

One of other reasons, which is rather theoretical, is that the prohibition of undue internal dealing and its intended targets, i.e. Chaebols, are so unique that no comparable discussion from other jurisdictions, which has often been a useful tool for discussing issues on the MRFTA, is available. The most critical theoretical reason, however, that created hot debates on the prohibition of undue internal dealings should be legislative carelessness in providing for undue internal dealings as a type of unfair trade practice under Article 23 of the MRFTA. Since the prohibition of undue internal dealings has legislative intent quite different from other types of unfair trade practices prohibited by the Article 23, one cannot find a coherent standard for evaluating all types of unfair trade practices including undue internal dealings. The lack of coherency in interpreting prohibition of unfair trade practices has caused troublesome problems in applying the provision to undue internal dealings as well as to other types of unfair trade practices.

To cure those problems and secure a clear standard in enforcing the prohibition of undue internal dealings, legislative improvement is necessary. If the prohibition of undue internal dealings mainly targeting the concentration of economic power by large business groups keeps its viability as a competition policy goal, then, it should be positively considered to provide for it as a measure to repress concentration of economic power under Chapter 3 of the MRFTA. This will secure the consistency between the legislative intents and the statutory regulation of undue internal dealings and thereby enable the law enforcers in the competition authority and practitioners to avoid unnecessary confusion on the prohibition of undue internal dealings.

Merger Regulations under the Korean Competition Law - Based on M&A Review Guidelines and KFTC's Decisions -

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Abstract

As a general rule, the Monopoly Regulation and Fair Trade Act prohibits mergers restricting competition in a given area of trade, mergers achieved through coercion or any other unfair methods, or those consummated by way of acts of evasion of law. Acting either on its own authority or a notification by a company involved in the merger, the Korea Fair Trade Commission examines in detail whether the merger in question falls under the proscribed categories above. The "M&A Review Guidelines," then, set a concrete standard to be used in assessing a merger.

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*As globalization has progressed, the need for establishing a uniform international standard for merger regulations has intensified. Recently, there has been a lively debate over the issue centered around the ICN. Viewed in that context, the current **M&A Review Guidelines** seem to fail to establish a concrete and objective standard concerning issues such as definition of relevant market and assessment of competition restrictiveness. Moreover, it is to be noted that the Korea Fair Trade Commission often draws conclusions without undertaking a thorough economic analysis or presenting a concrete basis for its findings.*

There exists a need to formulate an objective standard agreeable to the parties to a merger and to introduce a method for thorough economic analysis. However, the effort to establish a concrete standard through the accumulation of KFTC's decisions and judicial precedents on individual cases should be sustained since it is difficult to exactly reflect the economic reality of everyday life in the form of standard in enforcing competition law.

I. Introduction

A series of merger activities as part of a company's routine business practice are not illegal if the procedures and requirements set forth by the relevant law have been observed. However, even a merger consistent with commercial and other relevant regulations can be nullified or ordered to be subject to conditions if the merger is determined to be restricting competition under the Monopoly Regulation and Fair Trade Act (the "Act"). Therefore, independent of examining the procedure for executing a merger, the task of discerning whether the company in question conforms to the purpose of merger regulations under the Act takes on a great significance.

The mere fact that a merger has caused an unnatural structural change in the market does not necessarily mean that such a merger would lead to a competition-restrictive market behavior as such a merger is sometimes likely to enhance economic efficiency. Hence, competition authorities must conduct concrete evaluation by identifying both the positive and negative impacts of the proposed merger on competition and then by comparing and balancing both effects. In particular, to judge the illegality of a merger, one should invariably take market conditions into account; consequently, an almost identical merger can be determined as violating the law in one instance but not in another depending on the market conditions.¹⁾

In the following, the meaning of merger and the contents of M&A Review Guidelines("the Guidelines")²⁾ will be briefly expounded and evaluated in light of the International Competition Network("ICN") Merger Working Group's project on merger guidelines.³⁾ This paper will then examine the position of the Korea Fair Trade Commission (the "Commission") as reflected in its decisions over the years.

1) Dae Sik Hong, "The Merger Control in Korea", *Court Trial Materials* Vol. 87 (Seoul: Court Library, 2000), pp. 294-5.

2) In 1981, the Fair Trade Commission published "Review Outline Regarding M&A" as an internal guide. As the Review Outline failed to have much impact, under Article 7 Paragraph 5 of the Act, the Commission established in 1998 the "M&A Review Guidelines," currently enforced as amended in the Notification on M&A Review Guidelines, Notification No. 1999-2.

3) As globalization intensifies, the number of mergers by businesses with different nationalities has increased as

II. Main Body

A. The Meaning of Merger

1. The Definition of Merger

Because the term “merger” is often confused with concentration, business combination, or business group, etc., depending on the context of usage, it is difficult to interpret the term in a uniform manner. Commercial law stipulates various types of activities that can serve as ways of merging (business transfer, business lease, assignment of management, profit-sharing contract, business combination, mutual share ownership regulation, etc.) but does not define “merger” itself.

Likewise, the Act remains silent on the actual definition of merger. In theory, however, a merger under the Act is defined as “an act that eliminates economic independence of individual companies by unifying their capital, personnel, and organizations under a single decision-making and management structure.”⁴⁾

2. Classification of Merger

Article 7 Paragraph 1 of the Act classifies mergers into acquisition of shares, interlocking directorate, business combination, transfer of business, participation in the incorporation of a new company based on the types and means of business combination which are also related to such as filing process and the method of determining the formation of controlling relation. On the other hand, the Guidelines

has the impact of mergers by purely foreign business entities on a country. Since approximately 70 countries use different competition regulations, a merging company has the burden of examining all such regulations separately and the outcome of legal assessment may vary accordingly. Consequently, a proposal for resolving such issues through discussions and negotiations was in progress, bringing about the most notable such achievement in the form of the ICN Merger Working Group’s documents. For details, see ICN homepage available at <www.internationalcompetitionnetwork.org>., “Recommended Practices for Merger Notification Procedures” (working group documents), and “Project on Merger Guidelines - Report for the Third ICN Conference in Seoul (April 2004)” (Analytical Framework Subgroup), etc.

4) Oh Seung Kwon, *Merger Control* (Seoul: Beopmunsa, 1987), p. 32.

Section VII classifies mergers into three categories based on the impact of the merger on the relevant market in relation to determining competition-restrictiveness: horizontal merger, characterized by the merger between competing companies; vertical merger, characterized by the merger of companies in “adjacent” positions with regard to the production of raw materials, product production and sales, product distribution, etc.; conglomerate merger, separate from horizontal and vertical mergers.

B. Analysis of M&A Review Guidelines

The Commission’s review process generally begins after a merger, which is

5) The following is a brief analysis organized into a table.

Classification	Entity Required to Report	Merger Type	Reporting Period
Reporting Prior to Merger	Large-Scale Corporation	Business Combination	Within 30 days from the date of entering into contract
		Transfer of Business	Within 30 days from the date of entering into contract
		Involvement in Establishing New Company	Within 30 days from the date of resolution by the board of directors concerning incorporation of a new company
※ A large-scale corporation refers to one with total assets or sales is at least 2 trillion Korean won; registration of business combination, execution of transfer of business, or acceptance of shares are not permitted until 30 days after filling a report.			
Reporting After Merger	Entity Other than Large-Scale Corporation	Business Combination	Within 30 days of registration of business combination
		Transfer of Business	Date of completion for payment of transfer of business; 90 days from the date in question if payment completed after 90 days of entering into contract
		Involvement in Establishing New Company	Within 30 days from the next day of the deadline for payment of the assigned shares
	All Business Entities Required to Report	Share Acquisition ownership	Within 30 days from the date of delivery of share certificate (within 30 days from the date of payment for sales of shares if share certificate not issued)
※ Amendment to the Act to be effective 4/1/2005 includes all share acquisitions involving a large-scale company as subject to reporting prior to merger.			
	Large-Scale Corporation	Interlocking Directorate	Within 30 days from the date of selection of officers a general meeting of stockholders or partners in both companies

reported either prior to or following the actual deal depending on its type,⁵⁾ but the process may be begun by the Commission on its own authority. Moreover, the Commission's review is conducted in two separate processes for mergers falling under the general review category and those under the simplified review category, with the accompanying differences in review criteria used. The following is a brief summary of the major differences between the two.

