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Notification of the National Telecommunications Commission

Re: Criteria and Procedures for Merger and Cross-holding in Telecommunications Business

Whereas it is expedient to prescribe criteria and procedures for merger and cross-holding in telecommunications business in order to prevent a merger between licensees of telecommunications business that will otherwise lead to market domination, and to adhere to the principle of free and fair competition, promote and support competition, and enhance efficient and sustainable development of the telecommunications industry;

Pursuant to Section 51 (12) (13) and (14) of the Act on the Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunication Services, B.E. 2543 (2000) which contains certain provisions regarding the restriction of the rights and freedom of an individual as permitted to be done under the law by Article 29, in conjunction with Article 35, Article 36, Article 43, Article 45, Article 46, Article 47, Article 61 and Article 64 of the Constitution of the Kingdom of Thailand, together with Section 21 and Section 22 of the Telecommunications Business Act, B.E. 2544 (2001), which contains certain provisions regarding the restriction of the rights and freedom of an individual as permitted to be done under the law by Article 29, in conjunction with Article 35, Article 36, Article 41, Article 43 and Article 45 of the Constitution of the Kingdom of Thailand, the National Telecommunications Commission hereby prescribes as follows:

Clause 1 This Notification shall come into force as from the day following the date of its publication in the Government Gazette.

Clause 2 In this Notification,

- (1) “Licensee” means a licensee who has been granted a license to operate telecommunications business under the telecommunications business law, and shall include an operator granted authorization, concession or contract from TOT Public Company Limited or CAT Telecommunications Public Company Limited prior to the date the Telecommunications Business Act B.E. 2544 (2001) comes into force;
- (2) “Commission” means the National Telecommunications Commission;
- (3) “Secretary-General” means the Secretary-General of the National Telecommunications Commission;
- (4) “Relevant market” means the relevant market as prescribed in the Notification of the National Telecommunications Commission Re: Market Definition and Relevant Telecommunication Market B.E. 2551 (2008) or as amended, unless otherwise defined;

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(5) “Merger” shall include:

(5.1) a merger between a licensee or the licensee’s controller and another licensee, which results in the continued existence of one licensee and the termination of the other, or the establishment of a new juristic person according to the Civil and Commercial Code or a joint venture contract, or

(5.2) a licensee’s or the licensee’s controller’s acquisition of assets, whether in whole or in part, of another licensee, or

(5.3) a licensee’s or the licensee’s controller’s acquisition of shares, whether in whole or in part, of another licensee with the purpose of controlling policy, business administration, direction, or management. The following results of the acquisition of shares shall be deemed as a merger:

(5.3.1) change to the shareholding structure of another licensee with the licensee or the licensee’s controller holding at least 30 percent of the total number of shares of another licensee. Such shareholding proportion shall include the number of shares held directly by the licensee or the licensee’s controller, and indirectly by the licensee or the licensee’s controller through tiers of shareholding by several other juristic persons with at least 50 percent shareholding in each tier, including shares held by the related person thereto, or

(5.3.2) significant change to another licensee’s controlling power, although the licensee or the licensee’s controller does not hold at least 30 percent of the total number of shares of another licensee, but the licensee or the licensee’s controller has significant controlling power in the juristic person who is the shareholder of such other licensee, regardless of whether such controlling power has been gained directly or indirectly through tiers of shareholding or control in several other juristic persons in tiers of shareholding up to the juristic person that is the shareholder of such other licensee.

The licensee or the licensee’s controller having controlling power in the juristic person that holds shares in such other licensee shall include:

(a) Licensee or the licensee’s controller holding shares and voting rights of at least 50 percent of the total voting rights of such other licensee in case of direct controlling power, or of the juristic persons holding shares in tiers of shareholding up to the juristic person that is the shareholder of such other licensee in case of indirect controlling power, or

(b) Licensee or the licensee’s controller assigning persons or acting in the manner of assigning persons to be directors in a significant number in order to control the management or operations of such other licensee or of the juristic persons holding shares in tiers of shareholding up to the juristic person that is the shareholder of such other licensee.

