Legal Bulletin: Competition Law

Philippine Competition Commission Issues Implementing Rules and Regulations of the Philippine Competition Act and Merger Notification Forms

What it is about

After the conclusion of the public consultations conducted by the Philippine Competition Commission ("*PCC*") on May 24, 2016 and the lapse of the period for the submission of comments and suggested revisions to the draft implementing rules and regulations issued on May 10, 2016, the PCC has published the final implementing rules and regulations (the "*Rules*") of the Philippine Competition Act ("*PCA*") last June 3, 2016. The Rules took effect on June 18, 2016.

The PCA defines, prohibits and penalizes three types of anti-competitive conduct: *anti-competitive agreements*, *abuse of dominant position*, and *anti-competitive mergers and acquisitions*. The PCA, however, provides for a transition period of two years after the effectivity of the PCA to allow affected parties time to renegotiate agreements or restructure their business to comply with the provisions of the PCA and, thus, an existing business structure, conduct or practice or any act that may be in violation of the PCA shall be subject to administrative, civil and criminal penalties only if it is not cured or is continuing upon the expiration of such transition period. Because of this, the Rules largely reiterate the provisions of the PCA regarding anti-competitive agreements and abuse of dominant position. The following provision relating to abuse of dominant position is, however, note-worthy:

- *Abuse of Dominant Position.* Section 3, Rule 3 of the Rules provide that the concerned entity or entities invoking the exception to certain acts that are considered abusive of dominant position based on "*superior product or process, business acumen, or legal rights or laws*" shall clearly establish to the PCC's satisfaction that "*the barrier to entry or anti-competitive act is an indispensable and natural result of [such] superior product or process, business acumen, or legal rights or laws*."

The Rules provide additional guidelines regarding the merger notification regime under the PCA and the following items are note-worthy:

- *Joint Ventures.* Joint ventures are now expressly included in the definition of "mergers" and has been defined as "*a business arrangement whereby an entity or group of entities contribute capital, services, assets, or a combination of any or all 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 in connection therewith, with the intention to share both profits and risks and losses subject to agreement by the entities*." In relation to the notification requirement, the Rules provide that the contributing entities shall be deemed the acquiring entities and the

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joint venture shall be considered as the acquired entity.

- *Thresholds for Compulsory Notification.* The Rules further explain the manner of determining the transaction value threshold of Php 1 Billion, which would trigger compulsory notification. Under the Rules, such determination is differentiated based on the type of transaction (*i.e.* merger or acquisition of assets or voting shares of a corporation or an interest in a non-corporate entity) and, in relation to asset-related merger or acquisitions, whether the assets are inside or outside the Philippines or both.

- *Additional Requirement for Acquisition of Voting Shares or an Interest in a Non-Corporate Entity.* Aside from the requirement that the transaction value should exceed PhP 1 Billion, for compulsory notification to be required in the case of a proposed acquisition of voting shares of a corporation, the entity or entities acquiring the shares, together with their affiliates, should own voting shares of the corporation that, in the aggregate, carry more than 35% of the votes attached to all the corporation's outstanding voting shares or 50%, if the entity or entities already own more than the 35% before the proposed acquisition.

  Similarly, for compulsory notification to take place in the case of a proposed acquisition of an interest in a non-corporate entity, the entity or entities acquiring the interest, together with their affiliates, should hold an aggregate interest in the non-corporate entity that entitles the entity or entities to receive more than 35% of the profits of the non-corporate entity or assets of that non-corporate entity on its dissolution or 50%, if the entity or entities acquiring the interest are already entitled to receive more than 35% prior to the proposed acquisition.

The Rules also provide for the procedure for the notification, as follows:

- *In General.* Each party to a merger or acquisition required to give notification to the PCC shall submit the Notification Form (the "*Form*") and pay such applicable fees as may be determined by the PCC.

- *Who may execute the Form.* The Form must be signed by a general partner of a partnership, an officer or director of a corporation, or in the case of a natural person, the natural person or his/her legal representative, and certified that the contents of the Form are true and accurate of their own personal knowledge and/or based on authentic records. In all cases, the certifying individual must possess actual authority to make the certification on behalf of the entity filing the notification.

- *Basis of notification.* The parties may notify, on the basis of a binding preliminary agreement in any form, such as a memorandum of agreement, term sheet, or letter of intent. Each of the acquired and acquiring entities must submit an affidavit with their Forms, attesting to the fact that a binding preliminary agreement has been executed and that each party has an intention of completing the proposed transaction in good faith.

- *Waiting Period.* In general, the waiting period begins after all notifying entities have filed their respective Forms, together with the corresponding certifications and affidavits, and have been notified by the PCC that

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the Forms are complete. Upon submission of the Form, the PCC shall determine within 15 days whether the Form and other relevant requirements have been completed in accordance with applicable rules or guidelines, 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 purposes of commencing Phase I review of the merger or acquisition. Within thirty (30) days from commencing Phase I review, the PCC shall, if necessary, inform the parties of the need for a more comprehensive and detailed analysis of the merger or acquisition under a Phase II review, and request other information and/or documents that are relevant to its review. The issuance of such request has the effect of extending the period within which the agreement may not be consummated for an additional 60 days, which shall begin on the day after the request for information is received by the parties, *provided that,* in no case shall the total period for review by the PCC exceed 90 days from the time the initial notification by the parties is deemed complete. However, in the event the parties fail to provide the requested information within 15 days from receipt of the request, the notification shall be deemed expired and the parties must refile the notification. Alternatively, the parties may request for an extension of time within which to comply with the request for additional information, in which case, the period for review shall be correspondingly extended.

- *Modifications.* Parties to a proposed transaction under review shall inform the PCC of any substantial modifications to the transaction. On the basis of the information provided, the Commission shall determine if a new notification is required.

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