Mergers are subject to simplified review in which 1) parties to the merger fall under the specially related parties (excluding those participating in the merger with the common purpose of controlling the management) status, 2) a controlling relation is not formed between the companies, or 3) an entity not falling under the category of large-scale company undergoes a conglomerate merger and simplified review is applied when the merger satisfies one of the requirements as such. The Commission deems mergers conforming to any of these three groups to lack competition-restrictiveness and announces the outcome of its review within 15 days of the filing of the merger report after reviewing only the facts pertaining to the contents being reported. In contrast, general review is applied to mergers not applicable to the simplified review category merger and those mergers are subject to the following general review process.

1. An Outline of the Guidelines

As a general rule, a merger review begins with an appraisal of whether a controlling relation has been formed. This is so that the Commission can determine whether the economic identity of an independent company, in contrast to the case of a merger or business transfer resulting in a controlling relation, has been forfeited through share acquisition, interlocking directorate, or participation in the incorporation of a new company.

Then, the Commission determines the possible presence of competition-restrictiveness after defining a given area of trade in accordance with the object of transaction (product market), the transaction territory (geographical market), the stages of transaction, and the parties to transaction. Depending on the impact of the merger on the relevant market, the determining criteria for competition-restrictiveness consist of horizontal merger, vertical merger, and conglomerate merger. In particular, Article 7 Paragraph 4 of the Act stipulates that a merger is presumed to substantially restrict competition in a relevant market if the merger

satisfies certain criteria.

Even when a merger is judged as substantially restricting competition in a given area of trade, the business entity in question may be granted an exemption by substantiating claims of enhanced efficiency, non-viable enterprise, or failing firm.

Article 15 Paragraph 1 of the Act prohibits mergers consummated by way of acts of evasion of law and Article 21.3 Paragraph 1 Subparagraph 1 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act sets forth the criteria for determining the details of such violations. Also, where a merger involves coercion and unfair methods, the Act prohibits such a merger independently of the competition-restrictiveness factor.

2. Exemptions to Merger Prohibition

Prior to the amendment enacted on Feb. 5, 1999, rationalization of industry and enhancement of international competitiveness were acknowledged as grounds for exemption. After the amendment, however, only the effect of enhancing efficiency and non-viable corporations claims have been acknowledged as grounds for exemption, with the burden of proof resting on the business entity in question as was the case before the amendment. However, there exist few precedents of the Commission acknowledging such claims since it is extremely difficult to substantiate them.⁶⁾

a) *Efficiency* Defense

If the defense that the effect of enhancing efficiency otherwise difficult to achieve outweighs the harms from the restriction of competition caused by the merger is substantiated, it will be acknowledged as grounds for exemption (Article 7 Paragraph 2 Subparagraph 1). The details of the criteria are as follows.

Firstly, the effect of enhancing efficiency resulting from the merger must exceed the harms caused by the restriction of competition. The effect of enhancing

6) According to the Commission, a total of 13 cases have been granted exemption as of the end of 2003. Of those, only 5 occurred after the revision of Feb. 5, 1999, and 4 of the 5 cases were granted exemption based on the claim of non-viable enterprise.

efficiency resulting from a merger refers to that in areas of production, sales, research and development, or the effect of enhanced efficiency on the national economy as a whole. The criteria used in determining the possibility of the effect of enhancing efficiency on production, sales, and research and development are as follows: 1) whether the production cost can be reduced through the economization of scale, integration of production facilities, rationalization of the production process; 2) whether the sales cost can be reduced or sales or exports can be increased by integrating or sharing sales network; 3) whether sales or exports can be increased by sharing market information; 4) whether logistics cost can be reduced by sharing shipping and storage facilities; 5) whether production-related technology and research capacity can be enhanced through a mutual complementation of technology or sharing or effectively utilizing skilled personnel, organization, and capital; 6) whether other expenses can be significantly reduced.

On the other hand, the effect of enhancing efficiency on the national economy as a whole is determined according to the following: 1) whether the merger makes a significant contribution to job creation; 2) whether the merger makes a significant contribution to the development of regional economies; 3) whether the merger makes a significant contribution to the development of “forward and backward-related markets”; 4) whether the merger makes a significant contribution to the stabilization of the nation’s economy by providing a stable energy supply, etc.; 5) whether the merger makes a significant contribution to the improvement of the environmental pollution.

Secondly, such an enhanced efficiency should be difficult to achieve by using methods other than the given merger. If this defense is to be acknowledged, the following criteria must be satisfied: 1. it shall be difficult to attain enhanced efficiency through the expansion of facilities, development of technology, or methods other than the merger; 2. that cost reduction shall not be realized by using competition-restrictive methods like reduction in production volume, decline in the quality of service provided, etc.

Thirdly, it must be clear that the effect of enhancing efficiency will take place in the near future.

b) *Failing Company Defense*

If a company undergoing a merger satisfies one of the requirements for being classified as a non-viable corporation, e.g. having an total capital that is less than paid-in capital on the balance sheet for a considerable period of time, it will be acknowledged as grounds for exemption. The details are as follows.

Firstly, one of the companies involved in the merger must be a non-viable corporation. A non-viable corporation refers to one in default or in danger of being in default in the near future due to a severe deterioration of its financial position. The company is determined as a non-viable corporation in accordance with the following considerations: 1) whether the total shareholder equity of the company on its balance sheet has been less than its paid-in capital for a considerable period; 2) whether the interest expense of the company has exceeded its operating income for a considerable period during which the company has recorded an ordinary loss; 3) whether the company has filed for bankruptcy under Article 122 Paragraph 1 or Article 123 Paragraph 1 of the Bankruptcy Act; 4) whether the company has filed for the commencement of composition under Article 13 of the Composition Act; 5) whether the company has filed for the commencement of corporate reorganization procedure under Article 30 of the Corporate Reorganization Act; 6) whether the company is managed by its creditor financial institution as a result of the company’s entering into a contract to delegate its management to the financial institution in order to dispose of bad bonds.

Secondly, it must be difficult to use the company’s production facilities, etc. on a continuous basis in the concerned market by no other means than the merger. Hence, the Commission may not grant an exemption status to a company which satisfies one of the requirements for classification as a non-viable corporation if the company’s operations can be normalized after a certain period by an increase in capital, additional supply of debt, etc.

Thirdly, it must be hard to achieve a merger that is less likely to be competition-restrictive than the merger in question.⁷⁾

7) In practice, cases in which other potential bidders for acquisition do not exist or other potential bidders wish to take over at a price below that of the merger in question can be included in this category.

3. Formation of Controlling Relation

There is no provision under the Act that holds the existence of a certain type of transaction to be sufficient for classification as a merger and requires the formation of a controlling relation as a requirement for consummating such a merger. However, the Commission views the assessment of controlling relation as necessary since in actuality the formation of a controlling relation can be considered an essential conceptual element of any merger. Hence, whether a controlling relation has been formed is determined first in the case of share acquisition, interlocking directorate, and participation in the establishment of a new company besides the case of a merger or business transfer by its very nature causing the formation of a controlling relation.⁸⁾

Firstly, a controlling relation is determined to have been formed if the following conditions apply: 1) the shareholding ratio of the acquiring party and others in the acquired party is 50% or greater; 2) even when the shareholding ratio of the acquiring party and others is less than 50%, the acquiring party and others hold the greatest shareholding ratio and the share distribution is such that the acquiring party is in a position to control the company by exercising shareholder's rights or the acquired party receives most of its primary raw materials from the acquiring party while the latter stands in a market-dominant position in the production of the primary raw materials. The same set of terms applies to participation in the establishment of a new company.

