



ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2018

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A practical cross-border insight into mergers and acquisitions

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Sales Director

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Account Director

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Sales Support Manager

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Editor

Nicholas Catlin

Senior Editors

Suzie Levy
Caroline Collingwood

Chief Operating Officer

Dror Levy

Group Consulting Editor

Alan Falach

Publisher

Rory Smith

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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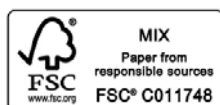
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Korea

Steve Kim



Seonho Kim



SEUM Law

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Korean Commercial Code (“KCC”)

The KCC provides general business and corporate regulations, including rules related to mergers, the acquisition of shares or assets and spin-offs (as well as other corporate activities).

Monopoly Regulation and Fair-Trade Act (“Fair Trade Act”)

M&A transactions are subject to reporting requirements of the Korea Fair Trade Commission, and the Fair Trade Act will apply if an antitrust review is triggered.

Foreign Investment Promotions Act (“FIPA”); Foreign Exchange Transactions Act (“FX Act”)

Cross-border M&A transactions are subject to FIPA, which addresses investment by foreigners into Korean companies, and the FX Act, which addresses foreign exchange matters.

Financial Investment Services and Capital Markets Act (“Capital Markets Act”)

The Capital Markets Act (along with the market rules of the KRX) will apply if an acquisition involves shares of a public company listed on the Stock Market Division of the Korea Exchange (“KRX”) or registered on the KOSDAQ market Division of the KRX.

Special Act for Business Reinvigoration (“Special Act”)

This temporary legislation aims to reduce the time and costs associated with the reorganisation of a business, where the purpose of the reorganisation is to “relieve oversupply” (i.e., companies not performing well due to market saturation). The Special Act, for example, provides benefits such as relaxed requirements for small-scale mergers. The Special Act became effective on August 13, 2016 and will expire after three years.

Applicable Legal Entities

The legislation set forth above generally applies to all Korean entity types, including the most commonly used joint-stock company (*jusik-hoesa*) or limited company (*yuhan hoesa*). A Korean company listed on the KRX markets must be a joint-stock company.

1.2 Are there different rules for different types of company?

Regarding the legislation set forth in question 1.1, please note the following:

Korean Companies – Private

If the target is a private Korean company, the KCC will apply, and the Capital Markets Act will not apply. The other laws will apply on a case-by-case basis.

Korean Companies – Public (listed in Korea)

If the target is Korean and has shares trading on the KRX markets, the KCC, Capital Markets Act and KRX regulations will apply. The other laws will apply on a case-by-case basis.

Korean Companies – Public (listed only outside Korea)

If the target is Korean and has shares trading on a foreign stock exchange (and not on the KRX markets), the KCC will apply and the Capital Markets Act will not apply. The other laws will apply on a case-by-case basis.

Foreign Companies

Generally, if a foreign company is a target, Korean laws will not apply. However, if the total Korea revenue of a company (including all of its affiliates) after the completion of a transaction meets certain thresholds, the Fair Trade Act will apply and antitrust clearance will be required. This requirement applies even if both acquirer and target are foreign companies.

1.3 Are there special rules for foreign buyers?

Other than special sector rules (see question 1.4), please note the following:

General

There are no investment restrictions or limitations on the exercise of shareholder rights for foreigners.

Foreign Direct Investment Report

Under FIPA, if a foreigner acquires (i) 10% or more of the voting shares of a Korean company, or (ii) the right to nominate a director, it must file a foreign direct investment report. If the applicable acquisition does not qualify as a “foreign direct investment” under FIPA (e.g., does not meet price threshold), then it will be treated as a securities investment and such foreigner will be subject to a simpler filing requirement under the FX Act.

Public Company Shares

If a foreigner desires to buy or sell shares of a Korean company listed in Korea, transactions should be made through the KRX markets, including off-hours block trades. If a foreigner desires to make an off-market transaction, it must obtain approval from the Financial Services Commission (“FSC”), *unless* such sale or purchase of shares requires a foreign direct investment report.

