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VIA FAX to 044-200-4342

Attn: Sang Min Song

Competition Policy Division
Korea Fair Trade Commission
Building #2. Government Complex Sejong
95, Dasom 3-ro
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Republic of Korea

Dear Mr. Sang Min Song:

Re: The Proposed Amendments to the *Monopoly Regulation and Fair Trade Act* — Additional Merger Notification Thresholds

We write on behalf of the Merger Streamlining Group (the "Group") to provide comments regarding the proposal to introduce a further set of merger notification thresholds related to high-value low-asset/revenue transactions in the Republic of Korea.

The Group's membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The Group's core 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] of which, as you know, the Korea Fair Trade Commission ("KFTC") is a longstanding member.

[1] The current members of the MSG include Accenture, BHP Billiton, Bosch, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

The Group was founded in 2001. Its work to date has included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (*e.g.*, the United Kingdom, Russia, Brazil, India, China, Japan, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*, including two prior submissions to the KFTC regarding merger notification thresholds.[3]

The Group appreciates the opportunity to provide these comments regarding the proposed draft bill (the "Draft Bill") amending the *Monopoly Regulation and Fair Trade Act* ("MRFTA").

The Draft Bill proposes to introduce new notification thresholds to target acquisitions of companies with small assets and revenues but with large transaction values (the "Proposed Thresholds"). Based on our members' substantial experience with multinational merger transactions, the Group is concerned that the existing Korean merger control thresholds do not require a material local nexus to Korea and that the Proposed Thresholds may be inconsistent with both the local nexus and objectivity standards in the ICN *Recommended Practices*. As explained further below, such thresholds will result in unnecessary time and cost burdens for both the parties to merger transactions and the KFTC itself.

I MERGER REVIEW THRESHOLDS

(a) Current and Proposed Thresholds

Under the proposed amendments, merging parties will continue to need to analyse the existing primary and secondary thresholds, as well as the Proposed Thresholds, for all domestic or international merger transactions where the parties have activities in Korea:

Primary Thresholds (currently Art. 12(1) of *MRFTA*)	• **First Party Threshold:** One of the merging parties (together with its worldwide affiliates both before and after the merger) has total assets or annual sales equal to or exceeding an amount prescribed by Presidential Decree (currently 300 billion won (approximately US$268 million)); and • **Second Party Threshold:** The other merging party (together with its worldwide affiliates both before and after the merger) has total assets or annual sales equal to or exceeding an amount prescribed by Presidential Decree (currently 30 billion won (approximately US$26.8 million)).
Secondary Thresholds	• If both merging parties are foreign (*i.e.*, it is headquartered or incorporated outside of Korea), each party (together with their respective worldwide

[3] *See* our January 2007 letter (<https://mcmillan.ca/Files/177070_O%20Kwon%20Letter.pdf> and August 2007 letter (<https://mcmillan.ca/Files/177078_Letter%20to%20Korea%20Fair%20Trade%20Commission%20August%202007.pdf>
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(Art. 18(3) of *Enforcement Decree*)	affiliates both before and after the merger) respectively has 30 billion won (approximately US$26.8 million) or more in annual sales in Korea; or If only the acquired party is foreign and the acquiring party is domestic, the acquired company (together with its worldwide affiliates both before and after the merger) has 30 billion won (approximately US$26.8 million) or more in annual sales in Korea.
Proposed Thresholds (proposed Art. 11(2) of *MRFTA*)	If the Primary Thresholds are not met: • **Transaction Value Threshold:** The total value of consideration paid for the merger transaction equals or exceeds an amount to be prescribed by Presidential Decree, and • **Korean Activities Requirement:** The acquired party has domestic business activities in Korea of a substantial level to be prescribed by Presidential Decree.

(b) Rationale for the Proposed thresholds

The Press Release accompanying the Proposed Amendments (the "Reasons") focuses on large-value acquisitions of start-up companies with small sales or total assets.[4] In particular, it appears that the lack of notifiability of the *Facebook / WhatsApp* transaction in Korea provided the impetus for the Proposed Thresholds (just as its lack of notifiability was a catalyst for the introduction of transaction value thresholds by the German Parliament). However, there was nothing uniquely significant to Korea (or to Germany) about this transaction. Both Facebook and WhatsApp are based in California, USA. This was a transaction between two US companies which was subject to review in the US and the European Union. We also note that the transaction was approved following phase I reviews, no remedies were required in any of the reviewing jurisdictions, and none would have been expected in Korea (or in Germany) had it been reviewed there. A Korean notification would simply have added costs for the parties and consumed KFTC resources, with no corresponding enforcement benefit.

