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Merger Regulations Of European Community, United States, Korea, And Japan: A Comparative Analysis

Sangbum Ro
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DEDICATION

This paper is dedicated to my parents who, even in a difficult financial situation, have tried their best to support and educate me. Their great love for their son will always encourage me to stay with God and accomplish His work given to me during the rest of my life.
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CHAPTER I

INTRODUCTION

Currently, we are facing globalization of the World Market as reflected in the astonishing increase of multi-national corporations. Accordingly, cross-border transaction of business is also on the way of great increase in amounts and numbers. However, those cross-border business transactions are to be subject of the regulation of foreign government, and this tendency is especially true in the merger transaction.

From the situation described above, businessmen with interest in establishing transnational mergers will need to know the other party's governmental regulations as well as those of their own. This task of becoming knowledgeable of transnational merger laws is potentially complicated since there is no international standard of merger regulation at this time. Each country with merger regulations has developed them from their own country's social, economical, and political necessities. Thus, one can expect many discrepancies, mismatches, and non-parallel regulations across countries and communities (e.g., European Community) that will cause problems during a merger transaction. Therefore, the current situation does not leave any other choice for those businessmen but to become knowledgeable on the other party's regulations when they prepare for a transnational merger. Depending on their social, political, economical policies, each of the nations has developed its own legal system to prevent unfair economic activity, and to promote their own industries by regulating and controlling their market.
Importance of the Paper and Purpose

This is especially true in the case of the four economic bodies that will be discussed in this paper--European Union (hereinafter European Community), the United States, South Korea, and Japan. I will discuss the development of competition laws in each of the countries and community, including merger regulation. As we will examine in the paper, the United States has the longest history in the area of merger regulation as well as competition law; and the other bodies, largely, have modeled their regulations after those of the United States. In the case of the European Community, it has been eight years since they have enacted the EC Regulation on the Control of Concentration between Undertakings,¹ although they had mostly relied on Articles 85 and 86 of the Rome Treaty² to control merger in their market. South Korea and Japan have comparatively short histories concerning competition law and merger regulation. Due to differences in the length of history of competition laws and merger regulations of the four economic bodies, the task of comparative analysis is a difficult one, but that which is needed in this changing global community.

The primary purpose of this paper is comparing and contrasting those four legal rules of merger control, focusing on comparing two systems, those of the United States and European Community, and furthermore comparing enforcement practices in these four different bodies.

CHAPTER II

EUROPEAN COMMUNITY (EC)

Background of Implementing Merger Regulation in 1990

On December 21, 1989, the Council of Minister of the European Economic Community (hereinafter EEC) adopted a regulation on the concentrations between undertakings, and this regulation became effective on September 21, 1990. Before that time, merger cases were brought under Articles 85 and 86 of the EEC Treaty, also known as the Rome Treaty, which was the main source of the EC competition law. However, it began to be criticized for its inadequacy in controlling merger cases under the two articles. Articles 85 and Article 86 of the Rome Treaty.

Article 85 of the prohibition states that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market." There is a considerable loophole when the Article 85 is applied to address merger in which, sometimes, two independent companies integrate to a single entity. That is, after a merger is accomplished, there will be no party that is any longer independent. Assuming that there must be more than at least two parties in order for a case to be ruled under Article 85, it is

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5 Merger Regulation, supra note 1.
4 EC Treaty, supra note, arts. 85, 86
6 EC treaty, supra note, art. 85.
not theoretically possible to bring a merger case under Article 85. The EC Commission, in it’s 1996 memorandum, declared that “it is not possible to apply Article 85 to agreement whose purpose is the acquisition of total or partial ownership of enterprises or the reorganization of the of the ownership of enterprises (merger, acquisition of holdings, purchase of part of the assets).”

A landmark decision with respect to application of Article 85 to a merge is the case of British American Tobacco Co./Reynolds Industries in 1987, in which Philip Morris agreed to purchase stock of Rothmans Tobacco, Ltd. (“Rothmans”), a competing cigarette manufacturer. The acquisition of 20.8% of stock gave Philip Morris 31% of interests and 24.9% of the voting rights in Rothmans Tobacco Ltd. the Commission began its proceeding against Philip Morris, but settlement was made when Philip Morris reached its agreement to keep its voting rights below 25%. Even though the Court of Justice of the European Communities (hereinafter ECJ) found that the behavior of Philip Morris was not unlawful under competition law, the importance of this case is that the court determined that Article 85 can be used to address merger cases as long as the parties at issue remain independent after the merger.

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8 Id.
11 Id. at 4493.
12 Id. at 4494.
13 Id. at 4495-97.
On the other hand, Article 86, from its wording, is supposed to control abuse of a dominant position. Article 86 prohibits "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." When the article is interpreted strictly, there also appears a loophole making it impossible to apply this article to every merger case and the loophole lies on the scope of Article 86. That is, the article does not include the issue of the creation of a dominant position. Therefore, Article 86 does not fulfill the requirement that merger regulation must be prohibitive with respect to creation of a dominant position.

However, in Continental Can Co./Commission in 1973, which is the first merger case brought to the ECJ, the court applied Article 86. In this case, the Continental Can, a U.S. company, acquired 86% of the shares in Schmalbach-Lubeca-Werke AG (hereinafter SLW), a German company. Later, with the financial help of its parent company (here, Continental Can), SLW could acquire 91% of the shares in the Dutch Company, Thomassen & Drijver-Verblifa (hereinafter TDV). SLW was the largest German producer of packaging and mental closures, and TDV was a leading manufacturer of packaging material in the Benelux.

The Commission found that the behavior of Continental Can was in violation of Article 86 of the EC Treaty because the behavior in which Continental Can, as the one

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15 EC Treaty art. 86.
16 Cook & Kerse, supra note 5, at 2-3.
17 Id.
19 Id. at 218.
20 Id. at 219.
21 Id. at 219-20.
holding the dominant position, had acquired 80% of the shares in TDV through its subsidiary (SLW), was an abuse of the dominant position that Continental Can had before its acquisition at issue.\footnote{\textit{Id}. at 220.}

Continental Can appealed to the ECJ, arguing that Article 86 of the EC Treaty could not be used to rule over a merger case because a merger is not the kind of abuse of a dominant position listed in Article 86.\footnote{\textit{Id}. at 223-25.} The ECJ dismissed this argument and upheld the Commission’s decision, thereby confirming again its position that competition cannot be ever distorted in the Common Market.\footnote{\textit{Id}. at 242-45.} By the decision in \textit{Continental Can}, the ECJ established the idea that Article 86 can be applied to a merger case.\footnote{\textit{Cook} & \textit{Kerse}, \textit{supra} note 5, at 2-5.}

Nevertheless, \textit{Continental Can} inspired the Commission to submit to the Council of Ministers of the EEC a proposal of adopting a cohesive merger regulation in 1973, but it was rejected by many member states which did not want to yield their own sovereignty on the matter of merger regulation to the EC Commission.\footnote{\textit{Opi}, \textit{supra} note 14, at 235.} After that time, the Commission amended the proposal several times, but each time, it was rejected by the Member States.\footnote{Id.} However, the judgement in \textit{Philip Morris} pushed the Council to adopt a merger regulation, and finally the Council, on December 21, 1989, adopted the regulation on the control of concentrations between undertakings.\footnote{Id. at 242.}

Since the adoption of the merger regulation, Articles 85 and 86 of the Treaty will not be applied to an agreement as far as the transaction will fall within the scope of the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id}. at 220.
\item \textit{Id}. at 223-25.
\item \textit{Id}. at 242-45.
\item \textit{Cook} & \textit{Kerse}, \textit{supra} note 5, at 2-5.
\item \textit{Opi}, \textit{supra} note 14, at 235.
\item \textit{Id}.
\item \textit{Id}. at 236.
\end{enumerate}
\end{footnotesize}
merger regulation. However, if the transaction may fall beyond the scope, the Commission and ECJ or national authority may apply those articles.²⁹

Jurisdictional Scope

One of the most important and differing aspects of the merger regulation from that of the Rome Treaty lies in exclusive application of the regulation.³⁰ In other words, if a concentration at issue fall within the scope of the merger regulation, the regulation allows only the Commission to exercise exclusive jurisdiction over the concentration, thereby leaving no chance for jurisdiction to any of the Member States.³¹ If the concentration, on the contrary, does not fall within the scope of the merger regulation, the Commission is excluded from exercising jurisdiction and national authorities of competition of each member states will have jurisdiction over the concentration.³²

Depending on whether the Commission deals with a concentration or one of the Member States does, the result of the case may greatly differ.³³ From the reason above, it is very important to clarify which concentrations fall within the scope of the regulation and which concentrations fall beyond its jurisdictional scope. Not all concentrations are addressed by the merger regulation. Rather, only those concentrations with community dimension will be treated by the regulation.³⁴ First, the definition of concentration will be

³⁰ *See* *id.* at 48-57.
³¹ *Id.*
³² *Id.* at 57-59.
³³ *See* *id.* at 57-59.
³⁴ *Id.*
explained, and second, the threshold test to determine community dimension will be introduced.

Definition of Concentration

The Merger Regulation uses the word *concentration* instead of *merger* in order to be more specific with its wording of the statute. Article 3 of the Merger Regulation is devoted to the definition of concentration. A concentration is a durable change of control.\(^\text{35}\) Article 3(3) of the Merger Regulation defines control as “the possibility of exercising decisive influence on an undertaking.”\(^\text{36}\) The change of control can be exercised in the various ways. According to Article 3(1), a concentration occurs when: (a) Two or more previously independent undertakings merge, or one or more persons already controlling at least one undertaking, or (b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract, or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.\(^\text{37}\)

Also, the Commission issued a notice called “Commission notice on the notion of a concentration,”\(^\text{38}\) thereby providing the definition of concentration more in detail. The following definitions are mostly excerpted from the Commission notice on the notion of concentration.


\(^{36}\) Merger Regulation, *supra* note 1, art. 3(3).

\(^{37}\) Merger Regulation, *supra* note 1, art. 3(1).

\(^{38}\) Commission notice on the notion of concentration under the Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1994 O.J. (395) 1 [hereinafter Notice on the Notion of Concentration].
Mergers between previously independent undertakings. A merger within the meaning of the Merger Regulation occurs where two or more undertakings combine into a new undertaking and cease to exist as different legal entities, or may occur where an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. ³⁹

As well as mergers on the legal basis, mergers on the de facto basis may be deemed as mergers within the meaning of the regulation when the combined activities of previously independent undertakings results in the creation of a single economic unit while those undertakings retaining their individual legal personalities. ⁴⁰

Acquisition of control. As described in the point (b) of Article 3(1) of the Merger Regulation, a concentration may occur in a case of acquisition of control. Acquisition of control, according to the Commission notice on the notion of a concentration, is divided into two forms of acquisition. ⁴¹ Furthermore, sole control is “normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company.” ⁴² Even if an undertaking acquired more than 50% of the share capital of a target company, it does not normally confer control unless the undertaking also acquired a majority of the voting right of the target company. ⁴³ Sole control may be acquired in the case of a “qualified minority”, which can be established on a legal and/or de facto basis. ⁴⁴ A legal basis refers a case in which specific rights are attached to the minority shareholdings, thereby enabling minority shareholder to determine the strategic commercial behavior of

³⁹ Id. ¶¶ 6-7.
⁴⁰ Opi, supra note 14, at 237.
⁴¹ Notice on the Notion of a Concentration, supra note 38, ¶ 13.
⁴² Id.
⁴³ Id.
⁴⁴ Id.
the target company.\textsuperscript{45} The power to appoint more than half of the members of the supervisory board or the administrative board is one of the examples.\textsuperscript{46}

A \textit{de facto} basis refers to a case in which the shareholder is highly likely to achieve a majority in the shareholders’ meeting, because the remaining shares are so widely dispersed that it is hardly expected all the smaller shareholders will be present or be represented at the shareholders’ meetings.\textsuperscript{47}

Sole control can be exercised by a minority shareholder that has the right to manage the company activities or to determine its business policy.\textsuperscript{48} A change from a joint control to a sole control is considered as a concentration in the meaning of the Merger Regulation because “decisive influence exercised solely is substantially different to decisive influence exercised jointly.”\textsuperscript{49}

On the other hand, there is a joint control where “two or more undertakings have the possibility to exercise decisive influence over another undertaking.”\textsuperscript{50} Here, decisive influence is defined as “the power to block actions which determine the strategic commercial behavior of an undertaking.”\textsuperscript{51} Even though the clearest form of joint control exists where only two parent companies equally share the voting rights of the target company, joint control can also exist even where there is no equality of voting rights.\textsuperscript{52}

This is the case in which minority shareholders have additional rights so that they are

\textsuperscript{45} Id. ¶ 14.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. ¶ 16.
\textsuperscript{51} Id. ¶ 19.
\textsuperscript{52} Id. ¶¶ 20-21.
able to veto decisions “which are essential for the strategic commercial behavior of the join venture.” Some examples of the veto rights are decisions about “the budget, the business plan, major investments or the appointment of senior management.”

