

Client Alert

June 2016

Philippine Competition Commission issues the rules implementing the Philippine Competition Act

Recent Developments

The Philippine Competition Commission ("**Commission**") issued the implementing rules and regulations ("**IRR**") of the Philippine Competition Act ("**Act**") on 3 June 2016. The IRR will take effect on 18 June 2016.

Implications for Business in the Philippines

The IRR has clarified and supplemented the thresholds and other requirements for mandatory notification of mergers and acquisitions ("**M&A**") that have an effect on trade and business in the Philippines. It has also clarified that M&A includes joint ventures.

Prior to the IRR, the Commission had issued two memorandum circulars to provide for transitory rules for notification requirements of M&As that are executed and implemented prior to the effectivity of the IRR, i.e., (i) Memorandum Circular No. 16-001 ("**Circular 16-001**") which covered M&As in general, and (ii) Memorandum Circular No. 16-002 ("**Circular 16-002**") which covered M&As effected through the Philippine Stock Exchange ("**PSE**") (collectively, the "**Circulars**"). Please see our previous Client Alert on the Circulars [here](#).

Parties to an M&A transaction that may involve or have an impact on trade or business in the Philippines are well advised to consider the M&A mandatory notification requirements under the IRR ("**Mandatory Notification**"), as their transactions may be covered and subject to review and the waiting periods under the Act.

An M&A transaction that fails to comply with the Mandatory Notification will be void and subject the parties to an administrative fine of 1% to 5% of the value of the transaction.

The provisions of the IRR on anticompetitive agreements and abuse of dominant position in the market are substantially similar to the provisions under the Act. Please see our previous Client Alert on the Act [here](#).

Mandatory Notification

The IRR requires parties to an M&A, including joint ventures, to notify the Commission prior to the execution of definitive agreements, if (a) the gross revenues in the Philippines or the assets in the Philippines of the ultimate parent of either the acquiring or acquired entity and its controlled entities, exceed PhP 1 billion, and (b) the value of the transaction in the Philippines exceeds PhP 1 billion. Transaction value is determined depending on the type of M&A transaction.

For an acquisition of assets, mandatory notification is required if (a) the value of the assets being acquired in the Philippines or the value of the acquiring entity's assets in the Philippines, depending on where the assets to be acquired are located, and (b) the gross revenues generated by those assets in or into the Philippines, exceed PhP 1 billion.

For acquisition of shares in a corporation, or of an interest in a non-corporate entity, mandatory notification is required if (a) the value of the assets of the target or its gross revenues in, into or from the Philippines, exceed PhP 1 billion, and (b) the acquisition will give the acquirer and its affiliates more than 35% of the target's outstanding voting shares or profits, or more than 50% of such voting shares or profits, if the acquirer already has more than 35% interest in the target, prior to the transaction.

In case of a joint venture, the acquirer is subject to mandatory notification if the total value of assets to be combined and

contributed to the joint venture in the Philippines, or the gross revenues in the Philippines from such assets, exceeds PhP 1 billion.

To address possible circumvention of the rules through creeping transactions, the IRR provides that M&A transactions consisting of successive transactions, or partial acquisitions of one or more entities, which shall take place within a one-year period between the same parties or their affiliates, shall be treated as one transaction.

The IRR affords parties with an opportunity for a pre-notification consultation with the Commission to seek non-binding advice on the specific information that is required in the notification.

The IRR requires ultimate parent entities of each party to a covered transaction to submit a notification form ("**Form**") to the Commission before the execution of "definitive agreements relating to the transaction", and prohibits them from consummating the transaction before the expiration of the waiting periods under the IRR. However, it is not clear what the definitive agreements refer to because the IRR also requires parties to submit the Form on the basis of a binding preliminary agreement and to attest that they have the intention to complete the transaction in good faith.

The Commission's review covers various stages and periods, beginning with a preliminary review within 15 days to determine whether the Form is sufficient. Following such determination, the Commission will proceed to review the transaction within an initial period of 30 days ("**Phase I review**"), at which time it may inform the parties of the need for a more comprehensive and detailed analysis of the transaction ("**Phase II review**"). A Phase II review may take an additional 60 days. The total period for Phase I review and Phase II review shall not exceed 90 days.

Within the review period, the Commission may absolutely prohibit the agreement, subject the agreement to certain changes, or require parties to enter into agreements specified by the Commission, based on its assessment of whether the transaction will substantially prevent, restrict or lessen competition in the relevant market in the Philippines.

If the Commission does not issue a decision within the review period, for whatever reason, the M&A transaction shall be deemed approved and the parties may proceed to implement and consummate it.

Notably, under the IRR, the Commission shall publish on its website information related to the M&A transaction on the basis of the Form submitted by the parties, but should take into account the protection of their trade secrets and other confidential information of the parties and the transaction.

The IRR reserves the power of the Commission to review M&A transactions that are not covered by the Mandatory Notification thresholds. In such cases, the review period provided under the IRR shall not apply.

Actions to Consider

Parties to an M&A transaction that will affect trade or business in the Philippines must assess whether the transaction will require Mandatory Notification, and consider its requirements and timing in structuring the transaction. Parties should also consider the substantive issues on the potential effect of the M&A transaction on competition in the relevant market in the Philippines. Considering the absence of precedents on Mandatory Notification under the IRR, parties may take advantage of the pre-notification consultation with the Commission to obtain non-binding advice that may help eliminate uncertainties and avoid unnecessary delays in the notification process .

Conclusion

The IRR marks another significant development in the country's first comprehensive antitrust regime (including merger control), and signals a move towards conformity with other nations in their approach and regulation of competition and transactions involving the Philippine market.

Businesses would be well advised to review and assess the impact of the IRR on their transactions involving the Philippines, and evaluate their business practices in general for compliance. Additionally, companies doing business in or affecting the Philippines should closely monitor the advisory opinions, decisions, and guidelines that the Commission may issue on competition matters, which are expected to further clarify the provisions of the IRR.

For more information

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