Even if *Facebook / WhatsApp* had been a transaction with material local nexus to Korea, the very significant expansion of notification requirements in the Proposed Thresholds cannot be justified on the basis of a single transaction that was not subject to review. The absence of any other basis for this major policy change indicates that it is unfounded and premature.

Apart from the *Facebook / WhatsApp* transaction, the *Reasons* do not provide any further examples of problematic transactions — let alone any transactions which caused any

[4] Korea Fair Trade Commission, Press Release "The Monopoly Regulation and Fair Trade Act to be Completely Amended in 38 Years", August 24, 2018.

competitive harm and which escaped a review by the KFTC. The *Reasons* claim that there is an enforcement gap, but fail to demonstrate the significance of any such gap in substance. There is no immediate need to adopt significant reforms that will subject many further transactions to merger control without full and appropriate consideration of the consequence of doing so. We also note that the *Reasons* do not contain any indication that the transaction value thresholds introduced in Germany in 2017 have had any benefits that would justify their cost burdens on the competition authority and merging parties. In addition, the French Competition Authority considered the possibility of introducing transaction value thresholds in October 2017 to address the perceived shortcomings in its merger control regime, but ultimately decided against introducing such thresholds June 2018 after finding that it would constitute a disproportionate response to a limited number of potentially problematic transactions.[5]

The KFTC currently receives more than 600 notifications per year, which is a very high number for a country of its size.[6] Indeed, most domestic and international transactions conducted by any sizeable Korean company (*i.e.*, a company that exceeds the First Party Threshold of 300 billion won in worldwide assets or sales) with a large transaction value are likely to require notification in Korea. It is difficult to predict how many additional transactions will be subject to notification under the Proposed Thresholds, particularly given the lack of details on the definition of the Korean Activities Requirement and the Transaction Value Threshold. However, the Group is concerned that the Proposed Threshold is likely to significantly increase the number of transactions subjected to a Korean notification, without any clear benefits (*i.e.*, addressing any identifiable enforcement gaps) and at considerable time and cost to merging parties and the KFTC.

> **Recommendation:** In order to allow for informed analysis by stakeholders and members of the Korean National Assembly, the Group urges the KFTC to release the full study/analysis relating to the predicted notification volume of both domestic and international transactions under the Proposed Thresholds.

Now that merger control has proliferated around the world, there is less rationale than ever before for a single jurisdiction such as Korea to sweep large numbers of transactions with minimal or no nexus into its local review regime. Jurisdictions with significant actual nexus can and should be relied upon to address the competition concerns that arise in transactions that affect supra-national markets.

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[5] French Competition Authority, Press Release " 07 June 2018: Modernization and simplification of merger control," available at <http://www.autoritedelaconcurrence.fr/user/standard.php?lang=en&id_rub=684&id_article=3182>.

[6] For comparison, in 2017, France received 235 merger notifications; Australia received 288; Canada received 208; Japan received 325; European Commission received 362. *See* Global Competition Review, Rating Enforcement 2017 (20 July 2017), available online at <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144770/introduction>.

II LOCAL NEXUS REQUIREMENT

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*."[7] 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.[8]

(a) Existing Thresholds

As a preliminary matter, although the Group recognizes that the current thresholds reflect a recent increase, it respectfully submits that Korea's existing mandatory notification thresholds do not ensure that the transactions subject to mandatory notification in Korea have sufficient "local nexus" with Korea.

Where both parties in a merger transaction are domestic Korean companies, the existing Primary Thresholds capture transactions where one party (together with is affiliates) has worldwide assets or revenues in excess of 300 billion won (approximately US$268 million) and the other party (together with its affiliates) has worldwide assets or revenues in excess of 30 won (approximately US$26.8 million). By referencing worldwide assets and revenues, these thresholds cannot ensure that the transactions that they catch have sufficient level of business activity in Korea. Thresholds that focus on worldwide assets and revenues are increasingly becoming divorced from the reality that large Korean enterprises are increasingly focusing on growth in the global market outside of Korea. For these large Korean companies, it is no longer the case that having worldwide assets or revenues exceeding the notification thresholds ensures that they have significant business activities in Korea.