Community Dimension

The Commission can apply the Merger Regulation only to the concentrations which have the Community dimension. In order to give a clear-cut guidance of whether the Commission will apply the regulation, the community dimension is based on the turnover of the undertakings concerned. The Merger Regulation provides five thresholds which the concentration must meet to have a Community dimension. First, the combined aggregate worldwide turnover of all the undertakings concerned must be more than ECU 2,500 million. Second, in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned must be more than ECU 100 million. Third, in each of the three Member States included for the purpose of second threshold, the aggregate turnover of each of at least two of the undertakings concerned must be more than ECU 25 million. Fourth, the aggregate Community-wide turnover of each of at least two of the undertakings is more than ECU 100 million. Lastly, when each of the undertakings concerned achieves more than two-thirds of its aggregate

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53 Id. ¶ 22.
54 Id. ¶ 23.
55 Merger Regulation, supra note 1, art. 21(2).
56 See Morten P. Broberg, supra note 35, at 10.
57 Merger Regulation, supra note 1, art. 5.
58 Id.
59 Id.
60 Id.
61 Id.
Community-wide turnover within one and the same Member States, the concentration does not have Community dimension.62

The Council broadened the scope of the Regulation by lowering the thresholds, thereby enabling the Commission to exercise much broader jurisdiction. The original thresholds are ECU 5,000 million world-wide turnover and ECU 250 million Community-wide turnover, and the second and third thresholds are newly adopted through the amendment in 1997.63 Now, many concentrations which would have been caught by national merger authorities will fall within the sole jurisdiction of the Commission.

It must be noted that the Community dimension is considering two factors, the amount of turnover and the location of the turnover.64 From the ECU 2,500 million world-wide turnover threshold and 100 million Community-wide turnover threshold, it is clear that the regulation will not be applied to a concentration which does not reach to a certain size (world-widely and Community-widely) nor to a concentration which does meet a certain size in the world market but does not meet the test of Community turnover that was intended to reflect a potential to affect the Community market.65 Also, the Merger Regulation will not be applied if each of the undertakings concerned achieves more than two-thirds of its turnover within one and the same Member States.66 As a result

62 Id.
63 See Cook & Kerse, supra note 5, at 61-62.
64 See id. at 62-66, 72-74.
65 See id
66 Merger Regulation, supra note 1, art. 3(d).
of this test, a merger between the two largest company can be subject to a national filing if each of them achieves mostly within the same Member States.\textsuperscript{67}

**Joint Venture-Distinction Between Cooperative And Concentrative Joint Venture**

With regard to the joint venture, the Article 3(2) of the Regulation states that "the creation of a joint venture performing on a lasting basis all the function of an autonomous economic entity shall constitute a concentration"\textsuperscript{68} within the meaning of the Merger Regulation. Also, the Article 2(4) reads that "[t]o the extend that the creation of a joint venture constituting a concentration pursuant to Article 3 has its object or the effect the coordination of the competitive behavior of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 85(1) and (3) of the treaty, with a view to establishing whether or not the operation is compatible with the Common Market."\textsuperscript{69}

The Merger Regulation is still distinguishing between joint ventures depending on whether they are concentrative and fall under the Merger Regulation, or they are cooperative and therefore fall under the application of Article 85(1) and (3). However, it is sometimes very difficult to draw a line between these two types of joint ventures because there is a great variance in joint ventures, ranging from merger-like operations to cooperation for particular functions such as R & D, production or distribution.\textsuperscript{70}

For the above reason, the Commission, in December, 1994, published a notice on the distinction between concentrative and cooperative joint ventures in order to provide

\textsuperscript{67} See Cook \& Kers, supra note 5, at 64.
\textsuperscript{68} Merger Regulation, supra note 1, art. 3(2).
\textsuperscript{69} Id art. 2(4).
guidance as to how the Commission interprets Article 3 of the Merger Regulation before its change in relation to joint ventures.\textsuperscript{71}

According to the Article 3(2) of the Merger Regulation, in order for a joint venture to be deemed to be concentrative, the joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity.\textsuperscript{72} In other words, the joint venture must be performing all the functions normally carried out by other undertakings on the same market, and to do so, the joint venture must have sufficient financial and other resources including finance, staff, and assets.\textsuperscript{73} The notice reads that a joint venture is not a full-function venture if it only takes over one specific function within the parent companies' business activities without access to the market. The notice interprets the term "on a lasting basis" as a condition in which the duration of a joint venture is enough to change the structure of the undertaking concerned.\textsuperscript{74}

Compatibility Test

Article 2 of the regulation provides that "[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."\textsuperscript{75} Therefore, it is most important to look at how the Commission and ECJ interpret "a dominant position" and what kinds of factors are


\textsuperscript{72} Id.; see also COOK & KERSE, supra note 5, at 46-55.

\textsuperscript{73} See also COOK & KERSE, supra note 5, at 47-50.

\textsuperscript{74} Id.

\textsuperscript{75} Notice on the Distinction, supra note 70, ¶ 16.
taken into account to access to a dominant position. Furthermore, when determining whether or not a proposed merger creates or strengthens a dominant position, it is also necessary to properly define the product and geographic market where a concentration may cause harm.

Defining The Relevant Market

The Merger Regulation does not provide any clear guidelines as to how to define the relevant product market.\textsuperscript{76} Only section 6 of the form CO in the annex of the Regulation states that "[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."\textsuperscript{77} Therefore, it is clear the Commission have taken into account a cross-elasticity of demand when defining a relevant product market.\textsuperscript{78} The factor to be taken into account needs to be explained more in detail with cases which reflect the pragmatic tendency of the Commission as well as the ECJ.

First of all, as shown in the section 6 of the form CO, physical characteristics of the product and intended end-use will be considered.\textsuperscript{79} In other words, if two products have so different physical characteristics that they cannot be expected to be used for the same end-use, those products are not substitutable and belong to different markets.\textsuperscript{80} For

\textsuperscript{75} Merge Regulation, supra note 1, art. 2(3).
\textsuperscript{76} Opi, supra note 14, at 248.
\textsuperscript{77} Form CO Relating to the notification of a concentration pursuant to regulation (EEC) 4064/89, 1994 O.J. (L 385) 1. Annex. Form CO lists data required for the notification of a concentration.
\textsuperscript{78} Opi, supra note 14, at 249.
\textsuperscript{79} PORTWOOD, supra note 29, at 66-68.
\textsuperscript{80} Id.
example, in *Renault/Volvo*, the Commission dealt with the reciprocal acquisition by the two companies of 45% shareholdings in each other’s bus and truck businesses. The Commission noted that the truck market was subdivided into three submarkets: (i) trucks below five tons; (ii) trucks between five and sixteen tons; and (iii) trucks above sixteen tons. The commission noticed that the main mechanical characteristics of the trucks, such as the type of engines, the number of axles, and the type of trailers, were different. The technical aspects of the upper range were more sophisticated because the requirements of durability and operating costs were greater than those for the intermediate range. Trucks above sixteen tons were used in long haul, construction, and long-distance distribution traffic. Furthermore, marketing conditions of trucks were influenced by these technical differences.

However, in most cases, this criterion of physical characteristics of the product and intended end-use alone, cannot be expected to be enough to define a relevant product market because certain products with very different physical characteristics and end-use may be demanded as a substitute by consumers while products with very similar characteristics and end-use may be demanded for different purposes. For example, a certain type of chemical product might be demanded by a cosmetic industry while there is also demand from pharmaceutical industry.

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81 Case IV/M004, Renault/Volvo, 1990 O.J. (C 281) 2.
82 See id. ¶ 9.
83 See id. ¶ 10.
84 Id.
85 Id.
86 Id.
87 See Opi, supra note 14, at 250.
88 See id.
Also, it is necessary to examine consumer preference along with product characteristics and end-use. There might be a case in which even though physical characteristic and end-use of two products are so similar as to be deemed interchangeable, those products may not be considered to belong to the same market because consumers strongly prefer one specific type of products over the other. In Nestle/Perrier, the Commission excluded soft drink from the market definition, based on consumer preference. The Commission noted that bottled spring water was bought and regularly consumed because of its image as a natural product and its association with purity, cleanliness, absence of contamination, and a healthy style of life. In order to reach that conclusion, the Commission took into account three factors: preference of final consumers; purchasing pattern of final consumers: and level of per capita consumption, which was higher for bottled spring water than for soft drinks.

Sometimes, the Commission also has taken into account supply side substitutability to define a relevant product market along with other factors the Commission may look at the possibility for a manufacturers of a certain product which is not part of the relevant market to switch to producing products which are considered as

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89 Id. at 251-53.
90 See id.
91 Case IV/M190, Nestle/Perrier, 1992 O.J. (L 356) 1. The transaction in the case concerned bottled mineral water in France: Nestle would acquire Perrier and, as part of the deal, would sale the Volvo source of Perrier to BSN, a competitor. Id. ¶ 10.
92 Id.
93 Id.
94 Id. ¶ 10-12.
95 PORTWOOD, supra note 29, at 66
belonging to the relevant market, in a short period of time and without incurring additional expenses or risks.\textsuperscript{96}

Of course, there are many other factors to be taken into account along with factors so far introduced when establishing a relevant product market (such as price difference, conditions of competition..., etc.).\textsuperscript{97} The Commission and ECJ will define a relevant product market after taking into account all the factors all together on the case-by-case basis.\textsuperscript{98}

On the contrary to the relevant product market definition, the merger regulation provides a definition for the relevant geographic market in Article 9(7): the relevant geographic market consists of an area “in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas.”\textsuperscript{99} Also, the article reads that the assessment should take into account, in particular, the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preference, price difference, and/or appreciable differences of the undertakings’ market shares between the area concerned and neighboring areas.\textsuperscript{100}

On the other hand, from the pragmatic aspect the Commission has developed, it is revealed that the Commission has taken into account the following factors [although it may sound similar to the definition in Article 9(7)]: the existence of regulatory barriers to

\begin{footnotesize}
\begin{itemize}
\item[96] See id.
\item[97] See id. at 66-68.
\item[98] Id.
\item[99] Merger Regulation, supra note 1, art. 9(7).
\item[100] Id.
\end{itemize}
\end{footnotesize}
market interpenetration; national procurement policies; cross-border imports; distribution and marketing infrastructure; transportation costs; consumer preferences; potential competition in the market; price differences; differing market shares; language; and differing local specific requirements.\textsuperscript{101} That is, the Commission takes into account whether or not legislation can constitute an absolute or partial barrier preventing trade between different countries or geographic areas.\textsuperscript{102} This criterion also appears in the regulation.\textsuperscript{103} For example, with regard to the pharmaceutical industry, the Commission once found that markets in the pharmaceutical industry were national due to the very tight legal framework under which the industry operates.\textsuperscript{104} There is also a national procurement policy where a government or its departments are monopolizing a specific industry and, as a result, all purchases are being done through domestic suppliers.\textsuperscript{105}

Transportation cost also may play an important role in assessing a relevant geographic market.\textsuperscript{106} This is especially true when the products concerned are low-cost products which may accompany significant transportation costs, such as sugar, cement, beer, or water because producers situated close to the consumers will have a cost advantage compared to remote manufacturers.\textsuperscript{107} As to the percentage that transportation costs must represent in order to constitute an entry barrier, it is assessed on a case-by-case

\textsuperscript{101} Opi, supra note 14, at 262.  
\textsuperscript{102} See id.  
\textsuperscript{103} Merger Regulation, supra note 1, art. 9(7).  
\textsuperscript{104} See Opi, supra note 14, at 262 (citing the case of Sanofi/Sterling Drug, 1991 O.J. (C 156) 10, ¶ 17).  
\textsuperscript{105} Id. at 263-64.  
\textsuperscript{106} See id. at 265.  
\textsuperscript{107} See id.
basis. In conclusion, what criterion will be used or not is mostly depending on the Commission dealing with a specific case.

Dominant Position

After finding a relevant market and measuring market shares of the undertakings concerned, the Commission will examine whether or not a concentration creates or strengthens a dominant position and also, if there is, whether or not effective competition in the common market would be significantly impeded as a result of the dominant position. Unfortunately, the Merger Regulation does not define “a dominant position.” However, since the concept of dominance was imported from the Article 86 of the EC Treaty, it is possible to define “a dominant position” as defined by European Court of Justice in United Brands Co./Commission in 1978, as “a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to an appreciable extent independently of its competitors and customers and ultimately of its consumers.”

Although recital 15 of the preamble of the Merger Regulation provides that there will not be a dominance where the market share of the undertakings concerned does not exceed 25% either in the Common Market or in a substantial part of it, it is virtually impossible to provide any meaningful guideline concerning how much market shares will

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108 See id. at 265.
109 See id. at 261-68.
110 See Portwood, supra note 29, at 85-86.
111 See id.
113 See id. at 277; Opi, supra note 14, at 272.
be enough to establish a dominance. Even, the Commission has taken pragmatic approaches depending on cases. However, it may be possible to find hint from the Commission’s practice. When a concentration holds less than 25% of the combined market share in the relevant market, impediment of effective competition is not likely and compatibility will be presumed. If the market share ranges between 25% and 39%, a finding of a dominant position is very rare, but not totally impossible. When the market share ranges between 40% and 69%, the Commission will look into the existence of actual and potential competitors of merging firms along with other factors. When the market share is above 70%, a dominance will be strongly presumed.

