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Philippines

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Philippines.

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PHILIPPINES

MERGER CONTROL



1. Overview

Under Philippine law, the Philippine Competition Act (Republic Act No. 10667) (“PCA”), its implementing rules and regulations (“IRR”), and other rules and guidelines issued by the Philippine Competition Commission (“PCC”) serve as the primary framework for merger control legislation.

2. Is notification compulsory or voluntary?

Compulsory Notification

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

- a. 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
- b. 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 (*i.e.*, acquisition of voting shares, mergers and acquisitions of assets, or joint ventures, as discussed in Item 4). Parties which breach the thresholds are required to notify the PCC within thirty (30) days from the execution of the definitive agreement.

On 15 September 2020, the Bayanihan to Recover as One Act (Republic Act No. 11494) (“BARO”) took effect and increased the notification threshold to PhP50B. Mergers or acquisitions entered into within 2 years from its effectivity on 15 September 2020 with transaction values of below PhP50B are exempted from the PCC compulsory notification requirements. 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 PhP50B notification thresholds are likewise exempted from the PCC’s power to review mergers and acquisitions *motu proprio* for a period of one (1) year from the effectivity of BARO.

However, transactions below the notification threshold may be reviewed by the PCC *motu proprio* after one (1) year from the effectivity of the law.

Voluntary Notification

Under Section 7 of the PCC BARO Rules, parties to a merger or acquisition with transaction values falling below the above-prescribed thresholds may nonetheless **voluntarily** notify the PCC in accordance with Section 3.2 of the PCC Rules on Merger Procedure (“PCC Merger Rules”), and the PCC may, in its discretion, give due course to the voluntary notification subject to the review periods of forty-five (45) days for Phase I and ninety (90) days for Phase II review. Section 3.2 of the PCC Merger Rules does not expressly provide a specific period for voluntary notification .

Notification to the PCC may be made on the basis of an executed binding preliminary agreement or a definitive agreement. Typically, voluntary notification is undertaken after the execution of a preliminary binding agreement but prior to consummation. Should the parties proceed with voluntary notification, the same shall constitute **a waiver to the exemption from *motu proprio* review** provided under the PCC BARO Rules.

Voluntary notification is usually availed of if a transaction does not meet the notification thresholds, but the parties nonetheless require some assurance that the transaction will not be subject to *motu proprio* review in the future. The requirement to process voluntary notification and secure PCC clearance for the transaction may be made a closing condition/deliverable by the parties, subject to their mutual agreement on this matter.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Yes. Notification must be made within thirty (30) days from the signing of the definitive agreement covering the transaction and prior to any acts of consummation.^[1]

A **definitive agreement** is one that sets out the complete and final terms and conditions of a merger or acquisition, including the rights and obligations between or among the transacting parties. This may be in the form of a share purchase agreement, asset purchase agreement, joint venture agreement or other similar agreement. The inclusion of conditions which must be fulfilled by a party or the parties to make the agreement effective against a party or the parties will not negate the definitive nature of the agreement.^[2]

Consummation, meanwhile, is deemed to have occurred when the parties have transferred, conveyed, assigned, encumbered any right, title, interest, property or asset pursuant to the executed definitive agreement or agreements, or more generally, acted in exercise of their rights and obligations as transacting parties under the definitive agreement or agreements.^[3]

References

^[1] Section 2 (A) (2.1), PCC Merger Rules Procedure (“MRP”).

^[2] Sections 3.1 and 4, Clarificatory Note No. 16-001.

^[3] Section 5, Clarificatory Note No. 16-001.

4. What types of transaction are notifiable or reviewable and what is the test for control?

Joint ventures, mergers and acquisitions of shares and assets, and issuance of new company shares are covered.

“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 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 types of transactions covered and manner of computation of threshold amounts are summarized below:

- a. 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;
- b. 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: (i) more than 35%; or (ii) more than 50%, if the entity or entities already own more than 35%; and
- c. 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.