1.4 Are there any special sector-related rules?

Finance

If a foreigner acquires a certain threshold ownership stake of a Korean company in the finance sector (e.g., 10% for banks, insurance companies and securities companies) or otherwise acquires management control, FSC approval is required.

Public Interest

If a foreigner acquires shares in certain industries deemed to be substantially related to the public interest such as electric power, telecommunications, broadcasting and newspapers, approval of the applicable ministry is sometimes required and certain ownership caps may apply (e.g., 49% for certain telecommunication companies). A national security review is required if a foreign investment may potentially impede local manufacturing of defence industry items.

Core Technology

Under the Act on Prevention of Disclosure and Protection of Industrial Technology (“**Core Technology Act**”), if a foreigner (including a Korean company owned by a foreigner) acquires 50% or more shares (or becomes the largest shareholder controlling management) of a Korean company with “national core technology” (e.g., nuclear or communications technology), the target company must file a report with the Ministry of Trade, Industry and Energy (“**MOTIE**”), and if the transaction is deemed to be a material threat to national security, MOTIE may prohibit the closing of the transaction.

1.5 What are the principal sources of liability?

With respect to non-contractual buyer/bidder liability, please note the following:

Insider Trading

Under the Capital Markets Act, the general use of material non-public information by individuals to buy or sell listed shares is prohibited and can result in disgorgement of profits and civil/criminal liability. Moreover, material non-public information includes information related to a tender offer so an offeror must be careful with respect to any purchases of its shares prior to the start of a tender offer.

Unfair Trade Practice; Market Manipulation

Under the Capital Markets Act, market price manipulation and other types of unfair or fraudulent trading (e.g., disguised transactions, dissemination of false information, omission of material facts) are prohibited and can result in disgorgement of profits and civil/criminal liability.

Tender Offer

Although uncommon in Korea, prior to the launch of a tender offer, an offeror should (i) consider insider trading laws, and (ii) comply with the mandatory tender offer rules under the Capital Markets Act (e.g., intent to acquire a 5% stake from outside the public market from 10 or more persons within a six-month period). Off-hours block trades are considered “in-market” under tender offer rules. Any violations of these requirements may result in disgorgement of profits, invalidation of acquisition, and civil/criminal liability.

Short-swing Profits

If an officer, employee or shareholder holding 10% or more shares of a listed company purchases shares of such company and sells those shares within six months (or sells shares and then purchases shares within six months), and realises a gain from such transaction, the company (including other shareholders bringing a derivative suit on behalf of the company) may claim such profits.

Disclosure Obligations

The Capital Markets Act imposes various public disclosure obligations such as material company management matters, intended tender offer, and the 5% Disclosure Report (see question 5.3). A violation of such disclosure obligations may result in administrative and criminal penalties, as well as the suspension of voting rights with respect to any acquired shares.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Share Acquisition

A purchaser can acquire a controlling stake by purchasing shares from existing shareholders of the target.

Pros

- Most common and overall process is straightforward and similar to other major jurisdictions such as the U.S.

Cons

- For tender offers, the procedural process can be time-consuming and requires compliance with many requirements.

Merger

A buyer can execute a merger to absorb the target company.

Pros

- The shareholders of a target can be allotted shares in the surviving company or given cash or other assets of any kind (including shares of the surviving company’s parent company).
- Direct merger, reverse triangle merger and forward triangle merger are all possible.
- Squeeze-out of minority shareholders is allowed where controlling shareholder(s) own 95% or more shares of a target.

Cons

- A target must execute certain procedural requirements such as obtaining shareholder approval via “special resolution” (approval by ½ of all outstanding voting shares and ⅔ of voting shares represented at the shareholder meeting).
- Dissenting shareholders may exercise appraisal rights.
- A creditor protection procedure is required.
- A public company involved in a merger must submit a merger report to the FSC and KRX, which is made available publicly.
- Mergers between Korean companies and foreign companies are not permitted.

Business/Asset Transfer

A purchaser may acquire the business/assets of a target company.

Pros

- Transferred assets, rights and obligations are specified in the transaction documents, and negotiated liabilities contingent to the transferred business can be carved out.

