Regulation of Business Combination under the Antimonopoly Regulation and Fair Trade Act with Emphasis on the Case Law*

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Abstract

This article discusses the key issues in the regulation of business combinations in Korea by analyzing the more important among the recent decisions of the Korea Fair Trade Commission ("KFTC") involving business combinations. First, it discusses the formation of control relationship among the participants in a given business combination, with reference to the Merger Review Guidelines of the KFTC. Second, it discusses the delineation of the relevant market under Korean law. The Merger Review Guidelines specifies three dimensions for delineating a relevant market: (a) product, (b) geographic area and (c) stage of trade and counterparty. The factors considered by the KFTC when delineating a relevant market are presented and compared with the factors considered in foreign jurisdictions. The need for delineations of the relevant markets from a dynamic, rather than static, perspective is explained. Once the relevant market has been delineated, the KFTC evaluates whether the business combination at issue would substantially restrain competition in that relevant market. This article discusses the elements of such evaluation, both quantitative (including the use of market share data, purchase ratio data, CRK and the Herfindahl-Hirschman Index) and qualitative (including the consideration given to availability of imports, ease of market entry, possibility of collusion among competitors, and the market foreclosure effect). Finally, two exceptions to the prohibition against anticompetitive business combinations are discussed: (a) combinations that would bring about an enhancement of efficiency outweighing the anticompetitive effect and (b) combinations involving a failing company (as participant) where there is no less anticompetitive alternative for revitalizing that failing company.

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I. Introduction

Through recent developments in technology, changes in market conditions and partial or complete deregulation of industries, business combinations throughout the world have lately become both larger in scale and more likely to involve international as well as domestic participants. Korea, not being an exception to such trend, saw a steep rise in the incidence of business combinations, particularly during the 1997 financial crisis and shortly thereafter (when many financially troubled companies were sold off), and a corresponding rise in the volume of rulings by the Korea Fair Trade Commission ("KFTC") pertaining to business combinations.[1] With a particular emphasis on those rulings, this paper will take a general survey of the regulatory system governing business combinations under the Antimonopoly and Fair Trade Act ("AFTA"),[2] analyze the system's issues and consider means to improve it.

II. Definition and Types of Business Combination

Generally, "business combination" has been defined as a "process or form of combining companies that extinguishes the economic independence of those companies by unifying their corporate activities under a single management system through a consolidation of capital, personnel and organization"[3] or as a "consolidation of capital or personnel of multiple companies with the objective of forming a unified decision-making on a continuing basis, or of submitting to such a decision-making, with respect to business activities."[4]

Article 7 of the AFTA classifies business combinations into the following five

1) After the regulation of business combinations came into force in April, 1981 under the Antimonopoly and Fair Trade Act , the KFTC ordered corrective measures in only 4 business combination cases and approved 4 other business combination cases (subject to certain exceptions) during the 16 years until 1997, when the 1997 financial crisis erupted. However, during the 3 years from 1998 to late 2000, the KFTC ordered corrective measures in 9 business combination cases and approved 7 business combination cases (subject to certain exceptions).

2) Antimonopoly and Fair Trade Act (Law No. 3320, December 31, 1980, lastly revised on January 26, 2002, as Law No. 6651 (hereinafter, the "AFTA").

3) Oh Seung Kwon, Economic Law (Seoul: Bupmoonsa, 2d. Ed., 2000), p. 178.

4) Doo Hyung Do, *Problems with the Interpretation of the Clauses for the Regulation of Business Combination,* Attorneys Vol. 23, (Seoul: Seoul Bar Association, 1993), p. 87.

categories according to the form or method of the combination transactions: (1) stock acquisition; (2) interlocking directorate; (3) corporate merger; (4) business transfer; or (5) participation in the establishment of a new company. This classification is critical in determining not only whether a report would be required in advance, *ex post facto*, or not at all,[5] but also whether a given business combination would require the formation of a control relationship, as will be covered below.

A business combination can also be classified on the basis of the relationship among the parties in the relevant market as: (1) a horizontal integration (a combination among competitors, or companies producing or providing the same or similar kind of product or service within the same relevant market); (2) a vertical integration (a combination among companies that occupy different stages of production or levels of distribution of the same product or service); or (3) a conglomerate integration (a combination among companies that are neither in a horizontal nor vertical relationship). The KFTC applies different standards in gauging the anticompetitive effect of a given business combination, as described in the following section, depending on the category of the business combination.

III. Formation of Control Relationship

A business combination means a set of transactions whereby multiple companies forgo their economic independence and form a single economic entity; and the formation of a single economic entity may be accomplished through the formation of a single legal entity, as in the case of a merger or business transfer, or through the establishment of control by one company over others, by which means they act as a single economic actor in the market while remaining separate legal entities. However, a business combination effected through such means as a stock acquisition (including participation in the formation of a new company) or interlocking directorate does not necessarily lead to the establishment of a control relationship among the participants. Therefore, the gauging of the anticompetitiveness of such a business combination

5) Under the current AFTA, all business combinations may be reported after the consummation of the transaction, provided that if one of the parties to the merger, business transfer or participation in the establishment of a new corporation is a statutory large company *i.e.*, a company whose asset or annual sales volume is at least 2 trillion won (approximately US$1.54 billion at the current exchange rate of US$1 = 1,300 won), the transactions must be reported before the consummation of business combination. *See* the AFTA, *supra* note 2, Art. 12(5).

requires, as a preliminary step, the determination of whether a control relationship has come into being.[6] The criteria for this determination are set forth in Section V of the KFTC Notification on the Business Combination Review Guidelines[7] (the "Review Guidelines").

The Review Guidelines provide that a control relationship is formed between the combining companies under the following situations: (1) acquisition or ownership of shares; (2) interlocking directorate; and (3) participation in the incorporation of a new company.

A. Acquisition or Ownership of Shares

The Review Guidelines provide that a control relationship is formed in case of an acquisition or ownership of shares if: (1) the acquiring party and its Related Parties[8] (collectively, the "Acquiring Party") hold 50% or more of the total shares of the acquired party[9]; or (2) if the Acquiring Party's shareholding in the acquired party is less than 50% and: (a) the Acquiring Party has the largest shareholding ratio and in light of the distribution of shares is able to control the acquired company by the exercise of its shareholder' rights; or (b) the Acquiring Party supplies most of the materials required for the acquired party's production process, and the Acquiring Party is in a market-dominant position with respect to the supply of such materials.[10]

An example of a business combination that raised an anticompetitive concern in spite of a shareholding ratio below fifty percent (50%) is the case regarding the

6) For a view that the presence of a control relationship between the parties to a business combination is a requirement of a business combination, *see* Bong Ewe Lee, A Review of Joint Venture from an Economic Law Perspective-Focusing on the Concept of the Joint Venture and Competition Structure, A presentation at the Annual Symposium of the Korea Competition Law Society (May 2000).

7) KFTC Notification on the Business Combination Review Guidelines, No. 1999-2 (hereinafter, the "Review Guidelines").

8) "Acquiring Party and its related parties" includes acquiring parties and others having the relationships described in Article 11 of the Enforcement Decree of the AFTA (hereinafter, the "Decree") with the acquiring parties (including Related Parties, which participate in such business combination with the purpose of co-controlling the management of the acquired party, as described in Subparagraph 3 of the same Article). See the Review Guidelines, *supra* note 7, Art. II.3.

9) *Id.* Art. V.1.A.

10) *Id.* Art. V.1.B.

acquisition of the business (as opposed to the shares) of the Haitai Beverages Co., Ltd. ("Haitai") by Pyoungchon Development Co., Ltd., a joint venture company incorporated by Hotel Lotte Co., Ltd. ("Lotte") and four other companies (the "Haitai Case").[11] In that case, Lotte together with its corporate affiliates (i.e. all other Lotte Group companies-"Lotte Group Companies") held only 19% of the joint venture company. The KFTC, having found that Lotte had the common purpose of controlling the management of the joint venture company together with Hikari Printing Co., Ltd. ("Hikari") (the then-largest shareholder of the joint venture company) and certain other parties, ruled that a control relationship existed between Lotte and the joint venture company. The ruling also included a corrective measure providing that, if it turned out that the actual shareholding ratio of Lotte together with the Lotte Group Companies exceeded 19% of the joint venture company's shares, they would have to dispose of all of their shares in the joint venture company to a third party.

It is noteworthy that the KFTC found Lotte to have a control relationship with the joint venture company, despite that the majority interest in the joint venture company was held by Hikari. The KFTC's finding was based on the fact that Hikari was a party with the common purpose of controlling the joint venture company with Lotte, from whom a substantial portion of its sales (11.5%) was derived. In fact, the ruling indicates that the KFTC suspected that Lotte was the party effectively controlling the business of the joint venture company, although the KFTC did not expressly state as much.

In this regard, this ruling appears to have a logical inconsistency in it. The corrective measure in this case must have been predicated upon there being a control relationship between Lotte and the joint venture company, and the control relationship could only have been found to exist by considering Hikari as a Related Party to Lotte. In other words, the imposition of the corrective measure assumed that the shareholding ratio under the effective control of Lotte and the Lotte Group Companies did in fact exceed 19%. If so, there should have been no need to order a corrective measure which would become operative if Lotte and the Lotte Group Companies were found to own more than 19%. As of this writing, there have been no other precedents in which the control relationship was a critical issue in the context of a business combination.