The market shares of undertakings are important indicum of dominance as the Commission stated in Alcatel/Telettra, however, market shares are not only factor to be considered, rather there are other many factors to be taken into account when determining dominance. For instance, the EC Commission in de Havilland noted that a high market share could indicate the existence of a dominant position only where the market share persists over time. Thus, persistence of power over certain period will be taken into

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114 Opi, supra note 14, at 274.
115 Id.
116 Id.
118 Id.
119 Id.
120 Case IV/M. 042, Alcatel/Telettra, 1991 O.J. (L 122) 48. The Commission stated that “a very high share of any market share could indicate that a dominant position exists.” Id. ¶¶ 38-40.
121 See Freret, supra note 7, at 154-61.
122 Aerospatiale-Alenia/De Havilland, 1991 O.J. (L 334) 42. The Commission stated: “In general terms, a concentration which leads to the creation of a dominant position may however be compatible with the common market … if there exists strong evidence that this position is only temporary and would be quickly eroded because of high probability of strong market entry. With such market entry the dominant position is not likely to significantly impede effective competition within the meaning of Article 2(3) of the Merger
account when determining a dominance. The Commission also takes into account existence of current or future competitors which may prevent an undertakings with a significantly high market share from acting independently in the market. The Commission stated in Tetra-Pak/Alfa-Laval that "in certain rare circumstances even such a high market share may not necessarily result in dominance. In particular, if sufficiently active competitors are present on the market, the company with the large market share may be prevented from acting to an appreciate extent independently of the pressures typical of a competitive market." The Commission also takes into account the maturity of the market and commercial or technical advantage over competitors. If the market is mature, a high market share of undertakings in a mature market is more likely to confer dominance than a high market share is in a highly innovative and rapidly changing market. Also, where an undertaking possesses a technical advantages over competitors owing to its secret technology or a patent, the Commission consider this as one of most criterion in accessing a dominant position. In Du Pont/ICI, in which the Commission found that the acquisition would have increased Du Pont’s marker share between 23% and 40%, the Commission found that Du Pont’s acquisition of ICI, particularly in the field of sensitive

Regulation. In order to assess whether the dominant position ... is likely to significantly impede effective competition therefore, it is necessary to assess the likelihood of new entry into the market.” Id. ¶ 53.

121 Case IV/M180, Tetra Pak/Alfa-Lavel, 1991 O.J. (L 290) 35.
122 Id. ¶ 3(3); See also Case IV/M042, Alcatel/Teletrera, 1991 O.J. (L 334) 42. The Commission cleared the merger even though the post-merger amounted to a market share of 83% of Spanish microwave equipment. The Commission found that entry barriers were not very high and the main competitors of Alcatel in Spain-AT&T and Ericsson- were considered to be capable of increasing production within a short period of time. Id. 51-53.
123 See Freret, supra note 7, at 159-60.
124 See id
125 See id
126 See id
nylon carpet fiber industry, would have provided Du Pont with a great technological lead, and this, in turn, would have strengthened of its existing customers and given Du Pont the ability to behave independently of its competitors. The concentration was finally cleared after Du Pont promised to give up to sell sufficient production capacity to bring its post-merger share down below the dominance threshold.

Besides those described above, there are other factors which the Commission ECJ will take into account when determining dominance, such as entry barrier, the existence of gaps of market share between a dominant undertaking and its main competitor..., etc.

There is also a political factor which the Commission consider when assessing a dominant position and compatibility. The Commission and ECJ may take into account the development of technical and economic progress. According to recital 13 of the preamble of the Regulation, it is required to take into account the legal framework of the achievement of the fundamental objectives which was referred in Article 2 of the EC Treaty, including that of strengthening the Community’s economic and social cohesion. In addition, the Merger Regulation confirms this Commission’s position, provided that “it is to consumers’ advantage and does not form an obstacle to competition.”

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129 Freret, supra note 7, at 159.
130 See id. 548.
131 Barbot, supra note 117, at 274-75.
132 See id.
133 See id.
134 See Cook & Kerse, supra note 5, at 131-33.
135 Merger Regulation, supra note 1, art.2(1)(b).
With regard to oligopolistic dominance, the Merger Regulation does not provide any wording, and there is only one case, Nestle/Perrier, in which collective dominance was found to exist. In this case, the commission considered that the transaction would create a duopolistic dominance which might significantly impede the effective competition in the market, given the high market share that Nestle and BSN would have after the Merger between Nestle and Perrier. Nestle and BSN both argued that the Regulation does not apply to oligopolistic dominance. Nevertheless, the Commission concluded that the Regulation should apply equally to the creation of single firm power or collective power. Later, the Commission allowed the transaction to proceed on certain conditions and obligations.

Procedural Aspects

Pre-Merger Notification

The Merger Regulation requires that concentrations with a Community dimension be notified to the Commission not more than one week after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling

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136 Case IV/M 190, Nestle/Perrier, 1992 O.J. (L 356) 1; see also supra note 91
137 See Pierre Raoul-Duval ET AL., The EEC Merger Control Regulation, SB04 ALI-ABA 357, 365-66 (1996); Cook & Kersl, supra note 5, at 134-136; Portwood, supra note 29, at 79-85; see also Opi, supra note 14, at 277-78.
138 See Portwood, supra note 29, at 81,82
139 Id
140 The Commission only allowed the merger on condition that Nestle sell off eight brands of mineral water in a single package to a third party in order to create a third force in the mineral water market in France which will, in turn, challenge the duopolistic dominant position of Nestle and BSN. This third party had to be approved by the Commission so that the latter could ensure that the purchaser had sufficient financial resources and expertise to be an effective competitor on the French market. Id. at 148.
interests, whichever comes first. In case of true merger, within the meaning of Article 3(1)(a), or in case of an acquisition of joint control, within the meaning of Article 3(1)(b), a concentration shall be notified by the parties jointly. In other cases, the notification shall be made by the acquiring party. The Commission may impose fines, ranging from ECU 1,000 to 50,000 if parties obliged to notify fail to do so. In addition, if the parties concerned supply incorrect or misleading information in a notification, they may be subject to the fines of the same amount. Not until a transaction has been declared with the Common Market, will it be realized in accordance with Article 7(1).

As soon as the Commission receives a notification, it must proceed a so-called first phase examination and decide whether or not it will approve the merger at issue within a month. The Commission will look the concentration as belonging to one of the following situation: (a) the notification does not fall within the scope of this Regulation; (b) the concentration notified, although falling within the scope of the Merger Regulation, does not raise serious doubts as to its compatibility with the common market; (c) the concentration notified falls within the scope of the Regulation and raises serious doubt as to its compatibility with the common market. Where the notified concentration belong to situation (a), the commission will, by means of decision, record that the concentration

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141 Merger Regulation, supra note 1, art. 4(1).
142 Id. art. 4(2).
143 Article 14(1)(a)-(b). The Commission also may impose fines if the parties concerned supply incomplete business record or refuse to submit an investigation by the Commission. Id. art. 14(1)(c)-(d).
144 Before its amendment in 1997, three weeks suspension was applied. In other word, a concentration could not put into effect within the first three weeks following its notification. See Portwood, supra note 29, at 141-43.
145 Merger Regulation, supra note 1, art 10(1). When there is a request for referral of the case to a Member State, this time-limit is extended to six weeks. Id.
146 Id. art. 6(1)(a)-(c).
does not have Community dimension.\textsuperscript{147} If the concentration notified falls within the category (b), the Commission will decide not to oppose it and will declare it compatible with the common market.\textsuperscript{148} In addition, the Commission may declare the concentration compatible under certain conditions which the undertakings concerned must comply with.\textsuperscript{149} As to the concentration in the category (c), the Commission will decide to initiate proceedings which is also called second-phrase examination, and this procedure may last four months while the first-phase may last up to only one month.\textsuperscript{150}

In the second-phase examination, the Commission will carry out a close examination of the concentration in liaison with the competent authorities of the Member States.\textsuperscript{151} After this examination, the Commission will prepare a statement of objections concerning the concentration at issue.\textsuperscript{152} Then, the parties concerned will have opportunity to submit their observation.\textsuperscript{153} The Commission can base its decision only on a statement of objections on which the parties had opportunity to submit their observation.\textsuperscript{154} Next, a draft decision by the Commission will be prepared, based on the objections and the observations, and this draft decision, in turn, is submitted for discussion to the Advisory Committee which consists of one or two representatives of the Member States.\textsuperscript{155} After this discussion, the Advisory Committee will deliver an opinion

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\item \textsuperscript{147} \textit{id.} art. 6(1)(a).
\item \textsuperscript{148} \textit{id.} art. 6(1)(b).
\item \textsuperscript{149} \textit{id.}
\item \textsuperscript{150} \textit{id.} art. 6(1)(c).
\item \textsuperscript{151} \textit{id.} art. 19(2).
\item \textsuperscript{152} \textit{id.} art. 18.
\item \textsuperscript{153} \textit{id.} art. 18(3).
\item \textsuperscript{154} \textit{id.}
\item \textsuperscript{155} Merger Regulation, \textit{supra} note 1, art. 19(3).
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on the Commission’s draft decision. On the basis of this opinion, the Commission makes a final decision.\footnote{\textit{Id} art. 19(4)}

The Commission is supposed to make a decision normally within one month or, in case of initiating the second-phase procedure, within five months including the first-phase period.\footnote{\textit{Id} art. 10(1)(3)} If the Commission does not take a decision within the period fixed for it, the concentration will be deemed to be compatible with the common market.\footnote{\textit{Id} art. 10(6)}

The Commission exercise exclusive power on the matters.\footnote{\textit{Id} If the parties concerned, either intentionally or negligently put into effect the transaction during suspension period, the Commission “may by decision impose fines not exceeding 10\% of the aggregate turnover of the undertakings concerned. \textit{Id} art. 7(2)(b). As to the concentrations which was not notified,}

\textit{Supra} note 29. at 130-31. 
\textit{Merger Regulation, supra note 1, art. 8(2).}
concerned is responsible for or if the information was obtained by deceit. Article 11 of the Regulation provides that the Commission may require information from the Governments and competent authorities of the Member States, and from undertakings or association of undertakings.  

Although the Commission possesses exclusive power in the decision of compatibility, there is a limit. Thus, the ECJ have unlimited jurisdiction to review the Commission’s decision including fines and periodic penalty payments. The ECJ “may cancel, reduce or increase the fine or periodic penalty payments imposed.”

**Negotiation Between the Commission and Undertakings**

If a concentration notified falls within the jurisdictional scope of the Commission, and has a significant possibility of impeding the effective competition in the common market, the Commission will not approve the concentration. However, the Merger Regulation is providing an opportunity for undertakings to be given clearance decision by adapting the concentration in the way which the Commission put. Article 6(1)(a) and Article 8(2) are dealing with those opportunity. Thus, a concentration, otherwise will be declared incompatible with the common market. will be cleared by modifying the concentration by entering into commitments. *Nestle/Perrier* is one of the important decision concerning the commitments. 

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162 Id. art. 8(5)(a).
163 Id. art. 11.
164 Id. art. 16. The Merger Regulation also provides that “Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.” Id. art. 21(1).
165 See Portwood, supra note 29, at 138-39.
In the case of Nestle/Perrier, the Commission cleared the merger only on the condition that Nestle sell off eight brands of mineral water in a single package to a third party in order to create a third force in the mineral water market in France, thereby creating a condition to challenge the duopoly of Nestle and BSN. This third party had to be approved by the Commission so that the Commission could ensure that the purchaser had sufficient financial resources and expertise to be an effective competitor on the French market. The settlement was reached, thereby denying Perrier the right to buy any share in the relevant market for ten years.

Exception to the Sole Jurisdiction by the Commission

The Merger Regulation provides the Commission with sole jurisdiction to take decisions, only subject to review by the Court of Justice. Furthermore, the regulation provides that “[n]o Member State shall apply its national legislation on competition to any consideration that has a Community dimension.” However, there are three exceptions to this principle, which are known as the German, English and Dutch clauses.

According to Article 9, also known as the German clause, the Commission may refer a notified concentration to the competent authorities of the Member State where, within three weeks of its receiving of the copy of the notification from the Commission, the Member State notify the Commission that “a concentration threatens to create or to

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166 Nestle/Perrier, 1992 O.J. (I 356) 1.
167 PORTWOOD, supra note 29, at 138-39.
168 See id.
169 See id.
170 Merger Regulation, supra note 1, art. 21(1).
171 ld. art. 21(2)
172 For more detail information, see PORTWOOD, supra note 29, at 50-59.
strengthen a dominant position as a result of which effective competition would be significantly impeded" on a distinct market within that Member State. If the Commission agrees that such a distinct market and a threat exist, it may either deal with the case itself or may refer the whole or part of the case to the competent authorities of the Member States concerned, with a view to the application of that State’s national competition law.

