

Transfer of Personal Information in a Corporate Structural Change

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Abstract

The legal framework of Korean data privacy law is built upon a system of strict application and enforcement of the notice and consent requirement. The emphasis on the data subjects' right to self-determine the collection and processing of their personal information has its legal basis on the explicit right provided under the Korean Constitution and is thus an element which is distinguishable from the data privacy schemes of other countries. As such, unlike in the EU or the U.S., where the collection and processing of personal information are generally permitted upon either the finding of the data controller's legitimate interest or the notice of sufficient information to data subjects, the Korean data privacy scheme requires, in principle, the explicit consent of the data subjects with respect to the collection and processing of personal information (including the transfer to or sharing of such information with third parties), except where the consent requirement is specifically exempted under the relevant laws.

As illustrated in this paper, such statutory exceptions are the results of the legislative efforts to strike a balance between the data subjects' constitutional right to self-determine processing their personal information against the need to facilitate commercial transactions in the rapidly changing business circumstances. One area where such exception is of particular relevance is in relation to the transfer of personal information in connection with corporate structural changes such as corporate mergers, business transfers and other similar corporate transactions, as stipulated under the relevant data privacy laws, namely Article 27 of the PIPA, Article 26 of the IT Network Act, and Article 32 of the Credit Information Act.

From a practical standpoint, however, given the inherent limitations of such statutory provisions to provide for each and every instance where the exception may apply, determining the precise scope of the applicability of these exceptions poses certain practical challenges. Specifically, this paper focuses on the data privacy implications associated with corporate mergers, business transfers, asset sales and purchases, and corporate divestitures to arrive at the appropriate scope of applying Article 27 of the PIPA. The analyses contained in this paper reflect an attempt to find a reasonable ground for determining the scope of the applicability of these statutory exceptions to the consent requirement, taking into consideration the legal concepts relating to each of the foregoing types of corporate actions under the Korean Commercial Code and the legislative intent behind the enactment of such statutory exceptions,

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as well as the interpretations and views held by the relevant regulatory authorities on this subject matter. In recognition of the practical ramifications of applying these statutory exceptions to the consent requirement in the Korean data privacy context, this paper calls for the need for a more flexible application of such statutory exceptions in certain corporate structural changes.

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I. Legal Framework of Korean Data Privacy: An Overview

Since the enactment and enforcement of the Personal Information Protection Act (the “PIPA”) in 2011,¹⁾ the importance of data privacy as an area of law has steadily increased. While the PIPA had its predecessors, such as the Act on the Protection of Personal Information Maintained by Public Institutions²⁾ for the public sector and the Act on the Promotion of Information and Communications Network Utilization and Information Protection (the “IT Network Act”)³⁾ in the private sector, and although the IT Network Act was intended to apply broadly so that it would apply to the data collection and processing of even non-IT network service providers in certain areas, these existing laws had certain limitations in terms of the scope of protection provided and their enforcement scheme. Having been enacted to deal with such limitations, the PIPA has since come to assume the position of a comprehensive and general statute governing data privacy in South Korea.

As compared to the data privacy laws in other countries, the PIPA has notably distinguishable characteristics, namely the principle of stringent application of the consent requirements. For example, unlike the U.S. data

1) Gaein Jeongbo Bohobeop [Personal Information Protection Act (the “PIPA”)].

2) Gong-gong Gigwan Ui Gaein Jeongbo BohoAe Gwanhan Beopryul [Act on the Protection of Personal Information Maintained by Public Institutions].

3) Jeongbo Tongsinmang Yiyongchokjin Mit Jeongbo Boho Deung-ae Gwanhan Beopryul [Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (the “IT Network Act”)].

privacy scheme which is largely based on notification of sufficient information, the legal framework of Korean data privacy is built upon a system of consent to allow for the data subject's exercise of his/her constitutional right in deciding whether or not to consent to the collection or processing of his/her personal information. This consent-based legal framework is intended to afford the data subjects the ability to control the collection and processing of their personal information by allowing them to exercise their independent judgment in either consenting to or rejecting consent.

Another feature of the Korean data privacy law is that it requires the data subject's consent to be based on sufficient information notified by the data handler. In particular, the law requires certain specific information to be disclosed to data subjects in advance. On the other hand, the extent of the specificity of the information required for this purpose poses practical challenges from a legal compliance standpoint. A prime example of this is the requirement that the data handler specify all third parties to whom the data subject's personal information may be provided (including sharing of such personal information) and obtain the data subject's consent thereto. The extent of the specificity required for this purpose is generally construed as identifying the third-party recipient of the information by the name (if an individual) or the trade name (in case of a business entity), and this also appears to be the position held by the relevant regulatory authorities. This is quite different from the standards under Europe's Data Protection Directive 95/47EC or the General Data Protection Regulation ("GDPR"), which allow such third-party recipients of the information to be identified by categories rather than by any specific identity. In addition to the disclosure of the specific identities of all third-party recipients, the PIPA requires data handlers to clearly notify data subjects of the following: (i) the purpose of the provision of the information, (ii) the items of personal information to be provided to the third party, (iii) the information retention period, (iv) the data subject's right to reject the consent, and (v) the disadvantages to the data subject for rejecting the consent, if any.⁴⁾ A notice which is lacking any of the foregoing enumerated items of information will

4) PIPA art. 17(2).

be deemed insufficient, thereby rendering the information sharing with the third party legally noncompliant. A data handler failing to notify the data subjects of the foregoing items of information may be subject to an administrative fine of up to KRW 30 million.⁵⁾ Further, consent which is based on a notice that is significantly lacking in the required information may be subject to challenge as to its validity.

