II. Korean M&A Reporting System

M&A meeting certain thresholds stipulated under Article 12 of the Monopoly Regulation and Fair Trade Law should be reported to the Korean Fair Trade Commission within the time-limit also stipulated under Article 12. Undertakings which fail to report within time-limit shall be fined up to 100million Won. Undertakings engaging in business combinations should be careful not to fail to report to KFTC. A brief overview of the business combination Reporting system in Korea is as follows. For more details, please refer to Notification on M&A Reporting Guidelines contained in this pamphlet.

1. Overview of related provisions

The Korean M&A reporting system is based on the MRFTA as a basic law, Enforcement Decree and guideline as a sub-regulation pursuant to the MRFTA.

Overall contents of relevant provisions are as followes,

< MRFTA >
- **Article 7 : Restrictions on Business combination, market share test etc.**
- Article 7-2 : standard for Acquisition or Ownership of Share
- **Article 12 : Filing Reports on Business Combinations**
- Article 16 : Corrective Measures
- Article 69-2 : Fine for negligence

< Enforcement Decree of the MRFTA >
- Article 11 : Scope of Specially Related Persons
- Article 12 : Criteria for Total Assets or Turnover
- Article 12-2 : Criteria for Large-Scale Corporations
- Article 12-3 : Exemption from the Scope of Specially Related Persons
- Article 12-4 : Business Combinations with a Company with no Possibility of Revitalization
- **Article 18 : Reporting, etc. of Business Combinations**
- Article 19 : Appointment of a Representative for the Reporting of Business Combinations

< M&A Reporting Guidelines >
- I : Purpose
- II : Categorization of Business Combinations Subject to Reporting
- III : Business Combination Reporting Guideline
- IV : M&A including at least one foreign company
- V : Filing Request for Arbitrary Pre-merger Examination
- VI : Filing Request for Designation and Change of the Representative for Reporting Business Combination
2. Which transactions should be reported?

A. M&As between foreign companies

**M&As between foreign companies and domestic company's acquisition of foreign company should be notified to the KFTC on the basis of the domestic sales (sales in Korean market)**

If domestic sales of acquired company and acquiring company [in case of newly established merger such as A+B -> C, domestic sales should be calculated for each acquired companies (A, B)] are 3 billion won or more respectively, the case should be notified to the KFTC. Therefore, M&As where domestic sales of at least one of the merging parties are less than 3 billion won are exempted from the notification obligation.

In summary, **when a company with total assets or turnover of 100 billion won or more and domestic sales of 3 billion won or more carries out the following merging activities, it should notify the case to the KFTC within the determined time.** (The same shall apply when a company with domestic sales of 3 billion won or more carries out the following activities to another company with total assets or turnover of 100 billion won or more and domestic sales of 3 billion won or more.)

- **Acquiring or getting to own 20% or more of the total shares** (excluding non-voting shares) issued by another company **with domestic sales of 3 billion won or more**

- **Interlocking Directorate**: Concurrently holding a position as an officer of another company **with domestic sales of 3 billion won or more**, while being an officer or employee of a company (This activity should be notified only if total assets or turnover of acquiring party are 2 trillion won or more)

- **Merging** with another company **with domestic sales of 3 billion won or more**

- **Taking over business**: Taking over or lease the whole or a substantial part of the business, undertaking the management of another corporation, or taking over the whole or a substantial part of the fixed operating assets of another company **with domestic sales of 3 billion won or more**.

**<Exemplary case falling under notification obligation>**

Let's assume that acquiring company is A (its affiliates: A1, A2) and acquired foreign company is B (its affiliates B1, B2).

① Domestic sales of companies concerned are 3 billion won and more respectively
   - Domestic sales of A: 5 billion won
   - Domestic sales of B: 5 billion won

② Domestic sales of companies concerned, including affiliates, are 3 billion won and more respectively
   - Domestic sales of A: 1 billion won, A1: 1.5 billion won, A2: 500 million won
- Domestic sales of B: 500 million won, B1: 1 billion won, B2: 1.5 billion won

③ Although the companies concerned do not have any domestic sales, the sum of domestic sales by their affiliates is 3 billion won and more respectively
- Domestic sales of A: none, A1: 3 billion won, A2: none
- Domestic sales of B: none, B1: none, B3: 3 billion won

<Exemplary case not falling under notification obligation>

Lets assume that acquiring company is A (its affiliates: A1, A2) and acquired company is B (its affiliates B1, B2).