Exemptions from the Rules on Compulsory Notification

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

- a. Internal restructuring within a group of companies wherein the acquired and acquiring entity have the same UPE;
- b. 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;
- c. Land acquisition not for the purpose of obtaining control; and
- d. Joint ventures formed by winning bidders in solicited Public-Private Partnership (“PPP”) projects under the Build Operate and Transfer Law, upon application by the procuring

government agency.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable

The acquisition of voting shares in certain instances may be notifiable/reviewable by the PCC. In such cases, for the purpose of determining the transaction value, parties to a merger or acquisition are required to provide notification when with respect to a proposed acquisition of voting shares of a corporation:

- a. If: (i) the aggregate value of the assets **in the Philippines** that are owned by the corporation or by entities it controls, other than assets that are shares of any of those corporations, is PhP50B or more; **or** (ii) the gross revenues from sales **in, into, or from the Philippines** of the corporation or by entities it controls, other than assets that are shares of any of those corporations, is PhP50B or more; **and**
- b. If as a result of the proposed acquisition of the voting shares of a corporation, the entity or entities acquiring the shares, together with their affiliates, would own voting shares of the corporation that, in the aggregate, carry more than the following percentages of the votes attached to all the corporation's outstanding voting shares: (i) 35%; or (ii) 50% if the entity or entities already own more than the percentage set out in subsection (i) above, as the case may be, before the proposed acquisition.

For purposes of calculating whether the transaction value is met, the aggregate value of assets in the Philippines shall be as stated on the last regularly prepared balance sheet or the most recent audited financial statements in which those assets are accounted for. The gross revenues from sales of an entity, meanwhile, shall be the amount stated on the last regularly prepared annual statement of income and expense of that entity.^[1]

Reference

^[1] Section 5, PCC BARO IRR.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different

thresholds that apply to particular sectors?

Please see Item 2. There are no special jurisdictional thresholds applicable to particular sectors.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

For purposes of calculating whether the transaction value is met, the aggregate value of assets in the Philippines shall be as stated on the last regularly prepared balance sheet or the most recent audited financial statements in which those assets are accounted for. The gross revenues from sales of an entity, meanwhile, shall be the amount stated on the last regularly prepared annual statement of income and expense of that entity.^[1]

Reference

^[1] Section 5, PCC BARO IRR.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

Under the Guidelines on the Computation of Merger Notification Thresholds, if the entity's financial statements are presented in a foreign currency, annual gross revenues from sales in, into, or from the Philippines shall be converted to Philippine Peso according to the average, over the twelve (12) months of that financial year, of the foreign exchange rate quoted by the *Bangko Sentral ng Pilipinas* ("BSP").

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Please see Item 4.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

Yes. A merger or acquisition consisting of *successive* transactions which shall take place within a one (1)-year period between the same parties or entities under common control, shall be treated as one transaction

("Creeping Transactions").

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.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

Compulsory notification thresholds implemented by the PCC ordinarily do not apply to foreign-to-foreign mergers and transactions involving a target/joint venture with no nexus to the jurisdiction, subject to the standards and thresholds discussed above.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

No. Based on our experience, the PCC's review pursuant to either voluntary or compulsory notification is ordinarily confined to factors related to competition and whether the transaction will result in the substantial lessening of competition in the relevant market.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

Transactions which substantially prevent, restrict or lessen competition in the Philippines in the relevant market or in the market for goods or services, as may be determined by the PCC, shall be prohibited, unless it falls under any of the exemptions.^[1] Please see Item 4.

Reference

^[1] Section 9, Rule 1, PCA IRR.

14. Are factors unrelated to competition relevant?

No. Subject to the requirements of the PCA and its IRR, only factors covered by merger notification thresholds and determination of the relevant market are considered for purposes of determining whether a transaction is anti-competitive.

15. Are ancillary restraints covered by the authority's clearance decision?

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.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

Please see Item 2. Parties which breach the thresholds are required to notify the PCC within thirty (30) days from the execution of the definitive agreement.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Please see Item 2. Typically, voluntary notification is undertaken after the execution of a preliminary binding agreement (*i.e.*, even before a definitive agreement is signed) but prior to consummation.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

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

19. What is the basic timetable for the authority's review?

Typically, the PCC notification process takes between 45-180 days, depending on the PCC's requests for information and whether a transaction is approved at either Phase I or Phase II of the review process. This is

subject to delays that may be incurred as a result of skeletal workforce arrangements implemented pursuant to community quarantine restrictions in Metro Manila.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

Please see Item 31 on negotiation of remedies with the PCC and its effect on the notification timetable, as applicable.

21. Are there any circumstances in which the review timetable can be shortened?

The PCC permits expedited review under PCC Resolution No. 008-2019. An expedited review shall last for a period of only fifteen (15) working days from the PCC’s acceptance of the Expedited Review Notification Form. In contrast, in regular reviews, Phase I alone spans thirty (30) days.

