

Unclassified

DAF/COMP/WP3/WD(2016)5

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

24-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

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

#### PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Korea --

14-15 June 2016

*This document reproduces a written contribution from Korea submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm](http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm)*

JT03396496

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/WP3/WD(2016)5  
Unclassified

English - Or. English

## KOREA

1. Competition authorities generally review the impact of business combination on competition, consumer welfare, and etc (herein after referred to as ‘standard element’), and impose remedies when necessary. This is because business combination can intensify monopoly and oligopoly, thereby raising price, reducing production and hampering innovation. Business combination can also affect income distribution and employment (herein after referred to as ‘public interest element’). The problem here is whether the public interest element should be considered along with the standard element in the process of reviewing business combinations by a competition authority.

2. On the other hand, there is generally a regulator for each regulated industry such as finance, communications, and broadcasting. A regulator regulates considering unique characteristics for each industry, and can review business combinations that occur in the relevant industry apart from the business combination review by a competition authority. In this situation, a regulator considers not only the standard element but also the public interest element.

### **1. How to review business combinations**

#### ***1.1 The applicable law of business combination review***

3. The KFTC reviews business combinations in order to determine anti-competitiveness. The business combination review is based on *the Monopoly Regulation and Fair Trade Act* (herein after referred to as the Act) Article 7. A general provision that prohibits anti-competitive business combinations is provided in the Act Article 1, and more detailed anti-competitive determining criteria by business combination type is stipulated in *the Guidelines for the Combination of Enterprises*.

4. As for horizontal business combination, the KFTC reviews the possibility of price hike by the business combination parties and cooperation among competitors. When reviewing the possibility of price hike by the business combination parties alone, market share of the business combination parties and competitors, and demand substitutability of the business combination parties’ and competitors’ products are considered. When reviewing the possibility of cooperation among competitors, whether important information can be easily shared and whether the products of the competitors are high in similarity are considered.

5. As for vertical business combination, the KFTC reviews whether the business combination has the possibility of foreclosing sales or purchasing channels and the possibility of cooperation among competitors after the business combination. The review of the possibility of foreclosing sales or purchasing channels take into account market share of the business combination parties in the upstream and downstream market, and how competitors are vertically integrated. When reviewing the possibility of cooperation, whether it becomes easier for the competitors to obtain information after the business combination will be considered.

6. As for conglomerate business combination, the KFTC reviews the potential room for undermining competition, foreclosure of competitors and increased effect of entry barrier due to business combination. In order to determine the potential competition undermining effect, the KFTC considers whether the party would have entered the relevant market of the other party if there had been no business combination. Also, whether the competitors are foreclosed due to the factors other than price or quality, and whether the entry barrier of the potential competitors increases are considered.

## 1.2 *Anti-competitiveness presumption and safe zone*

7. Furthermore, the Act Article 7 (4) provides the presumption requirement of anti-competitiveness. Anti-competitiveness is presumed in any of the following cases: 1) Total sum of business combination parties' market share meets the requirement of market-dominant enterprises, 2) the business combination parties become the market leader in the relevant market, and 3) the total sum of business combination parties' market share is more than 25% higher than that of the company with the second biggest market share.

8. The KFTC reviews anti-competitiveness considering the anti-competitiveness presumption requirements as well as other factors. Public interest element is not considered when reviewing anti-competitiveness.

9. Business combination review criteria prescribe the safe zone. In case of horizontal business combination, business combinations are considered to be in the safe zone in any of the following cases: 1)  $HHI^1 < 1,200$ , 2)  $1,200 < HHI < 2,500$  and  $\Delta HHI < 250$ , or 3)  $HHI > 2,500$  and  $\Delta HHI < 150$ . In case of vertical or conglomerate business combination, business combinations are considered to be in the safe zone in the following cases: 1)  $HHI < 2,500$  for the relevant market where the business combination parties belong and the market share of the business combination parties is below 25%, or 2) the business combination parties rank below 4<sup>th</sup> place in the relevant market.