11) KFTC Ruling No. 2000-70, (April 26, 2000).

B. Interlocking Directorate

The Review Guidelines provide that a control relationship exists if: (1) the number of directors or employees of the Acquiring Party who are also directors of the acquired party exceeds one third of all directors of the acquired party and by means of such interlocking management the Acquiring Party is able to exercise a substantial influence on the overall management of the acquired party;[12] or (2) an interlocking director or officer holds a post at the acquired party that grants the power to exercise substantial influence on the overall management of the acquired party, such as the representative directorship.[13]

To date, there has been no case in which an interlocking directorate alone formed the basis of a control relationship. For the most part, an interlocking directorate supplements, or occurs as a result of, a business combination effected through other means such as an acquisition of shares, transfer of business or merger; at any rate, a business combination effected solely by means of an interlocking directorate would be fairly unstable and therefore would be impracticable. For this reason, it is questionable whether an interlocking directorate should be considered a separate form of business combination.

C. Participation in the Incorporation of a New Company.

The Review Guidelines provide that the criteria for determining the formation of a control relationship in the context of participation in the incorporation of a new company will be the same as that for cases of increasing shareholdings in an established company, but does not add further details specific to cases of participation in the incorporation of a new company.[14] In this regard, the Haitai Case discussed above[15] is a good example.

In light of the recent rise in the formation of joint ventures as a means of strategic alliance or collaboration among companies (in many cases, competitors), business combination in this category is likely to raise antitrust concerns. Therefore, it would seem advisable for the KFTC to provide a reasonable standard in this area in the near

12) Review Guidelines, *supra* note 7, Art. V.2.A.

13) *Id.* Art. V.2.B.

14) *Id.* Art. V.3.

15) *supra* note 11.

future. We understand that the KFTC has been studying this issue for some time in order to formulate a guideline for joint ventures.

IV. Delineation of Relevant Market

A. The Significance of Market Delineation

The outcome of the issue of whether a business combination has a substantial anticompetitive effect may be radically different depending on the delineation of the area of trade, or relevant market. The AFTA defines the relevant market as an area of business in which competition takes place, or may take place, in terms of the product, stage of trade, or geographic area of trade.[16] The Review Guidelines provide in greater detail the standards for delineating a relevant market by reference to product, geographic area, level of trade and counterparty of trade, as well as the factors to be considered for each standard.[17] However, what is provided in the AFTA and the Review Guidelines is insufficient for the task of market delineation; nor have the case law and KFTC rulings treated the matter in depth.

B. Product Market

1. Criteria for Market Delineation in Foreign Countries

The 1992 Horizontal Merger Guidelines[18] (the "Horizontal Merger Guidelines") define product market as a product or group of products such that hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a 'small but significant and nontransitory'

16) AFTA, *supra* note 2, Art. 2. Sec. 8.

17) Review Guidelines, *supra* note 7, Art. VI.

18) Horizontal Merger Guidelines issued April 2, 1992, and revised April 8, 1997, by the U.S. Department of Justice and the Federal Trade Commission (hereinafter, the "Horizontal Merger Guidelines"). Note: the 1984 Non-Horizontal Merger Guidelines (hereinafter, the "Non-Horizontal Merger Guidelines") were originally issued as Section 4 of the "U.S. Department of Justice Merger Guidelines," June 14, 1984. All other sections of the 1984 Merger Guidelines have been superseded by the Horizontal Merger Guidelines. *See* http://www.usdoj.gov/atr/public/guidelines/ 2614.htm.

increase in price.[19] However, in United States v Du Pont & Co.[20], the Supreme Court held that "the [product] market is composed of products that have reasonable substitutability for the purposes for which they are produced," [21] and further, in Brown Shoe Co., Inc. v United States[22], the Court stated that "The outer boundaries of a product market are determined by the reasonable substitutability of use or the cross-elasticity of demand between the product itself and substitutes for it".[23]

Although the European Court of Justice does not seem to have issued a clear opinion concerning the definition and delineation criteria for product market, the European Commission applies the principle that product market consists of products for which consumers may substitute one for another within the same market depending on various factors such as the characteristics, price and use of the products[24], thereby confining the key element of product market to reasonable substitutability of products by consumers.

2. Criteria for Market Delineation in Korea

The Review Guidelines define a product market as a set of products (including services) within which a typical buyer may shift his purchases in response to a significant increase in the price of a specific product for a considerable period of time.[25] Thus, substitutability of demand is the primary factor in the product market delineation under the Review Guidelines.

Factors to be considered in delineating a product market, under the Review Guidelines, are:[26] (1) the similarity in function and use of the products; (2) the similarity in the price of the products; (3) buyers' awareness of the substitutability of products and their related purchase pattern; (4) sellers' awareness of the substitutability of products and their related pattern of business decisions; and (5) the classification of

19) Horizontal Merger Guidelines, *supra* note 18, Sec. 1.11.

20) 351 U.S. 377, 76 S.Ct. 994, 100 L. Ed. 2d 1264 (1956).

21) *Id.* at 404, 1012, 1285.

22) 370 U.S. 294, 82 S.Ct. 1502, 8 L. Ed. 2d 510 (1962).

23) *Id*. at 325, 1523-1524, 535.

24) Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (Comm., 1997.9.12, OJ C 372).

25) Review Guidelines, *supra* note 7, Art. VI.1.A.

26) *Id.* Art. VI.1.B.

the product market under the Korea Standard Industrial Classification. All of these factors, it may be said, primarily address substitutability of demand.

On the other hand, some hold the view that substitutability of supply too should be a factor, relying on the Horizontal Merger Guidelines' recognition of firms whose existing production and distribution assets could be used to produce and sell the relevant product within one year in response to a price increase by other market participants.[27] Although the Review Guidelines do list sellers' awareness of the substitutability of products and their related pattern of business decisions as a factor to be considered,[28] it is unclear whether it amounts to designating substitutability of supply as a determining factor. The Review Guidelines do provide that new entry into a given market is deemed easier to the extent that there exists a company which is deemed likely to participate in the market in the near future in response to a meaningful and non-transitory increase in price in the market, without a significant burden of cost of entry or exit (such as being able to enter in the concerned market without a significant modification to its existing production facilities).[29] Thus, the Review Guidelines consider the degree of potential competition as a factor in the gauging of anticompetitive effect of a given business combination. To the extent that the substitutability of supply is one of the factors to be considered in determining the degree of potential competition in a given relevant market after such market has already been delineated, the approach under the current Review Guidelines appear to be appropriate.

In most cases of business combination, the KFTC defines the relevant product market without conducting any in-depth economic analysis; however, the following cases provide a more detailed explanation of the criteria for the delineation of the relevant product market. First, in the case of the business combination between the Gillette Company and Rocket Korea Co., Ltd. (the "Gillette Case"),[30] the KFTC defined the product market as the market that includes alkaline and manganese batteries that are not rechargeable, rechargeable nickel-cadmium batteries for consumers and the so-called alcava batteries because there were sufficient similarities

27) Jae Woo Lee, *Toward Improvement of Regulation of Business Combination*, Fair Competition (Seoul: Korea Fair Trade Association, August 1999), p.13. *See* Horizontal Merger Guidelines, *supra* note 18, Sec. 1.321.

28) Review Guidelines, *supra* note 7, Art. VI.1.B(4).

29) *Id*. Art. VII.1.C(3)(b).

30) KFTC Ruling No. 98-282 (December 18, 1998).

in the use, form and characteristics of the products, and thus there existed substitutability of demand. Secondly, in the case of the business combination between Oriental Brewery Co., Ltd. ("OB") and Jinro Brewery Co., Ltd. ("Jinro Coors") (the "OB Case"),[31] the KFTC defined the product market as the market for beer on the grounds that beer was distinguishable from other brewed, distilled and mixed alcoholic beverages by the manufacturing process and by its principal characteristics such as taste, alcohol content and color. Thirdly, in the case of the business combination between SK Telecom Co., Ltd. and Shinsegi Telecom Industry Co., Ltd. (the "SK Telecom Case"),[32] the KFTC defined the relevant market to consist of the markets for cellular and PCS mobile phone services, in spite of the differences in the frequency range and the methods for transmission and reception, on the grounds that: (1) customers are not able to make such distinctions; (2) there was a correlation between the growing PCS market and the shrinking cellular phone market in the nation; (3) a large degree of substitutability of demand between the two services was shown where the services provided and/or rates differed; and (4) the services were similar in terms of the connection method, range of channels, serviceable areas, target customers, services provided, size and design of the terminal appliances and fee structure. In addition, this case distinguished the mobile phone service market and the wire telephone service market on the grounds of the differences in usage, facilities made by the provider, the means of usage of the network, rates and competing providers. The KFTC also distinguished the mobile phone service market and the market for pagers, "citiphones", telecommunications relay services, and wireless data communication on the grounds of differences in function and usage, in spite of their similarities.

However, in most cases only insufficient explanations are given for the delineation of markets. For instance, in the Haitai Case,[33] the KFTC distinguished between the market for fruit drinks and that for carbonated drinks citing merely that there are differences in the raw materials and the production method, without giving any concrete account of such differences.

