

Unclassified

English - Or. English

16 May 2025

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**Efficiencies in Merger Control – Note by Korea**

17 June 2025

This document reproduces a written contribution from Korea submitted for Item 2 of the 141<sup>st</sup> meeting of Working Party 3 on 17 June 2025.

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### 1. Introduction

1. While mergers may contribute to strengthening corporate competitiveness through economies of scale, technological innovation, and improved business management efficiency, as well as to enhancing consumer welfare and promoting economic development, they may also restrict market competition by reinforcing market dominance. Accordingly, the Korea Fair Trade Commission (hereinafter the “KFTC”) prohibits anti-competitive mergers through merger reviews to protect competition and prevent consumer harm. However, if a failing firm defense or an efficiency defense is acknowledged, even an anti-competitive merger may exceptionally be permitted without the imposition of corrective measures.

2. Efficiency defense refers to the argument that the efficiency gains resulting from a merger outweigh the potential harm to competition caused by the merger. If this defense is accepted, the merger in question—despite being anti-competitive—may be exempted from the applicable merger restrictions.

3. The following section introduces the legal framework of the efficiency defense and recent institutional improvements, and examines past KFTC’s decisions and court rulings.

### 2. Efficiency Gains under the Monopoly Regulation and Fair Trade Act

#### 2.1. Merger Review System under the Monopoly Regulation and Fair Trade Act

4. Article 9(1) of the Monopoly Regulation and Fair Trade Act (hereinafter the “MRFTA”) stipulates that no person shall substantially restrain competition in a relevant market through a merger. However, under Article 9(2), even if a merger is seen to be anti-competitive, it may be exceptionally exempted from merger restrictions if the KFTC recognizes efficiency gains, or the merger involves a failing firm. The efficiency defense and failing firm defense are considered only after the merger is determined to be anti-competitive. If either defense is accepted, the merger is not subject to corrective measures under Article 14 of the Act.

*Article 9 (Restrictions on Business Combinations)*

*No person shall perform any of the following practices (hereinafter referred to as "business combination") substantially restricting competition in a particular business area, either directly or through a person in a special relationship prescribed by Presidential Decree (hereinafter referred to as "related party*

*(Following subparagraphs omitted)*

*Paragraph (1) shall not apply to any business combination recognized by the Fair Trade Commission as falling under any of the following; in such cases, the relevant business entities shall assume the burden of proof as to whether they satisfy the conditions:*

*1. Where the effect of increasing efficiency that is impracticable to achieve by means other than the relevant business combination is greater than the negative effect of restricting competition;*

2. Where the business combination is made with an inviable company, such as a company whose total capital on its balance sheet is less than its paid-in capital for a considerable period, and satisfies the conditions prescribed by Presidential Decree.

*Article 14 (Corrective Measures)*

Where a violation of Article 9 (1) or 13 is or is likely to be committed, the Fair Trade Commission may order the relevant business entity or the relevant violator to take the following corrective measures.

*(Following subparagraphs omitted)*

5. According to the MRFTA, efficiency gains must be *merger-specific* and greater than the anti-competitive harm caused by the merger. The Act also requires that such efficiency gains be substantiated by the notifying party. While the KFTC does not provide specific criteria for quantitatively measuring efficiency gains, it evaluates the validity of the claims when the notifying party asserts them.

6. Although merging parties typically assert efficiency gains, the KFTC has not yet accepted efficiency gains as a valid defense to exempt an anti-competitive merger from merger restrictions.<sup>1</sup>

## 2.2. Standards for Assessing Efficiency Gains under the Merger Review Guidelines

7. The Merger Review Guidelines provide specific standards for evaluating efficiency gains (Section VIII.1). The guidelines set out: considerations for determining whether efficiency gains will arise, requirements for the gains to be recognized as merger-specific, and rule of reason for weighing anti-competitive effects against efficiency gains.

8. First, when determining whether efficiency gains will arise, the KFTC considers not only the impact on the relevant market, but also on the broader national economy. This suggests that public interest is taken into account when recognizing efficiency gains.

9. Efficiency gains in the relevant market may arise from improvements in production, sales, and research and development (R&D). These include potential cost reductions in areas such as production and logistics—through economies of scale, economies of scope, integration of production facilities, streamlining of production processes, and shared use of logistics infrastructure. Other considerations include the potential for expanded sales and exports through integration and joint use of sales networks and market information, as well as enhancements in production technologies and R&D capabilities.

10. Although not explicitly stated in the guidelines, the KFTC applies a consumer welfare standard when evaluating efficiency gains related to production and sales within the relevant market.<sup>23</sup> In other words, if cost reductions or increased sales merely lead to higher corporate profits without benefiting consumers, such gains are unlikely to be

<sup>1</sup> However, in the case of failing firm defense—another exception—there have been precedents where it was accepted, such as Dongyang Chemical’s acquisition of Kohap’s business division (2003) and Jeju Air’s attempted acquisition of Eastar Jet (2020).

