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The Use of Structural Presumptions in Antitrust – Note by Korea

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1. Introduction

1. Generally, the higher a business entity’s market share, the more likely its conduct is to limit competition. A business with a high market share holds strong market power, enabling it to unilaterally influence the outcomes of market competition, such as prices and terms of transactions. In contrast, a firm with low market share and weak market power has little ability to limit competition, even if it attempts anticompetitive conduct—and is unlikely to be capable of doing so in the first place.

2. The strong correlation between market share and anticompetitive outcomes suggests that market structure can play a crucial role in antitrust investigations. If a relevant market is highly concentrated and a firm’s market share is high, the firm’s conduct is more likely to be presumed unlawful, and vice versa. This is known as *structural presumption*, which uses market structure and individual market participants’ market share as key factors in determining a violation.

3. This presumptive approach is widely used by international competition authorities, including the Korea Fair Trade Commission (hereinafter the “KFTC”). The KFTC considers market structure and market share as key factors to assess the legality of conduct in various types of antitrust cases, such as mergers, abuse of market dominance and cartel activity. While market structure is a key indicator, it is not sole predictor of potential anticompetitive effects; a wide range of factors is taken into account comprehensively.

4. This paper elaborates on how the KFTC applies the structural presumption methodology in addressing antitrust cases. It first discusses the structural presumption in merger reviews, focusing on the relevant provisions that govern the methodology and actual case applications. The discussion then continues with the structural presumption in abuse of market dominance and cartel conduct.

2. The application of the structural presumption methodology in merger reviews

2.1. Outline

5. Most competition authorities’ merger guidelines define the presumptive thresholds for determining *either* the presence *or* absence of competition concerns: the former presumes mergers do not raise such concerns when the merging parties’ market concentration is below a certain level—a merger inside the *safety zone*—while the latter presumes mergers may pose harm to competition when their market concentration exceeds the threshold. In Korea, regulations concerning mergers are governed by the Monopoly Regulation and Fair Trade Act (hereinafter the “MRFTA”) and the KFTC’s Merger Guidelines (hereinafter the “Guidelines”). The MRFTA specifies particular merger cases presumed to restrict competition, whereas the Guidelines outline cases presumed not to restrict competition. A notable feature of Korea’s merger-related regulations is that both classifications—those presumed to be anticompetitive and those not—are clearly specified.

2.2. Presumptive thresholds for the existence of competition concerns in merger review cases

6. First, the presumptive thresholds indicating the existence of competition concerns under the MRFTA will be discussed. The MRFTA outlines the presumption of anticompetitive effects based on merger type: horizontal and non-horizontal.

7. The presumptive thresholds for horizontal mergers focus on the market share of the merging parties, presuming that a proposed merger raises competition concerns if their aggregate market share reaches a dominant level. Specifically, a proposed merger is presumed to restrict competition when:

1. the aggregate market share of the merging parties is the largest in the relevant market;
2. the aggregate market share is 50% or higher (CR1), or the combined market share of the three largest entities—i.e., the merging parties and the second- and third-largest firms—is 75% or higher (CR3); and
3. the market share gap between the merging parties and the second-largest firm exceeds one quarter of the aggregate market share of the merging parties.

8. In March 2024, the KFTC applied the provisions of presuming anticompetitive effects when reviewing a proposed merger between Megastudy and STUnitas, private learning institutes for Korea civil service exams. The KFTC defined two relevant markets for (i) the general administrative service exams and (ii) the firefighting service exams. Both markets exceeded the thresholds that presume likely harm to competition from the merger. Specifically:

1. in the market for the general administrative service exams, the aggregate market share of the merging parties was 68%, and the market share gap between this aggregate and the second-largest firm was 53%p, exceeding a quarter of the 68% (17%p); and
2. in the market for the firefighting service exams, the aggregate market share was 75%, and the gap with the second-largest firm was 66%p, exceeding a quarter of the 75% (18.75%p).

9. In addition to the high level of market concentration, the KFTC noted the potential risk that well recognized instructors, who are highly sought-after by examinees, would be drawn to the merged entity, causing difficulties for competitors in offering high-quality lecture services. Consequently, the KFTC blocked the merger, concluding that it is likely to result in direct consumer harm—an increase in tuition fees.

10. The presumptive thresholds for non-horizontal mergers focus on focus on cases where large companies seek to enter markets where small and medium enterprises (SMEs)¹ constitute a significant share. Specifically, a proposed merger is presumed to restrict competition when:

¹ The “Framework Act on Small and Medium Enterprises” defines SMEs based on different criteria by industry. For example, in terms of three-year average revenues, enterprises are classified as SMEs if their revenues do not exceed KRW 150 billion in the manufacturing industry and KRW 40 billion in the education industry.

