

## On the Law

By **Bae, Kim & Lee**

### Variety of antitrust issues found in Korea

Microsoft's legal battles have put antitrust concepts on the front pages for years. But antitrust regulation isn't the exclusive concern of giant near-monopolies. And in Korea, antitrust issues span a wide variety of business practices and transactions, from retailing tactics to M&A deals, joint ventures, supply contracts, distributorships, and licenses.

These issues are addressed broadly by the Korean Monopoly Regulation and Fair Trade Act and related regulations (MRFTA). Policed by the Fair Trade Commission (FTC), the MRFTA basically prohibits anticompetitive combinations (M&A) or collusions (e.g. cartels), abuses of market power, and "unfair" trade practices.

M&A deals, including an acquisition of a 20% stake in an unlisted company (or 15% in a listed company), and asset transfers, require filing of a "business combination report", if one or the other party is big enough (KRW 100 billion in assets or sales). The FTC may bar or void the deal, or require corrective steps, if the deal is seen to suppress competition. There are specific market share criteria, but, in a nutshell, there is a problem if the parties, added up, dominate the market.

Illegal collusive acts include price-fixing, and agreements dividing up market territories or limiting quantities. Abuses of market power and "unfair" trade practices—they can overlap—include predatory pricing (at below cost, to stifle

competitors), minimum resale price maintenance, and boycotts.

But there are more subtle examples of practices that could run afoul of the MRFTA. Sometimes exclusivity, non-compete, and territorial restrictions, such as in OEM, licensing and distribution arrangements, must be tailored to avoid problems of enforceability.

Also suspect are tie-ins—for example, the copier company insisting you use their toner instead of the substitutes out there. Not all tie-ins are bad, but often they draw charges of unfair leveraging. (Similar issues haunted Microsoft, with its "bundling" of Explorer.)

Penalties for MRFTA violations can be severe, in some cases a percentage of annual turnover.

The way these rules apply is clear enough in the case of abusive or unfair acts that happen in Korea or directly affect commerce into Korea. But what about "purely" overseas transactions, such as a merger between two European companies that don't even have affiliates here?

Until recently, it wasn't clear that MRFTA restrictions would really apply to all-overseas M&A deals, except in cases of anticompetitive collusion. However, the FTC has amended its guidelines on this point, effective as of July 1, 2003.

As a result, even M&A deals purely between foreign parties,

having no affiliates in Korea, may require an antitrust filing in Korea, if each side involved (along with its affiliates) has annual sales of KRW 3 billion (around US\$2.5 million) in the Korean market.

#### **Even overseas M&A deals may require antitrust filings in Korea.**

The new guidelines raise questions. For example, in the case of a business transfer, does the KRW 3 billion threshold relate to all sales in Korea, or only sales in the particular industry? Much is left to be clarified.

Overseas M&A deals mark the outer orbits of the MRFTA. But even more day-to-day types of agreements can raise MRFTA issues, and sometimes what seems fair game as a business proposition may not be so under the MRFTA.

*Bae, Kim & Lee is one of Korea's leading law firms. This column is intended for general information only. Readers should always consult their legal counsel for any advice relating to specific circumstances.*

Tel: 02-3404-0000  
email: [bkl@lawyers.co.kr](mailto:bkl@lawyers.co.kr)

**Bae, Kim & Lee**

法律法人 太平洋