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Doing Business In... 2021

Philippines: Law & Practice

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PHILIPPINES

Law and Practice

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CONTENTS

1. Legal System	p.3	6. Competition Law	p.12
1.1 Legal System and Judicial Order	p.3	6.1 Merger Control Notification	p.12
2. Restrictions to Foreign Investments	p.3	6.2 Merger Control Procedure	p.13
2.1 Approval of Foreign Investments	p.3	6.3 Cartels	p.15
2.2 Procedure and Sanctions in the Event of Non-compliance	p.3	6.4 Abuse of Dominant Position	p.15
2.3 Commitments Required from Foreign Investors	p.4	7. Intellectual Property	p.16
2.4 Right to Appeal	p.5	7.1 Patents	p.16
3. Corporate Vehicles	p.5	7.2 Trade Marks	p.17
3.1 Most Common Forms of Legal Entities	p.5	7.3 Industrial Design	p.17
3.2 Incorporation Process	p.6	7.4 Copyright	p.18
3.3 Ongoing Reporting and Disclosure Obligations	p.7	7.5 Others	p.18
3.4 Management Structures	p.8	8. Data Protection	p.18
3.5 Directors', Officers' and Shareholders' Liability	p.8	8.1 Applicable Regulations	p.18
4. Employment Law	p.8	8.2 Geographical Scope	p.19
4.1 Nature of Applicable Regulations	p.8	8.3 Role and Authority of the Data Protection Agency	p.19
4.2 Characteristics of Employment Contracts	p.9	9. Looking Forward	p.19
4.3 Working Time	p.9	9.1 Upcoming Legal Reforms	p.19
4.4 Termination of Employment Contracts	p.9		
4.5 Employee Representations	p.10		
5. Tax Law	p.10		
5.1 Taxes Applicable to Employees/Employers	p.10		
5.2 Taxes Applicable to Businesses	p.11		
5.3 Available Tax Credits/Incentives	p.12		
5.4 Tax Consolidation	p.12		
5.5 Thin Capitalisation Rules and Other Limitations	p.12		
5.6 Transfer Pricing	p.12		
5.7 Anti-evasion Rules	p.12		

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1. LEGAL SYSTEM

1.1 Legal System and Judicial Order

The Philippine legal system is a blend of civil law and common law. The civil law origins of statutes and principles are evident in areas such as family relations, property, succession, contract and criminal law, while common law operates in areas such as constitutional law, remedial law, corporation, taxation, banking, insurance and labour.

The Philippine judicial order is a hierarchical organisation consisting of the municipal and regional trial courts, the Court of Appeals, and the Supreme Court as the top tier exercising supervision over all lower level courts, including all court personnel.

2. RESTRICTIONS TO FOREIGN INVESTMENTS

2.1 Approval of Foreign Investments

As a general rule, foreign individuals, corporations or other entities are allowed to engage in business in the Philippines, except in activities or industries that are reserved for Filipino citizens, as provided in the Constitution and existing legislation. In particular, the extent of equity held by foreigners in certain businesses and/or activities is restricted or limited as enumerated in the Foreign Investment Negative List (FINL) issued by the President of the Philippines pursuant to Republic Act No 7042, or the Foreign Investments Act of 1991 (FIA). The maximum equity interest held by a foreigner in a corporation will therefore depend on the type of activity in which the entity will engage.

Philippine law requires foreign corporations to obtain a licence from the Securities and Exchange Commission (SEC) to do business in the Philippines. A foreign corporation found

to be doing business in the Philippines without a licence can be sued in Philippine courts, but cannot sue or maintain suits to enforce its rights. Under the Revised Corporation Code, a foreign corporation may also be subject to fines and penalties at the discretion of the court.

Additionally, the approval of the SEC is required for the primary registration of foreign investments that will trigger the foreign equity restrictions in the FIA and FINL. New corporations with more than 40% foreign equity are required to apply for authority to do business under the FIA by submitting the requisite SEC Application Form (SEC Form No. F-100) and declaring their percentage of foreign equity and intention to operate either a domestic market enterprise or an export market enterprise, as defined under the FIA. Existing corporations increasing their foreign equity to more than 40% are also required to file the requisite SEC Application Form No. F-101 with the SEC, while existing corporations that have more than 40% foreign equity but are increasing the percentage of their foreign equity participation under the FIA are required to file SEC Application Form No. F-102. Such corporations are required to declare whether the increase in foreign equity will be through the allowable assignment of shareholdings to non-Philippine nationals, the issuance of new stocks from the unsubscribed capital stock, an increase/decrease of authorised capital stock, a merger or consolidation, or other means.

Foreign corporations intending to establish a Branch and Representative Office are also required to submit the requisite SEC Application Form prior to registration (SEC Form No. F-103 and F-104, respectively).

2.2 Procedure and Sanctions in the Event of Non-compliance

Upon receiving the relevant application forms as discussed in **2.1 Approval of Foreign Invest-**

ments, the SEC evaluates the application to ascertain its compliance with the FIA. The entire evaluation and approval processes take approximately one to two months from the submission of the application and documentary requirements.

If there are incomplete details or inconsistencies in the application forms, the SEC allows the applicant to rectify the deficiency in the form to ensure compliance, instead of denying the application outright. However, the SEC may still deny the application for non-compliance with the requirements of the FIA.

In cases of foreign investment in excess or violation of the allowable foreign equity percentage in the FIA, Section 14 thereof provides that a violation of any provisions of the law or the terms and conditions of registration (which necessarily includes the foreign equity restrictions), shall give rise to fines, penalties and the forfeiture of all benefits granted under the FIA. In addition, the president and/or officials responsible therefor shall also be subject to a fine. The imposition of these penalties, however, is without prejudice to the administrative sanctions that may be imposed by the SEC.

