

Comments of the International Center for Law & Economics to the Korea Fair Trade Commission

*Re: Proposed Amendment to the Notification Guidelines for
Business Combinations (Acquihires)*

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Introduction

The International Center for Law & Economics (ICLE) submits these comments on the Korea Fair Trade Commission’s (KFTC) proposed amendment to the Notification Guidelines for Business Combinations (Proposed Amendment), published for public comment on Sept. 9.¹ ICLE is a nonprofit, nonpartisan global research and policy center that applies law & economics methods to public-policy debates. Its scholars have written extensively on acquihires—transactions centered on hiring a firm’s team—and artificial intelligence (AI) partnerships.² ICLE has also commented on the KFTC’s merger review guidelines.³

The Proposed Amendment would treat transactions in which a firm hires a target’s key personnel, often alongside a license to its technology, as business transfers under Article 9(1)(iv) of the Monopoly Regulation and Fair Trade Act (MRFTA).⁴ The KFTC describes the amendment as a clarification. In its view, acquihires already constitute business transfers under Article 9(1)(iv), and the amendment would make that clear so parties do not fail to notify. We welcome greater certainty for parties, but the proposed text goes beyond restating existing law.

The Proposed Amendment would expand the definition of a “business” to include organized personnel whose technology or knowledge enables them to perform a core business function. It would treat a “material part” of a business as transferred whenever the acquirer becomes able to carry on the same activities as the transferor. It would count any consideration paid to the transferor toward the transfer price, whatever its label, including payments to release rights over departing personnel and license fees. It would also treat the transferor’s cessation of business as implementation of the transfer.⁵

We share the principle behind the Proposed Amendment. Competition law should look to a transaction’s substance, not its form. A transaction that strips a firm of its competitive significance should not escape scrutiny merely because it takes the form of a hiring arrangement and no shares change hands. As drafted, however, the amendment would bring ordinary licensing and hiring

¹ Press Release, Korea Fair Trade Comm’n, *Sinyuhyeong Gieop Gyeolhap-ui Sagakjidae Haesoreul Wihan Gieop Gyeolhap-ui Singo Yoryeong Gaejeongan Haengjeong Yego* [Advance Notice of Proposed Amendment to the Notification Guidelines for Business Combinations to Eliminate Blind Spots for New Types of Business Combinations] (Sept. 9, 2026) [hereinafter Press Release]; *id.* attach. (comparison of current and proposed provisions) [hereinafter Proposed Amendment]. This comment cites lettered subdivisions of the Notification Guidelines by their English equivalents (□ = a, □ = b, and so on). Unless otherwise noted, translations of Korean-language materials are our own.

² See, e.g., Dirk Auer & Onyeka Aralu, ‘Reverse Acquihires’ and the Market for Talent: Antitrust Theory in Search of a Case, CONCURRENCES No. 9-2026 (forthcoming) [hereinafter Auer & Aralu, *Reverse Acquihires*]; Dirk Auer & Mario A. Zúñiga, *AI Partnerships and Competition: Damned if You Buy, Damned if You Don’t* (Int’l Ctr. for L. & Econ., Working Paper, May 2026).

³ Geoffrey A. Manne, Dirk Auer & Lazar Radic, *Comment of the International Center for Law & Economics Concerning the Proposed Amendments to Korea’s Merger Review Guidelines* (Int’l Ctr. for L. & Econ., Dec. 5, 2023).

⁴ Dokjeom Gyuje mit Gongjeong Georae-e Gwanhan Beomnyul [Monopoly Regulation and Fair Trade Act], Act No. 3320, Dec. 31, 1980, amended by Act No. 17799, Dec. 29, 2020, art. 9(1)(iv) (S. Kor.) [hereinafter MRFTA].

⁵ Proposed Amendment, *supra* note 1, §§ 4(b)(2), 4(c)(1), 4(d)(3), 4(f).

within merger control. We recommend that the KFTC withdraw it or narrow it substantially. Our comments make three points.

First, the case for extending notification has not been made (Section I). No competition authority has found an acquihire anticompetitive. The United Kingdom's Competition and Markets Authority (CMA) cleared the Microsoft/Inflection transaction in Phase 1. Brazil's Administrative Council for Economic Defense (CADE) also cleared it through an expedited review, finding that "[t]he transaction is not likely to result in significant changes to the competitive landscape in Brazil and therefore does not require a more in-depth analysis."⁶ Structuring a transaction to stay below notification thresholds is not misconduct. It is consistent with shareholders' interest in minimizing transaction costs. Nor does the concern that an acquihire might neutralize a nascent competitor warrant amending or clarifying competition law. Error-cost considerations counsel restraint: Wrongly deterring these transactions is costly and difficult to reverse, while errors from wrongly permitting them tend to correct themselves.

Second, most acquihires are not mergers in the competition-law sense (Section II). The Notification Guidelines define a business as a bundle of property rights. Employment contracts are not property rights in employees, who have a constitutional right to choose where they work.⁷ An acquirer instead obtains a coordinated but revocable set of employment decisions, often alongside a nonexclusive license that leaves rivals free to use the same technology. Against this backdrop, the proposed "material part" test asks what the acquirer can do rather than what the transferor has lost. The proposed implementation rule also ties the parties' obligations to decisions they do not control.