There are, however, several exceptions to the consent requirement under the PIPA, namely in connection with the collection of personal information and the provision of personal information to a third party.⁶⁾ For example, where the collection of personal information is inevitably necessary to execute and/or to perform a contract to which the data subject is a party, no separate consent is required.

Another context to which the consent exception is applicable is in the case of a corporate structural change involving such transactions as mergers and divestitures of a business or an asset resulting in the transfer or assignment, either in whole or in part, of certain rights and/or obligations (each a “Corporate Structural Change”). The legislative intent for providing such exception is in view of the fact that despite the large volume of data transfer which necessarily results from such corporate action, the purpose for which such information has been collected will not change following the consummation of the Corporate Structural Change. This particular type of exception to the consent requirement is provided in Article 27 of the PIPA and Article 26 of the IT Network Act. As with some of the other aspects under the Korean data privacy scheme, however, the application of such exception to the consent requirement raises certain issues from a practical standpoint. This paper discusses the basic rule applicable to the processing of personal information in the context of a Corporate Structural Change and, particularly, the practical issues associated with the legal compliance in this regard, as well as the practical solutions for each of such issues.

5) *Id.*, art. 75(2)(1).

6) *Id.*, art. 15(2) and art. 17(2).

II. Protection of Personal Information in the Context of a Corporate Structural Change

1. *The PIPA*

As discussed in Section I of this paper, the provision of personal information to or sharing of such information with a third party requires the notice to and consent from the data subject, prior to the provision of the information to the third party. However, in the case of a Corporate Structural Change, there are practical challenges to complying with the foregoing requirement. As such, in the case of the data transfer involving a Corporate Structural Change, the PIPA provides certain exceptions to the consent requirement as follows:

Article 27 (Limitations to Transfer of Personal Information Following Business Transfer, etc.)

(1) A personal information handler shall notify in advance the data subjects of the following matters in a manner prescribed by the Presidential Decree in the case of the transfer of personal information to a third party by way of a transfer of some or all of the business, a merger, etc.:

1. The fact that the personal information will be transferred;
2. The name (referring to the company name in case of a legal person), address, telephone number and other contact information of the recipient of the personal information (the “Business Transferee”); and
3. The method and procedure by which the data subject can withdraw the consent if he/she does not wish to have his/her personal information transferred.

(2) Upon receipt of the personal information, the Business Transferee shall, without delay, notify the data subjects of the fact in a manner prescribed by the Presidential Decree, except where the personal

information handler has already notified the data subjects of the fact of such transfer pursuant to paragraph (1).

(3) Upon receipt of the personal information as a result of the business transfer, a merger, etc., the Business Transferee may use, or provide a third party with, such information only for the original purpose [for which the information has been collected] prior to the transfer. In this case, the Business Transferee shall be deemed the personal information handler.

Article 75 (Administrative Fines)

(3) Anyone failing to do the following shall be subject to an administrative fine not exceeding KRW 10 million.

6. A person who fails to notify data subjects of the transfer of their personal information in violation of Article 27 (1) or (2).

Article 29 (Notification of Transfer of Personal Information Following Business Transfer, etc.)

(1) The methods of notice prescribed in the Presidential Decree relating to Article 27 (1) of the Act and the main sentence of Article 27 (2) means in writing, etc.⁷⁾

(2) Where a person who intends to transfer personal information to a third party pursuant to Article 27 (1) of the Act is unable to notify the data subjects of the items prescribed in subparagraphs of Article 27 (1) of the Act in the manner prescribed in paragraph (1) and such inability is not due to the person's negligence, the relevant items may be posted on the website for at least 30 days; provided that a business transferor, etc. without an operating website may post a notice of such items at a readily visible location at such person's workplace, etc. for at least 30 days.

⁷⁾ "In writing" in this context means writing, email, facsimile, telephone, text messages, and/or any other equivalent methods. See Gaein Jeongbo Bohobeop sihaengryung [Enforcement Decree of the PIPA] art. 28 (4).

A more detailed analysis of the data privacy implications under the PIPA relating to Corporate Structural Change is discussed in Section IV below.

2. *The IT Network Act*

Article 26 of the IT Network Act also provides for a similar exception. The IT Network Act governs data privacy between IT network service providers and their users. The term “IT network service provider” is construed very broadly and does not require, for example, that such service provider be engaged in the provision of the Internet services. Rather, any business operator which utilizes the Internet to conduct its business would be deemed an IT network service provider and thus will be subject to the IT Network Act. However, the exceptions to the consent requirement provided for business transfer under the IT Network Act are distinguishable from those under the PIPA in several respects as follows:

First, whereas the PIPA imposes the primary responsibility for notification of the data transfer on the transferor—thereby relieving the transferee of such responsibility if the transferor has complied with the notice requirements—the IT Network Act imposes such responsibility on both the transferor and transferee on a cumulative basis.

Second, as for the means of notice, the PIPA requires written notice to individual users or data subjects and permits the posting of the notice on the data handler’s website only where such individual notices are not feasible. In this regard, a plain reading of the IT Network Act appears to permit data handlers to satisfy the notice requirement simply by posting the notice on their website, without the need to notify through other means of writing such as email, writing, facsimile and/or telephone. Meanwhile, the Korea Communications Commission, the relevant regulatory agency enforcing the IT Network Act, takes the position that the notice required under the IT Network Act is also the type of the individual notice required under the PIPA, even though such interpretation does not seem to conform to the plain reading of the IT Network Act.⁸⁾

8) Korea Communications Commission, Explanation on Statutory Provisions relating to

Third, where notification by posting on the website is not feasible, for example, due to a force majeure event or other justifiable reason, the IT Network Act allows notification by at least one-time publication in a daily newspaper.⁹⁾ Such notice by publication in a newspaper as an alternative means of notification is not available under the PIPA.

