

Philippine Competition Commission issues Rules on Merger Procedure

Recent Developments

The Philippine Competition Commission ("PCC") has published its Rules on Merger Procedure ("Merger Rules") on 23 November 2017, which modifies certain processes, timelines and requirements for M&A notifications under the Implementing Rules and Regulations ("IRR") of the Philippine Competition Act ("PCA"). The Merger Rules will take effect on 8 December 2017.

Implications for Business in the Philippines

M&A transactions that meet the thresholds for mandatory notification under the IRR must comply with the modified procedure, timelines and requirements under the Merger Rules. Notably, under the Merger Rules, the notification to the PCC must now be made within 30 days from the date of signing of the definitive agreement, unlike the IRR, which required notification prior to signing of the definitive agreement. This modification also effectively dispensed with the requirement for parties to sign a preliminary binding agreement prior to notification, which caused some confusion under the previous notification process.

The Merger Rules also provides a more detailed process and requirements for M&A notification, including the pre-notification consultation, sufficiency periods, Phase 1 and Phase 2 review, interim measures, remedies, the imposition of fines and penalties for violations, and confidentiality of information.

Prior to the issuance of the Merger Rules, the procedure and requirements for M&A notifications were provided in the IRR. Please see our previous Client Alert on the IRR [here](#).

Parties to an M&A transaction that fall within the notification thresholds under the IRR must comply with the process and requirements under the Merger Rules, and consider the same in the structure and timelines for their transaction, as well as the risks and available remedies of the parties.

What the law says

Pre-Notification Consultation ("PNC")

The Merger Rules encourage parties to avail of the non-mandatory PNC to streamline and facilitate the notification process. In the PNC, the parties may seek clarification on the information required in the Notification Form ("Form") and any additional information that may be required by the PCC, discuss the identified markets, and seek guidance on the application of the thresholds under the IRR to facilitate the assessment on whether the transaction is notifiable.

Filing of the Form after the signing of Definitive Agreement and Determination of Sufficiency

Under the Merger Rules, parties may now sign the definitive agreements prior to the submission of their respective Forms, provided that the parties notify the PCC within 30 days from the signing of definitive agreements relating to the merger ("Notification Period").

Parties that have submitted their Forms to the PCC within the Notification Period will not be subject to the penalty for failure to notify, even if their Forms are deemed insufficient. However, in such a case, the parties must refile the Form prior to consummating the transaction.

Upon receipt of the Form, the PCC will conduct a sufficiency check within a 15-day period (**Sufficiency Period**), to determine whether the Form, and accompanying information and documents are complete. If the Form is deficient or incomplete, the PCC may refuse to accept the Form and allow the parties to address the deficiency within the Sufficiency Period. If the PCC determines that the submitted Forms are sufficient, the parties will be directed to pay the corresponding filing fee for a Phase 1 review.

Phase 1 Review

Phase 1 review, which takes a maximum period of 30 days, will commence on the first business day following the date of payment of the filing fee.

The purpose of the Phase 1 review process is to determine whether a transaction is likely to give rise to competition concerns. During Phase 1 review, the PCC may gather supplementary information from the parties, obtain information from and interview third parties, and conduct site visits or inspections of the business premises of the parties, their customers and/or their competitors.

Phase 2 review

If the PCC identifies competition concerns, or is unable to form a conclusion that the merger does not raise competition concerns, the merger shall be subjected to a Phase 2 review.

The purpose of the Phase 2 review is to determine the likelihood that the proposed transaction substantially prevents, restricts or lessens competition in the relevant market or in the market for goods and services as determined by the PCC ("SLC"). The Phase 2 review commences on the day after service of the Phase 2 Notice, and shall be completed within 60 days. To enhance the quality and efficiency of the review process, the MAO may also call for state of play meetings at key stages during the Phase 2 review process. If during the Phase 2 review, the MAO's analysis leads to a conclusion that the transaction is likely to give rise to an SLC, the MAO shall file a Statement of Concerns ("SOC") with the PCC not later than the 45th day of Phase 2 review. The SOC shall set forth the MAO's findings, and may include any recommendations or proposed remedial actions.

The PCC may direct the MAO to conduct a state of play meeting immediately following the parties' receipt of the SOC, to allow the parties to clarify matters which the MAO has identified as giving rise to competition concerns. Parties may also propose commitments to address the SOC.

