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Merger Control 2021

Philippines

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The primary merger control legislation is the Philippine Competition Act (Republic Act No 10667 or PCA), its implementing rules and regulations, and other rules and guidelines issued by the Philippine Competition Commission (PCC).

The Revised Corporation Code (Republic Act No 11232), as well as various issuances by the Securities and Exchange Commission (SEC), may also be applicable.

1.2 Legislation Relating to Particular Sectors

The Guidelines on the Computation of Merger Notification Threshold (the “Merger Rules”) provides the rules in determining whether a merger, acquisitions of shares of assets, or joint venture is subject to compulsory notification.

The Foreign Investments Act (Republic Act No 7042) and its implementing rules and regulations provide the general framework for foreign investments in the Philippines. Foreign equity investments in certain industries may be subject to restrictions as provided in the 1987 Constitution and various pieces of legislation.

The Foreign Investment Negative List (FINL) identifies the industries that are subject to nationality restrictions and indicates the allowed foreign equity. It compiles the foreign ownership restrictions found in various laws and regulations and is amended from time to time to reflect changes in the legislation.

1.3 Enforcement Authorities

Various government agencies regulate foreign investments in the Philippines. However, the primary agency concerned with ensuring compliance with the rules and regulations on foreign

investment in the Philippines are the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Conversely, the Philippine Competition Commission (PCC) has original and primary jurisdiction to review proposed mergers, acquisitions, and joint ventures. Other government authorities may assist in enforcing and reviewing compliance with the relevant regulation on foreign investment depending on the industry where the entity operates, and the incentives availed of.

2. JURISDICTION

2.1 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.

On 15 September 2020, the Bayanihan to Recover as One Act (Republic Act No 11494 or BARO) took effect and increased the notification threshold to PHP50 billion. Mergers or acquisitions entered into within two years from its effectivity with transaction values of below PHP50 billion are exempted from the PCC compulsory notification requirements. Under the PCC BARO Rules (Rules for the Implementation of Section 4(eee) of Republic Act No 1194, or the “Bayanihan to Recover as One Act”, Relating to the Review of Mergers and Acquisitions), transactions below the PHP50 billion notification thresh-

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

Mergers and Acquisitions

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

Acquisitions of Voting Shares

For 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. Further, 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%.

Joint Ventures

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 which any of the joint venture parties agreed to extend or guarantee.

Creeping Transactions

A merger or acquisition consisting of successive transactions which shall take place within a one-year period between the same parties or entities

under common control, shall be treated as one transaction, ie, a creeping transaction.

Parties which breach the thresholds are required to notify the PCC within 30 days from 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 which, when taken together with the preceding transactions, satisfies the thresholds.

2.2 Failure to Notify

A transaction which meets the notification threshold but was not notified to the PCC or notified but consummated prior to the expiration of the waiting period, is considered void and will subject the parties and their ultimate parent entities to fines and penalties to an administrative fine of 1% to 5% of the value of the transaction.

Pursuant to Memorandum Circular No 21-001, which implemented inflation adjustments for the imposable fines under the PCA, parties which fail to notify the PCC within the period for notification but have yet to consummate the transaction will be fined in the amount of 5% of 1% of the value of transaction for the first 30 days of delay or fraction thereof. The fine shall be increased by 1% of 1% of the value of the transaction for every additional 30 days of delay or fraction thereof, provided that the total amount of fine to be imposed shall not exceed PHP2.2 million.

The decisions imposing the penalties are made public.

2.3 Types of Transactions

Joint Ventures

Joint ventures, mergers and acquisitions of shares and assets, and issuance of new company shares have been found by the PCC to have failed to comply with the compulsory notification requirements.

Joint ventures refer to a business arrangement where two or more entities or group(s) of entities contribute capital, services, assets, or a combination of the foregoing to undertake an investment activity or a specific project where each entity shall have the right to direct and govern the policies of the joint venture with the intention to share in both profits and risks. An acquisition of shares may be considered as a joint venture if joint control will exist between or among the new existing joint venture partners after the acquisition.

Other Agreements

Other definitive agreements, which grant parties the option to acquire the share or other conversion agreements allowing other entities to gain or obtain control over an entity may be potentially covered by the notification requirement.

