MARKET STRUCTURE STILL MATTERS: THE KFTC BLOCKS A MERGER BETWEEN TOP FIRMS IN BROADCASTING AND COMMUNICATIONS

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I. INTRODUCTION

On July 18, 2016, the Korea Fair Trade Commission (the "KFTC") decided to totally ban the transaction involving SK Telecom Co., Ltd. ("SKT")'s acquisition of shares of CJ HelloVision Co., Ltd. ("CJH") (the "Acquisition"), and the merger of SK Broadband Co., Ltd. ("SKB") and CJH (the "Merger") (both the Acquisition and the Merger hereinafter referred to as the "Transaction"). The Transaction attracted public attention as it concerns a merger between the leader in the mobile communications industry and the leader in the cable TV industry, and creates a super-giant enterprise encompassing both communications and broadcasting for the first time in Korea's history. As such, it was reported that the KFTC had undergone a lengthy review of the Transaction for more than a half-year, closely examining the opinions of relevant administrative branches and interested parties, various economic analysis, foreign cases, etc.[2]

The parties who pursued this Transaction attempted to justify the Transaction by arguing that for the pay broadcasting industry the Transaction would bring economies of scale and readjust the structure of the industry through a firm in an already waning cable TV industry being absorbed into a growing Internet Protocol Television ("IPTV") firm. They also

[1] Chief Expert Advisor, Lee & Ko. This article is the author's personal opinion, and does not represent the views or opinions of Lee & Ko.

[2] *SK Telecom-CJ HelloVision — M&A Finally Failed: The KFTC is Reversing the Trends*, CHOSUNBIZ.COM, July 18, 2016, at. 3.

argued that the Transaction would build a foundation of innovation for the provision of more advanced media services by generating an enterprise with a comprehensive business scope covering broadcasting and communications.[3]

In the midst of the turbulence created by contradictory opinions regarding the possibility of anticompetitive effects in various markets including pay broadcasting and communications,[4] many predicted that even if the KFTC acknowledges that the Transaction would cause certain anticompetitive effects, it would resolve the concern by imposing behavioral remedies[5] or by ordering the sale of partial assets[6] while allowing the Transaction itself. It was because since 1981 when the KFTC's enforcement of the Monopoly Regulation and Fair Trade Act (the "MRFTA") had commenced, there had not been a single case where the KFTC completely prohibited a merger in the broadcasting or communications industry. Even if we count cases arising in all industries, a total ban of a merger had been extremely rare.[7]

However, the KFTC took an exceptionally strong stance in this case by prohibiting the entire Transaction.[8] The KFTC took a fundamentally preventive decision, considering that the Transaction would have led to serious monopolistic market structures in the pay broadcasting and communications markets, that the post-merger firm would have integrated business capacity across the broadcasting and communications sectors, and that the Transaction involves a mixed dimension such as horizontal as well as vertical integration. This article addresses the KFTC's analysis on the anticompetitive effects of the Transaction in the main relevant markets, and the justifications of the remedy imposed.

II. OVERVIEW OF PROPOSED TRANSACTION

On November 2, 2015, SKT entered into a share purchase agreement with CJ O Shopping Co., Ltd. ("CJ O Shopping") for SKT's acquisition of approximately 30 percent[9] of the issued

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[3] See, *SKT CJ HelloVision Acquisition Expected to Realize Operational Profit of Two Trillion Won in Two to Three Years*, CHOSUNBIZ.COM, Feb. 2, 2016, at 1.

[4] See, *SKT-CJ HelloVision Acquisition is a Method to Overcome the Crisis in Cable TV Industry vs. Side-effects*, CHOSUNBIZ.COM, Dec. 29, 2015.

[5] A "behavioral measure" refers to the corrective measure restraining the merging parties' business condition, method, scope, internal managerial activities, etc. in a certain manner for a limited period. The Imposition Standard of Corrective Measures for Mergers, KFTC Notification, No. 2011-3, June 22, 2011, □ . 10.

[6] A "sale of asset measure" refers to the corrective measure ordering merging parties' assets to be separated from the parties and be sold to an independent third party. Id., II. 5.