Secondly, with regard to interlocking directorate, a controlling relation is determined as having been formed if 1) the number of directors of the acquiring party and others with interlocking directorate of the acquired party exceeds one third of the total number of directors of the acquired party, thereby enabling the acquiring party and others to exercise substantial influence on the overall management of the acquired party; or 2) the interlocking director concurrently holds a position such as chairman of the board of directors of the acquired party that enables the interlocking director to exercise substantial influence on the overall management of the acquired party.

8) The Guidelines Section V.

4. Defining a Given Area of Trade (Relevant Market)

Defining a relevant market often plays a crucial role in determining whether a merger restricts competition. While in practice the definitions of the product market and the geographical market are used as principal criteria, the market defined according to transaction stage and the market defined according to the buyer groups are used as supplementary criteria. In addition, whereas a set of both quantitative and qualitative criteria appears to be used with regard to defining the product market and the geographical market in the guidelines, a quantitative method of analysis useful to determine whether the quantitative criteria have been met has yet to be proposed in a practical way.

The criteria used in defining a relevant market as reflected in the Guidelines are as follows.⁹⁾ Firstly, a product market refers to the aggregate of products with which major buyers of a specific product may substitute that product in response to a significant increase in the price of such product (including service) over a considerable period. The product market is determined with regard to 1) similarities in the function and usage of products; 2) similarities in the price of products; 3) buyers' perception of the substitutability of products and their related purchasing pattern; 4) sellers' perception of the substitutability of products and their related business decision-making patterns; 5) the Korea Standard Industry Classification notified by the director of the National Statistical Office under Article 17 Paragraph 2 of the Statistics Act (Classification of Statistics Data).¹⁰⁾

Secondly, a given area of trade refers to the entire geographic region with which major consumers in a specific region may substitute the sources of a specific product in the event of a significant increase in the price of that product over a considerable period while the price in all other regions remains constant. Whether a given geographic area can be classified as belonging to a specific area of trade is determined with regard to 1) the characteristics of the product (perishability, changeability, breakage, etc.) and the seller's business capabilities (production capacity, scope of sales network, etc.); 2) buyers' perception of the substitutability of

9) The Guidelines Section VI.

10) It has not been determined whether the base price here refers to the prevailing market price or competitive price. Likewise, the qualitative degree of a significant price increase has yet to be defined.

a geographic area in obtaining a specific product and their related behavioral patterns in changing purchase areas; 3) seller's perception of the substitutability of a geographic area in obtaining a specific product and their related business decision-making patterns; 4) the ease with which the purchase areas can be changed with respect to time, economy, and law. In practice, there exists no precedent of including a foreign market in determining a regional market, but the possible introduction of foreign competition is partly reflected at the level of determining the possible presence of competition-restrictiveness.

Thirdly, depending on the case, a market can be defined according to the stages of transaction such as manufacturing, wholesale, and resale. If there exists a particular buyer group with regard to products, geographic areas, or stages of transaction due to the characteristics of the buyers of the product or the peculiar nature of the product, a relevant market may be defined with regard to such buyer groups.

5. Substantial Restrictions on Competition

As discussed below, competition-restrictiveness of a merger is determined with respect to its classification as either horizontal, vertical, or conglomerate.¹¹⁾ However, while the Guidelines nominally call for assessing mergers by giving equal consideration to the structural standard based on the combined market share and other competition-related factors, in practice the Commission seems to give primary consideration to the structural standard based on the combined market share and secondary consideration to other competition-related factors.

The combined market share is usually calculated by using the total sales in the previous business year (if the business year has just ended, the total sales of the business year preceding the merger is used),¹²⁾ but quantity of material resources or productive capacity may be substituted if the market share is difficult to quantify or is an inadequate index.

11) The Guidelines Section VII.

12) Company's total domestic sales (sales of imports included) amount of the concerned product in divided by the total domestic sales (sales of imports included) amount of the concerned product.

a) Horizontal Mergers

Whether a merger between competing companies substantially restricts competition is determined according to the criteria below. Among the criteria, a quantitative set of criteria is given primary consideration with regard to the level of market concentration. With regard to the possibility of a new entry including the possible introduction of foreign competition, however, a qualitative set of criteria is given primary consideration.

Firstly, the degree of market concentration is considered.

A merger is determined as substantially restricting competition if the combined market share by the acquiring party (and others) and the acquired party is 1) 50% or greater; 2) among the top three and their combined market share is 70% or greater.

However, a merger involving a company with a market share among the top three whose combined market share is 70% or greater is nevertheless determined as not substantially restricting competition if 1) the combined market share of the acquiring party (and others) and the acquired party ranks second with less than 30%, with a significant gap with the first; 2) the combined market share of the acquiring company (and others) and the acquired party ranks third, with a significant gap between the first and the second or between the second and the third; 3) there are no significant gaps between the market shares of the first and second, between those of the second and the third, and between those of the third and the fourth.¹³⁾

In addition, a merger otherwise satisfying the preceding set of criteria for competition-restrictiveness is nevertheless determined as not substantially restricting competition if 1) the increase in market share is less than 5% or 2) a bulk purchaser¹⁴⁾ exists in the given area of trade.

Also considered are changes in market concentration for the last few years. If there has been a significant increase in market concentration in the last few years, a merger by businesses with high market shares is assessed as increasing the

13) A significant gap here refers to the market share of the company after the merger amounting to less than 75% of that of another company that ranks immediately above in terms of market share.

14) The term refers to a business entity whose total purchase, together with specially related parties, occupies a percentage of the total amount supplied in the given area of trade (the total domestic sales amount including the sales amount from imports of the product) that can substantially restrict competition in the given area of trade.

possibility of substantially restricting competition. In such cases, the presence of factors including the development of new technology, patent rights, and others that may cause changes in the ensuing competition relations in the market is considered.

Secondly, the level of foreign competition in the market and the general status of international competition are considered.

In a market where importing is easy or imports occupy increasingly greater percentage, a merger may decrease the possibility of substantially restricting competition. In such cases, the following factors are considered in assessing the possibility of market entry by foreign competitors: 1) international price and the status of the product supply and demand; 2) the extent of the opening in the domestic market and the current status of foreign investment; 3) the existence of a strong international competitor; 4) customs tariffs and plans to lower customs tariffs; 5) other non-tariff barriers.

In addition, if exports occupy a significant portion of sales turnover and a substantial competition exists in the international market, a merger is determined as less likely to substantially restrict competition.

Thirdly, the likelihood of new entries to the market is considered.

If new entries to the market can readily emerge in the near future, a merger is determined as less likely to substantially restrict competition since the number of competitors reduced by mergers can easily rise again. The likelihood of new entries, then, is assessed with regard to the following factors: 1) presence/absence of legal or institutional barriers to entry; 2) the size of minimum capital required; 3) production technology requirements including patents and other intellectual property rights; 4) conditions of location; 5) conditions of raw material purchase; 6) the distribution network of competitors and the cost of establishing sales network; 7) the level of product differentiation. In addition, new entries to the market are assessed as relatively easy in the event of the existence of a company falling under one of the following categories: 1) a company with publicly announced intent, plans, and the like to invest and participate in the market; 2) a company considered likely to participate in the market in the near future without a significant burden of cost of entry or exit in response to a significant increase in price in the market, e.g. the ability to enter the market in question without significantly modifying its existing production facilities.