(6) “Horizontal Integration” means an integration occurring between licensees producing compatible telecommunication goods or services and/or licensees producing telecommunication goods or services that are complements to one another;

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(7) “Vertical Integration” means an integration between a licensee who produces telecommunication goods or services as production materials for such other licensee with such other licensee who purchases those telecommunication goods or services;

(8) “Cross-holding” means two or more companies, partnerships, or any other juristic persons hold shares of one another for the purpose of business grouping or establishing a specific consortium of companies, partnerships or juristic persons, particularly in form of a holding company, or a business network in which a company, partnership, or juristic person is in charge of controlling administrative, financial or management policies.

The cross-holding according to paragraph one must be a shareholding that generates controlling power over another company, irrespective of the number of cross-shares. The controlling power may occur either directly or indirectly through shareholding or controlling in other juristic persons in tiers of shareholding up to the juristic person that is the shareholder of who is the shareholder of the other juristic person under control. One juristic person having controlling power over another juristic person shall include:

(8.1) A juristic person having voting rights of at least 50 percent of the total voting rights of such other juristic person under control in case of direct controlling power, or of the juristic persons holding shares in tiers of shareholding up to the juristic person that is the shareholder of such other juristic person under control in case of indirect controlling power, or

(8.2) A juristic person assigning persons or acting in the manner of assigning persons to be directors in a significant number in order to control the management or operations of such other juristic person under control or of the juristic persons holding shares in tiers of shareholding up to the juristic person that is the shareholder of such other juristic person under control.

(9) “Subsidiary company of the licensee” means

(9.1) a company in which the licensee holds at least 50 percent of the total voting shares of such company;

(9.2) a company in which the company under (9.1) holds at least 50 percent of the total voting shares of such company;

(9.3) a company whose shares are held in tiers of shareholding beginning from shareholding by the company under (9.2) in the amount of at least 50 percent of the total voting shares of such company;

(9.4) a company in which the licensee or company under (9.1) (9.2) or (9.3) holds shares either directly or indirectly in a combined amount of at least 50 percent of the total voting shares of such company;

(9.5) a company in which the licensee or company under (9.1) (9.2) (9.3) or (9.4) has controlling power on determining financial and operational policies of the company for making benefits from the activities of such company.

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Shareholding of the licensee or company under (9.1) (9.2) (9.3) or (9.4) shall include the shares held by related persons.

(10) “Associated company of the licensee” means

(10.1) a company in which the licensee or its subsidiary company holds shares in a combined amount of at least 20 percent but not over 50 percent of the total voting shares of such company;

(10.2) a company in which the licensee or its subsidiary company has power to join in the decision making on financial and operational policies of such company, but not to the extent of policy control and not deemed as a subsidiary or a joint venture partner;

Shareholding of the licensee or its subsidiary company shall include the shares held by related persons.

(11) “Major shareholder of the licensee” means a shareholder who holds at least 10 percent of the total voting shares of the licensee, including the shares held by related persons of the licensee;

(12) “Related persons of the licensee” means persons or partnerships related to the shareholders of the licensee, as follows:

(12.1) Spouse of any such shareholder, or

(12.2) Child not attaining majority of any such shareholder, or

(12.3) Ordinary partnership in which the shareholders or the persons under (12.1) or (12.2) are partners, or

(12.4) Limited partnership in which the shareholders or the persons under (12.1) or (12.2) are partners whose liability is unlimited or partners whose liability is limited, whose combined shares held are at least 30 percent of the total shares of the limited partnership, or

(12.5) Limited company or limited public company in which the shareholders or the persons under (12.1) or (12.2), or a partnership under (12.3) or (12.4) hold shares in a combined amount of at least 30 percent of the total shares sold of such company, or

(12.6) Limited company or limited public company in which the shareholders or the persons under (12.1) or (12.2), or partnership under (12.3) or (12.4), or a company under (12.5) hold shares in a combined amount of at least 30 percent of the total shares sold of such company, or

(12.7) Juristic person in which the shareholder has the authority to act on behalf of such juristic person.