In addition, failure to comply with nationality restrictions will be deemed a violation of Commonwealth Act No 108, as amended by Presidential Decree No 715, otherwise known as the Anti-Dummy Law, and is punished by imprisonment and a fine of not less than the value of the right franchise or privilege that is enjoyed or acquired in violation of the law. Presidents or managers and directors of corporations that falsely simulate the existence of minimum stock or capital as owned by Filipino citizens for the purpose of evading the foreign equity restrictions may also be punished by imprisonment. Furthermore, a corporation that allows the use, exploitation or enjoyment of a right, franchise or

privilege by persons or entities not qualified to do so shall forfeit such right, franchise or privilege, as well as the property or business enjoyed or acquired in violation of the law.

2.3 Commitments Required from Foreign Investors

The SEC evaluates an application for registration for compliance with the minimum capitalisation rules. Certain corporations are subject to minimum capitalisation requirements pursuant to special laws, including those engaged in the insurance business or issuance of pre-need plans, and investment houses.

Under the FIA, a domestic corporation or Philippine subsidiary that produces goods for sale, renders services or otherwise engages in any business in the Philippines is known as a “domestic market enterprise”. Foreigners can invest as much as 100% equity in domestic market enterprises, except in areas included in the FINL. For domestic market enterprises whose equity is more than 40% foreign-owned, the minimum paid-up capital requirement for the establishment of a subsidiary is generally USD200,000. The amount of required minimum capital may be reduced to USD100,000 if the enterprise involves advanced technology, as determined by the Department of Science and Technology, or if it directly employs at least 50 employees, as certified by the Department of Labor and Employment (DOLE).

On the other hand, an enterprise wherein a manufacturer, processor or service enterprise exports 60% or more of its output is known as an “export enterprise”. In export market enterprises, foreigners can invest as much as 100% equity, except in areas included in the FINL. The minimum paid-up capital requirement for the establishment of a subsidiary engaged in an export market enterprise is PHP5,000.

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In addition, certain corporate vehicles require specific minimum paid-up initial capitalisation. For the establishment of a Philippine Representative Office, at least USD30,000 must be remitted into the Philippines, or its equivalent in other acceptable foreign currency. For Regional Headquarters (RHQ), an initial inward remittance of USD50,000 is required; thereafter, USD50,000 is required to be inwardly remitted annually to cover operating expenses. The establishment of a Regional Operating Headquarters (ROHQ) requires a one-time remittance of USD200,000 as capital is required.

A Foreign Branch Office engaged in a domestic market enterprise requires a capitalisation of at least USD200,000. If the Foreign Branch Office is engaged in an export market enterprise, a capitalisation of at least PHP50,000 is required.

The SEC verifies the applicant's compliance with the following financial ratios:

- solvency, or the ratio of total assets to total liabilities;
- liquidity, or the ratio of current assets to current liabilities; and
- debt to equity, or the ratio of total liabilities over equity.

The applicant shall also be required to deposit securities with an actual market value of at least PHP500,000 with the SEC within 60 days of the issuance of its SEC licence.

2.4 Right to Appeal

There is no specific remedy under the law for a foreign investor to challenge the SEC's denial of its application in court.

If there are deficiencies in the submitted application, the SEC usually recommends modification and rectification of the application to ensure

compliance, instead of denying the application outright.

If a foreign investor has questions of law with respect to the interpretation and application of the FIA vis-a-vis the circumstances of its intended investments, it may request a Legal Opinion from the SEC Office of the General Counsel (SEC-OGC) for guidance prior to filing an application with the SEC. However, the issuance of the Legal Opinion may take several months, depending on the complexity of the issues involved and the workload of the SEC-OGC.

3. CORPORATE VEHICLES

3.1 Most Common Forms of Legal Entities

There are several legal vehicles available for a foreign investor to do business in the Philippines.

The most common form of legal entity is a Domestic Subsidiary. Where a domestic subsidiary of a foreign corporation is created, two separate and distinct corporate entities shall exist, so the Philippine subsidiary becomes a legally independent unit as a domestic corporation. Registration with the SEC requires the following.

- At least two incorporators (either a natural or juridical person).
- The indication of at least two but not more than 15 directors who shall be elected for a term of one year. The nationality of the directors must comply with nationality restrictions where applicable (eg, if the corporation intends to own land, it must be at least 60% Filipino-owned, and 60% of the total number of members of the board should be Filipinos).
- A treasurer-in-trust (a resident of the Philippines).

A Branch Office is considered an extension of the parent company. No independent juridical entity is created by the establishment of a branch office, so any judgment or claim for liability against the branch office in the Philippines is a liability of the head office or the foreign corporation. The assets of both the branch office and the foreign corporation may be charged with any liability of the branch office. For the registration of a branch office with the SEC, a resident agent is required.

A Representative Office is considered a mere extension of a head office in the Philippines. It is not authorised to engage in activities that would generate income/revenue and is fully subsidised by its head office. It deals directly with the clients of the parent company and undertakes activities such as information dissemination and promotion of a company's product as well as quality control of products. For the registration of a Representative Office with the SEC, a resident agent is required. The SEC shall also check the applicant's compliance with the financial solvency ratio of total assets/total liabilities.

On the other hand, the activities of an RHQ are limited to acting as a supervisory, communication and co-ordinating centre for its subsidiaries, affiliates and branches in the Asia-Pacific region. It does not derive income from sources within the Philippines and does not participate in any manner in the management of any subsidiary or branch office it might have in the Philippines.

Lastly, an ROHQ performs the following qualifying services for its affiliates, subsidiaries and branches in the Philippines:

- general administration and planning;
- business planning and co-ordination;
- sourcing/procurement of raw materials components;
- corporate finance advisory services;

- marketing control and sales promotion;
- training and personnel management;
- logistic services;
- research and development services and product development;
- technical support and communications; and
- business development.

ROHQs are prohibited from offering services to entities other than their affiliates, branches or subsidiaries as declared in their registration with the SEC, nor shall they be allowed to directly and indirectly solicit or market goods and services on behalf of their parent company, branches, affiliates, subsidiaries or any other company.

