PHILIPPINE COMPETITION COMMISSION
Ensuring businesses compete and consumers benefit

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GUIDELINES FOR THE *MOTU PROPRIO* REVIEW OF MERGERS AND ACQUISITIONS IN DIGITAL MARKETS

Legal Basis

1. Pursuant to Section 12(b)[1] of Republic Act No. 10667, otherwise known as the "Philippine Competition Act" (PCA), the Philippine Competition Commission (PCC) may review mergers and acquisitions and prohibit those which are likely to substantially prevent, restrict or lessen competition in the market.

Purpose

2. These Guidelines are being issued by the PCC pursuant to Section 12 (k)[2] of the PCA. These Guidelines are intended to give greater transparency and predictability to the PCC's understanding of the PCA. These are not intended to constitute a restatement of the PCA or its Implementing Rules and Regulations (PCA-IRR) and should not be construed as binding on how the PCC will act upon specific mergers or acquisitions. These Guidelines would allow digital companies to consult with the PCC on whether a particular transaction might be harmful to competition.

Indicators

3. The following is a non-exhaustive list of indicators of potential competition issues that may arise from a merger or acquisition in the digital market.

I. Transactions involving a gatekeeper.

4. A company may be considered a gatekeeper when it provides a digital service, access to which is necessary to participate in the market. When the digital service is an essential connection between business users and consumers, the gatekeepers may create a bottleneck in the digital economy and limit the development of competitors.

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[1] Review proposed mergers and acquisitions, determine thresholds for notification, determine the requirements and procedures for notification, and upon exercise of its powers to review, prohibit mergers and acquisitions that will substantially prevent, restrict, or lessen competition in the relevant market.

[2] Issue advisory opinions and guidelines on competition matters for the effective enforcement of this Act and submit annual and special reports to Congress, including proposed legislation for the regulation of commerce, trade, or industry.

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5. Mergers or acquisitions that involve one or more gatekeepers[3] with competitive significance in digital markets may have a significant effect on markets even if they remain below notification thresholds.

6. Gatekeepers could limit switching by bundling services, foreclose competitors' access to the platform, engage in self-preferencing, or limit multihoming.[4] Additionally, gatekeepers could enter adjacent markets by leveraging their dominant position in the platform market, thereby increasing their reach and limiting the development of competitors.

7. For example, a gatekeeper providing e-commerce services could acquire a small company providing logistics and transportation services. The gatekeeper could, after the acquisition, bundle its e-commerce services by offering its own transportation services. Although this could be efficiency-enhancing, it could also lead to the exclusion of non-vertically integrated logistics providers.

8. Mergers or acquisitions that involve only one gatekeeper may trigger a *motu proprio* review. In determining whether a transaction involves a gatekeeper, the PCC shall not rely solely on an entity's size. Other factors such as creation of direct and indirect network effects, access to and use of data relevant for competition, and innovation-driven competition, shall be considered, among others.

II. Transactions involving companies with data-centric operations.

9. Mergers or acquisitions involving data-centric companies affect the amount and nature of data[5] available to competitors.[6] Doing business with the data acquired and accessing it can become a key element in determining market power. Additionally, merging datasets can help digital platforms gain insights and economic value. These transactions could generate a competitive advantage or lessen privacy conditions for users.

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[3] The European Union introduced the concept of Gatekeepers in Art. 3.1 of the Digital Markets Act: "An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future."

[4] Users can multihome when they can join more than one platform offering the same or similar service. For example, if users download and utilize more than one ride-hailing application they are multihoming that particular service.

[5] The Australian Competition and Consumer Commission ("ACCC") in its Digital Platforms Inquiry has recommended to include "the amount and nature of data which the acquirer would likely have access to as a result of the acquisition" as a factor relevant to merger analysis.

[6] Massimo Motta & Martin Peitz, Big tech mergers, 54 Information Economics and Policy 100868 (2021), https://linkinghub.elsevier.com/retrieve/pii/S016724520300111 (last visited Apr. 6, 2023)

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10. For example, a transaction where a social media platform with advertisement services acquires a messaging application provider may allow the merged entity to consolidate data collected from users of both services. Post-transaction, the merged entity may use such data to improve its targeted advertisement, thereby gaining an advantage over other providers of advertisement services.

III. Transactions that might significantly reinforce network effects.

11. Network effects exist when an increase in the number of a platform's users leads to an increase in its value and attractiveness to all users. An e-commerce platform, for example, increases its value as more sellers and buyers interact on the platform. Similarly, a messaging application holds little value if it has no users. As a platform's user base increases, so does its value—as it offers more possibilities of communication for users.

12. By acquiring competitors, a platform can significantly strengthen network effects, thus making it more difficult for other platforms to compete. The platform could offer more options for interactions, making it more attractive, while eliminating a competitor. However, this ultimately limits users' choices. Increased network effects may tip the market in favor of a dominant provider. Once the market tips, competitors would be less likely to reach a similar scale, thus limiting competition in the market.

13. For example, a ride-hailing company that acquires a competitor, regardless of its size or revenues, would strengthen the platforms' network effects as it would connect an increasing number of drivers and riders.

IV. Transactions involving parties considered innovators.

14. An entity could be considered an innovator when it performs in a market where R&D is essential or where there is continuous competition for innovation. Mergers and acquisitions involving an innovator can have a significant competitive impact in the market, requiring further review by the PCC. The transaction may affect innovation strategies in the market by, for example, limiting the incentives to innovate, to interoperate with other providers, or to license patents. This is particularly important when the transaction involves a disruptive innovator.