- a large company with assets or revenues of at least KRW 2 trillion acquires a company operating in a market where SMEs hold at least 2/3 of the total market share; and
- the merged party will hold at least 5% market share in the market.

11. The thresholds were applied in the KFTC's review process for a vertical merger in July 2007, in which POSCO, a dominant steel plate manufacturer with annual revenues of KRW 26 trillion and a 92% market share, acquired Korea Core, an SME that manufactures cores² from steel plates. The KFTC defined five core markets by segmenting core products. All five markets were entirely supplied by SMEs, and Korea Core held a market share ranging from 12 to 69% across these markets. Following the merger, POSCO would secure up to 69% of market share in core markets where SMEs compete with each other. Since the merger would exceed the structural thresholds presuming harm to competition from non-horizontal mergers and POSCO was effectively the sole supplier of steel plates to core manufacturers, the KFTC imposed remedies on POSCO to prevent input foreclosure— withholding of steel plate supplies from competitors.

2.3. Presumptive thresholds for the absence of competition concerns in merger review cases

12. On the contrary, the presumptive thresholds indicating the absence of competition concerns under the KFTC's Merger Guidelines will now be discussed. The Guidelines outline safety zones by merger type—horizontal or non-horizontal—and presume that mergers within these safety zones do not pose competition concerns. Generally, the review process is completed swiftly without further investigation if mergers are presumed not to raise competition concerns. Conversely, mergers that fall outside the safety zone will undergo further analysis to assess the likely anticompetitive effects.

13. The Guidelines presume that mergers do not pose competition problems based on market concentration calculated by Herfindahl-Hirschman Index (HHI)³. In the case of horizontal mergers, a merger is presumed not to limit competition if the pre-merger concentration is low or, if it is high, the post-merger concentration does not increase significantly. The specific criteria to determine the absence of competition concerns are as follows:

- the pre-merger HHI is less than 1,200 (low concentration);
- the pre-merger HHI is between 1,200 and 2,500 (mid concentration), and the post-merger HHI increase is less than 250; or
- the pre-merger HHI is 2,500 or higher (high concentration), and the post-merger HHI increase is less than 150.

² Cores are essential components used to convert electric energy into kinetic energy, determining the efficiency of rotating devices such as motors.

³ The Herfindahl-Hirschman Index is calculated by squaring the market share of all business entities competing in the relevant market and then summing the resulting numbers.

Table 1. Structural presumption in horizontal mergers

Δ HHI \ HHI	Less than 1,200	Between 1,200 - 2,500	2,500 or higher
Less than 150	Presumption of the absence of competition concerns		
Between 150 - 250			
250 or higher			

14. The proposed merger between Tving and Seezn, the third- and sixth-largest Korean over-the-top service providers, was reviewed in October 2022 according to the provisions. The sum of the merging parties’ market shares was 18%, far below the then largest entity Netflix at 38%. The merger would not substantially affect market concentration; in the Korean OTT market, the post-merger HHI would be 2,207 with an increase by no more than 130 from the pre-merger HHI at of 2,076. As the merger fell inside the safety zone, the KFTC concluded that the merger did not cause consumer harm, such as an increase in OTT subscription fees.

15. In the case of non-horizontal mergers, which occur across multiple markets, the Guidelines presume the absence of competition concerns based on a comprehensive analysis of market concentration, the merging parties’ market shares and their market share rankings in the relevant markets. The specific criteria to determine the absence of competition concerns are as follows:

- the HHI is less than 2,500 (not classified as high concentration) and neither of the merging parties’ market shares exceed 25% in any relevant markets; or
- both merging parties hold less than 10% market share, or their market shares rank fourth or below.

Table 2. Structural presumption in horizontal mergers

Market Share \ HHI	Less than 1,200	Between 1,200-2,500	2,500 or higher
Less than 10%	Presumption of the absence of competition concerns		
Between 10% - 25%			
2,500 or higher			

16. The KFTC reviewed Microsoft’s acquisition of Activision Blizzard in May 2023, focusing on the possibility of foreclosure that Microsoft might withhold Activision Blizzard’ games, particularly Call of Duty, from competitors in the console⁴ and cloud markets, such as Sony and Nvidia. However, Activision Blizzard’s market share was less than 2% in the Korean game distribution market, and Microsoft’s market share was below 10% in the console market. It shows the merger fell within the safety zone for non-horizontal mergers with no competition concerns. Considering that Microsoft lacked the ability to foreclose competitors, the KFTC concluded the merger would not limit competition⁵.

