

# Legal Status of Joint Ventures under Korean Competition Law

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## Abstract

*This article reviews the regulatory framework for joint ventures and presents some proposals for its improvement. Korean competition law does not define a joint venture, not even a concentration from substantive points of view. An establishment of a joint venture can be assumed as either a concentration or a cartel. Therefore, there is a possibility of double control of this single behavior, which could severely threaten legal certainty and predictability.*

*Against this background, this article attempts to define the establishment of a joint venture substantively, and it means an acquisition of joint control to a newly created company by two or more undertakings. Considering that a joint venture has an ambivalent nature, or pro- and anticompetitive effects, it is suggested that a joint venture accompanied by structural changes in the participating firms will be dealt with in principle under merger control, where its cooperative effects are reviewed altogether. A joint venture for simple cooperation should be processed within a simplified procedure under certain circumstances. This would result in procedural economies without harming effective competition.*

## I. Introduction

### 1. Background

The Monopoly Regulation and Fair Trade Act of Korea (hereafter “the Act”) contains various kinds of instruments for the protection of fair and free competition. It prohibits abuse of market dominance, cartels, and unfair trade practices on the one hand, and market concentrations on the other hand. The regulation of market concentrations requires, unlike other things, assessment

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of competitive effects due to the challenged M&A transaction in a prospective manner. The Korea Fair Trade Commission (hereafter “the KFTC”), upon finding any serious competitive concerns, has the authority to impose corrective measures and surcharges, and to file a criminal complaint for prosecution (Article 5, 6, 16, 21, 22, 24, 24-2, 71 I of the Act). Any undertaking that has caused injury to other persons in violation of the Act is liable for compensation of actual damages (Article 56 of the Act).

Along with ongoing environmental changes, especially globalization, liberalization and consolidation during the last two decades, firms have come to cooperate with one another. One of the main instruments for their collaboration has been an establishment of a joint venture. In response to these rapid market changes, the KFTC has continuously modernized the competition laws of Korea in terms of substantive and procedural aspects. Above all, the KFTC reformed in 2007 the Notice on Merger Review<sup>1)</sup> (enacted in 1998) and applied vigorously the merger controls of Korea to a number of concentrations, whether domestic or international. Further, the Guidelines for Cartel Review was published in 2002 (revised in 2007)<sup>2)</sup> which accepted to some extent the recent developments of cartel regulation abroad. However, there remain many uncertain issues, which could threaten the effective protection of the competition order in Korea.

So is the case with an establishment of a joint venture. A joint venture is by nature of structural change and behavioral coordination neither *de lege lata* clearly classified into mergers or collaborative conducts, nor reviewed in terms of well-defined legal principles. Setting reasonable rules for joint ventures from substantive and procedural standpoints is of utmost importance, because joint ventures constitute about 20 to 30% of all notified concentrations yearly and those joint ventures are exposed to the risk of double control as discussed below. However, there has been no case where an establishment of joint venture was declared to substantially lessen competition in the relevant market and thereby prohibited. In the area of cartel enforcement, uncertainty prevails, mainly because a joint venture without being notified could be prohibited through an ex post investigation

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1) KFTC, Notice No. 2007/12 on Merger Review, 12. 20. 2007.

2) KFTC, Guidelines No. 49 for Cartel Review, 12. 21. 2007.

by the KFTC.

## 2. *Challenging Issues*

Under the Act, there is a basic and long-standing question of what kind of combination between undertakings should be understood as a merger or a cartel from a competition law perspective. After any answer is given to this problem, joint ventures as legal terminology could find certain contours of their own. And then, it can be clarified how the collaborative nature of a joint venture could be assessed under consideration that an agreement to establish structural change of participating undertakings is likely to raise concerns of competitor collaboration.

Collaborative conducts, which are in practice called joint ventures, strategic alliances, etc., could have some conflicting effects on the relevant markets due to their ambivalent nature. Therefore, the ways for the KFTC to assess such complicated effects of a joint venture, taking all the circumstances into account and avoiding procedural diseconomies, should be developed. For that purpose, not only substantive but also procedural rules for reviewing joint ventures should be improved. Such rules can be called as “an integrated and simplified approach”.

## II. Legal Definition of Joint Ventures

### 1. *Definition of concentrations*

#### 1) *De lege lata*

The Act defines concentrations between undertakings simply as one of the conducts described exhaustively under Article 7 I. There are 5 types of conduct, as follows:

- a. the acquisition or ownership of stocks of another company;
- b. the concurrent holding of an officer’s position in another company by an officer or employee;
- c. a merger with another company;
- d. an acquisition by transfer, lease or acceptance by mandate of the

whole or material part of the business of another company, or the acquisition by transfer of the whole or material part of the fixed assets used for the business of another company; or

e. participation in the establishment of a new company, i.e. a joint venture.