Please see **2.3 Commitments Required from Foreign Investors** regarding the required inward remittance for the above legal entities.

3.2 Incorporation Process

In general, the main steps involved in the incorporation of a domestic corporation or the registration of a legal entity (such as a branch, representative office, RHQ or ROHQ) are as follows:

- preparation and drafting of the required documentation;
- remittance of the required initial capitalisation requirement to a treasurer-in-trust for account;
- for new domestic corporations, securing a favourable endorsement with relevant government entities, if the proposed corporation will engage in an industry requiring a special licence; and
- submission of the incorporation or registration documents to the SEC and the payment of filing fees.

Application documents submitted to the SEC must generally include the following information:

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- the proposed name of the corporation or legal entity, in a format that follows the rules on naming issued by the SEC, and that is available or not similar to an existing corporate name as may be indicated in the name reservation platform of the SEC; and
- the primary purpose of the corporation (or, for a branch, representative office, ROHQ or RHQ, the purposes for which it intends to pursue business in the Philippines).

Incorporation or registration with the SEC is done through the SEC's online platform, called the SEC Company Registration System. The application is assigned to an SEC examiner, who shall evaluate the submitted documents and endorse the application for the approval of SEC directors and the issuance of a Certificate of Incorporation or Registration.

As for timing, the SEC generally take one week to one month, upon the submission of complete documents, to issue a Certificate of Incorporation, or a Licence to Transact Business in the Philippines in the case of a branch, representative office, ROHQ or RHQ.

Upon the incorporation of a domestic corporation or the registration of a foreign corporation with the SEC, post-registration requirements are secured from different government agencies, including a local business permit from the local government unit where the principal office is located, and securing a Certificate of Registration from the Bureau of Internal Revenue (BIR).

3.3 Ongoing Reporting and Disclosure Obligations

In general, Philippine corporations are required to file the following annual reports with the SEC:

- a General Information Sheet (GIS) must be filed within 30 calendar days of the annual stockholders' meeting; and

- the Audited Financial Statements (AFS), as stamped received by the BIR, must be filed with the SEC within 120 calendar days from the end of the fiscal year according to the Financial Statements.

Branch Offices and Representative Offices of foreign corporations, as well as ROHQs and RHQs, are likewise required to file the following with the SEC:

- a GIS within 30 days of the anniversary of the issuance of the SEC Licence; and
- the AFS, as stamped received by the BIR, within 120 calendar days from the end of the fiscal year according to the Financial Statements.

For domestic corporations, an amended GIS is submitted to the SEC for any relevant changes, including changes in the directors or officers of the corporation during the year. A Notification Update Form is required for any change in the principal office address, officers or additional subsidiaries of Branch Offices and Representative Offices of foreign corporations, as well as ROHQs and RHQs.

Pursuant to SEC Memorandum Circular No 15-2019, all SEC-registered domestic corporations are also required to identify their beneficial owners, which are defined as natural persons who ultimately own, control or exercise ultimate effective control over the corporation. The corporation's GIS shall include a beneficial declaration page in compliance with said SEC directive.

Listed and public companies, as well as companies with secondary licences, are subject to more stringent reportorial and disclosure requirements with the SEC, including required reports on changes in beneficial ownership of securities, and the submission of quarterly reports.

3.4 Management Structures

There is no explicit requirement for a specific management structure in the Philippines. However, the Revised Corporation Code of the Philippines provides that the Board of Directors or trustees shall exercise the corporate powers, conduct all business, and control all properties of the corporation. Directors are elected by those stockholders who are entitled to vote, in a meeting where the owners of the majority of the outstanding capital stock are present.

In addition, the Revised Corporation Code requires the appointment of the following officers after incorporation:

- a President, who must be a director;
- a Corporate Secretary, who must be a Filipino citizen and a Philippine resident;
- a treasurer, who must be a Philippine resident; and
- such other officers as may be provided in the bylaws.

If the corporation is vested with public interest, the board shall also elect a compliance officer. The officers shall manage the corporation and perform such duties as may be provided in the bylaws and/or resolved by the board of directors.

3.5 Directors', Officers' and Shareholders' Liability

A director holds a position of trust and is considered a fiduciary of the corporation. Directors or trustees who wilfully and knowingly vote for or assent to patently unlawful acts of the corporation, or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees, shall be liable jointly and severally for all damages resulting therefrom suffered by the

corporation, its stockholders or members and other persons.

In addition, following the doctrine of separate juridical personality, corporations in the Philippines are treated as separate and distinct legal entities from the natural persons comprising them. By virtue of this doctrine, stockholders of a corporation enjoy the principle of limited liability. Thus, the corporate debt is not the debt of the stockholders.

However, the Supreme Court has warranted the piercing of the corporate veil in situations when the separate personality of a corporation is used as a means to perpetuate fraud or an illegal act, or as a vehicle for the evasion of an existing obligation or the circumvention of statutes, or to confuse legitimate issues.

Therefore, whether the separate personality of the corporation should be pierced hinges on the facts of each case. Any piercing of the corporate veil has to be done with caution, although the Court has held that it shall not hesitate to disregard the corporate veil when it is misused or when doing so is necessary in the interests of justice.

4. EMPLOYMENT LAW

4.1 Nature of Applicable Regulations

The employment relationship is primarily governed by the Labor Code of the Philippines, rules and regulations issued by the DOLE, and cases decided by the Supreme Court. The employment relationship may be further defined by the employment contract and collective bargaining agreement (CBA), if any, as long as such is not contrary to the Labor Code and established case law.

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4.2 Characteristics of Employment Contracts

An employment contract is perfected by mere consent. The Labor Code does not require a specific form or a written employment contract to prove the existence of an employer-employee relationship. However, it is recommended to have a written employment contract to clearly define the relationship between the parties. Notably, an employee is presumed to be a regular employee unless there is a written employment contract showing that he or she is a non-regular employee, such as a probationary, casual, project, seasonal or fixed-term employee.