3. The application of the structural presumption methodology in other antitrust cases

3.1. Abuse of market dominance

17. The structural presumption is also used in demonstrating the market dominance of an entity, as well as in reviewing a merger. The MRFTA sets out provisions regarding the presumption of market dominance based on a business entity’s market share as follows:

- the business entity has market dominance if its market share is at least 50% (CR1); and
- the business entity ranks among the top three, with the combined market share of these three largest firms being at least 75% (CR3), and its individual market share is at least 10%.

18. However, an entity with annual revenues of less than KRW 8 billion are presumed not to have market dominance despite having a high market share.

19. The presumptive methodology was applied in sanctioning the abuse of dominance by Kakao Mobility, which operates the taxi-hailing application Kakao T. With a market share of at least 90% in the *general taxi-hailing service market*⁶ in terms of monthly active user, Kakao Mobility met the criteria for being presumed a market-dominant entity under the MRFTA. Moreover, the lock-in effect generated by this substantial market share created high entry barriers, making it difficult for new competitors from entering the market. Consequently, the KFTC concluded that Kakao Mobility held dominance in the general taxi-hailing service market.

20. In addition to the general taxi-hailing service, Kakao Mobility was running a franchise taxi-hailing service Kakao T Blue with affiliated drivers as well. Kakao Mobility leveraged its dominance in the *general taxi-hailing service market* into the *franchise taxi-hailing service market*⁷ by giving preferential treatment to its own affiliated drivers over

⁴ A console is a mechanical device used to play video games—e.g., X-Box from Microsoft and Playstation from Sony.

⁵ Microsoft held a market share of 60-70% in the cloud market, which remains outside the safety zone; but the KFTC concluded the firm lacked the ability to engage in input foreclosure, as Blizzard’s market share in the game distribution market is still less than 2%.

⁶ The general taxi-hailing service market refers to the market where passengers use ride-hailing applications to hail a ride from professional drivers, either independent drivers or those affiliated with franchise taxi companies.

⁷ The franchise taxi-hailing service market refers to a market where franchise taxi companies provide rides to passengers by using its pool of affiliated drivers—franchisees.

non-affiliated drivers in the passenger-driver matching process. As a result of this self-preferencing, Kakao T Blue member drivers had more opportunities for rides and higher incomes than non-member drivers. This practice attracted drivers from competing taxi-hailing services to join Kakao T Blue, significantly reducing the market shares of rival franchise taxi operators. In June 2023, the KFTC imposed a fine of KRW 25.7 billion on Kakao Mobility for its self-preferencing, which resulted in anticompetitive effects that excluded competitors from the market.

3.2. Unlawful cartel conduct

21. The structural presumption is regularly implemented in establishing a violation involving softcore cartels as well. According to the MRFTA, cartel conduct is classified into two categories: *hardcore*, which includes collusive agreements on prices, output, sales regions, and determining the winner of a bidding process; and *softcore*, which encompasses collusive agreements on product standards, production capacity and terms and conditions. In determining whether a softcore cartel is unlawful, the KFTC takes account of the aggregate market share of cartel participants. If the sum of their market shares is no more than 20%, their market power is deemed insufficient to limit competition, and the cartel is deemed not unlawful.

4. Conclusion: Balanced application of structural presumption

22. As explained above, the KFTC developed the presumptive framework and employs the methodology for various types of antitrust behaviors. The structural presumptions have served as key tools in handling antitrust cases, enabling effective law enforcement by relieving much of the burden of proof.

23. Aside from the structural presumption, the KFTC also draws upon various sources, including internal documents from entities, market statistics and precedents in similar markets. Even if a proposed merger or conduct exceeds the presumptive thresholds, it only constitutes a “presumption” of a violation or market dominance and can be rebutted by the entity. Aware that the presumption can be reversed, the KFTC is making exhaustive efforts to verify the legality of each case.

24. Such a balanced approach is well recognized in recent improvements. The “KFTC Merger Guidelines,” upgraded in May 2024, ensure that the analysis of potential anticompetitive effects is conducted based on various factors as well as market concentration. Additionally, the “Guidelines on Abuse of Market Dominance by Online Platforms,” established in January 2023, state that the market-dominant status should be determined based on factors such as network effects, the capability of collecting and using data and the influence of a firm as a gatekeeper. Building on these regulatory improvements, the KFTC will continue its enforcement efforts against anticompetitive practices while employing a balanced approach to structural presumption.