The legal definition above is said to focus mainly on formal instruments rather than any substantive feature of a concentration. This accompanies some legal uncertainties and hampers procedural economies by unnecessarily encompassing too many concentrations under merger control.<sup>3)</sup> In case of a joint venture, any joint acquisition of other stocks satisfies the requirement of concentration, notwithstanding an obligation to notify it to the KFTC. Moreover, the Act does not distinguish between transactions which are likely to cause any structural change of corporate control or simply to accompany any behavioral coordination.

## 2) *Substantive element of a concentration*

As described above, the Act does not contain any substantive element of a concentration in terms of competition law. Theoretically, the distinguishing feature of concentrations from simply collaborative activities lies in that one of the pre-existing undertakings, as a result of the concentration, ceases to exist as an independent economic entity.<sup>4)</sup> This corresponds to the purpose of market concentration regulation. Integration into a single economic entity occurs on a legal or de facto basis; the former, a merger agreement, the latter, an acquisition of shares.

It is necessary to first discuss whether such a substantive definition of a concentration can be derived from any provisions concerning prior notification, because only concentrations subject to mandatory notification under Article 12 of the Act could raise competition concerns requiring further review. Under the Act, a company should notify to the KFTC, especially if it holds at least 20% (15% for a publicly listed or registered corporation) of the total number of stocks issued by another company, it becomes the largest

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3) Bong-Eui Lee, *Review of Joint Ventures under Korean Competition Law*, 7 JOURNAL OF COMPETITION LAW 54 (2001).

4) JONATHAN FAULL & ALI NIKPAY, *THE EC LAW OF COMPETITION* 208 (1999).

shareholder by additionally acquiring shares of another company after notifying the combination of enterprises, or it acquires the largest stocks of a new company to be established (§12 I No. 1, 2 and 5 of the Act). Whereas being the largest stockholder normally implies a kind of control relationship between acquiring and acquired firm, acquisition of 15 or 20% of total stocks would not automatically show any strong links between them.

The concept of a control relationship, which tends to view two separate legal entities as a single economic entity, is found in the Notice for Merger Review, although it was misplaced because the Notice was aimed at providing an approach to be taken by the KFTC and the criteria for determining whether a concentration, as defined per Article 7 of the Act, may substantially restrain competition in the relevant market, and then whether there would be any objective justifications that outweigh the competition concerns, e.g. efficiency-enhancing effect or acquisition of failing firms (Article 7 II No. 1, 2. and V of the Act). The logic is, however, somewhat ironic, because a transaction lacking any control relationship between participants cannot be deemed a concentration from a teleological perspective and it therefore needs not be subject to competition scrutiny at all.

From the discussion above, “control relationship” can be inferred as a core element of the legal definition of a concentration, and what matters is the acquisition of control of one undertaking by another. Control can be acquired by a single undertaking or by several undertakings. The latter represents the case of a joint venture, as follows. It can be suggested *de lege ferenda* that a general, comprehensive clause based on the substantive element of “single or joint control” should substitute for exhaustive illustration of legal instruments of concentration. In this case, the criteria for identifying a control relationship would rather be provided in detail in another Notice instead of the current Notice.

## 2. *Joint ventures under merger regulation*

### 1) *Approaches*

The Act neither uses nor defines the term “joint ventures” at any place. Commentators argue without doubt that No. 5 of Article 7 I of the Act, which illustrates “the participation into a creation of new company” as one type of a concentration, means a joint venture. No. 7 of Article 19 I of the Act, which

describes “a creation of companies etc. to carry out jointly the main area of commercial activities” as one example of cartel, also represents a kind of joint venture.<sup>5)</sup> Here, to define a joint venture in detail has been left to lawyers and economists.