The following transactions are exempt from the rules on compulsory notification:

- internal restructuring within a group of companies wherein the acquired and acquiring entity have the same ultimate parent entity;
- consolidation of ownership wherein the merger or acquisition involves several entities controlled by the same natural person and there is no change in control over the entity post-transaction;
- land acquisition not for the purpose of obtaining control; and
- joint ventures formed by winning bidder(s) in solicited public-private partnership (PPP) projects under the Build Operate Transfer Law,

upon application by the procuring government agency.

2.4 Definition of “Control”

“Control” refers to the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise. Control is presumed to exist when the parent owns directly or indirectly, through subsidiaries, more than half of the voting power of an entity, unless in exceptional circumstances, it can clearly be demonstrated that such ownership does not constitute control.

Control also exists even when an entity owns 50% or less of the voting power of another entity when:

- there is power over more than half of the voting rights by virtue of an agreement with investors;
- there is power to direct or govern the financial and operating policies of the entity under a statute or agreement;
- there is power to appoint or remove the majority of the members of the board of directors or equivalent governing body;
- there is power to cast the majority votes at meetings of the board of directors or equivalent governing body;
- there exists ownership over or the right to use all or a significant part of the assets of the entity; or
- there exist rights or contracts which confer decisive influence on the decisions of the entity.

With respect to joint ventures, the grant of veto powers may also be deemed to vest control if the veto rights relate to strategic decisions in the business policy or activities of the corporation, such as the appointment of corporate officers or key management personnel, determination of the budget, adoption of and amendments to

the business plan and other similar aspects of business management. The existence of any of such right, depending upon the content of the veto right and the importance of this right in the context of the specific business of the corporation, may be sufficient to grant control.

2.5 Jurisdictional Thresholds

See **2.1 Notification**. There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The Size of the Party Test is computed based on the value of the assets and revenues in the Philippines of the UPE, including all the entities it controls. The Size of the Transaction Test is computed based on the value of the assets being acquired and/or gross revenues generated by the assets being acquired, or of the acquired entity and entities it controls, depending on the type of transaction.

In determining the value of the assets being contributed for joint venture transactions, the following shall be included:

- all assets which the JV partners agreed to transfer, or for which agreements have been secured for the joint venture to obtain at any time; and
- any amount of credit or any obligations of the joint venture which any of the joint venture parties agreed to extend or guarantee to the joint venture.

The aggregate value of assets or revenues in the Philippines shall be that as stated on the most recent audited financial statements, or if the entity is not required to prepare audited financial statements, the last regularly prepared balance sheet in which those assets are accounted for.

The value of the assets or revenues in the Philippines of an entity shall be expressed in Philippine peso. If the financial statements were presented in a foreign currency, value of the assets shall be converted to Philippine peso according to the average, over the 12 months of that financial year, of the foreign exchange rate quoted by the BSP.

However, as noted, mergers or acquisitions entered into within two years from 15 September 2020 and with transaction values of below PHP50 billion are exempted from the PCC compulsory notification requirements.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

To satisfy the Size of Party Test at least one of the notifying UPEs, including all entities it controls, directly or indirectly (the UPE and all entities it controls, directly or indirectly, collectively comprise the “Notifying Group”), must have either aggregate annual gross revenues “in”, “into” or “from” the Philippines or have assets “in” the Philippines exceeding PHP6 billion.

The annual gross revenues from sales “in”, “into” or “from” the Philippines of the Notifying Group shall be that as stated in the UPE’s consolidated financial statements, in accordance with the general principles discussed above. If based on the accounting principles adopted by the UPE, it does not prepare consolidated financial statements, the annual gross revenues shall be determined by aggregating the gross revenues from sales “in”, “into” or “from” the Philippines of the entities within the Notifying Group, as booked or reflected in their separate statements of income and expenses.

Note that the gross revenues from sales “in”, “into”, or “from” the Philippines of an entity within the Notifying Group that is jointly controlled

with a different entity shall be proportionate to its ownership interest. Changes in the business are reflected in the financial statements in accordance with accounting principles.

2.8 Foreign-to-Foreign Transactions

The PCA covers entities engaged in trade or industry in the Philippines or international transactions which have direct, substantial and reasonably foreseeable effects in trade in the Philippines. Thus, even if the transaction occurs offshore or involves an entity not based in the Philippines, the transaction may be subject to notification to and review by the PCC if the notification thresholds are met. For the purposes of computing the notification thresholds, the assets or revenues generated by the acquired or acquiring entity in the Philippines, including the entities they control, are material.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold.

