



Bayanihan 2 increases the compulsory merger notification threshold to Php50 Billion for 2 years, and suspends the PCC's power to review non-notifiable transactions *motu proprio* for 1 year

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On September 11, 2020, the Philippine President signed into law *Republic Act No. 11494*, otherwise known as the "Bayanihan to Recover as One Act" (Bayanihan 2). It is intended to, among other things, accelerate the recovery of the Philippine economy from the downturn caused by the COVID-19 pandemic. Bayanihan 2 will become effective immediately upon its publication in a newspaper of general circulation or in the Official Gazette.

As part of the economic recovery measures, and for the stated purpose of "promot[ing] business continuity and capacity building," Bayanihan 2 --

- (a) exempts from the compulsory notification requirement under Section 17 of the Philippine Competition Act all mergers and acquisitions with transaction values below Php50 billion if entered into within two years from Bayanihan 2's effectivity; and
- (b) exempts such transactions from the power of the Philippine Competition Commission (PCC) to review mergers and acquisitions *motu proprio* (or on the PCC's own initiative) for a period of one year from Bayanihan 2's effectivity.

Bayanihan 2 does not define "transaction values." However, based on the PCC's use of similar terms in its various issuances and regulations, "transaction values" may be understood to refer - depending on whether the transaction is a merger or acquisition of assets within or outside of the Philippines (or both), or an acquisition of voting shares -- to the value of the Philippine assets to be acquired, the amount of Philippine revenues generated by the assets to be acquired, or the value of the assets of, or the amount of revenues generated by the corporation being acquired. Pre-Bayanihan 2 thresholds are Php6 Billion (size of party) and Php2.4 Billion (size of transaction).

Significantly, however, Bayanihan 2 (a) does not suspend or repeal the prohibition under Section 20 of the Philippine Competition Act against mergers or acquisitions that "substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services;" (b) does not exempt from said Section 20 prohibited transactions with values less than Php50 Billion and entered into within two years from Bayanihan 2's effectivity; (c) does not provide for a "deemed approval" regime for transactions with values less than Php50 Billion during said two-year period; and (d) suspends the PCC's *motu proprio* review powers only for a period of one year from Bayanihan 2's effectivity.

Taking into consideration the foregoing clauses in Bayanihan 2, particularly (d) above, it can be said that a merger or acquisition, even if not compulsorily notifiable during the two-year period from Bayanihan 2's effectivity, may nevertheless be reviewed by the PCC *motu proprio* after the lapse of one year from the law's effectivity, and then, if it is found to substantially prevent, restrict or lessen competition in the relevant market, it can be voided or approved subject to certain remedies or commitments. The PCC may also issue interim measures while its review is ongoing.

It is therefore still important for transacting parties, especially in a transaction where there are horizontal overlaps or vertical relationships between and among the seller, the buyer, and the target companies and assets, to conduct a competitive assessment of their transaction to (a) assess whether or not the transaction would raise competition-related concerns, (b) consider the risks of the PCC conducting a *motu proprio* review upon the lapse of the one year prohibition, (c) prepare possible defenses that may be asserted in the event that such a *motu proprio* review is conducted, and (d) evaluate if a voluntary notification would be the more prudent course of action to obtain deal certainty and avoid a subsequent review by the PCC.

The PCC has also indicated that it will issue implementing guidelines for pending and future transactions. It will also be important to monitor these issuances.

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SyCipLaw's Special Projects Department

This briefing was prepared by the firm's Competition and Anti-trust practice group which is the Special Projects Department.

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We are active in the area of policy development, having worked closely with the PCC in developing implementing regulations and having provided critical feedback on rules relating to joint ventures and land acquisition.

This briefing contains a summary of the legal issuances discussed above. It was prepared by SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) to update its clients about recent legal developments.

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