Antitrust discussions on joint ventures developed in the U.S. during the last several decades seem to give no clear guidance to this dogmatic work. Prof. Pitofsky, the former chairman of the Federal Trade Commission (1995-2001), lamented earlier that, in the antitrust field of the U.S., there has not been any generally accepted legal definition of joint ventures.<sup>6)</sup> One defined joint venture as “any association of two or more firms for carrying out some activities that each firm might otherwise perform alone,”<sup>7)</sup> another defined it as “a cooperation that falls short of a complete merger.”<sup>8)</sup> However, this overly broad definition of joint ventures does not help to clarify their genuine competition concerns. The former excludes, without any reasonable explanation, joint ventures between companies which otherwise individually could not enter a new market,<sup>9)</sup> while the latter ignores the substantive differences among various forms of collaboration, e.g. equity joint ventures, stock-swapping, joint R&D, and sharing of production facilities and/or distribution networks, etc. A typology such as that joint ventures can be divided per their functions into R&D, production, distribution ventures etc., is nothing but a simple description of economic phenomena, and it therefore does not provide any useful guides in order to systematically analyze the complicated effects of a joint venture from a competition law perspective. Furthermore, even the definition developed in company law cannot work without modification,<sup>10)</sup> mainly because definitions in law should be made

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5) OH-SEUNG KWON, *THE ECONOMIC LAW* 170 (7<sup>th</sup> ed. 2009) ; HO-YEOL JUNG, *THE ECONOMIC LAW* 203 (2<sup>nd</sup> ed. 2008).

6) Robert Pitofsky, *Joint Ventures under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARVARD L. R. 1007 (1969); see also Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARVARD L. R. 1521, 1524 (1982).

7) ROBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 200 (2005).

8) FTC/DOJ, *Antitrust Guidelines for Collaborations among Competitors*, April 2000, 1. 1. It is commonly referred to as the “Joint Venture Guidelines.”

9) It is especially the case that a certain business entails huge investment and high risks, namely R&D ventures.

10) For example, joint ventures are defined as a company composed of domestic and foreign capital. DONG-YOON JUNG, *THE COMPANY LAW* 44 (2000); HUN-JAE SEO, *CASEBOOK COMPANY*

under consideration of its own goal.<sup>11)</sup>

Here, the starting point is the definition of a concentration described above: control of another undertaking by one or more undertaking(s). Joint ventures subject to merger regulation can be thereby assumed from joint control of another undertaking by two or more undertakings. That is, in case of an establishment of a new joint venture, it is deemed to be a concentration between several acquiring companies on the one hand, and the acquired joint venture on the other hand. That is of much importance, attempting to classify various forms of joint ventures into horizontal, vertical or conglomerate merger and calculating turnover and market shares of participating firms on the basis of any classification.<sup>12)</sup>

Under merger regulations of Korea, the establishment of a joint venture is not captured by No. 5 of Article 7I of the Act if all the participating companies are “specially related persons” as defined under Article 11 of the Enforcement Decree of the Act (hereafter “the Decree”). That means, the participating companies which stand under the same control and therefore belong to the same corporate group, are deemed to be a single economic entity, and therefore, the establishment of a joint venture where only such affiliates are involved gives rise to a single dominance (Article 3 of the Decree).<sup>13)</sup> Besides, an establishment of a joint venture whose stocks are owned 100% by one company will be neither a joint venture nor even any concentration subject to the merger control under the Act.<sup>14)</sup>

Finally, a joint venture could be deemed a concentration in terms of No. 5 merger regulation only where its legal form is a corporation, whereas a joint venture could exist as a cartel regardless of its legal form, i.e. corporation, association, etc. Joint ventures in the form of a corporation should be one that

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LAW 45 (2000). However, in antitrust law, the nationality of participating companies is not relevant.

11) GEORG JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE 224 (2. Aufl. 1919).

12) For details, see BONG-EUI LEE, DIE BEURTEILUNG VON FORSCHUNGS- UND ENTWICKLUNGSGEMEINSCHAFTS-UNTERNEHMEN IM EUROPÄISCHEN KARTELLRECHT 93 (2000); FRITZ RITTNER/MEINRAD DREHER, EUROPÄISCHES UND DEUTSCHES WIRTSCHAFTSRECHT 599 (2008).

13) KWON, *supra* note 5, at 170.

14) In-Ok Son, *Guidelines of Korean Merger Control*, LECTURES ON THE KOREAN FAIR TRADE LAW 153 (2000). Before 1999, the single establishment of an affiliate company was to be notified and reviewed under the Act.

is newly created, if that joint venture can be regulated by merger or cartel controls.<sup>15)</sup> Therefore, if C acquires 50% stocks of B which is 100% controlled by A, and then a joint control between A and C is established, then the acquisition of C cannot be subject to Article 7 I No. 5 of the Act. In the same context, a transition from single control to joint control due to corporate restructuring is not a participation in the establishment of a joint venture, but simply an another acquisition of stocks.

