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Premerger Notification Arrives in the Philippines

The Philippine Competition Commission has implemented compulsory merger control, while other Philippine antitrust provisions await full application.

The world's 12th most populous nation joins the global antitrust community

Last summer the Republic of the Philippines became one of the last APEC Member Countries to adopt a comprehensive modern antitrust law. Although some limited competition provisions could be found lurking in diverse corners of Philippine law, they were rarely enforced. The Philippine Competition Act (PCA), which became effective on August 8, 2015, provides a comprehensive antitrust enforcement regime with prohibitions on the same broad range of anticompetitive practices that has become the baseline for antitrust law in over 130 global jurisdictions: anticompetitive agreements, abuse of a dominant position and anticompetitive structural transactions. The PCA also creates a new enforcement agency, the Philippine Competition Commission (PCC), and provides both administrative and criminal remedies for infringements.

Mandatory transaction notification under the Philippine Competition Act

Like most other antitrust regimes, the PCA envisions a mandatory notification requirement for structural transactions that meet certain thresholds. The statutory framework for this system is set out in a basic form in the PCA, although many specifics remain to be filled in by PCC regulations that the PCA requires to be promulgated. The PCA provides a general two-year transition period, but the PCC had indicated that the merger control provisions would be enforced beginning March 8, 2016. While all five members of the PCC (including its chairman) were recently appointed, the PCC appears to have minimal staffing, shows limited outward signs of activity and has issued none of the implementing regulations called for in the Act.

The result is that the Commission appears caught between the jaws of a vise: on the one hand, the PCC is already well past the date when its implementing regulations were supposed to have been in place (six months after its effective date — *i.e.*, February 8, 2016); on the other hand, with the Philippine presidential election scheduled for May 9, the outgoing president will be able to claim only limited credit for creating a competition regime given the scant progress on implementation. Helping to alleviate this squeeze, however, the PCC issued memorandum circulars on February 12 and 16, 2016 that provide a kind of interim compliance pathway for parties whose transactions appear to meet the notification thresholds.

Compliance with the interim notification regime

The first circular covers all transactions other than those involving companies listed on the Philippine Stock Exchange, while the second addresses transactions that do involve PSE-listed companies. The first

declares that all transactions executed or implemented before the effective date of the circular[1] are exempt from notification and deemed approved. For transactions executed or implemented after the circular's effective date with a transaction value exceeding the statutory threshold — 1 billion Philippine Pesos (approx. US$ 21.651 million at current exchange rates) — the parties are required to notify the Commission of the transaction via letter. This letter must contain basic information about the transaction — the identity, description and contact information of the parties; and the type, consideration, key terms and timing of the transaction. Once the parties have notified the Commission with such a letter, the transaction is deemed approved, and the parties may immediately proceed with closing the deal. The second circular lays out very similar rules for transactions involving companies listed on the Philippine Stock Exchange.

Benefits of compliance and potential substantial fines for non-compliance

The circulars provide that transactions notified "may not be challenged" under the PCA, "except when the notification required ... contains false material information." However, notifiable transactions that do not comply with the circular are subject to potentially severe sanctions, specifically the consummated agreement "shall be considered void" and subject to an administrative fine of 1-5% of the value of the transaction. Even 1% of transaction value is, of course, a potentially substantial amount, and a transaction "considered void" might have other serious collateral consequences. (Contrast, for example, with the Chinese monetary penalty for failure to notify a transaction, which is limited to a maximum of 500,000 RMB — about US$ 77,400 at current market exchange rates.) One may speculate that a nascent authority like the PCC would hesitate to order such remedies — and might struggle to enforce them without substantially greater enforcement resources — but the prospect is facially troubling.

Remaining questions regarding coverage of the notification obligation

Although these circulars offer what appears to be an easy way to obtain approval for a transaction before the Commission issues further regulations, they leave some yawning gaps for parties trying to determine when compliance is required. For example:

- Does the 1 billion peso threshold apply only to the value of Philippine assets or securities to be acquired?
- Is a specific Philippine nexus required, and if so, how is it defined and measured?
- The key PCA provision requires "mergers and acquisitions" meeting the applicable thresholds to be notified. According to definitions provided in the Act,

> "Acquisition refers to the purchase of securities or assets, through contract or other means, for the purpose of obtaining control by:
>
> (1) One (1) entity of the whole or part of another;
>
> (2) Two (2) or more entities over another; or
>
> (3) One (1) or more entities over one (1) or more entities.
>
> "Merger refers to the joining of two (2) or more entities into an existing entity or to form a new entity."

These definitions raise many subsidiary issues immediately apparent to counsel experienced in international merger notification: what are "securities," what "other means" are covered, is "purpose" to be

construed objectively or subjectively, what type and degree of "control" (*e.g.,* merely negative control) are sufficient?

As is often the case in the early days of brand new antitrust regimes, no one knows the answers to these questions, including, perhaps, the PCC itself. Clearly, however, until the PCC issues implementing regulations (reported to be in progress), parties have an opportunity to close the door on future antitrust scrutiny by taking the relatively painless step of providing the PCC with some very basic information about their transaction. Parties involved in transactions that have a connection to the Philippines should thoughtfully consider taking this step.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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Endnotes

[1] Each circular stated it would take effect 15 days following publication in the Official Gazette or a newspaper of general circulation. Apparently, publication of the first circular in the Official Gazette took place on February 12, 2016 so the effective date would have been February 27, 2016. The second appears to have been published on February 16, 2016 so the effective date would have been March 2, 2016.