PHILIPPINE COMPETITION COMMISSION

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PCC Guidelines on Merger Remedies

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1. Introduction

1.1. Section 20 of Republic Act No. 10667 or the Philippine Competition Act ("**PCA**")empowers the Philippine Competition Commission ("**PCC**") to prohibit mergers and acquisition agreements that will likely result in substantial prevention, restriction, or lessening of competition ("**SLC**") in the relevant market/s.

1.2. Section 18(c) of the PCA provides that remedies may be considered and accepted by the PCC in mergers and acquisitions that would otherwise be prohibited under Section 20 of the PCA.

1.3. These Guidelines on Merger Remedies (the "**Guidelines**") explain the PCC's approach in assessing remedies for mergers and acquisitions that were found during review to likely result in SLC in identified relevant markets. More particularly, these Guidelines contain a discussion of the design, selection, and implementation of merger remedies.

1.4. In case of irreconcilable conflict between these Guidelines and any other guidelines or clarificatory notes, whether published or adopted by the PCC, the most recently published document shall take precedence, unless a contrary intention is otherwise stated. To the extent that these Guidelines are inconsistent with Section 11 of the PCC Merger Review Guidelines, the latter are deemed superseded.

1.5. The PCC, to the extent applicable, may refer to the principles set out in these Guidelines in assessing remedies appropriate for mergers and acquisitions. However, these Guidelines are not exhaustive. Each transaction warrants an individual assessment, and the appropriate remedy to be adopted shall depend on the particular circumstances of the transaction. The PCC, given the intricacies of each case, 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.

1.6. 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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2. Key Principles of Merger Remedies

2.1. Section 20 of the PCA provides that merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services as may be determined by the Commission shall be prohibited.

2.2. A merger or acquisition that may give rise to SLC may be allowed to proceed if the Parties modify their agreement to reflect changes specified by the Commission or enter into legally enforceable agreements specified by the Commission.

2.3. The PCC will endeavor to preserve and/or restore competition that would otherwise be prevented, restricted, or lessened, while permitting, if possible, the realization of efficiencies and other benefits to the consumers.

2.4. Remedies may be proposed by the parties for the consideration of the PCC at any stage of merger review.[1] Parties are encouraged to submit their proposed remedies or commitments at the earliest opportunity.

3. Types of Merger Remedies

3.1. There are two broad types of merger remedies that parties may propose: (i) behavioral, and (ii) structural.[2] The parties are encouraged to include ancillary measures in their proposal to ensure proper implementation of the remedy.

Behavioral Remedies

3.2. Behavioral remedies seek to address the identified SLC by regulating the conduct/s of parties, post-transaction. This is achieved by imposing requirements or restrictions on certain conducts of the merged firm post-transaction so that it does not act in an anti-competitive manner or exercise its enhanced market power to foreclose rivals despite having the ability and incentive to do so.

3.3. Behavioral remedies target and seek to minimize the adverse effects of the transaction by regulating post-merger outcomes.

[1] PCC Rules on Merger Procedure (2017), sec. 12.3.

[2] Republic Act No. 10667 or the Philippine Competition Act ("PCA"), sec. 12 (h); *and* PCC Merger Review Guidelines (2017), sec. 11.2.

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3.4. Proposed behavioral remedies must conform to the following: (i) their terms are readily and affordably monitored, (ii) there is a straightforward punishment mechanism with strong deterrence effect for breach, and (iii) there is more benefit to adopt a behavioral remedy than a structural remedy or a structural remedy is not feasible.

Structural Remedies

3.5. Structural Remedies affect the structure of the market, usually by creating, restoring or maintaining a firm that will compete independently.

3.6. Structural remedies are self-policing and do not require active monitoring;[3] their effects on the market have a degree of permanence; and they directly address the source of competitive harm by eliminating its root cause.[4]

3.7. Divestiture is a type of structural remedy that seeks to preserve or restore competition through the sale of an autonomous, on-going business unit or a set of assets of the merged firm to a new market participant or an existing market participant.

3.8. To be effective in restoring or maintaining competition in a relevant market where an SLC is likely to occur, a divestiture should involve the sale of an appropriate assets or divestiture package to a suitable purchaser through an effective divestiture process.

3.9. In some cases, behavioral remedies may be required to supplement a divestiture. Ancillary measures may also be put into place.