① Domestic sales of acquiring company are 3 billion won and more, while those of acquired company are less than 3 billion won, or vice versa.
- Domestic sales of A : 100 billion won, domestic sales of B : 2 billion won, or versa.

② The sum of domestic sales by acquiring company (acquired company) and its affiliates is less than 3 billion won.
- Domestic sales of A: 500 million won, A1: 1.5 billion won, A2: 500 million won
- Domestic sales of B: 100 billion won, B1: 10 billion won, B2: 1 billion won
- Or vice versa.

In calculating the volume of domestic sales (which amounts to 3 billion won) of acquiring company and acquired company, domestic sales of affiliates should be also added up.

Because domestic sales generated by affiliates of merging parties can also influence competition in domestic market, they should be included in deciding whether the proposed M&A meet the 3 billion won threshold or not.

Provided however, in the aspect of acquired party, it may be separated from their business group after the consummation of the proposed M&A. In such case, only the domestic sales of companies, which still remain as affiliates before and after the consummation of the M&A, should be included in summing up total domestic sales of the acquired party.

e.g.) Company A (affiliates : A1, A2, A3, A4)
- Company B [affiliates : B1(owning 20% of shares issued by B), B2(owning 30% of share issued by B), B3, B4]
  When company A acquires 50% of shares issued by company B from B1 and B2,

  Domestic sales of acquiring company A
  = Domestic sales of A + domestic sales of A1 + A2 + A3 + A4 = Sum A
  Domestic sales of acquired company B
  = Domestic sales of B+ domestic sales of B3 + B4 = Sum B

  If Sum A and Sum B are 3 billion won or more respectively, the proposed merger should be notified to the KFTC.
In case of taking over the business, the concerned business is fully separated from the acquired party (transferring company). Therefore, in calculating domestic sales of the acquired party, those of affiliates are not included.

e.g) Acquiring company A (its affiliates: A1, A2, A3, A4), acquired company B (Running the business of b1 and b2, its affiliates: B1, B2, B3, B4)
When A undertakes the management of b1, among the businesses run by B,

Domestic sales of acquiring company = domestic sales of A + domestic sales of A1 + domestic sales of A2 + domestic sales of A3 + domestic sales of A4

Domestic sales of acquired company = domestic sales of B

In other words, after M&A, A1, A2, A3 and A4 still remain as affiliates of acquiring company A, before and after the merger, while domestic sales of B1, B2, B3 and B4 are not included in those of acquired company or transferring company.

**Definition of the Acquiring company and Acquired company**

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<th>Acquiring company</th>
<th>Share acquisition-ownership</th>
<th>Interlocking Directorate</th>
<th>Merger Undertaking</th>
<th>Management Undertaking</th>
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<td>Company, acquiring and owning the shares of acquired company</td>
<td>Large company, which an officer of acquiring company holds the position as an officer of acquired company as well</td>
<td>Company, remaining after the merger</td>
<td>Transferred company</td>
<td>Financing company</td>
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| Acquired company | Company, issuing the shares of its own company | Company, appointing staff and managers of large company as its own managers | Company, ceasing to exist after the merger | Transferring company | Newly established company |

**Starting point of implementing amended notification threshold**

It is applied to M&A, on which notification obligation comes into existence from July 1st 2003.

Therefore, M&A, whose triggering event bringing notification obligation happens before July 1st 2003 but notification obligation remains even after July 1st, does not need to comply with the notification obligation.
Amended Reporting Form

- 'The Sales in Korea' is added in the notification document for foreign company, requiring foreign company to mark its domestic sales as well as the total domestic sales of business group including affiliates.

- In the form of 'Status of affiliates' among the attached documents, both the 'Name of Item' generating sales in Korea and the amount of 'Sales in Korea' of each item are newly added, in case of foreign company.