2.10 Joint Ventures

Joint ventures may be formed by:

- incorporating a joint venture company;
- entering into a contractual joint venture; or
- acquiring shares in an existing company (if joint control will exist between or among the existing joint venture partners).

Joint ventures are subject to compulsory notification if the notification thresholds for size of the party and size of the transaction are met. For the purposes of computing the size of the party, the contributing entities shall be deemed the acquiring entity and the joint venture shall be deemed the acquired entity.

The size of the transaction is based on the aggregate value of the assets that will be combined in the Philippines or contributed into the joint

venture, or the gross revenues generated in the Philippines by such assets exceeding PHP2.4 billion.

Calculating Asset Value

For purposes of calculating the aggregate value of the assets to determine the size of the transaction, the following shall be included:

- the value of all assets that are not owned by any of the joint venture parties for which agreements have been secured by any of the joint venture parties for the joint venture to obtain at any time, whether or not such entity is subject to the requirements of the act;
- any amount of credit or any obligations of the joint venture which any of the joint venture parties agreed to extend or guarantee to the joint venture, at any time; and
- the value of the assets owned by any of the joint venture parties that will be combined in the Philippines or contributed into the proposed joint venture.

In the case of a formation of a joint venture through acquisition of shares in an existing corporation, the assets to be combined through such acquisition will include the assets or revenues generated by the assets of the existing corporation.

2.11 Power of Authorities to Investigate a Transaction

The PCC, on its own or upon notification, has the power to review mergers and acquisitions having a direct, substantial and reasonably foreseeable effect on trade or industry in the Philippines.

The statute of limitation for any action arising from a violation of any provision of the PCA and its implementing rules and regulations is five years, calculated from:

- the time the violation is discovered for criminal violations; and
- the time the cause of action accrues for administrative and civil actions.

2.12 Requirement for Clearance before Implementation

The parties to transactions which are subject to compulsory notification are not allowed to consummate the transaction before either the approval of the transaction or the expiration of the relevant periods of review.

2.13 Penalties for the Implementation of a Transaction before Clearance

A transaction that meets the thresholds and does not comply with the waiting periods prior to consummation shall be considered void and will subject the parties to an administrative fine of 1% to 5% of the value of the transaction. The PCC has not yet published a decision penalising parties for this indiscretion.

2.14 Exceptions to Suspensive Effect

Transactions which meet the notification threshold are required to comply with the mandatory notification to the PCC, except those transactions which are expressly exempted from the notification requirements as provided in **2.3 Types of Transactions**. There are no exceptions to the waiting periods for transactions subject to compulsory notification.

Even if the transaction is not included among the exempt transactions, parties may consider applying for Letter of Non-coverage to confirm that the transaction is not subject to compulsory notification, such as when the notification thresholds are not met or the transaction does not involve any change in control over the entity.

2.15 Circumstances Where Implementation before Clearance is Permitted

Parties can only consummate a notified transaction without the clearance of the PCC if the PCC fails to issue a decision within the periods provided in the law. The PCA provides that the PCC has 30 days from commencement of the Phase 1 review to review the transaction. Within those 30 days, the PCC shall, if necessary, inform the parties of the need for a more comprehensive and detailed analysis of the transaction under a Phase 2 review, and request other information and/or documents that are relevant to its review.

The issuance of the request has the effect of extending the period within which the agreement may not be consummated for an additional 60 days. The additional 60-day period shall begin on the day after the request for information is received by the parties. The parties shall provide the requested information within 15 days from receipt of the said request, otherwise, the notification shall be deemed expired and the parties must refile their notification.

In case the PCC does not issue a decision within the period provided by law, the transaction is deemed approved.

3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

Parties that breach the thresholds are required to notify the PCC within 30 days from the execution of the definitive agreement. See **2.2 Failure to Notify**.

3.2 Type of Agreement Required Prior to Notification

Notification may be made based on a binding preliminary agreement upon its execution even if the complete and final terms and conditions of the merger or acquisition are yet to be agreed upon. A binding preliminary agreement refers to such terms and conditions on which parties to a planned merger or acquisition have reached a consensus and on the basis of which the parties intend to complete the transaction in good faith. The agreement may be in any form, such as a memorandum of agreement, term sheet or letter of intent.