15. To illustrate, when a social media platform acquires a competitor that offers a new social media service which is gaining momentum among users, the acquiring entity could incorporate the services of the acquired entity to its main business, thereby limiting the development of an innovative competitor.

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16. When a party to merger or acquisition is a significant player in an industry where innovation is important, the PCC may view such party's R&D activities as falling within an innovation market, or as part of a broader market which may encompasses manufacturing.[7] The innovator may either be the acquiring or acquired entity in the transaction.

V. Conglomerate transactions involving digital players.

17. Conglomerate mergers are those which involve parties that have neither horizontal nor vertical relationships. The parties to a conglomerate merger are not competitors, nor do they have customer-supplier relationships.

18. Conglomeration in digital markets can limit competitors' development, restrict innovation, and increase barriers to entry. A conglomerate merger could allow an e-commerce platform to expand into downstream markets. It can also increase the merged entity's incentives to foreclose companies providing competing products by restricting access to the platform. In addition, conglomerate digital mergers may allow for the development and expansion of digital ecosystems. Digital ecosystems can foster innovation by offering new products and services. However, they can also lock in consumers into their products and services, limit switching, increase the risk of market foreclosure, cause data concentration, promote anticompetitive tying and bundling strategies, or limit innovation.

19. For example, a ride-hailing company that acquires a brick-and-mortar retail chain may adopt a bundling strategy by providing delivery services only to its own stores, thus limiting users' access to competing options.

VI. Transactions of parties involved in subsequent acquisitions.

20. Two or more mergers or acquisitions made by a digital operator within a one-year period may raise a red flag with the PCC. The successive transactions contemplated herein may involve the same acquirer and different acquired entities that do not necessarily belong to the same notifying group. For example, a digital operator that acquires several small

[7] As defined by the Korean Federal Trade Commission in its Amended Merger Review Guidelines for Greater Guidance in Reviewing Mergers in Innovation Industries "if the nature of the industry to which the merging parties belong is such that innovation activity such as R&D is essential or there is continuous innovation competition, and at least one of the merging parties is an important competitor in such competition, then a field with innovation activity in close proximity may be defined separately as an innovation market or as part of a broader market encompassing manufacturing and sales." (Section V.1.c)

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enterprises in a series of transactions that do not breach the notification thresholds within a period of one year may trigger a *motu proprio* review by the PCC. While the sizes of the parties and of the transaction are not substantial enough to trigger notification, the successive transactions could have an aggregated impact on competition in the market.

VII. Transactions involving parties under investigation.

21. Mergers or acquisitions could have even more pressing consequences when attended by other anticompetitive conduct in the market. Thus, transactions involving parties under investigation for possible violation of the PCA warrant a review by the PCC to prevent further anticompetitive effects.

VIII. Transactions with a value of the transaction close to notification thresholds.

22. Transactions that do not breach the notification thresholds need not be notified to the Commission. Nonetheless, the PCC may consider reviewing a non-notifiable merger or acquisition in the digital markets where the value of the consideration or contract price is close to the size-of-transaction threshold. In determining whether or not the transaction must be reviewed, the Commission shall consider both monetary consideration and non-monetary benefits (e.g., stocks, board seat, or management position, etc.).

IX. Transactions involving parties with a significant share of the supply of a good or service.

23. The share-of-the-supply criterion focuses on the parties' market influence in the possible joint provision of a good or service, which may not be in the same market. A definition of the relevant market is not required to analyze the share of the supply. The goods or services analyzed to determine whether a *motu proprio* review is needed do not need to be the same as the relevant markets defined for the merger analysis. A share of the supply of 30% in any of the involved goods or services would signal significant participation of the parties in the market.[8]

24. Take for example a digital ecosystem providing mapping services that acquires a real-time navigation application. The transaction does not trigger notification based on the thresholds, possibly because of the low revenues generated by the acquiring entity. Nonetheless, if the navigation application supplies more than 30% of its market, the PCC

[8] The United Kingdoms' Competition and Markets Authority includes share of the supply as one of the two elements that may trigger the analysis of mergers by the authority.

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could consider this a transaction of interest in view of the relevance of the parties to the supply of these services.

Consultation and Voluntary Notification

25. Digital mergers and acquisitions would typically involve some of the abovementioned indicators. Parties to transactions where these indicators are present are encouraged to consult with the Mergers and Acquisitions Office (MAO) prior to the execution of definitive agreements relating to their transaction. During the consultation, the parties may present evidence and information to justify that their transaction would not pose a risk for competition or agree on a voluntary notification of their transaction.

Interpretation

26. The Guidelines are not exhaustive and do not set a limit on the power of the PCC to conduct a *motu proprio* review of mergers and acquisitions. The PCC will apply these Guidelines flexibly, or where appropriate, deviate therefrom, considering the attending circumstances of each merger or acquisition, and will apply these Guidelines to attain the policy objectives of the PCA, PCA-IRR, and other regulations relating to mergers and acquisitions.

27. These Guidelines shall be applied by the PCC together with the 2018 PCC Merger Review Guidelines and the PCC Non-Horizontal Merger Review Guidelines.

28. The PCC may update these Guidelines to reflect developments in the local competition landscape and may publish new or supplemental guidance.

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