(13) “Licensee’s controller” means shareholders or other persons who, by behavior, are able to influence significant decision making on the licensee’s policy, management or operations, whether such influence is because he is a shareholder or authorized person under contract or any other matter, especially the person under any one of the following clauses:

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(13.1) A person who has either directly or indirectly at least 25 percent of the total voting rights of the licensee;

(13.2) A person who, by behavior, is able to control the appointment or the removal of the licensee's directors;

(13.3) A person who, by behavior, is able to control the person in charge of policy setting, management or operations of the licensee to adhere to his/her instructions on the determination of the management or operational policies of the licensee;

(13.4) A person who, by behavior, conducts the business for the licensee, or who takes charge of the licensee's operations in a manner of an executive, including the person holding a position who has the same authority as such person of the licensee.

Chapter 1

Methods and Procedures of Application for Merger of Business

Clause 3 Methods and procedures for a merger shall be in accordance with the respective laws governing the licensee or the licensee's controller.

Licensee or the licensee's controller wishing to apply for registering a merger according to Clause 4 paragraph one, or to notify a merger according to Clause 4 paragraph two shall have definite and fair shareholding structure that reflects the controlling power and beneficial interests of the shareholders and shall not have a cross-holding between the licensee and another licensee in the relevant market, the major shareholder of the licensee, subsidiary company of the licensee and associated company of the licensee.

Clause 4 Licensee or the licensee's controller wishing to undertake a merger with another licensee shall submit its application for a merger to the Secretary-General for his consideration as to whether the merger would lead to the relevant market dominance within a period of at least 60 days before taking actions as follows:

(1) Register a juristic person in case of a merger between the licensee or the licensee's controller and another licensee, which leads to establishment of a new juristic person under the Civil and Commercial Code or according to a joint venture contract, or

(2) Enter into an asset purchase contract in case of a merger where the licensee or the licensee's controller buys another licensee's assets either in whole or in part, or

(3) Enter into a share purchase and sale contract in case of a merger where the licensee or the licensee's controller buys another licensee's shares, in whole or in part, in order to control business administration, direction, or management policy.

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Except for the case where the licensee or the licensee's controller is able to demonstrate that after the merger, the assets of the licensee or the licensee's controller would not exceed 800 million baht, or the assets acquired from other licensee would not exceed 50 million baht, or the annual income of the licensee or the licensee's controller would not exceed 120 million baht, in such case, the licensee or the licensee's controller shall inform the Secretary-General of the merger and the rationale thereof within any period of time prior to taking action according to paragraph one (1) or (2) or (3) without having to appoint an independent advisor and without having to request for permission according to paragraph one.

In the case where the licensee or the licensee's controller buys shares more than 10 percent of the total number of shares of another licensee or buys assets either in whole or in part in order to control another licensee's policy or business management, and such acquisition of shares or assets is regarded as a merger according to Clause 2 (5), the licensee or the licensee's controller shall submit an application for registering the merger according to paragraph one or report on the merger according to paragraph two without having to seek any approval from the Commission according to Clause 8 of the Notification of the National Telecommunications Commission regarding Measures for the Prevention of Monopoly or Unfair Competition in Telecommunications Business B.E. 2549 (2006).

Clause 5 The application for a merger filed to the Secretary-General according to Clause 4 paragraph one shall at a minimum contain the following particulars:

- (1) Rationale, necessity and appropriateness of the merger;
- (2) Merger plan;
- (3) Details about the licensee or the licensee's controller wishing to undertake a merger, and another licensee to be merged, which shall at a minimum comprise shareholder structure and voting rights, sales and relevant market shares thereto;
- (4) Identify relevant market according to the Notification of the National Telecommunications Commission Re: Market Definition and Relevant Telecommunications Market B.E. 2551 (2008);
- (5) Details of the conditions and size of the relevant market;
- (6) Details about the rivals in the relevant market;
- (7) Documents or other details as may be specified by the Commission.

Clause 6 The Secretary-General may summon the licensee or the licensee's controller to present information or solicit additional evidentiary documents at any time as from the date of receiving the application for a merger under Clause 4 paragraph one.

The licensee or the licensee's controller may submit additional evidentiary documents to support its application for the merger to the Secretary-General within 15 days as from the date of submission of the application under Clause 4 paragraph one.