Basically, in delineating a product market, the KFTC appears to consider, with a primary focus on substitutability of demand, the similarities in function and use of the

31) KFTC Ruling No. 99-252 (December 10, 1999).

32) KFTC Ruling No. 2000-76 (May 16, 2000).

33) *supra* note 11.

product. However, even the first three aforementioned cases, which contain some analytic approach to market delineation, do not provide much guidance as to what degree of substitutability of demand or similarity in function would suffice for inclusion in the same product market, or what degree of difference would suffice for separation of the product markets. They also fail to elucidate the criteria for delineation of product markets. For instance, the cases provide no quantitative or analytic grounds for distinguishing the market for beer from that for other alcoholic beverages or for distinguishing the market for mobile telephone services from the market for wire telephone services, in spite of the similarities in function.

3. Trend Towards Expansion of Product Market

Apart from the factors considered under the Review Guidelines, other factors that should not be overlooked in delineating the product market are the change and the possibility of future change of market conditions and structure. In the past, due to entry barriers erected by technical and legal limitations, it was possible to make narrow delineations of the relevant product market in a given industry. However, with the lifting of entry barriers caused in part by rapid technological development and deregulation, the scope of the relevant product market will need to be broadened. For example, through recent developments in communication technologies, cable television providers and internet service providers are now able to provide telecommunication services that used to be provided only by general telecommunication service providers in the past; and through the use of the Internet, the telecommunication service providers are also now able to provide broadcasting services. Thus, the trend in the telecommunication industry and the broadcasting industry is toward unification. Furthermore, through deregulation of formerly regulated industries, financial services such as banking, securities and insurance may now be provided by one provider, as are telecommunication services such as local, long distance, international and wireless telephone services. Therefore, such removal of entry barriers and fusion among markets necessitate a new delineation of the product markets.[34)]

Of course, actual and potential change in market environment and industry

34) Sai Ree Yun, *The Direction of the Business Combination Regulation Policy in the Global Economy*, Fair Competition (Seoul: Korea Fair Trade Association, August 1999), p.19.

structure need also be considered not only in delineating a relevant market, but also in gauging the anticompetitive effect. However, the Review Guidelines do not consider the trend in the changes of the degree of market concentration at the product market delineation stage. Rather, they consider that issue only in the context of measuring the anticompetitive effect of the business combination after the product market has been delineated. In delineating the relevant market, the KFTC actually still applies the criteria largely similar to those used a decade ago. As discussed above, technological development and deregulation tend gradually to unify adjacent product markets, and thus the Review Guidelines should be revised to allow a closer consideration of such changing elements at the product market delineation stage.

In *the Brown Shoe case*,[35] the U.S. Supreme Court held that a business combination must be viewed in the context of the particular market involved, and its structure, history and probable future in order to determine its probable anticompetitive effects.[36] This proposition was supported in the *United States v. General Dynamics Corp.*[37] In addition to considering the market's structure and change in order to determine anticompetitive effect, the Court also stated in *the United States v. Continental Can Co.*[38] that in defining the relevant market, each manufacturing industry's past, present and future aspects of competition as well as possibility of competition need to be considered.[39]

Also, with the spread of the Internet, the traditional off-line product market is rapidly going on-line, which increases efficiency for producers and distributors alike, reduces marginal cost and consumers' cost of product selection and widens the scope of consumer's choice of products. In this regard, one may argue that in light of the differences in its customers, sales and delivery methods and ancillary services provided, an on-line product market may have to be considered separate and distinct from the off-line market for the same product. In the United States, so far we are not aware of any cases in which an on-line market has been treated differently from an off-line market. However, in *FTC v. Staples Inc.*,[40] the Federal District Court in Washington, D.C. defined the relevant product market as consumable office supplies

35) *supra* note 22.

36) *Id.* at 322, 1522, 534, n.38.

37) 415 U.S. 486 at 498, 94 S. Ct. 1186 at 1194, 39 L. Ed. 2d 530 at 542, (1974).

38) 378 U.S. 441, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964).

39) *Id.* at 458, 1747-1748, 965.

40) 970 F. Supp. 1066 (D.D.C. 1997).

sold through office supply superstores,[41] thereby treating identical products as belonging to two distinct markets based on the difference in their distribution methods. As there have been no such cases with respect to on-line and off-line markets in Korea, the KFTC seems to take the position that the question as to the delineation of on-line and off-line markets must be decided upon on a case-by-case basis.[42] However, it seems that, in the future, itwill be necessary to establish a standard in this area and to incorporate it into the Review Guidelines or relevant statutes.

C. Geographic Market (Area of Trade)

1. Criteria for Geographic Market Delineation in Foreign Countries.

The U.S. Supreme Court has defined geographic area as "[an] area of effective competition in the known line of commerce [which is] charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies,"[43] and has held that "the proper question to be asked...is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[44] The Horizontal Merger Guidelines define a geographic market as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere,"[45] holding similarly to the definition of product market, as discussed previously.

41) *Id.* at 14.

42) *See* KFTC Press Release of November 13. 2001

43) *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, at 327, 81 S. Ct. 623 at 628, 5 L. Ed. 2d 580 at 587 (1961).

44) *United States v. Philadelphia National Bank*, 374 U.S. 321, at 357, 83 S. Ct. 1715 at 1738, 10 L. Ed. 2d 915 at 941 (1963).

45) Horizontal Merger Guidelines, *supra* note 18, Sec. 1.21.

2. Criteria for Geographic Market Delineation in Korea

The Review Guidelines define a geographic market as an entire geographical area within which a typical buyer in a specific area may shift its purchases in response to a significant increase in the price of a specific product only in that area for a considerable period of time.[46] Additional factors to be considered under the Review Guidelines in delineating the geographic market are: (1) characteristics of the product (including perishability, mutability and frailty) and the sellers' business capabilities (including production capability and scope of the distribution network); (2) buyers' awareness of the possibility of shifting to other geographical areas for sources of the product and their related patterns in such shifting; (3) sellers' awareness of the possibility of buyers' shifting to other geographical areas for sources of the product and the sellers' related decision-making pattern; and (4) the ease of shifting to other purchase areas considering the time, economic and legal constraints.[47]

Most of the KFTC rulings having to do with the geographic market have delineated it as the domestic market (*i.e.*, the entire Korean market), but without offering much in the way of explanation for such delineation.[48]

3. Trend Towards the Expansion of the Geographic Market

The geographic market can be defined as "[a] geographic area in which buyers could reasonably change the supplier of a product with the change in price of the product by the supplier." [49] As mentioned before, however, the scope of the geographic market is increasingly becoming broader and broader due to rapid development in information technology, the means of transportation on-line trading service, and the abolition of various entry barriers including market opening and reduction of tariff rates.

D. Stages in Trade and the Counterparty

The Review Guidelines also provide that the relevant market can be delineated by

46) Review Guidelines, *supra* note 7, Art. VI.2.A.

47) *Id.* Art VI.2.B.

48) The Gillette Case, *supra* note 30;the OB Case, *supra* note 31;the SK Telecom Case, *supra* note 32.

49) Sai Ree Yun, *supra* note 34. Regarding a view that competition in foreign countries needs to be considered at

stages in trade such as production, wholesale and retail distribution.[50]

The Guidelines also provide that, where, based on the buyer characteristics or the product characteristics, there exist different groups of buyers according to the product, geographical area or trade stages, such groups may be further classified into separate relevant markets.[51] However, so far we have seen no business combination cases in which the KFTC defined a relevant market according to separate buyer groups.

V. Anticompetitive Effect

A. Review Guidelines for Anticompetitive Effect

In examining business combination cases, following the delineation of the relevant market, the KFTC must determine under the AFTA whether or not the effect of such business combination is to substantially restrain competition in that relevant market. Since it is difficult to obtain a perfect competition market in the real world, "substantial restraint of competition" under the AFTA[52] should be understood as a restraint that makes effective or workable competition difficult, that is to say, causing a state of market dominance.[53] First, we will briefly review some foreign cases dealing with the criteria for the restraint of competition, and then we will review the criteria for the restraint of competition under the AFTA and the Review Guidelines.

1. Criteria for Restraint of Competition in Foreign Jurisdictions

(a) United States

The U.S. Supreme Court held in the *Du Pont* case that the power of price increase and that of exclusion of competitors from the market must be considered as the criteria for determining whether one has the ability to exercise the monopoly power in the

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the time of delineating the geographic market, *see* Michael P. O'Brien, *Foreign Competition in Relevant Geographic Markets*: *Antitrust Law in World Markets*, 7 J. Int'l. L. Bus. 37.

50) Review Guidelines, *supra* note 7, Art. VI.3.

51) *Id.* Art. VI.4 .

52) AFTA, *supra* note 2, Art. 7 Sec. (1) & Art 2 Sec. 8-2.

53) Kwon, *supra* note 3, at 191.

relevant market.[54] In this context, the power to increase the price means an enterprise's ability to increase the price by reducing its own output, and the power to exclude competitors means the power to increase the price by reducing the competitors' output through increasing the competitors' cost.

