

The SyCipLaw Antitrust & Competition Bulletin

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PCC Issues Motu Proprio Merger Review Guidelines for Digital Markets

On 21 August 2023, the Philippine Competition Commission (“PCC”) issued the Guidelines for the *Motu Proprio* Review of Mergers and Acquisitions in Digital Markets (the “Guidelines”) to provide greater transparency and predictability over the PCC’s power of *motu proprio* review of mergers and acquisitions (M&As) within the digital market.

The Guidelines set out a non-exhaustive list of transactions that the PCC believes may pose competition issues in the digital market and, thus, may trigger a *motu proprio* review by the PCC. These are:

1. *Transactions involving gatekeepers, i.e.,* entities that offer services that act as access points for consumers to participate in the market. Gatekeepers can potentially create a bottleneck if access to the digital service is an essential connection between users and consumers, which can potentially affect the development of competitors.
2. *Transactions involving companies with data-centric operations* – these involve companies the operations of which include the collection, preparation, and utilization of datasets to gain key insights and economic value. M&As involving these companies pose a competitive threat through the consolidation of datasets that give them an advantage over their competitors.
3. *Transactions that might significantly reinforce network effects* – these involve digital companies who are heavily reliant on a large base of users to increase its value. The acquisition of competitors can significantly strengthen a company’s position, which may harm the competitive landscape.

4. *Transactions involving parties considered as innovators, i.e.,* those entities in a market where there is continuous competition for innovation. M&As between or among innovators may affect competition in the market through limitation of incentives to innovate, interoperability with other providers, or licensing of patents.

5. *Conglomerate transactions involving digital players* – these involve M&As between parties who are neither competitors nor customers or suppliers of one another but which M&As can nonetheless harm competition through foreclosure of competitors by expanding in downstream markets or by locking consumers in the conglomerate’s products and services that limit switching across competitors.

6. *Successive transactions in the digital market* – these involve subsequent M&As, which although below the compulsory notification thresholds, may invite *motu proprio* review from the PCC if the aggregate impact of the acquisitions is harmful to competition.

7. *Transactions involving parties under* – these involve M&As among parties who are also involved in other anticompetitive conduct in the digital market.

8. *Transactions with a value of the transaction close to notification thresholds* – while these M&As do not breach the notification thresholds, the PCC may nonetheless initiate *motu proprio* review when the value of the consideration is close to the size of transaction threshold (and, in determining the value, the PCC will consider both monetary consideration and non-monetary benefits).

9. *Transactions involving parties with a significant share of the supply of a good or service* – for these M&As, the PCC will focus on the parties’ market influence through the potential joint supply of a good or service. A share of the

supply of at least 30% in any involved goods or services will be considered as significant. We note, however, that goods or services need not be the same as the relevant markets defined for the merger analysis.

Parties to M&As in the digital market are encouraged to carefully assess whether their intended transaction falls within the indicators described above and, if necessary, to consult with the PCC (through its Mergers and Acquisitions Office). During the consultation, the M&A parties may present evidence and information to justify that their transaction would not pose a risk for competition. Alternatively, the M&A parties may also evaluate if it will be more prudent to file a voluntary notification with the PCC in respect of their transaction. ■



PCC Issues Merger Review Guidelines for Non-Horizontal Mergers

On 18 May 2023, the PCC published the Non-Horizontal Merger Review Guidelines (the “**NHM Guidelines**”), which set out the analytical techniques, practices, and enforcement policy of the PCC with respect to non-horizontal mergers and acquisitions.

The NHM Guidelines focus on M&As between parties who do not directly compete in the same relevant market but which M&As may nonetheless be harmful to competition since the impact is felt on different levels of the supply chain or on different supply chains altogether. Thus, the thrust of the NHM Guidelines is not on the prevention of competitor elimination but on limiting the increased propensity of a competitor to engage in anti-competitive conduct.

With the publication of these guidelines, parties to M&As, even if they are not direct competitors, may expect a broader and more comprehensive review of their transactions by the PCC. Parties should carefully assess and identify not only the potential competition issues that may occur within the relevant market but also along various levels of the supply chain of the product or service. ■



PCC Adjusts Thresholds for Mandatory Merger Notification

On 16 February 2023, the PCC, through Commission Resolution No. 04-2023, adjusted the thresholds for mandatory notification as follows: *Size of Party Threshold* – **PhP7 billion**; and *Size of Transaction Threshold* – **PhP2.9 billion**. Both thresholds must be satisfied to trigger compulsory notification to PCC.

Size of Party refers to the value of assets or revenues of the Ultimate Parent Entity of either transacting entity, while Size of Transaction broadly refers to the value of assets or revenues of the acquired party and the entities it controls.

Prior this, the Size of Party threshold was PhP6.1 billion and Size of Transaction threshold was PhP2.5 billion.

The revised thresholds apply to M&As the definitive agreements of which are executed on or after **1 March 2023**. However, the revised thresholds shall not apply to (i) M&As that are already pending review by the PCC; (ii) notifiable transactions consummated before 1 March 2023; and (iii) transactions which are already the subject of a decision by the PCC. ■



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