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Clause 7 Upon receiving the application for the merger according to Clause 4 paragraph one together with evidentiary documents to the Secretary-General's satisfaction, the Secretary-General shall have the duty to appoint an independent advisor whose task is to provide opinions on the application for the merger. The licensee or the licensee's controller who files the application shall bear the costs for this purpose.

The independent advisor appointed according to paragraph one shall submit the opinions on the application for the merger within 30 days as from the date of appointment in accordance with the following analysis framework:

(1) Shareholding structure and voting rights concerning the telecommunications business before and after the merger;

(2) Analysis of the relevant market;

(3) Analysis of other licensees who are the rivals in the relevant market;

(4) Analysis of impacts from a horizontal integration as follows:

(4.1) whether or not the integration would help raise the relevant market share or influence the relevant market direction that would lead to monopoly. The results must be described and assessed.

(4.2) whether or not the integration would cause negative impacts on the competitiveness of other licensees who are rivals in the relevant market;

(4.3) whether or not the integration would generate an excess profit that could result in economic monopoly in the relevant market.

(5) Analysis of impacts from a vertical integration as follows:

(5.1) whether or not the integration would create significant market power in the relevant market by assessing the concentration level within the relevant market demonstrated by the proportion of sales of telecommunications service;

(5.2) whether or not the integration is likely to obstruct competition of other licensee who is the rival in that relevant market;

(5.3) whether or not the integration would restrict rivals' entry of the relevant market in the future;

(5.4) whether or not the integration would lessen or hinder the enhancement of efficiency of competition in the relevant market by restricting rival licensees' access to production materials or telecommunications service required for the upstream or downstream production;

(5.5) whether or not the integration can distort the relevant market mechanism.

(6) Analysis of barriers to entry to the relevant market after the merger;

(7) Assessment of relevant market efficiency after the merger.

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Chapter 2

Merger Resulting in Relevant Market Domination

Clause 8 Apart from being obliged to the law on trade competition, the licensee or the licensee's controller shall be prohibited from undertaking a merger that would lead to relevant market domination.

In determining whether the merger would result in relevant market domination under paragraph one or not, a Herfindahl–Hirschman Index (HHI) shall be applied to indicate concentration level of the relevant market, thereby the market share percentage figures of each respective licensee are squared and added together, the result of which will show whether the relevant market has high concentration.

The HHI for the following situations shall be deemed as market dominance as resulted from a merger:

(1) When the HHI is used to determine a market share in term of sales, if the relevant market has an HHI less than or equivalent to 1,800 before a merger, and has an HHI higher than 1,800 after the merger, that increase the HHI by more than 50 points, it means the merger results in a highly concentrated market. Therefore, such merger is considered posing negative impact on competition, hence relevant market domination.

(2) When the HHI is used to determine a market share in term of sales, if the relevant market has an HHI higher than 1,800 before a merger, and has an HHI higher than 1,800 after a merger, that increase the HHI by more than 100 points, it means the merger results in a highly concentrated market. Therefore, such merger is considered posing negative impact on competition, hence relevant market domination.

Clause 9 The Secretary-General shall file an application for a merger under Clause 4 paragraph one accompanied by recommendations thereon pursuant to Clause 7 paragraph two to the Commission for the latter's consideration and shall issue an order within 15 days as from the date of receiving the independent advisor's opinions on the merger application. In the case where the Commission considers that the merger will not cause relevant market domination, the Commission shall permit the merger. However, in the case where the Commission considers that the merger may result in relevant market domination, the Commission shall prohibit such merger unless for economic benefit or national security or investment promotion and innovation development in the telecommunications industry or for public interests, the Commission may permit the merger. The Commission's decision shall be final.

In the case where the licensee or the licensee's controller violates the merger rules without having shareholding structure in accordance with Clause 3 or has not submitted an

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application for a merger in accordance with Clause 4 paragraph one or has not reported about the merger in accordance with Clause 4 paragraph two or has filed an application under Clause 4 paragraph one but executed the merger prior to the Commission's issuance of order and its merger has been prohibited by the order of the Commission or has executed the merger despite prohibition by the Commission, the Secretary-General shall have the power to order the violating licensee or licensee's controller by virtue of Section 64 of the Telecommunications Business Act B.E. 2544 (2001).

