

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

Pursuant to Section 12 (a) of Republic Act No. 10667,¹ otherwise known as the “Philippine Competition Act” (PCA), the Philippine Competition Commission (PCC) may investigate any merger when it has reasonable grounds to believe is likely to substantially prevent, restrict or lessen competition in the market.

The PCC is issuing these Guidelines pursuant to Section 12 (k)² of the PCA. The purpose of these guidance is to provide legal certainty to the public by identifying the underlying risks of digital mergers that would trigger a *motu proprio* review by the competition authority. These Guidelines would allow digital companies to consult with the competition authority on whether a particular transaction might be harmful to competition.

The following is a list of indicators that may trigger a *motu proprio* review of a merger in the digital market. The combination of two or more of the following indicators, though the list is not exclusive, will be considered red flags and potentially trigger a *motu proprio* review by the PCC.

1. Transactions involving a gatekeeper.

A company would be considered to be a gatekeeper when it provides a digital service whose access is essential to participate in the market. When the digital service is an essential connection between business users and consumers the gatekeepers could act as a bottleneck in the digital economy limiting the development of competitors.

Transactions involving one or more firms with prominent positions in digital markets that can be considered “gatekeepers”³ may have a significant effect on markets even if they remain below notification thresholds. Gatekeepers could limit switching by bundling services, foreclosing competitors’ access to the platform, or limiting multihoming.⁴ Additionally, gatekeepers could enter adjacent markets by leveraging their dominant position in the platform market, increasing their reach and limiting the development of competitors.

For example, a gatekeeper providing e-commerce services could acquire a small company providing logistics and transportation services. The gatekeeper could, after the merger, bundle its e-commerce

¹ Conduct inquiry, investigate, and hear and decide on cases involving any violation of this Act and other existing competition laws *motu proprio* or upon receipt of a verified complaint from an interested party or upon referral by the concerned regulatory agency, and institute the appropriate civil or criminal proceedings.

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.

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.

services offering its own transportation services. Although this could be efficiency-enhancing it could also lead to the exclusion of non-vertically integrated logistics providers. Transactions that involve only one gatekeeper may trigger a motu proprio review.

2. Transactions involving companies with data-centric operations.

Mergers involving data-centric companies affect the volume of data available to competitors.⁵ Doing business with the data acquired and accessing it can become a key element in determining market power and eventually a dominant market position. 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.

For example, a social media platform offering advertisement services that acquire a messaging application provider could consolidate data from both services. Post-transaction, the company could improve its targeted advertisement, gaining an advantage over other advertisement providers.

3. Transactions that might significantly reinforce network effects.

There are network effects when the more users connected to a platform the more attractive the platform is for all users. An e-commerce platform, for example, increases its value as more sellers and buyers interact in their platform. Similarly, a messaging application holds little value if it has no users, as its user base increases so does its value as it offers more possibilities of communication for their users.

By acquiring competitors, an enterprise can significantly increase 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, thus limiting users' choice. 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, limiting competition in the market.

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

4. Transactions involving parties considered innovators.

The parties to the transaction would be considered an innovator when it performs in a market where R&D is essential or there is continuous competition for innovation, and one of the transacting parties is a relevant competitor in such activities.⁶

⁵ Massimo Motta & Martin Peitz, Big tech mergers, 54 Information Economics and Policy 100868 (2021), <https://linkinghub.elsevier.com/retrieve/pii/S0167624520300111> (last visited Apr. 6, 2023).

⁶ 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

Mergers involving a relevant innovator can have a significant competitive impact in the market, requiring further review by the competition authority. The innovator could be the acquirer or target in the transaction. The merger could affect innovation strategies in the market by, for example, limiting the incentives to innovate, interoperate with other providers, or license patents. This criterion is particularly relevant when the transaction involves an innovative nascent competitor.⁷

To illustrate, a social media platform acquires a nascent competitor that offers a new social media service, which is gaining momentum among users. The dominant social media provider could incorporate the services of the acquirer to its main services, limiting the development of an innovative competitor.

5. Conglomerate transactions involving digital players.

Conglomerate mergers are those in which the parties to the transaction do not hold neither vertical nor horizontal relations. The parties to a conglomerate transaction are not competitors nor do they hold customer or supplier relationships.

Conglomeration in digital markets can limit competitors' development, limit innovation and increase barriers to entry. A conglomerate merger could allow for an e-commerce platform to expand into downstream markets. These conglomerate mergers could increase its incentives to foreclose access to the e-commerce platform to those companies providing competing products. 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. Nonetheless, they can also lock in consumers into their products and services, limit switching increase the risk of market foreclosure, data concentration, anticompetitive bundling and tying strategies, or limit innovation.

For example, a ride-hailing company that acquires a brick-and-mortar chain shop, may generate a bundling strategy in which the ride-hailing company limits its deliveries to its own stores, limiting users' access to competing options.

6. Transactions of parties involved in subsequent acquisitions.

Digital operators that undertake two or more below-notification threshold acquisitions within a calendar year could be scrutinized by the competition authority. Although each of these transactions do not trigger notification based on the merger thresholds, they could have an aggregated impact on competition in the market. The subsequent acquisitions could involve the same acquirer and different target companies. For example, a digital operator that acquires several small enterprises in different transactions all below the notification threshold during a calendar year may trigger a motu proprio review.

7. Transactions involving parties under investigation.

may be defined separately as an innovation market or as part of a broader market encompassing manufacturing and sales." (Section V.1.c)

⁷ Nascent competitors are those companies with significant potential for growth. These firms could grow into credible competitors, offering products or services in competition with the incumbent firms..

Mergers or acquisitions could have even more pressing consequences when combined with further anticompetitive conduct in the market. The PCC will most likely analyze transactions involving parties under investigation for possible violation of the PCA to prevent additional anticompetitive effects.

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

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 notification threshold for the size of transaction. 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.).

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

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. The 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

For example, a digital ecosystem providing mapping services acquires a real-time navigation application. The transaction does not trigger notification based on the thresholds, given the low revenue generated by the acquirer. Nonetheless, the navigation application supplies more than 30% of its market. The competition authority could consider this a relevant transaction triggering a *motu proprio* review, given the relevance of the parties in the supply of these services.

Consultation and Voluntary Notification

Digital mergers would typically involve some of these criteria. Merging parties in transactions where several of these elements are present are encouraged to consult with the Mergers and Acquisitions Office 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

The list provided in these Guidelines shall not be construed to be an exclusive list. The PCC will consider the attending circumstances of each merger and will apply these Guidelines to attain the policy objectives of the PCA, its Implementing Rules and Regulations, and other regulations relating to mergers and acquisitions.

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.