If there is no binding preliminary agreement or parties do not wish to notify at that stage, notification to the PCC may be made prior to the execution of the definitive agreement(s) relating to the merger or acquisition. The terms and conditions of the most recent draft of the definitive agreement or agreements shall be the basis of the notification, provided that the parties issue an undertaking that they intend to sign the agreement in good faith and to send to the PCC a copy of the executed version. However, if the parties amended or made changes to the agreement, the parties will be required to re-notify the PCC.

3.3 Filing Fees

Notification filing and Phase 1 review are subject to a fee of PHP250,000.

Phase 2 review is subject to a fee of 1% of 1% of the value of the transaction which shall not be less than PHP1 million or exceed PHP5 million.

The fees are payable within ten days from receipt of an Order of Payment from the PCC.

3.4 Parties Responsible for Filing

If notice to the PCC is required for a merger or acquisition, then all acquiring and acquired pre-

acquisition UPEs, or any entity authorised by a UPE to file notification on its behalf, must notify.

3.5 Information Included in a Filing

The notifying parties shall accomplish the Notification Form of the PCC. This includes information on the parties to the transaction, value of the transaction and the assets and shares, operations of the parties in the Philippines, horizontal and vertical relationships and other relevant information. Documents to be submitted include:

- the definitive agreement or binding preliminary agreement;
- corporate documents;
- secretary's certificates that the transaction was approved by the shareholders;
- studies, surveys, analyses and reports that were prepared in relation to the transaction;
- confidential information memoranda;
- ordinary course documents; and
- financial statements and annual reports.

The submission must be in English. Certifications must be notarised, and consularised or apostilled if executed abroad.

3.6 Penalties/Consequences of Incomplete Notification

Incomplete notifications shall not be deemed filed and shall not stop the running of the 30-day period after execution of the definitive agreement within which the parties are required to file. Failure to complete the notification shall deem it unfiled and subject the parties to the penalties for a failure to notify.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Notification Form has a certification that the information and all appendices and attachments are complete, true and correct to the best of the ability of the authorised representative filing the

notification. If the party is deemed to have supplied incorrect or misleading information, the PCC may, after due notice and hearing, impose upon the party fines of up to PHP1.1 million. The party may also be liable for perjury.

Supply of of incorrect or misleading information has been defined to mean:

- providing information that is false, inaccurate, or erroneous; or
- omitting, concealing, or failing to make known information reasonably likely to be relied upon by the PCC in the performance of its official functions, provided that such omission, concealment, or failure may mislead, tend to mislead, or otherwise create a false impression on the PCC.

Where the incorrect or misleading information is supplied in written or printed form, supply of such information in any single document shall constitute one violation.

The PCC has yet to issue a decision fining a party as having supplied inaccurate or misleading information. If the information is unclear or incomplete, the PCC usually requests the parties to provide clarifications.

3.8 Review Process

Upon submission of the notification, the PCC will conduct a sufficiency check over a 15-day period to determine if they have sufficient information to conduct a Phase 1 review. If the PCC requests further information about the transaction, the parties will have 15 days to provide this information, and the PCC will then have 15 further days to conduct a second sufficiency check. If the PCC determines that the information is sufficient, the parties will be directed to pay a filing fee.

Phase 1

The Phase 1 review period will commence on the first business day following the date of payment of the filing fee and will last for a maximum period of 30 days. The Phase 1 review involves an initial assessment by the PCC to determine if the transaction raises any competition concerns under the PCA that would warrant a more detailed review. If no competition concerns are raised at this stage, the transaction will be approved by the PCC within the Phase 1 review period.

However, if, for any reason, the PCC identifies competition concerns during the Phase 1 review or determines that it has insufficient information to form a conclusion as to the potential impact of the transaction on competition in the market, the PCC will refer the transaction for a Phase 2 review.

Phase 2

The Phase 2 review shall commence on the day after service by the PCC of a Phase 2 notice. The PCC will then have a period of 60 days to conduct the Phase 2 review, during which period the transaction cannot complete. In practice, the Phase 2 review period may last longer than 60 days if the PCC requires more time to determine if further information is required to conduct the Phase 2 review, and if so, for the parties to provide such further information.

In light of the COVID-19 pandemic, the PCC implemented the MAO Interim Guidelines, which allow for the notification process to be undertaken online. The MAO Interim Guidelines continue to be in effect.

