International Legal Highlights Korea | July 2022

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SUMMARY

UNDERSTANDING CONSTRUCTION RISK ON INFRASTRUCTURE INVESTMENTS

Private investment in infrastructure, especially renewable energy projects, is surging across the globe. In fact, total new investment in renewable energy hit an all-time high during the first half of 2021. The resulting competition among investors has led funds to invest in riskier projects in the hopes of obtaining higher returns.

Risk on infrastructure projects comes in many forms. One of the more difficult risks to manage is the potential for cost overruns during construction and, the larger the project, the greater the risk for overruns. According to McKinsey & Company, 98% of megaprojects (projects with a total cost greater than US$1 billion) suffer cost overruns of more than 30%, and 77% of them are completed at least 40% behind schedule. Such cost overruns will significantly threaten an investor's return, but this risk can be mitigated by ensuring that the owner of the project properly manages its relationship with its contractor. To that end, investors should be mindful of the following:

- Make time for a robust front-end design. The more design work done before putting a project out to bid, the more defined the scope will be for the project. This will reduce the risk of unforeseen conditions and growth in quantities of material and equipment.
- Shift the risk of cost overruns onto the contractor. A lump-sum or a guaranteed maximum price contract will provide the project with greater cost certainty than a cost-reimbursable contract. While a contractor will insist on a higher price to assume the risk of cost overruns, it may be better for investors to have that price negotiated up front in exchange for greater cost certainty moving forward.
- Insist on an engaged management team. Problems on construction projects tend to snowball if they are allowed to fester. During the project, the owner should employ an internal project management staff

dedicated to monitoring costs, schedule and, most importantly, holding the contractor to the terms of its contract.

- Understand international dispute resolution. In the event the owner and contractor cannot resolve their dispute on delays and cost overruns, they will be forced to have their claims adjudicated by a tribunal. International projects often utilise arbitration for disputes, with the International Chamber of Commerce being the most popular venue. The benefit of these proceedings is that they allow the parties to avoid the idiosyncrasies of a local court, the eventual award is typically kept confidential, and it is internationally enforceable.

The decision to invest in a capital project does not always account for the intricacies of the construction process, even though it can torpedo key cost assumptions. A bit of diligence and discipline during this phase can help ensure an investor's targeted rate of return.

DOJ TO DEVOTE SUBSTANTIAL RESOURCES TO INVESTIGATING AND PROSECUTING CORPORATE CRIME, EMPHASIZING IMPORTANCE OF EFFECTIVE COMPLIANCE PROGRAMS

In March 3, 2022, speeches at the American Bar Association's Annual National Institute on White Collar Crime (ABA White Collar Institute), US Attorney General (AG) Merrick Garland and US Assistant Attorney General for the Criminal Division (AAG) Kenneth Polite Jr. addressed the US Department of Justice's (DOJ) increased commitment to investigating and prosecuting corporate crime.

As a testament to their commitment to these resource-intensive cases, AG Garland discussed plans to hire 120 new prosecutors and 900 new FBI agents; this announcement represents a substantial surge in resources. AG Garland and AAG Polite also addressed specific ways they intend to increase enforcement efforts, including through the expanded use of data analytics. Finally, in addition to outlining substantive enforcement priorities, AG Garland and AAG Polite emphasized DOJ's focus on individual accountability, with AG Garland reiterating that DOJ's primary goal is "obtaining individual convictions rather than accepting big-dollar corporate dispositions."

As AG Garland warned, DOJ's white-collar enforcement efforts will further "accelerate as we come out of the pandemic" and DOJ's interest in corporate crime is clearly "waxing again." Companies must therefore take proactive steps to prepare for this increased enforcement activity.

Substantial Additional Resources for Corporate Crime Enforcement

In 2021, DOJ charged 5,521 individuals with "white collar" crimes, which represented a 10% increase over 2020.

During his speech, AG Garland announced that DOJ will be devoting even more resources toward its corporate crime enforcement efforts going forward. Specifically, DOJ will seek funding to hire 120 new prosecutors and 900 new FBI agents, all of whom would focus on white-collar crime. If DOJ obtains such funding, those new prosecutors and agents could supercharge DOJ's enforcement efforts. For example, 120 prosecutors is more prosecutors than there are in many US Attorneys' Offices (including in the District of Massachusettsa district that is already active in corporate enforcement, particularly in the resource-intensive healthcare space). Adding 900 new FBI agents—a number that is similarly larger than many existing FBI field offices—could allow DOJ to pursue thousands of new corporate criminal investigations.