4.3 Working Time

The normal working hours for any employee must not exceed eight hours a day. It is permissible to exceed eight hours a day if the employee is paid the corresponding overtime pay. An employee may render overtime only if he or she is obliged or permitted by the employer to do so.

Employees are also entitled to a rest period of not less than 24 consecutive hours after every six consecutive normal work days.

4.4 Termination of Employment Contracts

“At will employment” is not recognised under Philippine law; an employee may only be terminated for just or authorised causes for dismissal. This policy is anchored on the principle of the security of tenure of employees, which is not only statutorily provided but is constitutionally enshrined.

The just causes for termination are as follows:

- serious misconduct or wilful disobedience;
- gross and habitual neglect of duties;
- fraud or wilful breach of trust;
- loss of confidence;

- commission of a crime or offence by the employee against his or her employer, the employer’s immediate family or his or her duly authorised representatives; and
- other causes analogous to the foregoing.

The authorised causes for the termination of a contract are as follows:

- the installation of labour-saving devices;
- redundancy;
- retrenchment to prevent losses;
- the closure or cessation of business; and
- a disease not curable within six months as certified by a competent public authority, and when the continued employment of the employee is prejudicial to his or her health or to the health of his or her colleagues.

The cause of dismissal determines which procedure must be followed prior to the dismissal. For just causes, an employer must:

- serve the employee with a written notice containing the specific causes or grounds of termination, and giving him or her an opportunity to provide an explanation, within at least five days of receiving notice to clarify his or her defence;
- conduct a hearing or conference to allow the employee to explain his or her defences, present evidence and rebut the evidence presented against him or her; and
- serve the employee with a written notice of termination indicating that all circumstances involving the charge against him or her have been considered, as well as the grounds to justify the severance of his or her employment.

Severance pay is not required for just cause dismissals but may be granted in exceptional circumstances.

For authorised causes, the employer must send written notices to the employee and to the DOLE regional office at least 30 days before the intended date of termination of the employment contract. The employee must also be granted severance pay at the rate prescribed by the Labour Code or by the CBA with the union.

Failure to comply with the procedural requirements shall not invalidate a dismissal where just or authorised causes exist. However, an erring employer may be held liable for nominal damages of up to PHP30,000 for just causes, or up to PHP0,000 for authorised causes.

There is no legal requirement to notify a union prior to a termination, but such a requirement may be provided in the CBA. Furthermore, no employee class may be exempt from termination, subject to regulations on the termination of employment contracts for authorised causes as may be prescribed in a CBA.

4.5 Employee Representations

Employees and employers are encouraged to form labour management councils to facilitate the exercise of the employees' right to participate in the company's policy and decision-making processes. Employee representatives to labour management are elected by at least the majority of all employees in the establishment.

Employees also have a constitutionally protected right to self-organisation. Rank-and-file and supervisory employees are free to form, join or assist unions of their own choosing for purposes of collective bargaining.

Unions are "locally" formed within a company through specific bargaining units and are open only to employees within that company. To exercise the rights granted by law to unions, a union must be duly registered with the DOLE either as an independent union (which must gener-

ally consist of at least 20% of all the employees in the bargaining unit where it seeks to operate) or as a local chapter created by a national union or federation through the issuance of a charter certificate. A bargaining unit is a group of employees sharing mutual interests within a given employer unit comprised of all or a portion of the entire body of employees in the employer unit, or any specific occupational or geographical grouping within that employer unit.

A union selected as the sole exclusive bargaining representative shall retain this status as follows:

- for one year from the last certification election;
- during the course of negotiations for a CBA;
- during a bargaining deadlock; and
- during the five-year validity of a CBA, except within the last 60 days prior to its expiry.

Once selected, the bargaining representative and the employer have a duty to bargain collectively.

5. TAX LAW

5.1 Taxes Applicable to Employees/ Employers

Based on Section 42(A)(3) of the Tax Code, compensation for labour or personal services performed within the Philippines is considered as gross income earned from the Philippines, and is therefore subject to Philippine income tax.

As a general rule, an employee who is a resident citizen, non-resident citizen or a resident alien shall be subject to Philippine income tax at the rate of 0% to 35%, depending on the amount of taxable income earned within the Philippines for the taxable year. For the resident citizen, income from compensation rendered abroad is also subject to Philippine income tax. Under Rev-

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Revenue Regulation No 08-2018, taxable income for compensation earners is defined as the gross income minus non-taxable income/benefits such as but not limited to the 13th month's pay and other benefits, de minimis benefits, and the employee's share in government-mandated employee social service contributions and union dues.

On the other hand, an employee who is a non-resident alien not engaged in trade or business within the Philippines is subject to Philippine income tax at the rate of 25% of the income received from salaries and wages earned within the taxable year.

Employers as Withholding Agents

The employers are required to withhold certain amounts from compensation to be transmitted to the employees. The amounts to be withheld and transmitted to the National Government directly depend on the taxable income of the employees.

5.2 Taxes Applicable to Businesses

A corporation doing business in the Philippines is subject to various taxes at varying rates, depending on its classification.

Domestic corporations, or those created or organised in the Philippines, are taxed on their net income from all sources. They are subject to the following Philippine taxes:

- Regular Corporate Income Tax (RCIT) at the rate of 25% (may be reduced to 20% if certain criteria are met) based on the net taxable income derived during each taxable year from all sources within and without the Philippines, or Minimum Corporate Income Tax (MCIT) at the rate of 1% based on the gross income derived during each taxable year, beginning on the 4th taxable year, from all sources

within and without the Philippines, whichever is higher;

- Value-Added Tax (VAT) at the rate of 12% of the gross selling price for the sale of goods or properties or 12% of the gross receipts for the sale of services, whichever is applicable;
- Withholding Tax on Compensation at varying rates depending on the taxable income of its employees;
- Expanded Withholding Tax (EWT) on certain expenses provided under Revenue Regulation No 02-98, as amended;
- Final Withholding Tax (FWT) at varying rates depending on the type of passive income; and
- Local Taxes imposed by the Local Government Units (LGU).