Article 21, known as the English clause, opens a way for a concentration with a Community dimension to avoid the exclusive application of the Regulation. This Article allows Member States to take appropriate measure to protect “legitimate interests” other than those considered by the Regulation, provided that they are compatible with the general principles and other provisions of the Community law. Those legitimate interests include “public security, plurality of the media and prudential rules.”

According to Article 22, known as the Dutch clause, the Commission, at the request of a Member State or at the joint request of two or more Member States, may itself deal with the transaction without a Community dimension, applying the Merger Regulation, if the Commission finds that the transaction, by creating or strengthening a dominant position, has significant impeding of effective competition within the Member State of States making the joint request. The Commission is allowed to take only the

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173 Merge Regulation, supra note 1, art. 9(2)(a).
174 Id. art. 9(1),(2).
175 Id. art. 9(3).
176 See Raoul-Duval et al., supra note 137, at 369-70.
177 Merger Regulation, supra note 1, art. 21(3).
178 Id.
179 Id. art. 22(3)
measures strictly necessary to maintain or restore effective competition within the territory of the Member States or states concerned.\textsuperscript{180}

**Remedies**

In general, there are two types of remedial measures available under the Merger Regulation and those measures are "divestiture" and "separation of joint control."\textsuperscript{181}

Full divestiture calls for selling off and/or redistribution of the acquired assets or undertaking from the purchaser and their recovering as an efficient and independent competitor in the market.\textsuperscript{182} Divestiture can result in a range from a few to too many number of transactions.\textsuperscript{183} For example, the original seller can be offered with an option to repurchase its interests, and/or the plant and equipment could be sold off to an independent undertaking.\textsuperscript{184} Separation of joint control is an efficient remedial measure for joint ventures and similar situation such as cross directorship and cross shareholdings.\textsuperscript{185} This involves changes in voting right, management bodies, or redistribution of capital between parent undertakings.\textsuperscript{186}

Besides those two remedial measures introduce above, the Commission may take any of the following actions:

1) ordering partial divestiture of the target company in the hands of acquiring company;

2) ordering sterilization measures that permit acquisition of the challenged

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\textsuperscript{180} Id. art. 22(5).

\textsuperscript{181} See Portwood, supra note 29, at 152.

\textsuperscript{182} See id.

\textsuperscript{183} See id.

\textsuperscript{184} See id.

\textsuperscript{185} See id.

\textsuperscript{186} See id.
ownership with restriction on its voting or managerial rights that may lead to
anti-competition effect;

3) ordering prohibitions on future acquisitions in the same market; and lastly,

4) ordering investiture of an independent undertaking to which the required
assets are transferred. This measure is ordered when there is a danger that any
sale to a third party would results in an anti-competition effect as the
merger.\textsuperscript{187}

\textsuperscript{187} See id.
CHAPTER III

UNITED STATES

Historical Background

Early cases involving mergers were tried under section 1 and section 2 of the Sherman Act, which were originally adopted to control the excessive economic and political power concentrated on Oil, Steel and other monopolies. However, the Government faced with difficulties in dealing with merger cases with these statutes and wanted tougher and more efficient law to regulate merger cases. From this need, the Government came to enact section 7 of the Clayton Act. Now, it has become the principal antitrust statute under which merger and acquisition cases are regulated. The section 7 of the Clayton Act was first enacted in 1914, and later strengthened by amendments in 1950 (the Celler-Kefauver Act), 1980, and 1984.

When it was originally passed, section 7 only prohibited stock acquisition of a corporation engaged in commerce by another corporation also engaged in commerce “if the effect might be substantially to lessen the competition between them, to restrain

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188 15 U.S.C. §§ 1,2 (1994). Section 1 states “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Id. § 1. Section 2 states “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” Id. § 2.

189 See Thomas W. Brunner et al., Mergers in the New Antitrust Era 3-6 (1985); see also Opi, supra note 14, at 226 n.17.

190 See id.


192 For general information, see Brunner et al., supra note 189, 3-5.

193 See id
commerce in any section of the country, or to create monopoly.194 There was not any mention with regard to asset acquisition.195 This was considered inadequate by the Government because this lack of jurisdiction was frustrating the merger agents’ effort to more aggressively attack mergers which may harm competition.196 There was another problem, section 7 was apparently covering only horizontal mergers between direct competitors, not either vertical mergers nor conglomerate mergers.197 Consequently, the Congress amended section 7 in 1950 through the Celler-Kefauver Act198 and fortified it by expanding its jurisdictional scope to acquisition of corporate assets and shares of capital or stock, also enabling it to cover all three type of mergers.199

In addition, section 7 of the Clayton Act, by reading “may be,”200 makes it clear that it covers not only actual, realized anti-competitive effect, but also possible or probable effect from transactions.201 Therefore, the merger enforcement Agencies or private plaintiffs do not have to prove that a transaction at issue will have an adverse effect on competition. Rather it is sufficient to show that there is a slight probability of harm on competition.202

195 See Brown Shoe Co. v. United States, 370 U.S. 294, 312-15 (1962); see also Opi, supra note 14, 226 n.16.
196 See, e.g., in United States v. Columbia Steel Co., 334 U.S. 495 (1948), the Justice Department tried, under the Sherman Act, to stop United States Steel Company from acquiring the assets of the Consolidated Steel Corporation, but the Supreme Court rejected this Justice Department’s effort. Id. at 521-23.
197 See Brunner et al., supra note 189, at 3-5.
199 See Brunner et al., supra note 189, at 5-6.
201 Opi, supra note 14, at 244-45.
202 Id.
There are also other resources for U.S. merger regulation. Enactment of Hart-Scott-Rodino Antitrust Improvement Act\(^{203}\) in 1976 began to provide specific thresholds by which pre-notification to both Federal Trade Commission (hereinafter FTC) and the Department of Justice may be required.\(^{204}\) Most importantly, there are guidelines issued by the Department of Justice (hereinafter DOJ).\(^{205}\) Although these guidelines have no legal binding on the courts, but they strongly suggest the merger agencies' intention and policy concerning merger cases.\(^{206}\) Also, FTC issues statement, thereby providing a secondary guideline.\(^{207}\)

**Jurisdictional Scope**

One part of Section 7 of the Clayton Act states:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.\(^{208}\)

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204 See BRUNNER ET AL., supra note 189, at 5,6.
205 The guideline explain how the DOJ will define markets, classify mergers, analyze their competitive impact, and assess certain defenses. BRUNNER ET AL., supra note 189, at 13.
206 Id. at 13-14.
207 Id. at 3-5.
As explained briefly, when it was originally passed in 1914, the jurisdictional range of section 7 of the Clayton Act covered only stock acquisition between corporations engaged in commerce.\textsuperscript{209} However, by its amendment in 1950, the Government added assets acquisition to its jurisdictional scope.\textsuperscript{210} Also later, through its 1980 amendment the jurisdictional reach of the Act was more broadened to include acquisitions virtually by any type of entity, and as a result, there was no difference now under the statute whether a transaction at issue is made by a corporation, a natural person, a partnership, a joint venture, or some other type of business entity.\textsuperscript{211} Also, before its 1980 amendment, the Clayton Act reached only transactions “in commerce,”\textsuperscript{212} thereby excluding from its jurisdictional reach transactions between companies which were not directly engaged in the production, distribution, or purchase of goods or services in interstate commerce.\textsuperscript{213} However, by amending the statute to insert “any activity affecting commerce,”\textsuperscript{214} U.S. extended the jurisdictional scope, making it reach as far as does the Sherman Act.\textsuperscript{215} Consequently, the need for the Sherman Act sections 1 and section 2 also almost disappeared.\textsuperscript{216}

Section 7 also itself contains an exemption from its broad jurisdiction.\textsuperscript{217} It clearly states that this section 7 would not be applied to persons purchasing stocks “solely for investment and not using the same by voting or otherwise to bring about, or in attempting

\begin{itemize}
\item \textsuperscript{209} See supra text accompanying notes 188-207.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Barbara A. Reeves \& Linda R. Blumkin, \textit{Acquisitions and Mergers}, 890 PLI/Corp 473, 478.
\item \textsuperscript{212} 15 U.S.C. § 18 (1950).
\item \textsuperscript{213} See Reeves \& Blumkin, supra note 213, at 478-81.
\item \textsuperscript{214} 15 U.S.C. § 18 (1980).
\item \textsuperscript{215} See Reeves \& Blumkin, supra note 213, at 478-81.
\item \textsuperscript{216} Id. at 478.
\item \textsuperscript{217} See id. at 481.
\end{itemize}
to bring about, the substantial lessening of competition. This exemption was inserted to exclude from its strict enforcement firms with no intention to acquire the control over another company by purchasing stock. However, determining whether the stock acquisition is solely for the purpose of "investment" is not simple. The courts rely on a variety of circumstances for determining the purpose of stock acquisition, trying to apply objective standard. For instance, the court look to "borrowing at unfavorable terms to finance large purchases," "speed of acquisition," "presence or absence of representation on the board of directors."

Many scholars in the United States, depending on the competitive relationship which existed between parties, classifies mergers into three types: (1) horizontal merger, (2) vertical merger, and (3) conglomerate merger. Horizontal mergers are consolidations between direct competitor who were manufacturing or distributing same product or providing same service in the same geographic area. Horizontal mergers are normally deemed most hazardous because of their great potential to directly affect the market structure by reducing the number of direct competitor. Vertical mergers are consolidations between firms at different levels of the same industry (upstream and downstream), such as a merger between a manufacturer and one of its distributor or

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219 See Reeves & Blumkin, supra note 213, at 479-80.
220 Id.
221 See Brunner et al., supra note 189, at 80-82.
222 See id.
224 See Brunner et al., supra note 189, at 16, 17.
225 See id.
supplier.\textsuperscript{226} Government enforcement policies toward vertical mergers have been unclear and have been changed from strict enforcement to wide permission.\textsuperscript{227} Lastly, conglomerate mergers may include all type of mergers that are not classified as horizontal or vertical mergers. In other word, conglomerate mergers are ones other than those which can be categorized as horizontal or vertical mergers.\textsuperscript{228} In a conglomerate merger, the acquiring company is neither potential of actual competitor of the acquired company, nor is not a supplier of purchaser.\textsuperscript{229}

As explained, the Clayton Act, as originally passed, was covering only horizontal merger, but through its amendment, now its coverage includes both vertical and conglomerate mergers, thus covering all of the three types of mergers existing.\textsuperscript{230}

Defining the Relevant Market

As in European Community, the market definition is also crucially important in the United States.\textsuperscript{231} When determining whether the effect of the merger “may be substantially to lessen competition or tend to create a monopoly.”\textsuperscript{232} the FTC and DOJ, first of all, have to define properly the relevant product and geographic market.\textsuperscript{233} Until the DOJ and FTC worked together to develop a more sophisticated approach toward

\begin{itemize}
  \item See id. 51-53.
  \item See id. 52-53.
  \item See id. at 61-66.
  \item See id.
  \item See supra text accompanying notes 197-99.
  \item Reeves & Blumkin, supra note 213, at 481.
  \item 15 U.S.C. 18.
  \item Reeves & Blumkin, supra note 213, at 481-82.
\end{itemize}
measuring the relevant market and issued their 1992 Horizontal Merger Guidelines,\footnote{U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Apr. 2, 1992) [hereinafter 1992 Merger Guidelines].} which refined the analysis presented in the Justice Department's 1982 and 1984 Merger Guidelines and the FTC's 1982 Statement Concerning Horizontal Mergers,\footnote{U.S. Dep't of Justice & Federal Trade Comm'n, Merger Guidelines, 47 Fed. Reg. 38,493 (June 14, 1982); U.S. Dep't of Justice & Federal Trade Comm'n, Merger Guidelines, 49 Fed. Reg. 26,823 (June 14, 1992).} there was no unifying principles as to how to define the relevant market, and therefore, most courts had made inconsistent ruling on the matter of market definition, relying on their subjective opinion.\footnote{See BRUNNER ET AL., supra note 189, at 83-87.} Nevertheless, there are several landmark cases with respect to market definition and these cases have had tremendous influences on later cases and also have been providing the FTC and DOJ with basis when both agencies issue guidelines. These are discussed next.