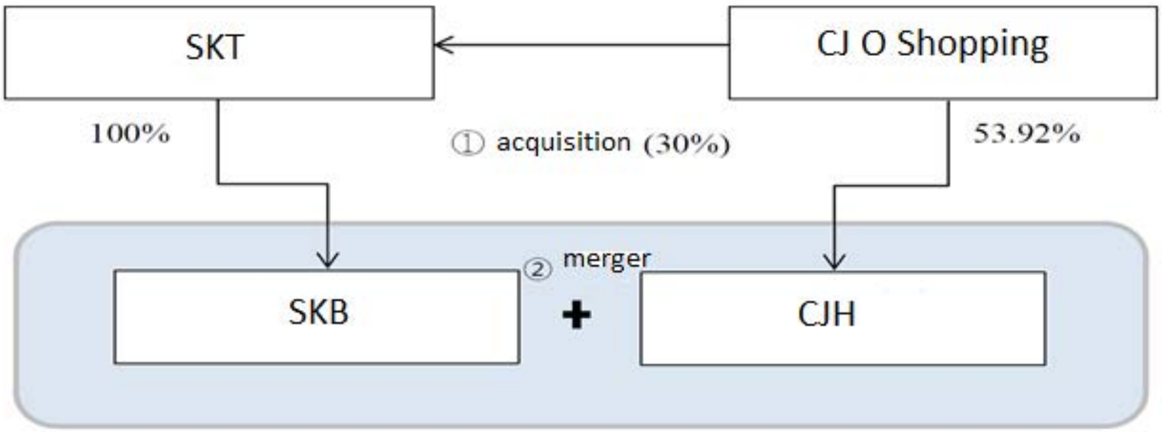
[7] The following article reports that the total number of cases with prohibition measures levied is only eight. *So Far Only Eight Cases were Not Allowed*, MK NEWS, July 5, 2016.

[8] KFTC Press Release, *The KFTC, Blocking the M&A of SK Telecom and CJ HelloVision: Intercepting the Fountainhead of Anticompetitiveness in Pay Broadcasting and Mobile Communications Markets*, July 18, 2016. A "prohibition measure" is the strongest measure within structural measures. A "structural measure" refers to the measure changing the structure of assets or ownership of merging parties, which includes a prohibition measure, an asset divestiture measure, and an intellectual property measure. KFTC Notification, supra note 5, □ . 3.

[9] As of the date of the agreement, CJ O Shopping owns 53.92 percent of the shares of CJH. The agreement is regarding the purchase of CJH shares by SKT from CJ O Shopping. KFTC Decision, No. 2016-213, 2016KiGyeol1393, July 18, 2016 (hereinafter, the "SK Merger Decision"), p. 2, fn 1.

shares of CJH.[10] On the same day, CJH entered into a merger agreement with SKB (CJH being the surviving entity).[11] The parties to the Transaction filed a merger notification to the KFTC on December 1, 2015.[12] The structure of the transaction is set forth in the image below.

Structure of the Proposed Transaction



Through the Transaction, SKT would acquire sole control over CJH (as the survivor of the merger with SKB).[13] According to the current status of the parties to the Transaction, SKT is in the business of mobile communications retail, mobile communications wholesale supply and high-speed internet resale, among other things; SKB is in the business of landline phone service, high-speed internet service and IPTV, among other things; and CJH is in the business of cable TV, high-speed internet service, Voice over Internet Protocol and mobile communications retail business, among other things.[14]

Accordingly, in the Transaction, horizontal mergers occur in various markets including the pay broadcasting and mobile communications markets, a vertical merger occurs in the mobile communications wholesale market, and conglomerate mergers occur in other various markets at the same time, as set forth in the table below.

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[10] Id. at. 2.
[11] SKB is the wholly-owned subsidiary of SKT. Id. at 5.
[12] See, id. at 2-3 for more details regarding the Transaction.
[13] Regarding the formation of control, pursuant to the Acquisition SKT would become the largest shareholder of CJH by holding 38.61 percent of the shares of CJH which is 14.69 percent more than the second largest shareholder CJ O Shopping, and through the concurrent Merger SKT would finally hold a total of 78.33 percent of CJH shares. SKT also admitted in various public documents that SKT would acquire direct managerial control over CJH through the Transaction. Id. at 7-8.
[14] Id. at 3-4.