Fourth, where the data subject wishes not to have his/her personal information transferred to a third party, the PIPA requires the data handler to specify in the notice the “measures which can be taken by the data subjects and the procedures thereof,”¹⁰⁾ whereas the IT Network Act provides that the data handler must notify the data subjects of the “means and the procedures for withdrawal of their consent.”¹¹⁾ Given that there are certain instances where the collection and processing of personal information are permitted even in the absence of the data subject’s consent thereto,¹²⁾ the ability of the data subject under the PIPA to demand the deletion of his/her personal information as one of the measures which can be taken appears to be more reasonable than the mere ability to withdraw consent under the IT Network Act.

3. *The Credit Information Act*

The Credit Information Use and Protection Act (the “Credit Information Act”)¹³⁾ governs the collection and processing of credit information which has been obtained or created during the course of the data handler’s conduct of business. The Credit Information Act is intended to serve as the primary data privacy law governing the use and protection of credit information, except as otherwise explicitly provided under the PIPA.¹⁴⁾

As in the PIPA, the Credit Information Act has specific provisions

Protection of Personal Information for IT Service Providers, September 2012, pages 122 to 123.

9) Enforcement Decree of the IT Network Act art. 11.

10) PIPA art. 27(3).

11) IT Network Act art. 26-3.

12) For prime examples, see the PIPA arts. 15(1)(2) and 15(1)(6); and the IT Network Act art. 22(2).

13) Shinyong Jeongbo Ui Yiyong Mit BohoAe Gwanhan Beopryul [Credit Information Use and Protection Act (the “Credit Information Act”).

14) Credit Information Act art. 3-2.

relating to the transfer or provision of “personal credit information” in the case of a Corporate Structural Change. “Personal credit information” is defined under the law as the information necessary to assess an individual’s credit worthiness or ability to engage in credit transactions, the specific types of which information are further described in the Presidential Decree.¹⁵⁾ Specifically, in such cases, the Credit Information Act permits the transfer or provision of the personal credit information without a separate consent from the data subject¹⁶⁾, provided that the data subject has been notified of such transfer or provision and the reasons therefor.¹⁷⁾

Prior to the 2015 amendments to the Credit Information Act, it was unclear whether the notice required in this context must be a prior notice or whether a notice after the fact would also suffice for purposes of complying with the law. As amendments effective as of March 11, 2015, the Credit Information Act now explicitly requires a prior notice for any transfer or provision of personal credit information in connection with a Corporate Structural Change. The only exception to this requirement is where an exigent circumstance makes it infeasible to provide prior notice, in which case an after-the-fact notice by posting on the website or other similar means is permitted. In this regard, the Enforcement Decree of the Credit Information Act sets forth the timing and the specific means relating to such prior and after-the-fact notices. The details are as below the table.¹⁸⁾

Reasons for Provision or Transfer of Personal Credit Information	Transfer of personal credit information as part of the transfer, in whole or in part, of certain rights and/or obligations resulting from a business transfer, divestiture, mergers, etc. pursuant to Article 32(6), Item 3 of the Credit Information Act.
Person Making the Notice	Provider of personal credit information
Timing of Notice	Prior to provision of personal credit information

15) *Id.*, art. 2(2).

16) *Id.*, art. 32(6)(3).

17) *Id.*, art. 32(7).

18) Enforcement Decree of the Credit Information Act art. 28(1) Exhibit 2-2.

Methods of Notice	<p>Per the methods described below:</p> <p>a. Normal circumstances: By writing, telephone, text message, email, facsimile, and other similar means of individual notification.</p> <p>b. In cases where the data subject's contact information is unknown without any willful or negligent act on the part of the data handler: By any method prescribed in the Presidential Decree to Article 34(2)(2) of the Credit Information Act: (i) by posting the notification on the website; (ii) by making the notification available to the data subject at the data handler's place of business or shop; or (iii) by publishing the notification in a daily or weekly newspaper available for general circulation in the relevant administrative city district where the data handler's main place of business is located, or in an Internet newspaper.</p>
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In addition, a financial institution intending to transfer or provide personal credit information in connection with a Corporate Structural Change must obtain an approval from the Financial Services Commission as to the extent of the personal credit information to be transferred to the third party, as well as the management and safeguard measures for personal credit information maintained by such third party.¹⁹⁾ Meanwhile, following the 2015 amendment to the Credit Information Act, any personal credit information which has been collected pursuant to such approval by the Financial Services Commission must be maintained separately from the data subject's other personal credit information.²⁰⁾

19) Credit Information Act art. 32(8); and Enforcement Decree of the Credit Information Act art. 28(13) and art. 28(14).

20) Credit Information Act art. 32(9); and Regulation on Supervision of Credit Information Businesses art. 38(4). Regarding this separate maintenance requirement, the Regulation on Supervision of Credit Information Businesses provides that: (i) the person who has been provided personal credit information pursuant to Article 32(8) of the Credit Information Act must maintain such information after marking it as information which has been received as part of a business transfer, divestiture or merger, etc.; and (ii) if such personal credit information, at the time of receipt by the data handler, relates to an already concluded transaction and thus is maintained separately by the data handler, then such personal credit information must be marked as provided in item (i) and managed separately

III. Review of Foreign Data Privacy Laws Applicable to Corporate Structural Changes

1. Overview

As is the case under the Korean data privacy scheme, many countries, namely the EU member states, the U.S. and Japan also provide certain exceptions with respect to the transfer or sharing of personal information (or consumer financial information), especially where such information-sharing occurs as a result of a Corporate Structural Change as further described below.