The following mergers and acquisitions are qualified for expedited review:

- a. There are no actual or potential horizontal or vertical (including complementary) relationships in the Philippines between the acquiring entity, including its Notifying Group, and the acquired entity and the entities it controls;
- b. The merger is a global transaction where the acquiring and acquired entities identified in the definitive agreement are foreign entities (“foreign parents”), and their subsidiaries in the Philippines act merely as manufacturers or assemblers of products with at least 95% of such products exported to the foreign parents, subsidiaries, affiliates or third parties located outside the Philippines: *provided*, that the remaining 5% product sales in a market in the Philippines is minimal in relation to the entirety of such Philippine product market;
- c. The candidate relevant geographic market of the merger is global and the acquiring and acquired entities have negligible or limited presence in the Philippines; and
- d. Joint ventures, whether incorporated or not, formed purely for the construction and development of a residential and/or commercial real estate development project.

Under the Interim Guidelines During Periods of Community Quarantine dated 25 May 2021 issued by the PCC, acceptance of Expedited Review Notification Forms

shall be suspended during all periods of community quarantine.

22. Which party is responsible for submitting the filing?

If notice to the PCC is required for a merger or acquisition, then all acquiring and acquired pre-acquisition UPEs or any entity authorized by a UPE to file notification on its behalf must notify.

23. What information is required in the filing form?

The notifying parties shall accomplish the Notification Form of the PCC. This includes, among others, 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:

- a. The definitive agreement or binding preliminary agreement;
- b. Corporate documents;
- c. Secretary’s certificates that the transaction was approved by the shareholders;
- d. Studies, surveys, analyses and reports that were prepared in relation to the transaction;
- e. Confidential information memoranda;
- f. Ordinary course documents; and
- g. Financial statements and annual reports.

The submission must be in English. Certifications must be notarized, and consularized or apostilled, if executed abroad.

24. Which supporting documents, if any, must be filed with the authority?

Please see Item 23.

25. Is there a filing fee?

Yes. Notification filing and Phase I review is subject to a fee of PhP250,000.00, while Phase II 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 (10) days from receipt of an Order of Payment from the PCC.

26. Is there a public announcement that a notification has been filed?

No, the PCC does not issue/publish a notice that a merger notification has been filed.

27. Does the authority seek or invite the views of third parties?

Yes. 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.

28. What information may be published by the authority or made available to third parties?

Decisions of the PCC on notifications reviewed 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 information of the public. Commercial information may be subject to claims of confidentiality, accompanied by a detailed explanation why particular parts of their submissions should not be disclosed.

29. Does the authority cooperate with antitrust authorities in 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, insofar 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.

30. What kind of remedies are acceptable to the authority?

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 PCC considers the commitments proposed by the merger parties as a suitable remedy, 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.

The PCC considers two types of remedies to address competition concerns:

- a. **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 partially), licensing (compulsory licensing of legal rights, usually intellectual property rights), rescission (undoing a completed transaction), and dissolution (ending a legal entity); and
- b. **Behavioral** remedies are measures that directly alter the behavior of an entity. The PCC may impose both structural and behavioral remedies simultaneously.

31. What procedure applies in the event that remedies are required in order to secure clearance?

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 thirty (30) days (the “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.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

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. Meanwhile, parties and their UPEs failing to notify the PCC within the period for notification but has yet to consummate the merger will be fined in the amount of ½ of 1% of 1% of the value of transaction, but not exceeding PhP 2 million.

A transaction that meets the thresholds and does not comply with the waiting periods before consummation shall be considered void and will subject the parties to an administrative fine of 1% to 5% of the value of the transaction. Since parties generally wait for the decision after notification before consummating the agreement, the PCC has not yet published a decision penalizing parties who consummated the agreement before the PCC has issued its decision.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

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 authorized 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 PhP 1.1 million. The party may also be liable for perjury.

“Supplying of incorrect or misleading information” has been defined to mean: (a) providing information that is false, inaccurate, or erroneous; or (2) 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 1 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.

34. Can the authority's decision be appealed to a court?

Under Section 5.1 of the PCC Rules of Procedure, final orders or decisions of the PCC shall be appealable to the Court of Appeals 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. In the appeal, the Commission shall be included as a party respondent to the case.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

We note that it is standard for parties engaged in covered transactions to comply with the compulsory notification requirements of the PCC in order to mitigate the risk that the transaction be questioned and deemed void. Likewise, parties to transactions that may not be covered by compulsory notification requirements are increasingly approaching the PCC on a voluntary basis or to secure a Letter of Non-Coverage (“LNC”). Issuance of an LNC may provide greater comfort to parties to a transaction, even when the relevant party/transaction thresholds are not met by the transaction at hand.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

There have been no significant changes to the PCA, except the adjustment to the notification threshold which has been increased to PhP 50B under the BARO, as well as the increase in fines and penalties for violations of the PCA. Nonetheless, the current framework for anti-trade legislation is subject to continuing development, particularly in view of the PCC's recent decisions.

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