<Table 1> Types of Mergers in the Transaction[15]

Relevant Market	Reporting Company			Counterparty (CJH)	Merger Type
	SKT	SKB	SK Telink[16]		
Twenty-three broadcast regions in the pay broadcasting market	×	○	×	○	Horizontal
Broadcast advertising market	×	○	×	○	Horizontal
Broadcast channel transmission rights market	×	○	×	○	Horizontal
Communications retail market	○ (MNO)[17]	×	○ (MVNO)[18]	○ (MVNO)	Horizontal
High-speed internet market	○	○	×	○	Horizontal
Landline telephone market	×	○	○	○	Horizontal
International telephone market	×	○	○	○	Horizontal
Mobile communications wholesale market	MNO	×	MVNO	MVNO	Vertical
Pay broadcasting, mobile communications retail, high-speed internet, landline telephone market, etc.					Conglomerate

III. JUDGMENT ON ANTICOMPETITIVENESS IN THE MAIN RELEVANT MARKETS AND ON CORRECTIVE MEASURES UNDER THE MRFTA

A. Anticompetitive Effects of Horizontal Merger

1. Pay Broadcasting Market

"Pay broadcasting" is a broadcasting service that provides a variety of channels for a fee according to an agreement with subscribers, which is currently provided by cable TV operators (also known as System Operators, or "SO"s), satellite broadcasters and IPTV enterprises.

[15] Id. at 32, Table 21.
[16] An affiliate of SKT.
[17] A "Mobile Network Operator." For the meaning of the term, refer to p. 8 and infra note 33.
[18] A "Mobile Virtual Network Operator." For the meaning of the term, refer to p. 8 and infra note 34.

On a national market level, the status of competition is shown in the table below. The pay broadcasting market consists of the following: 51.4 percent by cable TV (CJH is the top cable TV enterprise at 14.7 percent), 37.5 percent by IPTV (SKB is the second largest IPTV service provider at 11.3 percent) and 11.1 percent by satellite broadcasting.

<Table 2> Pay Broadcasting Market Status of Competition[19]

(As of the end of June 2015; Unit: in thousands, percent)

Category	Enterprise	Subscriptions	Market Share
Cable TV	CJH	4,160	14.7
	Tbroad	3,272	11.5
	D'LIVE	2,377	8.4
	CMB	1,498	5.3
	HCN	1,347	4.8
	Other SOs	1,903	6.7
	Subtotal	14,557	51.4
IPTV	KT	5,061	17.8
	SKB	3,191	11.3
	LG U+	2,389	8.4
	Subtotal	10,641	37.5
Satellite Broadcasting	KT SkyLife	3,138	11.1
Grand Total		28,336	100.0

* Source: Korea Communications Commission, The 2015 Broadcasting Market Competition Situation Ratings, March 2016.

a) Defining the Geographic Market: Chain of Substitutability Needs Positive Proof

One of the core issues of the determination of anticompetitive effects in the pay broadcasting market was the scope of the geographic market. For cable TV, where CJH has conducted business, the Ministry of Science, ICT and Future Planning divided the nation into 78 different broadcast regions and currently manages these regions through a permit system (among these 78 regions, CJH conducts business in 23). As such, the supply substitutability is limited to a certain broadcast region, and likewise demand substitutability can only occur within a certain broadcast region. However, since the IPTV business (where SKB was operating) as well as satellite broadcasting are on a nationwide basis, whether the relevant market should

[19] SK Merger Decision, p. 23, Table 12.

be defined according to the whole domestic market, or the individual markets of each broadcast region, was fiercely debated.