Where both merging parties are foreign or only the acquired party is foreign, the existing Secondary Thresholds only capture transactions where each of the parties or the acquired party, as the case may be, has revenues in Korea in excess of 30 billion won (approximately US$26.8 million). In the Group's respectful view, this is too low to be considered material to create a sufficient "local nexus," given Korea's large economy. Many other jurisdictions with similar or smaller economies employ significantly higher notification thresholds. [9]

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

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

[9] For example:

- Belgium — requires notification where each of two parties to the transaction has turnover in Belgium in excess of €40 million (more than 50 billion won).
- Canada — requires notification where the acquired party to have assets in Canada or revenue in or from Canada in excess of C$92 million (more than 80 billion won) and both parties together with their affiliates have assets in Canada or revenue in, from or into Canada in excess of C$400 million (approximately 350 billion won).

As noted earlier, the current Korean regime generates a very large number of merger filings, with only a very small percentage of the filings proceeding to an in-depth review and an even more minuscule percentage being challenged, blocked, or resolved with remedies. For example, 630 mergers were filed with the KFTC in 2017, only 26 (approximately 4%) of those filings were warranted in-depth analysis of potential competition concerns, and only 4 of them were challenged.[10] In other words, more than 600 notifications per year (95% of the total) under the current thresholds clearly do not raise competition concerns. Nevertheless, private parties and the KFTC expend significant resources on the preparation and review of such filings.

Given Korea's important role in Asia and the global economy, the Group respectfully recommends that the Korea's existing mandatory notification threshold should be amended to provide a more meaningful local nexus to Korea. Such an amendment would provide a strong and appropriate endorsement of the importance of all jurisdictions employing a meaningful local nexus materiality standard in the design of merger notification regimes.

> **Recommendation:** In order to provide a more meaningful local nexus for the application of Korean merger control rules to international merger transactions, the Group encourages the KFTC to consider amending the Primary Thresholds (both parts) to reference Korean domestic assets and revenues (rather than worldwide assets and revenues).

It is not clear to the Group whether the KFTC intends to keep the Secondary Threshold applicable to foreign-to-foreign and Korean-to-foreign transactions, which is currently provided for by way of Enforcement Decree, together with the Proposed Thresholds. If the KFTC does not intend to amend the Primary Thresholds as recommended above, the existing Secondary Thresholds for foreign-to-foreign and Korean-to-foreign transactions are necessary to ensure that multinational transactions that do not have sufficient local nexus to Korea are not unduly caught by Korean notification requirements.

> **Recommendation:** If the KFTC does not intend to amend the Primary Thresholds as recommended above, the Group urges that the existing Secondary Threshold for foreign-to-foreign and Korean-to-foreign transactions be maintained alongside the Proposed Threshold.

(b) Proposed Thresholds

The Proposed Thresholds provide a local nexus by way of the Korean Activities Requirement, that the acquired party must have "domestic business activities in Korea of a substantial level", which is to be prescribed by Presidential Decree at a later date.

- Italy — requires notification where the merging parties have combined aggregate turnover in Italy in excess of €495 million (approximately 640 billion won).

[10] *See* Global Competition Review, Rating Enforcement 2017, "Korea's Fair Trade Commission" (21 July 2017), available online at < https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144818/koreas-fair-trade-commission >.

The *Reasons* note that the Proposed Thresholds are intended to capture acquisitions of start-ups with have large growth potential but current with small revenues or assets (*i.e.*, starts-ups that currently do not meet the Second Party Threshold of having 30 billion won in worldwide assets or revenues). If there is a genuine desire to focus on Korean start-up companies, as suggested in the *Reasons*, this can easily be achieved by limiting the Proposed Thresholds to the acquisition of shares (or other ownership interests in entities) or assets *in Korea*, rather than anywhere in the world.

> **Recommendation:** If the KFTC wishes to proceed with a notification regime for high-value low-asset/revenue acquisitions of Korean start-up companies, the Proposed Thresholds should be revised to cover only acquisitions of assets in Korea or shares or other ownership interests in a Korean entity.

III OBJECTIVELY DETERMINABLE THRESHOLDS

The requirement for objectively determinable notification thresholds is one of the most important components of the ICN's *Recommended Practices*:

> 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.[11]

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[11] *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 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

Objectively determinable thresholds are essential for merging parties and their advisors to determine whether or not they have filing requirements in particular jurisdictions. For international transactions, there may be dozens of jurisdictions to be assessed, and it is important at an early stage in transaction planning to be able to identify and plan for the filings which will be required. Objectively determinable thresholds also serve the interests of competition agencies by clearly establishing which transactions are subject to filings and minimizing case-by-case consultations or disputes.