The fourth consideration is the possibility of collusion by competitors.

A merger is assessed as likely to substantially restrict competition if the decline in the number of competitors due to the merger creates a situation conducive to explicit or implicit collusion on price, output, or terms of transaction. The existence of such situations is determined according to the following considerations: 1) whether the price of the products sold in the concerned market has been significantly higher than the average price of similar products not included in the relevant market; 2) whether businesses in competing relations have maintained a stable market share for the past few years in the market with an inelastic demand for the product in the relevant area of trade; 3) whether there exists a high level of homogeneity among the products supplied by businesses in competing relations as well as a similar set of the terms of production and sales among competitors; 4) whether information about the business activities of competitors is easily accessible; 5) whether there have been improper concerted activities in the past.

The fifth consideration is the existence of similar goods and adjacent markets.

If a product is determined as similar to the product at issue in function and use but constitutes a different product market due to differences in price or other factors, the similar product's effect on the relevant market such as the possibility of production technology development and the similarity of sales channels are considered. On the other hand, if it is determined that separate markets exist according to their physical locations, the effect of surrounding markets including the size of participants in those markets, the geographical proximity of the markets, shipping methods, and the possibility of the development of shipping technology are considered.

In addition to the preceding five considerations, the Commission has increasingly come to use assessment criteria not established by the Act or the Guidelines. Among such criteria is the Herfindal-Hirshman Index ("HHI") created in accordance with the Horizontal Merger Guidelines (4/2/1992) of the U.S. Department of Justice Antitrust Division and the Federal Trade Commission. The Korea Fair Trade Commission determines a merger to create or strengthen market-dominance, or to easily exercise the power of market-dominance if the HHI increases by 100 or more in a concentrated market characterized by a HHI value of 1,800 or greater.

b) Vertical Merger

The competition-restrictiveness of a vertical merger, undertaken by interrelated corporate entities in the process of production and distribution from the production of raw materials to the production and sales of goods, is determined mainly with respect to market foreclosing effect. Hence, a company is determined as substantially restricting competition by foreclosing the purchase or sales channels of its competitors if it meets one of the following criteria: 1) the market share of a raw material supplier (including specially related parties in the case of acquiring company) meets the criteria concerning the degree of market concentration in the horizontal merger (50% by a single company, 70% by the top three); 2) the ratio of the total purchases of the buyer of raw materials (including specially related parties in the case of acquiring company) to the total domestic supply meets the established criteria in the horizontal merger (50% by a single company, 70% by the top three).

In addition to market share, the following factors are considered in determining the likelihood of the presence of market foreclosing effect due to the merger in question: 1) the purpose of the merger; 2) the possibility of securing alternative channels of sales and distribution, including those for imports and exports by competitors; 3) the extent of vertical integration of competitors; 4) the growth prospect of the relevant market and the business plans of the company in question, e.g. plans for facility expansion; 5) the likelihood of collusion to eliminate competitors; 6) the situation of the product market and the effect on that market in raw material-dependent relations with the product in question and the market producing the final product.

Moreover, if vertical mergers are undertaken between large-scale corporations or occur widely in continuous stages and in consequence raise the entry barrier to the extent that it is difficult for competitors to enter the market, e.g. increasing the size of the minimum capital required for market entry, such mergers are assessed as likely to substantially restrict competition.

c) Conglomerate Merger

A conglomerate merger, distinct from a horizontal or vertical merger, is assessed mainly with regard to whether it undermines potential competition.

A conglomerate merger is assessed as substantially restricting competition in a given area of trade by hindering potential competition if it meets the following conditions: 1) if not for the merger in question, as a large-scale corporation the acquiring party - since producing products with similar production technology, distribution channels, purchase stages, etc. - is likely to have entered the given area of trade using means with less competition-restrictive effects, or it is determined that the existence of the acquiring party and others, with the potential to enter the given area of trade, is discouraging businesses in the given area of trade from exercising market dominance; 2) the market share of the acquired party is 50% in the case of a single company, or 70% in the case of three; 3) there exist significant gaps between the acquiring party and most of the competitors of the acquired company with the business scale, capital, etc.

In addition, a conglomerate merger is assessed as likely to substantially restrict competition if 1) the merger gives rise to a significant improvement of the overall business capabilities of the companies, such as technology, sales power, and the ability to mobilize capital and acquire raw materials, to the extent of eliminating competitors based on factors other than price and quality; 2) the merger raises the barriers to market entry by, for instance, increasing the minimum capital required to enter the market to the extent of rendering difficult the market entry of other potential competitors.

d) Presumption of Competition-Restrictiveness

According to Article 7 Paragraph 4 of the Act as amended Dec. 30, 1996, the presence of competition-restrictiveness is presumed if the requirements delineated below are satisfied.¹⁵⁾ The Commission has often utilized the presumption clause,¹⁶⁾ but such use has not been subject to judicial review.

First, a merger will be deemed to substantially restricting competition if the total market share of the company involved in the merger 1) meets the requirements for

¹⁵⁾ It is difficult to find legislations of this nature after a similar clause in the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränken, GWB) was deleted in 1999.

¹⁶⁾ After establishing the clause, the Commission has applied it in 15 of the 27 cases involving merger regulation through November 2004.

market-dominant businesses (50% or greater for a single company, 75% or greater for three companies or less); 2) is first in the given area of trade; 3) differs from that of the second-ranking company by 25% or greater (“Market Share Criteria”).

Secondly, a merger is presumed to substantially restricting competition if the merger, undertaken by a large-scale corporation either directly or through specially related parties, 1) takes place in a given area of trade in which two-thirds of the market share are occupied by small and medium sized enterprises as defined under the Framework Act on Small and Medium Enterprises; 2) acquires a market share of 5% or greater (“Scale of the Company Criteria”).

While there has been a controversy over the legal effect of presumptive rules of competition-restrictiveness, the Supreme Court has taken the stance that the presumption clause (Article 19 Paragraph 5 of the Act) relevant to improper concerted activities carries the same weight as does the presumption in civil procedures and that once the Commission proves the requirements for the presumption, the burden of proof for reversing the presumption in question lies on the business entity.¹⁷⁾ However, the Commission uses the presumption clause mainly as a set of criteria with which to determine the degree of market concentration in relation to horizontal mergers and makes complementary assessments on requirements other than those involved in presumption.¹⁸⁾

6. Prohibition of Mergers Achieved through Unfair Methods and Evasion of Law

Mergers achieved by means of coercion or any other unfair methods are prohibited under Article 7 Paragraph 3 of the Act. Such methods or procedures, which clearly violate other laws or are substantially unfair, are regulated independently from the determination of competition-restrictiveness.

17) See Supreme Court Decision on Case, March 14, 2002 (99 du 6514, 99 du 6521); if the Supreme Court maintains such stance on the interpretation of the presumptive clause of competition-restrictiveness to the merger as well, the business entity faces the burden of proving that competition is not substantially restricted.

18) While objections exist, it is generally agreed that the market share criteria(article 7 paragraph 4 subparagraph 1 of the Act) applies to horizontal mergers, scale of the company criteria(article 7 paragraph 4 subparagraph 2 of the Act) to conglomerate mergers by large-scale corporations.