The parties of the Transaction argued that the relevant market should be defined as the entire domestic market according to a theory of "chain of substitutability." They argued that even in the absence of direct competition among SOs in different broadcast regions, if each SO is in competition with national enterprises including IPTV enterprises that set common prices nationwide, then through indirect demand substitutability or chains of substitutability the scope of competition will enlarge to include competition among SOs across regions. Therefore, the geographic market should be defined as the national market.[20]

However, the KFTC stated, "It is difficult for us to hold that chains of substitutability are sufficiently operating or established among broadcast regions as a result of common pricing constraints, considering that the actual competitive pressure and conditions among competitors are different for each broadcast region, CJH's price levels and product composition, and the actual sale price among other things are different for each broadcast region."[21]

The KFTC concluded that it was appropriate for the geographic market to be defined for this Transaction according to each broadcast region, viewing that SOs as cable TV enterprises conduct business in each broadcast region, and that SOs, satellite broadcasters and IPTV enterprises each compete for consumers in each broadcast region.[22]

b) Utilizing Various Economic Analysis Methods

The KFTC viewed that the probability of the occurrence of a cooperative effect from the Transaction was not high in the pay broadcasting market,[23] and therefore focused on the unilateral effect in its determination of the anticompetitive effects of the Transaction. The KFTC used various economic analyses to determine the unilateral effects on competition.

Correlation between Market Share and Average Revenue Per User ("ARPU")

When the geographic market is defined according to each broadcast region, the market concentration resulting from the Transaction becomes severe. Pursuant to the Transaction, CJH, who was the top enterprise in the pay broadcasting market in 17 broadcast regions, would have an increased market share gap with the second largest enterprise after the Transaction. Also, in four broadcast regions where CJH was the second largest enterprise, CJH would be the new top enterprise after the Transaction. Therefore, CJH would become the top enterprise in 21 out of 23 broadcast regions in which it conducts business.

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[20] For example, if an SO in a certain regional market decreases prices, then an IPTV enterprise can lower prices in the same market in response, in which case such IPTV enterprise, due to common pricing constraints must lower prices on a national level, which would pressure the SOs in competition with the IPTV enterprise to decrease prices in other regions.

[21] SK Merger Decision, p. 18.

[22] KFTC Press Release, supra note 8, at 4.

[23] This is because pay broadcasting fees were subject to the regulations of the Ministry of Science, ICT and Future Planning, national enterprises like satellite broadcasting and IPTV enterprises compete with other SOs and SKB in markets other than the 23 broadcast regions where the Transaction takes place, and most pay broadcasting enterprises also fiercely compete in other areas such as mobile communications services and high-speed internet. SK Merger Decision, p. 43.

To determine the possibility of price increases due to the increase in market share from the Transaction, an analysis on the correlation between CJH's market share and the ARPU was conducted and showed a positive correlation.[24]

Diversion Ratio

The higher the demand substitutability between products of merging parties, then the higher the possibility of anticompetitive effects resulting therefrom. The analysis of the "diversion ratio" in this case resulted in the following: if CJH's cable TV prices increase by 10 percent, the diversion ratio of SKB's IPTV (in the 39.1～39.4 percent range) would be higher than that of its competitors (KT in 34.0～36.5 percent range; LG U+ in the 20.7～22.4 percent range).[25]

The KFTC viewed the result as relevant to SKT's dominance over the mobile communications retail service market. There is a tendency for consumers who change from cable TV to IPTV to choose the same brand as their mobile communications service provider. Among mobile communications retail enterprises, SKT has the largest market share.[26] Ultimately, it can be seen that SKB's IPTV, with the added benefit of SKT's wide base of subscribers, is the closest substitute to CJH's cable TV.[27]

This implies that current dominance over the mobile communications retail market would affect the status in the pay broadcasting market after the Transaction. In other words, although broadcasting and communications are different markets, there exists a dynamic interplay between the two markets which is relevant to consumer choices.

