An Examination of the Merger Review and Voluntary Commitments System Under the Philippine Competition Act

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I. INTRODUCTION

Philippine merger review has recently adopted substantive criteria for approval in its mandatory notification regime, adopting substantive rules on their effect on market competition. Mergers have been both blocked and approved, subject to voluntary commitments, based on the regulator's assessment of their potential effect on market competition. The interplay between sectoral regulator approval and competition regulator approval and regulatory approval of the same in view of its evidentiary value in merger proceedings is watched with much interest. Likewise, a confirmation of the validity of the voluntary merger commitment regime and concomitant monitoring obligations remains to be seen.

The Philippines has made substantial changes in substantive merger review since the promulgation of the Philippine Competition Act (PCA)[1] in 2015. The Philippines observes a mandatory merger notification regime, while providing for an optional merger review for competition-sensitive sectors as identified by the Philippine Competition Commission (PCC).[2] Prior to the passage of the said law, however, the Philippines generally did not observe any form of substantive merger review except in key sectors,[3] and the criteria for review of these mergers were not definitively established as being in relation to their impact on market competition in the relevant market. Before the PCA, sectoral approval for any merger involving banks or banking institutions,

1. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

2. Philippine Competition Commission, Rules on Merger Procedure, ¶ 2.1 (Nov. 9, 2017).

3. These sectors include "banking, insurance[,] and telecommunications." Rafael A. Morales, et al., *Philippines*, *in* THE MERGERS & ACQUISITIONS REVIEW 660 (Simon Robinson & Mark Zerdin eds., 2013).

building and loan associations, trust companies, insurance companies, public utilities, educational institutions, and other special corporations governed by special laws was required, never explicitly specifying the criteria to be imposed for such an approval (only that the merger should not violate existing laws).[4]

Said sectors were required to obtain the favorable recommendation of the appropriate government agency.[5] If the Securities Exchange Commission (SEC) "is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of [the Corporation Code] and existing laws, it shall issue a certificate of merger or of consolidation, at which time the merger or consolidation shall be effective."[6]

II. THE MERGER CLEARANCE PROCESS PRIOR TO THE PCA

A. On Sectoral Clearances and Substantive Review

Section 79 of the Corporation Code[7] required prior clearance of the articles of merger or of consolidation from appropriate government agencies before the SEC reviews the same for approval.[8] Thus, for mergers or consolidations of banks or quasi-banks, the Bangko Sentral ng Pilipinas (BSP) must first give its stamp of approval.[9] Likewise, the National Telecommunications Commission (NTC) must authorize such transactions under the Public Service

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4. Before its revision in 2019, the Corporation Code stated "[t]hat in the case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions[,] and other special corporations governed by special laws, the favorable recommendation of the appropriate government agency shall first be obtained." The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Blg. 68, § 79 (1980) (repealed 2019).

5. *Id.*

6. *Id.*

7. This provision is now found in Section 78 of the Revised Corporation Code. *See* An Act Providing for the Revised Corporation Code of the Philippines [REV. CORP. CODE], Republic Act No. 11232 (2019).

8. CORP. CODE, § 79.

9. Bangko Sentral ng Pilipinas, Manual of Regulations for Banks, § 108 (X108.1) (Dec. 31, 2015) & Bangko Sentral ng Pilipinas, Manual of Regulations for Non-Bank Financial Institutions, § 4108Q (2015).

Act.[10] The following sub-Part includes some illustrative cases from the pre-PCA merger regime in which the competition aspect was examined.

B. Notable Pre-PCA Mergers

1. Bayantel-Globe Merger

In 2013, service provider Bayan Telecommunications Inc. (Bayantel) filed an action for corporate rehabilitation[11] for failure to pay its debts amounting to US$497 Million.[12] The initial target was to finish the rehabilitation by 2023,[13] but an amended plan for a debt-to-equity conversion in favor of its creditor Globe Telecom Inc. (Globe) was approved.[14] Philippine Long Distance Company (PLDT), among other oppositors, took issue with this allegedly anti-competitive transaction and argued that the agreement was essentially a "transfer of the franchise from Bayantel to Globe which require[d] congressional approval."[15] The Bayantel-Globe agreement had already been

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10. An Act to Recognize the Public Service Commission, Prescribe Its Powers and Duties, Define and Regulate Public Services, Provide and Fix the Rates and Quota of Expenses to be Paid by the Same for Other Purposes [Public Service Act], Commonwealth Act No. 146, § 20 (g) (1936) (as amended).