2. The EU

The Data Protection Directive 95/46EC (the “EU Directive”), which has been the primary source of data privacy guideline for the EU member states, does not have a separate provision governing the Corporate Structural Changes and instead treats the transfer or sharing of personal data in such cases in the same manner as in other general instances. In short, the EU Directive applies the uniform principle to all third-party transfer or sharing of personal data, which permits the transfer of personal information by the data controller in the following circumstances: (i) upon the data subject’s consent, (ii) where a legitimate interest of the data controller or the third party receiving the personal data exists, or (iii) to perform a contract in effect between the data controller and the data subject.²¹⁾ The GDPR, which will come into force in 2018 and replace the EU Directive, also adopts a similar principle. Under the GDPR, therefore, the prevailing view appears to be that the transfer or sharing of personal data due to a Corporate Structural Change would be deemed valid if

from the relevant data subject’s other personal credit information. In this regard, the “separate management” of personal credit information which requires a separate marking and maintenance is distinguishable in concept from the separate management typically used in the Korean data privacy context.

21) Data Protection Directive 95/46 EU art.7.

consented by the data subject, necessary to serve a legitimate interest of the data controller or the third-party recipient of the data, or to perform a contract.

Under normal circumstances, therefore, the transfer of personal data as a result of a Corporate Structural Change is generally construed as serving the legitimate interest of either the data controller or the third-party recipient under the EU system. Accordingly, in such instances, no separate consent of the data subject would be required even under the EU system.

3. *The U.S.*

Since data privacy in the U.S. is generally governed by various state laws without a uniform, statutory scheme at the federal level, there is also no specific U.S. statutory provision relating to the transfer or sharing of personal data in the context of a Corporate Structural Change. It should be noted, however, that where the transfer of personal data as part of a Corporate Structural Change is carried out in violation of the data controller's privacy policy, such conduct may be deemed by the U.S. Federal Trade Commission as a deceptive, unfair or anti-competitive transaction actionable under the Federal Tort Claims Act.²²⁾

In the case of the transfer or sharing of consumer financial information by a financial institution, the Gramm-Leach-Bliley Act requires that the customer be notified and be given an opportunity to opt-out,²³⁾ except in certain instances including the sale, transfer, exchange, merger of the data controller's business, in whole or in part, in each of which cases neither a separate notice nor a right to opt-out need to be provided to the customer.²⁴⁾

4. *Japan*

The Act on the Protection of Personal Information of Japan (the "APPI") explicitly provides for the data privacy implications associated with

22) In the Matter of GeoCities, A Corporation, Federal Trade Commission, Docket No. C-3850 (Feb. 5, 1999).

23) Gramm-Leach-Bliley Act (1999) Sections 6802(a) and (b).

24) *Id.*, Section 6802(e)(7).

Corporate Structural Change, under which an exception to the consent requirement is available.²⁵⁾ As in most of the other countries mentioned above, the Japanese data privacy scheme also operates under the principle of requiring the data subject's consent in the case of a third-party transfer or sharing of personal information. However, in the context of a data transfer or sharing in connection with a merger or other similar assignment or succession of business, the recipient of such information is not deemed a "third party" under the APPI²⁶⁾ and thus no separate consent is required for such purpose, absent a change in the purpose for the collection and use of the information. In this regard, the requirement that the information recipient must use the information only for the same purpose for which the information has been collected in the first place is similar to the requirement under the Korean data privacy laws.²⁷⁾

IV. Data Privacy Implications of Corporate Structural Change under the PIPA

This Section of the paper discusses in detail Article 27 of the PIPA which governs the transfer or sharing of personal information in the context of the Corporate Structural Change, and, in particular, the scope of applicability, the requirements and the effects (or the restrictions applicable to the third-party recipient information) thereunder.

1. Legislative Intent

Article 27 of the PIPA is intended to allow the transfer of personal information without a separate consent from the data subject in the case of a Corporate Structural Change, provided that the data subject has been notified of such transfer in advance. Specifically, in a typical corporate merger whereby the surviving company or the buyer acquires the target

²⁵⁾ See generally, the Act on Protection of Personal Information ("APPI") art. 16(2) and art. 23(4)(2).

²⁶⁾ *Id.*, art. 23(4)(2).

²⁷⁾ *Id.*, art. 16(2).

company in its entirety, including all of the target's assets, businesses and liabilities, despite the actual transfer of the personal information maintained by the target to the surviving company as a result of the merger, the prevailing view among the Korean data privacy practitioners is that such transfer is necessitated by the merger and thus is not a typical type of data transfer requiring a separate consent under the law. However, the law is intended to afford the maximum amount of protection to data subjects and thus allows the data subjects to be notified in advance of such transfer and to request the measures to be taken if the data subject wishes not to have his/her personal information transferred.

On the other hand, a business transfer—which is a limited transaction by its nature as compared to a merger—would be, in the absence of the specific provisions under Article 27, regarded as a typical data transfer triggered by a specific event (as opposed to the comprehensive nature of a corporate merger), and thus should be subject to the prior consent requirement. However, with a view towards facilitating the contemplated business transaction, Article 27 nonetheless exempts data handlers from having to obtain the data subjects' prior consent in connection with a business transfer, provided that the data handler has given prior notice to the data subjects.