Moreover, one must not attempt to evade the application of merger regulations (Article 15 Paragraph 1). Evasion of law as applicable here refers to substantially restricting competition in a given area of trade by using methods other than mergers, e.g. a large-scale corporation using the internal structure of a company (Article 15 Paragraph 2 of the Act, Article 21 Paragraph 1 Subparagraph 1 of the Enforcement Decree).¹⁹⁾

C. An Assessment of the M&A Review Guidelines

1. Problems Relating to Conceptual Definition of Merger

The most fundamental problem relating to merger regulations under the Act is that the definition of a merger has not been clearly established as an express provision of law. Hence, when a new type of merger is not included in the law and regulations (the Guidelines), it becomes difficult to determine whether such combination is to be regulated as a type of merger. Taking the example of strategic alliance agreement, one can only predict that in Korea a strategic alliance agreement achieved through methods not included in the relevant law is not likely to be regulated as a merger according to the practice of the Commission. Hence, it is difficult to predict with accuracy whether such an agreement should be viewed as a form of merger or merely as a cooperation agreement since it may or may not have the effect similar to that produced by a merger depending on the degree of the alliance involved.

Furthermore, it has been pointed out that the discrepancy in the criteria used in assessing the possible formation of a controlling relation in a merger and that used in assessing the incorporation of a affiliated corporation is not quite rational when in fact the “formation of *de facto* controlling relation” is used to assess both mergers and incorporation of affiliated corporation under the Act.²⁰⁾ Such criticism notwithstanding, the notion of controlling relation under the Act can be divided into “*de facto* control,” used in assessing an affiliated corporation and “substantive

19) At present, there exists no precedent of mandating corrective measures based on evasion of law.

20) Jae Woo Lee, “Toward Improvement of Regulation of Business Combination”, *Fair Competition* (Seoul: Korea Fair Trade Association, August 1999), p.11.

control,” used in determining the possible formation of a controlling relation in a merger. Hence, “*de facto* control,”²¹⁾ determined by considering the percentage of stake - which alone can grant the status of an affiliated corporation - as the primary factor followed by the secondary consideration of influence, “substantive control”²²⁾ requiring the exercise of substantive influence as a necessary condition can be understood as entailing a greater degree of “control.”

On the other hand, a controlling relation with regard to a company has real meaning only at the time of its initial formation since the control over a company is acquired at only one point. In the case of market-dominant power influencing competition in the market, the maintenance or strengthening of such control may become a factor in addition to its formation.²³⁾ However, a controlling relation concerning a company and market-dominant power, used as assessment criteria for competition-restrictiveness, constitutes distinct concepts discussed on different contexts; as such, its maintenance or strengthening need not be addressed when assessing a possible controlling relation. Even in the European Union with its well-defined notion of controlling relation under merger assessment criteria, the issue of control maintenance or strengthening through acquisition of shares, etc. is not considered. For instance, if a controlling relation has already been formed by the acquisition of shares in a corporation, further acquisition of shares by that corporation or an affiliated corporation does not constitute a separate merger.

2. Problems Concerning the Definition of a Given Area of Trade

The Guidelines have defined a given area of trade as “an area of business in

21) Each of the two or more companies belonging to a single business group is referred to as an “affiliated corporation” (Article 2 Paragraph 3 of the Act) while “business group” refers to a group of corporations whose businesses are controlled by a single entity (this entity is referred as “same person” in the Act) according to a certain standard. However, in Article 3 of the Enforcement Decree that sets a concrete standard with regard to the scope of a business group, a specific percentage of stake is given primary consideration, the exercise of dominant influence secondary consideration.

22) See B. 3 of this paper.

23) However, substantive restriction of competition is interpreted as the “formation of market dominance” in Supreme Court decision ,May 12, 1995 (94 nu 13794).

which a competing relationship exists or may be formed” and seem to apply the U.S standard (SSNIP Test) to a certain extent. However, while the Guidelines also define the term as referring to “the aggregate of products to which major buyers of a specific product can switch, in response to a significant and non-transitory increase in the price of such product,” it remains silent on the specific process by which “the aggregate” is formed (if for instance, product A can be substituted with B, B with C, and C with D, whether the aggregate consists of A and B or A,B,C, and D) and consequently renders the definition of a given area of trade less than clear.²⁴⁾

Furthermore, while in determining a given area of trade the Guidelines define a product market as “the aggregate of products to which major buyers of a specific product can switch, in response to a significant and non-transitory increase in the price of such product,” it is unclear whether the base price, used as the basis for determining price elasticity, refers to the prevailing market price or competitive price. In addition, there are no specific provisions that define such “significant and non-transitory increase.” Recently, the SSNIP Test has been utilized in a few cases. The determining criteria used in Korea as a whole, however, can be assessed as highly flawed since the SSNIP Test (interpreted as a 5% increase maintained over one year) is utilized in practice while the abstract standard of “significant and non-transitory increase” is used as the basis for determining demand-side substitutability. Finally, it must be pointed out that there exists as yet no precedent of a SSNIP Test that analyzed price elasticity and critical loss based on economic data for the purpose of merger review.

3. Problems Concerning Assessment of Substantive Competition-Restrictiveness

Since the Guidelines do not address whether considerations such as the status of market concentration or the market position of the merging company supercede other considerations or to what extent various factors are to be considered, it is unclear which factors are to be considered, and if they are considered, to what extent they receive consideration. In particular, considerations such as the introduction of

24) Jae Woo Lee, *supra* note 20, pp.12-13.

foreign competition and the expansion of supply capacity are assessed only with regard to competition-restrictiveness under the Act when in fact they also relate to the definition of market.

In addition, in defining the relevant market, the elasticity of supply is included as a factor in determining a given area of trade. However, the effectiveness of the relevant regulations can be questioned since a concrete set of criteria that reflect such consideration is not provided for. In the end, the elasticity of demand is the only factor actually considered while production facilities are not included in computing the degree of market concentration except in cases where it is difficult to determine sales criteria.

In some countries, mergers are classified into a secure zone, a challenge zone essentially characterized by competition-restrictiveness, and a middle zone characterized by an ambiguous level of competition-restrictiveness according to the degree of market concentration, and the limited assessment capacities of the relevant competition authorities are efficiently utilized by concentrating its efforts on the middle zone. In Korea, however, the resources of the Commission are not efficiently utilized since mergers are classified into only two categories: simplified review mergers and general review mergers, or secure zone and middle zone.²⁵⁾ Moreover, it is highly difficult to predict whether a merger will be assessed as restricting competition since the precise relation between the degree of market concentration and other considerations has not been defined.²⁶⁾ For instance, it cannot be determined with precision the position that the degree of market concentration occupies in the overall merger review process.

With regard to unilateral effects/coordinated effects,²⁷⁾ a similar notion can be said to exist in Korea since 'the possibility of collusion by competing businesses' is assessed under the Guidelines. Nevertheless, an improvement is needed in this area

25) *Id.*, p.14.

26) *Id.*, p.15.

27) Unilateral effects (non-coordinated effects) arise when the merged group is able profitably to raise the product price or lower the opportunity for product choice or development, without the need for a co-operative response from competitors; coordinated effect refers to reduced output, increased price or diminished innovation led by coordination among the remaining firms in the industry facilitated by loss of a firm through a merger, joint venture or other concentration.

since assessment of unilateral effect or coordinated effect based on such rigorous economic analysis is not reflected in the Guidelines at all as is conducted in legislations of other countries.

Lastly, a more concrete provision on the possibility of new entry seems to be needed. Expansion barrier, caused by increased production on the part of existing producers in a given market, should be considered as well as new entries to the market.²⁸⁾ Furthermore, as in the U.S., adopting a fixed quantitative criterion to the mainly qualitative set of provisions on the possibility of new entry currently in existence merits some consideration at the level of establishing a more objective set of assessment criteria.

4. Problems Concerning the Defense of Enhancing Efficiencies

Taking into consideration the supplier aspect as well as public interest for the national economy, provisions on the defense of enhancing efficiencies are generally regarded to have been broadly legislated in comparison to other statutes.²⁹⁾ It should be noted, however, that consumer surplus standard is not reflected at all in the regulations. In summary, how to weigh the defense of enhancing efficiencies merits some consideration in light of the provision that calls for a balancing between the degree of competition-restrictive effects and the degree of efficiencies.