Cons

- For transfer of all or a material part of the company’s business, (i) shareholder approval via special resolution is required, and (ii) dissenting shareholders may exercise appraisal rights.
- If a party to the transfer is a public company, and the business/asset to be transferred represents 10% or more of the total business/assets of the public company, it must (i) submit a business transfer report to the FSC, (ii) disclose the transfer, and (iii) obtain third-party appraisal for the transferred assets/business.

New Share Issuance

An acquisition can be achieved by purchasing newly issued shares of a target, which is typically done via a private placement offering, or equity-related securities such as convertible bonds, bonds with warrants and exchangeable bonds.

Pros

- Since the sale proceeds go directly to the target, this type of transaction is commonly executed for acquisitions of insolvent companies.

Cons

- The target's board of directors ("Board") must approve any private placement offering to a third-party bidder.
- Disputes challenging private placements often arise since the KCC requires reasonable management cause, particularly in the context of a defence against a hostile takeover.

2.2 What advisers do the parties need?

General

Subject to the size and complexity of the transaction, the following advisers are typically required:

- financial advisers (e.g., investment banks) to assist with financial diligence, establish fair value, source buyers/sellers and provide financing;
- legal advisers to perform legal diligence, prepare and negotiate principal documentation, guide through and prepare documentation for the regulatory approval process; and
- tax/accounting advisers to help structure the deal for tax efficiency.

Merger; Business/Asset Transfer

In addition to the above, for a merger or business/asset transfer, a third-party appraiser (e.g., accounting firm) is additionally required.

Tender Offer

The Board of the target company may desire to retain separate advisers to assess the fairness of the deal. For hostile tender offers, the bidder may desire to obtain a public relations adviser to handle media and possible negative public sentiment.

2.3 How long does it take?

Generally, the duration of an M&A transaction is similar to other major jurisdictions such as the U.S., but timing varies depending on the nature of the transaction and its requirements (e.g., regulatory approval).

Share Acquisition

For an acquisition of existing shares of a private or public company, the negotiation of the principal agreements is typically the most time-consuming element. However, if an antitrust review is required, this generally adds another 30 days (and can be extended for an additional 90 days) *plus* additional time to respond to requests for additional information from the Korea Fair Trade Commission. Approval by the target company's Board or shareholders is not required.

Merger; Business/Asset Transfer

If a merger involves a public company, in addition to negotiation of the principal documents, about six weeks is needed for the target company to obtain the required shareholder approval via special resolution, a one month minimum is needed for the required creditor protection procedure, time is needed to handle dissenting shareholder appraisal rights and a merger report must be filed with

the FSC and KRX. If antitrust review is required, additional time will be required.

A business/asset transfer of all or a material portion of the target company will require a similar process to the merger and will therefore take a similar amount of time.

Tender Offer

A tender offer period from 20 to 60 days from the announcement date is required, and settlement takes about one week after the end of the offer period.

2.4 What are the main hurdles?

The principal milestones for the execution of a transaction are as follows:

General

- Completion of financial and legal due diligence.
- Negotiation of principal agreements.
- Negotiation and/or consultation with regulatory authorities to receive approval, if necessary.

Share Acquisition

- The 5% Disclosure Report requirement may become a hurdle in the context of a hostile takeover that the purchaser preferred to keep confidential. See question 5.3.
- Mandatory Tender Offer requirements may become a hurdle. See question 1.5.
- For new share issuances, shareholders may nullify the share issuance if the transaction does not satisfy requirements for third-party allocation such as reasonable cause.

Merger; Business/Asset Transfer

- The target may have difficulty obtaining shareholder approval via special resolution.
- Handling dissenting shareholder appraisal rights may take time. The exercise price of appraisal rights is determined by (i) a formula set forth in the Capital Markets Act (for public companies), (ii) private negotiations, or (iii) a court.
- Merger of a public company into a private company is generally only possible after the target company has been de-listed.

