providing some guidance regarding the "domestic business activities in Korea of a substantial level" requirement. However, the Group respectfully submits that further guidance related to the application of proposed local nexus test is required in order to provide certainty to filing parties.

Regarding the first branch, in defining local nexus in terms of the number of customers in South Korea served per month, the test has left substantial ambiguity and uncertainty as to how this nexus should be measured. Especially for technology start-up businesses with little revenue, depending on the target business's business model, supplying good or services to 1 million customers or more per month could mean several different things, such as monthly new unique users, monthly active recurring users, etc.

The Group respectfully submits that the KFTC should provide guidance to the interpretation and application of this branch of the local nexus test in order to improve certainty and predictability for merging parties.

Regarding the second branch, the Group respectfully submits that a local nexus test defined in terms of local R&D activities should be removed. First, R&D activities in South Korea do not necessarily mean that there would be any potential future effects on the Korean domestic market. Second, there is uncertainty in identifying exactly what activities would be considered R&D activities.

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Thank you very much for conducting this public consultation and for considering the Group's views. We would be pleased to respond to any questions or discuss this submission with Commission officials at your convenience.

Yours very truly,

A. Neil Campbell

William S. Wu

Copy to: Members of the Merger Streamlining Group