In Brown Shoe Co. v. United States,\footnote{370 U.S. 294 (1962).} the Court stated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."\footnote{Id., at 325 (1962).} Since the Court in Brown Shoe stated that "within [a] broad product market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes,"\footnote{Id.} the courts in the U.S. have been considering the possibility of submarkets whenever they define a relevant market.\footnote{Id.} The Court in Brown Shoe also introduced seven "practical indicia"\footnote{Id.} for determining whether a submarket existed: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar...
characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.\textsuperscript{242}

In \textit{United States v. Philadelphia National Bank},\textsuperscript{243} the Court added further consideration to market definition.\textsuperscript{244} In this case, although the Supreme Court noticed that some bank services such as checking accounts are “so distinctive that they are entirely free of effective competition from products or services of other financial institution,”\textsuperscript{245} and the Court determined that a “cluster”\textsuperscript{246} of unique and non-unique services constituting “commercial banking” was a relevant product market.\textsuperscript{247} This case is also important with regard to geographic market definition.\textsuperscript{248} The Court noted that the geographic market is the area of effective competition in which the “seller operates, and to which the purchaser can practically turn for supplies.”\textsuperscript{249} For geographic market definition, Courts in the United States have took into account factors such as “consumer locations, normal pricing patterns, industry recognition, and transportation costs.”\textsuperscript{250}

Now, the 1992 Horizontal Merger Guideline provides a certain standard about how to define the relevant market. It should be pointed out that the guideline does not have legal binding on courts as indicated in several decisions.\textsuperscript{251} Rather, as stated by

\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} 374 U.S. 321 (1963).
\textsuperscript{244} \textit{ABA Anti Trust Section, Monograph No. 12, Horizontal Mergers: Law and Policy} 35,36 (1986).
\textsuperscript{245} \textit{Id.}
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} \textit{See} Reeves & Blumkin, \textit{supra} note 213, at 485-86.
\textsuperscript{249} 374 U.S. at 359.
\textsuperscript{250} \textit{See} Reeves & Blumkin, \textit{supra} note 213, at 485-86.
\textsuperscript{251} \textit{Id.}
Brunner, the Guideline is "the prevailing standards of the current Administration and a fair predictor of the questions future Administrations might ask." Nonetheless, some courts as well as both antitrust agencies have been following the Guideline's approach on the matter of defining a relevant market. Under the Guideline, according to Brunner, "[m]arket definition is a process of identifying firms that, were they to act as a single entity, could profitably raise and maintain price (a proxy for the exercise of market power)."

In order to define a relevant product market under the Merger Guideline, both the agencies, FTC and DOJ, will take into account price increase as the most important factor, and then consider the other factors as ancillary factors that indicate the likely effect of a price increase. The Agencies will begin with each products produced or sold by each merging firms and ask whether a hypothetical monopolist of those products would be able to impose profitably at least a "small but significant and nontransitory increase" in price for considerable period, with a condition in which sale of all other products is remaining still. More specifically, the agency, assuming that a hypothetical monopolist pursues maximum profits in deciding whether to raise the prices of its products, may ask a hypothetical monopolist who is able to impose "small but significant

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252 See supra note 189
253 Id. at 13.
254 Id. at 88.
255 Id. at 85.
256 1992 Merger Guidelines, supra note 234, § 1(11).
257 Id. According to the Guidelines, the "small but significant and nontransitory" increase in price will be five percent, but this can be larger or smaller depending on nature of industry at issue. Opi, supra note 269-70.
and nontransitory increase in price for considerable time period, without losing its customers to other products or inducing new entry with facilities easily changeable for supply substitution. If the reduction in sales of the product, as a response to a price increase, would be large enough that a hypothetical monopolist would not find it profitable to impose such a price increase, then the Agency will add to the product group the product that is next-best substitutable for the merging company’s product and will ask the same question again until the Agencies delineate the relevant product market to the smallest group of products that will satisfy this test.

The Agencies, in considering the likely reaction of the buyers to a price increase, will take into account all relevant factors including the following four factors:

1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;

2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;

3) the influence of downstream competition faced by buyers in their output markets; and

4) the timing and costs of switching products.
This process is also same for geographic market definition.\textsuperscript{263} For each product market both Agencies determine the geographic market or markets in which the merging firms produce or sell.\textsuperscript{264} In order to define a relevant geographic market or markets affected by a merger, the Agencies will begin with the location of each merging firm and ask whether a hypothetical monopolist of the relevant product would be able to impose profitably "small but significant and nontransitory" increase in price, where the terms of sale at other locations did not change.\textsuperscript{265} This test is based on assumption that buyers who are purchasing products produced within a location may shift, in response to a price increase, to purchasing products produced within other locations.\textsuperscript{266} If the reduction in sales of the product at that location would be large enough so that a hypothetical monopolist producing or selling the relevant product at the merging firm's location would not find it profitable to impose such an increase in price, then the Agencies will add "the location from which production is the next-best substitute for production at the merging firm's location. This process will continue until a group of location is identified such that a hypothetical monopolist over that group of locations would profitably impose a "small but significant and nontransitory" increase in price.\textsuperscript{267}

The 1992 Merger Guideline is listing four nonexclusive factors which the DOJ and FTC will take into account when they consider the likely reaction of buyers in response to a price increase as follows:

\textsuperscript{263} See Opi, supra note 14, at 261.  
\textsuperscript{264} Id.  
\textsuperscript{265} 1992 Merger Guidelines, supra note 234, § 1(21).  
\textsuperscript{266} Id.; see also Reeves & Blumkin, supra note 213, at 485-87.  
\textsuperscript{267} Id.
1. evidence that buyers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables;

2. evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables;

3. the influence of downstream competition faced by buyer in their output markets; and

4. the timing and costs of switching supplies.\(^\text{268}\)

The 1992 Guidelines do not explicitly refer to other criteria which were listed in the 1984 Guidelines,\(^\text{269}\) such as shipment patterns, transportation costs as possible barriers to shipment into the area, costs of local distribution as possible entry barriers, and excess capacity by companies outside the location of the merging company.\(^\text{270}\) However, this does not mean the Agencies do not consider these factors any more, rather the 1992 Guidelines states that “the Agency will take into account all relevant evidence.”\(^\text{271}\)

**Market Shares And Concentration**

For measuring the level of concentration, the U.S. antitrust authorities have developed so-called the Herfindahl-Hirschman Index (hereinafter HHI) which was introduced by the 1984 Guidelines.\(^\text{272}\) The 1992 Guidelines is continuously using this

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\(^{270}\) See Opi, *supra* note 14, at 271.

\(^{271}\) Id.

\(^{272}\) See Id. at 277.
One of the important characteristics of this test lies in squaring the market share of each participant in the market in order to give greater weight on the market power of the larger firms. In detail, the Agencies determine the market share of participant and square them, and finally add the result to measure the concentration level. Thus, if a market consists of five firms with market shares of respectively 40%, 26%, 17%, 10%, and 7%, its HHI will be \((40 \times 40)+(26 \times 26)+(17 \times 17)+(10 \times 10)+(7 \times 7)=2,714\). Whether the Agencies will challenge a merger or not depends on both post-merger market share and the increase in concentration resulting from the merger.

According to the Guidelines, a market with the post-merger less than 1,000 is unlikely to be challenged. In other words, those markets will be deemed not to be concentrated. If the post-merger HHI in a market is between 1,000 and 1,800, the market will be deemed to be moderately concentrated. the Agencies are unlikely to challenge a merger unless an increase in the HHI exceeds 100 points because mergers in this circumstances are considered not to have adverse competitive consequences. However, if a merger produce an increase in the HHI of more than 100 points in moderately concentrated markets, the Agencies will take into account several factors set forth from section 2 to section 5 of the 1992 Guidelines, such as oligopolies, entry barriers, efficiencies, and the “failing company” defense.
Markets with a post-merger HHI above 1,800 points are deemed to be highly concentrated. Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated market, are unlikely to be challenged because they will be considered not to have adverse competitive consequences in a market. If the merger produce an increase in HHI of only between 50 and 100 points, the Agencies may challenge, depending on the related factors. The Agencies will challenge most mergers that produce an increase in HHI in excess of 100 points, even though related other factors can overcome this presumption.

Defense And Justification For Mergers

If the net-impact of a merger is pro-competitive, the merger might be given justification defending on situations.

1. Small company doctrine. The Supreme Court once recognized in Brown Shoe Co. v. United States that two or more companies might be allowed to merge in order to compete more effectively with larger, dominant firms in the relevant market. However, this opinion was rejected in United State v. Von’s Grocery.

2. Failing company doctrine. This justification is also contained in the 1992 Merger Guidelines. According to the Guidelines, a merger will be deemed to have little

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281 Id.
282 Id.
283 Id.
284 Id.
285 These exceptional situation are called defenses because they need to be raised and proved by the merging parties. Abir, supra note 223, at 151.
286 370 U.S. 294.
287 384 U.S. 270 (1966)
possibility to create or enhance market power or facilitate its exercise if the merger meet the following conditions:

1) the allegedly failing firm would be unable to meet its financial obligations in the near future;

2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;

3) it has made unsuccessful good-faith effort to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and in tangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and

4) absent the acquisition, the assets of the failing firm would exit the relevant market.  

Procedural Issues

1. Hart-Scott-Rodino Act and Pre-merger Notification. The United States merger procedure is well provided in the Hart-Scott-Rodino Antitrust Improvement Act. Most importantly, this Act requires that mergers and acquisitions with a certain size file a merger notification forms with the FTC and the DOJ before its consummation. This pre-merger notification requirement is intended to give a better chance to both agencies for investigating mergers which may be in violation of the Clayton Act.  

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289 Id.
291 See Abir, supra note 223, at 150-51.
292 See Id.
The following are two criteria by which it is decided whether or not a merger should be notified prior to its consummation:

1) At least one of the parties to the merger must do business in of affect interstate or foreign commerce.\textsuperscript{293}

2a) The size of the merging parties must meet one of the three conditions: the acquiring party's assets or annual sales equal $100 million or more and the acquired party engaged in manufacturing has assets or annual sales equal to $10 million or more; or

2b) the acquiring party's assets or annual sales equal $100 million or more and the acquired party not engaged in manufacturing has assets equal to 10 million or more; or

2c) the acquiring party's assets or annual sales equal $10 million or more and the acquired party have assets or annual sales equal to $100 million or more. This test can be satisfied without the total acquisition of the assets of the acquired party.\textsuperscript{294}

After the transaction is complete, either the acquiring party will hold an aggregate total amount of securities and assets of the acquired party totaling $15 million or more in value, or the acquiring party will hold 15% or more of the voting securities of the acquired party.\textsuperscript{295} If the parties to a merger which is subject to a pre-merger notification consummate the merger without filing the notification forms with both agencies (DOJ

and FTC), they may be subject to civil penalties of up to $10,000 per day, for each day the violation continues.\textsuperscript{296}

The parties to a merger which is subject to the pre-merger notification cannot complete the merger for a certain period of time. This HSR waiting period is normally 30 days.\textsuperscript{297} If the reviewing agency, however, believe that the merger raises doubt as to its compatibility with the Clayton Act, the agency may issue a formal “request for additional information” or “second request” prior to the end of the initial waiting period.\textsuperscript{298} If there is a second request from the reviewing agency, demanding the parties involved to provide additional information on the transaction, the waiting period is extended for additional 20 days from the time that all the parties required to be in compliance with the second request are actually in compliance with the request.\textsuperscript{299} If the agencies decide to stop the merger, they must do so within this additional twenty days.\textsuperscript{300} For the cash tender offer, the initial waiting period is 15 days, and this period is subject to extension of additional 10 days from the time of actual compliance.\textsuperscript{301}

At the end of the waiting period, if one of the Antitrust agencies decide to challenge the merger or acquisition, the reviewing agency seeks a temporary restraining order and preliminary injunction in federal district court.\textsuperscript{302} Some transactions with minor concern may be allowed to proceed if the parties enter into consent decrees with the

\textsuperscript{296} 15 U.S.C. § 18a(g)(1)
\textsuperscript{297} According to Abir, supra note 223, at 151, even though the waiting period is generally 30 days, failure to take immediate action against a merger subject to pre-merger notification does not prevent the agencies form subsequently challenging the merger as a violation of section 7 of the Clayton Act.
\textsuperscript{299} Id.
\textsuperscript{300} Id.
\textsuperscript{301} See Reeves & Blumkin, supra note 189, at 501.
agency. If the Agencies do not ask the district judge to issue a preliminary injunction or if the request is dismissed, then the parties to the merger at issue are free to consummate the merger. Nevertheless, an action may be brought before an administrative law judge or before a district court, depending on which agency is dealing with the case.

Consent Decree

Negotiation resolution in the U.S. merger control system is made through consent decrees. A consent decree has a characteristic of quasi-contractual and also quasi-judicial because the compromises negotiated between the Department of Justice and the companies is later ratified as an order of the federal court.

Similar to EU merger settlement, United States often require companies to divest assets in order to reduce their power in a particular field of market. Also, United States sometimes attain an assurance from acquiring companies that they will continue to do their business in their relevant markets as independent competitors.

