

Philippine Competition Commission Approves New Thresholds for Mandatory Notification of M&A Transactions

Recent Developments

On 5 March 2018, the Philippine Competition Commission (“PCC”) issued Memorandum Circular no. 18-01 (“MC 18-01”), which increases the thresholds for mandatory notification of M&A transactions from the previous Php1 billion threshold, to Php5 billion and Php2 billion, for the Size of Person Test and Size of Transaction Test, respectively. The new thresholds shall take effect on 20 March 2018, and shall apply to M&A transactions the definitive agreements¹ of which are executed after such date.

Implications for Business in the Philippines

M&A transactions the definitive agreements² of which are executed after the effectivity of MC 18-01 on 20 March 2018, are subject to mandatory notification to the PCC only if they meet the Php5 billion Size of Person Test and the Php2 billion Size of Transaction Test.

Unless modified by the PCC, the thresholds for mandatory notification shall be automatically adjusted commencing on 1 March 2019, and on March 1 of every succeeding year based on the Philippine Statistics Authority’s computations from the previous calendar year.

M&A transactions that meet the thresholds for mandatory notification must comply with the notification procedure, timelines and requirements under the Rules and Regulations of the Philippine Competition Act (“PCA”) (“PCA-IRR”) and the Rules on Merger Procedure (“Merger Rules”).

What the Regulation Says

Back round of MC 18-01

In MC 18-01, the PCC emphasized that the rationale for providing mandatory notification thresholds is to ensure that M&A transactions that are *more likely* to substantially lessen competition in the market for goods and services are subject to compulsory notification under Section 17 of the PCA, and to exclude those that are *less likely* to pose competition concerns. In line with this, the PCC recognizes a need to adjust the thresholds for notification to reflect inflation and economic growth. In addition, adjusting the thresholds for notification, will help ensure the efficient use of the PCC’s limited resources.

Under the PCA-IRR, parties to an M&A must notify the PCC if the transaction meets the **Size of Person Test** and the **Size of Transaction Test**.

Size of Person Test

M&A transactions the definitive agreements of which are executed after 20 March 2018 will meet the Size of Person Test if the aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds Php5 Billion.

¹ Under PCC Clarificatory Note no. 16-01 a 'definitive agreement' 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. These would include share purchase agreements, asset purchase agreements, joint venture agreements and other similar agreements.

² Ibid.

Size of Transaction Test

The Size of Transaction Test is determined depending on the specific type of M&A transaction.

We underline below the new thresholds for a merger or acquisition of assets, acquisition of shares, and joint venture under MC 18-01.

1) As a **merger or acquisition of assets**

Under the IRR, a merger or acquisition of assets will be subject to notification in the following situations:

- (1) With respect to a proposed merger or acquisition of assets in the Philippines if either:
 - i. the aggregate value of the assets in the Philippines being acquired in the proposed transaction exceeds Php2 Billion; or
 - ii. the gross revenues generated in the Philippines by assets acquired in the Philippines exceed Php2 Billion.
- (2) With respect to a proposed merger or acquisition of assets outside the Philippines, if:
 - i. the aggregate value of the assets in the Philippines of the acquiring entity exceeds Php2 Billion; and
 - ii. the gross revenues generated in or into the Philippines by those assets acquired outside the Philippines exceed Php2 Billion.
- (3) With respect to a proposed merger or acquisition of assets inside and outside the Philippines, if:
 - i. the aggregate value of the assets in the Philippines of the acquiring entity exceeds Php2 Billion; and
 - ii. the aggregate gross revenues generated in or into the Philippines by assets acquired in the Philippines and any assets acquired outside the Philippines collectively exceed Php2 Billion.

2) As an **acquisition of shares**

Under the IRR, a proposed acquisition of (i) voting shares of a corporation, or of (ii) an interest in a non-corporate entity, would be subject to notification if:

- a)
 - (i) the aggregate value of the assets in the Philippines that are owned by the corporation or non-corporate entity or by entities it controls, other than assets that are shares of any of those corporations, exceeds Php2 Billion; or
 - (ii) the gross revenues from sales in, into, or from the Philippines of the corporation or non-corporate entity or by entities it controls, other than assets that are shares of any of those corporations, exceed Php2 Billion; 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) Thirty-five percent (35%), or
 - (ii) Fifty percent (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.

3) As a **joint venture transaction**

Under the IRR, a joint venture transaction shall be subject to notification if either:

- i. the aggregate value of the assets that will be combined in the Philippines or contributed into the proposed joint venture exceeds Php2 Billion or
- ii. the gross revenues generated in the Philippines by assets to be combined in the Philippines or contributed into the proposed joint venture exceed Php2 Billion.

In determining the assets of the joint venture, the following shall be included:

- 1) All assets which any entity contributing to the formation of the joint venture has agreed to transfer, or for which agreements have been secured for the joint venture to obtain at any time, whether or not such entity is subject to the requirements of the act; and
- 2) Any amount of credit or any obligations of the joint venture which any entity contributing to the formation has agreed to extend or guarantee, at any time.

The revised thresholds shall not apply to mergers or acquisitions pending review by the PCC.

MC 18-01 also provides for the automatic adjustment of the thresholds beginning March 1, 2019 and to continue March 1 of every succeeding year, using as index the Philippine Statistics Authority's official estimate of the nominal Gross Domestic Product growth of the previous calendar year rounded up to the nearest hundred millions (e.g. Php 2.14 B shall be rounded up to Php 2.2 B).

Actions to Consider

Parties to an M&A that will not meet the increased thresholds under MC 18-01 will no longer be required to notify the PCC of the transaction, if the definitive agreements for such transaction are executed after 20 March 2018. On the other hand, M&A transactions whose definitive agreements are signed prior to 20 March 2018 must continue to use the current Php1 billion threshold under the PCA-IRR.

Parties should also continue to monitor the automatic adjustment of the notification thresholds to take effect annually, beginning on 1 March 2019.



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