Third, the proposed transfer-price calculation would not track competitive significance and would create perverse incentives (Section III). It would count license fees paid for access without control. And because it would count only payments to the transferor—payments that return capital to a startup's investors—it would burden compensated, cooperative transactions while leaving uncompensated raids on a startup's workforce untouched.

⁶ *Microsoft/Inflection*, Merger Case No. 08700.005792/2026-71, Decision No. 475/2026/CGAA5/SGA1/SG, ¶ 19 (Braz. Admin. Council for Econ. Def. 2026), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddbNMADk2AO6MZR6aBnSzp6KvSE3SnFkjaYX5WBvy-aRe0rVTcGut04mNHPDwDq9y_ebH8rs7cqfZFpufAf0t1Iw ("Neste contexto, entende-se que a Operação não possui o condão de acarretar alterações significativas ao ambiente concorrencial no Brasil, não demandando, deste modo, um maior aprofundamento da análise.").

⁷ Daehanminguk Heonbeop [Constitution] art. 15 (S. Kor.) ("All citizens shall enjoy freedom of occupation.").

I. The Case for Extending Notification Has Not Been Made

The KFTC explains that the Proposed Amendment seeks to prevent parties from evading notification obligations, noting that large global technology firms have used acquihires to recruit key personnel from AI startups.⁸ This concern echoes statements by U.S. enforcers and legislators.⁹

A transaction's exclusion from a notification regime says little about its competitive effects. Every threshold invites parties to structure transactions around it. Notification regimes deliberately leave many transactions unreviewed to focus scarce resources on those most likely to alter competitive conditions and give parties a predictable basis for planning.¹⁰

Acquihires also arise partly because conventional acquisitions face heightened scrutiny. When firms respond with licensing and hiring arrangements that leave the target independent, extending merger control to those arrangements tells them they are “damned if they buy and damned if they don’t.”¹¹ The relevant question is whether the transactions the Proposed Amendment would capture are likely to restrain competition. The published materials offer no evidence that they are.

Before extending notification obligations to a new class of transactions, the KFTC should establish that the class poses a significant risk to competition, that existing law cannot adequately address that risk, and that the benefits of review outweigh the costs. The Proposed Amendment meets none of these conditions.

Published reviews and evidence from evolving AI markets favor restraint rather than a presumption of harm (Subsection A). Existing law reaches harmful hiring practices and allows authorities to weigh the evidence, reasonable justifications, and efficiencies (Subsection B). Acquihires also support team mobility, workers' bargaining power, and startup investment. Wrongly deterring them would impose broad, often unobservable costs that could exceed those of wrongly permitting them, across sectors well beyond AI (Subsection C).

A. Published Reviews and Market Evidence Favor Restraint

The KFTC states that it developed the Proposed Amendment through exchanges with authorities in the European Union, Germany, and the United Kingdom.¹² But if anything, those authorities' experience points toward restraint. The CMA and CADE have both reviewed Microsoft's

⁸ Press Release, *supra* note 1.

⁹ See Bloomberg Podcasts, *FTC Chair Andrew Ferguson Talks Acquihires* | *Bloomberg Talks*, YOUTUBE (Jan. 16, 2026), https://www.youtube.com/watch?v=8u_hazxCplM; Letter from Sens. Elizabeth Warren, Ron Wyden & Richard Blumenthal to Gail Slater, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., and Andrew N. Ferguson, Chairman, Fed. Trade Comm’n (Feb. 4, 2026), https://www.warren.senate.gov/wp-content/uploads/media/doc/final_warren_wyden_blumenthal_letter_to_the_department_of_justice_and_the_federal_trade_commission_on_big_tech_revers_e_acqui-hires.pdf.

¹⁰ See Auer & Zúñiga, *supra* note 2, at 6–7.

¹¹ *Id.* at 23–24; Brian J. Broughman, Matthew T. Wansley & Samuel N. Weinstein, *No Exit*, 100 N.Y.U. L. REV. 1481, 1484–86 (2025) (situating license-and-hire transactions among responses to tougher merger enforcement).

¹² Press Release, *supra* note 1.

arrangements with Inflection AI and cleared the transaction. These published reviews provide a more useful starting point than a presumption that acquihires harm competition.

Microsoft reportedly paid about \$620 million for a nonexclusive license to Inflection's models and \$30 million for a waiver of claims arising from its hiring of Inflection staff, most of whom joined Microsoft.¹³ The CMA asserted jurisdiction but cleared the transaction at Phase 1. It found that Inflection had a very small share of chatbot use, had struggled to grow or sustain its user base, and exerted no material competitive constraint on rival services.¹⁴

CADE likewise cleared the transaction through an expedited review, concluding that it was "not likely to result in significant changes to the competitive landscape in Brazil and therefore does not require a more in-depth analysis."¹⁵ CADE also observed:

Microsoft would not exceed a 30% market share in any of the segments related to the development and application of artificial intelligence tools, which would mitigate major vertical competition concerns.

It is worth noting that the artificial intelligence sector is rapidly evolving, with the boundaries of relevant markets not yet clearly defined; it is reasonable to assume that there remains scope for market contestability and significant gains before a state of stabilization is reached. Furthermore, there are no strong indications of a decline in rivalry that would warrant intervention.¹⁶

Germany's Bundeskartellamt concluded that the transaction could, in principle, constitute a concentration but declined jurisdiction because Inflection had no substantial operations in Germany.¹⁷ The European Commission took no decision after the Court of Justice curtailed referrals of transactions below notification thresholds in *Illumina*.¹⁸ U.S. agencies have opened investigations but, to our knowledge, have brought no enforcement action against an acquihire.

