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Efficiencies in Merger Control – Note by the Philippines

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1. A merger may be allowed despite potentially resulting in significant lessening of competition (SLC) if it brings about significant improvements in efficiencies.¹ Today, competition authorities, and even courts, have a more favorable view of efficiencies than they did in the past.² However, incorporating efficiency defenses in merger reviews has proven to be difficult.³

1. Efficiencies as defense in the Philippines

2. The Philippine Competition Act⁴ (PCA) establishes the legal framework for implementing the competition policy in the Philippines. Under the PCA, the Philippine Competition Commission (PCC) may grant an exemption to an otherwise anticompetitive merger if the parties can demonstrate that the transaction results in significant efficiencies that outweigh the potential SLC in the relevant market. This exemption is explicitly provided under Section 21 of the PCA.⁵

3. The burden of proving the efficiency gain lies with the party seeking the exemption. Section 22 of the PCA requires such party to establish through detailed and verifiable evidence that significant efficiency gains are anchored on the transaction and such gains

¹ See OECD, *Dynamic Efficiencies in Merger Analysis*, 2 May 2013, Roundtables on Competition Policy Papers, available at https://www.oecd.org/en/publications/dynamic-efficiencies-in-merger-analysis_df6017f9-en.html; *The Role of Efficiency Claims in Antitrust Proceedings*, 2 May 2013, Roundtables on Competition Policy Papers, available at https://www.oecd.org/en/publications/the-role-of-efficiency-claims-in-antitrust-proceedings_ceaed16d-en.html. See also OECD, *Out-of-Market Efficiencies in Competition Enforcement*, 2 May 2013, Roundtables on Competition Policy Papers; OECD, *Environmental Considerations in Competition Enforcement*, 2 May 2013, Roundtables on Competition Policy Papers. Note that in some mature jurisdictions, the analysis of efficiency gains in merger review is similar to the “Rule of Reason.” See Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 *Antitrust L.J.* 471 (2012), available at <http://scholarship.law.ufl.edu/facultypub/292>.

² *Id.* OECD, *Dynamic Efficiencies in Merger Analysis*, 2 May 2013, Roundtables on Competition Policy Papers.

³ *Id.*

⁴ Republic Act No. 10667.

⁵ The relevant section of the law states:

“Section 21. Exemptions from Prohibited Mergers and Acquisitions. – Merger or acquisition agreement prohibited under Section 20 of this Chapter may, nonetheless, be exempt from prohibition by the Commission when the parties establish either of the following:

The concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement; or

A party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity’s assets.”

would not be realized if the transaction will not be allowed.⁶ Merger specific efficiencies are efficiencies that can only be accomplished with the proposed merger, without any other less anticompetitive means.⁷

4. Once evidence on the claimed efficiency is presented by the party, the PCC shall then verify by reasonable means the likelihood and extent magnitude of each asserted efficiency, and how and when each would be achieved.⁸

5. The relevant efficiency provisions of the PCA are likewise reflected in its Implementing Rules and Regulations (IRR).⁹ Specifically, under Section 1 of Rule 4 of the IRR, a merger review considers the substantiated efficiencies likely to arise from the transaction.¹⁰

6. Efficiencies in horizontal mergers are advantages which would be realized from combinations of entities operating in the same industry and at the same stage of production, such as cost savings from rationalizing production by shifting production from a less efficient to a more efficient plant, economies of scale, innovations in production processes, and savings in the purchase prices of intermediate goods when large volumes are purchased.¹¹ Efficiencies that increase competition in the market may also be considered by the PCC.¹² Benefits of efficiencies may also take the form of lower prices, improved quality, enhanced services, and new products.¹³

⁶ Sec. 22, PCA:

“Section 22. Burden of Proof. — The burden of proof under Section 21 lies with the parties seeking the exemption. A party seeking to rely on the exemption specified in Section 21 (a) must demonstrate that if the agreement were not implemented, significant efficiency gains would not be realized.”