<sup>2</sup> The KFTC stated that the rationale for recognizing efficiency gains as an exception to merger restrictions is that such gains can lower the costs of the merging parties, thereby promoting competition and enhancing consumer welfare in Korea through price reductions or increased output. (Samick-Young Chang case, KFTC Decision No. 2004-271)

<sup>3</sup> The High Court’s ruling on the rationale for recognizing efficiency gains aligns with the KFTC’s position and held that the term “efficiency” refers specifically to “productive efficiency.” (Samick-Young Chang case, 2005Nu3174)

recognized as efficiency gains. Only when these improvements result in benefits for consumers—such as lower prices—can they be acknowledged.

11. For example, the High Court ruled that while an increase in revenue itself cannot, in principle, be recognized as an efficiency gain because it is not directly related to improvements in a firm's internal economic efficiency such as cost structure enhancements, cost reductions resulting from production efficiency achieved through economies of scale may be recognized as efficiency gains if they are properly substantiated.<sup>4</sup>

12. Efficiency gains at the national level are assessed based on whether the merger significantly contributes to improvements in employment, regional economic development, the growth of related upstream and downstream industries, the stability of the overall economy, and environmental protection.

13. Furthermore, the guidelines set out conditions for efficiency gains to be recognized as *merger-specific*. The gains must be difficult to achieve through means other than the merger, and they must be both evident and likely to materialize in the near future. Efficiency gains that could have been realized even without the merger are not taken into account.

14. Finally, it stipulates that the recognized efficiency gains must outweigh the anti-competitive harms resulting from the merger.

### 2.3. The KFTC's Assessment of Efficiency Gains: The Merger between Delivery Hero and Baemin (2020)

15. In December 2019, Delivery Hero SE (DH), which operates the food delivery app Yogiyo in Korea signed an agreement to acquire approximately 88% of the shares of Woowa Brothers Corp., the operator of Baemin, the leading food delivery app in Korea and notified the KFTC of the merger.

16. As of 2019, the two companies accounted for approximately 99.2% of the Korean food delivery service market, leading to the presumption of the merger's anti-competitiveness. The KFTC determined that the elimination of competition between the two companies could significantly reduce consumer benefits and increase commission fees for restaurants, raising serious concerns over anti-competitive practices.

17. However, DH argued that the merger would increase the number of restaurants listed on the delivery app, which would enhance order density, reduce delivery time, improve consumer satisfaction, and boost the number of orders. As a result, DH claimed that efficiency gains would arise for consumers, restaurants and delivery workers.

18. However, the KFTC's review of DH's economy analysis found no correlation between the number of restaurants listed on the delivery app and a reduction in delivery times. Rather, it showed that an increase in the number of listed restaurants led to longer delivery times. Accordingly, the KFTC concluded that DH had failed to sufficiently substantiate its claims of efficiency gains.

19. In addition, the reduction in delivery times claimed by DH could be achieved through less anti-competitive means, such as increasing the number of delivery workers. In particular, considering the potential congestion effect—where increased deliveries per worker may actually lead to longer delivery times—the KFTC determined that this claimed efficiency gain could not offset the competitive concerns associated with the merger.

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<sup>4</sup> Samick-Young Chang case, 2005Nu3174

### 3. Recent Institutional Improvements: Revision of Merger Review Guidelines to Reflect the Characteristics of the Digital Economy

20. While reviewing the DH-Baemin merger case, the KFTC recognized the need to reflect the unique characteristics of the digital economy in its review process in order to effectively protect competition in the digital sector and further promote innovation. Accordingly, in May 2024, the KFTC revised its merger review guidelines.

21. The digital economy has distinct characteristics compared to traditional industries. Due to network effects, an increase in the number of users can itself enhance the value of the service, and data serve as a key source. In addition, online platforms are easily expandable through the addition of new services. To accurately assess the impact of mergers on competition and efficiency in the digital economy, it is necessary to incorporate these characteristics in the review process.

22. In assessing efficiency gains, the revised guidelines allow for the consideration of additional effects from the unique characteristics of online platforms. These include whether an increase in users resulting from the merger enhances user benefits through network effects, whether the integration of user bases or data assets leads to the development of innovative services or reductions in production and distribution costs, and whether consumers benefit from a wider range of available services.

23. Moreover, in Korea, when a start-up returns investment through an M&A, founders often go on to establish new start-ups. In particular, in the digital sector, start-ups are frequently acquired by large companies seeking to enter emerging industries or launch new services. Accordingly, the KFTC has introduced the consideration of whether a merger significantly contributes to the revitalization of the domestic start-up ecosystem as part of the broader economic efficiency gain assessment.

### 4. Conclusion: Remaining Challenges

24. The KFTC will take a balanced approach in considering the anti-competitive effects and efficiency gains in the review process to maximize the positive functions of mergers while preventing the harms of anti-competitiveness. The KFTC is currently conducting ex-post analyses to examine changes in market structure and the promotion of competition following corrective measures in competition law cases, and plans to assess the appropriateness of its decision in the aforementioned DH-Baemin merger case. In particular, it will evaluate changes in consumer welfare by estimating the price increases that would have occurred in the absence of its conditional approval. The findings may also be used to review the adequacy of the current criteria for assessing efficiency gains.

25. In a rapidly changing economic environment driven by technological advancement and innovation, the scope and evaluation criteria for efficiency gains may also evolve. The KFTC will continue to refine these criteria to reflect such changes, thereby enhancing predictability of merger reviews.