The markets in which these transactions occur also show little sign of the entrenchment that critics predict. The cost of AI inference—running a trained model to produce an output—has fallen sharply. Epoch AI reports that "the price to achieve GPT-4's performance on a set of PhD-level science

¹³ Krystal Hu & Harshita Mary Varghese, *Microsoft Pays Inflection \$650 Mln in Licensing Deal While Poaching Top Talents*, Source Says, REUTERS (Mar. 21, 2024), <https://www.reuters.com/technology/microsoft-agreed-pay-inflection-650-mln-while-hiring-its-staff-information-2024-03-21>.

¹⁴ Competition & Mkts. Auth., *Microsoft Corporation's Hiring of Certain Former Employees of Inflection AI and Its Entry into Associated Arrangements*, Case ME/7103/24, Phase 1 Decision, ¶ 22 (Sept. 4, 2024), https://assets.publishing.service.gov.uk/media/6719ff5f549f63039436b3c8/Full_text_decision_.pdf.

¹⁵ *Microsoft/Inflection*, Decision No. 475/2026/CGAA5/SGA1/SG, ¶ 19.

¹⁶ *Id.* ¶¶ 14–15.

¹⁷ Press Release, Bundeskartellamt, *Taking Over Employees May Be Subject to Merger Control in Germany—Bundeskartellamt Not Competent to Review Microsoft/Inflection Transaction as Inflection Has No Substantial Operations in Germany* (Nov. 29, 2024), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/29_11_2024_Microsoft.htm.

¹⁸ See Joined Cases C-611/22 P & C-625/22 P, *Illumina, Inc. v. Comm'n*, ECLI:EU:C:2024:677 (Sept. 3, 2024), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CJ0611>; Bundeskartellamt, *supra* note 17 (noting the Commission's Sept. 18, 2024, announcement that it would not issue a decision).

questions fell by 40x per year. The rate of decline varies dramatically depending on the performance milestone, ranging from 9x to 900x per year.”¹⁹

New firms continue to enter at every layer of the AI supply chain, from computing resources to consumer services. Startups, rather than incumbents with the largest data holdings, produced the most successful early generative-AI services.²⁰ The empirical record on “killer acquisitions” also offers little basis for presuming harm. The study that popularized the term and prompted several investigations estimated that 5.3% to 7.4% of *pharmaceutical* acquisitions preempted future competition.²¹ Evidence of comparable effects in digital markets remains limited.

One of that study’s authors, Florian Ederer, has since examined roughly 1,200 startup acquisitions by eight leading technology firms and found little evidence that they suppress innovation. Patenting in the relevant technology areas rose before acquisition and continued afterward where further acquisitions followed. Acquired patents received more citations, including from firms that hired the targets’ employees, and target inventors who stayed with the acquirer went on to patent more.²²

We encourage the KFTC to take a wait-and-see approach while the evidence develops and generative AI remains in a formative stage. A notification obligation covering an entire class of transactions should rest on evidence that the class poses a significant risk to competition.

B. Existing Law Reaches Harmful Hiring Practices

The harms critics attribute to acquihires—hollowing out a rival or hoarding talent to deny it to competitors—are forms of conduct the MRFTA already reaches. Article 45(1)(viii) prohibits unfair interference with another firm’s business activities. The Enforcement Decree identifies unjustly inducing or hiring another firm’s personnel as one form of interference when it significantly impedes that firm’s business.²³ The KFTC’s guidelines give examples that closely match the concerns raised about acquihires: recruiting a large share of a firm’s core personnel with excessive benefits, or recruiting key personnel the hiring firm does not need to obstruct a competitor. The guidelines also allow the KFTC to consider reasonable justifications and efficiency gains.²⁴

¹⁹ Ben Cottier, Ben Snodin, David Owen & Tom Adamczewski, *LLM Inference Prices Have Fallen Rapidly but Unequally Across Tasks*, EPOCH AI (Mar. 12, 2025), <https://epoch.ai/data-insights/llm-inference-price-trends>.

²⁰ Auer & Zúñiga, *supra* note 2; Geoffrey A. Manne & Dirk Auer, *From Data Myths to Data Reality: What Generative AI Can Tell Us About Competition Policy (and Vice Versa)*, CPI ANTITRUST CHRON., Feb. 2024, at 2, 7–8.

²¹ Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021).

²² Florian Ederer, Regina Seibel & Timothy Simcoe, *Digital (Killer?) Acquisitions* (Nat’l Bureau of Econ. Rsch., Working Paper No. 35762, Sept. 2026), <https://www.nber.org/papers/w35762>.

²³ MRFTA, *supra* note 4, art. 45(1)(viii); Dokjeom Gyuje mit Gongjeong Georae-e Gwanhan Beomnyul Sihaengnyeong [Enforcement Decree of the Monopoly Regulation and Fair Trade Act], annex 2, item 8(b) (S. Kor.). This provision treats the conduct as an unfair trade practice rather than an abuse of dominance. The burden of proof is therefore lower: Plaintiffs need not show that the defendant holds a dominant position.