2. Scope of Applicability

While Article 27 explicitly mentions “the transfer of business, in whole or in part, a merger, etc.,” it does not provide for the data transfer implications associated with every type of business transaction, and this leaves much to be answered at the practical level. When applied in practice, the precise scope of the applicability of Article 27 should be reviewed in view of the potential impact on the data subjects' legal rights to determine the use of their personal information and the need to maximize the benefits of the business transaction contemplated under the particular Corporate Structural Change.²⁸⁾ Therefore, in deciding the scope of its applicability in

28) Kim Hyunkyung, *A Review on Legal Principle of 'Personal Information' as 'Business Assets' in Business Transfer of the Commercial Act*, Kyungpook Natl. Univ. Law Journal, Vol. 38 (Feb. 2012), pages 309 to 310.

practice, the potential impact of Article 27 needs to be analyzed on a case-by-case basis and in the totality of the relevant circumstances. The following discusses the applicability of Article 27 under each type of the Corporate Structural Changes.

1) Transfer of Business (in Whole or in Part)

Since the PIPA provides no specific definition for the term “business transfer,” it would be reasonable to refer to such definition provided under the Korean Commercial Code (the “KCC”).

Business transfer is covered under the KCC where it provides for the respective rights and obligations of the buyer and seller, as well as their respective legal relations to third parties,²⁹⁾ and also in the context of the business transactions subject to a separate approval by the shareholders.³⁰⁾ In this regard, the Korean Supreme Court regards all of the foregoing types of business transfers as being equal and thus does not differentiate one type of business transfer transaction from the others. Specifically, the Court regards a business transfer as a certain type of contract, pursuant to which a business – which is a functional asset of an organic organization – is transferred for a specific commercial purpose and the subject business continues its existence after the closing of the transaction.³¹⁾ The business assets subject to such transfer includes both the active and passive assets indicated in the balance sheet, and thus include all assets, liabilities, personnel, customers, management organizations, business know-how and trade secrets relating to the business being transferred, as well as any other assets having proprietary value in connection with such business.

In this sense, from a commercial/business transactional standpoint, a business transfer is distinguishable from an asset sale and purchase – regardless of whether such sale and purchase concerns the entire asset or a part thereof.³²⁾ However, as to whether this distinction should be considered in determining the scope of the applicability of Article 27, there

29) Sangbeop [Korean Commercial Code] Chapter 1, art. 42 and art. 45.

30) *Id.*, art. 374.

31) Supreme Court of Korea, 2007Da89722, April 11, 2008, etc.

32) Heechul Kang, *Legal Aspects of Sale and Purchase of Business*, BFL No. 38, 2009, pages 39 to 40.

appears to be no consensus among the data privacy practitioners in Korea. Whereas the KCC differentiates the transfer of a “material business asset” from that of other assets by subjecting the former to a special shareholders’ resolution, applying such differentiation appears to be of little practical value from a data privacy standpoint. As such, in determining the applicability of Article 27 in the context of an asset sale and purchase, the materiality of the subject asset would be irrelevant.

2) *Mergers*

A corporate merger refers to the combination of two or more business entities by contract.³³⁾ While there are various types of merger, the most prevalent form of merger involves the merging of an entity into another existing company, with the latter surviving after the consummation of the merger. This type of merger is distinguishable from the other types of Corporate Structural Changes in that the entity which is merged into the surviving entity ceases to exist upon the closing of the merger without the need for a separate winding down of the business, and also the surviving entity assumes all assets and liabilities of the other entity. Irrespective of the particular type of merger, from a data privacy perspective, there appears to be no question that all such transactions are subject to Article 27 of the PIPA and/or its counterparts under the other applicable data privacy laws.

3) *Other Forms of Corporate Structural Changes*

The issue arises, however, in determining the precise scope of the applicability of Article 27, as the statute does not enumerate every type of Corporate Structural Changes. This is of a particular issue in the case of asset sales and purchases and corporate divestitures. The data privacy implications associated with each of these types of Corporate Structural Changes are discussed below.

a. *Asset Sale and Purchase*

Whereas a business transfer involves the transfer and assignment of all of the assets related to the particular business subject to the transaction and thus is comprehensive in its nature, an asset sale and purchase is limited to

33) Gunsik Kim, *Company Law* 734 (Pakyoungsa 2015)

the sale of a specific asset of the seller. In this regard, in light of the legislative intent in relaxing the consent requirement relating explicitly to the transfer of personal information in the case of a business transfer, the statutory interpretation supported by the Ministry of Government Administration and Home Affairs is that where the practical effect of a particular asset sale and purchase is effectively a business transfer, then such transaction—albeit not technically a business transfer—should be afforded the exception to the consent requirement provided under Article 27.³⁴⁾

Meanwhile, as to whether Article 27 should apply to an asset sale and purchase which does not amount to a business transfer is the subject of controversy in practice. And, to date, there has been no official statutory interpretation on this point issued by the relevant regulatory authorities. However, it appears reasonable to construe that while such transaction may not constitute a business transfer under the KCC, given the legislative intent for Article 27, even an asset sale and purchase not amount to a business transfer should nonetheless be permitted to benefit from the relaxed requirements under the statute.

b. Sale and Purchase of Receivables or Debt

Another issue is whether Article 27 should apply to the transfer of personal information resulting from the transfer of receivables or debt. In line with the foregoing discussion on business transfer vis-à-vis asset sale and purchase, if the sale and purchase involves only the specific receivable or debt, then it appears unlikely that such transaction would be afforded the relaxed statutory requirement. Likewise, in the case of collective receivables or debt, unless such transaction arises to the level of a business transfer, it would be difficult to argue for the application of Article 27 solely on the basis of the “collective” nature of the debt transfer.