Ancillary Measures

3.10. Ancillary measures refer to additional steps or conditions that the parties must comply with before, during, and/or after the implementation of the remedy to ensure the effectivity of the proposed remedy.

[3] *Merger Remedies Guide (2016)* by ICN Merger Group p. 9, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf (last accessed on 24 April 2024).

[4] Organization for Economics Cooperation & Development ("OECD"), *The Divestiture of Assets as a Competition Remedy: Stocktaking of International Experiences*, 26, ch. 2(2019), available at https://www.oecd.org/daf/competition/divestiture-of-assets-competition-remedy-ENG-web.pdf (last accessed on 10 October 2021).

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4. Considerations for Choice and Design

4.1. The proposed merger remedies must comply with the following general requirements:

4.1.1. *Remedies must be directed and tailored to address the competitive harm identified during the merger review.* There should be a close and logical nexus between the remedy and the competitive harm.[5]

4.1.2. *Remedies must be effective in addressing the harm to competition.* These remedies are expected to address both the SLC and its adverse effects.

4.1.3. *The remedies must be proportionate to the harms being addressed.*

4.1.4. *Such other conditions or requirements that the PCC may deem necessary.*

4.2. In evaluating a proposed remedy, the PCC may use the following parameters to determine its effectiveness with reasonable certainty:

4.2.1. *Acceptable Risk Profile.—* The PCC notes that the ultimate effect of any merger remedy will always be subject to a certain degree of uncertainty. The PCC, however, considers a remedy to be more effective if it has a higher likelihood of achieving its objective, which is addressing the SLC and its corresponding adverse effects.

4.2.2. *Practicality.—* Merger remedies are practical if they can be implemented, monitored, and enforced easily by the parties and the PCC, and where applicable, sector regulators.

4.2.3. *Duration and timing.—* A remedy is effective if it addresses any SLC and its adverse effects within its period of implementation. Remedies that do not immediately and decisively resolve the SLC are either ill-designed, ineffective, or even harmful to competition.

4.3. While the parties primarily shoulder the costs of implementing the proposed remedies and monitoring compliance, the PCC may also consider other forms of costs in assessing remedies.

[5] United States of America Department of Justice Remedies Manual (2020).

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4.3.1. The amount of PCC resource that will be utilized to monitor the proposed remedies and ensure the parties' compliance is also an important factor.

4.3.2. Proposed remedies may also directly or indirectly cause market distortion, which may include deviation from prices and production levels that ordinarily exist in a competitive market.

4.4. In addition to the foregoing, sufficient weight will be given to the impact of remedies on any established merger-specific efficiencies, which redounds to the benefit of the consumers. Given a choice among several remedy packages that are equally effective in addressing the SLC and its adverse effects, greater preference shall be accorded to those that are able to preserve these efficiencies benefitting consumers.

4.5. Each proposed remedy is evaluated based on the particular facts of the case. Therefore, the fact that the PCC has accepted a particular remedy and/or provision in a prior merger or acquisition will not on that basis alone be persuasive that the same provision should be accepted and/or resolve the SLC in the new matter. Remedies and provisions in previous cases may ultimately prove insufficient and thus may not be acceptable in a future matter.

5. Remedies Process

5.1. This section outlines the process to be observed from the initial discussion of the remedies until enforcement of the remedies.

5.2. The parties assist the PCC in its determination whether a proposed remedy is suitable to address the competitive harm by providing information and documents required for such assessment. It is advisable for parties to fully cooperate with the PCC at the earliest possible time to ensure that any proposed remedy can be thoroughly analyzed, and if viable, can be accepted by the Commission without need for a protracted negotiation.

(i) Timing

5.3. At any time during the merger review process, whether in Phase I or II, the parties may submit Voluntary Commitments ("**VC**") to the PCC to initiate a discussion on remedies that may address the SLC and the corresponding harms brought about by the merger.[6]

[6] PCC Rules on Merger Procedure (2017), sec. 12.3.

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*Remedies proposed before issuance of Statement of Concerns (“**SOC**”)*

5.3.1. Where merger remedies are proposed during Phase I Review, or at any time during Phase II Review, but prior to the issuance of a Statement of Concerns by the Mergers and Acquisitions Office (“**MAO**”), these remedies shall be subject to the review and evaluation of, and continuous negotiation with, the MAO.