Resident Foreign Corporations, including a branch, are subject to the following Philippine taxes:

- RCIT at the rate of 25% based on the net taxable income derived during each taxable year from all sources within the Philippines, or MCIT at the rate of 1% based on the gross income derived during each taxable year, beginning on the 4th taxable year, from all sources within the Philippines, whichever is higher;
- VAT at the rate of 12% of the gross selling price for the sale of goods or properties or 12% of the gross receipts for the sale of services, whichever is applicable;
- Branch Profit Remittance Tax at the rate of 15% of total profits applied or earmarked for remittance;
- Withholding Tax on Compensation at varying rates depending on the taxable income of the employees;
- EWT on certain expenses provided under Revenue Regulation No 02-98, as amended;
- FWT at varying rates depending on the type of passive income; and

- Local Taxes imposed by the LGU.

Finally, Non-Resident Foreign Corporations are subject to the following Philippine taxes:

- RCIT at the rate of 25% based on the gross income derived during each taxable year from all sources within the Philippines;
- VAT at the rate of 12% of the gross selling price for the sale of goods or properties or 12% of the gross receipts for the sale of services, whichever is applicable; and
- FWT at varying rates depending on the type of passive income.

5.3 Available Tax Credits/Incentives

The amount of income taxes paid or incurred during the taxable year by a domestic corporation to any foreign country may be claimed as a tax credit in the Philippines. However, there are limitations on the tax credits that may be claimed under the Tax Code.

5.4 Tax Consolidation

Tax consolidation is not available in the Philippines. Parent companies, subsidiaries and affiliates are taxed separately.

5.5 Thin Capitalisation Rules and Other Limitations

There are no thin capitalisation rules in the Philippines.

5.6 Transfer Pricing

Transfer pricing rules are applicable in the Philippines. Section 50 of the Philippine Tax Code provides that the Commissioner of Internal Revenue is authorised to distribute, apportion or allocate gross income or deductions between or among organisations that are owned or controlled directly or indirectly by the same interests, if he/she determines that such distribution, apportionment or allocation is necessary in order to

prevent the evasion of taxes or to clearly reflect the income of any organisation.

5.7 Anti-evasion Rules

There are anti-tax evasion rules in the Philippines. Section 254 of the Philippine Tax Code provides that any person who wilfully attempts to evade or defeat any tax provided under the Tax Code shall be punished by a fine, in addition to the other penalties provided by law.

6. COMPETITION LAW

6.1 Merger Control Notification

The Guidelines on the Computation of Merger Notification Threshold (Merger Rules) provide the rules on determining whether a merger, an acquisition of shares or assets, or a joint venture is subject to compulsory notification.

Notification is compulsory if the transaction breaches the compulsory notification thresholds:

- the aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity (UPE) of at least one of the acquiring or acquired entities, including that of all entities that the UPE controls, directly or indirectly, exceeds PHP6 billion (Size of the Party Test); and
- the value of the transaction exceeds PHP2.4 billion (Size of the Transaction Test).

Computing the value of the transaction depends on the type of the transaction.

For mergers or acquisitions of assets in the Philippines, the amount is computed based on the value of the assets that are the subject of the transaction or the gross revenues generated in the Philippines of such assets.

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For an acquisition of voting shares of a corporation or of an interest in a non-corporate entity, the amount is computed based on the aggregate value of the assets of the acquired entity or gross revenues generated by such assets in the Philippines. Furthermore, as a result of the proposed acquisition, the entity acquiring the shares, together with their affiliates, should own voting shares or interests of:

- more than 35%; or
- more than 50%, if the entity or entities already own more than 35%.

For joint ventures, the amount is computed based on the aggregate value of the assets that will be contributed into the proposed joint venture or the gross revenues generated by such assets, including any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee.

On 15 September 2020, Republic Act No 11494 (otherwise known as the Bayanihan to Recover as One Act, or Bayanihan Law 2) took effect and increased the notification threshold for the review of mergers and acquisitions to PHP50 billion. Mergers or acquisitions with a transaction value of below PHP50 billion are exempted from the Philippine Competition Commission (PCC) compulsory notification requirements for a period of two years from the date of effectivity of Bayanihan Law 2.

Under the Rules for the Implementation of section 4(eee) of Republic Act No 1194, otherwise known as the Bayanihan to Recover as One Act, Relating to the Review of Mergers and Acquisitions (PCC BARO Rules), transactions below the PHP50 billion notification thresholds are likewise exempted from the PCC's power to review mergers and acquisitions motu proprio for a period of one year from the effectivity of Bayanihan Law 2.

However, the transaction below the notification threshold may be reviewed by the PCC motu proprio after one year from the effectivity of the law.

A merger or acquisition consisting of successive transactions that shall take place within a one-year period between the same parties or entities under common control shall be treated as one transaction (Creeping Transactions).

Parties that breach the thresholds are required to notify the PCC within 30 days of the execution of the definitive agreement.

For Creeping Transactions, if a binding preliminary agreement provides for such successive transactions, the entities shall provide notification on the basis of such preliminary agreement. If there is no binding preliminary agreement, notification shall be made when the parties execute the agreement relating to the last transaction that satisfies the thresholds, when taken together with the preceding transactions.

6.2 Merger Control Procedure

Parties that breach the thresholds are required to notify the PCC within 30 days of the execution of the definitive agreement. The notification process is as follows.

- Prior to filing the notification, the parties required to notify may inform the PCC of the proposed merger or acquisition and request a pre-notification consultation, in which they may seek non-binding advice as to what information is required to be specified in the notification.
- Each party shall submit a Notification Form and pay the applicable fees. An electronic copy of the form and a scanned copy of the required certification executed by each party's representative – providing that the contents of the Notification Form and annex-

es thereto, if any, are true and accurate of their own personal knowledge and/or based on authentic records – and contained in a secure electronic storage device shall likewise be submitted, simultaneous with the filing of the hard copy.