3.9 Pre-notification Discussions with Authorities

Prior to filing a notification, parties that are required to notify may inform the PCC of their proposed transaction and request a pre-notifica-

tion consultation. During consultations, the parties may seek non-binding advice on the specific information needed for the notification. The PCC encourages pre-notification consultations and this process is treated confidentially.

3.10 Requests for Information during Review Process

Requests for information are common. The PCC is allowed to issue a Notice of Deficiency if the party's notification is insufficient before commencing Phase 1 review.

3.11 Accelerated Procedure

The PCC may conduct an expedited review of the transaction for a shortened review period of 15 days for Phase 1 review of the following qualified transactions:

- transaction with no-overlaps – the parties to the transaction and their notifying group do not have actual or potential horizontal, vertical or complementary relationship;
- global transaction with subsidiaries in the Philippines which act merely as assemblers or export manufacturers – the transaction is global where the acquiring and acquired entities are foreign and the Philippine subsidiaries export 95% of the production, while the 5% is minimal in relation to the entirety of such Philippine product market;
- global transaction with limited presence in the Philippines – the candidate relevant geographic market of the transaction is global, and the parties have negligible or limited Philippine presence; or
- joint ventures solely for construction and development of a real estate development project.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

In reviewing transactions, the PCC assess whether the transaction is likely to result in substantially preventing, restricting or lessening competition in the relevant market.

4.2 Markets Affected by a Transaction

Market definition focuses on the extent to which customers would likely switch from one product to another ("Relevant Product Market"), or from a supplier in one geographic area to a supplier in another area ("Relevant Geographic Market"), in response to changes in prices, quality, availability, or other features.

In determining the relevant market, the PCC considers the following factors, among others:

- the possibilities of substituting the goods or services;
- the cost of distribution of the good or service, its raw materials, its supplements and substitutes from other areas and abroad, and the time required to supply the market from those areas;
- the cost and probability of users or consumers seeking other markets; and
- national, local or international restrictions which limit the access by users or to alternate sources of supply or the access of suppliers to alternate consumers.

Once a market is defined, the PCC will, where circumstances require, consider market shares and concentration as part of the evaluation of competitive effects.

Determining Overlap

To determine whether there are overlaps in the parties' activities, the PCC looks at horizontal and vertical relationships between the parties in

the relevant market. There is a horizontal relationship when the parties and/or entities within their respective Notifying Groups (which include subsidiaries, affiliates and other entities controlled by the Ultimate Parent Entity) provide products or services that directly compete in the same market. There is a vertical relationship when the parties and/or entities within their respective Notifying Groups operate at different levels of a production or supply chain (such as when an entity from a party's Notifying Group produces goods that use raw materials processed by an entity in the other Notifying Group).

An “overlap” in the form of a vertical or horizontal relationship does not necessarily void the transaction unless it is shown that the transaction is anti-competitive.

4.3 Reliance on Case Law

The PCC assesses market definition within the context of particular facts and circumstances of the transaction under review. Relevant markets identified in past investigations in the same industry or investigations conducted in other jurisdictions may be informative but are not necessarily applicable to PCC's assessment of transactions.

4.4 Competition Concerns

The PCC looks at unilateral effects and co-ordinated effects. In analysing the potential of a horizontal merger to result in anti-competitive unilateral effects, the PCC assesses whether the merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power independently. In analysing the potential for co-ordinated effects, the PCC assesses whether the merger increases the likelihood that firms in the market will successfully co-ordinate their behaviour or strengthen existing co-ordination in a manner that harms competition.

4.5 Economic Efficiencies

Anti-competitive mergers may be exempted from prohibition by the PCC when the parties establish that the merger has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that will likely result from the transaction. Efficiencies that increase competition in the market may also be considered.

In order to be taken into account by the PCC, the efficiencies must be demonstrable, with detailed and verifiable evidence of anticipated price reductions or other benefits. Moreover, the efficiency gains must be merger-specific and consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.

4.6 Non-competition Issues

There is no explicit authority for the PCC to consider “non-competition” issues when reviewing transactions.

4.7 Special Consideration for Joint Ventures

An acquisition of shares in a corporation will be deemed as a joint venture transaction if joint control will exist between or among the new and existing joint venture partners post-transaction.

In the context of joint ventures, joint control refers to the ability of the joint venture partners to substantially influence or direct the actions or decisions of the joint venture, whether by contract, agency or otherwise. Joint control exists when an entity has the ability to determine the strategic commercial decisions of the joint venture (positive joint control), or to veto such strategic decisions (negative joint control).