5.3.2. The discussions with the parties will be based on provisional assessments of the merger or acquisition.

Remedies proposed after issuance of SOC

5.3.3. The Commission shall constitute a Voluntary Commitment (“**VC**”) Review Team.

5.3.4. Proposals after the release of the SOC shall be submitted to the VC Review Team, which shall evaluate the same and hold negotiations with the Parties as necessary.

5.4. After the review and evaluation of the proposed remedies, the MAO or the VC Review Team, as the case may be, shall present its findings to the Commission.

5.5. If the Commission is unable to conclude that the proposed remedies are sufficient to address the SLC, the review will resume at the point at which it was suspended.[7]

(ii) Designing the Remedies

5.6. The VC Review Team or the MAO, whichever is applicable, will assist the Parties in understanding the relevant market/s being considered, competition concerns, and the anticipated harms to competition post-transaction, among others, in order for the parties and the VC Review Team to effectively negotiate the most suitable remedy.

5.7. When proposing behavioral remedies, the parties must provide the following information in regard to every proposed behavioral remedy:

a. The harm it intends to eliminate or mitigate;
b. Duration of the implementation of the remedy;
c. The data, reports or other proof of compliance to the proposed remedy;

[7] PCC Rules on Merger Procedure (2017), sec. 12.5.

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d. Frequency of submission of the data, reports or other proof of compliance (e.g. annual, semi-annual or quarterly);
e. Period of submission (e.g. 15 days after the end of each period); and
f. Specific performance metric or quantitative indicator of compliance, if applicable; and
b. Implementation plan

(iii) Market Testing

5.8. The PCC conducts a facts-based evaluation of the proposed remedies, and as such, resorts to Market Testing to gather data and insights on the viability of the remedies. Market Testing includes identification of stakeholders, communication of proposed remedies to the identified stakeholders, feedback collection and data analysis.

5.9. The PCC may obtain feedback from customers, suppliers, competitors, other potential purchasers, and other relevant stakeholders, as well as concerned sector regulators and government agencies in determining whether a proposed remedy addresses the competition concerns identified during an investigation.

5.10. In consulting stakeholders, the PCC shall ensure that safeguards are in place to protect confidential information.

5.11. The PCC's ability to consult publicly on the suitability of the proposed remedy reduces the risk of an unsuccessful remedy. Through Market Testing, third parties are able to verify the proposed remedy's effectiveness, identify potential weaknesses, and provide opinions on how to improve the remedy. For example, Market Testing of a proposed divestiture remedy can allow the PCC to verify factual information provided by the parties, assess whether the business to be divested will be an effective competitor that will preserve or restore competition in the relevant markets, and determine whether there is sufficient interest in the remedy package from potential acquirers.

(iv) Implementation

5.12. The parties are responsible for implementing the merger remedies approved by the PCC.

5.13. Nonetheless, the PCC may require the appointment of a third party monitoring trustee to oversee the implementation of the remedies at the expense of the parties.

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5.14. The PCC may also consider cooperation and coordination with sector regulators, where possible, for the proper implementation of the proposed remedies.

5.15. The PCC and the parties shall agree on the timeline for implementation of the proposed remedies. It is recognized that the period for implementation can vary from case to case, depending on the type of remedy, market structure, the industry involved, and the scale of the parties' operations, among others. For instance, the divestiture of an autonomous, on-going business unit typically expedites the timeline as opposed to the divestiture of a package of assets that do not comprise a separate business unit.

(v) Amendment of the Remedies

5.16. Should the parties be unable to implement the approved remedies, due to factual or legal circumstances outside their control, it is their responsibility to promptly file a written application to vary, substitute, or be released from their commitments in accordance with the procedure laid out in the PCC Rules on Merger Procedure.

5.17. Applications to vary, substitute, or be released from commitments may be justified in light of significant and permanent changes in market conditions which affect or diminish (but not augment) the initial competition concerns. In this regard, the parties must show that the changes in market conditions either alleviate the need for the remedies or require that the same be modified in order to remain effective.

6. Monitoring Compliance with Remedies

6.1. The PCC may appoint an impartial third-party monitoring trustee ("**Monitor**") to independently monitor, on behalf of the PCC, the parties' compliance with its commitments. The appointed Monitor shall work under the supervision of, and shall be accountable to the PCC.

6.2. In cases where the approved remedy is a divestiture *not* to an upfront buyer, provision may be made for the appointment of a Divestiture Trustee and/or Hold-Separate Manager.

6.3. The appointment of the Monitor, Divestiture Trustee and/or Hold-Separate Manager shall be at the expense of the parties.