In the United States, CR_K[55] was used until 1982 in calculating the level of market concentration as a measure of the anticompetitive effect of a proposed business combination. However, the Non-Horizontal Merger Guidelines[56] introduced the Herfindahl-Hirschman Index[57] (the "HHI") as a means of such measurement. A more complicated method for economic analysis has now been incorporated into the Horizontal Merger Guidelines. Those Guidelines stipulate that, in general, a market in which the HHI exceeds 1,800 is a highly concentrated market, that an increase of the HHI by 100 or more due to a business combination in such a market is presumed likely to create or enhance market domination, and that an increase of the HHI by more than 50 but less than 100 due to a business combination in such a market is presumed to raise significant antitrust concerns.[58] The Guidelines also provide that a market in which the HHI is between 1,000 and 1,800 is a moderately concentrated market, and that a business combination bringing about an increase in the HHI by 100 or more in such a market raises significant antitrust concerns.[59] A business combination in a market with an HHI less than 1,000 (which would be presumed to be unconcentrated) is in principle allowed under the Guidelines.[60] In cases of vertical integrations, only those taking place in a market with an HHI over 1,800 are considered potentially problematic.[61] Nevertheless, the above Guidelines are not considered absolute criteria, and other market factors are also considered.[62]

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54) Du Pont, *supra* note 20, at 391, 1005, 1278.

55) CR_K (Concentration Ratio) is defined as an index of market concentration of the top K number of companies in a given market, and measures the sum of the market share of each K number of companies.

56) *supra* note 18.

57) The Herfindahl-Hershman Index (HHI) is calculated by summing the squares of the individual market shares of all the companies competing in the market.

58) Horizontal Merger Guidelines, *supra* note 18, Sec. 1.51(c).

59) *Id.* Sec. 1.51(b).

60) *Id.* Sec. 1.51(a).

61) Non-Horizontal Merger Guidelines, *supra* note 18, Sec.4.131.

62) *Id.*

(b) European Union[63)]

In determining whether the business combination in question is compatible with the European Union Market, the European Commission examines whether such business combination is likely to create, or facilitate the creation of, a position of market power as well as whether such combination significantly restrains effective or workable competition within the European Union Market. Under the European Merger Control Regulation, market shares not exceeding 25% post-business combination are not considered as restraining effective or workable competition.[64)]

2. Criteria in Korea

(a) Criteria under the AFTA

(i) Definition of an "Act Substantially Restraining Competition"

The AFTA defines an act substantially restraining competition as an act that brings about conditions in which, due to decreased competition in a given area of trade, a specific company or a trade group is able to substantially influence or threaten to influence the determination of price, volume, quality or other conditions of trade.[65)]

(ii) Provisions on the Presumption of Anticompetitive Effect

The AFTA divides into two categories business combinations that are presumed to be substantially restrictive of competition in a given relevant market. Of these, the more important is the category of business combinations satisfying the following criteria: (1) that the aggregate market share of the parties to the business combination satisfies the criteria for market-dominant enterprises; [66)] (2) such aggregate market

63) Council Regulation 4064/89/EEC on the Control of concentrations between undertakings.

64) *See Id.* Sec (15) of the Preamble.

65) AFTA, *supra* note 2, Art. 2 Sec. 8-2.

66) "Market-Dominant Enterprise" means any supplier or demander in a given trade area and which holds market dominance to determine, maintain, or alter price, volume, quality and other terms of trade either on its own or with other enterprises. *See* the AFTA, *supra* note 2, Art. 2 Sec.7. Pursuant to Art. 4 of the AFTA, any enterprise whose

share is the highest in the given relevant market; and (3) the difference between such aggregate market share and the market share of the corporation with the second highest market share is more than 25% of such aggregate market share.[67)]

The KFTC has interpreted Article 7 Section (4) of the AFTA (the presumption clause) as requiring the satisfaction of all three criteria. For instance, in the OB Case,[68)] where the aggregate market share (49.62%) placed the parties to the combination in second place thus leaving criteria (2) unsatisfied, the KFTC did not apply Article 7 Section (4) of the AFTA, but instead applied Article VII.1.A(1) of the Review Guidelines, which sets forth criteria for substantial restraint on competition in the context of a business combination. Also, in the Haitai Case,[69)] although the parties to the acquisition had the largest aggregate share (45.3%) of the relevant market for carbonated beverages and the aggregate market share of the three largest market participants after the acquisition would be 92.2%, the KFTC did not apply Article 7 Section (4) of the AFTA on the grounds that the difference between the parties to the acquisition and the enterprise with the second largest market share was not equal to or greater than 25% of the aggregate market share of the parties to the acquisition, and instead applied Section VII.1.A(1) of the Review Guidelines.

The second category of business combinations that are presumed to be substantially restrictive of competition under the AFTA is that of the business combinations carried out either directly or through a related person by a Large-Scale Corporation[70)] in a relevant market where the aggregate market share of the small and medium-sized companies (as defined under the Basic Small and Medium-Sized Enterprise Act[71)] is equal to or greater than two-thirds, or where that Large-Scale Corporation would acquire a market share equal to or greater than 5% of such market as a result of the business combination in question.[72)] This provision, however, is solely for the purpose

market share falls under any of the following categories shall be presumed as a Market-Dominant Enterprise: (1) market share of one enterprise is more than 50% or (2) combined market share of less than three largest enterprises (except any enterprise with market share of less than 10%) is above 75%.

67) AFTA, *supra* note 2, Art. 7 Sec. (4).

68) *supra* note 31.

69) *supra* note 11.

70) A statutory large-scale corporation is defined under the AFTA as a corporation whose total assets or annual turnover exceeds two trillion won. *See* AFTA, *supra* note 2, Art. 7 (1). *See* also the Decree, *supra* note 8, Art. 12-2.

71) *See* Basic Small and Medium-Sized Enterprise Act, Art. 2.

72) AFTA, *supra* note 2, Art. 7 Sec. (4)2.

of protecting small and medium-sized companies, and it is difficult to find a rationale for it on antitrust policy grounds. Therefore, it seems appropriate to abolish this provision some time in the future.

(b) Criteria under the KFTC Review Guidelines

The Review Guidelines provide a set of criteria for substantial restraint of competition in the case of each of the horizontal, vertical and conglomerate types of business combinations.

B. Horizontal Business Combination

Horizontal business combinations reduce the number of competitors and, by increasing the market share of the parties to the business combination in question, directly and adversely change the state of competition in the relevant market. Therefore, horizontal business combinations are subject to a more stringent restriction in comparison with the other types of business combinations. In fact, with the exception of the Tongyang Nylon Case,[73] all cases of business combination in which the KFTC imposed a corrective measure due to the anticompetitive effect are concerned with horizontal business combinations.

1. The Degree of Market Concentration

(a) Market Concentration

The Review Guidelines provide that a business combination may be substantially restrictive of competition if:[74] (1) the aggregate market share of the parties to the business combination at issue is 50% or more; or (2) the parties to the business combination are among the three companies with the largest market shares and the aggregate of such three largest is 70% or more, except where: (i) the aggregate market share of the parties to the business combination at issue is the second largest, but less

73) *infra* note 125.

74) Review Guidelines, *supra* note 7, Art. VII.1.A(1)(a).

than 30% of the total market share, and there is a "significant gap" between the aggregate market share of the parties to the business combination and that of a company that ranks immediately above such parties in terms of market share; (ii) the aggregate market share of the parties to the business combination is the third largest and there is a significant gap between the largest and the second largest or between the second and the third largest; or (iii) where there is no significant gap between the largest and the second largest, no significant gap between the second and the third largest, and no significant gap between the third and the fourth largest. In this context, a significant gap is generally considered to exist if the market share of a company is less than 75% of that of another company that ranks immediately above the first company in terms of market share. In addition, the Review Guidelines provide that a substantial restraint of competition may not result if the increase in the market share due to the business combination at issue is insignificant (i.e., less than 5%) or there exists a large-scale buyer in the relevant market.[75)]

Thus, the criteria provided under the Review Guidelines for finding a business combination to be substantially restrictive of competition are somewhat different from those provided under Article 7 Section (4) of the AFTA. For instance, while the AFTA employs the criterion of "the market share of a single enterprise at 50% or more or the aggregate market share of three or less enterprises at 75% or more," the Review Guidelines employ the criterion of "the market share of a single enterprise at 50% or more" or "among the three largest in market share where the aggregate of the three largest is 70% or more." Therefore, a business combination that, under the Review Guidelines, may be substantially restrictive of competition may not be considered so under the AFTA. Therefore, there should be an elucidation of the meaning of "may be substantially restrictive of competition" under the Review Guidelines and its relation to the presumption of substantial restriction of competition under the AFTA.

In the OB Case,[76)] the combination of the two companies was held likely to substantially restrict competition since the aggregate market share of the two companies was 49.62% and the difference between their aggregate market share and the highest market share was 0.57%. Therefore, the business combination met the criteria stipulated in Article VII.1.A(1) of the Review Guidelines. In the Haitai

75) *Id.* Art. VII.1.A(1)(c) & (d).

76) *supra* note 31.

Case,[77] however, the KFTC ruled that the acquisition fell within the scope of the presumption provided by Article VII.1.A(1) of the Review Guidelines, as the aggregate market share of the parties to the acquisition in the carbonated beverages industry would be the largest at 45.3% and, after the combination, would be among the three largest where the aggregate market share of the three largest was 70% or more. However, this latter ruling appears to make the mistake of interpreting Article VII.1.A(1) of the Review Guidelines as providing a definitive set of criteria for making a decision, when in fact such section merely provides that business combinations satisfying the criteria may be substantially restrictive of competition.