²⁴ Korea Fair Trade Comm’n, *Bulgongjeong Georae Haengwi Simsa Jichim* [Guidelines for Review of Unfair Trade Practices] pt. V, item 8(b) (S. Kor.).

The talent-hoarding theory also rests on thin evidence. The most prominent study of this theory infers that incumbents keep researchers idle using data that shows only that certain software firms retained more skilled employees after their patent protection weakened. Yet ordinary management decisions could explain the same pattern.²⁵ Where hoarding does occur and impedes a rival, the KFTC can assess it under the existing rules on the evidence.

Other provisions of Korean competition law address related conduct. Article 5 reaches abuse of a dominant position, including unfair interference with rivals' business activities. Article 40 reaches agreements among competitors, including restraints on hiring. Korea's trade-secret law addresses the misappropriation of confidential information by departing employees.²⁶ These laws allow authorities to assess conduct on an actual record without burdening the many transactions that raise no concern.

C. Acquihires Support Labor Mobility and Startup Investment

Acquihires serve important economic functions. They give founders and investors an opportunity for exit when a startup cannot raise further capital, preserve teams whose joint value exceeds the sum of individual hires, and reward entrepreneurial risk-taking. Sought-after engineers often prefer to move through an acquihire rather than leave individually, which could damage their standing with investors who might finance future ventures.²⁷

Competition for AI talent has also boosted workers' compensation.²⁸ Treating coordinated team moves as reportable business transfers would weaken those workers' bargaining position. A team that can move together has a better alternative to its current employer—and therefore more bargaining power—than individuals who must move one at a time. Burdening employers who bid for teams would reduce competition for their services, contrary to competition law's aims in labor markets.

For many target firms, failure is the realistic alternative to an acquihire. Practitioners and scholars describe acquihires as a soft landing for startups that cannot secure further funding, although the recent AI transactions that prompted regulatory scrutiny involved considerably better-capitalized targets.²⁹

²⁵ Geoffrey A. Manne, *Gotta Catch 'Em All? Antitrust and the AI Talent Wars*, TRUTH ON THE MKT. (June 18, 2026), <https://laweconcenter.org/resources/gotta-catch-em-all-antitrust-and-the-ai-talent-wars> (discussing Shaolong Wu & Zefan Qian, *Talent Hoarding and Upstream Innovation: Labor Market Distortions by Large Incumbents* (working paper)).

²⁶ MRFTA, *supra* note 4, arts. 5, 40; Bujeonggyeongjaeng Bangji mit Yeongeopbimil Boho-e Gwanhan Beomnyul [Unfair Competition Prevention and Trade Secret Protection Act], Act No. 911, Dec. 30, 1961 (as amended) (S. Kor.).

²⁷ John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 DUKE L.J. 281 (2013).

²⁸ Auer & Zúñiga, *supra* note 2, at 14–15.

²⁹ See Elizabeth Pollman, *Startup Failure*, 73 DUKE L.J. 327 (2023) (discussing soft-landing acquisitions and acquihires as alternatives to formal insolvency); Louis Lehot, *What an Acqui-Hire Looks Like for an AI Startup Today*, MEDIUM (July 16, 2026) (noting that most acquihires involve companies that raised less than \$5 million and could not raise another round).

Making these exits costlier or less certain lowers the expected return on venture investment and, with it, the funding available to the next generation of startups.³⁰ Japan offers a useful contrast. Acquisitions now account for 88% of Japanese startup exits, and the Japanese government has made raising that share an explicit policy objective.³¹

The costs of enforcement errors are asymmetric. If the KFTC wrongly permits an acquihire, the error tends to correct itself because employees remain free to leave, join rivals, or found new firms. As Section II.B explains, acquired employees leave at higher rates than ordinary hires. If the KFTC wrongly deters acquihires, the costs fall on labor mobility and venture investment across the economy. Those costs are largely unobservable because the deterred transactions never occur.³²

These costs would extend beyond AI and global technology firms. The Proposed Amendment applies to any acquirer that meets the MRFTA's thresholds, and Chairman Joo Byung-ki has identified semiconductors and pharmaceuticals among the sectors of concern.³³ Their importance raises the costs of both mistaken intervention and inaction. Well-intentioned rules that chill procompetitive deals can do lasting harm to the competition they aim to protect.

II. Acquihires Do Not Fit the Business-Transfer Framework

The Proposed Amendment would bring acquihires within merger control by redefining a “business” under Article 9(1)(iv) of the MRFTA rather than amending the statute. This approach stretches provisions designed for transfers of assets, contracts, and an organized business to cover voluntary employee moves, often accompanied by a nonexclusive license.

The amendment departs from the existing definition of a business transfer and raises questions about the KFTC's authority to expand statutory obligations through an administrative notice (Subsection A). Employees retain control of their human capital and remain free to leave, limiting the acquirer's ability to retain a team (Subsection B). The proposed “material part” test overlooks what the transferor retains and whether rivals can still access its technology (Subsection C). Finally, the implementation rule ties the acquirer's obligations to decisions it may not control, while conventional merger remedies cannot reliably restore a team to its former employer (Subsection D).

These problems call for a narrower approach tied to transferred property rights, the target's loss of competitive significance, and acts within the parties' control.

³⁰ Geoffrey A. Manne, Samuel Bowman & Dirk Auer, *Technology Mergers and the Market for Corporate Control*, 86 MO. L. REV. 1047 (2022).