11. Philippine Long Distance Telephone Company v. National Telecommunications Commission, CA-G.R. SP No. 136211, Mar. 26, 2015, at 2, *available at* http://services.ca.judiciary.gov.ph/casestatusinquiry-war/faces/jsp/view/ViewResult.jsp (last accessed Nov. 30, 2019).

12. Lawrence Agcaoili, *Globe seeks NTC okay for Bayantel takeover*, PHIL. STAR, July 7, 2014, *available at* https://www.philstar.com/business/2014/07/07/1343193/globe-seeks-ntc-okay-bayantel-takeover (last accessed Nov. 30, 2019). *See also* Lito U. Gagni, *Bayantel's rehabilitation hangs in the balance*, BUS. MIRROR, Oct. 28, 2014, *available at* https://businessmirror.com.ph/2014/10/28/bayantels-rehabilitation-hangs-in-the-balance (last accessed Nov. 30, 2019).

13. Krista A.M. Montealegre, *Bayantel on track to exit corporate rehabilitation*, BUSINESSWORLD, Sep. 29, 2015, *available at* http://www.bworldonline.com/content.php?section=Corporate&title=bayantel-on-track-to-exit-corporate-rehabilitation&id=116057 (last accessed Nov. 30, 2019).

14. *Philippine Long Distance Telephone Company*, CA-G.R. SP No-136211, at 2-3. *See also* Keith Richard D. Mariano, NTC allows Globe's takeover of Bayantel, *available at* https://www.gmanetwork.com/news/money/companies/515202/ntc-allows-globe-s-takeover-of-bayantel/story/?related (last accessed Nov. 30, 2019).

15. *Philippine Long Distance Telephone Company*, CA-G.R. SP No-136211, at 7. *See also* Rappler, NTC okays Globe takeover of Bayantel, *available at*

approved by the NTC when a petition for certiorari was filed by PLDT before the Court of Appeals.[16] In denying PLDT's petition, the Court held that NTC must be allowed to receive evidence of "an actual transfer of franchise" before ruling on the same issue.[17]

2. Globe-PLDT Frequency Buyout

Meanwhile, 2016 saw the joint acquisition by telco giants Globe and PLDT of all issued and outstanding shares of San Miguel Corporation subsidiary Vega Telecom, Inc.[18] At that time, no Implementing Rules and Regulations had yet been issued, so the transaction was governed by the transitory rules embodied in PCC Memorandum Circular Nos. 16-001 and 16-002.[19] Under these Rules, the transaction is "deemed approved"[20] upon notifying the Commission of the following information:

(1) the parties to the merger or acquisition;

(2) the name and contact details of the authorized representatives of each of the parties to the merger or acquisition to whom the Commission may address any correspondence;

(3) a brief description of the businesses of the parties to the transaction;

(4) the type of transaction (whether a merger or an acquisition);

(5) the consideration;

(6) the key terms of the transaction; and

(7) the timing for the execution or implementation of the transaction.[21]

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https://www.rappler.com/business/industries/172-telecommunications-media/98302-globe-controlling-stake-bayantel (last accessed Nov. 30, 2019).

16. *Philippine Long Distance Telephone Company*, CA-G.R. SP No-136211, at 3-5.

17. *Id.* at 7.

18. Philippine Long Distance Telephone Company v. Philippine Competition Commission, CA G.R. SP No. 146528, Aug. 6, 2016, at 2, *available at* http://services.ca.judiciary.gov.ph/casestatusinquiry-war/faces/jsp/view/ViewResult.jsp (last accessed Nov. 30, 2019).

19. *Id.*

20. Philippine Competition Commission, Mergers and Acquisitions Executed and Implemented After the Effectivity of R.A. 10667 and Before the Effectivity of Its Implementing Rules and Regulations, Memorandum Circular No. 16-001 [Memo. Circ. 16-001], ¶ 4 (Feb. 12, 2016).