Upward Pricing Pressure ("UPP")

Upward pricing pressure analysis[28] is a method that analyzes the possibility of an increase in price after a merger in markets with differentiated products. UPP analyzes post-merger incentive to increase prices as the prices change from being set by two separate firms for the maximization of their respective profits to being set by one merged firm for the maximization of common profit. The KFTC noted that the UPP analysis figure for this case was positive, which indicated there was a possibility of a price increase after the Transaction in the cable TV market.[29]

Meanwhile, the parties to the Transaction argued that the figure from the Gross Upward Pricing Pressure Index ("GUPPI")[30] analysis (which excludes the possibility of price decreases due to efficiencies and only analyzes the causes of price increases) was under five

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[24] Id. at 37-8, fn 65. Also, limiting the scope of analysis to regions where CJH has the largest market share, CJH's ARPU and the market share gap with the second largest enterprise showed a significant correlation. Id. at 38, fn 66.

[25] Id. at 39-40.

[26] See, p. 8.

[27] SK Merger Decision, p. 40, fn 71.

[28] For more details of UPP, see, Joseph Farrell and Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, THE B.E. JOURNAL OF THEORETICAL ECONOMICS, Vol. 10, Iss. 1 (Policies_perspectives), Article 9, 2010.

[29] Appendix 1 of the SK Merger Decision contains the UPP analysis.

[30] The KFTC states that "What is important in interpreting GUPPI is not whether it is positive or negative but its size. There has not been a consensus yet as to the size of GUPPI that can be a threshold for the safety zone. However, many economists acknowledge anticompetitiveness if it is higher than 10 percent." SK Merger Decision, p. 43, fn 79.

percent in most broadcast regions and under ten percent in all broadcast regions, while accounting for ten percent in efficiencies results in a negative UPP level. As such, the parties argued that there was no possibility for an increase in prices as a result of the Transaction. However, the KFTC criticized that the merging parties' economic analysis ignored the fact that CJH was a producer of various products including analog cable TV as well as digital cable TV, and as such, their UPP figure and GUPPI figure were severely underestimated.[31]

c) Assessment of the Consolidation of Alternative Platforms: Creating Unbeatable Production Capacity

Pursuant to the Transaction, the parties would become the only domestic enterprise with both the cable TV and IPTV platforms. In addition to SK's capacities in the mobile communications, high-speed internet and IPTV sectors, SK would obtain a new capacity to provide cable TV services. The KFTC noted that, considering the current trend of increasing subscriptions with arrangements bundling various services from mobile communications and broadcasting, there are concerns of the strengthening of the merged-entity's dominance in the pay broadcasting market.[32]

d) Overall Judgment

As seen above, the KFTC concluded that the Transaction raises anticompetitive concerns in the pay broadcasting market by considering various factors, including: CJH, the top cable TV enterprise will merge with SKB, the fastest growing IPTV enterprise; for subscribers to CJH, SKB has the highest diversion ratio among IPTV enterprises; CJH will become the market leader in 21 broadcast regions; and the UPP figure is positive.

2. Mobile Communications Retail Market

The mobile communications retail market is where mobile communications services are sold to the end-user. The primary enterprises in this market possess certain frequencies through which they do business as mobile network operators ("MNO"s).[33] However, since September 2010, it became possible to enter this market without being an MNO. Namely, an enterprise that is provided a wholesale mobile network and which engages in the reselling of the same to the end-consumer became known as a mobile virtual network operator ("MVNO").[34] MVNOs are also called a "frugal phone enterprise."

In this market, since the appearance of MVNOs the competitive landscape with the three oligopolistic MNOs (SK, KT, and LG U+) gradually shifted, and as of the end of 2015, subscribers to frugal phones constituted 10.3 percent of the total mobile communications retail market.[35] After the introduction of the frugal phones, the fees for mobile

[31] Id. at 44, fn 82.
[32] Id. at 41.
[33] In order to conduct a mobile communications network business, certain requirements must be met and approvals must be obtained from the Ministry of Science, ICT and Future Planning. Refer to the Telecommunications Business Act, Article 6.
[34] An enterprise without a mobile communications network may still do business in the mobile communications retail market by fulfilling certain conditions and registering with the Ministry of Science, ICT and Future Planning. Refer to the Telecommunications Business Act, Article 38.
[35] SK Merger Decision, p. 27.