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302 Id. at 501-502..
303 Id.
304 Id.
305 15 U.S.C. 18a(f). If the FTC is dealing with the case, the jurisdiction over the case belongs to an administrative law judge, and if the DOJ is dealing with the case, the jurisdiction belongs to a district court. Reeves & Blumkin, supra note 213, at 501.
306 Freret, supra note 7, at 168-70.
307 Id.
308 Id.
309 Id.
Remedies

There are basically seven actions that the government can order undertakings. These are: (1) injunction against consummation, (2) abandonment, (3) total divestiture, (4) partial divestiture, (5) mandating aid to competitors, (6) conduct restrictions, and (7) restrictions on future acquisitions. Each is discussed below:

1) injunction against consummation is issued before the closing date of the merger, it prohibits consummation of the entire transaction and thus, causing a “full-stop” injunction;

2) abandonment of the merger usually takes place when there is a government announcement of intent to sue;

3) total divestiture is the most common remedy ordered by the government if the merger has closed. (It takes one of three forms: (a) rescission—although it is rarely ordered by the courts due to its punitive effects, it involved the acquired business being resold to its former owners; (b) spinoff—the acquired business is made an independent company with its stock distributed to the shareholders of the acquirer and management is separated; and (c) sale to a third party—most divestiture are by sale of assets to a third party;

4) partial divestiture is achieved by selling off a subsidiary or division;

5) remedies have included mandating aid to competitors ordering provisions to create or strengthen competitor of the merged firm. It may involve ordering

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310 See generally, BRUNNER ET AL., supra note 189, at 189-203.
311 See id.
312 See id.
313 See id.
314 See id.
the buyer to help a rival company by providing new firm forms, customer
lists, and related supplies.\textsuperscript{315}

6) conduct restrictions in lieu of divestiture is also favored by the government. It
restricts the conduct of would-be parties by prohibiting common management,
limiting exchange of information, and placing rules about sales to each
other;\textsuperscript{316}

7) when the government deems that it cannot win divestiture, it settles for an
order restricting future acquisitions. (One of the three measures is ordered: (a)
blanket prohibition is a flat ban on acquisition for a period of years. It is
rarely used presently due to its unduly restrictive effects; (b) companies are
required to get a prior approval from the government. The government
usually puts a ten-year restraint on future acquisitions; and (c) sometimes the
government requires a notice of a future transactions that is not reported under
HSR\textsuperscript{317}).\textsuperscript{318}

\textbf{Penalties.} These remedies are strictly enforced and compliance to orders is
expected.\textsuperscript{319} When the DOJ initiates an action, it may institute a criminal action to
impose a fine or imprisonment for violation of the monopoly laws or if there is a per se
violation.\textsuperscript{320} Corporations may be fined up to $1 million for violation of the Sherman
Act. Likewise, individuals may be fined up to $100,000 and/or imprisonment for up to

\textsuperscript{315} See Id.
\textsuperscript{316} See Id.
\textsuperscript{318} See Brunner et al., supra note 189, at 189-203..
\textsuperscript{319} See Id
\textsuperscript{320} See Id.
three years. In addition, violations of the FTC’s order are punishable by fines up to $10,000 per offense, or per day for each day of the continuing offense, and, even resulting in imprisonment.

321 See Id.  
322 See Id.
CHAPTER IV
SOUTH KOREA

Background Of Implementing The Monopoly Regulation And Fair Trade Act

The anti-merger provision of South Korea is found in the Monopoly Regulation and Fair Trade Act. Especially, the Chapter 3 of the Monopoly Regulation and Fair Trade Act is providing whole provisions for the merger regulation in the Act. As a series of mergers by conglomerates in Korea have been causing a significant economic concentration in the Korea market, the “Merger Regulation and Fair Trade Act” in 1981, the Korean Antitrust Act, was enacted against the economic concentration. In this Section, a brief history of implementing the MRFT Act will be introduced, and in addition, a brief report about merger practice in Korea will be provided.

Historical Overview

From the 1970s, new social and economic problem began to appear in South Korea as anti-competitive behaviors of business entities, such as aggravation of monopolization and generalization of various type of trust and unfair trade practice, was being spread and accepted in common sense among people as well as business bodies.

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325 See Id.
This chaotic economic situation forced the Korean Government to enact the MRFT Act with the purpose of (1) stimulating fair competition among business groups, (2) protecting customers, and (3) accomplishing well-balanced national economic growth. Until the seventies, the Government had tried to maximize economic scale by supporting the largest groups politically and financially. However, while the largest groups were enlarging their business scales with monopoly power, middle-sized and small-sized firms were being seriously threatened to be expelled from the market.

Also, the market was becoming more and more concentrated, and the number of anti-competitive practices including monopolization and unfair trust was increasing rapidly each year, along with increment of unfair trade behaviors. Under these dynamic circumstances, the Korean Government came to enact the MRFT Act in the hope of correcting unfair business practice and stimulating fair competition in the market.

The Article 7 of the MRFT Act, especially, is the anti-merger provision very similar to the Section 7 of the Clayton Act of the United States. In fact, the Article 7 of the MRFT Act was modeled after the amended Section 7 of the Clayton Act, and as a result, the key languages in both anti-merger statutes are quite similar. For instance, like the Section 7 of the Clayton Act, the Section 7 of the MRFT Act is supposed to prohibit any mergers of which the effect ‘may’ substantially lessen competition in the

1 See id.
2 See id.
3 See id.
4 See id.
5 See id.
6 See id.
7 See id.
8 See id.
10 Chang, supra note 324, at 43-44.
particular field of trade." Therefore, the Korean MRFT Act also, like the Clayton Act, is authorizing the right to interfere even where there is only possibility of anti-competitive effect without any actual negative effect on the market.

One of the outstanding point about the MRFT Act is the fact that the bill introducing MRFT Act was proposed in 1980 by the executive branch rather than the legislature. At that time, Korea was experiencing the transition from Fourth to Fifth Republics, and the Korea Assembly (Congress) was in temporary suspension. The “National Security Legislation Conference” was elected as an interim authority of the Korea Assembly. During replacement period, this National Security Legislation Conference passed several bills, and MRFT Act is one of them.

**Merger Practices in South Korea**

Even though, South Korea has essentially similar merger regulation as that of the United States, the application of the regulations have shown quite different aspect owing to the differences in their own respective economic circumstances and government policies. This section will provide a brief picture of merger practice in South Korea until 1990.

Informally, the Korean economy is sometimes called *chaebol economy* due to the large economy sector controlled by a few number of conglomerates called “chaebol.” Chaebol is officially called “Ki-Up-Jip-Dhan”, and both words represent “business

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333 MRFT Act, *supra* note 323, art. 7(1).
334 Chang, *supra* note 324, at 44.
337 See Id.
conglomerates." These select conglomerates are composed of several specialized companies which are interrelated closely with each other. Although the subordinate companies, in most cases, appear to operate independently as a matter of law, they form interdependence by supporting and servicing each other financially and technically.

In South Korea, the economic concentration is closely connected to the growth of the chaebols’ economic power. The Korea economy history reveals that the conglomerates, while trying to accomplish diversification, aggravated the economic concentration in the market. Until the 1970s, most corporations tried to enlarge their business sizes by focusing on internal growth, and as a result, almost all markets began to be dominated by these minority number of enlarged corporations.

However, after the 1970s, the situation changed dramatically. It was no longer possible to enlarge the business scale by just relying on internal growth because all markets were already occupied by a few corporations with a dominant position. Corporations were not left any choice but to merge with other corporation. With this change, the corporations with dominant position began to trying to expand their business lines by merging and acquiring other corporations. and thus, became huge economic

\[338 \text{See Chang, supra note 324, at 48.}\]
\[339 \text{Most criticism concerning chaebol economy is about their executive bodies. Originally, most of the chaebol evolved from a family business and they are still remaining under the control of the family members of the one who created the business. In other world, these family members are occupying the core executive position and possessing a strong power to have decisive influence on business decisions. \textit{Id}}\]
\[340 \text{\textit{Id}}\]
\[341 \text{Id at 48-57.}\]
\[342 \text{Id}\]
\[343 \text{Id}\]
entities with several number of affiliates. The new generation of chaebols created in this background has seriously contributed to economic concentration in Korea.\textsuperscript{344}

There were 2,003 mergers reported to the Korea Fair Trade Commission (hereinafter KFTC) between 1981 and 1990, but among these, only two mergers were challenged by the Korean government.\textsuperscript{345} Furthermore, even these two cases were settled down without being brought to the merging firms, as they accepted the administrative order as a matter of negotiation.\textsuperscript{346} To make it worse, large portion of mergers accomplished by large-scale business entities were executed for the sole purpose of establishing diversification rather than structure rationalization or to strengthen competition.\textsuperscript{347} Furthermore, most of the target firms were companies not belonging to any other chaebol, as a result, in most cases, only small independent businesses were sacrificed.\textsuperscript{348}

During all this time, the Korea government, in the effort of establishing large size of economic scale and strengthen international competitiveness in the foreign market, had a policy \textit{not} to challenge mergers.\textsuperscript{349}

\textbf{Jurisdictional Scope}

Due to the lack of any legislative record of decisions by the Korea court, it is necessary to closely examine the statute itself, in this case, to figure out the legislative

\begin{flushleft}
\textsuperscript{344} \textit{Id}
\textsuperscript{345} \textit{Id} at 55-56.
\textsuperscript{346} Two cases are: (1) Dong-Yang Chemical, 82-1, January 13, 1982, 1982 MRFT Act Decision) and (2) Song-won Industry, 82-24, December 15, 1982, 1982 MRFT Act Decision).
\textsuperscript{347} Among the mergers accomplished between 1981 and 1990, more than 32\% of the mergers were accomplished for the sole purpose of diversification, 17.1\% for the purpose of rationalization of financial structures and rationalization of production and marketing, and 8.2\% for acquiring failing firms. Chang, \textit{supra} note, at 57.
\textsuperscript{348} \textit{Id}
\end{flushleft}
intention. The Article 7 of the MRFT Act prohibits two types of combination. The first type is a combination which may result in restricting competition in the market. That is, any corporation that meets the paid-in capital or whole asset threshold set in the enforcement decree is prohibited from engaging in any activity when there is likely to a substantial restriction of competition in “particular field of trade.” The statute, in the same Article, is listing those prohibited activities as follows:

1) acquiring or owning shares of another corporation;
2) allowing an office or an employee to concurrently hold a position as an office of another corporation;
3) merging with another corporation;
4) taking over or leasing the whole or a substantial part of the business or undertaking the management of another corporation, or taking over the whole or substantial part of the fixed assets used for the business of another corporation; and
5) participating in the establishment of a new corporation.

The second type is combinations which are accomplished through compulsion or unfair method. The Act provide that, regardless the size of the corporate, this kind of combinations are strictly forbidden by the Act.
Thus, the statute is expressly showing that the regulation will be applied to mergers with a certain size as in the European Community. The Article 11 of the president decree for the MRFT Act, as amended in Feb. 1993, require that the merger regulations only apply to corporations with paid-in capital of more than 5 billion won or with whole assets of 20 billion won. The words “particular field of trade” is similar to the United States’ definition of a relevant market which is “in any line of commerce or in any activity commerce in any section of the country,” and has a meaning of a relevant market including both the relevant product and geographic market.

Defense and Justifications for Combinations

Mergers and acquisitions have been playing important roles in the Korea economy history and have been catalysts in accomplishing a considerably large scale of the economy. As a result, the Korean government has the tendency not to intensely challenge mergers when the effects of mergers are especially not highly dangerous to the market. This tendency is much more apparent when the mergers only involve small- and medium-sized firms.

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354 See supra text accompanying notes 55.
356 MRFT Act, supra note 323, art. 7.
358 Abir, supra note 223, at 155-56.
359 Id. at 157.
360 Id.
361 Id.
According to the MRFT Act, the Commission is allowed to give permission to certain combinations when they have the purpose of achieving industrial rationalization or strengthening international competitiveness specified in the MRFT Act Decree. The burden of proving the need to rationalize the industry or strengthen international competitiveness lies on the enterprises seeking the combination in question.

Compatibility Test

For a compatibility test of a merger, the KFTC will take into account several factors. However, as in the United States, this test may be somehow different, depending on whether the merger is horizontal, vertical or conglomerate because, for example in case of a horizontal merger, there will a explicit anti-competition effect due to the reduced competitor in the same market.

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362 MRFT Act art. 7(1). MRFT Act Decree is providing detail conditions for this kind of defense. According to the article, business combinations for "industry rationalization" shall be permitted only when the conditions set forth in any one of the following subparagraphs are met:

1. when restructuring the industrial organization is critical for enhancing the efficiency of industrial activities and the rationalization of management;
2. where investment in facilities and operations requires substantial funds, and procurement of such funds is impossible through normal means; or
3. where a business combination is necessary for the public interest. MRFT Act Decree, supra note 355, art. 13.

Article 14 set forth conditions for the justification of "strengthening international competitiveness":

1. where international competitiveness can be significantly improved in terms of price and quality by means of accelerating technological development, attaining optional scales for management, and the like; or
2. where a substantial contribution can be made to the increase of exports by accelerating business activities in overseas markets, such as collecting information, marketing, and sales. Id. art 14.