21. *Id.* ¶ 2.

In addition to this "deemed approved" status of the transaction, the Rules also apply the principle of finality of rulings on mergers and acquisition under which no challenge may be raised under the PCA, unless there was fraud or false material misrepresentation.[22] Globe and PLDT complied with the notification requirement and banked on the "deemed approved" provision for the validity of the agreement.[23]

However, PCC was of the view that the parties' submission lacked the key terms of the transaction, the insufficiency of which being the basis for refusing to apply the "deemed approved" provision.[24] The agreement was subjected to full investigation. PLDT and Globe claimed that by operation of the "deemed approved" provision, the transaction can no longer be assailed.[25]

The Court of Appeals found that under the transitory rules, PCC exercises a limited power of review which is different from its actual review power under the PCA.[26] Despite this limited transitory power, the PCC cannot make unreasonable interpretations of its own rules; otherwise, there would be grave abuse of discretion on its part.[27] Absent any provision on the specific form of the information required to be furnished, the PCC cannot ask for more than what the rules require of PLDT and Globe, especially when latter have fully complied with the letter of the law.[28]

3. EastWest Bank & Green Bank Merger

As previously stated, bank mergers require the approval of the BSP.[29] Memorandum Circular No. M-2009-028 outlines the requirements to be

22. *Id.* ¶ 4. *See also* Philippine Competition Act, § 23.

23. *Philippine Long Distance Telephone Company*, CA G.R. SP No. 146528, at 3.

24. *Id.*

25. *Id.* at 4.

26. Philippine Long Distance Telephone Company v. Philippine Competition Commission, CA G.R. SP No. 146528 & 146538, Oct. 18, 2017, at 34, *available at* http://services.ca.judiciary.gov.ph/casestatusinquiry-war/faces/jsp/view/ViewResult.jsp (last accessed Nov. 30, 2019).

27. *Id.* at 36.

28. *Id.* at 37.

29. Bangko Sentral ng Pilipinas, Guidelines on the Submission of Application for Merger and Consolidation, Memorandum Circular No. M-2009-028 [Memo. Circ. M-2009-028], ¶ 2 (Aug. 12, 2009).

submitted to BSP and/or the Philippine Deposit Insurance Corporation (PDIC).[30]

In 2014, the BSP approved the merger of Green Bank (A Rural Bank) Inc. and East West Banking Corp. (EastWest Bank), following the consent from PDIC a few months prior.[31] The last step before consummation of the merger was SEC approval, which was granted about two months from the sectoral clearances.[32]

As may be seen from the abovementioned, while the issue of anti-competitive effect was often brought to the fore in the approval of these mergers, they were, at the time, not subject to any legal requirement for a substantive analysis of these effects. The subsequent passage of the PCA[33] and the Revised Corporation Code[34] explicitly made such a substantive analysis a requirement for covered transactions, and further issuances expounded on what such an analysis would entail.

III. THE PRESENT MERGER REVIEW AND CLEARANCE PROCESS

A. Legal Framework of Merger Notification

Under the Revised Corporation Code, a provision has been added under Section 176 thereof, which provides as follows —

> The Congress of the Philippines may set maximum limits for stock ownership of individuals or groups of individuals related to each other by consanguinity, affinity, or by close business interests, in corporations declared to be vested with public interest pursuant to the provisions of this section, or whenever necessary to prevent anticompetitive practices as provided in Republic Act No. 10667, otherwise known as the 'Philippine Competition Act', or to implement national economic policies designed to promote

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30. *Id.*

31. Donnabelle L. Gatdula, *BSP okays EastWest Bank-Green Bank merger*, PHIL. STAR, Apr. 4, 2014, *available at* https://www.philstar.com/business/2014/04/04/1308507/bsp-okays-eastwest-bank-green-bank-merger (last accessed Nov. 30, 2019).