EXPANDED USE OF DATA ANALYTICS

For the past two years, DOJ and other federal agencies have increasingly relied on sophisticated data analytics tools to identify and prosecute corporate crime. AG Garland specifically identified data analytics as another "force-multiplier" for DOJ. DOJ's use of data analytics will undoubtedly expand going forward. Among other things, AG Garland announced that a new squad of FBI agents has been embedded within the Criminal Division's Fraud Section to "further strengthen [DOJ's] ability to bring data-driven corporate crime cases nationwide." As DOJ increasingly relies on "big data," including vast amounts of data from other state and federal agencies, companies must ensure that they are proactively using data analytics to further their own internal compliance efforts.

DOJ's Priority Enforcement Areas

AG Garland and AAG Polite mentioned several of DOJ's specific white-collar criminal enforcement priorities during their remarks. In addition to traditional areas such as healthcare fraud, securities fraud and Foreign Corrupt Practices Act violations, companies should expect increased DOJ scrutiny in the following areas:

- **Antitrust**: AG Garland highlighted DOJ's active investigations and prosecutions of alleged criminal antitrust violations and collusive activity in government procurement. DOJ's Antitrust Division ended the last fiscal year with 146 open grand jury investigations—the most in 30 years—and is trying or preparing to try 18 indicted cases against 10 companies and 42 individuals. AG Garland previously noted that "reinvigorating Antitrust enforcement" was a top priority for DOJ, and he requested a budget increase of 9% for the Antitrust Division (more than $200 million). Such significant additional resources will bolster the Antitrust Division's aggressive pursuit of alleged violations in their current priority areas: government procurement, labor markets, consumer products and the healthcare industry. In addition, during separate remarks at the ABA White Collar Institute, Richard Powers, the Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division, noted that the Division is also prepared to criminally charge individual executives for violations of Section 2 of the Sherman Act (the provision prohibiting market monopolization). Charging Section 2 cases criminally is an exceedingly aggressive and controversial

approach, and it something that the Division has not done in decades.

- **COVID-19 Fraud**: AG Garland reiterated DOJ's commitment to pursuing fraudulent conduct in connection with the COVID-19 pandemic. As President Biden recently announced, AG Garland will be "naming a chief prosecutor to lead specialized teams dedicated to combatting pandemic fraud." The chief prosecutor will "build on" the work of the COVID-19 Fraud Enforcement Task Force announced in May 2021. Additional pandemic-related prosecutions and investigations will likely continue for years to come and may increase in scope and complexity.

- **Cryptocurrency**: AAG Polite specifically mentioned the "emerging cryptocurrency space" as an area in which individual victims are particularly vulnerable to being "exploited by other market participants." AAG Polite referenced the recent indictment of the founder of cryptocurrency platform BitConnect in connection with an alleged $2.4 billion Ponzi scheme. His remarks follow increased cryptocurrency enforcement and regulatory activity from the US Securities and Exchange Commission (SEC), the Financial Crimes Enforcement Network (FinCEN), the Internal Revenue Service (IRS) and other federal agencies during the past year, and they demonstrate that cryptocurrency remains squarely in the DOJ's crosshairs.

DOJ's Renewed Focus on Individual Accountability

The remarks of AG Garland and AAG Polite focused heavily on DOJ's efforts to ensure that individuals are held accountable for corporate crime. AG Garland stated that DOJ's "first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasances." AG Polite in turn noted that DOJ "prioritize[s] prosecution of individuals responsible for corporate crimes to the fullest extent of the law."

Although "individual accountability" has long been at the core of DOJ's Principles of Federal Prosecution, AG Garland and AAG Polite's statements were noteworthy since prosecutions of individuals for corporate crime had waned during the past administration. AG Garland recognized that "obtaining individual convictions rather than accepting big-dollar corporate dispositions is a difficult and resource-intensive road," but committed to marshalling the resources necessary for DOJ to pursue such prosecutions successfully.

AG Garland and AAG Polite also reemphasized DOJ's requirement that, to be eligible for cooperation credit, companies must provide DOJ "with all non-privileged information" about "all individuals involved in or responsible the misconduct at issue," regardless of "their position, status or seniority." First announced by Deputy Attorney General (DAG) Lisa Monaco last fall, AG Garland described this requirement and defense lawyers as a "force multiplier" for DOJ. DOJ now expects companies and their defense lawyers to "come clean about everyone involved in the misconduct, at every level." This is a change from the previous administration, which required only that companies make disclosures regarding those individuals the companies deem to have had "substantial" involvement

in the misconduct.