- In the form of 'Market Situation, including Supply and Demand of Major Items among other attached documents, foreign company should mark the top 3 item lists based on the amount of domestic sales.

- In the form of 'Supporting Materials for M&As Subject to Simplified Reporting', 'Item of Sales in Korea' and the amount of 'Sales in Korea' are added for foreign company in the 'Status of Affiliates'. The 'Status of Market relevant to the Corporation subject to Simplified Reporting' shall be marked in terms of the top 3 lists based on domestic sales.

B. Foreign Company's acquisition of the Korean Company.

Where a corporation whose total amount of assets or turnover(meaning the sum of the total amount of assets or turnover of affiliates) is at least 100 billion Won(2 trillion Won in case of interlocking directorate) engages in a business combinations that fall under one of the following categories the corporation shall file a report with the Korean Fair Trade Commission pursuant to Article 12 of Monopoly Regulation and Fair Trade Act. The same shall apply when corporations not subject to reporting engage in business combinations with corporations subject to reporting

- Where a corporation, including its affiliates, owns 20 % or more(15 % or more for corporations listed in the Korea Stock Exchange or registered in the Korea Securities Dealer Automated Quotation<KOSDAQ>) of the total outstanding shares issued by another corporation(excluding non-voting shares pursuant to Article 370 of the Commercial Code);

- A Director or Auditor of a corporation concurrently holds the position of director or auditor of another corporation(interlocking directorate);

- A corporation merges with another corporation;

- A corporation takes over or leases the whole or a substantial part of the business, undertakes the management of business or corporation, or takes over the whole or a substantial part of the fixed operating assets of another corporation(hereinafter "Take-over of Business"); or

- A corporation subscribes to twenty percent (20%) or more of the shares of a corporation to be established.
2. Who is required to file a report?

Only the positive parties in a transaction that is, the acquiring corporations have the obligation of notification. Negative Parties, the acquired corporations don't have to notify their transaction. But in a business combination by means of merger, both parties have to file reports.

3. When should the report be filed?

**Transactions subject to prior notification and Prohibition of consummation before termination of waiting period**

- Where one or more corporation participating in the combination is a Large-Scale Enterprise that is, a corporation whose total amount of assets or turnover (total assets or turnover of affiliates combined) is more than 2 trillion Won, Merger, Take-over of business should be reported within 30 days from the date of contract, and Subscription of the shares of a newly established corporation should be reported within 30 days from the date of adoption of a resolution at a shareholders meeting (or at a Board of Directors meeting which can replace it) concerning participation in the establishment of a corporation.

- And Transactions subject to prior notification cannot be consummated before the termination of a waiting period, which is 30 days and can be extended by a maximum of sixty (60) days

**Transactions subject to post consummation notification**

- Transactions not subject to prior notification is subject to post consummation notification

**Voluntary Prior Notification**

- Any corporation, which intends to engage in any type of business combination aforementioned, may file a report with the Korean Fair Trade Commission, even before the reporting period for a pre-merger examination as to whether the business combination has the effect of substantially restraining competition

- Where a corporation files an Arbitrary Prior Notification, the KFTC will notify the corporation of the result within thirty (30) days from the date of notification, but this period can be extended by a maximum of sixty (60) days

4. How to file a M&A report?

A Report Form specified by the KFTC should be used. Report Form and relevant Instructions (Notification On M&A Reporting Guidelines) can be downloaded from the KFTC website.
5. Penalties

The parties falling under one of the following violations shall be punishable by a fine ranging from 1 million to 100 million Won: failure to file a report, delay of filing a report, filing a false report, violation of obligation not to close the proposed M&A without notification or prior to the termination of waiting period.

Where a corporation whose total amount of assets or turnover (meaning the sum of the total amount of assets or turnover of affiliates) is at least 100 billion Won (2 trillion Won in case of interlocking directorate) engages in a business combinations that fall under one of the following categories the corporation shall file a report with the Korean Fair Trade Commission pursuant to Article 12 of Monopoly Regulation and Fair Trade Act. The same shall apply when corporations not subject to reporting engage in business combinations with corporations subject to reporting.