⁷ Sec. 9.7, Merger Review Guidelines. The OECD describes a merger specific efficiency as “when there are no less anticompetitive but reasonable alternatives that would be likely to achieve the efficiencies other than the proposed merger.” See OECD, Dynamic Efficiencies in Merger Analysis, 2 May 2013, Roundtables on Competition Policy Papers, available at https://www.oecd.org/en/publications/dynamic-efficiencies-in-merger-analysis_df6017f9-en.html.

⁸ Sec. 9.5, Merger Review Guidelines.

⁹ Sec. 10 and 11, Rule 4, Rules and Regulations to Implement the Provisions of Republic Act No. 10667 (IRR).

¹⁰ Sec. 1, IRR:

“SECTION 1. Review of mergers and acquisitions. x x x

In conducting this review, the Commission shall:

Assess whether a proposed merger or acquisition is likely to substantially prevent, restrict, or lessen competition in the relevant market or in the market for goods and services as may be determined by the Commission; and

Take into account any substantiated efficiencies put forward by the parties to the proposed merger or acquisition, which are likely to arise from the transaction.”

¹¹ Lars-Hendrik Röller, Johan Stennek and Frank Verboven, Efficiency Gains from Mergers, Working Paper No. 543, 2000 from The Research Institute of Industrial Economics, available at <https://swopec.hhs.se/iuiwop/papers/iuiwop0543.pdf>.

¹² Sec. 9.3, Merger Review Guidelines.

¹³ Id., at Sec. 9.2.

7. The Non-Horizontal Merger Review Guidelines of the PCC gives some typical examples of the potential efficiency benefits derived from vertical or conglomerate mergers. These include stable supply of inputs and access to supply chains for better supply management, reduced inventory sizes, elimination of hold-up problems, and economies of scale or scope leading to cost reduction.¹⁴

8. In all cases, the Mergers and Acquisitions Office (MAO) of the PCC, in its evaluation of efficiencies for both horizontal¹⁵ and non-horizontal¹⁶ mergers, is guided by the principles set out in the Merger Review Guidelines.

9. The PCC will take into account the claimed efficiencies only if they are demonstrable, with detailed and verifiable evidence of the anticipated benefits like price reductions or increased incentives to compete. The efficiency gains must be merger specific and the consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.¹⁷

10. Consumer welfare, the central tenet of the country's antitrust analysis, stays at the forefront as an important factor even when evaluating efficiencies. The PCA declares that the state policy is to penalize all forms of anticompetitive activities with the objective of protecting consumer welfare.¹⁸ In the same vein, the Merger Review Guidelines provides that the greater the potential adverse effect of a merger, the greater must be the demonstrated efficiencies, and the more they must redound to the benefit of the customers.¹⁹

11. In sum, the evaluation of efficiencies follows these generally accepted principles: verifiability and substantiation, merger-specificity, likelihood of benefits being passed on to consumers, timeliness and magnitude, and balancing test.

2. Illustration of how the MAO evaluated efficiencies claimed by the parties

12. In the "Matter of the Proposed Merger of BancNet, Incorporated and Philippine Clearing House Corporation"²⁰ (PCC Case No. M-2023-002-SOC), the merging parties, BancNet and PCHC, were the only clearing switch operators (CSO) in the Philippines. The MAO recommended a *motu proprio* review of the transaction on the grounds that it will result in a merger-to-monopoly and that the transaction takes place in a critical industry (e-

¹⁴ Sec. 8.2, Non-Horizontal Merger Review Guidelines.

¹⁵ Sec. 9, Merger Review Guidelines.

¹⁶ Sec. 8.3, Non-Horizontal Merger Review Guidelines.

¹⁷ Sec. 9.4, Merger Review Guidelines. Note that business efficiencies are also explicitly recognized in the PCC Guidelines on Notifications of Joint Ventures (Sec. 1.4).

¹⁸ Sec. 2, PCA.

¹⁹ Sec. 9.8, Merger Review Guidelines.

²⁰ PCC Case No. M-2023-002-SOC; Commitment Decision No. 02-M-2024.

commerce being a priority sector of the PCC).²¹ The MAO identified the relevant market to be the non-card CSO services for interbank electronic fund transfers nationwide.

13. During the review, the parties asserted that the merger will not result in SLC in the relevant market, and claimed that efficiency gains will be realized through cost reduction on the management and technological requirements of the business. Parties also asserted that having a holistic view on the payment system will enable both BancNet and PCHC to simplify compliance with the country's central bank regulations and ease their interactions with financial institutions.