KEY TAKEAWAYS

With a surge of DOJ resources focused on corporate crime (and AG Garland's clear commitment to enforcement in that area), the importance of an effective corporate compliance plan cannot be overstated. In fall 2021, DAG Monaco reiterated the import of self-monitoring, a trend that has been gaining momentum at DOJ since it first issued comprehensive compliance guidance in 2017. AAG Polite reiterated the same on March 3, 2002, providing additional insight into what DOJ will be looking for when evaluating corporate compliance programs:

- DOJ wants to know "whether you are doing everything you can to ensure that when that individual employee is facing a singular ethical challenge, he has been informed, trained and empowered to choose right over wrong."
- When misconduct takes places, DOJ will be evaluating whether your company has in place "a system that immediately detects, remediates, disciplines, and then adapts to ensure that others do not follow suit."
- Even when a CEO is not involved in wrongdoing, DOJ expects corporations to "examine whether a change in leadership is necessary" and analyze whether current leadership "modeled poor ethical behavior for the workforce, or fostered a climate in which subordinates committed wrongdoing with intent to benefit the company, or permitted weak internal controls that allowed the crimes of individuals to go undetected."

DOJ ANTITRUST DIVISION SIGNALS IMPENDING CRIMINAL MONOPOLIZATION

On March 2, 2022, the US Department of Justice (DOJ) Antitrust Division Deputy Assistant Attorney General Richard Powers revealed that the DOJ intends to investigate and pursue alleged criminal violations against individuals or companies who violate Section 2 of the Sherman Act. For more than 40 years, criminal enforcement of antitrust laws have focused nearly exclusively on hardcore, *per se* anticompetitive agreements (*i.e.*, price fixing, output restriction or market allocation) among two or more horizontal competitors. Section 2 of the Sherman Act, on the other hand, primarily focuses on conduct by *one* firm or company with significant market power and, typically, is a means to bring a civil case for monopolization or anticompetitive use of the existing monopoly power.

LEGAL BACKGROUND

This marks a radical departure from longstanding DOJ antitrust enforcement of monopolization claims. In general, the DOJ has refrained from Section 2 criminal prosecutions.

Section 2 makes it illegal to acquire or maintain monopoly power through anticompetitive means and focuses primarily on unilateral or one-sided anticompetitive behavior. Courts (including the Supreme Court of the United States) generally have analyzed Section 2 cases under the "rule of reason," which weighs both procompetitive and anticompetitive effects of conduct.

Because the rule of reason imposes a balancing test that is akin to the preponderance of evidence standard, the higher criminal burden of proof could clash with existing jurisprudence and agency guidelines on Section 2 enforcement standards. In contrast, Section 1 of the Sherman Act prohibits anticompetitive agreements—where courts have automatically deemed certain types of agreements, such as agreements to fix prices, allocate markets or rig bids—as illegal "per se," because they (through ample judicial and economic experience) have been deemed to produce little or no procompetitive effects.

DOJ's HISTORY WITH SECTION 2

In the last 50 years, the vast majority of criminal cases that the Antitrust Division has brought involved *per se* illegal agreements under Section 1. The Antitrust Division appears to have initiated very few *criminal* Section 2 cases during that same period with mixed success. For instance, in *United States v. Cuisinarts*, the DOJ prosecuted the defendant under Section 2 for *per se* resale price maintenance agreements.[1] The defendant agreed to pay a $250,000 fine for a plea of *nolo contendere*. However, today, the per se criminal treatment of resale price

maintenance is in serious doubt as the long line of Supreme Court decisions from *GTE Sylvania* to *Leegin* have firmly placed most vertical resale price restraints for Section 2 under the rule of reason standard.

WHAT'S NEXT

In 2016, the Federal Trade Commission and the DOJ released a joint publication called the "Antitrust Guidance for Human Resource Professionals" when announcing expanded criminal enforcement in labor markets for wage fixing and no-poaching agreements.[2] We expect the DOJ to release similar guidance with respect to criminal prosecution of Section 2 claims.

The policy shift raises a host of additional questions, such as what types of conduct under Section 2 the Division intends to focus on (*i.e.*, conspiracy to monopolize), how the Division intends to prove elements like relevant market and criminal intent, and whether companies will be able to rely on any reasonably well-defined "safe harbors." Without clarity around these issues, DOJ's new approach may impair future competition and innovation- the very things that Section 2 was intended to encourage. In short, the lack of clear instructions for avoiding criminal exposure and ambiguous enforcement guidance could dampen significantly competitive conduct among firms and potentially increase the likelihood of companies facing criminal investigations that later choose to accept plea deals or civil settlements that may not be warranted by underlying facts.