363 MRFT Act, supra note 323, art. 7(2).
364 See Abir, supra note 223, at 157-78.
365 See Kim, supra note 335, at 280-281.
In general, the Korean Merger Regulation is applied not only where there is an actual dominant position but also where there is a possibility of creating a dominant position. The MRFT Act provides that any combination should be considered to be substantially restraining competition in a particular market if the combination fall into one of the following categories:

1) The total market share of the parties to the business combination meets the criteria of a market-dominant enterprise and is the highest in the particular market, and also the difference between the total market share and the market share of the corporation with the second highest market share is more than 25% of the sum of the market share.

2) At least one of the parties to the merger is one of the large-scale corporations listed by the Commission and the business combination at issue takes place in a market in which the market share of the small-and-medium enterprises is more than two-thirds. And also, the parties to the combination acquire more than 5% of the market share as a result of the business combination.

For the horizontal merger compatibility test, the KFTC will take into account following factors:

a) market share and market concentration before and after the merger;

b) existence of new technology or new product which might have potential ability to change the market structure;

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^366 Id.  
^367 MRFT Act, supra note 323, art 7(4).
c) the financial condition of the concerned parties;

d) threatening from abroad (import and export situation, custom, etc.);

e) market entry barrier to a new participant; and

f) substitutability of the concerned product.\(^{368}\)

The Korean Merger Guidelines also provides a 3-step test:

1) First, there must be newly formed command-acceptance relationship between the merging parties after the merger.

2) Second, those merging parties must be in a competitive relationship or in a supplier-consumer relationship for the resource material.

3) Third, there must be a dominant position formed due to the newly formed command-acceptance relationship.\(^{369}\)

In any case, the first step for the compatibility test is comparing the market share and market concentration. The HHI Index is often used for the market concentration analysis.\(^{370}\) However, if the same measure used in the United States is applied to mergers in Korea, too many different types of products such as milk, electric washer, auto, gas, and telecommunication will be belonging to a highly concentrated market in which the post-merger HHI is over 1,800.\(^{371}\) More sophisticated study on this matter is required for both KFTC and business entities in respect of predictability.

\(^{368}\) Id. These Factors are also important factors to be taken into consideration in case of vertical and conglomerate mergers. Abir, supra note 223, at 157.

\(^{369}\) Kim, supra note 335, at 281-83.

\(^{370}\) See id.

\(^{371}\) See id.
Filing of Report

The MRFT Act requires corporations which meet the conditions set forth in its Article 12 to notify the KFTC of mergers and acquisition transactions, thereby allowing the Commission the opportunity to examine combinations which may have anti-competitive impact on a particular market.\textsuperscript{372} The reporting requirement is only applied to corporations whose total amount of assets or revenues (meaning the sum of the total amount of assets of revenues of affiliates) meet the criteria set forth in the enforcement Decree, and the Article 18 of the enforcement Decree provides the total assets or sales revenue exceeding 100 billion won.\textsuperscript{373}

For corporations with such a dimension as described above, the combination must notify the Commission:

a) when the acquiring corporation owns more than twenty percent (or more than 15 percent for listed corporations by the Commission) of the total number of shares issued by the acquired corporation;

b) when an officer or an employee of a corporation concurrently holds the position of officer of another corporation;

c) a corporation intends to merge with another corporation, takes over another corporation, or establish a new corporation; or

\textsuperscript{372} MRFT Act, \textit{supra} note 323, art. 12.

\textsuperscript{373} \textit{Id.} art. 12(1).
d) when a corporation subscribes to twenty percent or more of the shares of a new corporation to be established. 374

The MRFT Act applies different reporting periods for the combinations by large size or market-dominant corporations. 375 In general, a reporting for business combination must be filed within 30 days after the date of execution of a business combination. However, provided the case involves mergers, takeovers, or the establishment of new firms, and if one or more corporations in the combination is a large corporation or a market-dominant Enterprise, the combination must be reported within 30 days after the date of execution of a merger agreement of a business transfer agreement or the date of adoption of a resolution at a shareholders meeting concerning participation in the establishment of a corporation. 376

Once an enterprise has filed a report to the KFTC, it cannot register a merger, perform the obligations under the business transfer agreement, or subscribe to shares within 30 days. The Commission may, if it deems it necessary, shorten this period or extend up to 60 days. 377

The KFTC can request from merger parties any documents necessary for its investigations. 378 If the parties to a combination required to file a report to KFTC fail to

374 Id. art. 12(1).
375 MRFT ACT requires that the Fair Trade Commission, once a year, designate market-dominant enterprises, and also according to Article 14 the commission is required to designate large business groups. Id. art. 4.
376 Id. art. 12(4).
377 Id. art. 12(5).
378 Id. art. 4(2).
do this or provide a false report, it is punishable by a fine up to 100 million won.  

Also, if a corporation has been established or companies have been merged in violation of Article 7 or without filing report or observing the waiting period, the Commission may file a lawsuit to nullify the business combination at issue.  

Other than large-scale enterprises or market-dominant enterprises, corporations wishing to establish business combinations may petition the Commission for a pre-merger examination as to whether the business combination has the effect of substantially restraining competition, and the Commission, after receiving a request for a pre-merger examination, shall notify the petitioner of the result within 30 days. The Commission may extend this period up to 60 days if it deems it necessary. 

**Remedies**

For the companies which have violated or are likely to violate the merger regulations, the first step the KFTC may opt to take is issuing corrective measures against those companies. The KFTC may order “prohibition of such act in violation,” “disposition of an officer,” “resignation of an officer,” “transfer of business,” “cancellation of debt guarantees,” “public announcement of the violation,” or “other corrective measures necessary to correct the violation of law.” 

Any party who is dissatisfied with any measures taken by the Fair Trade Commission can file an appeal with the Fair Trade Commission within 30 days from 

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379 Id. art. 68(2).
380 Id. art. 16(2).
381 Id. art. 12(6).
382 Id. art. 16(1).
383 Id. art. 16(1). The Fair Trade Commission must provide opportunity the parties or interested parties with the opportunity to state their opinions. Id. art. 52.
receiving the measures at issue. The Fair Trade Commission has 30 days until it reaches a decision concerning the appeal, but the period is extendible up to 30 days under unavoidable circumstances.

If any party which filed an appeal with the KFTC still wants to file a lawsuit with respect to the measures taken by the Commission, it will do so within 30 days from receiving the judgment on the its appeal. In this case, the whole jurisdiction exclusively belongs to the Seoul High Court.

If a combination already has been accomplished in violation of article 7 or without filing a report, the KFTC may file a lawsuit to nullify the combination. In other words, unlawful combinations of companies are not deemed to be null and void until there is a final and conclusive court decisions nullifying those combinations.

Penalties. There is also penal provisions in the MRFT Act. The violation of the regulation may result in a fine up to two million won and three years in jail for any person who violated it. According to Article 66, the prison sentence and fine may be imposed concurrently. Also, the KFTC may impose surcharge for companies in violation of the regulations. The amount of surcharge will vary depending on the provision violated, the type of the combination and the amount of transaction.

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384 Id. art. 53(1).
385 Id. art. 53(2).
386 Id. art. 54.
387 Id. art. 55.
388 Id. art. 16(2).
389 Article 66 through 71 is dealing with penal sanctions. Id. arts. 66-71.
390 Id. art. 66(1).
391 Id. art. 66(2).
392 Id. art. 17.
393 Id.
CHAPTER V

JAPAN

Background: The Antimonopoly Act of Japan

Chapter 4 of the Antimonopoly Act (hereinafter AMA) is devoted to the merger regulation. The following content in this section of the article is background of implementing of the AMA Act.

Before the Second World War, there was not any anti-monopoly law in Japan. Even the term “fair competition” was not receiving any attention from the business world. Economic development was achieved under government’s strong interference and guidance, the concern of the Japanese government did not lie on fair competition nor balanced development of industries.

At this time, the Japanese economy was suffering from economic concentration by many large industrial combines called “zaibatsu.” They were large industrial conglomerate composed of many companies engaged in various industries controlled by a head company and linked through mutual stock holding and interlocking directories. As the economic problem caused by “zaibatsu”, the Japanese government changed its

394 The official title of the Act is “Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of 14 April 1947).
395 See MITSUO MATSUSHITA, INTERNATIONAL TRADE COMPETITION LAW IN JAPAN 76 (1993).
396 See id.
397 See id.
398 See id.
attitude drastically and established its goal on the economic democratization and deconcentration. The AMA was the first tool for this new government policy.\textsuperscript{399}

The original AMA was enacted in 1947. Generally speaking, the original AML Act was modeled after United States Antitrust law. The original AMA imposed stringent controls over mergers and acquisitions, strictly prohibited cartels among firms in competitive relationship, prohibited undue imbalance in business power, and allowed severely narrow exemptions.\textsuperscript{400} Thus, the main concern of the AML Act was a structural control rather than prohibiting specific conduct of the enterprises.\textsuperscript{401}

In 1953, the Japanese Government relaxed AMA enforcement through amendment of the Act after realizing that too much stringent enforcement is not any beneficial to the economy after the war.\textsuperscript{402} The amendment relaxed and changed the \textit{per se} prohibition against cartels to a prohibition against substantial cartels, relaxed the provisions regulating mergers and acquisitions, and abolished the prohibited prohibition of undue imbalance in economic power.\textsuperscript{403}

The AMA was once again amended in 1977. The amendment of 1977 is significant because it was the first amendment which strengthened its enforcement. The amendment introduced “control of monopolistic situation” to the Act for “structure control,” also introduced price reporting system whereby the Fair Trade Commission could apply prohibition to a price cartel agreement.\textsuperscript{404}

\textsuperscript{399} See \textit{Id}. at 76-78.
\textsuperscript{400} See \textit{Id}. at 78-79.
\textsuperscript{401} See \textit{Id}.
\textsuperscript{402} \textit{Id}. at 79-81.
\textsuperscript{403} \textit{Id}.
\textsuperscript{404} \textit{Id} at 82-84.
The current AMA regulates a broad range of business activities. The Act prohibits cartels with certain exceptions and private monopolization and unreasonable restraints on trade. The Act restricts holding companies, stockholdings, interlocking directories, and merger and acquisitions which may substantially restrain fair competition in a market. Also, the Act prohibits international agreement or contract in restraint of trade, and prohibits unfair business practices.  

The AMA also created the Fair Trade Commission which is the enforcement agency of the AMA provisions. The Fair Trade Commission is given a wide scope of power to investigate, hold hearing, and decide whether the act in question violates the AMA. The Fair Trade Commission can issue an administrative order commanding a party in violation of the AMA to cease or make some correction to the conduct in violation of the Act.

Jurisdictional Scope

Provisions in Chapter 4 of the AMA are providing measures which is, in general, specifically designed to prevent concentration of economic power by few large enterprises. Articles 9, 9(2) and 11 are provisions for the control of a general concentration of economic power, and the other articles in the same chapter have provisions for the control of a specific concentration of economic power. For example,

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405 Id. at 86-89.
406 Id. at 98-110.
407 Id.
408 See Abir, supra note 290, at 168-69.
409 The title of Article 9 is “prohibition of holding company,” the one of Article 9.2 is “restriction on total amount of stockholding by a giant non-financial company,” and the title of Article 11 is “restriction on stockholding rate by a financial company.” AMA, supra note 394, arts. 9-11.
Article 10 is dealing with stock acquisition, Article 13 prohibits the interlocking directories, Article 14 prohibits an acquisition of stocks by a person other than a company if this tends to substantially restrain competition in a market, and Article 15 is devoted to mergers.

**Prohibition of Holding Companies**

Article 9 of the AMA prohibits any holding companies which is, according to Article 9(2), a company whose major business is to hold stocks of other companies and to control them.\(^{410}\) Under the Article 9, it does not matter whether the holding company in question causes an anti-competitive impact in a particular filed of market or not.\(^{411}\) In other words, this provision is applicable as long as a company exist as a form of holding company.\(^{412}\) On the contrary, as far as a company continue to carry out its own business, this company does come under the range of Article 9 even when the company controls another company by means of stockholding.\(^{413}\)

The reason for this strict prohibition can be traced back to legislative history. Before the enactment of AMA, Japanese economy was suffering from economy domination by the "zeibatsu" combinations in which a holding company controlled stocks of various companies which belonged to the same group.\(^{414}\) One of the legislative purpose of the AMA was strict prohibition of resurrection of the "zeibatsu" combinations and the legislative body thought that they can achieve this goal by controlling formation of

\(^{411}\) See Id.
\(^{412}\) Id.
\(^{413}\) Id.
\(^{414}\) Id.
holding companies at an early stage. Therefore, the Article 9(2)(1) is regarded as a preliminary preventive measure. However, there have been criticism about this provision because the Article 9 prohibits any holding companies even when they do not create any anti-competitive effect in a market.