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7. Remedies in Digital Markets

7.1. While the established concepts underpinning merger remedies remain valid for digital markets, there is a need to factor in market dynamics and characteristics. Some key features of digital markets include: [8]

7.1.1. *Multi-sided markets* where a digital product acts as a platform, bringing different groups of consumers together. For example, a digital content platform may feature content creators on one side, viewers of content on another, and advertisers on another.

7.1.2. *Strong network effects* meaning that as the number of users grows, the value of the product to users increases. In the extreme, these network effects may lead to markets "tipping" into a monopoly.

7.1.3. *Substantial economies of scale and scope* since many digital markets exhibit high fixed cost and low or zero variable costs. Firms can therefore rapidly scale up, expand their geographic coverage, or potentially use their assets in one market to enter another.

7.1.4. *Reliance on large amount of user data* that can be difficult to replicate and costly to analyze.

7.1.5. *Switching costs* for example user may have invested time and effort to create a profile on social network or a reputation as providers on an exchange platform, which they may lose by switching.

7.1.6. *Often important intellectual property rights* including patents which grant the owner a limited-term monopoly over the use of a technology or method.

7.1.7. *Low or zero prices* associated with business models that earn revenue from the collection of consumer data, the sale of advertising or the use of customer relationships to sell "premium" or other paid products.

7.1.8. *Disruptive innovations* that dramatically reduce transaction and intermediary costs, and may be offered outside of regulatory frameworks that limit competition by incumbents.

[8] OECD, *Handbook on Competition Policy in the Digital Age*, 13-14, available at https://www.oecd.org/daf/competition/oecd-handbook-on-competition-policy-in-the-digital-age.pdf. (last accessed on 24 April 2024).

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7.1.9. *Vertically-integrated and conglomerate business models* which may give rise to specific concerns about anticompetitive conduct. Digital platforms that act as "gatekeepers" between downstream firms and their customers may be the subject of competition concerns if they provide advantages to their own downstream operations. Further, firms may seek to leverage their market power from one market into another, for example with bundling and tying strategies that foreclose competition for a digital "ecosystem" of products.

7.2. Considering the key features of digital markets above, the following sections outline possible remedies which the parties may consider taking also into account the nature of their business, the competitive harms brought about by the merger and the feasibility of implementation.

7.3. *Divestment.* Structural remedies that preserve competition on dynamic dimensions include the divestment of innovation resources or capabilities[9] such as intellectual property rights and research and development units.

7.4. *Firewall Provisions.* Firewall provisions restrict access to and sharing of sensitive information within a company to prevent actions harmful to competition, like collusion. They include prevention measures like non-disclosure agreements and separate IT access, detection methods such as IT alerts, and corrective actions like reassigning employees.[10]

7.4.1. Firewall provisions may be stand-alone requirements. It may be applied on vertical and conglomerate issues. For example, a vertical merger may allow a supplier (one of the merging parties) to become aware of the price and terms of its competitor via that supplier's customer (the other merging party). The customer (who is now a part of the merged entity) can also work as a conduit for information exchange between competing suppliers. If that is the case, firewall provisions may be imposed to prevent access to competitively sensitive information.[11]

7.4.2. Firewall provisions may also be imposed (or implied) as ancillary to structural remedies. They are often required (1) during the period between the issuance of the Commitment Decision and the closing of the relevant divestiture, and (2) even after closing, for historical information held by the merged entity to the extent that it remains

[9] Michael Katz & Howard Shelanski, *Mergers and Innovation*, ANTITRUST LAW JOURNAL (2007).
[10] Fay Zhou, et al, *Non-Structural Remedies and Their Key Strengths* 4 (2013), p 4, available at: https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/non-structural-remedies-and-their-key-strengths (last accessed on 24 April 2024).
[11] *Id at 5.*

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competitively sensitive, as part of the broader requirements to maintain viability of the divestiture business.[12]

7.4.3. Example: The anti-trust agency approved Company A's commitment to establish firewalls in order to protect information relating to third parties that compete in adjacent markets in which either of the merging parties is active.[13]

7.5. *Research and Development Commitment.* Research and development commitments require the merged entity to continue its research efforts. It stems from the concern that the merged entity may have a reduced motivation for doing so that negatively affects innovation, for reasons such as having acquired existing products or more advanced research projects from the merger.[14]