A party may file a verified comment within 10 days from receipt of the SOC, and request access to the supporting documents of the SOC for the purpose of preparing their defense in the proceedings. The parties may propose to make oral presentations to the PCC upon submission of their verified comment to the SOC. After taking into account the parties' response to the SOC, the PCC shall render a decision.

Interim Measures

The PCC may impose interim measures, either *motu proprio* or upon application by the MAO or a party, to prevent any action that may prejudice its ability to investigate the transaction or its ability to impose appropriate remedies, or when the PCC finds reasonable grounds to believe that the transaction may give rise to SLC. Interim measures may include ordering a party to temporarily cease or desist from the performance of certain acts, such as the layoff of certain staff members, or the exchange of commercially sensitive information.

Proposal for Remedies

If the PCC finds that the transaction results to an SLC, the PCC may impose remedies to address the potential negative effect of the transaction. The PCC may also accept remedies proposed by the parties concerned (i.e., voluntary commitments), issue conditions, require parties to modify the terms of their agreement, or to desist from a particular conduct or practice, as a condition to the approval of their transaction.

Voluntary commitments may be proposed at any stage of the Phase 1 or 2 review. On the other hand, proposals for commitments after PCC has rendered a decision will not be allowed.

Confidentiality of Information included in Form

Any claim of confidentiality over information or documents that are submitted to the PCC, must be substantiated and accompanied by a detailed explanation of the basis for confidentiality, and a non-confidential version must be submitted at the same time as the original submission. Blanket or overly broad confidentiality claims will not be accepted by the PCC.

The MAO or the PCC shall exercise discretion in granting the confidentiality, and shall inform the relevant party if it does not agree with the claim of confidentiality.

Fines and Penalties

- Parties to a transaction and their ultimate parent entities failing to notify the PCC prior to consummation of their transaction, or violating the applicable waiting period(s), shall be imposed a fine equivalent to 1 to 5% of the value of transaction¹. Parties that violate gun-jumping may be assessed with a basic fine of 3% of the value of the transaction, for each violation. The basic fine may be increased or decreased, on a case-by-case basis depending on the gravity and duration of the violation, provided that the imposable fine for each violation shall not exceed 5%, or be less than 1%, of the value of the transaction.
- Parties and their ultimate parent entities failing to notify the PCC within the Notification Period but has yet to consummate the transaction will be fined an amount equivalent to ½ of 1% of 1% of the value of transaction, but not exceeding PhP2 million.
- Parties and their ultimate parent entities found to consummate a transaction that gives rise to an SLC may be imposed a fine of PhP100 million (for the first offense) up to PhP250 million (for the third and succeeding offenses).

Merger parties, together with their pre-acquisition ultimate parent entities, successors or assigns, shall be solidarily liable for the penalties imposed under the PCA, its IRR, the Merger Rules and other applicable rules of the PCC.

¹ The value of the transaction shall be set with reference to the following, whichever is higher:

- The aggregate value of the assets in the Philippines subject of the proposed transaction or owned by the target corporation; or
- The gross revenues generated by assets subject of the proposed transaction or from sales in, into, or from the Philippines of the target corporation.

Actions to Consider

Parties to an M&A transaction that meet the thresholds for mandatory notification under the IRR should consider the modified process and requirements under the Merger Rules when planning and structuring their transaction. Parties are now allowed to sign a definitive agreement even prior the filing of the Form with the PCC. Parties should also consider taking steps to ensure that all the requirements in the filing of the Form are complied with to avoid delays.

The parties may also utilize the mechanisms provided in the Merger Rules to expedite the review and approval process, such as (i) the PNC, to obtain non-binding advice that may eliminate uncertainties and avoid unnecessary delays in the notification process, (ii) the submission of relevant but non-mandatory information and documents to the PCC to expedite their review, (ii) participating in the state of play meetings to address and clarify any issues raised in the review, and (iii) proposing voluntary commitments to address the SOCs raised by the MAO. In addition, parties should take special care to avoid blanket or overly broad confidentiality claims when submitting information to the PCC. Parties should instead ensure that its confidentiality claims are supported by appropriate justifications, and follow the formalities provided under the Merger Rules.

Conclusion

The enactment of the Merger Rules presents a more comprehensive procedural framework for the review of M&A transactions, and signals a move towards conformity with the approach to merger review in other jurisdictions with more mature antitrust regimes. The Merger Rules allow the parties to be better equipped to anticipate and address possible issues and roadblocks. The Merger Rules also provide the parties with mechanisms to expedite the review and approval process, which may lead to a more efficient, effective, and predictable M&A clearance process.

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