communications services continued to decline while MVNOs applied strong competitive pressure against SKT, KT, LG U+ and other MNOs in the mobile communications retail market.[36]

a) The Extinction of a Maverick and Unilateral Effects

If viewed in terms of subscriber count in the mobile communications retail market, SKT, together with its affiliate SK Telink, has a market share of 46.2 percent and is the top enterprise in the market, while CJH's market share is 1.5 percent as of 2015.[37] Therefore, the increase of SK's market share pursuant to the Transaction would only amount to 1.5 percent point. Furthermore, this market hosts other powerful competitors such as KT and LG U+ who each holds 25.7 percent and 19.3 percent market share respectively, and exert competitive pressure in the market.[38]

However, the KFTC focused on CJH's unique role as a maverick in this market. Citing the loss of such role as a main reason, the KFTC determined that substantial concerns of anticompetitive effects on the mobile communications retail market would arise from the Transaction.[39] A "maverick" is the enterprise that plays the role of disrupting the existing market order through the use of aggressive competitive strategies that leads to price decreases and innovation. CJH, as the top MVNO enterprise, has played the role of a maverick through progressive marketing strategies.[40] For example, CJH was the first to introduce LTE service for MVNOs, and it also introduced half-price, no-commitment LTE USIM plans; Korea's cheapest LTE plan; and other innovative rate plans. CJH was also the first to sell the iPhone5 with MVNO, expanding the MVNO market. As such, CJH fulfilled the leading role of boosting competition.[41] This can be confirmed by looking at the LTE service subscriber ratios of MVNOs: as of September 2015, the average LTE service subscriber ratio of MVNO enterprises was 12.9 percent whereas CJH's LTE subscriber ratio was at 36 percent (the second largest enterprise SK Telink's LTE ratio was at 4 percent).[42]

Furthermore, CJH was unique in that it was the only major MVNO that was not an affiliate of an MNO.[43] The Ministry of Science, ICT and Future Planning regulates the sum of market shares of MVNOs that are affiliates of the main MNOs not to exceed 50 percent of the total frugal phone market. However, after the Transaction, CJH would become an affiliate of an MNO which would increase the total market share of MVNOs that are affiliates of MNOs to 40.15 percent, which leaves only 9.85 percent from the allowed maximum of 50 percent.[44]

[36] Id. at 47.
[37] Id. at 45, Table 29. Here SKT is an MNO, SK Telink is an MVNO, and CJH is an MVNO. Id.
[38] Id.
[39] See, SK Merger Decision, pp. 47-52. The KFTC referred to the fact that T-Mobile US, Inc. ("T-Mobile")'s role as a maverick was considered in the previous cases that prohibited the merger between AT&T Inc. and T-Mobile in 2011, and the merger between T-Mobile and Sprint Corporation in 2014. KFTC Press Release, supra note 8, p. 10.
[40] SK Merger Decision, pp. 48-9.
[41] KFTC Press Release, supra note 8, p. 10.
[42] Id.
[43] SK Merger Decision, p. 47.
[44] Before the Transaction, as of the end of December 2015, in the frugal phone market, the combined market share of the MVNOs, affiliated to the 3 MNOs, was 25.91 percent. Id. at 49.

This will work as a constraining factor for the business activities of competitors.[45]

b) The Extinction of a Maverick and Cooperative Effects

Pursuant to the Transaction, CJH would become an affiliate of one of the three MNOs. As such, it is highly possible that the MVNO affiliates of the three MNOs will not fiercely compete against each other, but rather attempt to keep or reduce the current status of the frugal phone market.[46] Also, aside from the three MNOs and their MVNO affiliates, most mobile communications enterprises are small and medium-sized enterprises with low market shares. Under such a market structure, it is difficult to expect that the small and medium-sized enterprises would effectively prevent cooperative acts of the main players. Therefore, the KFTC held that there was a high possibility for collusion among competitors in such market if it allowed the Transaction.[47]

B. Anticompetitive Effects of Vertical Merger

The mobile communications wholesale market is a market where MNOs provide frequencies and mobile network equipment wholesale to MVNOs that is necessary to conduct a mobile communications business.[48] The Transaction also includes a vertical merger between a supplier (SKT) and a customer (CJH) in the mobile communications wholesale market.