In this regard, the 2003 guideline issued by the Ministry of Government Administration and Home Affairs and other financial regulators provides that no consent of the data subjects is required, in principle, in cases of the transfer of receivables or debt, or other proprietary assets, if such transfer serves a business purpose, whereas the transfer of designated receivables or

34) Ministry of the Interior and Safety, Published Guidelines on Interpretation of Statutory Provisions relating to Protection of Personal Information, 2016, page 193.

debt would be subject to the data subject's notice.³⁵⁾ However, the position expressed in said guideline should probably not be extrapolated into making a generalization that all receivables or debt transfers should be permitted to avail of the relaxed consent requirement. Meanwhile, in the case of the transactions involving a large-scale collective debt structure (i.e., the so-called non-performing loans), or other large-scale transfers of receivables or debt, it could be argued that such transactions are subject to Article 32(6), Paragraph 3 of the Credit Information Act, which is the equivalent to Article 27 of the PIPA applicable to personal credit information.³⁶⁾ However, despite that each such transaction would then be subject to Article 8 of the Credit Information Act and thus be subject to an approval by the Financial Services Commission, there has been no reported case of the parties to these types of transaction seeking such approval in practice to date.

c. Corporate Divestitures

As in the case of the corporate mergers involving a comprehensive transfer of all assets and liabilities, the general view on the data transfer implications associated with corporate divestitures appears to be that the transfer of personal information in a divestiture which results in a comprehensive Corporate Structural Change should be permitted with only the notice to the data subjects without the need to obtain a separate consent from the data subjects.³⁷⁾

The most common forms of corporate divestitures include a regular spin-off and a spin-off combined with a merger. Spin-offs can further be categorized into horizontal spin-offs and vertical spin-offs, depending on whether the shares in the newly created entity after the spin-off are owned pro rata by the existing shareholders of parent company (in the case of a horizontal spin-off) or by the parent company (in the case of a vertical spin-

35) Ministry of Government Administration and Home Affairs et al., Published Guidelines on Financial Aspects relating to Protection of Personal Information, July 2013, page 55.

36) Hyeok-Joon Rho et al., *Restructuring of Financial Institute and Data Transfer*, BFL No. 66, 2014. 7., page 44. Meanwhile, in Japan, the competent authority stated its opinion that the implied consent of debtor is presumed in this case.

37) Ministry of the Interior and Safety, Published Guidelines on Interpretation of Statutory Provisions relating to Protection of Personal Information, 2016, page 192.

off). A typical spin-off involves the separation of a part of the parent company's business into a separate entity, and it is not common that a spin-off involves the separation of only certain assets of the parent. Meanwhile, the subject of the spin-off must be limited to the property specified in the spin-off plan; it is, however, not necessary that such spin-off property described in the plan be further specified into any particular assets and liabilities. As such, in practice, the personal information which is subject to the transfer under a spin-off is also usually not specified: Rather, the existence of such information would be implied as part of the contracts to be transferred in the spin-off (i.e., the terms and conditions in effect with the customers, employment contracts, etc.).

Under both the horizontal or vertical spin-offs, while the actual party managing the personal information database following the data transfer would be a different entity from the one which originally collected the data, there appears to be no logic in treating the data transfer in such cases in any different manner than in the case of a business transfer. Accordingly, it appears reasonable to have Article 27 of the PIPA apply to the data transfer associated with a corporate spin-off. Nonetheless, considering the legislative history which intended to protect the data subject's right to self-determine the use of his/her personal information while facilitating the data transfer in instances where the use of the data will be limited to the same purpose for which the data was originally collected, the application of Article 27 in the context of corporate spin-offs poses certain unique issues as follow:

First, there is a potential issue as to whether the decision to transfer one's personal information to a third party, which is the right exclusively attached to a person, may be effectuated as part of a comprehensive transfer of rights without the consent of the data subject, in light of the Korean Supreme Court decision which has explicitly excluded personal rights from the subject of a comprehensive transfer even where such rights are specifically listed in the spin-off plan or the contract for the spin-off, absent the specific law permitting such comprehensive transfer of rights.³⁸⁾ Given that corporate spin-offs are not explicitly included as one of the

38) Supreme Court of Korea, 2010Da44002, August 25, 2011, etc.

Corporate Structural Changes to which Article 27 applies, an outright application of Article 27 to corporate spin-offs warrants a careful review.

Secondly, unlike in the case of a regular merger or a consolidation where all of the personal information of the original data handler would be transferred to the surviving entity (in the case of a regular merger) or the newly-created entity (in the case of a consolidation) without leaving any portion of the personal information with the original data handler, since a corporate spin-off involves the divestiture of a portion of the company's business to another entity, there could be instances where the original data handler may need to retain some or all of the personal information that was the subject of the transfer even after the consummation of the spin-off. In such case, while the newly-created entity's use and processing of the transferred personal information would be governed by Article 27(3), there is no such statutory provision relating to the original data handler that would be applicable to the post-spinoff situation. Even in the absence of such explicit statutory provision, however, it would be reasonable to view that the extent of the original data handler's use and processing of the personal information should not be identical to the days of the pre-spinoff, as the scope and nature of the original data handlers' business may have changed following the spin-off.

On the other hand, the Credit Information Act explicitly provides for corporate spin-offs under Article 32(6), Paragraph 3, thereby exempting the consent requirement in the case of corporate spin-offs.

d. Share Purchase and Sale and Comprehensive Transfer or Exchange of Shares

A sale and purchase of shares and the comprehensive transfer or exchange of shares is yet another form of Corporate Structural Change which could have implications from a data privacy standpoint. In the case of a share purchase and sale, the issuer's existing rights and obligations, including those relating to its receivables or debts, remain the same after the transaction with there being only a change in the shareholders. In such case, however, since there will be no change in the entity managing the personal information even after the consummation of the transaction and thus there will be no transfer of personal information, it will be reasonable to view such transaction as not constituting one of the Corporate Structural Changes covered under Article 27 of the PIPA and thus no separate notice

to the data subjects would be required in such transaction.³⁹⁾

3. Legal Requirements for Data Transfer

As explained above, the transfer of personal information in connection with a Corporate Structural Change pursuant to Article 27 of the PIPA can be effectuated by giving notice to the data subject without the need to obtain a separate consent from the data subject. The PIPA provides the specific methods of notice for this purpose.