This is only the latest wave of scrutiny in the DOJ's more aggressive approach to antitrust issues. Powers' remarks affirm an earlier promise made by DOJ Antitrust Division Assistant Attorney General Jonathan Kanter in January 2022 that criminal prosecutions of Section 2 cases remain a top priority for the Antitrust Division.[3] The announcement is consistent with calls from members of US Congress and other policymakers for more stringent (and potentially

criminal) enforcement of monopolization claims, particularly for large tech corporations. Senator Elizabeth Warren (D-MA) repeatedly has urged the DOJ to deconcentrate companies and target corporate executives, publishing her most recent letter to the DOJ on February 8, 2022.[4]

1 *United States v. Cuisinarts*, Inc., No. H80-559, 1981 WL 2062, at *1 (D. Conn. Mar. 27, 1981).

2 Department of Justice press release, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (20 October 2016) available at https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

3 Department of Justice press release, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (24 January 2022) available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

4 Senator Elizabeth Warren press release, Warren Calls On DOJ to Take Aggressive Action to Enforce Antitrust Laws As Giant Corporations Raise Consumer Prices to Highest Levels in Decades (8 February 2022) available at https://www.warren.senate.gov/newsroom/press-releases/warren-calls-on-doj-to-take-aggressive-action-to-enforce-antitrust-laws-as-giant-corporations-raise-consumer-prices-to-highest-levels-in-decades.

THINK GREEN BEFORE YOU APPLY: EU COMPETITITION LAW AND CLIMATE CHANGE ABATEMENT

The European Union (EU) has sounded the alarm: "climate change and environmental degradation are an existential threat to Europe and the world". To mitigate this threat, the EU recently presented the 'European Green Deal' (EGD), which aims to achieve climate neutrality by 2050. While competition policy may not be the most obvious instrument to achieve this aim, it does in the authors' view have a role to play. This article seeks to offer some perspective on how the rules pertaining to Article 101(3) TFEU and the EU Merger Regulation (EUMR) could be applied differently and/or amended to effectively accommodate environmental benefits.

ARTICLE 101(3) TFEU: A PROVISION THAT RADIATES VERDANCY

Article 101(1), which catches restrictive practices, is set aside by Article 101(3) where such restrictive practices contribute to "*improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit', and neither "impose[s] on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives' nor 'afford[s] such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*".

A strict interpretation of Article 101(3) suggests that the test enshrined therein is exclusively economic in nature. However, the European Commission (EC) has previously stated that the terms of Article 101(3) are sufficiently broad to include other policy objectives, and more specifically environmental protection objectives. The approach taken by the EC in this regard has, however, been relatively patchy, with much greater deference being given thereto under the now defunct Regulation 17 compared to under the current rules in force.

ARTICLE 101(3) UNDER REGULATION 17: AN ERA OF PERMISSIVENESS?

Regulation 17 endowed the EC with sole power to declare (now) Article 101(1) inapplicable to restrictive practices pursuant to Article 101(3). Under this system, the EC was amenable to accepting environmental benefits as a justification for the application of Article 101(3). A good example is *Conseil Européen de la Construction d'Appareils Domestiques* (CECED) (1999). CECED involved an agreement amongst domestic appliance manufacturers to refrain from manufacturing and/or importing washing machines that did not meet certain energy efficiency criteria. The agreement was found to infringe Article 101(1). When undertaking its cost/benefit analysis under Article 101(3), however, the EC found that "*the future operation of the total of installed machines providing the same service with less indirect pollution is more economically efficient than without the agreement*". Crucially, the EC appears to have put the reduction of pollution on a par with economic efficiency. Furthermore, the EC took into account the "collective economic benefits" that CECED would engender to conclude that it would likely contribute significantly to technical and economic progress, whilst allowing consumers a fair share of the benefits.

ARTICLE 101(3) UNDER REGULATION 1/2003: AN ERA OF UNPERMISSIVENESS

Regulation 1/2003 introduced the direct application of Article 101(3), whereby competition authorities and Member State courts were given the power to also apply Article 101(3). Restrictive practices that satisfy the conditions of Article 101(3) are legally valid and enforceable ab initio without the need for an administrative decision to that effect. As a corollary, the onus now rests with companies to undertake a risk-based analysis of whether a restrictive practice is compliant with EU competition law. The EC issued a wealth of instruments to enable companies to perform such '(self-)assessments'. Such assessments are, however, to be undertaken within '*a legal framework for the economic assessment of restrictive practices*' to the exclusion of factors extraneous to competition. This move to a purely economics-based approach under Article 101(3) was in the authors' view controversial in light of EC and EU Court precedent in particular.