As the Notification Form requires highly specific information, in practice, the same is provided through appendices, to which supporting documents may likewise be attached as sub-appendices.

- Upon submission of the Notification Form, the PCC shall determine within 15 days whether the Notification Form and other relevant requirements are complete, and shall inform the parties of other information and/or documents it may have failed to supply, or issue a notice to the parties that the notification is sufficient for the purposes of commencing a Phase 1 review of the merger or acquisition. In the case of the former, a Notice of Deficiency shall be issued, listing the missing information. In the case of the latter, an Order of Payment shall be issued, mandating the payment of a fixed fee of PHP250,000 within a period of ten days from receipt of such order. After the payment, a Notice of Sufficiency shall be issued, informing the parties that their notification is complete, and a Phase 1 review shall commence.

Note that the appropriate periods for the phases of review shall commence only upon the PCC's determination that the notification is complete. If the parties fail to provide the requested information within 15 days of receiving the request, the notification shall be deemed expired and the parties have to refile the notification. If the parties need additional time to put together the requested information, they may request an extension, in which case the periods for review shall be correspondingly extended.

- The Phase 1 review lasts for a maximum period of 30 days from complete notification and payment. It involves an assessment to determine if the notified merger or acquisition raises any competition concerns under the Philippine Competition Act (PCA) that would warrant a more detailed review. If no competition concerns are raised, the merger or acquisition may be cleared within the period for Phase 1 review.
- If, after the conduct of a Phase 1 review, the PCC is unable to conclude that the notified merger or acquisition does not raise competition concerns, it will provide the parties thereto a notice and request for additional information for the purpose of commencing a Phase 2 review. An Order of Payment shall be sent to the parties within five days from such notice. The Phase 2 review fee shall be 1% of 1% of the value of the transaction, which shall not be less than PHP1 million nor more than PHP5 million.

A Phase 2 review lasts for a maximum period of 60 days and is a more detailed and in-depth assessment of the merger or acquisition. The additional 60-day period shall begin on the day after the request for information is received by the parties. In no case shall the total period of review by the PCC exceed 90 days from the time the initial notification of the parties is deemed complete.

- At any time before the PCC has rendered a final decision, the parties may propose commitments that remedy, mitigate or prevent the substantial lessening of competition arising from the merger or acquisition, and if the PCC approves the proposed commitments, the merger or acquisition may be allowed to proceed subject to the commitments accepted by the PCC.
- At the end of the Phase 1 or 2 review process, the PCC may decide to (i) approve the

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merger or acquisition; (ii) prohibit the merger or acquisition; or (iii) prohibit the merger or acquisition, subject to conditions that it considers appropriate to remedy, mitigate or prevent anti-competitive transactions. If no decision is promulgated upon the lapse of the periods of review, the merger or acquisition shall be deemed approved.

The PCC introduced the Interim Guidelines on the Operations of the Mergers and Acquisitions Office during the Modified Enhanced Community Quarantine, the effectivity of which was extended throughout the period of community quarantine in the Philippines and continues to be in effect. Submissions of notification forms are now done through an online facility, to which parties may request access from the PCC.

6.3 Cartels

Philippine law prohibits agreements whose object or effect is to substantially prevent, restrict or lessen competition. Nevertheless, agreements that contribute to improving the production or distribution of goods and services, or that contribute to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, are not considered a violation of Philippine Law on anti-competitive agreements.

In particular, the PCA prohibits agreements between and among competitors that restrict competition in terms of price, or components thereof, or other terms of trade, or those fixing price at an auction or in any form of bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation.

The PCA likewise prohibits agreements between or among competitors that have the object or effect of substantially preventing, restricting or lessening competition, such as those setting,

limiting or controlling production, markets, technical development or investment, or those dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means.

6.4 Abuse of Dominant Position Rules Governing Conduct Amounting to Abuse of Dominant Position

The PCA specifically prohibits situations wherein one or more entities abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition, including:

- selling goods or services below cost with the object of driving competition out of the relevant market;
- imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner except those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws;
- making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;
- setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially, subject to permissible price differentials; and
- imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebates upon such price, or

imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially, provided that the following are not prohibited:

- (a) permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those that give each party the right to unilaterally terminate the agreement; or
- (b) agreements protecting intellectual property rights, confidential information or trade secrets.

The PCA likewise prohibits making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier that have no direct connection with the main goods or services to be supplied; directly or indirectly imposing unfair purchase or selling prices on competitors, customers, suppliers or consumers, provided that prices that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be considered unfair prices; and limiting production, markets or technical development to the prejudice of consumers.

Recent Application

In 2019, the PCC decided on its first abuse of dominance case, involving a property developer that imposed a sole internet service provider on its residents, thereby preventing the residents from utilising alternative, cheaper internet services. As a corrective measure, the PCC ordered the property developer to pay a fine of PHP27 million and invited other internet service providers to offer their services to residents.

The PCC also blocked a major food manufacturer's proposed acquisition of a sugarcane milling entity, as it decided that the acquisition would substantially lessen competition in the market for sugarcane milling services in South-

ern Luzon. The prohibition of the transaction supposedly prevented the creation of a monopoly that could significantly harm the welfare of sugarcane farmers, purportedly demonstrating the PCC's growing focus on stakeholders who belong to priority sectors.

7. INTELLECTUAL PROPERTY

7.1 Patents

A patent is a bundle of exclusive rights granted to the owner of a technical solution, such as a product or process, which is new, involves an inventive step, is industrially applicable, and is not excluded by law from patent protection.

Patent applications must be filed within 12 months from the priority date, if any. A national phase entry application under the Patent Cooperation Treaty (PCT) must be filed within 30 months from the priority date or the international filing date, if no priority is claimed, subject to a one-month extension upon payment of a surcharge fee.

A patent application undergoes both formal and substantive examination. Currently, it takes around three years from filing before an application is examined. Depending on the issues and objections found, the examination stage takes around two years. Once allowed, a Letters Patent Certificate is issued.