Quantitative Limitation of Stock-Holding

Article 9(2)(1) prohibits any large company engaged in business other than financial services from holding stocks of another company above the value of its own capital, or its net worth, whichever is greater. Here, a large company is one whose capital is larger than 10 billion yen or whose net assets are larger than 30 billion yen. Article 11 provides a maximum limit of stockholding for financial institutions which are exception from application of Article 9(2). According to the Article, these financial institutions are prohibited from acquiring or holding stock of another company in excess of 5% of the total outstanding stock of unless there is a permission from the Fair Trade Commission of Japan.

Acquisition and Holding of Stocks

Under Article 10(1), the acquisition of stocks is unlawful if, as the result of stocks by one company of another company, competition in a market may be substantially restrain, or if the acquisition of stocks is accomplished through unfair trade pratices.

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415 Id.
416 Id.
417 AMA, supra note 394, Art 9.2(1).
418 Id.
419 Financial Companies refer to one engaged in banking, trust, insurance, business securities. Id.
420 Id. art 11.
421 Id. art. 10(1). This Article is dealing with a situation in which a company acquires stocks of another company, thereby controlling the other company, but each company remains a separate company. Id.
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As to the issue of how much stock holding by a acquiring company is necessary to be deemed to have control over the acquired company, the Fair Trade Commission, in 1981, issued guidelines called “Standards for Examination of Stockholding by Companies.”\(^{422}\) According to the guidelines, it is deemed that there is control if: (1) stocks of another company reach more than 50% of a company’s outstanding stocks; (2) the acquired company amounts to a “related company” which is a corporate entity whose outstanding stocks are owned by another corporate entity by 20% or more; (3) the acquiring company holds more than 25% of the outstanding stocks of the acquired company; (4) if the acquiring company holds more than 10% but less than 25% of the outstanding stocks of the acquired company and the acquired company is the first-rankiing shareholder, or the acquiring company and the acquired companies are in a competitive relationshiop; or (5) companies jointly hold stocks of another company in the form of a joint venture and the holding companies are in a competitive relationship.\(^{423}\)

Article 10 uses the words “may be” in the provision.\(^{424}\) This means that the regulation is authorizing the Fair Trade Commission to be able to block a merger in its

\(^{421}\) Id. art. 10(1). This Article is dealing with a situation in which a company acquires stocks of another company, thereby controlling the other company, but each company remains a separate company. Id

\(^{422}\) See Matsushita, supra note 395, at 126.

\(^{423}\) Id, at 127.

\(^{424}\) AMA, supra note 394, art. 10(1).
tends to be substantially restrained or if the merger is carried out through an unfair business practice.\textsuperscript{426}

As in the Article 10(1) for stock acquisition, the Article 15(1) also has the term “may be,” thereby implying that the Article 15(1) is applicable even if competition in a market is not restrained but there is a likelihood that competition will be in danger by the merger in question.\textsuperscript{427}

The Fair Trade Commission issued the guidelines for the merger regulation in 1980 to help in deciding whether to proceed against a merger or not.\textsuperscript{428} According to the guidelines, if the value of the total assets of each of the companies intending to consummate a merger is 5 billion yen or less, generally, there is not any examination about the substance of the merger.\textsuperscript{429} This enforcement policy can be traced back to the Japanese Government’s intention to protect mergers consummated between small companies.\textsuperscript{430}

On the contrary, a merger will be closely examined if: (1) the market share of one of the companies intending to effect a merge or the aggregate of the market shares of both companies together is 25% or above; (2) one or both of the companies ranks first in market share and the difference between the top ranking and lower ranking companies in terms of market is great; (3) the ranking in market share of one or both of the merging companies is within the top three and the aggregate of the market shares of these three

\textsuperscript{426} Id. at 127-28
\textsuperscript{427} Id.
\textsuperscript{428} Id. the merger guideline is entitled ‘Administrative Procedure Standards for Examining Mergers, etc. by Companies.’ In this guidelines, some general tests are announced and mergers are classified into horizontal mergers, vertical mergers, and conglomerate mergers. Id.
\textsuperscript{429} Id. Therefore, the Fair Trade Commission will only examine whether or not the parties are fulfilling the reporting requirement of Article 15(2). Id.
amounts to 50% or above; (4) the number of competitions in the market in which one of the merging companies belongs is small; or (5) the total assets of one of the merging companies is above 10 billion yen and those of the other company is 10 billion yen or more.\textsuperscript{431}

Relevant Market Definition

The term “particular field of Trade” used in the merger regulation refers to the relevant market including both product and geographical market.\textsuperscript{432} It is necessary also in AMA to determine a market in which ant-competitive conduct occurs.

For the product market definition, the most important criterion considered by the Fair Trade Commission is substitutability of products or services.\textsuperscript{433} For the geographic market definition, there is no standard to be applied uniformly to every case. However, when the Fair Trade Commission issued the guidelines on mergers and acquisitions in the retail business, the Fair Trade Commission announce that the administrative boundaries of a city would be considered as a geographic market in retail business except for the six large cities for the purpose of reviewing mergers and acquisitions.\textsuperscript{434}

\textsuperscript{430} \textit{Id.}
\textsuperscript{431} \textit{Id.} at 128-29.
\textsuperscript{432} Matsushita, supra note 395, at 92-3.
\textsuperscript{433} \textit{Id.}
\textsuperscript{434} \textit{Id.} the official title of the Guidelines is “On Mergers and Acquisitions in Retail Business”(1981). \textit{Id.}
Procedural Issues

Filing Requirement

There are different filing requirements in each provision for different types of concentration of economic power. For instance, Article 10 provides filing requirement for stockholding by a company, Article 12 for interlocking directories, Article 14 for stockholding by a person other than a company, and Article 15 provides for filing requirement for mergers.

According to the Article 15, every company in Japan which intends to be involved in a merger, regardless of its size, must file a notification with the Fair Trade Commission. Also, those companies which filed notifications with the Commission cannot effect their merger within 30 days from the date of complete filing. This waiting period may be shortened, or extended up to sixty days, when the Commission deems it necessary. During this waiting period, the Commission will examine whether or not the merger at issue is in violation.

There are penalties against failure to file notifications. Failure to notify with the Commission is punishable by a fine up to two million yen. For companies which effect mergers without filing notification or without observing the waiting period, the Fair Trade Commission may bring a suit to nullify the mergers at issue.

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435 AMA, supra note 394, art. 15(2).
436 Id. art 15(3)
437 Id. It is also required that the Commission acquire the consent of the companies concerned when it changes the waiting period. Id.
438 MATSUSHITA, supra note 395, at129.
439 AMA, supra note 394, art 12.
440 Id. art. 18.
If the Fair Trade Commission finds sufficient reason to suspect that the business combination at issue violates the merger regulation, the Fair Trade Commission either recommends the parties concerned to take corrective measures or initiate the formal hearing proceeding.\textsuperscript{441}

Article 18 provides corrective measures for business combination. For instance, the Fair Trade Commission recommend the parties concerned to dispose the whole or part of the stocks, to transfer a part of his business, to resign from his position as an officer in a company.\textsuperscript{442} Furthermore, besides the measures introduced above, the Fair Trade Commission may take any other measures to eliminate the act in violations of the regulation.\textsuperscript{443} If the parties accept the recommendation, the Fair Trade Commission renders a decision without initiating a hearing procedure.\textsuperscript{444}

After a hearing procedure, the Fair Trade Commission may order the concerned parties to take corrective measures provided in the Article 17(2) or clear the act in question. If the parties is going to file a suit against the decision by the Commission, they must do that within thirty days from the date which the decision became effective.\textsuperscript{445} The jurisdiction of the cases belong to the Tokyo High Court.\textsuperscript{446} There is no mention of the fate of an unchallenged unlawful combination. It seems that such combinations remain as long as there is no challenge against those combinations, as is the case in South Korea.\textsuperscript{447}

\textsuperscript{441} Id. art. 48.
\textsuperscript{442} Id. art. 17(2)
\textsuperscript{443} Id.
\textsuperscript{444} Id. art. 48(4).
\textsuperscript{445} Id. art. 48(4).
\textsuperscript{446} Id. art. 77.
\textsuperscript{447} Id. art. 85.
\textsuperscript{447} Abir, supra note 290, at 171.
Penalties. There is also penal provisions. Any act in violation of the merger and acquisition provisions is punishable by fine up to 2 mission yen, one year of imprisonment or both.\footnote{AMA, supra note 394, art 91.} The AML provides standing to bring suit for private parties injured as a result of a violation of the regulation.\footnote{Abir, supra note 290, at 171.} While the United States provides for treble damages, the damages in Japan is limited to the actual damages.\footnote{Id.}
CHAPTER VI

CONCLUSION

This chapter is devoted to comparative analysis of merger regulations which were examined in the previous chapter and to concluding remarks. The comparison will be mainly focused on the EC and U.S. system not only because they have well developed and considerably sophisticated regulations but also because both countries have been more active in applying their regulations, thereby controlling market concentration caused by merger and acquisition.

EU competition law which is based on Article 85 and 86 of the EC Treaty, and Korea MRFT Act, and Japan AMA, all of them were directly influenced by the U.S. antitrust law. However, depending on their differing purpose, they evolved into having different rules and different interpretation of the regulation. For example, in applying the rules, some social and political values has played less important role in a United States competition analysis than in a EU competition analysis, and we may find the reason from the fact that the main concern of the U.S. antitrust law lied more on pure competition while the primary purpose of the EU competition law was market integration rather than pure competition. In Korea and Japan, the governments main concerns were to build up competitiveness of their industries rather than strictly controlling market concentration.

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451 Abir, supra note 306, at 143-44.
452 Freret, supra note 7, at 144-45.
and fair competition. From these discrepancy, the application and interpretation of merger regulation also have diverged.

The methods of measuring market concentrations are different, even though they are all basically based on the market shares of the companies in a market. The U.S. Agencies seem to rely more on economic tools that the agencies of the other countries do. In European Community’s experience, the lack of clear and objective analytical criteria has led to legal uncertainty in the Commission’s decision as well as court’s decision and have been criticized by scholars.

There is a big difference in the power of enforcement agencies. In United States, when the FTC and the DOJ is going to block a merger, they have to proceed in the court, seeking the a court decision. The EC Commission, in contrast to the U.S. agencies, need not proceed in court to block a merger. Korea Fair Trade Commission and Japan Fair Trade Commission also render a decision and order the concerned parties to take corrective measures provided in their regulations. Nevertheless, for some mergers such as ones which failed to notify prior to the consummation or which filed wrong information. Those agencies of both countries have to file an action to nullify the mergers at issue. On the contrary, even if a company has already implemented a merger without a pre-notification of their intention to merge, the European Commission has power to

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453 See supra text accompanying notes 359-61, 394-407.
454 Opi, supra note 14, at 274-280.
455 See supra text accompanying notes 302-5.
456 See supra text accompanying notes 159-64.
457 See supra text accompanying notes 382-84, 442-444.
458 See supra text accompanying notes 380, 384.
require the post-merger company to be separated or has the power to take any appropriate measure necessary to restore the competition.\textsuperscript{459}

The EC Commission investigate only concentrations which were informed to them.\textsuperscript{460} On the contrary, the enforcement agencies of the other three countries may initiate an investigation on a concentration on their own decision if they believe the concentration raises doubts.\textsuperscript{461}

Each regulation sets forth pre-merger notification requirement and waiting period. Except in the European Community, the waiting period for the parties to merger is 30 days upon notification in the other three countries.\textsuperscript{462} The waiting period in European Community is three weeks upon request.\textsuperscript{463} Exceptionally, the Japanese pre-merger notification applies to all firms, regardless of their size or market shares.\textsuperscript{464} These waiting periods allow the enforcement agencies to evaluate the transaction in question.

In conclusion, great similarity is found in the merger regulations of each countries even though there are big and small differences. As a matter of fact, those regulations of EU, Korea and Japan were modeled after the United States merger regulation.

However, there is great difference in its application. Since Korea and Japan are more concerned with the growth of their industry, they have not placed strong effort on enforcing regulations which control mergers as well as any other anti-competitive behavior. These two countries have been keeping lenient application of their rules to achieve their goals. European seemed to be more active in applying their regulation.

\textsuperscript{459} See supra text accompanying notes 161.
\textsuperscript{460} See supra text accompanying notes 145.
\textsuperscript{462} See supra text accompanying notes 297, 377, 436.
\textsuperscript{463} Merger Regulation, supra note 1, art. 7(1).
compared to Korea and Japan, their primary was not laid on aggressively blocking anti-competitive behavior, rather laid on market integration. Therefore, the application of the merger regulation in EU has been looser than in the United States. The primary concern of the United States merger regulations is to achieve its goal of free competition in the market through the aggressive application of its antitrust law. As a result, the United States has been most aggressive in applying their merger regulations, thereby blocking mergers which may be substantially restrain the competition in a particular field of market.

Perhaps, these differences in the manner of application, rather than in the measure itself, makes it much more difficult for the businessmen who are running their business across their borders to predict the outcome of their business behavior in another country. No less than knowing the regulation of other countries, an uniformed business regulation including merger regulation, or negotiation or treaty among countries is needed.

464 See supra text accompanying notes 435.