In the majority of recent rulings in business combination cases, the KFTC, in order to determine the level of market concentration, has used the CR_1 and CR_3 standards (which are provided in the Review Guidelines) together with the HHI (which is not provided in the Review Guidelines).[78] Despite the difficulty involved in its complicated calculation as well as the in-depth examination and analysis of the market condition in general, the HHI not only reflects the market condition accurately, but also reflects the anticompetitive effect of business combinations by large-scale corporations in a highly concentrated market, and is considered superior to the CR_1 and CR_3.[79] Thus, although it is actually being used as a supplement to CR_1 and CR_3, the HHI should be incorporated in the Review Guidelines in the near future.

(b) Changing Trend of Market Concentration

In addition to gauging the anticompetitive effect by the level of market concentration, the Review Guidelines consider the trend in the level of market

77) *supra* note 11.

78) The case of business combination KFTC Ruling No.1998-84 (May 23, 1998) between Proctor & Gamble GMBH and Ssangyong Paper Co., Ltd. is the first case in which the KFTC applied the HHI as one of the standards for the assessment of market concentration.

79) An example of comparison of CR and HHI: suppose the distribution of the top four ranking companies' market share is as follows:

1) All four companies hold 25% of the market share each; or 2) one company holds 70% of the market share and the other three companies hold 10% each. If the business combination occurs between the company with the highest market share and the company with the second highest market share, each company has CR_3 of 100. However, in that case, in terms of HHI index, there is a notable difference between 1) and 2) since the HHI index is 3,750 in 1), whereas it is 6,600 in 2).

concentration.[80] The Review Guidelines also provide that restraint of competition is likely to increase if the level of market concentration has risen considerably in the past few years and that, in those cases, consideration must be given to whether there exists any elements that may affect the future state of competition, including development of new product or patents.[81] As mentioned above, in the United States, actual changes and the likelihood of changes in the structure and condition of the market are considered at the market delineation stage.[82] However, the Review Guidelines require consideration of those factors only at the stage of gauging the anticompetitive effect.

In practice, in the case of business combination between Hyundai Motor Company and Kia Motors Corporation (the "Hyundai Motor Case"),[83] the KFTC acknowledged that a presumption of restraint of competition arose under Article 7 Section (4) Subsection 1 of the AFTA regarding the relevant market for passenger cars, buses and trucks. However, it also considered the fact that for the previous four years, in the market for passenger cars, the aggregate market share of the parties to the business combination at issue had been steadily decreasing and the market share of Daewoo Motor Co., Ltd., the second in market share after the parties to the business combination, had been steadily rising. Furthermore, in the OB Case,[84] the KFTC held that although the combination of the businesses in question can be judged likely to restrain competition on the basis of the Review Guidelines and the HHI, since the market share of Hite Brewery Co., Ltd. ("Hite") (the company with the highest market share) had continuously been rising since 1993 and the market share of OB had been falling, the business combination at issue would increase the competition against Hite by OB and therefore have a pro-competitive effect.

2. Introduction of Overseas Competition and Condition of International Competition

The Review Guidelines provide that anticompetitive effects may be mitigated where the relevant product can be imported easily or where the proportion of imported

80) Review Guidelines, *supra* note 7, Art. VII.1.A(2).

81) *Id.* Art. VII.1.A(2).

82) Horizontal Merger Guidelines, *supra* note 18, Sec. 1.11 and 1.521.

83) KFTC Ruling. No.99-443 (April 7, 1999)

84) *supra* note 31.

goods in the relevant market is on the rise.[85] In assessing the possibility of the market entry by foreign competitors, the Review Guidelines consider the following factors:[86] (1) the price of the relevant product in the international market, and the condition of supply and demand of such product; (2) the degree of opening of the market, and the current state of foreign investment in the relevant industry; (3) the existence of influential international competitors; (4) tariff rates and any plans to reduce the tariff rates; and (5) any non-tariff entry barriers. Although the Review Guidelines require that the ease of importation, the market share of the products in the relevant market, and the increasing or decreasing trend of imports' market share be considered in the context of the level of foreign competitors' participation in the relevant market, the KFTC takes into consideration the market share of imported goods in the context of the market concentration level even where the relevant geographic market is limited to the domestic market. Thus, the ease of importation and the increasing trend of imports in the market may also be considered in the context of the possibility of change in the market concentration level.

Among the factors enumerated in the Review Guidelines, those that are frequently reviewed in the KFTC rulings are the market share of imported goods and the rising trend of such market share, tariff rates, non-tariff barriers, and the level of the opening of the market. In recent KFTC rulings including a case involving Proctor & Gamble GMBH and Ssangyong Paper Co., Ltd. (the "Proctor and Gamble Case"),[87] the market share of imported goods and the trend towards the increase of such share were considered. In the Gillette Case,[88] the KFTC found that the amount of imported goods was unlikely to increase because the price of the relevant goods in the international market was higher than that in the Korean market. In the Hyundai Motor Case,[89] the KFTC anticipated the rise in the importation of Japanese cars as a result of the abolishment of the Import Source Diversification System.[90] Furthermore, in the SK Telecom Case,[91] the KFTC found it difficult for foreign competitors to enter the

85) Review Guidelines, *supra* note 7, Art. VII.1.B.

86) *Id*.

87) *supra* note 78.

88) *supra* note 30.

89) *supra* note 83.

90) The Import Source Diversification System restricted import of certain products from the country with the largest trade surplus with Korea (*i.e.*, Japan).

91) *supra* note 32.

Korean mobile phone market because it is not practically easy for the foreign competitors to establish a Korean mobile phone company due to the government allocation of the channel frequencies and the limitation of foreign shareholding ratios to 49%.

3. Possibility of New Entry

(a) The Horizontal Merger Guidelines

A business combination is not likely to have an anticompetitive effect if entry into the market is sufficiently easy that market participants, after the business combination, could not profitably maintain a price increase above pre-combination levels. Under the Horizontal Merger Guidelines, entry is considered sufficiently easy if entry would be timely, likely and sufficient in its magnitude, character and scope to deter or counteract the anticompetitive effect. If those three elements are satisfied, the U.S. Department of Justice and the Federal Trade Commission (collectively, the "U.S. Agency") may approve the proposed business combination even if the HHI is somewhat high.[92] With respect to timeliness of an entry, the U.S. Agency in general considers timely an entry that can be achieved within two years from initial planning to significant market impact.[93] Typically, an entry is likely if the minimum viable scale[94] of an entrant is 5 percent or below of the demand of the relevant market.[95] An entry is deemed sufficient if the entrant is able to perform its role as an effective competitor.[96] However, such entrant must possess extensive knowledge of the market situation and financial capability in order to introduce new products or services which are necessary to exert a significant influence on price.

92) Horizontal Merger Guidelines, *supra* note 18, Sec. 3.

93) *Id.* Sec. 3.2.

94) Minimum Viable Scale is the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at pre-merger prices. Cf. Minimum Efficiency Scale, which is the smallest scale at which average costs are minimized.

95) Horizontal Merger Guidelines, *supra* note 18, Sec. 3.3.

96) *Id.* Sec. 3.4.

(b) The KFTC Review Guidelines

The Review Guidelines provide that anticompetitive effects are low where entry can be carried out easily within a short period of time.[97] In assessing the likelihood of entry, the Review Guidelines require that the following be considered: [98] (1) the existence of any legal or institutional barriers to entry; (2) the minimum amount of capital necessary for entry; (3) conditions of production technology including intellectual property rights such as patents; (4) location requirements; (5) conditions for a supply of raw materials; (6) the extent of vertical integration of the competitors' distribution channel and the cost for the establishment of sales network; and (7) the degree of product differentiation. For instance, if the entry barriers are high, the minimum amount of investment necessary for entry is substantial, sophisticated technology is required for the management of business, it is difficult to supply raw materials, or it is difficult to establish a sales network due to the extensive vertical integration of distribution channel, then a new entry would be difficult.

In the rulings regarding the business combinations considered in the Proctor and Gamble Case,[99] Delphinium Enterprise Pte. Ltd. Case[100] the Hyundai Motor Case,[101] the OB Case,[102] and the SK Telecom Case,[103] the KFTC held that entry was difficult because of the substantial amount of minimum capital required for entry. Moreover, the KFTC found that entry in business combinations in the Proctor and Gamble Case, the OB Case, and the SK Telecom Case was difficult because sophisticated technology was required. In the Proctor and Gamble Case, the Gillette Case and the Haitai Case, the KFTC stated that entry was not easy due to the difficulty involved in the establishment of new distribution channels. In other rulings, the KFTC has based its findings on the degree of consumers' brand recognition,[104] the potential of the market growth,[105] and the

97) Review Guidelines, *supra* note 7, Art.VII.1.C.

98) *Id*. Art VII.1.C(2)

99) *supra* note 74.

100) KFTC Ruling No. 98-269 (November 20, 1998).

101) *supra* note 83.

102) *supra* note 31.

103) *supra* note 32.

104) In the OB Case and the Gillette Case, it was stated that there was a high tendency of consumers relying on brand names.

105) It was held that the new entry was difficult due to the low growth potential of the domestic market in the

status of supply and demand of the relevant product or operation rate.