The case according to paragraph two shall not be deemed as a violation of the rules if the merger has been undertaken by the licensee or the licensee's controller acquiring another licensee's shares without any intention to take over, and the licensee or the licensee's controller has changed its holding proportion to less than 30 percent of the total number of shares of such other licensee or not more than the holding proportion of the licensee or the licensee's controller within the previous 30 days as from the date the licensee or the licensee's controller has acquired the shares which is deemed as a merger.

Licensee or the licensee's controller may not claim that it has acquired another licensee's shares without the intention to take over the business under paragraph three if the licensee or the licensee's controller has exercised the rights as a shareholder after the said share acquisition except for the case of exercise of right to receive dividend.

Chapter 3

Post-Merger Supervision

Clause 10 Upon permitting the licensee or the licensee's controller to undertake a merger under Clause 9 paragraph one, the Secretary-General shall appoint an independent advisor to take charge of assessing the behaviors of the licensee or the licensee's controller that may affect the relevant market after the merger. The independent advisor shall report the said behaviors and impacts to the Commission every three months throughout a period of at least two years as from the date of taking action under Clause 4 (1) or (2) or (3). The licensee or the licensee's controller who undertakes the merger shall be responsible for the costs and expenses.

The Commission shall have the power to specify specific measures in accordance with the nature of the telecommunications business in order to prevent the licensee or the licensee's controller from committing any act in the manner of monopoly or reduction or restriction of competition in supplying the telecommunications service throughout the reporting period.

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In this regard, the criteria for the regulation following the permission for a merger shall be in accordance with the Notification of the Commission on Measures for the Prevention of Monopoly of Unfair Methods of Competition in Telecommunications Business B.E. 2549 (2006).

Clause 11 The licensee or the licensee's controller permitted to undertake a merger under Clause 9 paragraph one who has sold or acquired shares in the manner that makes the licensee or other person increases or decreases its shareholding in an aggregate proportion of each five percent of the total number of shares sold whether or not the share transfer has been registered, and irrespective of the number of shares increased or decreased each time, such person shall have the duty to report to the Secretary-General the number of shares in a proportion of each five percent acquired or sold except when the sale has no effect on the change of directors or the business. A certified report shall be submitted to the Secretary-General within 30 days from the date of acquiring or selling the shares.

Clause 12 The Secretary-General shall have the duty to prepare a technical report on merger and cross-holding in telecommunications business and submit it to the Commission within 30 days as from the day this Notification comes into force.

Upon the preparation of the report under paragraph one, the Secretary-General shall prepare a guideline for permitting a merger and cross-holding in telecommunications business and submit it to the Commission within 180 days.

Transitory Provision

Clause 13 Unless otherwise exempted by the Commission, all licensees whether they undertake merger or not, shall not have a cross-holding between the licensees, other licensee in relevant market, the licensee's major shareholders, subsidiaries of the licensee, and associated companies of the licensee.

A relaxation allowing for a licensee's cross-holding under paragraph one may be granted provided that the licensee is able to prove that such cross-holding would cause no market dominance and no impact on competition, or not result in market distortion. Within three months as from the date this Notification comes into effect, the licensee who holds cross-shares under paragraph one shall inform the Secretary-General of its cross-holding. The Secretary-General shall propose the matter including his recommendations and a Regulatory Impact Assessment (RIA) to the Commission for consideration as to whether the licensee may be granted relaxation allowing for cross-holding.

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Any licensee fails to report its cross-holding according to paragraph two or continues to hold cross-shares after the Commission determined that the case may not be relaxed, the Secretary-General shall have the power to order the licensee or the licensee's controller who acts in violation by virtue of Section 64 of the Telecommunications Business Act B.E. 2544 (2001).