2.5 How much flexibility is there over deal terms and price?

Share Acquisition

- For the purchase of existing shares, parties may freely determine the deal terms and price, *except* with respect to off-hour block trades which have certain price restrictions based on the previous day's closing price.
- For new share issuances, the issue price must be (i) equal to or greater than par value, and (ii) for public companies, must be equal to or greater than the price calculated based on an average market price formula set forth in the Capital Markets Act *minus* 10% (i.e., a discount of up to 10% of the formula price is allowed) in a public placement or *minus* 30% in a private placement.

Merger; Business/Asset Transfer

- For a merger involving a public company, the merger (or swap) ratio must be calculated based on an average market price formula set forth in the Capital Markets Act.
- Third-party appraisal is required with respect to the merger ratio or the value of a business/asset that will be transferred.
- Dissenting shareholders will have appraisal rights subject to a statutory formula.

Tender Offer

- There are no pricing restrictions, but there are a number of requirements such as a minimum and maximum offering period, no cancellation (subject to certain exceptions) and no financing conditions.

2.6 What differences are there between offering cash and other consideration?

Cash is most commonly used for acquisitions, but other forms of consideration are possible.

Securities

- Shares issued by a purchaser or a third party (e.g., the parent of the purchaser) may be used as consideration.
- For tender offers, the offeror is required to submit evidence to the Financial Supervisory Service (“FSS”) that sufficient securities are held in an account of the offeror.
- For new share issuances, if a foreigner seeks to pay for such shares with securities, it must file a report with the Bank of Korea pursuant to the FX Act.

Other In-Kind Consideration

- For new share issuances, generally third-party appraisal and court approval are required with respect to any in-kind consideration.

2.7 Do the same terms have to be offered to all shareholders?

No, different treatment of shareholders is allowed, *except* for tender offers where the same terms must be offered to all shareholders of the same class.

2.8 Are there obligations to purchase other classes of target securities?

No, there are no such obligations.

2.9 Are there any limits on agreeing terms with employees?

No, there are generally no restrictions or obligations with respect to any deal-related benefit packages or future employment terms for employees. However, the Labor Standards Act contains detailed and mandatory requirements related to general employment, and any agreement that departs from such standards will most likely be invalid.

2.10 What role do employees, pension trustees and other stakeholders play?**Share Acquisition**

No change occurs with respect to the relationship between the target and its employees, thus no consultation or other engagement with employee representatives is needed.

Mergers; Business Transfers

The surviving entity or the purchaser, as applicable, assumes all employees and labour liabilities, so no consultation or other engagement with employee representatives is formally required. However, as a practical matter, when the merger or business transfer occurs, if the target has a strong labour union, demands relating to job security, bonuses, etc. may occur, so prior consultation is advisable.

2.11 What documentation is needed?

The documentation required to complete a transaction is similar to other major jurisdictions such as the U.S. Generally, it will be as follows:

Share Acquisition

- A share purchase agreement.
- A share certificate for the transfer of title to shares.
- Recording transfer on the target’s shareholders register to secure the purchaser’s rights *vis-à-vis* the company.
- Regulatory filings, as necessary.

Merger; Business/Asset Transfer

- A definitive agreement.
- A merger (business/asset transfer) report must be filed with the FSC prior to closing.
- Regulatory filings, as necessary.

Tender Offer

- Statutorily prescribed documents such as an announcement in a newspaper, filing with the FSC, prospectus, etc.

2.12 Are there any special disclosure requirements?**Share Acquisition**

- The 5% Disclosure Report. See question 5.3.

Merger; Business/Asset Transfer

- If a public company is involved in a merger, it must submit a merger report to the FSC and the KRX, which is made publicly available.
- If a public company is involved in a business/asset transfer or spin-off, a similar filing is required.

Tender Offer

- A tender offer or proxy solicitation requires certain information to be disclosed, as set forth under the Capital Markets Act.

2.13 What are the key costs?

The following significant costs are typically incurred:

- Tax liability.
- Financing and foreign exchange-related costs.
- Advisers’ fees.

2.14 What consents are needed?

For typical consent requirements, please see questions 1.3 (FIPA), 1.4 (special sector) and 2.3 (antitrust).

2.15 What levels of approval or acceptance are needed?

See question 2.1.

2.16 When does cash consideration need to be committed and available?

Generally, there is no requirement, *except* for tender offers, which requires that proof of sufficient cash be submitted to the FSS prior to launch.