Accordingly, it is crucial to design the Korean Activities Requirement and the Transaction Value Threshold in a way that is consistent with the ICN *Recommended Practice* related to objectivity.

(a) Korean Activities Requirement

The Korean Activities Requirement has yet to be clarified in a Presidential Decree. To provide an objectively determinable standard for notification, the to-be-drafted Presidential Decree should clarify whether the necessary Korean local activities are limited to sales of products or services from a physical location within Korea. In particular:

- Does the Proposed Threshold apply to physical sales of a product into Korea by traditional channels of commerce and possibly over the internet?

- Does the Proposed Threshold apply to the sales of services which are ultimately supplied in Korea by a company outside of Korea (e.g. transportation by a foreign airline)?

- More remotely, does the Proposed Threshold apply to products or services sold to Korean customers by foreign companies which are supplied abroad (*e.g.*, hotel accommodation outside of Korea)?

> **Recommendation:** In 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.

Moreover, it is currently unclear whether the Korean Activities Requirement is intended to apply only to current or also potential future business activities that the acquired company may expect to engage in Korea. A threshold that will require notification of an acquisition of a business that does not currently have, but may in the future have, business

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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.

activities in Korea is not objective and would create an unacceptable level of uncertainty for merging parties. If the KFTC opens up the possibility that the Korean Activities Requirement can be assessed in reference to possible future activities, disputes over notification would likely arise.

> **Recommendation:** The Korean Activities Requirement should only focus on the acquired party's current business activities in Korea and should not reference any possible future activities in Korea.

(b) Transaction Value Threshold

The Proposed Thresholds and the *Reasons* appear to assume that the value of consideration in a transaction is always objectively determinable. However, 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*.

> **Recommendation:** If a Transaction Value Threshold is to be incorporated into the Draft Bill, it will be essential to provide specific rules or guidance regarding the wide range of issues that arise in valuing the consideration exchanged in public and private merger transactions.

The precise value for the Transaction Value Threshold is to be prescribed by Presidential Decree.

As discussed earlier, the Proposed Thresholds should be revised to apply only to acquisitions of assets in Korea or shares or other ownership interests in a Korean entity, so that the Proposed Thresholds are directly targeted at high-value acquisition of Korean start-ups that may raise anti-competitive concerns in Korea.

If the KFTC intends to apply the Proposed Thresholds to transactions outside of Korea, then the principle of proportionality requires a recognition that Korea generally will account for a small portion of the sales of a company with an Asian focus, and an even smaller fraction of the sales of a company with broad international or global operations. As a point of reference, Korea's GDP represents approximately 2% of world GDP. Accordingly, for acquisitions of assets, shares or entities outside of Korea, the overall transaction value threshold should be quite high. We note that the sole example given in the *Reasons* to support the Proposed Thresholds was the *Facebook / WhatsApp* transaction, which involved a transaction value of 24 trillion won (US$19 billion).

Recommendation: If the Proposed Thresholds are implemented, 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.

IV FUTURE REVIEW

If the Proposed Thresholds are introduced, the Group believes that it will be very important to collect reliable data on the number of transactions that are notified and the outcomes of such reviews. In addition, there should be a time period for review by the National Assembly to ensure that the results achieved from the review of high-value, low-asset/revenue transactions are assessed along with the filing and review burdens that have been imposed on merging parties and the KFTC.

Given the relatively low level of Korea's current merger notification thresholds and the high number of filings (as well as the fact that there are only a small number of cases where second-phase potential concerns are present), a review of the existing regime would also be warranted.

Recommendation: The Draft Bill should require the KFTC to track data and report to the Korean National Assembly three years after the enactment of the Amendment. In addition to the number of reviews, and the outcomes thereof, for both the current regime and the Proposed Thresholds, the KFTC should be required to collect data on the actual sales of each party to mergers that trigger notifications, and to monitor whether future sales materialize as expected if filings are based on expected future rather than current activities in Korea.

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Thank you for considering these submissions. The Group believes that our recommendations would benefit both the KFTC as well as Korean and other multinational companies by focusing merger review on cases with potential competitive significance in Korea.

We would be pleased to respond to any questions or discuss this submission with you or your colleagues further at your convenience.

Yours very truly,

A. Neil Campbell

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
William Wu, McMillan LLP