1) The Notifying Party

In principle, both the seller (i.e., the original data handler) and the buyer (i.e., the third-party recipient of information) have the legal obligation to notify the data subjects of the data transfer in the event of a Corporate Structural Change. However, the statutory provision stipulates that once the seller has fulfilled its legal obligation by notifying the data subjects in a manner compliant with the law, this will effectively relieve the buyer from its own notice obligation. The IT Network Act, on the other hand, strictly adheres to the foregoing principle of dual notification; and, thus, the seller and the buyer must each fulfill the notice requirement. Therefore, in a typical business transfer or an asset sale and purchase transaction under both the PIPA and the IT Network Act, it is good practice to require the seller to fulfill the seller's notice obligation prior to the closing of the transaction by including such provision as a condition precedent to closing.

2) Content of Notice

The notice required in this context must include the following information:⁴⁰⁾

1. The fact that personal information will be transferred;
2. The name (referring to the company name in case of a legal person), address, telephone number and other contact information

³⁹⁾ Jaeyoung Seo, *Company Restructuring and Personal Information Transferring*, Seoul National University, pages 66 to 67.

⁴⁰⁾ PIPA, art. 27.

of the recipient of the personal information (the “Business Transferee”); and

3. The method and procedure by which the data subject can withdraw the consent if he/she does not wish to have his/her personal information transferred.

As applied in practice, the notice needs only to state that the data subject’s personal information will be transferred, and there is no explicit requirement that such notice specify the information to be transferred. As such, from a practical standpoint, it does not appear to be in violation of Article 27 to describe the data to be transferred in a broad, descriptive manner.

Meanwhile, the prior notice aspect of the requirement poses certain practical difficulties, as the notice must be provided to the specific individuals whose personal information will be subject to the transfer. In the context of a Corporate Structural Change, since the proposed business transaction often needs to be kept in confidence, the precise timing of the prior notice must be carefully calculated to minimize any potential adverse effect on the transaction being contemplated while ensuring legal compliance from a data privacy standpoint.

3) Methods of Notice

The notice required in this context must be in writing. According to the Presidential Decree to Article 27 of the PIPA, such written methods include notice by writing, email, facsimile, telephone, text message, or by other equivalent means.⁴¹⁾ The critical factor here is that such notice must be, in principle, provided to the data subjects on an individual basis given the intended purpose of the notice. Where the data subject’s precise contact information is not known to the data handler, the data handler will not be deemed to have complied with the notice requirement solely for attempting to notify using such unverified contact information. In the foregoing case, the data handler must additionally post the notice on its website for at least 30 days to be compliant with the law.

41) Enforcement Decree of the PIPA art. 28(4).

In addition, the data handler intending to transfer personal information in connection with a Corporate Structural Change but is unable to individually notify the data subjects using the methods prescribed in Article 27 of the PIPA through no willful or negligent act on the part of the data handler, then the data handler must post the notice on its website for at least 30 days. In the case where the data handler does not operate a website, such notice may be posted at the data handler's place of business or at another place where the notice would be easily accessible for at least 30 days.

4) Timing of Notice

The notice must be given in advance and on an individual basis, provided that where such individual notice is not feasible, notice by posting (for a minimum of 30 days) as described in Section (3) above may be used in lieu of the individual notice. There is, however, no definitive authority on the precise timing for the notice. One school of thought subscribes to the notion that the notice should be given at the time of the data handler's execution of the agreement for the proposed Corporate Structural Change,⁴²⁾ while another view holds that the timing of the notice should be at the time of the actual transfer of the personal information database rather than at the time of the execution of the agreement.⁴³⁾ Considering the legislative intent, it appears that the most appropriate timing for the notice would be at the time of the actual data transfer. In practice, therefore, in the case of a merger, this would be at the time the merger takes legal effect; and, as for a business transfer, this timing would be when the transferred assets can be first physically released to the buyer (i.e., the date of the deal's closing). It may also be possible for the parties to the transaction to separately agree on the timing of the data transfer.

Meanwhile, the buyer's notice obligation is triggered once the personal information has been transferred to the buyer from the seller, and the buyer

42) Ministry of the Interior and Safety, Published Guidelines on Interpretation of Statutory Provisions relating to Protection of Personal Information, 2016, page 192.

43) Commentary on the IT Network Act (Parts written by Jinhwan Kim), as available on October 7, 2017 at <http://www.onju.com>; Korea Communications Commission, Explanation on Statutory Provisions relating to Protection of Personal Information for IT Service Providers, September 2012, page 123.

must fulfill its notice obligation if the seller fails to do so.

5) Restrictions on the New Data Handler's Use of the Transferred Personal Information

Following the business transfer, the transferee of the business (now the data handler) must use and share the transferred personal information only for the same original purposes for which the information was collected. Determining the precise scope of the "original" purpose, however, is not always easy in today's rapidly expanding business circumstances. A case in point can be illustrated by the following example: Suppose that Company A, a music record label, was merged into Company B, a consumer electronics manufacturer. Assuming that Company A had obtained the required consent from its consumers for marketing promotions relating to record distribution, there is no doubt that Company B may also continue to use the consumers' personal information for its marketing of the record distribution business. But what if Company B goes under another Corporate Structural Change, as a result of which, its electronics business and record distribution business are combined into one business? Would Company B be able to use the same consumer information for the marketing of its electronics products?