7.5.1. Example: The anti-trust agency approved a divestiture commitment in connection with an early-stage pipeline research project. In addition to a transfer of tangible assets and a non-exclusive license for the technology and trade secrets relating to that project, the merged entity was required to continue the research project for two years post-closing, so as to increase the chance of success of the project and increase the number of products available on the market. [15]

7.6. *Access Provisions.* Access provisions require the merged entity to allow other market participants access to certain key inputs. These may include key technologies, data, network, and infrastructure. Access provisions are often required when the merged entity may have the ability to leverage such key inputs and foreclose competitors.[16]

7.6.1. Example: The anti-trust agency approved Company A's commitment to provide to Company B, one of the leading telecom operators in the region, at least 10 years of access to the existing fixed network

[12] Fay Zhou, et al, *Non-Structural Remedies and Their Key Strengths* 4 (2013), p 5, available at https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/non-structural-remedies-and-their-key-strengths (last accessed on 24 April 2024).

[13] Nvidia/Mellanox: China's Close Scrutiny of Semiconductor Deals Continues by Garrod et al., 11 May 2020, available at https://www.akingump.com/en/insights/alerts/nvidiamellanox-chinas-close-scrutiny-of-semiconductor-deals-continues (last accessed on 24 April 2024).

[14] *Supra* note 10, at 6.

[15] The Merger Control Review Twelfth Edition by Ilene Knable Gotts, p 17, available at https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/20210801-international-merger-remedies.pdf (last accessed on 24 April 2024).

[16] *Supra* note 10, at 7.

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infrastructure it is acquiring from Company C and Company D and its future fiber-to-the-premises network.[17]

7.7. *Mandatory Licensing Provisions.* Mandatory licensing provisions require the merged entity to license certain technology, know-how and intellectual property rights to third parties. The underlying concern is often the consolidation of technologies and intellectual property may allow the merged entity to foreclose other competitors who rely on some of these technologies to compete effectively. These provisions may require licensing certain intellectual properties or products to all eligible and interested third parties.[18]

7.7.1. Example 1: The anti-trust agency approved the acquiring entity's commitment to continue to license certain standard essential patents on fair, reasonable and non-discriminatory (FRAND) terms. [19]

7.7.2. Example 2: The anti-trust agency's clearance was conditional upon the acquiring entity offering a free license to consumers in the region to stream, via any cloud game streaming services of their choice, all current and future PC and console games of the acquired entity which they have a license, and a corresponding license to cloud game streaming service providers.[20]

8. Remedies for Multijurisdictional Mergers and Acquisitions

8.1. The PCC shall cooperate with competition and regulatory agencies outside the Philippines for review of remedies involving multijurisdictional mergers and acquisitions.[21] This is to ensure that the remedies across borders work together efficiently and effectively, to avoid inconsistencies and conflicting

[17] Arianna Podesta, *Mergers: Commission clears the acquisition of VOO and Brutélé by Orange, subject to conditions*, European Commission Press Release**,** (20 March 2023), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1722. (last accessed on 24 April 2024).

[18] *Supra* note 10, at 7.

[19] *Microsoft-Nokia Merger Control in East Asia* by Santa Clara High Technology Journal Volume 36 Issue 5, 1 August 2020, p 27, available at https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1661&context=chtlj (last accessed on 24 April 2024).

[20] Arianna Podesta, *Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions*, European Commission Press Release (May 15, 2023), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705. (last accessed on 24 April 2024).

[21] "Multijurisdictional merger" refers to a merger or an acquisition that is reviewed by multiple jurisdictions regardless of whether notification is mandatory or voluntary.

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remedies, and minimize unnecessary duplication of work for merging Parties and competition authorities.

Sharing of Information

8.2. The PCC may exchange non-confidential information with competition and regulatory agencies outside the Philippines, which may include, for example, publicly-available information, review timetables, and/or PCC assessments on markets, potential competitive effects, theories of harm and possible remedies (to the extent they do not involve confidential information), as appropriate and consistent with the laws and regulations of the Philippines and that of the competition and regulatory agencies outside the Philippines.

8.3. In instances in which PCC considers it useful for its assessment of a particular matter, it shall seek waivers of confidentiality ("waivers") from the merging and/or third parties to enable discussion of confidential materials submitted in connection with that matter to one or more cooperating cross-border agencies. Obtaining waivers from the merging and/or third parties enables the PCC to discuss and/or exchange confidential information to cross-border agencies.