Announced on the 14th day of May B.E. 2553 (2010)

Professor Prasit Prapinmongkolkarn

Chairman of the National Telecommunications Commission

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Appendix A

Qualifications of Independent Advisor

An independent advisor under this Notification shall have the following qualifications:

(1) Being a financial institution or juristic person set up under Thai law for the main purpose of conducting a business that provides financial, accounting or legal advice;

(2) Being independent, having no relation to or no beneficial interest with the licensee or the licensee's controller or any other licensee merged with the licensee or the licensee's controller. The advisor shall have adequate capabilities and experience in providing opinions in the following manner:

(2.1) Not holding shares of the licensee or the licensee's controller or the major shareholder of the licensee or subsidiary company of the licensee or associated company of the licensee or juristic person who may have conflicts of interest with the licensee or the licensee's controller;

(2.2) Not being owned by the licensee or the licensee's controller or the major shareholder of the licensee or subsidiary company of the licensee or associated company of the licensee or juristic person who may have conflicts of interest with the licensee or the licensee's controller;

(2.3) Not being current employee, staff, or advisor who receives salary, or the licensee's controller or the major shareholder of the licensee or subsidiary company of the licensee or associated company of the licensee or juristic person who may have conflicts of interest with the licensee or the licensee's controller;

(2.4) Not having a business relationship with the licensee or the licensee's controller or the major shareholder of the licensee or subsidiary company of the licensee or associated company of the licensee or juristic person who may have conflicts of interest with the licensee or the licensee's controller, in the manner that may hinder his or her independent judgment, or having any other characteristics that would impair his or her independent opinion concerning the operations of the licensee or the licensee's controller;

(2.5) Director, manager, person holding the position of departmental head of the independent advisor or equivalent not being a person related by blood or by registration under the laws, such as father, mother, spouse, sibling, and child, including spouse of the children of the executives, major shareholders, controllers, or persons to be nominated as executives or controllers of the licensee or major shareholders of the licensee or subsidiary company or associated company of the licensee;

(3) Having clear, rigorous and adequate criteria and guidance for business operations as a financial, accounting or legal advisor who is trustworthy and able to attain the high level of

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professional standards and code of ethics in connection with the rendering of financial, accounting or legal advice without any conflicts of interest;

4) Having no behaviors or probable cause to believe that the independent advisor has or had a misbehavior in maintaining standards of performance and ethical conduct in connection with the rendering of financial, accounting or legal advice or any other advice that must employ knowledge and responsibilities similar to those of a financial, accounting or legal advisor, or parted in or supported other person in such conduct;

(5) Director, manager, person holding the position of departmental head of the independent advisor have no any of the following disqualifications:

(5.1) Being adjudged by the Court that his property be restrained, bankrupt, incompetent or quasi-incompetent;

(5.2) Being currently charged or prosecuted on criminal charge on grounds of cheating, misappropriation or corruption or sentenced by a final judgment of committing the said criminal offense.

(5.3) Being under the prohibition from holding the position or performing the duty of a director, manager, person having authority in the management or an advisor to any independent advisor;

(5.4) Having behaviors or probable cause to believe that he has or had a misbehavior in maintaining standards of performance and ethical conduct in connection with the rendering of financial, accounting or legal advice or any other advice that must employ knowledge and responsibilities similar to those of a financial, accounting or legal advisor, or parted in or supported other person in such conduct;

(5.5) Having behaviors or probable cause to believe that he has or had behaviors deemed to be dishonest or misappropriation, or parted in or supported other person in such conduct.

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Appendix B

Calculation of Herfindahl – Hirschman Index (HHI): An Example

Herfindahl – Hirschman Index (HHI) can be calculated as shown in the following example:

For instance, Market A comprises 3 licensees. Each has a market share of A, B and C. The HHI of Market A is calculated by $A^2+B^2+C^2$. If there is a merger between the first licensee and the second licensee, the HHI would change to $(A+B)^2+C^2$. The index is calculated by $(A+B)^2+C^2 = (A^2+2AB+B^2)+C^2$. When compared with the HHI of the market before merger, that is $A^2+B^2+C^2$, it can be seen that the merger results in an increase of the HHI. It thus indicates the change in the market before and after the merger, that is $2AB$.

An HHI of the whole market indicates the following market concentration:

An HHI below 1,000 indicates a non-concentrated market

An HHI between 1,000 to 1,800 indicates a moderately concentrated market

An HHI above 1,800 indicates a highly concentrated market

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