³¹ Geoffrey A. Manne, Dirk Auer, Lazar Radic & Mario A. Zúñiga, *Comments of the International Center for Law & Economics to the Japan Fair Trade Commission Re: Opinions on the Draft of the Business Combination Guidelines 3-4* (Int'l Ctr. for L. & Econ., Aug. 27, 2026).

³² For an explanation of the error-cost framework, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

³³ Kim Nam-myung, *Korea to Screen “Acqui-Hire” Deals as Corporate Mergers*, SEOUL ECON. DAILY (Sept. 10, 2026), <https://en.sedaily.com/finance/2026/09/10/korea-to-screen-acqui-hire-deals-as-corporate-mergers>.

A. Personnel Moves Are Not Transfers of Property Rights

Article 9(1)(iv) of the MRFTA reaches the acquisition or lease of all or a material part of another company's business, and the acquisition of all or a material part of its fixed operating assets.³⁴ The Notification Guidelines define a business as "a bundle of property rights organized for the company's business purposes and functioning as an integrated whole," including sales rights, intellectual-property rights, and permits of economic value.³⁵ A part of a business is "material" if it can operate as an independent business unit or its transfer significantly reduces the transferor's sales.³⁶

Both definitions describe something that changes hands. A business transfer moves assets, contracts, and the organization that uses them from one owner to another. The associated employment relationships generally pass to the transferee, subject to each employee's right to object. In an acquihire, by contrast, employees resign and accept new offers, while the transferor retains its property.

The existing definition mentions personnel only as a component of sales rights, which include "sales-related organization, personnel, and agency relationships."³⁷ Personnel therefore count when they form part of an organized business that changes hands together with its contracts and assets. The Proposed Amendment would make the movement of personnel and their know-how sufficient, even when the transferor transfers nothing else and continues to operate.

Adding organized personnel to a category defined by bundles of property rights makes the definition internally incoherent. Employees remain free to change employers after a deal. Their movement does not itself transfer property rights.

The amendment also raises a question of legal authority. The KFTC presents it as a clarification, but it would substantially expand statutory notification obligations. An administrative notice should not bring transactions within the statute's scope when its existing provisions do not cover them. The National Assembly should decide whether to expand Article 9(1)(iv).

B. Employees Retain Control of Their Human Capital

Article 15 of the Korean Constitution guarantees every citizen's freedom to choose an occupation.³⁸ Other legal systems recognize similar principles. Section 6 of the U.S. Clayton Act provides that "the labor of a human being is not a commodity or article of commerce." The House of Lords held in *Nokes v. Doncaster Amalgamated Collieries* that, absent a contrary statutory provision, an employment

³⁴ MRFTA, *supra* note 4, art. 9(1)(iv).

³⁵ Korea Fair Trade Comm'n, *Gieop Gyeolhap-ui Singo Yoryeong* [Notification Guidelines for Business Combinations] § 4(b) (S. Kor.) [hereinafter Notification Guidelines].

³⁶ *Id.* § 4(c).

³⁷ Notification Guidelines, *supra* note 35, § 4(b).

³⁸ S. Kor. Const. art. 15.

contract cannot transfer without the employee’s consent.³⁹ An employer offers terms that individuals remain free to accept or reject.

An acquirer therefore gains the prospect that a team will move together, rather than ownership of its human capital. Coordinated offers, bonuses tied to the team’s joining, and agreements not to sue align the incentives of individuals who could otherwise decide separately. Each employee remains free to decline, leave later, or join a rival.⁴⁰ Economic theory supports the same distinction. Under the property-rights theory of the firm, a firm owns the complementary assets around which employees organize their work, but cannot own their human capital.⁴¹

The evidence confirms that employee retention is uncertain. A study of roughly 230,000 acquired startup workers finds that “acquired workers show significantly higher turnover rates than regular hires,” with attrition concentrated among the highest earners.⁴² Other research finds the same pattern among senior and technical staff, and finds that acquisitions increase acquired employees’ later entrepreneurship.⁴³ Acquihiere theories of harm depend on the acquirer retaining a team. That assumption weakens fastest for the people whose departure from the target supposedly causes the harm.

Some commentators identify the relevant asset as the know-how the team carries.⁴⁴ This argument conflates two kinds of knowledge. Codified know-how—source code, model weights, and documentation—moves through licenses or assignments, to which existing legal analysis already applies. Tacit know-how—knowledge embedded in employees’ skills and experience—is inseparable from the people who hold it. Those employees remain free to leave. Where departing employees take information they have no right to use, trade-secret law supplies the remedy rather than merger control.

C. ‘Material Part’ Test Should Assess What Is Transferred

The Proposed Amendment adds a third way to satisfy the first component of the “material part” test. It would suffice that the acquirer becomes able, after the transaction, to carry on the same

³⁹ 15 U.S.C. § 17; *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] AC 1014 (HL).

⁴⁰ Auer & Aralu, *Reverse Acquihiere*, *supra* note 2; Onyeka Aralu & Dirk Auer, *Acquihiere and Antitrust: When Buying the Team Isn’t Buying the Company*, TRUTH ON THE MKT. (Apr. 9, 2026), <https://truthonthemarket.com/2026/04/09/acquihiere-and-antitrust-when-buying-the-team-isnt-buying-the-company> [hereinafter Aralu & Auer].

⁴¹ Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990).