As discussed, for purposes of calculating the aggregate value of the assets to determine the size of the transaction, any amount of credit or any obligations of the joint venture which any of the joint venture parties agreed to extend or guarantee to the joint venture at any time shall be included.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

The PCC may prohibit or interfere with a transaction if it will likely result in substantially lessening, restricting or preventing competition in the relevant market. The PCC may prohibit the implementation of the agreement or require modification or amendments to address competition concerns. It may also impose penalties on the parties and nullify transactions which were consummated in violation of the compulsory notification requirements.

Decisions shall be in writing and the merger parties shall be furnished a certified copy of the decision. A non-confidential version may also be furnished to such persons as the PCC considers appropriate and published on the PCC website for public information.

5.2 Parties' Ability to Negotiate Remedies

Should there be a finding that a merger is likely to substantially prevent, restrict, or lessen competition, the parties are allowed to negotiate remedies to address the competition concerns. At any stage of the review, the parties may propose to amend or modify the agreements or undertake commitments that will remedy, mitigate, or prevent the competition concerns identified by the PCC as arising from the merger.

Before accepting any commitments, the PCC must be of reasonable belief that these are sufficient to clearly address the competition concerns and are proportionate to them. In instances where the PCC considers the commitments proposed by the merger parties as a suitable remedy, the PCC may decide to consult the concerned stakeholders or the public and issue an invitation to comment on its website. Third parties may also be approached on an individual basis for their views.

Changes and Alternative Remedies

Should the PCC decide that changes need to be made to the commitments in light of responses to the consultation, it will discuss the material changes with the parties.

The PCC may consider and impose alternative remedies, notwithstanding the merger parties' proposals. The PCC will adopt a Commitment Decision once it decides to accept the commitments of the merger parties. Where the PCC has rendered a Commitment Decision, the party who provided the commitment may apply to PCC to vary, substitute or release such commitment.

5.3 Legal Standard

There is no strict legal standard. However, in determining the remedy or set of remedies that would be appropriate, reasonable and practicable to address the adverse effects of the merger on competition, the PCC shall take into account the adequacy and effectiveness of the action in preventing, remedying or mitigating the anti-competitive effects of the merger.

5.4 Typical Remedies

The PCC considers two types of remedies to address competition concerns: structural remedies and behavioural remedies.

Structural remedies are measures that directly alter market structure and address issues that

give rise to competition problems. They include divestitures (forced sale of business units or assets, either in full or partial), licensing (compulsory licensing of legal rights, usually intellectual property rights), rescission (undoing a completed transaction) and dissolution (ending a legal entity).

Behavioural remedies, meanwhile, are measures that directly alter the behaviour of an entity. The PCC may impose both structural and behavioural remedies simultaneously.

5.5 Negotiating Remedies with Authorities

At any stage of the review, merger parties may propose commitments that will remedy, mitigate, or prevent the competition concerns identified by the PCC as arising from the merger.

Upon submission of a proposed commitment, the review periods shall be suspended for a period of 60 days. However, PCC may shorten such period, or extend for a maximum of 30 days (“Commitment Review Period”) by submitting a model request and waiver together with its proposed commitment. Once the Commitment Review Period expires without PCC’s acceptance of the proposed commitments, Phase 1 or 2 review shall resume.

The PCC will confer with the parties to discuss their proposed commitments. Should the PCC decide that changes need to be made to the commitments in light of responses to the consultation, it will discuss the material changes with the parties.

Alternative Remedies and Applications to the PCC

The PCC may consider and impose alternative remedies, notwithstanding the merger parties’ proposals. The PCC will adopt a Commitment Decision once it decides to accept the commit-

ments of the merger parties. Where PCC has rendered a Commitment Decision, the party who provided the commitment may apply to PCC to vary, substitute or release such commitment. The written application shall contain the following:

- description of the terms of the proposed varied or substitute commitment;
- an explanation as to the impact which the variation or substitution of the commitment will have on the competition concerns;
- for applications for release, an explanation as to whether the competition concerns sought to be addressed by the commitment which the party is seeking release from still exist; and
- full contact details of the main competitors, customers and clients of the party subject to the commitment.