14. The MAO found that the parties did not meet the requirements of the Merger Review Guidelines on efficiencies.²² The parties failed to provide detailed and verifiable evidence to support their claims.²³ Proof is necessary under Philippine law and general allegations on efficiency gains are not given credence.

15. The case was eventually cleared by the PCC on 25 January 2024, subject to voluntary commitments.²⁴

3. Absence of specific efficiency claims

16. While merging parties are not required to present claims of efficiencies as a defense, there are instances when the PCC, despite the absence of specific claims, looked into potential efficiencies resulting from the transaction. This enabled the PCC to determine and evaluate the overall effect of the transaction on the relevant market.²⁵

17. In **Bunge-Viterra** (MAO Case No. M-2023-021),²⁶ the possible efficiency identified was the benefit of broader supply options for food and animal feed customers. **AHCHI-Joleco** (MAO Case No. M-2024-02)²⁷ is a case involving drugstores, where the investment in the other party was said to provide an opportunity to unlock synergies that would deliver efficiencies to the parties' platforms and would ultimately benefit their customers in the pharmaceutical sector. Finally, in four (4) merger cases involving renewable energy – **FRLC-PSALM-NIA** (MAO Case No. M-2023-023),²⁸ **Greenlight-**

²¹ Eventually, the parties voluntarily notified the PCC of the transaction on 17 November 2022, pursuant to Section 3.2 of the Rules on Merger Procedure.

²² Sec. 9, Merger Review Guidelines.

²³ In this case, the parties failed to specify the price reductions that will be implemented after the merger. Worse, there was no single documentary evidence presented to support their allegations.

²⁴ See generally Commitment Decision No. 02-M-2024. The parties undertook to do the following commitments: (i) commitment on fees, (ii) commitment to refrain from discriminatory behavior, (iii) commitment on quality of services, (iv) commitment on continued innovation.

²⁵ Note that this is neither expressly prohibited nor allowed by the current rules.

²⁶ In the Matter of the Proposed Acquisition by Bunge Limited of Shares in Viterra Limited.

²⁷ In the Matter of the Proposed Acquisition by AHCHI Pharma Ventures, Inc. of Shares of Joleco Resources, Inc.

²⁸ In the Matter of the Proposed Acquisition by Fresh River Lakes Corp. of the Casecan Hydroelectric Power Plant Owned by the Power Sector Assets and Liabilities Management Corporation and National Irrigation Administration.

San Isidro (MAO Case No. M-2023-010),²⁹ **MGreen-Pasuquin** (MAO Case No. M-2023-012),³⁰ and **Hyperion-Apolaki** (MAO Case No. M-2023-018)³¹ – the MAO found that the potential vertical integration (i.e., sourcing electricity from their own plants or facilities) may likely enable suppliers to deliver electricity to their customers at more affordable rates.³²

18. Notwithstanding these efficiency considerations in actual merger reviews, the PCC has not yet ruled on any case where efficiencies were the sole ground for exempting a merger that would otherwise have been prohibited due to SLC.

²⁹ In the Matter of the Proposed Acquisition by Greenlight Renewables Holdings, Inc. of San Isidro Solar Power Corporation and the Proposed Joint Venture Between Shell Overseas Investments B.V. and Emerging Power Inc.

³⁰ In the Matter of the Proposed Joint Ventures of MGEN Renewable Energy, Inc. with Pasuquin Energy Holdings, Inc., and 7 Balboa Energy Holdings, Inc., through the Acquisition of Shares in 3 Barracuda Energy Corporation, Bolt Energy Holdings, Inc., Island Wind Energy Corporation, and Koan Development Corporation.

³¹ In the Matter of the Proposed Joint Venture Between Ace Endeavor, Inc. And Ib Vogt (Singapore) Lte. Ptd., and the Acquisition by Hyperion Renewable Holdings, Inc. of Apolaki Two Inc.

³² See also Commission Decisions No. 03-M-2024, No. 11-M-010/2023, No. 13-M-012/2023, and No. 19-M-018/2023.