⁴² J. Daniel Kim, *Startup Acquisitions as a Hiring Strategy: Turnover Differences Between Acquired and Regular Hires*, 9 STRATEGY SCI. 118 (2024).

⁴³ Weiyi Ng & Toby E. Stuart, *Acquired Employees Versus Hired Employees: Retained or Turned Over?*, 43 STRATEGIC MGMT. J. 1025 (2022); J. Daniel Kim, *Startup Acquisitions, Relocation, and Employee Entrepreneurship*, 43 STRATEGIC MGMT. J. 2189 (2022).

⁴⁴ See Nina Fridman, *When a Mass Resignation Becomes a Merger: Rethinking Asset Acquisitions for the AI Era*, 93 U. CHI. L. REV. 999 (2026); David T. Wong, Comment, *An Acquisition by Another Name: Reverse Acquihiere Under the Clayton Act*, 135 YALE L.J. 3175 (2026) (treating human capital as an asset while distinguishing it from employees themselves).

business activities as the transferor.⁴⁵ This test focuses on the acquirer’s capabilities rather than the transferor’s loss, treating hiring arrangements coupled with exclusive and nonexclusive licenses alike. An incumbent already active in the field will often satisfy it by definition, as will almost any hire that adds capability. As an alternative to the existing criteria, it also bypasses the requirement that the transferred part be capable of operating as an independent business unit—the requirement that gives “material part” its meaning.

The other jurisdictional requirements do little to narrow the test. The price threshold requires consideration equal to only 10% of the transferor’s total assets or 10 billion South Korean won (KRW).⁴⁶ The thresholds for the parties’ size reach any acquirer group with KRW 300 billion in assets or turnover and any transferor with KRW 30 billion.⁴⁷ Because total assets count toward these thresholds, a well-capitalized startup holding venture funding may qualify despite having little revenue.

Consider a hypothetical transaction. A Korean electronics group hires 15 engineers from a chip-design startup holding KRW 40 billion in venture funding and pays it KRW 12 billion for a nonexclusive license to its design tools. The startup retains its remaining staff, continues to serve other customers, and remains free to license the same tools to the group’s rivals. Under the Proposed Amendment, the transaction could qualify as a business transfer. The engineers form an organized team whose knowledge enables them to perform a core function, the group can now carry on the startup’s design activities, and the license fee exceeds KRW 10 billion. Yet nothing in this sequence suggests that the transaction has transferred or eliminated the startup’s competitive significance.

A more accurate test would focus on what the transaction removes from the market, including whether the acquirer’s rivals retain commercially meaningful access to the target’s technology.⁴⁸ When the target remains free to license its technology to others and continue operating, the acquirer gains a workforce it cannot own and a license its rivals can also obtain. By contrast, a formally nonexclusive license that operates as exclusive in practice, or prevents the target from using or licensing its technology, may transfer the target’s competitive position and properly qualify as a business transfer.

The transactions that prompted the Proposed Amendment—including those involving Inflection, Character.AI, Windsurf, and Groq—rested on nonexclusive licenses under which the target retained the right to use and license its technology.⁴⁹ The guidelines should distinguish these arrangements from transfers that remove a business’s competitive significance.

⁴⁵ Proposed Amendment, *supra* note 1, § 4(c)(1).

⁴⁶ Notification Guidelines, *supra* note 35, § 4(c); Proposed Amendment, *supra* note 1, § 4(c)(2).

⁴⁷ MRFTA, *supra* note 4, art. 11(1); Shin & Kim LLC, *Merger Control in Korea Vol. 13—KFTC to Bring “Acquihires” Within the Scope of Merger Review* (May 29, 2026), <https://shinkim.com/eng/media/newsletter/3312> [hereinafter Shin & Kim].

⁴⁸ Aralu & Auer, *supra* note 40.

⁴⁹ Auer & Aralu, *Reverse Acquihires*, *supra* note 2; Press Release, Groq, *Groq and Nvidia Enter Non-Exclusive Inference Technology Licensing Agreement to Accelerate AI Inference at Global Scale* (Dec. 24, 2025).

The KFTC has publicly indicated that ordinary recruitment and the hiring of a handful of employees will not count as business transfers.⁵⁰ The Proposed Amendment contains no such exclusion. The final guidelines should state it expressly.

D. Implementation and Remedies Must Be Workable

The new implementation rule illustrates the mismatch. For organized personnel, the Proposed Amendment treats a business transfer as implemented when the transferor ceases its existing business.⁵¹ Implementation determines when parties must submit a post-closing notification and what parties subject to pre-closing notification may do before clearance.⁵²

The transferor's board and investors decide when to cease operations, and the Proposed Amendment does not define cessation. A full wind-down would presumably qualify. A product pivot, a reduction in operations, or the sale of the remaining business to a third party is less clear. An acquirer could face liability for implementing a transaction before clearance because of a decision it neither made nor knew about.