32. The Manila Times, *EastWest, Green Bank merger gets SEC nod*, MANILA TIMES, June 6, 2014, *available at* https://www.manilatimes.net/2014/06/06/business/eastwest-green-bank-merger-gets-sec-nod/102177 (last accessed Nov. 30, 2019).

33. The Philippine Competition Act was enacted in 2015.

34. The Revised Corporation Code took effect in 2019.

> general welfare and economic development, as declared in laws, rules, and regulations.[35]

Read in relation to the PCC's own charter,[36] it is clear that a substantive merger review has just been mandated for covered entities. Under the PCA, the PCC has the power to review covered mergers which meet the following criteria —

> [Section] 16. *Review of Mergers and Acquisitions.* — The Commission shall have the power to review mergers and acquisitions based on factors deemed relevant by the Commission.
>
> [Section] 17. *Compulsory Notification.* — Parties to the merger or acquisition agreement referred to in the preceding section wherein the value of the transaction exceeds one billion pesos (₱1,000,000,000.00) are prohibited from consummating their agreement until [30] days after providing notification to the Commission in the form and containing the information specified in the regulations issued by the Commission: *Provided*, That the Commission shall promulgate other criteria, such as increased market share in the relevant market in excess of minimum thresholds, that may be applied specifically to a sector, or across some or all sectors, in determining whether parties to a merger or acquisition shall notify the Commission under this Chapter.[37]

Note that under the abovementioned provision, the same law has provided that the PCC may adjust the notification threshold based on appropriate criteria it deems fit.[38] In 2018, the PCC adjusted the threshold based on the existing inflation index, issuing Memorandum Circular No. 18-001 which provided for a yearly adjustment every first day of March based on the gross domestic product of the country.[39] Hence, the threshold was raised to ₱2 Billion for the Size of Transaction and ₱5 Billion for the Size of Party (roughly US$40 Million and US$100 Million, respectively). Violation of the compulsory nature of the notification would result in a substantial fine ranging from one percent to five percent of the transaction value.[40]

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35. REV. CORP. CODE, § 176, para. 2.
36. Philippine Competition Commission, Citizen's Charter, *available at* https://phcc.gov.ph/wp-content/uploads/2018/11/PCC-Citizens-Charter_Rev.-No.-03_Dec-2019.pdf (last accessed Nov. 30, 2019).
37. Philippine Competition Act, §§ 16-17.
38. *Id.* § 16.
39. Philippine Competition Commission, Amendment of Rule 4, Section 3 of the Implementing Rules and Regulations of Republic Act No. 10667, Memorandum Circular No. 18-001 [PCC Memo. Circ. 18-001], § 1 (Mar. 1, 2018).
40. Philippine Competition Act, § 17, para. 2.

With the PCC's merger approval becoming an indispensable component for the approval for any merger, the sectoral regulator's approval, though still required, now serves as presumptive evidence of the absence of a negative effect on competition. Thus, "[a] favorable recommendation by a governmental agency with a competition mandate shall give rise to a disputable presumption that the proposed merger or acquisition is not violative of this Act."[41]

Hence, the PCC's approval still remains to be a requirement for the consummation of any covered mergers. As for the criteria used by the PCC for the approval of the same, this has not been provided for in the law itself. Rather, the primary law merely provides for mergers which, though anti-competitive, are nevertheless to be approved based on a determination by the PCC that the following exemptions exist:

> (1) The concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement; or
>
> (2) A party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets.[42]

Thus, this amounts to an acknowledgement that the common legal principles in merger review of efficiency gain[43] and failing firm[44] defenses are recognized in this jurisdiction.

B. Expanded Definition of Merger Under the PCA

The PCC has likewise expanded transactions deemed as mergers beyond the limited scope provided for in the Corporation Code and existing jurisprudence. Under the PCA and the Implementing Rules, a merger is defined as the "joining of two [ ] or more entities into an existing entity or to form a new entity[,]"[45] including joint ventures.[46] This is not a static definition, however, as it is subject to the rule-making power of the PCC.

41. *Id.* § 17, para. 6.

42. *Id.* § 21.

43. *Id.* § 21 (a). *See also* Philippine Competition Act, § 22.

44. *Id.* § 21 (b).

45. *Id.* § 4 (j).