## 2) *Assessment of joint control*

In Korean merger control regime, it does not matter whether and how “joint” control is established. More important is that two or more companies jointly acquire stocks of the newly created joint venture for the purpose of control. Therefore, in case that two or more companies jointly acquire stocks of another non-newly created firm, a concentration in the meaning of Article 7 I No. 1, not No. 5, matters. So the element “joint” is given little importance. For further criteria in order to assess joint control, the Jurisdictional Notice of the EC will be helpful.<sup>16)</sup> Whether any control relationship between two or more acquiring firms and the acquired joint venture is likely to be created through the challenged transaction, is assessed as follows.

In principle, control relationship as of a joint venture is to be assessed under the same criteria applied to single control through stock acquisition. In case of an acquisition or ownership of shares, a control relationship can be easily inferred, provided that the shareholding ratio of the acquiring firms is 50% or more. Even if the shareholding ratio of the acquiring firms is less than 50%, a control relationship can be inferred if the acquiring firms can influence the acquired joint venture considering the following in general (V 1, 3 of the 2007 Notice):

- (1) shareholding ratio of each stockholder, distribution of shares, mutual relationship among stockholders;

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15) Lee, *supra* note 3, at 62.

16) The Commission, Consolidated Jurisdictional Notice on the control of concentrations between undertakings, OJ 2008 C, 95/1. This Notice replaces the Notice on the concept of concentration, the Notice on the concept of full-function joint ventures, the Notice on the concept of undertakings concerned and the Notice on calculation of turnover.



- (2) whether the acquired joint venture gets its main raw materials from the acquiring firms;
- (3) interlocking directorate between the acquiring firms and the acquired joint venture; and
- (4) the existence of transactional relation, money relation, or affiliate relation between the acquiring firms and acquired joint venture.

Additionally, if more than 2 companies acquire stocks of another company, which corresponds not necessarily to the creation of a joint venture, the shareholding ratio, gap, and mutual relation of each acquiring companies and the purpose of acquiring stock and contractual relation for the acquiring stock, are to be considered. The control does not have to be non-transitory; only temporary control is sufficient.

The Act does not differentiate between full-function and partial function joint venture. As a result, an establishment of a joint venture carrying out only a small part of business activities can be regulated as a concentration. The same applies for a joint venture regulated as a cartel.

### 3. *Nature and effects of joint ventures*

#### 1) *Ambivalent nature of joint ventures*

Under the Act, an establishment of a joint venture pursuing common management of a “main” business part could also be challenged *ex post* by the KFTC, considering whether it is likely to unduly restrain competition (Article 19 I No. 7 of the Act). As a result, provisions concerning merger regulation and cartel prohibition are likely to apply to an agreement to establish a joint venture in parallel but within different procedures. This raises the problem of double control to a single identical behavior.<sup>17)</sup> It should also be noted that an establishment of a joint venture would be treated as a cartel between the participating companies that compete in the same product and geographical market.<sup>18)</sup> Ancillary agreements accompanying the establishment of a joint venture will be reviewed as a whole under the Guidelines. Therefore, the

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17) FRITZ RITTNER/MEINRAD DREHER, *supra* note 12, at 599.

18) See JUNG, *supra* note 5, at 309.

establishment of a joint venture which is likely to be allowed as a concentration due to lack of substantial lessening of competition in the meaning of Article 7 I of the Act, could be prohibited *ex post* as an unduly anti-competitive cartel.

There are more differences from the procedural treatment of joint ventures. In case of a concentration, the contracting parties to a joint venture have the obligation to pre-notify it to the KFTC under certain requirements, whereas there is no obligatory notification for a cartel-like joint venture. The KFTC should notify the results of its merger review to the parties within 30 days—it can be delayed to within 90 days if necessary—(Article 12 VI and VII of the Act), whereas a cartel case has neither obligatory notification nor any time limit to be finished.<sup>19)</sup>

Most serious is the difference of their legal effects. If a joint venture is considered to substantially lessen competition in the market, the KFTC may impose corrective measures and, if necessary, periodical fine (Article 16, 17-3 I of the Act). On the contrary, firms that engaged in a cartel-like joint venture will almost always be sanctioned by fine of up to 10% of the related turnover (Article 22 of the Act).

All of this increases legal uncertainty and unpredictability. As a result, undertakings committing to an establishment of a joint venture are obliged to notify the timeline for the concentration and are persuaded to simultaneously apply for an exemption for anti-competitive but outweighing, efficiency-generating cartel. This would necessarily threaten economies of procedure. In sum, the destiny of a joint venture to a large extent will be up to the art of the initiated procedure.<sup>20)</sup>

## 2) *Ambivalent effects of joint ventures*

A joint venture between competitors is likely to warrant economies of scale based on cost savings, to make possible risk-sharing in especially high-

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19) See general time limit for administrative procedure (Article 49 IV of the Act). According to this, if five years has passed since a violation of the provisions of this Act was committed, the Fair Trade Commission shall not issue orders for corrective measures or impose surcharges as prescribed by this Act against such offense. Note, however, that this provision shall not apply in case a corrective measure or the imposition of surcharge is canceled by a court judgment and if a new disposition is made based on the relevant reasons for judgment.