On the interpretation of the relevant provision under the IT Network Act pertaining to the above scenario, the Korea Communications Commission holds the view that where two companies, each dealing in a different type of product, merge into one and promote such different products in a combined manner, then even if the original data handler had obtained the consumer consent with respect to new product marketing, where such marketing relates to the promotion of two products of completely different nature which have been packaged together, then a separate consent is required.⁴⁴⁾ From a practical standpoint, however, an assessment of the scope of the original consent provided by the consumers must precede the determination as to the need for a separate consent. A strict application of the Korea Communications Commission's foregoing view in every instance where there is a difference in the businesses of the

44) Korea Communications Commission, Explanation on Statutory Provisions relating to Protection of Personal Information for IT Service Providers, September 2012, page 124.

original data handler and the new data handler seems to defy the legislative intent behind Article 27 of the PIPA.

V. Other Practical Implications: At the Preparation Stage for a Corporate Structural Change

As described in the foregoing, the typical context in which an Article 27 issue arises is in connection with a Corporate Structural Change, as a result of which the personal information that has been collected and retained by the target company is transferred to the acquiring company. Where such transaction is subject to either the PIPA or the IT Network Act, no separate consent from the data subjects is required with respect to the data transfer, but the data subjects must be notified of the transfer in advance and be provided with an opportunity to withdraw his/her consent or to otherwise object to the proposed transfer of data. Where the IT Network applies, the acquiring company has a separate obligation to notify the data subjects in addition to such obligation imposed on the seller or the original data handler. Moreover, if the data being transferred involves personal credit information, the data transfer must be approved by the Financial Services Commission. While such legal requirements may appear at first as imposing more burdensome obligations on the part of the data handler as compared with their foreign counterpart regulations, the Korean data transfer scheme relating to Corporate Structural Change may also be viewed as an attempt to strike a balance between the data subjects' right to self-determine the use of their personal information while attempting to facilitate business transactions.

There are, however, instances where the data transfer must precede the consummation of a Corporate Structural Change, and corporate due diligence is a case in point. A prospective buyer of a business would need to evaluate the target company by conducting due diligence on the target, which process almost always involves the prospective buyer's gaining access to personal information held by the target company to certain extent; and, the data transfer in such case occurs in the course of the prospective buyer's assessment of the prospects of proceeding with the business acquisition. Since the Korean data privacy laws governing Corporate

Structural Change are intended to apply to the transfer of personal information following a Corporate Structural Change rather than before, where the data transfer occurs prior to the consummation of a Corporate Structural Change—as in the case of the conduct of a corporate due diligence—this often poses practical dilemmas in determining whether the data handler can avail of PIPA's Article 27 or Article 26 of the IT Network Act. Unlike in the EU system wherein the transfer of personal data in the course of assessing the prospects of a business transaction would be deemed a legitimate interest for which no separate consent of the data subjects is required, since the basic premise under the relevant Korean data privacy laws is that the consummation of the Corporate Structural Change must precede the data transfer, the transfer of personal information as part of a corporate due diligence would not be covered under the plain reading of these Korean laws.

Even under an expansive interpretation or inference of the relevant statutory provisions, having to notify the data subjects of the data transfer in advance in the context of a corporate due diligence works against the need to keep the proposed transaction confidential at the due diligence stage of the deal. As such, the recommended practice is to proactively preclude any transfer of personal information at the due diligence stage. Nonetheless, there are instances where personal information is an integral part of the information to be reviewed during the due diligence, such as where the proposed Corporate Structural Change contemplates imposing a lock-up restriction with respect to certain executives of the target company, or where it is necessary to review the content of a technology license or evaluate the intellectual property rights held by the key members of the target company.

Given the foregoing, there is a view advocating a move away from the strict interpretation and enforcement of data privacy laws in the context of Corporate Structural Change. For example, some argue that data transfer which lacks the data subject's consent in a business transfer or merger should not constitute a per se violation of the data privacy laws. Rather, the proponents of such view supports applying the justifiable act exception provided under Article 20 of the Criminal Act,⁴⁵⁾ which position is also

45) Commentary on the IT Network Act (Parts written by Jinhwan Kim), as available on

supported by the authors of this paper. In this regard, the Supreme Court has held that the existence of a justifiable act can be found upon showing of the following: (i) the justifiable purpose; (ii) the justifiability of the means utilized; (iii) the balancing of the benefits and protection of law; (iv) the existence of exigency; and (v) the existence of other supplementary factors.⁴⁶⁾

Accordingly, where the extent of the personal information to be reviewed during the course of a corporate due diligence is limited only to the minimum amount necessary to achieve the purpose of such due diligence and obtaining the data subject's consent conflicts with the necessity to keep confidential the existence of the due diligence and/or the prospects of the transaction, then such circumstance should be deemed to qualify as a justifiable act exception described above.

VI. Conclusion

The exceptions to the consent requirement provided under Article 27 of the PIPA and its counterparts under the IT Network Act and the Credit Information Act are the results of the legislative efforts to strike a balance between the data subjects' constitutional right to self-determine the use of their personal information against the need to facilitate commercial transactions in the rapidly changing business setting.

As illustrated in this paper, a uniform application of such statutory exceptions is not feasible as each type of the Corporate Structural Change serves a different business purpose and may impact the data subjects' right in a different manner. As such, the precise scope of the applicability of these statutory exceptions should be determined on a case-by-case basis, in each case, taking into consideration the balancing act intended in the legislative efforts described above.