3 Friendly or Hostile

3.1 Is there a choice?

Yes, hostile takeovers are permitted, but uncommon in Korea. If the target is listed, a hostile takeover may be done through a tender offer or purchase on the public market.

3.2 Are there rules about an approach to the target?

Generally, there are no rules or typical procedures regarding how to approach a target, *except* for tender offers. See question 1.5.

3.3 How relevant is the target board?

Generally, the target's Board is a spokesperson for its shareholders and generally complies with the intentions of the majority shareholder. For tender offers, the Board is permitted to express its view, and this may affect shareholder views on tendering.

3.4 Does the choice affect process?

Friendly Transaction

The process would be generally cooperative, involving negotiation, information exchange (e.g., diligence) and the transaction would be governed by the relevant transaction document (e.g., share purchase agreement).

Hostile Takeover

The process would be unilateral as the acquirer would purchase shares on the market or through a tender offer, and then acquire control by replacing the directors through a proxy fight. Due to the 5% Disclosure Report requirement, a "creeping acquisition" would be difficult and the target will likely be uncooperative with respect to information exchange. See question 5.3.

4 Information

4.1 What information is available to a buyer?

The target has no non-contractual obligations (or limitations) with respect to providing a purchaser with information.

General

- Company Register Extract – This is publicly available and can be obtained by anybody with respect to any company. It contains, for example, director names and the paid-in capital of the company.

Public Companies

- Periodic Filings – An annual, semi-annual and quarterly report required to be publicly filed, outlining, for example, the status of voting rights, shareholders holding 5% or more of the shares, directors and financial status.
- Non-Periodic Filings – Any material information that may affect an investor's decision or the company's decision on a particular matter is required to be publicly disclosed.

4.2 Is negotiation confidential and is access restricted?

Private Company

If both the purchaser and the target are private, there are no disclosure obligations and no limits on contact with shareholders of the target.

Public Company

If either the purchaser or target is listed, confidentiality can be maintained during the negotiation stage (even if a non-binding MOU is executed). See question 4.3. However, a stock exchange may ask the public company to comment on market rumours or media reports, in which case the company will usually need to disclose that discussions are taking place. There are no limits on contact with shareholders of the target.

4.3 When is an announcement required and what will become public?

5% Disclosure Report

The 5% Disclosure Report is required at the time the definitive agreement is executed. See question 5.3. Generally, the purchaser must disclose its capital, officers, largest shareholder, number of shares acquired and the purpose of the acquisition.

Merger; Business/Asset Transfer Agreement

If a public company is involved in a merger or business/asset transfer, it must submit a report to the FSC at the time the definitive agreement is executed, which is made publicly available. See question 2.1. Generally, the report must disclose, among other things, the major terms of the agreement, valuation and certain shareholder rights information.

Tender Offer

This will involve similar public disclosure to a merger report. The disclosure will occur when the documents are filed.

4.4 What if the information is wrong or changes?

Generally, a disclosing party must update or correct any information publicly disclosed. Improper public disclosure may result in penalties such as forfeiture of voting rights. With respect to acquirer's rights, recourse options are typically set forth in any applicable definitive agreement (e.g., indemnification, walk-away rights).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

For tender offers, the purchaser (including related persons) may only purchase shares through the offer process during the offer period.

5.2 Can derivatives be bought outside the offer process?

For tender offers, the purchaser (including related persons) may only purchase derivatives such as convertible bonds through the offer process during the offer period. Any purchase of such derivatives would be subject to the 5% Disclosure Rule. See question 5.3.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

5% Disclosure Report (and 1% Report)

Once the purchaser (including related parties) holds 5% or more voting shares (or certain other equity-related securities) issued by a listed target, such purchaser must disclose its ownership (and at each increment of 1% thereafter) as well as the share purchase price (the “**5% Disclosure Report**”). The purchaser must file the 5% Disclosure Report with the FSC within five business days from the execution of the share purchase agreement (and not upon the closing), and an addendum report must be filed within five business days of any change of 1% or more in such shareholding (or by the 10th of the following month for passive investments). A filing obligation is also triggered if the purpose of the investment changes (e.g., passive investment vs. intention to exert influence on management).