20) Lee, *supra* note 3, at 65.

tech industries, synergy effects etc. and thereby to facilitate effective competition in the long run.<sup>21)</sup> On the contrary, joint ventures may help to coordinate competitive behaviors between participating companies on the relevant market and/or aggravate market structure through monopolization and foreclosure effects.<sup>22)</sup>

Positive and negative effects of a joint venture can be assessed according to the theoretical backgrounds. However, the identification of its various, often conflicting competitive effects is not so simple. Calculation of efficiency is often unclear and there are still many obstacles to its legal acceptance.<sup>23)</sup> Therefore, any definite answer to probable effects of a joint venture is not allowed. As follows, however, some policy implications can be derived from controversial discussions on the possible effects of joint ventures.

First, joint venture as an optimal form of organization has the potential to bring about innovation, which tends in turn to facilitate further rivalry. Second, supplementary relationship between efficiency and competition should be taken into account in assessing competitive effects of joint ventures, provided the efficiency can be proved as specific to the joint venture, verifiable and likely to arise in the short term. Finally, economies of procedure and legal certainty do not always work in contradiction to the just results of substantive analysis. It is especially the case, when effects anticipated from the joint venture necessarily seem conflicting and the legal survival of it depends on the selected procedure under the current regime of double control as proceeded below.

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21) Jeffrey Pfeffer & Phillip Nowak, *ANTITRUST BULLETIN* 315, 319 (1976); Thomas M. Jorde & David J. Teece, 4 *J. Eco. PERSP.* 75, 77, 81 (1990); Joseph Kattan, 61 *ANTITRUST L.J.* 937, 939 (1993); CARSTEN THOMAS EBENROTH & MARTIN SCHICK, *EWS* 218 (1994); ANDREAS FUCHS, *KARTELLRECHTLICHE GRENZEN DER FORSCHUNGSKOOPERATION* 189, 273 (1989).

22) Hartmut Berg, *Marktphasen, Zeitwettbewerb und Strategische Allianzen: Die Beispiele „Mikroelektronik und Personal-Computer“*, in *FS KANTZENBACH* 197, 213 (1996); Michael Bräulke, *Contestable Markets - Wettbewerbskonzept mit Zukunft?*, *WuW* 945, 947 (1983).

23) MEINRAD DREHER, *KONGLOMERATE ZUSAMMENSCHLÜSSE, VERMUTUNGEN UND WIDERLEGUNGSGRÜNDE* 78 (1987).

### III. The Privilege of Concentration

#### 1. Practice of the KFTC

The possibility of double control of a single behavior for establishing a joint venture does not seem desirable as mentioned above. Double control threatens legal certainty and predictability in applying the Act. Looking into the practice of the KFTC, the problem of double control has not yet been realized. Undertakings which are willing to establish a joint venture notify their plans in advance to the KFTC, but so far there has not been a single case where corrective measures were imposed because of its anti-competitive effects as a concentration. More precisely, there has been no joint venture case where in-depth investigation was initiated under merger control.

On the contrary, there have been several cartel cases where the KFTC intervened *ex post*. Almost all the joint venture cases prohibited as a cartel by the KFTC concerned sales or marketing venture between actual competitors.<sup>24)</sup> According to the consistent precedents, the KFTC took a somewhat strict structural approach to a cartel-like joint venture, where the aggregate market share of the participants was considered as of highest importance. Therefore, the KFTC found those joint ventures as threatening to substantially lessen competition based directly on the fact that the aggregate market shares of their participants amounted to over 60% or 90.9%.<sup>25)</sup> Sometimes, it was also considered, although not most importantly, whether the joint venture pursuing cooperation of each sales activities restricted price or output of the targeted item.<sup>26)</sup> Recently, a joint organization for bid-rigging was challenged and sanctioned because of its anti-competitive pricing behaviors.<sup>27)</sup>

However, the problem of double control may come true at any time. For setting effective regulatory framework in the future, it will be helpful to carry out comparative analysis on the procedural approaches to a joint venture.

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24) To date, a total of 16 cases concerning cartel-like joint ventures have been prohibited.

25) KFTC, 3.14.2000, Decision No. 2000-44; 6.18.1996, Decision No. 96-98.