10. It is presumed not to be anti-competitive when satisfying any of the above criteria. The public interest element is not considered when determining whether the business combination is in the safe zone or not.

## 2. **Considering public interest element in the business combination review stage**

11. As mentioned above, public interest element is not considered by the KFTC when reviewing anti-competitiveness of business combination. It is just that it may be possible to consider public interest element when determining whether the business combination concerned be an exception to anti-competitiveness.

12. Pursuant to the Act 7 (2), efficiency enhancing effect or business combination of the companies that are not viable are provided as the exception to anti-competitiveness. The exception to anti-competitive has been in place since 1981, when the law was first enacted. At the time the law was enacted, *Industry rationalization or business combination to strengthen international competitiveness* were provided for the exceptions to anti-competitiveness. Later in the process of revising the law in 1999, *the industry rationalization and strengthening international competitiveness* was deleted, and *efficiency enhancing effect and company that are not viable* was introduced.

13. Among the exceptions to anti-competitiveness, efficiency enhancing effect of the national economy and company that are not viable come under the public interest element. According to *the Guidelines for the Combination of Enterprises*, the efficiency enhancing effect in the national economy actually means increase in employment, regional economy, development of downstream and upstream market, stable supply of energy and improvement of environmental pollution. According to *the Guidelines for the Combination of Enterprises*, when determining whether the company is not viable, the following factors are considered: whether the company has impaired capital for a considerable period of time, whether ordinary income or loss records a deficit for a considerable period of time, whether the revival process has been initiated or bankruptcy has been filed pursuant to *the Debtor Rehabilitation and Bankruptcy Act*, and whether the creditor financial institution is managing the company in order to manage non-performing bond.

---

<sup>1</sup> Herfindahl–Hirschman Index.

14. Of course, just because of efficiency enhancing effect or the company that is not viable, it does not mean the exception to anti-competitiveness is accepted. After the KFTC compares the efficiency enhancing effect or why the company is not viable with the anti-competitiveness, the KFTC decides whether it meets the exception requirement. In terms of efficiency enhancing effect, it has to be obvious that efficiency will occur in the near future, and it should be based on a solid ground not just on a mere presumption. In the situation that the company is not viable, the exception is only accepted when the production facilities cannot be utilized without the business combination, or when other types of business combination with little anti-competitiveness cannot occur. The KFTC judges the exception very strictly, and there is almost no example where the exception was applied.

### **3. The way business combination is regulated in the regulated industries.**

15. As mentioned above, the KFTC single-handedly reviews anti-competitiveness of business combinations in general industries, and the public interest element is considered to be the exception to anti-competitiveness. However, there is a regulator in charge of each industry, which is also in charge of regulations that are specific to each regulated industry. In Korea, according to the relevant act, there is a specific regulator that regulates finance, communications and broadcasting industry, and has the right to review business combinations that happen in the relevant industry. Generally, since the regulator considers public interest element that is specific to the relevant industry, the public interest element is also considered when reviewing business combination.

16. For example, a permit by the regulator is required for business combination of key telecommunications business operators such as telecommunications and high-speed internet service according to the Telecommunications Business Act. The regulator considers not only the anti-competitiveness, but also the public interest element comprehensively such as financial capability of the enterprise, appropriateness of information communications resources management like frequency and telecommunications number, user protection and utilization of electric communications facilities and communications network, efficiency of R&D and international competitiveness of communications industry.

17. However, even though the regulator reviews business combination, it does not necessarily mean the KFTC is excluded in business combination review process. The KFTC can independently review anti-competitiveness and impose remedies. Pursuant to the relevant act, the regulator needs to consult with the KFTC in order to determine anti-competitiveness while reviewing business combination. Therefore, when the KFTC submits the results after reviewing anti-competitiveness, the regulator reviews business combination taking into account the opinions from the KFTC and other public interest elements.