Furthermore, the Review Guidelines state that entry is sufficiently easy where: (a) there is an entrant that pronounced officially its intention to enter the market or make an investment in the market; or (b) where an entrant is likely able to enter the market in the near future without incurring substantial entry or exit expenses if there is a significant increase in the market price over a substantial period of time.[106)]

4. Collusion Among Competitors

According to the Review Guidelines, anticompetitive effects increase where the collusion among the competitors is made easy due to the decease in the number of the competitors in the market.[107)] The Review Guidelines provide that in determining whether collusion among the competitors is easy, the following factors will be considered: (1) whether the price of the relevant product in the relevant market has been notably higher than the price of a similar product in another market for the past several years; (2) whether the competitors have maintained stable market shares of the relevant market for the past several years because the demand of the product in the market is inelastic; (3) whether there is a high degree of homogeneity among the products supplied by the competitors and whether the conditions for manufacturing and sale of the product are similar; (4) whether the information related to the business activities of the competitors can be obtained easily; and (5) whether there was any undue concerted act in the past.[108)]

The KFTC has examined the possibility of collusion among competitors in connection with the OB Case,[109)] the Haitai Case,[110)] and the SK Telecom Case.[111)] In the OB Case and the Haitai Case, the KFTC stated that collusion among competitors was likely because the business combinations at issue would decrease the number of competitors in the relevant markets and there was a history of undue concerted acts

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Gillette Case, due to the excess supply capacity of the domestic market in the Hyundai Motor Case, and due to the low operating rate of the manufacturing companies in the OB Case as well as the Haitai Case.

106) Review Guidelines, supra note 7, Art. VII.1.C(3).

107) *Id.* Art. VII.1.D.

108) *Id.*

109) *supra* note 31.

110) *supra* note 11.

among the competitors. In particular, it appears that the KFTC, among the five factors provided in the Review Guidelines, focused on whether or not there was any undue concerted act in the past. This is because a reduction of the number of competitors alone would be insufficient to justify the increase in the possibility of collusion among competitors. This, however, does not mean that the absence of undue concerted acts in the past would eliminate any concern about the likelihood of an increase in collusion among competitors after the combination. In the SK Telecom Case, it was found that there was a low possibility of collusion among competitors because prior authorization from the Ministry of Information and Communication was required for change of a user agreement with consumers. On the other hand, in the same case, while finding that collusion among competitors is possible in other areas that are not subject to government authorization, the KFTC did not specify the grounds for such finding.

There exists the view that, in addition to the five aforementioned factors enumerated in the Review Guidelines, another factor for determining ease of collusion is whether a foreign company is participating in the relevant Korean market. According to such view, if there are foreign companies among the market participants, collusion among competitors is more difficult than where the participants in the market are composed of Korean companies only. This view is based on the argument that the communication between foreign and Korean companies is not easy, and there is a cultural difference between foreign companies and domestic companies with regard to the manner in complying with the laws and regulations.[112] However, that view is not mentioned anywhere in the Review Guidelines, and it would not be persuasive to argue that there is a lower possibility of collusion among competitors only because the market participants include foreign companies. In the Haitai Case[113], the KFTC found that the collusion among competitors would be easy despite that Coca Cola Korea Company, Ltd. (the company with the largest market share in the carbonated drink market) was a foreign company, and there was no previous history of performing undue concerted acts. This is because the market would consist of two main companies after the business combination between Haitai and Lotte.

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111) *supra* note 32.

112) In-Ok Son, *The Trend of Development in Examination of Business Combination with the Progress of Globalization*, Fair Competition (Seoul: Korea Fair Trade Association, August 1999) p. 6.

113) *supra* note 11.

5. Characteristics of Market—Similar Products or Adjacent Markets

Under the Review Guidelines, where another product that is similar to the product at issue in terms of function or use forms a separate market because of the price or other reasons, the potential for the development of production technology, similarity of distribution channel, and the impact of such similar product on the market at issue should be considered. On the other hand, where a separate market is created due to geographic locations there, then the geographical proximity between the markets, the existence of transportation means and the potential for development of transportation technology, the scale of participants in the adjacent market and other impacts of the adjacent geographical market on the relevant market are to be considered. [114)]

The existence of separate, but similar or adjacent, markets is closely related to the delineation of product markets and geographical markets. In Korea, in general there are quite a few similar products or adjacent markets because a relevant market tends to be defined narrowly.[115)] However, there seems to have been no rulings of the KFTC in which those factors were reflected.

C. Vertical Business Combination

1. U.S. Department of Justice Merger Guidelines

In the U.S., the standard provided in the Non-Horizontal Merger Guidelines[116)] is applied to vertical business combinations. The underlying premise of the Non-Horizontal Merger Guidelines is that non-horizontal business combinations such as vertical business combinations, in general, do not raise concerns over significant anticompetitive effects. The Non-Horizontal Merger Guidelines provide the following as examples of situations in which a vertical merger becomes unlawful by restricting competition: (1) where a vertical business combination creates barriers to entry; and (2) where a vertical business combination facilitates collusion among competitors in

114) Review Guidelines, *supra* note 7, Art. VII.1.E.

115) For example, *see* the Gillette Case, *supra* note 30.

116) *supra* note 18. Note: Since the Horizontal Merger Guidelines do not provide any separate guidelines for non-horizontal mergers (vertical and conglomerate mergers), the Non-Horizontal Merger Guidelines are equally being used for such type of mergers.

the upstream market.[117)]

First, regarding entry barriers, barriers to entry generally are considered to exist where all of the three following conditions are met: (1) an entrant to one market (the "primary market") would have to enter simultaneously into other market (the "secondary market") which is in a vertical relationship with the primary market; (2) the requirement of entry at the second level must make entry at the primary levelsignificantly more difficult and less likely to occur; and (3) the structure and other characteristics of the primary market must be otherwise so conducive to non-competitive performance that the increased difficulty of entry is likely to increase non-competitiveness.

Second, facilitation of collusion refers to a situation where a vertical business combination between a firm in an upstream market and a firm in a downstream market facilitates collusion in the upstream market by making it easier to monitor prices in the downstream market, or where collusion in the upstream market is facilitated through the elimination by vertical merger of a particularly disruptive buyer in a downstream market.

2. The KFTC Review Guidelines[118)]

A vertical business combination does not bring about direct changes to the market shares of the parties to the business combination at issue. Rather, the anticompetitive effects of a vertical business combination originate from the market foreclosure effect whereby the competitors who have been engaged in transactions with the parties to be combined are excluded from any future transaction.[119)] Thus, the Review Guidelines require a close examination of any market foreclosure effect.

In determining whether there is a market foreclosure effect, the Review Guidelines look to either the market share of a material supplier which is a party to the vertical combination or the ratio of the total amount of materials purchased by the material buyer (including its affiliates) which is a party to the vertical combination to the total amount of material supply in the relevant market (the "Purchase Ratio").[120)] That is,

117) Non-Horizontal Merger Guidelines, *supra* note 18, Sec. 4. 2.

118) Review Guidelines, *supra* note 7, Art. VII.2.

119) According to the theory of transaction cost economics, a vertical business combination is a replacement process which internalizes the organization of the trades in the market and the anticompetitive effects flowing from that process is the reduction in cost of trade. *See* Williamson, *1982 Merger Guidelines: Vertical Merger Guidelines: Interpreting the 1982 Reforms*, 71 Calif. L. Rev. 604 (1983).

anticompetitive effects will be found where the market share of the supplier or the Purchase Ratio is:[121] (1) 50% or more; or (2) among the three companies with the largest market shares and the aggregate of such three largest is 70% or more, except where: (i) the supplier's market share or the Purchase Ratio is the second largest, but less than 30% and there is a significant gap between the market share or the Purchase Ratio and that of a company that ranks immediately above the supplier or buyer in terms of market share; (ii) the market share or Purchase Ratio is the third largest and there is a significant gap between the largest and the second largest or between the second or the third largest; or (iii) where there is no significant gap between the largest and the second largest, no significant gap between the second and the third largest and no significant gap between the third and the fourth largest. As mentioned above in connection with the horizontal business combination, in this context, a significant gap is considered to exist if the market share of a company is less than 75% of that of another company that ranks immediately above the former in terms of market.[122]

In addition to the market share or Purchase Ratio, the Review Guidelines consider the following factors in determining the likelihood of occurrence of the market foreclosure effect: (1) the purpose of the business combination; (2) of the possibility of competitors securing substitute channels for supply and sales, including those for import and export; (3) the degree of vertical integration of competitors; (4) the growth prospect of the relevant market and the business plans of the company involved in a vertical business combination, such as a plan for facility expansion; (5) the likelihood of collusion to eliminate competitors; and (6) the condition of, and effect on, the product market which is in a vertical relationship with the product market related to the business combination at issue.[123]

Moreover, according to the Review Guidelines, a vertical business combination may give rise to anticompetitive effects if the vertical combination results in an increase of entry barriers because, for example, the minimum capital required for market entry increases significantly as a result of a vertical combination between large companies or of continuous and extensive vertical combinations.[124]

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120) Review Guidelines, *supra* note 7, Art. VII.2.A.

121) *See Id.* Art. VII.1.A(1).

122) *Id.* Art. VII.2.A(1).