A view of the mobile communications wholesale market shows that the upstream market consists of SKT, KT and LG U+ with market shares of 45.6 percent, 46.7 percent and 7.7 percent respectively.[49] Meanwhile, the downstream frugal phone market consists of CJH, SK Telink and 26 other small enterprises. CJH and SK Telink are the top two enterprises with a combined market share of 28.45 percent (CJH at 14.24 percent and SK Telink at 14.21 percent).[50]

Foreclosure Effect

First, regarding the foreclosing effects on purchasing lines, SKT, as a subject to the Telecommunications Business Act, has a duty to supply telecommunications wholesale to any frugal phone enterprise that requests such supply according to the price stipulated in the administrative regulations. As such, the KFTC viewed that the Transaction had almost no possibility for foreclosing effects on purchasing lines.[51]

Meanwhile, regarding foreclosing effects on selling lines, pursuant to the Transaction the parties to the Transaction will secure 28.45 percent of frugal phone users. As such, the KFTC viewed that a foreclosing effect on the SKT's competitors' selling lines for mobile communications wholesale was possible. In particular, the KFTC paid attention to the fact that CJH had already acquired the high-end customers in the frugal phone market, where if calculated by revenue rather than the number of subscribers, there will be a foreclosing effect

[45] Id.
[46] Id. at 50-1.
[47] Id. at 51.
[48] Id. at 13.
[49] Id. at 59. This does not include the MNO's self-supply and is calculated based on the number of subscribers using the mobile communications network supplied wholesale to MVNOs. Id.
[50] Id. at 59-60, Table 36.
[51] Id. at 60, fn 111.

on 53.3 percent (combining both CJH and SK Telink) of the mobile communications wholesale market.[52]

C. Anticompetitive Effects of Conglomerate Merger

The KFTC did not enter into an additional analysis of the anticompetitive effects of the conglomerate merger in the Transaction because it was unclear whether the launch of a new bundled product in and of itself would have an actual anticompetitive effect on the relevant market. Although the launch of a new bundled product could leverage the existing power over one market to another market, since bundled products often come at discounted prices which have some effect of increasing consumer welfare and competition, the KFTC viewed that the resulting anticompetitive effect is unclear.[53]

However, the KFTC considered the merged firm's expansion of business capacity into various sectors (which would secure the competitive advantage over competitors through the production of bundled products) as one of the factors affirming the anticompetitive effects resulting from the horizontal merger in the pay broadcasting market, as seen above.[54]

D. Whether Exceptions Apply

The parties to the Transaction argued that the Transaction would contribute to consumer welfare and the national economy by the provision of bundled products, and the development of cable TV to digital. However, the KFTC stated that it would be difficult to confirm such would be the case since the parties failed to specifically prove that the occurrence of such efficiency effects would be imminent, manifest and merger-specific.[55]

Also, the KFTC noted that the financial structure of the parties to the Transaction did not indicate that any party was insolvent or would soon be insolvent, and thus the failing firm defense which would otherwise allow the Transaction does not apply.[56]

E. Corrective Measures

In preceding merger cases in the broadcasting or communications sector, the KFTC had been using the remedy of "conditional approvals" with behavioral constraints rather than blocking the merger itself. In pay broadcasting sectors, even when the post-merger market share would have been well above 90 percent, the KFTC imposed only behavioral remedies such as the prohibition of price increase or of reduction in the number of TV channels, or strengthening notification obligations to consumers.[57] In the communications sectors, for

[52] KFTC Press Release, supra note 8, p. 11.
[53] SK Merger Decision, p. 32, fn 54.
[54] See, p. 7, (c).
[55] SK Merger Decision, p. 68.
[56] Id. at 68-9.
[57] For example, in the Hyundai Homeshopping case the KFTC allowed the merger itself while adding certain behavioral restrictions despite that the sum of the merging parties' market share reaches 97.9 percent in the relevant market, and the market becomes monopolized with no possibility of new entry. The KFTC Decision, No. 2006-010, 2005KiGyeol2592, Feb. 3, 2006. Also, in other cases including the CMB case (2008SeoIl0562) and the HCN case (2006KyeolHap1315), the post-merger firm's share was respectively 97.2 percent and 96.3 percent. However, only behavioral measures were levied.