46. Rules on Merger Procedure, ¶ 1.3.

Indeed, mergers under the PCA may be deemed to have the broadest definition of all existing statutes, which has only grown over time as the PCC has expounded on covered transactions through its Clarificatory Notes.

1. Clarificatory Note No. 16-001 — On the Phases of Merger

Mergers and acquisitions can be viewed as a three-step process involving: (a) the execution of a binding preliminary agreement; (b) the execution of definitive one or more definitive agreements; and (c) the consummation of the merger or acquisition.[47] The distinguishing factor between steps (a) and (b) is the completion of the final terms and conditions of the transaction.[48]

When parties have only entered into an agreement expressing resolve to conclude a merger or acquisition (e.g., memorandum of agreement or letter of intent), there is only a binding preliminary agreement.[49] In this case, the Implementing Rules provide that the acquired and acquiring entities may notify the PCC through an affidavit with the necessary forms.[50]

The parties may also decide to execute one or more definitive agreements that will already provide for the parties' rights and obligations and the complete terms and conditions of the merger or acquisition.[51] If the acquiring and acquired entities do not enter into any preliminary agreement or if they did not give notification upon that stage, there is a compulsory notification requirement before any definitive agreement is executed.[52] The thresholds for this compulsory notification are laid out in Section 3 of Rule 4 of the Implementing Rules.[53]

2. Clarificatory Note No. 16-002 — On Internal Restructuring

Note, however, that when the parties have the same ultimate parent entity (UPE), i.e., there is merely "an internal restructuring within a group of

47. Philippine Competition Commission, Definitive Agreements and Binding Preliminary Agreements in Mergers and Acquisitions, PCC Clarificatory Note No. 16-001, ¶ 2 (Sep. 16, 2016).

48. *Id.* ¶¶ 3-4.

49. *Id.* ¶ 3.

50. Rules and Regulations Implementing the Philippine Competition Act, Republic Act No. 10667, rule 4, § 5 (c) (2016).

51. PCC Clarificatory Note No. 16-001, ¶ 4.

52. *Id.* ¶ 6 (b).

53. Rules and Regulations Implementing the Philippine Competition Act, rule 4, § 3.

companies[,]" the notification requirement does not apply so long as there is no change in control.[54]

3. Clarificatory Note No. 17-001 — Special Rules for Voting Securities

In cases where the compulsory notification requirement applies, the Rules provide for the filing of a Notification Form from the UPEs of all acquiring and acquired entities.[55] Generally, when all parties required to notify have submitted the required documents and have been informed of such completion, the waiting period for the parties and the PCC's review of the transaction commences.[56] However, in the specific case of a voting securities acquisition, the acquired entity must complete its submission at most 10 days after the acquiring entity files its own forms.[57] Otherwise, the PCC's initial review may not be completed within the 30-day period provided by the rules.[58]

4. Clarificatory Note No. 18-001 — On Controlling Interests

The PCC has also clarified the importance of change in control to determine if a transaction is covered by the compulsory notification requirement. When there is no change in the controlling interest of a natural person in the entities involved in the merger or acquisition, notification is not compulsory.[59] However, even if the same persons retain the same control post-transaction, the requirement still applies when there are other shareholders who can similarly or jointly exercise control over the merged or acquired entity.[60]

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54. Philippine Competition Commission, Coverage of Compulsory Notification, PCC Clarificatory Note No. 16-002, ¶¶ 2 (a)-(b) (Sep. 16, 2016).

55. Rules and Regulations Implementing the Philippine Competition Act, rule 4, § 2 (b).

56. *Id.* §§ 5 (e) & (g)-(i).

57. Philippine Competition Commission, Compulsory Notification in Voting Securities Acquisition, PCC Clarificatory Note No. 17-001, ¶ 5 (Feb. 23, 2017).

58. *Id.* ¶ 6.

59. Philippine Competition Commission, Consolidation of Ownership, PCC Clarificatory Note No. 18-001, ¶ 2 (Sep. 21, 2018).

60. *Id.* ¶ 3.