26) KFTC, 7.26.1989, Decision No. 89-45; 9.30.1997, Decision No. 97-218.

27) KFTC, 4.22.2009, Decision No. 2009-99.

## 2. Examples of the EC and Germany

### 1) EC Law

Article 3 IV of the EC Merger Regulation (hereafter “the ECMR”), amended 2004, provides that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of Article 3 I b. Before the ECMR had been adopted in 1989, the European Commission (hereafter “the Commission”) was able to regulate concentrations and cartels according to Article 81 and 82 of the EC Treaty. An establishment of a joint venture had been treated as a coordination of competitors’ behaviors, i.e. cartel. At the time the ECMR was adopted, the legal status of joint ventures was fiercely discussed in order to clearly delineate the jurisdiction of European and national competition laws<sup>28)</sup> and to favor concentrative ventures from substantive and procedural aspects. This was named as “the privilege of concentration”.<sup>29)</sup> And until the 1st revision of the ECMR in 1997, the distinction between concentrative and cooperative joint ventures, which was developed earlier in German competition law, had been widely accepted in the practice of competition authorities in the EU. As a result, a joint venture that performs on a lasting basis all the functions of an independent economic unit, was to be under exclusive jurisdiction of European merger control, unless it is likely to coordinate competitive behaviors between participating companies.

Meanwhile, the Commission had interpreted the two elements of concentrative joint ventures so broadly that most of the joint ventures had been brought into the scrutiny of European merger control. And the revised ECMR of 1997 codified the practice of the Commission by substituting concentrative, cooperative joint ventures for full-function, partial function

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28) Under the ECMR, the Commission had exclusive jurisdiction over concentrations having importance of European dimension, whereas competition authorities of each Member States were able to apply Article 81 I EC Treaty to anti-competitive agreements in parallel.

29) Simon Hirsbrunner, *Die revidierte EG-Fusionskontroll-Verordnung*, EuZW .69, 72 (1998); see critical views, Carolin B. Hösch, *Rechtssicherheit im EG-Wettbewerbsrecht nun auch für kooperative Gemeinschaftsunternehmen*, EWS 5, 8 (1997).

ones. After that revision, in case of a full-function joint venture, whether or not there is a possibility to coordinate participators' behavior, the Commission was to review all the competitive concerns resulting from those ventures and various ancillary agreements in a more transparent and unified procedure of European merger control. It was anticipated to enhance legal certainty at least with respect to collaborations between competitors like joint ventures.<sup>30)</sup>

## 2) German Law

In German competition law, namely "Gesetz gegen Wettbewerbsbeschränkungen" (GWB), a joint venture is understood somewhat differently from that of European competition law. Article 37 I No. 3 paragraph 3 GWB provides that if two or more undertakings acquire equity of another undertaking simultaneously or one after another, then a concentration between them is deemed to be created in the market where the joint ventures is supposed to be active. It is thereby assumed to be a partial merger (so called, Teilfusion) between participating companies,<sup>31)</sup> and such an approach was said to be fit for taking spill-over effects between them into account that are likely to arise through that joint venture.

Under the concept of "partial merger," many commentators and the practice of the German competition authority, i.e. the Bundeskartellamt, divided joint ventures into two categories: concentrative and cooperative ventures. The former is subject to merger control, and the latter the prohibition of cartel (so called Trennungstheorie).<sup>32)</sup> In the meanwhile, the BGH accepted the Zweischranken-Theorie that, in certain circumstances, prohibition of cartel and merger control could be applied parallel to a joint venture because the two are supplementary with each other and the categorization of joint ventures into the above two, is not always simple.<sup>33)</sup> The BGH accepted,

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30) Alexander Schaub & Rüdiger Dohms, *Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag 1055*, WuW (1999).

31) FRITZ RITTNER & MEINRAD DREHER, *supra* note 12, at 598.

32) Peter Ulmer, *Gemeinschaftsunternehmen im EG-Kartellrecht*, WuW 438 (1979); Ulrich Huber, *Gemeinschaftsunternehmen im deutschen Wettbewerbsrecht*, in HUBER/BÖRNER, *GEMEINSCHAFTS-UNTERNEHMEN IM DEUTSCHEN UND EUROPÄISCHEN WETTBEWERBSRECHT* 162, 166 (1978).