123) *Id.* Art. VII.2.A(2).

124) *Id.* Art. VII.2.B.

In a case regarding the business combination between Tongyang Nylon Co., Ltd. ("Tongyang") (buyer) and Korea Caprolactam Co., Ltd. ("Korea Capro") (material supplier),[125] the business combination of Tongyang and Korea Capro was ruled to have anticompetitive effects. As a nylon manufacturing company, Tongyang acquired 30.14% of the total shares of Korea Capro, which is a monopolistic company manufacturing and selling caprolactam (a raw materials needed for manufacturing nylon). In this ruling, the KFTC held that the vertical combination between Tongyang and Korea Capro would have anticompetitive effects on the caprolactam market since, as a result of the business combination, Tongyang's competitors would have difficulty in obtaining caprolactam. Further, the KFTC found that the business combination would also have anticompetitive effects on the nylon market since Tongyang's market share of the nylon market was 48 percent and the percentage of the cost of caprolactam with respect to nylon products was 55 to 60 percent.

D. Conglomerate Business Combination

1. Non-Horizontal Merger Guidelines

The Non-Horizontal Merger Guidelines hold conglomerate mergers that deter the potential competition as unlawful.[126] Whether the potential competition is deterred will be determined based on the perceived potential entrant theory and the actual potential entrant theory.

Where a company is perceived as a potential entrant, the participants in the relevant market try to maintain the price and the amount of production of the relevant product at a competitive level in order to prevent such potential entrant from entering the market. According to the perceived potential entrant theory, if such potential entrant is one of the participants being combined, such competitive effect would be eliminated.

On the other hand, under the actual potential entrant theory, where a company enters a market by establishing a new company or by taking over a small-sized company, such entry would promote competition because the number of competitors in the market increases. However, if such actual potential entrant is combined with

125) KFTC Ruling. No. 96-51 (April 22, 1996).

126) Non-Horizontal Merger Guidelines, *supra* note 18, Sec. 4.0.

another large company, competition in the market would be restrained because of the decrease in the number of the competitors. In addition, the Non-Horizontal Merger Guidelines contain the standards for the examination of market concentration, general entry requirements, and the advantage of entering the market. In particular, the degree of market concentration would be considered reasonable if the HHI is less than 1,800.

2. The KFTC Review Guidelines

The Review Guidelines review a conglomerate business combination by focusing on the restraints on the potential competition. To be specific, the KFTC would consider whether a conglomerate business combination at issue would eventually enable the companies involved in the combination to exclude their competitors by significantly improving their technology, sales capacity and capacity to raise funds and obtain raw materials, and whether entry barriers would increase due to the increase in the minimum amount of capital necessary for entry as a result of the combination. According to the Review Guidelines, if all of the following factors are present in a conglomerate combination, it would be deemed to restrain potential competition, thereby possibly substantially restraining competition:[127] (1) the acquiring company's total asset or sales turnover is at least 2 trillion won (approximately 1.54 billion U.S. dollars at the current exchange rate of US$1 = 1,300 Korean won); (2) the acquiring company is a potential entrant [128]; (3) the acquiring company's market share falls under the Review Guidelines Art. VII.1.A(1)(a); and (4) there is a significant difference in the scale of business and the capacity to raise capital between the acquiring company and the acquired company's competitors.

It appears in practice, however, that in conglomerate combination cases the KFTC has not ordered any corrective measures arising from the anticompetitive effects of such conglomerate combinations.

127) Review Guidelines, *supra* note 7, Art. VII.3.A.

128) In other words, without the combination at issue, either the acquiring company would have entered the market by using other means that are less anticompetitive because the acquiring company produces the products with similar production technology, similar distribution channel and similar consumer groups, or the participants in the market would continue to refrain from exercising market power due to the existence of the acquiring company as a potential entrant.

VI. Exceptions To Prohibition of Anticompetitive Business Combination

The AFTA allows a business combination with anticompetitive effects if the KFTC acknowledges that either: (i) the enhancement of efficiency to be generated by the business combination which cannot be achieved by any other means outweighs the harm of the anticompetitive consequences from the business combination; or (ii) the business combination involves a failing company whose assets would have to exit the market without the combination, and there exists no combination which is less anticompetitive (the "failing company doctrine").[129)]

A. Enhancement of Efficiency

The Review Guidelines divide the effects of enhanced efficiency resulting from a business combination into two categories. The first category is the effects of enhanced efficiency on the areas of the production, sales, and research and development, and the second category is the effects of enhanced efficiency on the national economy.[130)] The Review Guidelines provide the factors which need to be considered for each category. For both categories, the effects of the enhanced efficiency would have to take place in the near future.[131)] It appears that there is only one ruling in which the KFTC allowed a business combination despite anticompetitive effects where the KFTC found that the effects of enhanced efficiency of the business combination would outweigh the anticompetitive effects. That ruling addressed the business combination in the low-density polyethylene market between Hanwha Chemical Corporation and Daelim Industrial Co., Ltd., in December 1999.[132)] Most other rulings approving anticompetitive business combinations have relied on the failing company doctrine, in addition to the enhancement of efficiency. For instance, in a ruling examining a business combination among Hyundai Heavy Precision Industry Co., Ltd., Daewoo Heavy Industries & Machinery Ltd. and Hanjin Heavy Industries & Construction Co., Ltd.,[133)] such

129) AFTA, *supra* note 2, Art. 7(2).

130) Review Guidelines, *supra* note 7, Art. VIII.1.A.

131) *Id*.

132) KFTC Decision on Case No. 9912 gigyul 1705 (December 23, 1999).

133) KFTC Decision on Case No. 9906 gigyul 0914 (July 1, 1999).

business combination was approved despite its anticompetitive effects because of the insolvency of the three companies' railroad car business, as well as the effects of enhanced efficiency arising from the elimination of overlapping investment of the three companies. Furthermore, in the Hyundai Motor Case,[134] despite its anticompetitive effects, the KFTC allowed the business combination because it recognized Kia Motors Corporation (which at that time was subject to corporate reorganization proceedings under Korean insolvency law) as an insolvent company and found that the efficiency of the passenger vehicle and bus market would be enhanced through the business combination of those two companies. In the OB Case and the SK Telecom Case,[135] the KFTC issued an order of corrective measures with respect to those business combinations because the effects of enhanced efficiency of those business combinations would not be significant enough to outweigh their anticompetitive effects. However, since the corrective orders in those cases did not actually prohibit the business combination, but merely put a limitation on the aggregate market share of the companies, it may be viewed that the KFTC in effect approved the business combination as an exception based primarily on the grounds of efficiency enhancement.

Regarding the factors to be considered in determining whether or not the enhancement of efficiency cannot be achieved through any methods other than the proposed business combination, the Review Guidelines list the following: (1) it must be difficult to achieve the enhancement of efficiency through any methods, such as facility expansion and improvement of technology, other than by a business combination; and (2) the enhancement of efficiency must not be achieved by anticompetitive means such as the reduction of production or the deterioration of the quality of service.[136] So far, the business combination in the SK Telecom Case[137] appears to be the only ruling in which those two factors as provided in the Review Guidelines have been examined. In that ruling, the KFTC held that since the overlapping investment in the IS-95C communication network could be prevented through the cooperation of the companies, it could not be argued that the enhancement of efficiency could be achieved through any methods other than the business combination of SK Telecom. The concept of 'effects of enhanced efficiency that

134) *supra* note 83.

135) *supra* notes 31 and 32 respectively.

136) Review Guidelines, *supra* note 7, Art. VIII.1.B.

cannot be achieved through any methods other than a business combination' appears to be a concept similar to "merger-specific efficiency" under the Horizontal Merger Guidelines. According to the Horizontal Merger Guidelines, in determining whether a business combination may result in the merger-specific efficiency, "only alternatives that are practical in the business situation faced by the merging firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical."[138] If the Horizontal Merger Guidelines were applied in the SK Telecom case, the KFTC should have considered carefully whether it would be practically possible for the companies to set up the IS-95C communication network through the cooperation of those companies, despite, among other things, the intense competition among the cellular phone companies.

B. Failing Company

A business combination with anticompetitive effects may be approved if the business combination involves a failing company. A failing company under the AFTA and the Review Guidelines refers to a company which is basically insolvent.[139] The KFTC may approve a business combination with anticompetitive effects involving a failing company if: (1) such company's production facilities can no longer be used in the relevant market unless it is combined with another company through the proposed business combination; and (2) no other business combinations which have less anticompetitive effects than the proposed business combination are reasonably available.[140]

The Review Guidelines provide a detailed list of factors to be considered in determining whether a company is a failing company. In general, "a failing company" means "a company which is insolvent or expected to be insolvent in the near future due to the deterioration of its financial condition." Further, the following factors are considered in order to determine whether a company constitutes such company that is insolvent or to be insolvent:[141] (1) whether the company's total capital is less than its

137) *supra* note 32.

138) Horizontal Merger Guidelines, *supra* note 18, Sec. 4.

139) AFTA, *supra* note 2, Art 7(2)2.

140) The Decree, *supra* note 8, Art. 12-4.

paid-in-capital on the balance sheet for a considerable period of time; (2) whether, for a considerable period of time, the company's operating profit has been less than the interest payable by the company, and whether the company's ordinary income exceeded the company's ordinary loss during such period of time; and (3) whether there has been an application for the commencement of a procedure of a insolvency, composition or corporate reorganization with respect to the company.