10% Disclosure Report

Once the purchaser (in this case not including related parties) holds 10% or more voting shares (or certain other equity-related securities) issued by a listed target (or otherwise has actual influence over “material matters” such as Board nomination rights) it is considered a “major shareholder”, and a separate report must be filed with the Securities and Futures Commission (“SFC”) within five business days, and any change in shareholding must be reported to the SFC within five business days of such change.

5.4 What are the limitations and consequences?

Limitations

Generally, none, *except* certain foreign ownership restrictions for special sectors. See question 1.4. For tender offers, purchases outside the offer process are not permitted. See question 5.1.

Consequences

For tender offers, purchases outside the offer process may result in fines and criminal penalties, as well as a prohibition from participating in future offers.

6 Deal Protection

6.1 Are break fees available?

Yes, parties may negotiate break-up fees or inducements for commitments (e.g., deposits for auction sales) and there are no limitations. For tender offers, break-up fees are not permitted.

6.2 Can the target agree not to shop the company or its assets?

Yes, targets may agree to not seek alternative offers. Exclusivity or no-shop covenants are commonly seen in agreements with a selling shareholder or the target (in a business transfer deal). For tender offers, such agreements would not involve the target.

6.3 Can the target agree to issue shares or sell assets?

Generally, yes. A target may issue new shares or sell off material assets to support a preferred bidder or frustrate intervention by a competitor, but the target’s Board should carefully consider fiduciary

duty issues and courts often invalidate new share issuances aimed at retaining management control.

For tender offers, the target may issue new shares to a “white knight”, but this is subject to enhanced scrutiny by the regulators and/or courts in respect of directors’ fiduciary duties and the fairness of terms. Also, if an asset to be sold is material to a target’s business, the sale will require special resolution shareholder approval.

6.4 What commitments are available to tie up a deal?

Targets may agree to the following to assist a preferred bidder: no-shop/exclusivity covenants; confidentiality obligations; break-up fees; and other penalty provisions. A tender offer typically would not contain these features since there is no acquirer-target agreement.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Parties may negotiate conditions to purchase (i.e., conditions precedent) and there are no limitations. As a practical note, public disclosure requirements may require disclosure of material terms. For tender offers, only a limited range of prescribed conditions are permitted.

7.2 What control does the bidder have over the target during the process?

A purchaser may negotiate typical pre-closing rights and/or conditions with respect to the target’s business such as restrictions on debt incurrence or sale of assets. Any violation of these terms provides the purchaser with contractual recourse. For tender offers, a purchaser has no particular rights related to a target’s business, but may cancel the tender offer if there is a material event such as the sale of a material asset.

7.3 When does control pass to the bidder?

Effective day-to-day control over a target passes to the acquirer when its nominees are elected as directors comprising a majority of the Board. The election of a director requires an “ordinary resolution” of shareholders (one-fourth of outstanding voting shares and a majority of shares represented at the meeting), and the removal of a director requires a special resolution. There are no management restrictions related simply to the existence of minority shareholders.

7.4 How can the bidder get 100% control?

If a purchaser with control over a target company desires to obtain 100% ownership, the following are typical approaches:

- For a listed target, a tender offer can be used to purchase remaining shares held by minority shareholders, but minority shareholders cannot be compelled to sell.
- If the purchaser owns 95% or more of the target’s shares, it can require minority shareholders to sell their shares to it at an agreed price (or price determined by the court).
- Mergers utilising a stock-swap structure can be used, but procedural requirements such as special resolution approval by both parties must be met.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Generally, no. The target's Board has no duty to disclose (including notice to shareholders) with respect to offers or negotiations, but it must disclose material binding decisions made and must respond to inquiries made by a stock exchange. See questions 4.2 and 4.3.