While guidance was published to assist companies with the task of performing an economic assessment of whether Article 101(3) is applicable, there is currently very little scope for the successful invocation of Article 101(3) on the basis of environmental protection. The Guidelines on Article 101(3) allude to the fact that '*goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101](3)*'. This has left little room for climate change abatement considerations to be taken into account:

First, EC guidance on the application of Article 101(3) is exclusively focused on the countervailing *economic* benefits that a restrictive practice leads to for consumers. As such, the Guidelines on Article 101(3) accentuate economic efficiencies over any other type of countervailing benefit, including environmental benefits.

Second, according to the EC, the economic benefits engendered by a restrictive practice in one market must, generally speaking, outweigh its restrictive effects in that same market ("in-market efficiencies"). This approach sits uneasily with the dicta of the EU Courts. For example, in GSK v. Commission (2006), the General Court held that "[*i*]*t is* [...] *for the Commission, in the first place, to examine whether* [...] *the agreement in question* [...] *enable*[*s*] *appreciable objective advantages to be obtained, it being understood that these advantages may arise not only on the relevant market but also on other markets*".

Third, the Guidelines on Article 101(3) recognize that there may be cases where a certain period of time needs to elapse before any efficiencies emerge. However, the EC also states that "[...] *the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on*". Therefore, even if climate change abatement were recognized as a countervailing factor under Article 101(3), the relative immediacy with which efficiencies must arise automatically rules out its successful invocation.

THE EUMR: EFFICIENCIES DO NOT, BUT COULD, RADIATE VERDANCY

The substantive test embedded in the EUMR is whether a concentration would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position (SIEC).

In making its appraisal of whether there is an SIEC, the EC must take account of "[...] *the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*" (Article 2(1) EUMR). This provision forms the legal basis for the "efficiency defence".

Invocation of the efficiency defence, even on economic grounds, has been largely unsuccessful, however. A closer look at some of the elements of the defence demonstrates that the ability to invoke countervailing environmental benefits, such as a lessening of carbon emissions, is inconceivable based on current practice. This is inter alia because efficiencies must in principle benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur. The approach towards the efficiencies defence, and the manner in which it is applied, is therefore arguably too rigid to achieve climate neutrality by 2050.

SECURING CLIMATE CHANGE ABATEMENT VIA THE EU COMPETITION RULES: A FEW SUGGESTIONS

Article 101(3)

The EC's current approach to Article 101(3) does not as things stand permit the invocation of genuine out-of-market environmental benefits. Granted, the EC's current *draft* Horizontal Cooperation Guidelines recognise so-called "collective [sustainability] benefits": "*where consumers in the relevant market substantially overlap with, or are part of the beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market occurring outside that market can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered*". Moreover, according to the draft guidance, for collective sustainability benefits to be taken into account, parties should be able to: (a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur, (b) define clearly the beneficiaries, (c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries that are part of them and (d) demonstrate that part of the collective benefits occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market.

It is hoped, however, that the EC does not interpret this draft guidance too strictly when it enters into force on 1 January 2023 if it wishes to contribute to achieving the climate neutrality objective by 2050.

The EUMR

Many mergers bringing about environmental benefits do not pose competition problems. However, the parties to a merger would struggle to run a successful efficiencies defence based on environmental benefits because efficiencies must "*in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur*". The reference to "in principle" means that the EC could, if it so desired, take out-of-market efficiencies into account in its assessment of an efficiency defence. Further, the EC could draw inspiration from the approach

proposed by the Dutch competition authority in relation to Article 101(3), *i.e.*, there should be no need to quantify the efficiencies where the harm to competition is, based on a rough estimate, obviously smaller than the benefits of the merger.

In summary, the EC is urged to ensure that EU competition law adequately takes into account the protection of the environment. Not doing so risks failing to avert the existential threat posed by climate change and environmental degradation.

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1 Department of Justice press release, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (24 January 2022) available at www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust- division-delivers-remarks-new-york.

2 Department of Justice press release, Justice Department and Federal Trade Commission

Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (20 October 2016) available at https://www.justice.gov/opa/pr/justice-department-and- federal-trade-commission-release-guidance-human-resource-professionals.

3 Senator Elizabeth Warren press release, Warren Calls On DOJ to Take Aggressive Action to Enforce Antitrust Laws As Giant Corporations Raise Consumer Prices to Highest Levels in Decades (8 February 2022) available at https://www.warren.senate.gov/newsroom/press-releases/warren-calls-on-doj-to-take- aggressive-action-to-enforce-antitrust-laws-as-giant-corporations-raise-consumer-prices-to-highest-levels- in-decades.

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