33) WuW/E BGH 2169 = BGH 96, 69 "Mischwerke" (1986). See comments to this BGH decision, Kurt Stockmann, *Verwaltungsgrundsätze und Gemeinschaftsunternehmen*, WuW 269

however, the exclusive application of merger control to an establishment of a joint venture not accompanying any behavioral coordination between the participating companies.<sup>34)</sup> After that, in the practice of the Bundeskartellamt, concentrative joint ventures have been so widely construed and exclusively subject to merger control, considering that merger control has some procedural and substantive merits in contrast with cartel prohibition.<sup>35)</sup> By means of this approach, the Bundeskartellamt no doubt aims at facilitating innovative joint ventures and thereby enhancing international competitiveness of domestic industries.

### 3. Some implications

Joint ventures cannot be defined and tested *sui generis* as a concentration or a cartel. The division of concentrative/cooperative or full-function/partial function joint venture had been conceptualized from the perspective of competition policy, not from legal dogmatism or theoretical perfectionism. The only common character found in various forms of joint ventures is ambivalence of their nature: structural change and possible coordination thereto.

Therefore, the point is how to construct legal conditions that joint ventures need to be processed in terms of a merger, which are able to contribute toward eliminating expensive double control in favor of legal certainty and predictability of participating companies. This will be helpful for taking a number of complicated factors into account, which makes possible a comprehensive assessment of a joint venture as a whole.<sup>36)</sup> To this end, it seems thinkable to make only joint ventures lacking any structural change on a lasting basis subject to the cartel prohibition; other joint ventures will be reviewed under the merger control, where the danger of competitors'

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(1988); Karsten Schmidt, *Gemeinschaftsunternehmen im Recht der Wettbewerbsbeschränkungen*, AG 271 (1987); Otto-Friedrich v. Gamm, *Das Gemeinschaftsunternehmen im Kartell- und Fusionskontrollrecht unter Berücksichtigung kartellbehördlicher Unbedenklichkeitserklärung und allgemeiner Verwaltungs-grundsätze*, AG 329 (1987).

34) BGHZ 96, 69 = WuW/E BGH 2169 "Mischwerke."

35) The elements of concentrative joint ventures are in general identical with those of full-function ones.

36) Lee, *supra* note 3, at 78.

collusion can be checked as a whole under the Act.

#### **IV. Integrated procedure for Joint Ventures as a Concentration**

##### *1. Examples of the EU and the U.S. and Korea*

As explained above, a joint venture of full-functionality is subject exclusively to merger control in Europe, if it has a Community dimension (Article 3 IV of the ECMR). The participating companies are obliged therefore to pre-notify that joint venture to the Commission, which in turn is reviewed in terms of the “significant impediment to effective competition” (SIEC) test. Ancillary restraints accompanying the joint venture, which would be by their nature subject to Article 81 EC Treaty, are appraised within the same procedural framework (so called, “one-stop-shop”).

On the contrary, there is not any special, integrated procedure designed to effectively review two different aspects of a joint venture in the U.S. Such an integrated procedure concerning mergers, including joint ventures, is not found in Korea.

##### *2. Proposals*

In Korea, where firms decide to establish a joint venture, they are obliged to pre-notify it to the KFTC and will also be challenged ex post in terms of illegal collusion. Under the current KFTC’s organization chart, business concentrations and cartel cases are reviewed by “the Merger Division” and “the Cartel Investigation Bureau”, respectively. This dual procedure threatens legal certainty and consistence of decisions made by the KFTC. Not the least, it is difficult for the involved Division and the Bureau to cooperate and screen all the competition concerns imminent in the same joint venture. In order to escape from this problematic situation, it can be desirable to introduce one-stop shop in the sense that concentrative and cooperative effects of a joint venture would be reviewed under an integrated procedure. For this task to be carried out, some organizational changes will also be needed.



## V. Simplified procedure for certain Joint Ventures

### 1. *Examples of the EU and the U.S. and Korea*

In Europe, “the Notice on a simplified procedure for treatment of certain concentrations under Council Regulation No. 139/2004 of 2005<sup>37)</sup> and “the Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of 2001<sup>38)</sup> set out a simplified procedure for full-function joint ventures subject to the ECMR and for partial function ones subject to Article 81 of the EC Treaty, respectively. The former provides that the Commission will apply the simplified procedure to certain categories of concentrations in terms of turnover and market share, and it will adopt a short-form decision declaring a concentration compatible with the common market:

(a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:

- (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory; and
- (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory;

(b) two or more undertakings acquire joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged;

(c) two or more undertakings acquire joint control of another

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37) The Commission, OJ 2005/C 56/04.