A patent owner has the exclusive right to restrain, prohibit and prevent any unauthorised making, using, offering for sale, selling or importing of a patented product or a product obtained from a patented process. If the patent application was filed prior to 1 January 1998, the term of the patent is 17 years from the issuance of the patent; otherwise, the term is 20 years from the filing of the application.

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Any violation of the patent owner's exclusive rights constitutes patent infringement. To claim damages and secure an injunction against an infringing activity, the infringement action may be filed as an administrative complaint with the Philippine Intellectual Property Office (IPOPHL), or as a civil case with the commercial courts. A criminal action for patent infringement may only be pursued if the infringement is repeated after a court has found the defendant guilty of a previous infringement.

7.2 Trade Marks

A trade mark is any visible sign capable of distinguishing the goods or services of an enterprise, including a stamped or marked container of goods.

The Philippines follows the first-to-file rule for trade mark protection. An application is granted a filing date upon the filing of complete requirements, then undergoes substantive examination to determine registrability. If registrable, the mark is published for opposition. If no opposition is filed within 30 days of said publication, the mark is deemed registered and a Certificate of Registration is issued in due course.

A trade mark registration remains in force for ten years, unless it is cancelled or removed sooner. It may be renewed for ten-year periods by filing a request for renewal before the expiration, or within six months after expiration subject to the payment of a surcharge.

A trade mark application or registration must be kept active by filing a Declaration of Actual Use (DAU) together with proofs of use of the mark within the following periods:

- three years from its filing date;
- six years from its registration date; or
- one year from its renewal date.

Failure to comply with these DAU requirements will result in the refusal of the application or the removal of the registered mark.

A trade mark registrant has the exclusive right to prevent anyone from using an identical or confusingly similar mark in relation to the same or related goods and/or services covered by the trade mark registration. A violation of this right constitutes trade mark infringement and/or unfair competition, which may be filed before the IPOPHL as an administrative case, or before the regular courts as a civil and/or criminal case. To claim damages, it must be shown that the infringer had prior notice of the mark's registration. Where fraud or deception is employed to pass off one's goods as that of another's, with or without a registered mark, an unfair competition case may be filed.

7.3 Industrial Design

An industrial design is a composition or combination of shapes, lines or colours, or a three-dimensional form, which produces an aesthetic and ornamental effect and gives a special appearance to and can serve as a pattern for an industrial product or handicraft.

Only a formality examination is conducted for industrial design applications, which can take around eight months depending on the issues and objections found. Once allowed, a Certificate of Registration is issued.

An industrial design is registered for five years from its filing date, and may be renewed for not more than two consecutive five-year periods.

Like patents, an industrial design owner has the exclusive right to restrain, prohibit and prevent any unauthorised making, using, offering for sale, selling or importing of a registered design, and may pursue an infringement action against

violations to claim damages and/or secure an injunction.

7.4 Copyright

Copyright is a statutory right granted to the proprietor of a literary, artistic or scientific work for its exclusive use and enjoyment to the extent specified by the law.

Works are protected by the sole fact of their creation. Nonetheless, an author may register his work with the National Library, the Supreme Court Library (for works in the field of law) and the IPOPHL, and will be issued a certificate of copyright registration.

Copyright is generally protected until 50 years after the death of the author. An author's right to attribution shall last his lifetime and in perpetuity after his death, while other moral rights are coterminous with the economic rights.

The author enjoys the exclusive right to use, authorise and prevent others from the reproduction, publication or communication of his work, subject to fair use exceptions. In case of infringement, the author may institute an administrative, civil or criminal case with a claim for damages and injunctive relief within four years from the cause of action. Copyright infringement can take the form of direct infringement, beneficial infringement, or contributory or causal infringement.

7.5 Others

Trade Secrets

A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. Trade secrets are not registered with the IPOPHL. Philippine laws are instead tailored towards preventing compulsory disclosure of such secrets, and parties usually resort to non-disclosure agreements.

Plant Variety

A plant variety may be a seed, transplant, plant, tuber, tissue culture plantlet, and other forms that can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant groupings by the expression of at least one characteristic, and considered as a unit with regard to the suitability for being propagated unchanged.

An application for plant variety protection is filed with the National Plant Variety Protection Board and, if allowable, a Certificate of Plant Variety Protection is issued. For trees and vines, the term of protection is 25 years from the date of the grant of protection and 20 years for all other types of plants.

Indigenous/Traditional Knowledge

Traditional knowledge is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. Through the Indigenous People's Rights Act of 1997, indigenous cultural communities and peoples are entitled to recognition of the full ownership and control and protection of their cultural and intellectual rights.

8. DATA PROTECTION

8.1 Applicable Regulations

Under Republic Act No 10173, otherwise known as the Data Privacy Act of 2012, the collection, processing, sharing and retention of personal data shall be allowed, subject to adherence to general principles laid out in said law, including the implementation of adequate and appropriate safeguards to ensure the integrity and confidentiality of the same.

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In addition, the law requires entities that process or collect data to designate data protection and/or compliance officers to be accountable for establishing compliance with data privacy and security policies under the applicable laws and regulations enacted by the National Privacy Commission (NPC). The law likewise provides for acts made punishable under the law and the consequent penalties for the same, which include the imposition of fines and possible imprisonment. The Implementing Rules and Regulations (IRR) of the Data Privacy Act and issuances of the NPC also prescribe the minimum standards for qualifications of the designated data protection officer, the factors to be taken into consideration in the registration of entities processing or collecting data, and the procedure for rectifying data breaches.