example, the SKT's acquisition of Hanaro Telecom, Inc. was allowed despite the KFTC's acknowledgment of the anticompetitive effects arising from bundled products, and from the comprehensive business capacity of the combined firm. In that case, only a temporary ban of certain behaviors involving the sale of bundled products was added for the approval of the deal.[58] The KFTC kept this stance of favoring behavioral remedies in the merger of KT Corporation and KT Freetel Co., Ltd. In that case, the KFTC viewed that the possibility of predatory pricing of bundled products can be controlled by the ex-post measures of the KFTC itself or the price regulation of the Korea Communications Commission.[59] In addition, in vertical merger cases which occurred in sectors outside of broadcasting or communications, even when the parties possessed strong dominance in either upstream or downstream market, the KFTC only imposed behavioral remedies.[60]

Furthermore, even among the structural remedies, the KFTC could have chosen a more moderate route such as ordering the sale of partial assets. Instead, the KFTC was firm in carrying out the strictest measure, i.e. totally blocking the deal. The SKT's purchasing of CJH's stocks and the merger of CJH and SKB were prohibited from being implemented.[61]

Through its press release, the KFTC expressed its view of this Transaction that, contrary to the preceding merger cases in broadcasting or communications sector, the Transaction brings a mixture of horizontal and vertical integration, creating anticompetitive concerns that are too complicated to be resolved simply by requiring behavioral measures or partial divestitures.[62] We can think of additional factors that can differentiate this merger from the preceding cases. The preceding mergers occurred either between cable TV service providers within the pay broadcasting market, or between the firms within the communications market. On the contrary, the Transaction combines the top firm in the communications market with another top firm in the pay broadcasting market. Furthermore, pursuant to the Transaction, even within the pay broadcasting market, two different kinds of platforms (cable TV and IPTV) would be integrated into one entity. As such, the post-merger firm would have perhaps acquired an almost invincible status not only as a result of the high market share acquired, but also with the wide range of business capacity.

IV. CONCLUSION

The remedy taken by the KFTC with regard to the Transaction is significant as it will fundamentally prevent the occurrence of anticompetitive harm and the establishment of a

[58] KFTC Decision, No. 2008-105, 2008SeoIl0339, March 13, 2008.

[59] KFTC Press Release, *KT-KTF Merger Allowed without Conditions*, Feb. 5, 2009, p. 3.

[60] See, KFTC Decision, No. 2015-162, 2015KiGyeol0464, May 18, 2015; KFTC Decision, No. 2007-351, 2007KyeolHap1076, July 3, 2007.

[61] SK Merger Decision, p. 70.

[62] The KFTC viewed that a partial divestiture would have a limitation in resolving the anticompetitive concerns in this case. In the pay broadcasting market, if all firms belonging to the regions with potential anticompetitive concerns are to be sold, such in fact would not be so different from a total ban of the deal in that market. In addition, it is difficult to find an appropriate purchaser only for a part of the regions since such part alone would not have synergy effects. It is also hard to find a purchaser for the frugal phone business of CJH which has an equivalent level of competitiveness of CJH playing the role of a maverick. The KFTC Press Release, supra note 8, at 13.

monopolistic structure in the pay broadcasting or mobile communications markets, thereby protecting consumers.[63]

It might be difficult to determine a perfect balancing point in the trade-offs between the need for positively readjusting an industry structure and the concern for maintaining a competitive market structure. The solution may also change depending on the time and place. Still, we can find meaning in the action taken by the KFTC regarding this Transaction as the KFTC's attempt to act as a guardian of consumer welfare by showing the existence of a firm line that cannot be crossed for the maintenance of competitive order even in the face of possible justifications involving the rationalization of an industry. This case especially showed that when a transaction brings serious and complex structural concerns such as the acceleration of market concentration accompanied by the creation of a super-giant holding substantial power across different (but closely related) sectors, the KFTC would oppose it with a corresponding level of countermeasures.

[63] Id. at 14.