There are several rulings of the KFTC dealing with the issue as to whether a company involved in a business combination is a failing company. In the Gillette Case,[142] the KFTC acknowledged that the companies involved in the business combination would go insolvent because: (a) Rocket Electric Co., Ltd., a de facto party to the business combination, had interest expenses whose amount exceeded Rocket Co., Ltd.'s operating income; (b) Rocket Corporation Ltd., another *de facto* party to the business combination, incurred operating losses and was under capital deficit; and (c) the liquidation value of those two companies was higher than their going-concern value. Nevertheless, the KFTC held that the companies could not qualify as failing companies.

In the OB Case,[143] Jinro Coors was considered a failing company because after the commencement of a reorganization proceeding under the Korean Corporate Reorganization Act, Jinro Coors Beer was sold to a third party through an international bidding process. However, based on the fact that Coors Brewing Company ("U.S. Coors") was striving to acquire Jinro Coors, the KFTC stated that the business combination at issue did not satisfy the condition that requires that other business combinations with less anticompetitive effects than the business combination at issue must be unavailable.[144] In the Haitai Case,[145] it was acknowledged that Haitai Beverages was a failing company because its total capital on the balance sheet was less than the paid-in capital and the creditor banks were managing Haitai Beverages' cash

141) Review Guidelines, *supra* note 7, Art. VIII.2.

142) *supra* note 30.

143) *supra* note 31.

144) This is the situation where the managing seller, Korea Development Bank, chose OB as a successful bidder of Jinro Coors Beer after a competitive bidding with U.S. Coors. As a result, U.S. Coors commenced legal proceedings on the grounds of unfairness in the bidding process. It was rejected in the Chungju District Court, and later appealed to the Taejun High Court.

145) *supra*, note 11.

flow. However, since other companies such as Citibank had expressed their interest in acquiring Haitai Beverages, the KFTC found that the condition that requires there be no other business combinations with less anticompetitive effects than the business combination at issue was not satisfied.

In the Hyundai Motor Case,[146] the KFTC decided whether Kia Motors Corporation was insolvent with respect to different products markets. First, the KFTC acknowledged that Kia Motors Corporation met the definition of a failing company because the reorganization of Kia Motors Corporation from a corporate reorganization proceeding appeared to be impossible and international bidding was in progress. With respect to the markets of passenger vehicles and buses, the KFTC allowed the business combination despite its anticompetitive effects after finding that, other than the business combination, there were no other methods to reorganize Kia Motors Corporation. On the other hand, after finding that the anticompetitive effects of the business combination in the truck market were significant, the KFTC issued a corrective order limiting their truck price increase rate to that of their truck export price increase rate for three years. However, the corrective order did not disallow the business combination in the truck market but merely put restraints on their price. Therefore, as in the SK Telecom case, the KFTC's ruling in connection with the truck market could be deemed as an exception (on the grounds of efficiency and failing company) to the principle that a business combination with anticompetitive effects is not allowed.

In light of the foregoing, it appears that, in examining the cases of business combinations involving failing companies, the KFTC focuses on whether any other business combinations with less anticompetitive effects are available.

The Review Guidelines, however, do not provide detailed explanations regarding the circumstances under which the manufacturing facilities would be viewed as becoming useless without a business combination, or under which there would be considered no other business combinations with less anticompetitive effects. In the past rulings, the KFTC appears to have concluded that the manufacturing facilities of a merged company would be useless without a business combination whenever it was deemed impossible to reorganize the merged company without the proposed combination. Particularly, if third party bidding was in progress for a failing company,

146) *supra* note 83.

the KFTC has almost always ruled that such company's manufacturing facilities would exit the relevant market without the business combination at issue.[147)]

As to the issue of the availability of any other business combinations with less anticompetitive effects, in the Haitai Case and the OB Case,[148)] the KFTC concluded that since other companies expressed their interests in acquiring the merged companies by participating in the biddings, there were in fact other business combinations with less anticompetitive effects.

However, there is room for criticism as to whether it should be considered that there are other business combinations available with less anticompetitive effects even where, under those alternatives, other companies would buy the merged company at a price lower than the liquidation value. The reasoning behind the allowance of anticompetitive business combinations involving failing companies is that it is more beneficial to the market to allow such business combinations than to let the manufacturing facilities of the failing companies exit in the relevant market. Even if there is a company that wishes to take over the failing company at a price lower than the liquidation value, such takeover bid is unlikely to be accepted. Rather, from an economic standpoint, the manufacturing facilities of the failing company would eventually be sold component by component at their liquidation value. Therefore, the failing company, as a manufacturing unit, will be eliminated from the market.[149)] For that reason, when the bid price is below the liquidation value of failing company's assets, the existence of other bidders is meaningless in light of the objectives that the KFTC desires to achieve through business combinations of failing companies. Therefore, in such event, the existence of other bidders should be disregarded in determining the availability of less anticompetitive alternatives.

Although the AFTA allows a business combination with anticompetitive effects in the case of a failing company, it does not address the business combinations of failing business divisions which are parts of a corporation. It would be necessary to consider the business combinations of failing business divisions in the same manner as business

147) The Haitai Case, the OB Case, and the Hyundai Motor Case. *Seesupra* notes 11, 31 and 83 respectively.

148) *supra* notes 11 and 31 respectively.

149) In cases involving bidding procedures for sale of the failing company's assets, regarding the availability of a less anticompetitive alternative, it will be desirable for the KFTC to rely on the information acquired from international bidding procedures. *See* Dae Sik Hong, *Failing Firm*, Studies on Economic Law Vol. 1 (Seoul: Supreme Court Library, 1999), pp. 45, 52.

combinations of failing companies. However, it is not clear whether the current law can be interpreted as allowing a business combination involving a failing business division to be approved as an exception on the same basis as a business combination involving a failing company. The Horizontal Merger Guidelines treat a merger with a failing division in the same manner as that with a failing company[150] and the U.S. case law also supports such concept.[151] Since the effects of elimination of an insolvent company and an insolvent business division from a market are the same, if the business combination of an insolvent company is allowed, a business combination of an insolvent business division should also be allowed.

In fact, the KFTC did approve anticompetitive business combinations involving the acquisition of insolvent business divisions in the rulings regarding the establishment of a joint company among three railroad car companies[152], regarding the exchange of businesses between Hanhwa Chemical Corporation and Daelim Industrial Co., Ltd.,[153] regarding the establishment of a joint venture company between Samyang Corporation and SK Chemical Co., Ltd.,[154] and regarding the business transfer of LG Chemical Ltd.'s Hyundai Petrochemical Co., Ltd.[155] To remove uncertainty, however, the AFTA and the Review Guidelines should be amended to include an insolvent business division in the definition of a failing company.

150) "A similar argument can be made for 'failing' divisions as for failing firms. First, upon applying appropriate cost allocation rules, the division must have a negative cash flow on an operating basis. Second, absent the acquisition, it must be that the assets of the division would exit the relevant market in the near future if not sold. Due to the ability of the parent firm to allocate costs, revenues, and intracompany transactions among itself and its subsidiaries and divisions, the Agency will require evidence, not based solely on management plans that could be prepared solely for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market. Third, the owner of the failing division also must have complied with the competitively-preferable purchaser requirement of Section 5.1." Horizontal Merger Guidelines, *supra*, note 18, Sec. 5.2.

151) Antitrust Law Developments (4th), Vol. 1, (American Bar Association), p. 316.

FTC v. Great Lakes Chem. Corp., 528 F. Supp. 84, 96 (N.D.III.1981);

US v. Reed Roller Bit Co., 274 F. Supp. 573, 584 n.1 (W.D.Oklas, 1967).

152) *supra* note 133.

153) This ruling was unreported, but released to Hanhwa Chemical Corporation and Daelim Industrial Co., Ltd.(December. 22)

154) *See* KFTC Press Release of October 24, 2000.

155) *See* KFTC Press Release of November 24, 2000.

VII. Conclusion

Twenty years have passed since the commencement of regulation of business combinations from an antitrust perspective in Korea. As shown above, however, many issues associated with the concept of business combination, market delineation and restraint of competition still remain unresolved.

In particular, in determining the unlawfulness of any business combination, the current method of static analysis—that is, the method that focuses on the state of affairs at a fixed time, be it past or present, such as market share—is no longer effective or reliable in many respects. For instance, in the area of communication services, which is undergoing rapid technological developments and fusion of markets, the static analysis is an inadequate tool for the task of market delineation or the gauging of anticompetitive effect. Furthermore, unlike abuses of dominant market position or unfair trade practices, a business combination, in and of itself, does not hinder free and fair competition but, in many cases, may bring about efficiency-enhancing effects or promote competition. Therefore, a method of dynamic analysis that can best reflect and regulate the future market conditions after the consummation of the business combination at issue is all the more necessary.

Finally, as raised herein, the KFTC rulings on the business combination so far have not contained detailed and sophisticated economic analysis. In light of the importance of the review of business combinations, the government and the KFTC should allocate more resources and efforts in this area and should properly regulate or prohibit anticompetitive combinations. while not unduly regulating non-anticompetitive combinations.