D. Analysis of KFTC's decisions on mergers

1. Current State of Merger Review

From 1982 to November 2004, there have been a total of 27 cases of extensive

28) However, there is a precedent in which the Commission determined the absence of the possibility of expanding the productive capacity of the existing industry in assessing the possibility of new entry in KFTC's decisions (the INI Steel case, for instance).

29) However, the Commission does not, in general, seem to acknowledge defense of enhancing efficiencies in the national economy since it resembles the authorization criteria for certain concerted acts (Article 19 Paragraph 2 of the Act - industrial rationalization, research and technology development, overcoming economic depression, promoting industrial restructuring, rationalizing terms of trade, and strengthening the competitiveness of small-and-medium enterprises.

merger review by the Commission; the following is a brief summary of those cases (objections raised treated as part of original rulings).

	Case Number	Incident
1	2004. 11. 17. 2004gigyul1532	Violation of Merger Regulations by INI Steel Co., Ltd. and Hyundai Hysco
2	2004. 9. 24. 2004gigyul1200	Violation of Merger Regulations by SAMICK Musical Instrument CO., LTD. and Samsung Triopines
3	2004. 8. 30. 2004gigyul1222	Violation of Merger Regulations by Cheonan Broadcasting Corporation and Anyang Broadcasting Corporation
4	2004. 8. 27. 2004gigyul1133	Violation of Merger Regulations by CJ CableNet Yangchen Broadcasting and others
5	2004. 4. 6. 2004gigyul0415	Violation of Merger Regulations by PointNix, MDhouse, and specially related parties
6	2003. 9. 24. 2003gigyul0928	Violation of Merger Regulations by Yongsan Chemicals, Inc
7	2003. 9. 4. 2003gigyul1176	Violation of Merger Regulations by LG Chem, Ltd and Honam Petrochemical Corporation
8	2003. 3. 24. 2003gigyul0327	Violation of Merger Regulations by CJMall / CJ Home Shopping
9	2003. 1. 7. 2002gigyul1847	Violation of Merger Regulations by CJMall / CJ Home Shopping and others
10	2003. 1. 7. 2002gigyul1848	Violation of Merger Regulations by Hyundai Home Shopping and others
11	2003. 1. 7. 2002gigyul1849	Violation of Merger Regulations by LG Home Shopping, Inc.
12	2002. 12. 23. 2002gigyul1718	Violation of Merger Regulations by Kolon Industries Inc.
	2003. 4. 1. 2003simsam0233	Raising of Objection by Kolon Industries Inc.
13	2003. 1. 28. 2002gigyul1295	Violation of Merger Regulations by Muhak Co., Ltd., and specially related party
	2003. 8. 27. 2003simsam0403	Raising of Objection by Muhak Co., Ltd., and specially related party

14	2002. 6. 18. 2002gigyul0610	Violation of Merger Regulations by Hyundai Motor Company and Kia Motors Corporation
15	2001. 6. 29. 2001gigyul1398	Violation of Merger Regulations by SK Corporation
16	2000. 9. 30. 2000gigyul0846	Violation of Merger Regulations by Incheon Iron & Steel Company (now INI Steel Co., Ltd.)
17	2000. 4. 26. 2000gigyul0332	Violation of Merger Regulations by Hotel Lotte Co., Ltd., Hikari Printing Co., Ltd., and others
18	2000. 5. 16. 2000gigyul0129	Violation of Merger Regulations by SK Telecom Co., Ltd
	2000. 10. 18. 2000simi0766	Raising of Objection by SK Telecom Co., Ltd.
19	2000. 2. 25. 9912gigyul1745	Violation of Merger Regulations by BD Korea Inc.
20	1999. 12. 10. 9910gigyul1449	Violation of Merger Regulations by Oriental Brewery Co., Ltd
21	1999. 4. 7. 9901gigyul0126	Violation of Merger Regulations by Hyundai Motor Company
22	1998. 12. 18. 9811gigyul1907	Violation of Merger Regulations by the Gillette Company
23	1998. 11. 20. 9810gigyul1650	Violation of Merger Regulations by Delphinium Enterprise Pte. Ltd
24	1998. 5. 23. 9801gigyul0063	Violation of Merger Regulations by P&G
25	1996. 4. 22. 9603giup0190	Violation of Merger Regulations by Tong Yang Nylon Co., (now Hyosung Co., Ltd.)
26	1982. 12. 15. No.82-24	Acquisition of Shares in Daehan Specialty Chemicals., Ltd by Songwon Industrial Co., Ltd
27	1982. 1. 13. No.82-1	Acquisition of Shares in Korea Peroxide Co., Ltd (now Hansol Chemical) by Oriental Chemical Industries Co., Ltd. (now Oxyco., Ltd.)

Classifying them according to the merger type, 20 cases concern horizontal mergers, 9 cases vertical mergers (case numbers 4, 6, 8, 9, 10, 11, 14, 15, 25),³⁰⁾ 23

³⁰⁾ Cases numbers 6 & 14 were each counted twice since both horizontal and vertical mergers occurred in combination.

cases acquisition of shares, 4 cases transfer of business (case numbers 1, 12, 17, 23), and one case merger by unfair methods(case number 5).³¹⁾

2. Analysis of Actual Tendencies in the Application of M&A Review Guidelines

a) Determining the Possible Formation of Controlling Relation

When a merger has satisfied the necessary conditions for formation of a controlling relation, the Commission do not undertake a separate examination of the formation of a controlling relation in its decisions. The Commission's assessment procedure is also questionable in this matter since it determines the possible formation of a controlling relation as part of the competition-restrictive consideration when in fact the former logically precedes the latter.

The merger of Haitai Beverage Co., Ltd.("Haitai"), involving a joint venture company incorporated by Hotel Lotte Co., Ltd.("Hotel Lotte") and its Specially Related Parties, (case number 17, "the Hotel Lotte case") is a representative case in which the competition-restrictiveness of a merger formed by an acquisition of less than 50% share in acquired company became a concern. In the case, Hotel Lotte together with its corporate affiliates had a 19% share in the joint venture company; the Commission ruled that a controlling relation nevertheless existed since Hotel Lotte and Hikari Printing Co., Ltd.("Hikari"), the then largest shareholder, had the common purpose of controlling the management of Haitai. In addition, the Commission ruled that Hotel Lotte was to sell its share in Haitai if it was affirmed that the former's share in the latter exceeded 19% genuinely. However, such ruling seems contradictory. According to the Guidelines, a ruling on competition restrictiveness is possible only if a controlling relation is determined to have been formed. Moreover, there was no need to determine whether Hotel Lotte's share had actually exceeded 19% since the Commission's ruling essentially acknowledged the existence of a controlling relation between Hotel Lotte and Haitai, with the largest

31) Case number 5 was counted twice since it simultaneously involved the issue of horizontal merger by way of share acquisition as well as the issue of merger by unfair method.

shareholder, Hikari, as a Specially Related Party to the former.³²⁾

b) Determining a Given Area of Trade

In general, the Commission defines a relevant product market without conducting an in-depth economic analysis in its decisions,³³⁾ and even in cases with need for economic analysis, it has often failed to explain its rulings on the determination of a given area of trade.³⁴⁾

However, there are a few rulings that provide a relatively detailed explanation as to the definition of the relevant product market. First, in the case of the merger between the Gillette Company and the Rocket Korea Co., Ltd., (case number 22, "the Gillette case") the Commission defined the relevant market as including manganese and alkaline batteries that are not rechargeable (the first-stage battery) as well as rechargeable nickel-cadmium batteries for consumers and the so-called alcava batteries (the second-stage battery). In the Gillette case, the Commission explained its decision by pointing to the possibility of the demand-side substitutability created by the similarity of the two products in their use, form, and characteristics.³⁵⁾ Second, in the case of the merger between Oriental Brewery Co., Ltd. and Jinro Coors Brewing Co. (case number 20, "the OB case") the Commission defined the relevant product market as the beer market based on the view that beer

32) Sai Ree Yun, "Regulations of Business Combination under the Antimonopoly Regulation and Fair Trade Act with Emphasis on the Case Law", *Journal of Korean Law* Vol. 2, No.1 (Seoul: Seoul National University College of Law, 2002), p.8. However, this case invites the suspicion that companies with superficially vague affiliation based in Japan participated in the merger avoiding legal risk since it was clear that the merger would be assessed as restricting competition if a group of companies with clear affiliation acquired the acquired party.