All explanations should be accompanied by relevant supporting documents and certified under oath by an authorised representative of the party. Before varying, substituting or releasing a commitment, PCC will consult with such persons as it deems appropriate.

5.6 Conditions and Timing for Divestitures

There is no PCC standard approach regarding the conditions and timing for remedies, as they are imposed or agreed upon on a case-to-case basis.

This timing for the enforcement of the remedies will depend on the nature of the remedy – specifically, whether or not it is intended to take place prior to consummation (such as a simple divestment of particular assets) or after consummation (such as submission of monitoring reports, etc).

The penalties for failure to comply with the commitments or conditions imposed by the PCC are

usually indicated in the decision issued by the PCC for approval of the transaction. In addition to these penalties, the failure by the parties to comply with a ruling, order, or decision of the PCC after due notice and hearing, may be imposed a penalty of not less than PPHP50,000 up to PHP2 million for each violation. In addition, a similar amount of penalty shall accrue for each day of non-compliance beginning 45 days from the time that the said ruling, order, or decision was served until the party fully complies.

5.7 Issuance of Decisions

Decisions shall be in writing and the merger parties shall be furnished a certified copy of the decision. A non-confidential version may also be furnished to such persons as the PCC considers appropriate and published on the PCC website for public information.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To date, there have been no published decisions where the PCC required remedies or prohibited foreign-to-foreign transactions.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

There is no requirement for separate notification of ancillary restraints. The assessment of the PCC of a transaction is holistic and, therefore, looks at all the provisions of and mechanisms in the agreement embodying the transaction, including ancillary restraints, if any. The PCC is not prohibited from reviewing or including in its decision any related arrangements or agreements imposing ancillary restraints if these will likely substantially prevent, restrict or lessen competition in the relevant market.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

In relation to a review, the PCC has the power to require production of documents or information from the third parties and consult them in the process of reviewing commitments. The PCC may contact third parties, such as customers, suppliers or competitors, by means of market calls or inquiry letters in order to obtain relevant information regarding the market, their views on the merger, any competition issues it may raise and how they will be affected. Third parties may also include other governmental entities, sectoral regulators, industry associations, consumer bodies, think-tanks, market research firms or centres for information, among others.

7.2 Contacting Third Parties

Since the PCC was recently established, it usually contacts third parties in reviewing transactions to gather information about the relevant market and the possible effects of the transaction.

7.3 Confidentiality

The decision of the PCC on a transaction subject to compulsory notification is made public. When publishing a decision, the PCC provides a summary of the transaction, subject to the parties' claims of confidentiality.

Commercial information may be subject to claims of confidentiality. Such claims must be substantiated, such that it must be accompanied by a detailed explanation why particular parts of their submissions should not be disclosed. Additionally, a non-confidential version should be provided at the same time as the original submission.

The PCC may share the non-confidential versions of submissions with the merger parties or third parties. Unless there is a claim of confidentiality, it will be presumed that none of the information contained in a party's submission is confidential. The following classes of information, however, are not generally considered to be confidential by PCC:

- the fact of the merger itself;
- information that relates to the business of any of the merger parties but is not commercially sensitive in the sense that disclosure would cause harm to the business;
- information that reflects the merger parties' views of how the competitive effects of the merger could be analysed; and
- information that is general knowledge within the industry, or is likely to be verified by any diligent market participant or trade, finance or economic expert.

7.4 Co-operation with Other Jurisdictions

At any time before the case is submitted for decision, the PCC may consult a sector regulator or other relevant government agencies from foreign jurisdictions, if appropriate.

Information, including documents, shall not be communicated or made accessible by the PCC, in so far as it contains trade secrets or other confidential information, the disclosure of which is not considered necessary by the PCC for the purpose of the review. If a transaction is under review in multiple jurisdictions, parties to the transaction may waive the confidentiality protections contained to allow the PCC to exchange otherwise protected information with competition authorities in other countries.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

Parties to the merger may file a motion for reconsideration of a decision, order, or resolution of the PCC within 15 days from receipt thereof. A motion for reconsideration shall be based on any of the following grounds:

- the evidence on record is insufficient to justify the decision, order, or ruling; or
- the decision, order, or ruling is contrary to law.

Final orders or decisions of the PCC shall be appealable to the Court of Appeals within 15 days from the notice of the judgment in accordance with the Rules of Court. The appeal shall not stay the final order or decision sought to be reviewed, unless the Court of Appeals shall direct otherwise upon such terms and conditions it may deem just. In the appeal, the PCC shall be included as a party respondent to the case.