8.2 What can the target do to resist change of control?

The following defensive measures may be considered by a target:

- New share (or derivatives) issuance to a white knight, but courts often invalidate new share issuances aimed at retaining management control.
- Typical “shark repellent” tactics, such as staggered board elections, limits on the number of directors, and supermajority shareholder approval, but these require advance planning so may be impractical in a sudden hostile takeover context.
- Poison pill tactics, multiple voting shares or golden shares are generally not permissible due to the “one share, one vote” (equal treatment among shareholders) principle under the KCC.

When considering defensive measures, directors of the target should consider fiduciary duty obligations carefully. There are no rules that create a particular challenge for purchasers seeking to make an unsolicited approach of a target.

8.3 Is it a fair fight?

The fiduciary duty obligations of a target's Board primarily serve to ensure fair treatment and review of offers from preferred bidders and unsolicited competing bids. Such duties require a Board to determine which offer is most fair and in the shareholders' best interests, and whether any defensive measures are advisable or permissible.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The following factors typically have a major influence on outcome:

- Deal valuation.
- Acquirer's relationship with the controlling shareholders and target's Board.

- If the target has a labour union, cooperation by such union.
- Regulatory approval factors such as the relationship with regulators and approval qualifications.

9.2 What happens if it fails?

There are no restrictions preventing or limiting a purchaser from making another attempt to acquire control after a prior failed attempt. For example, following a failed tender offer, an offeror may immediately proceed with a new offer.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Stalking Horse Bids

In May 2017, the Seoul Bankruptcy Court amended its rules to allow for “stalking horse bids” in connection with acquisitions of companies undergoing rehabilitation proceedings. The objective of this amendment was to encourage successful acquisitions of companies in rehabilitation and to help such targets obtain a fair sale price. Under the amended rules, the target can enter into a sale agreement with the stalking horse bidder without going through a public and competitive bid process. After entering into such sale agreement, the target may still initiate a formal bid process, subject to court approval and payment of a break-up fee.

The basic structure of the stalking bid process is similar to that allowed in U.S. bankruptcy proceedings, and break-up fees are generally expected to be around 3% of the purchase price or less. Targets have already utilised these provisions as seen through recent sales of Sampyo Cement & Energy Corp. and STX Heavy Industries Co. Ltd. We expect companies in rehabilitation to increasingly take advantage of these new rules to avoid low-ball bids, thereby protecting the value of the company and facilitating the execution of more reasonable and realistic rehabilitation plans favoured by creditors and the Bankruptcy Court.

**Steve Kim**

SEUM Law
Teheran-ro 211, KFAS Building, 13F
Gangnam, Seoul 06141
Korea

Tel: +82 2 562 3115
Email: steve.kim@seumlaw.com
URL: www.seumlaw.com

Steve is a U.S. attorney with a general corporate practice focusing on international companies investing in Korea and operating in or seeking to enter the Korean market, as well as Korean companies engaging in cross-border matters. Prior to SEUM, Steve's broad experience includes: representing financial institutions and international companies in connection with IPOs and debt/equity offerings in the New York and Hong Kong office of a leading international law firm, and start-up/emerging company representation in its Silicon Valley office; representing Korean and international companies in connection with investments, joint ventures, partnerships, acquisitions and other cross-border matters in Seoul at one of the leading traditional Korean law firms; and outside advisory and in-house counsel experience at an investment and enterprise building firm and social networking start-up company.

**Seonho Kim**

SEUM Law
Teheran-ro 211, KFAS Building, 13F
Gangnam, Seoul 06141
Korea

Tel: +82 2 562 3115
Email: seonho.kim@seumlaw.com
URL: www.seumlaw.com

Seonho is a corporate partner, focusing his practice on M&A, private equity, foreign and domestic investment, fund formation, and corporate governance, and he also advises on antitrust, employment and compliance matters. Advising both Korean and international clients, Seonho has handled numerous acquisitions, buy-out deals, cross-border investments, joint ventures, partnership and antitrust review matters, and in 2015 was named a rising lawyer in the field of M&A buyouts by the *Korea Economic Daily*. Seonho is active in the legal community, serving as outside general counsel for numerous companies, and is frequently invited to speak on a variety of legal issues. Prior to joining SEUM, Seonho worked at one of the leading traditional Korean law firms representing large Korean corporations and international clients in M&A and general corporate matters.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com