The rule would also pressure startups to keep hollowed-out operations running during review, consuming investors' capital to avoid triggering the acquirer's obligations. The transitional provision compounds this uncertainty. It applies the amendment to business combinations whose notification obligation arises after its effective date, so a transaction signed years earlier could become notifiable if the transferor winds down afterward.⁵³

Remedies present a further difficulty. Corrective measures for unlawful business combinations, such as orders to dispose of shares or transfer a business, presuppose assets the acquirer can relinquish.⁵⁴ The KFTC cannot order employees to return to a former employer without conflicting with their constitutional freedom to choose an occupation. Requiring the acquirer to dismiss the team would not restore competition, because nothing would ensure that the employees return to the target. Rescinding the license would deprive the target and its investors of the consideration that often keeps the target alive. A pre-closing hold would, in practice, prevent individuals from starting jobs they have already accepted.⁵⁵ A notification obligation that cannot lead to a workable remedy imposes costs without corresponding benefits.

Recommendation: Delete subparagraph (2) of the definition of a business, or limit it to personnel who move together with transferred property rights, such as exclusive intellectual-property rights, ownership of source code or model weights, or customer contracts. Replace the new "material part"

⁵⁰ Kim Nam-myung, *supra* note 33.

⁵¹ Proposed Amendment, *supra* note 1, § 4(f).

⁵² MRFTA, *supra* note 4, art. 11(8); Notification Guidelines, *supra* note 35, § 4(e).

⁵³ Proposed Amendment, *supra* note 1, addendum ¶ 2.

⁵⁴ MRFTA, *supra* note 4, art. 14.

⁵⁵ Auer & Aralu, *Reverse Acquihires*, *supra* note 2.

criterion with a test focused on what the transferor loses and whether rivals retain access to the technology. Tie implementation to acts within the parties' control.

III. The Rules Would Misidentify Reportable Transactions

Under the current Notification Guidelines, the “transfer price” includes consideration paid for the business or fixed operating assets, liabilities assumed, and annual fees for leases and management entrustment.⁵⁶ Each element reflects something the transferor gives up, such as ownership of assets or the right to operate a business for a specified period.

For organized personnel, the Proposed Amendment would count any economic consideration paid to the transferor for the transaction, “regardless of its designation.” Examples include payments to release rights relating to departing personnel and license fees for intellectual property needed for the business.⁵⁷ The KFTC presents this as a technical change to account for consideration spread across several contracts.⁵⁸ Its consequences are substantive. The transfer price determines whether a transaction meets the price requirement of the “material part” test. A personnel-based transfer that falls below that threshold is not notifiable, even if it satisfies the test’s other component.⁵⁹

These rules would poorly distinguish transactions that warrant review. License fees and payments supporting lawful hiring do not establish that the acquirer gains control over the target’s competitive position, and their size does not establish competitive harm (Subsection A). Counting only payments to the transferor would burden cooperative deals, encourage uncompensated recruitment, and shift value toward selected employees at the expense of investors and those who remain. Unclear aggregation rules would compound the uncertainty and encourage parties to restructure payments to avoid notification (Subsection B).

A. Transaction Prices Do Not Establish Competitive Harm

A nonexclusive license fee buys access to technology without control over it. The licensor remains free to use the technology and license it to others, including the licensee’s rivals. For this reason, the U.S. Federal Trade Commission’s Premerger Notification Office has long treated exclusive licenses as potentially reportable asset acquisitions and nonexclusive licenses as outside the notification requirement.⁶⁰

The transactions that prompted the Proposed Amendment illustrate the point. After Microsoft’s arrangements with Inflection, Inflection retained “the unfettered ability to commercialise” its

⁵⁶ Notification Guidelines, *supra* note 35, § 4(d).

⁵⁷ Proposed Amendment, *supra* note 1, § 4(d)(3).

⁵⁸ Press Release, *supra* note 1 at 2.

⁵⁹ Proposed Amendment, *supra* note 1, § 4(c).

⁶⁰ Fed. Trade Comm’n, Premerger Notification Off., Informal Interpretation 9307006 (July 1993), <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/9307006>; Eric Fruits, Daniel J. Gilman, Onyeka Aralu & Brian Albrecht, *ICLE Comments to FTC and DOJ on Premerger Notifications* pt. IV.B (Int’l Ctr. for L. & Econ., May 22, 2026).

models, including by licensing them to third parties. It also announced that it would offer its latest model through licensing partnerships and application programming interfaces (APIs) that let other software access its models.⁶¹ Counting a nonexclusive license fee as the price of a business conflates access with control. The test proposed in Section II.C would capture a formally nonexclusive license that operates as exclusive in practice. The transfer-price calculation need not substitute for that inquiry.

The same problem affects the transaction-value threshold. Korea introduced it in 2021 on the premise that a high price for a target with little revenue may signal competitive significance that revenue-based thresholds miss. Authorities have rarely invoked it since.⁶² Whatever the merit of that premise for acquisitions, it does not carry over to license-and-hire arrangements. Those payments buy a license the licensor can grant again and a set of employment decisions it cannot guarantee.

Payments to release rights over departing personnel serve a similar function. In the Microsoft/Inflection arrangements, the reported \$30 million payment secured a waiver of claims arising from Microsoft's hiring of Inflection staff. Such payments remove a litigation threat that would otherwise deter lawful mobility. They support the hiring arrangement without purchasing the target's business.⁶³

More generally, transaction prices reflect scarce talent, the opportunities new technology may create, the benefits of combining the target's capabilities with the acquirer's assets, and competition among bidders. None of these establishes that the transaction eliminates a competitive constraint imposed by the target.⁶⁴

The price requirement compounds the problem. Measured against the transferor's total assets, the 10% threshold captures the transaction's size relative to the target rather than its effect on competition. For a small startup, almost any meaningful payment will meet it.