38) The Commission, OJ 2001/C 368/07(so called “de minimis Notice”).

undertaking and:

- (i) two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 15 %; or
- (ii) one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), provided that none of their individual or combined market shares is at either level 25% or more;

In case of the latter Notice, the Commission will not institute proceedings either upon application or on its own initiative, if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between actual or potential competitors on any of these markets; or if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between non-competitors on any of these markets. In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors, the 10% threshold is applicable.

On the contrary, a special procedure for joint venture is not found in the U.S. Therefore, it is not clear whether a joint venture will be subject to Section 2 of the Sherman Act or Section 7 of the Clayton Act. Instead, the Collaboration Guidelines of 2000 in the U.S.<sup>39)</sup> provides only a safe harbor for certain joint activities in order to enhance legal certainty and economies of procedure. In case of joint ventures, for example, antitrust authorities will not challenge a joint venture unless the aggregate market share of participating companies and the joint venture exceeds 20% on the relevant market.

In Korea, there is neither in the Act nor in the Guidelines a safe harbor for joint ventures considered to be a collusion. According to the Guidelines, joint

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39) See FTC/DOJ, Collaboration Guidelines of 2000, 4.2., 4.2.

ventures are treated as a non-hardcore cartel and reviewed in terms of the rule of reason. As above described, the revised Notice for Merger Review of 2007 provides for several cases subject to a simplified review procedure, where the notified concentration is presumed to create no competition concerns and in principle reviewed with respect to the truth of notified facts to be cleared within 15 days from the date of acceptance of that notification (III of the 2007 Notice). The cases for this fast track are assumed, for example, if the participating companies are in a special relationship with each other, or between acquiring or acquired firms any control relationship is not created, or companies other than Large Corporations in the meaning of Article 12-2 of the Decree are involved in a conglomerate merger, or in the event the market share of the company or market concentration of the transaction territory after the combination falls under the following criteria (II 1 of the 2007 Notice):

- (A) the following for horizontal M&A:
  - ① less than 1,200 Herfindahl-Hirschman Index (a measure of market concentration; hereinafter referred to as “HHI”)
  - ② 1,200 to 2,500 HHI, HHI increase of less than 250
  - ③ more than 2,500 HHI, and HHI increase of less than 150
- (B) the following for vertical M&A or conglomerate M&A:
  - ① the HHI is less than 2,500, and the market share is less than 25%.
  - ② the ranking of the company in each area of trade is less than no. 4.

## 2. *Proposals*

However, it seems to be unclear whether, under the current regime, an establishment of a joint venture will be subject to such a simplified review procedure or not. A joint venture, which is to be subject to merger control because of its concentrative nature, should be notified to the KFTC under Article 12 of the Act. Unless it satisfies any of the above mentioned cases, it will be reviewed in depth with respect to the criteria of whether effective competition is likely to be harmed through the challenged joint venture. However, it is not clear how the thresholds for simplified procedure be applied or interpreted in case of concentrative full-function joint ventures. It

can be also very controversial how joint ventures are to be classified into horizontal, vertical or conglomerate mergers. In this context, most important is that substantive matters, e.g. calculation methods of joint venture's turnover<sup>40)</sup> and classification criteria of joint ventures, should be clearly provided in the Notice.

If a joint venture is otherwise characterized by its cooperative nature, it can be suggested that it enjoys a safe harbor too in that joint ventures by companies with small market share would not be likely to unduly restrict competition in the market. For example, one can conceive of joint ventures whose mother companies have less than 20 percent aggregate market share. This suggestion can also be desirable for other forms of competitors' cooperation except for several hardcore cartels.

## VI. Conclusion

Korean competition law does not define a joint venture, not even a concentration from the substantive points of view. An establishment of a joint venture can be assumed either as a concentration or a cartel to a broader extent. Therefore, there is a possibility of double control of this single behavior. This would thereby severely threaten legal certainty and predictability.

An establishment of a joint venture should be defined substantively as an acquisition of joint control to a newly created company by two or more undertakings under merger control. Otherwise, it should be dealt as a simple collaboration under the Act. Considering that a joint venture has an ambivalent nature, with pro- and anticompetitive effects, it is suggested that a joint venture accompanied by structural changes in the participating firms will be dealt with in principle under merger control, where its cooperative effects are reviewed altogether. A joint venture for simple cooperation should be

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40) The Commission, Notice on a simplified procedure for treatment of certain concentrations under Council Regulation No. 139/2004, Note 5, where the turnover of the joint ventures should be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.

processed within a simplified procedure under certain circumstances. This would result in procedural economies without harming effective competition.

KEY WORDS: joint ventures, competition law, legal definition, joint control, ambivalent nature, market concentration, cartel, double control, simplified procedure, safety zone, unified approach, one-stop shop