33) The determination is based on differences in product characteristics and price with regard to an adjacent product, as well as forced determination of the field of operation by relevant law (broadcasting regulations, for instance).

34) Sai Ree Yun, *supra* note 32, p.12. For example, the Commission merely stated that differences existed in raw materials and manufacturing methods in determining the market for fruit drinks and that for carbonated drinks in the Hotel Lotte case without giving any concrete account of such differences (the substitutability between the two, for instance).

35) The Commission assesses only the qualitative element relating to the product substitutability and does not undertake a quantitative assessment based on economic analysis.

can be distinguished from other brewed, distilled and mixed alcoholic beverages with regard to the manufacturing process and main characteristics such as taste, alcohol content, color, etc. Third, in the case of the merger between SK Telecom Co., Ltd. and Shinsegi Telecomm, Inc. (case number 18, “the SK Telecom case”), the Commission determined the cellular phone and the PCS mobile phone services markets as one relevant product market based on the following considerations: the inability of the consumers to detect a noticeable difference between the two despite the difference in frequency range and transmission methods; the correlation between the growth of the domestic PCS market with the encroachment on the cellular market; the great degree of the demand-side substitutability depending on the service provided and the price rate; similarities with regard to the connection method, range of channels, the serviceable areas, target customers, services provided, size and design of the terminal appliances and price, initial subscription fee, fee structure, etc. In the decision, the Commission also ruled that separate markets exist for mobile phone service and wire telephone service due to significant differences in usage, facilities made by the provider, the means of usage of the network use, rates, competing providers, etc., while also confirming the presence of separate markets between mobile phone service and pagers, “citiphones” and telecommunications relay services, wireless data communication due to differences in function and usage despite some similarities.

In contrast, the Commission’s ruling on the merger between SK Corporation (“SK”) and DOPCO Co., Ltd., (case number 15, “the SK case”) has been subject to the criticism that it committed “a reverse cellophane fallacy.” In that case, SK, the foremost business entity in the domestic petroleum sales market and the holder of a 34.04% stake in DOPCO which retains and maintains the oil pipeline network in Korea, appointed 6 directors - comprising 40% of the 15 directors at DOPCO. The Commission determined the relevant service market as the first-stage shipping market of petroleum products (from oil refinery to oil storage facility) using the national pipeline while defining the relevant geographical market as the shipping sphere (the Seoul metropolitan area, the Daejeon metropolitan area, the Daegu metropolitan area, the Jeonju area, and the Gwangju metropolitan area) of petroleum products using the national pipeline. However, it has been pointed out that the Commission committed an error by failing to consider the impact of substitute shipping means for pipeline, e.g. oil tanker, on shipping price. In fact, DOPCO did

experience a great deal of competitive pressure from the substitutability of pipeline with oil tanker, thereby setting a lower price for sections of the pipeline with a high possibility of substitution.³⁶⁾ Hence, the Commission has been criticized for using the shipping price for such sections of the pipeline as the base price as well as for overlooking the fact that oil tanker presented a high degree of competition to DOPCO’s pipeline in the Seoul metropolitan area, oil freight truck in the Daejeon metropolitan area.³⁷⁾ In the end, the Commission can be said to have committed the error (the so-called “reverse cellophane fallacy”) of mechanically applying the SSNIP Test to the merger between SK and DOPCO when the latter set the total shipping price at approximately 10% lower than that of substitute shipping means due to the fierce competition from substitute shipping means depending on the region and also due to the low percentage of its own operation.³⁸⁾

c) Determining Competition-Restrictiveness

1) Determining Competition-Restrictiveness Based on the Degree of Market Concentration (Market Share)

With regard to competition-restrictiveness in horizontal mergers, the Commission presumes the presence of competition-restrictiveness if the market share of the company in question meets the certain criteria under the presumptive provisions of the Act. Even in cases in which the certain criteria are not satisfied, the Commission determines competition-restrictiveness according to the criteria for assessing the degree of market concentration under the Guidelines Section VII.1.A.(1).³⁹⁾ Moreover, in most cases involving mergers (the merger between Proctor & Gamble and Ssang Yong Paper Co., Ltd., (case number 24, “the Proctor & Gamble case”),

36) It appears that documents supporting the fact that tanker and pipeline stood in mutually substitutable relation, thereby belonging to the same market were submitted at the stage of the Commission review procedure. Sang Seung Lee, “A Reverse Cellophane Fallacy: KFTC’s market definition in DOPCO case”, *Industrial Organization Review* Vol. 11, No. 3 (Seoul: Korea Industrial Organization Association, 2003), p.113.

37) *Id.*, pp.112-113.

38) *Id.*, pp.116-117.

39) See B.5.a) of this paper.

the aforementioned SK Telecom case, the merger involving Muhak Co., Ltd., (case number 13, “the Muhak case”), the merger involving BD Korea Inc.(case number 19), etc.) the Commission uses the HHI index in addition to the criteria for assessing the degree of market concentration, namely CR1 and CR3 market share criteria, in determining competition-restrictiveness.⁴⁰⁾

Furthermore, the Commission in the case of the merger involving INI steel Co., Ltd. (case number 1. “the INI Steel case”) has also taken into account the supplementary consideration of “the possible existence of a substantive or closely related competitor capable of suppressing the price increase of the company merging”⁴¹⁾ as formulated in the U.S. Federal Trade Commission’s “Horizontal Merger Investigation Data, Fiscal Years 1996-2003” published in February 2004.⁴²⁾

The issue of whether in-house production should be included in computing market share has been dealt with in both ways.⁴³⁾ Among the examples, the merger between Yongsan Chemicals, Inc. and Korea PTG., Ltd. (case number 6, “the Yongsan Chem case”) is the first such case in which the issue was explored, based on economic analysis. In that case, the Commission ruled that if 1) in-house production can be supplied by being converted into market sales share in response to price increase in the relevant product and 2) it is desirable to assess competition-restrictiveness by including in-house production in the market if a profit can be gained by doing so, the convertibility of market sales share and the profitability

40) Sai Ree Yun, *supra* note 32, p.24.

41) In practice, the term refers to a company with a market share of 10% or greater, or one entering the market with an innovative product (see the decision above).

42) While such practice can be evaluated favorably on the grounds that the Commission does not mechanically rely on CR1 and CR3 market share criteria, the HHI index and the criteria for assessing the presence of substantive competitor are not based on laws and regulations. Moreover, the application of such standards has not been consistent.