B. The Price Rule Distorts Deal Structures

The Proposed Amendment counts only consideration paid to the transferor. These payments allow a startup's investors, remaining employees, and option holders to recover value. An acquirer that recruits a startup's team without paying the startup would not meet the price requirement. The rule would therefore burden cooperative transactions while leaving uncompensated raids on a startup's workforce untouched. This result runs counter to the Proposed Amendment's stated purpose of

⁶¹ Competition & Mkts. Auth., *supra* note 14, at 21.

⁶² Shin & Kim, *supra* note 47, § 3.

⁶³ Broughman, Wansley & Weinstein, *supra* note 11; Auer & Aralu, *Reverse Acquihires*, *supra* note 2, pt. III (describing such covenants as ancillary to lawful hiring).

⁶⁴ Manne, Bowman & Auer, *supra* note 30; Geoffrey A. Manne *et al.*, *Comments of the International Center for Law & Economics: EU Draft Merger Guidelines—Public Consultation* pt. II.A.3 (Int'l Ctr. for L. & Econ., June 22, 2026) (explaining that acquisition prices reflect complementarity, option value, and talent).

protecting venture companies.⁶⁵ It would encourage structures that leave investors with less and substitute litigation for negotiated settlements.

The rule would also encourage parties to shift value from payments to the transferor toward compensation paid directly to individual employees. This would arbitrarily favor founders and senior researchers over investors and employees who stay behind. The disputes following the Windsurf transaction illustrate these conflicts over how to distribute a deal's proceeds.⁶⁶

The press release explains that “regardless of its designation” aims to capture consideration spread across several contracts, but the Proposed Amendment provides no aggregation rules.⁶⁷ It does not identify which agreements form part of a transaction or the period over which payments count. Nor does it explain whether accompanying agreements for cloud computing, chips, or distribution count toward the price, or whether payments to the transferor's shareholders count at all. These gaps prevent parties from determining whether they must notify and encourage them to stagger payments or route them through affiliates.

Recommendation: Exclude nonexclusive license fees and payments ancillary to hiring, such as releases of noncompete covenants and agreements not to sue, from the transfer price. Specify which agreements count, the aggregation period, and whether payments to the transferor's shareholders count. If the KFTC retains a price rule for personnel-based transfers, set a separate, substantially higher threshold to reduce the risk of capturing harmless transactions, rather than treating price as a measure of competitive significance.

IV. Conclusion and Recommendations

The concern that a firm might acquire a competitor's business in substance without acquiring it in form supports a narrow rule. The Proposed Amendment instead would reach ordinary licensing and hiring, measure transactions by prices that do not establish competitive harm, and tie notification obligations to events outside the acquirer's control. Employees remain free to leave, and conventional merger remedies cannot reliably restore a team to its former employer.

Published reviews and the evidence from AI markets instead favor restraint. Existing law already addresses harmful hiring practices, while acquihires can preserve teams, strengthen workers' bargaining power, and provide exits that support startup investment. Wrongly deterring these transactions would impose broad, often unobservable costs extending beyond AI and global technology firms. Acquirers could shift toward uncompensated recruitment, staggered payments, and litigation, while costlier, less certain exits would reduce the returns that finance venture investment in Korea.

⁶⁵ See Kim Nam-myung, *supra* note 33.

⁶⁶ Auer & Aralu, *Reverse Acquihires*, *supra* note 2, pt. IV.

⁶⁷ Press Release, *supra* note 1, at 2.

Firms would also face obligations they cannot reliably assess in advance under a combination of tests no peer jurisdiction has adopted. The United Kingdom, which the KFTC consulted, is moving toward narrower jurisdiction. Its government has proposed to narrow the open-ended share-of-supply test that gives the CMA broad discretion to assert jurisdiction, and the CMA has said it is less likely to investigate global transactions that other authorities are reviewing.

Guidelines serve their purpose when firms can predict how the KFTC will treat a transaction. Predictable merger control also helps make Korea an attractive place to found, finance, and acquire innovative companies. We recommend that the KFTC withdraw the Proposed Amendment and address harmful conduct through Articles 5, 40, and 45 of the MRFTA. Any expansion of statutory notification obligations should come from the National Assembly.

If the KFTC nonetheless proceeds, we recommend that it:

1. Delete subparagraph (2) of the definition of a business, or limit it to personnel who move with transferred property rights that together constitute an operating business.
2. Replace the new “material part” criterion with a test asking whether the transferor loses its ability to continue the business and rivals lose commercially meaningful access to the relevant technology.
3. Expressly exclude ordinary recruitment and provide safe harbors for nonexclusive licenses that leave the licensor free to license others and for transactions after which the transferor continues operating.
4. Exclude nonexclusive license fees and payments ancillary to hiring from the transfer price. Specify the agreements and periods covered by aggregation, clarify whether shareholder payments count, and set a separate, substantially higher threshold for personnel-based transfers.
5. Tie implementation to acts within the parties’ control and confirm that an individual’s start of employment never constitutes implementation.
6. Exclude transactions signed before the effective date, regardless of when the transferor ceases its business.
7. Publish worked examples addressing transactions like those involving Inflection, Character.AI, Windsurf, and Groq, and provide a channel for informal pre-notification consultation.
8. Review the amended guidelines after a defined period and publish data on notifications and their outcomes.