8.2 Typical Timeline for Appeals

See **8.1 Access to Appeal and Judicial Review**. There have been successful appeals of decisions of the PCC. The Court of Appeals reversed the decision of the PCC and upheld the legality of the co-acquisition by PLDT Inc and Globe Telecom Inc, two of the biggest telecommunication providers in the Philippines, of the telecommunications assets of San Miguel Corp.

8.3 Ability of Third Parties to Appeal Clearance Decisions

As a general rule, third parties cannot appeal a decision clearing a transaction. The PCC may also initiate and conduct a fact-finding or preliminary inquiry for the enforcement of the PCA upon a verified complaint filed by an interested party.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

There have been no significant changes to the PCA, except the adjustment to the notification threshold which has been increased to PHP50 billion under the BARO, as well as the increase in fines and penalties for violations of the PCA.

9.2 Recent Enforcement Record

The total amount of fines the PCC imposed in 2019 reached PHP114.6 million – four times greater than in 2018. There is no official information yet on the amount of fines imposed by the PCC in 2020. Likewise, the PCC launched its Leniency Programme, a whistle-blower-type programme that is a staple in most jurisdictions. The Supreme Court issued the Rule on Administrative Search and Inspection, which strengthens PCC's ability to conduct dawn raids.

The PCC has established a dedicated channel for receiving COVID-19 related complaints. Accordingly, the PCC received 162 queries and complaints, resulting in the commencement of eight preliminary and five full administrative investigations. These particularly concerned water utilities, internet services, retail associations, and poultry.

9.3 Current Competition Concerns

The PCC decided on its first abuse of dominance case. It involved a property developer that imposed a sole internet service provider on its residents. This prevented them from availing themselves of alternative and cheaper internet service.

Among its corrective measures, 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. Such was

the impact of this decision that other property developers with similar conduct initiated remedial actions on their own practices – a clear example of deterrence and voluntary compliance as a result of effective enforcement.

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 Southern Luzon. The prohibition of the transaction supposedly prevented the creation of a monopoly that could significantly harm the welfare of sugarcane farmers. Supposedly, this demonstrates the PCC's growing focus on stakeholders who belong to priority sectors. Notably, a year after, a similar transaction involving the same acquiring entity, though in a different locale, was approved by the PCC, as accordingly, the acquisition did not pose similar merger-to-monopoly concerns.

An Overview of 2020

According to its 2020 year-end report, the PCC issued a Statement of Objections on its first cartel case in early 2020. The National Home Mortgage Finance Corporation (NHMFC) came to the PCC seeking a review of its agreements with a pool of insurance companies. The PCC charged the pool and NHMFC for entering into anti-competitive agreements for the exclusive provision of mortgage redemption insurance (MRI) to its account holders for almost four decades. MRIs ensure the settlement of outstanding loans if a borrower dies. The exclusive arrangement effectively has deprived NHMFC and the housing loan borrowers from getting MRI coverage from other providers that may offer better terms at lower premium rates. This case is still under adjudication by the PCC.

In 2020, the PCC reported receiving notification for 26 M&A transactions, with a total worth PHP909 billion. Of these, 20 were approved,

one withdrawn, two returned, and the remaining three were in different stages of review at the time of disclosure. The sectors with the most transactions were electricity and gas (six), and transportation and storage (five). Manufacturing, finance and insurance and real estate each reported three transactions.

The PCC issued papers on five sectors: sugar, corn, cargo services, retail petroleum and agrochemicals. The PCC has found that in the digi-

tal commerce market, the rise in e-commerce requires more effective regulation of courier services. The Competition Impact Assessment (CIA) that the PCC conducted on the Cheaper Medicines Act (CMA), meanwhile, showed that although some provisions may seemingly limit what the stakeholders in the pharmaceutical sector are allowed to do, the law has in fact fostered a favourable environment for generics, thereby increasing access to medicines, especially for lower income households.

Villaraza & Angangco (V&A Law) is a full-service law firm that has been at the forefront of the Philippine legal landscape since 1980. With its lawyers adept at handling the most intricate problems to provide comprehensive solutions, highly trained legal staff and decades of experience in serving a full spectrum of clients' interests, the firm offers professional services of the highest calibre. The firm's corporate and com-

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