43) Some cases in which in-house production was included as a factor are the mutual transfer of business by Hanwha Chemical Corporation and Daelim Industrial Company and the participation in the incorporation of a new company between Samyang Corporation and SK Chemicals. Some cases in which in-house production was not considered are: the transfer of the PVC business from Hyundai Petrochemical Co. Ltd. to LG Chem, Ltd.; the share acquisition of Wia Corporation by Hyundai Motor Company and Kia Motors Corporation; share acquisition of KPTG by Aekyung Petrochemical Co., Ltd.; business transfer of Gohap’s PA and DOP to DC Chemical Co., Ltd.; the merger between Yongsan Chemicals, Inc. and KPTG.

thereof do not exist when various factors are considered as a whole.⁴⁴⁾

On the other hand, any possible trend of change in the market share is another consideration in assessing competition-restrictiveness. In particular, the Commission ruled in the merger between Hyundai Motor Company (“Hyundai Motor”) and Kia Motors Corp. (“Kia Motors”) (case number 21, “the Hyundai Motor case”) that while competition-restrictiveness exists in the respective markets for passenger cars, buses, and trucks under Article 7 Paragraph 4 Subparagraph 1 under the Act, restriction of competition was actually eased due to the decline in the aggregate market share of Hyundai Motor and Kia Motors over the course of the four preceding years in contrast to the rise in market share of Daewoo Motor Co. Ltd., the second in market share after the parties to the merger.⁴⁵⁾

2) Considering the Level of Foreign Competition Introduced and State of International Competition

Among the factors listed by the Guidelines, mainly considered are the market share of imports and any trend of increase in its market share, the tariff rate, non-tariff barriers, the degree to which the market remains open to competition, etc. From a broad perspective, both the competitive pressure due to imports as well as that faced by foreign businesses in directly entering the domestic market are to be considered. Usually, however, a much greater emphasis on the former is placed and it leads to the assessment that introducing foreign competition becomes difficult when, from the vantage point of importing foreign products, the price of imports exceeds the price of the domestic market or the tariff rate is high. Hence, in practice the Commission takes no further action than to consider the possibility of change in domestic consumption in the quantity of existing export products if domestic price increases in an industry with a high share of exports.

44) Suk Ho Kim, “Economic Analysis of Merger and Economic meaning of In-house Production”, *Fair Competition* (Seoul: Korea Fair Trade Association, November 2003), pp.6-11.

45) Sai Ree Yun, *supra* note 32, pp.24-25.

3) The Possibility of New Entry

The Commission has ruled that the possibility of new entry is low depending on the large scale of minimum required investment for new entry (the Proctor & Gamble case, the Delphinium Enterprise Pte. Ltd. case (case number 23), the Hyundai Motor case, the Oriental Brewery case, the SK Telecom case),⁴⁶⁾ the need for advanced technology (the Proctor & Gamble case, the OB case, the SK Telecom case), the difficulty in establishing a new distribution network (the Proctor & Gamble case, the Gillette case, the Hotel Lotte case),⁴⁷⁾ etc.

4) The Possibility of Collusion by Competing Businesses

In the OB and Hotel Lotte cases, the Commission determined the possibility for collusion to be substantial simply because the number of competing businesses declined due to the merger in question and because an act of collusion occurred in the past. However, while ruling in the SK Telecom case that the possibility of collusion existed in areas not subject to authorizations despite the small possibility of collusion due to the need for prior authorization from the Ministry of Information and Communication on the change of an adhesion contract of use, the Commission failed to present the basis for such ruling. The Commission also ruled in the Hotel Lotte case that despite the status of Coca-Cola Korea Company Ltd., the largest business entity in the domestic carbonated beverage market, as a foreign corporation and despite the lack of prior acts of collusion, a proclivity to collusion nevertheless existed due to the formation of a two main companies structure in the relevant market engendered by the merger between Lotte and Haitai.⁴⁸⁾

In determining the possibility of collusion between competing businesses in the

46) In particular, see the Delphinium Enterprise Pte. Ltd. case. Since the clients for the paper manufacturing of newspapers are newspaper companies and as such large-scale purchasers, products can be imported if the domestic price is considerably higher than the international price. Moreover, it was recognized by Delphinium that the possibility for a price increase was unlikely since domestic production greatly exceeded the demand.

47) Sai Ree Yun, *supra* note 32, p.28.

48) *Id.*, pp.29-30.

domestic market, the Commission considers the possibility of participation in the market by foreign businesses as well as factors delineated in the Guidelines (the Hotel Lotte case, etc). In one case (the INI Steel case), the Commission determined the future entry of imports to the domestic market to be a barrier to the possibility of collusion. This ruling can probably be explained by the Commission's failure to understand in precise terms of the nature of the possibility of collusion by competing businesses and by the subsequent, confused consideration of other factors (the possibility of new entry or introduction of foreign competition).

5) Assessing the Defense of Enhancing efficiencies

In assessing the defense of enhancing efficiencies, the Commission seems to apply relevant factors differently depending on its determination of the nature of the case. For instance, it has acknowledged the reduction of marketing expenditure as generally having the effect of enhancing efficiency by reducing sales expenditure delineated in the Guidelines but in another case determined the reduction of marketing expenditure as amounting only to a side effect reflecting the elimination of competition (the Muhak case).

On the other hand, there is a precedent in which the effect of enhancing international competitive capacity, formulated in neither the existing law nor the Guidelines, was considered and recognized as grounds for granting exemption (the SK Telecom case). In that case, the Commission acknowledged an increase in the capacity for international competition as having the effect of enhanced efficiency by reasoning: that the parties to the merger may become an influential partner in international cooperation through the merger; that the parties to the merger may contribute to enhancing the capacity for technological competition by increasing the possibility for sharing technological development with foreign businesses; that in consequence a favorable position in matters such negotiating for technology standard can be gained.

However, the Commission's position on the controversial merger involving the acquisition of Young Chang Co., Ltd. by SAMICK Musical Instrument CO., LTD. (case number 2, "the Samick case") appears somewhat surprising. In that case, the Commission ruled that the merger would lead to a decline in competitive capacity in both domestic and international markets thereby increasing the possibility of

infringing on domestic consumer benefits.⁴⁹⁾ The rationale lies in that both companies were already in possession of independent competitive capacity with solid foundations for domestic consumption and exports (the two companies are said to possess significant market shares in the U.S. and boast international level of competitive capacity with regard to the quality, value, and brand recognition) and that the two companies came to gain such global competitive capacity mainly due to the fierce competition in the domestic market.

Furthermore, the Commission has demonstrated a negative stance toward considering the effect of an increase in operating profit due to an increase in sales volume as a factor in determining the effect of enhancing efficiency (the INI Steel case). The Commission also appears to view miscellaneous costs arising from a merger, though not delineated in the Guidelines, as reducing the effect of enhancing efficiency (the INI Steel Case).

6) Assessing the Defense of Non-viable Enterprise

Numerous cases exist in which the defense of non-viable enterprise was advanced, but such defense has not been acknowledged except in the case of the merger involving Hyundai Motor Company at the stage of the Commission review procedure.

For a defense of non-viable enterprise to be acknowledged, the Commission has strictly adhered to the general position that based on Article 7 Paragraph 2 Subparagraph 2 of the Act and Article 12-4 of the Enforcement Decree, first the total capital must be less than paid-in capital on the balance sheet, the production facilities of the company difficult to continue to be used in the absence of the merger in question, and a merger less competition-restrictive difficult to materialize.

49) The KFTC press release (September 2004), "The Fair Trade Commission's Basic Position on the Acquisition of Young Chang Co., Ltd. by SAMICK Musical Instrument CO., LTD".

III. Conclusion

To justify the rationale behind the Commission's merger review, the overall review process must be supported by an objective standard that is convincing to the parties to a merger. To that end, it is necessary to introduce a method enabling rigorous economic analysis and a statutory provision for such analysis. However, while formulating a concrete and objective set of criteria is important in enforcing the Act, one should bear in mind that it is highly difficult for any set of criteria to accurately reflect the economic reality of everyday life such as market characteristics.

Accordingly, while the relevant criteria should indicate the general elements within a technically possible range, more concrete and detailed criteria should be established through accumulation of the Commissions decisions and judicial precedents that embody the substantial guidelines for the merger review with conducting an in-depth market analysis on individual cases reflecting market characteristics.