5. Clarificatory Note No. 19-001 — On Control in Cases of Land Acquisitions

In the context of land acquisition, control remains to be a deciding factor for the application of the notification requirement.[61] Apart from evaluating control gained over the acquired entity, the PCC also assesses whether the land acquired contains improvements that can either be "an operating segment ... result[ing] in a horizontal or vertical relationship between the [parties]"[62] or an essential facility.[63] If there is a positive finding that the improvements on the land constitute either of the two previously mentioned, the notification requirement applies.[64]

Having established the parameters for what constitutes a "merger" under present Philippine law and practice, it is also important to establish the factual coverage or economic "jurisdiction" wherein the PCC may carry out this mandate. This is done through the process of market definition.

C. Market Definition in Merger Review

Market definition, as defined in generally accepted practices of competition authorities across various jurisdictions, involves the delineation of the relevant markets after due consideration of a variety of factors and consultation with any relevant parties and stakeholders.[65] In the Philippines, the process of market definition may be conducted through a synthesis of both the product markets and the geographic markets, as may be discerned from the definition of the "Relevant Market" as "the market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market."[66]

61. Philippine Competition Commission, Coverage of Compulsory Notification in Land Acquisition, PCC Clarificatory Note No. 19-001, ¶ 4 (Jan. 8, 2019).

62. *Id.* ¶ 4 (b) (i). An improvement is considered an operating segment when it is used to "[engage] in business activities from which it earns or may earn revenues and incur expenses[.]" *Id.* ¶ 6. On the other hand, it is considered an essential facility "if it cannot be duplicated in a practicable manner by would-be competitors or it is indispensable to carrying on another person's business because there is no actual or potential substitute in existence." *Id.* ¶ 7.

63. *Id.* ¶ 4 (b) (ii).

64. *Id.* ¶ 4.

65. Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 130 (2007).

66. Philippine Competition Act, § 4 (k).

In turn, both of these factors have been defined by the PCA in the following wise —

> A relevant product market comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices and their intended use[. On the other hand, t]he relevant geographic market comprises the area in which the entity concerned is involved in the supply and demand of goods and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are different in those areas.[67]

From the foregoing definition, the characteristics which Congress has statutorily imposed upon the regulator when it comes to the practice of market definition can be determined. With respect to the product market, the law expressly provides that substitutability is the criteria to be observed, and that in the determination of substitutability, product characteristics, price levels, and intended use are to be considered.[68]

On the other hand, with respect to the geographic market, conditions of competition and homogeneity have been identified as the criteria.[69] This provides some leeway for scoping of geographic definition, in consideration of any existing barriers to entry and the ease of entry and exit into any given market. Thus, the rules on market definition may be construed to provide the PCC the legislative mandate to frame the "area" within which it will exercise the substantial amount of powers that the PCA provides it. It is worth noting at this juncture that the powers and remedies available to the PCC are generally restricted to those within the relevant market.

For instance, Section 31 of the PCA provides for the PCC's broad power to order "desistance from the performance of certain acts ... [when] the continued performance of which would result in a material and adverse effect on consumers or competition in the relevant market."[70] Likewise, under Section 12 of the PCA (which defines the powers of the PCC), its merger review power was duly qualified as follows — "Review proposed mergers and acquisitions, determine thresholds for notification, determine the requirements and procedures for notification, and upon exercise of its powers to review,

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67. *Id.*
68. *Id.* § 4 (k) (1).
69. *Id.* § 4 (k) (2).
70. *Id.* § 31, para. 3.

prohibit mergers and acquisitions that will substantially prevent, restrict, or lessen competition in the relevant market[.]"[71]

IV. MERGER NOTIFICATION AND REVIEW PROCEDURE

A. Dual-Notification Rule

The PCA requires two notifications for covered mergers and acquisitions: one from the acquiring entity's notifying group[72] and another from that of the acquired entity.[73] The thresholds provided in Rule 4 of the Implementing Rules serve as the basis of whether the parties are required to notify the PCC.[74] In 2018, these thresholds were raised from ₱1 Billion to (a) ₱5 Billion with respect to the gross revenue component of either party to the transaction, and (b) ₱2 Billion with respect to the transaction value itself.[75]