8.2 Geographical Scope

The Data Privacy Act applies extraterritorially, particularly to an act or practice engaged in and outside of the Philippines by an entity if:

- the act, practice or processing relates to personal information about a Philippine citizen or a resident;
- the entity has a link with the Philippines and is processing personal information in the Philippines, or even if the processing is outside the Philippines as long as it is about Philippine citizens or residents, such as:
 - (a) a contract is entered into in the Philippines;
 - (b) a juridical entity is unincorporated in the Philippines but has central management and control in the country; and
 - (c) an entity that has a branch, agency, office or subsidiary in the Philippines and the parent or affiliate of the Philippine entity has access to personal information; and
- the entity has other links in the Philippines, such as but not limited to:
 - (a) the entity carries on business in the Philippines; and

- (b) the personal information was collected or held by an entity in the Philippines.

8.3 Role and Authority of the Data Protection Agency

The NPC administers and implements the provisions of the Data Privacy Act. Its tasks include monitoring and ensuring the Philippines' compliance with international standards set for data protection and receiving complaints, instituting investigations and awarding indemnity on matters affecting personal information.

If processing is found to be detrimental to national security and public interest, the NPC is also empowered to issue cease and desist orders and to impose bans, whether temporary or permanent, on the processing of personal information. It can also recommend prosecution and the imposition of penalties specified under the Data Privacy Act.

9. LOOKING FORWARD

9.1 Upcoming Legal Reforms

Several legislative reforms have been adopted, promulgated or put forward, particularly in response to the COVID-19 pandemic.

Regarding foreign investments, several bills are pending with Congress that seek to relax foreign investments to aid the Philippines' economic recovery after the COVID-19 pandemic. In particular, Senate Bill No 2094 seeks to update the 83-year-old Commonwealth Act 146, more commonly known as the Public Service Act. Senate Bill No 1156 seeks to amend some provisions of the Foreign Investments Act of 1991 to ease equity restrictions of foreign investments in the Philippines. Likewise, Senate Bill No 1840 seeks to amend the Retail Trade Liberalization Act of 2000 to lower the required paid-up capital for foreign enterprises. These measures are sup-

ported by President Duterte, who certified the urgent passage of these economic bills.

As of June 2021, several stimulus package bills are also pending in the Congress to provide measures for economic recovery in the face of COVID-19, such as House Bill No 9411, which is the substitute bill for the known as Bayanihan to Arise as One Act (Bayanihan 3) and Senate Bill No 2123, known as the Expanded Stimulus Package Act of 2021. Both pending bills propose to align funds, provide assistance to certain business sectors, and direct relief to households.

The proposed amendments to Republic Act No 8293, otherwise known as the Intellectual Property Code, as stated in House Bill No 8620 endorsed by the Philippine IPOPHIL, are welcome improvements to the current IP system in the country. The proposed amendments provide more stringent penalties for IP rights violations and stronger enforcement powers for the IPO-

PHIL, among other matters. IP rights are guaranteed a higher level of protection that would undoubtedly promote their creation, use and commercialisation in the Philippines.

Following the promulgation of Republic Act No 11534 or the Corporate Recovery and Tax Incentives for Enterprises Act (CREATE Act), which is referred to as Package Two of the Comprehensive Tax Reform Programme of the Duterte Administration, it is hoped that Package Three or the Real Property Valuation Reform will be passed into law. Package Three involves proposals to rationalise real property tax administration and collection, including the establishment of a single valuation base through a schedule of market values.

PHILIPPINES LAW AND PRACTICE

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Villaraza & Angangco was established in 1980 and is a full-service law firm based in the Philippines with consistently recognised expertise in the areas of litigation and dispute resolution, corporate and commercial law, intellectual property, and labour and employment. The firm is headed by legal luminaries and practitioners who are deemed experts in their respective fields, and has about 70 lawyers and 100 highly trained non-legal staff who capably provide comprehensive, multi-layered, innovative and

practical solutions to both foreign and domestic clients. With decades of experience in serving at the forefront of the evolving landscape of Philippine law, Villaraza & Angangco continues to gain the confidence of prominent individuals, multinational corporations and business leaders across practice areas, and to establish itself as one of the leading firms in both the international and domestic legal spheres offering professional service of the highest calibre.

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Sylvette Y Tankiang is the chief financial officer and Tax Department chair of Villaraza & Angangco. She is consistently recognised globally as an outstanding practitioner in the fields of taxation, M&A, banking and finance, securities, real estate, mining, natural resources, and power and energy. With years of extensive experience in legal practice, Sylvette is highly regarded for her ability to deliver decisive direction with meticulous attention to detail. She served as the president of the Harvard Law School Association of the Philippines, the Harvard Club of the Philippines, and the University of the Philippines Women Lawyers' Circle, Inc.



Alejandro E Navarro is the current managing partner of Villaraza & Angangco. He has more than 30 years of well-grounded litigation experience in appearing before various courts, including the Philippine Supreme Court and the Singapore International Arbitration Centre, and is an internationally recognised litigator for his ingenious approach to solving legal problems. He is relied upon to defend high-profile clients who are dragged into criminal litigation as an offshoot of intra-corporate and commercial disputes, defending the constitutionality of electronic power industry issuances, as well as in cross-border commercial disputes that have an impact on the country's infrastructure development.

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Franchette M Acosta is the Corporate Department head at Villaraza & Angangco. She has a high level of expertise in corporate and commercial law, and has navigated cross-border

and domestic M&A with multi-faceted regulatory issues. She is highly regarded for her ability to successfully guide clients in foreign direct investment market entry/expansion, M&A, finance and project development, competition and data protection laws, and government contracts across industries, including telecommunications, financial services, real estate, power/energy, mining and manufacturing. She has also successfully acted as lead counsel for borrowers in syndicated loan agreements and project financing, and for underwriters in IPOs in various exchanges in Southeast Asia.



Katrina V Doble has more than 16 years' experience in IP law, covering the full spectrum of the practice area. Due to her breadth of experience, she played a crucial role in the

growth of Villaraza & Angangco's trade mark prosecution practice and in expanding the firm's client base in China and the USA. Katrina's extensive IP litigation experience includes cases that have contributed to the building of Philippine jurisprudence on trade marks. She was a pioneer member of INTA's Unreal Campaign Committee and a Trustee of IPAP, the leading Philippine organisation for IP practitioners.

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