B. Automatic Threshold Adjustment Rule

An automatic threshold adjustment proviso was also laid down, which took effect beginning 1 March 2019.[76] Thus, the applicable thresholds at present are ₱5.6 Billion and ₱2.2 Billion for the size of the person and the transaction, respectively.[77] The PCC, pursuant to its power to reasonably adjust merger thresholds with criteria it sees fit,[78] recently promulgated Policy Statement 18-01, pegging the merger notification threshold to annual adjustment,[79] in order to prevent the erosion of value of the initial notification threshold set by Congress. This serves as but one of a variety of criteria the PCC may employ

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71. *Id.* § 12 (b).

72. The Notifying Group pertains to "all entities directly or indirectly controlled by the Ultimate Parent Entity filing a proposed merger to the PCC for its review[.]" Rules on Merger Procedure, ¶ 1.4 (f).

73. Philippine Competition Act, § 17, para. 1.

74. Rules and Regulations Implementing the Philippine Competition Act, rule 4, § 3.

75. PCC Memo. Circ. 18-001, § 1.

76. *Id.*

77. Philippine Competition Commission, Adjustment of the Thresholds for Compulsory Notification of Mergers and Acquisitions, Memorandum Advisory 2019-001, para. 2 (a)-(b).

78. Philippine Competition Act, § 17, para. 1.

79. Philippine Competition Commission, On the Adjustment of Thresholds for Compulsory Notification of Mergers and Acquisitions, Policy Statement-18-01, at 2-3 (2018).

in the conduct of merger review, which includes both statutorily defined criteria but also a broad leeway to look into whichever factors it may deem relevant in assessing the possible effects of a merger on market competition.

This may be deemed to be a form of contingent legislation, already ruled upon as valid by the Supreme Court in *Republic v. Drugmaker's Laboratories, Inc.*[80] with respect to the variety of rules an administrative agency may issue —

> An administrative regulation may be classified as a legislative rule, an interpretative rule, or a contingent rule. Legislative rules are in the nature of subordinate legislation and designed to implement a primary legislation by providing the details thereof. They usually implement existing law, imposing general, extra-statutory obligations pursuant to authority properly delegated by Congress and effect a change in existing law or policy which affects individual rights and obligations. Meanwhile, interpretative rules are intended to interpret, clarify or explain existing statutory regulations under which the administrative body operates. Their purpose or objective is merely to construe the statute being administered and purport to do no more than interpret the statute. Simply, they try to say what the statute means and refer to no single person or party in particular but concern all those belonging to the same class which may be covered by the said rules. Finally, contingent rules are those issued by an administrative authority based on the existence of certain facts or things upon which the enforcement of the law depends.[81]

C. Sufficiency in Form and Substance Rule

The PCC will only proceed with the merger review if both notifications are sufficient in form and substance,[82] in which case Phase I of the review shall commence.[83] The parties may only consummate the agreement 30 days after the notification,[84] unless the PCC asks for more details by conducting a Phase II review.[85] If there is such a request made within the initial 30-day period, an additional 60 days from the date of PCC's request extends the waiting period of the parties.[86] During Phase II, the Mergers and Acquisitions Office (MAO)

80. Republic v. Drugmaker's Laboratories, Inc., 718 SCRA 153 (2014).

81. *Id.* at 161-62.

82. Rules and Regulations Implementing the Philippine Competition Act, rule IV, § 5 (f).

83. *Id.* rule IV, § 5 (g).

84. Philippine Competition Act, § 17, para. 1.

85. *Id.* § 17, para. 3.

86. *Id.*

may hold a *State of Play meeting*[87] to relay the competition concerns and raise these issues to the parties.[88] Failure to comply with the compulsory submission within the prescribed period subjects the parties to payment of fines.[89]

D. Mergers "Deemed Approved"

Absent any decision upon expiration of the periods mentioned above, the parties may implement the agreement because the law considers it approved.[90] However, if the PCC finds the agreement violative of the anti-competitive merger provisions of the PCA, it can enjoin the parties from consummating the agreement.[91]

E. "No Look Back" Principle

The PCA has expressly provided that a merger successfully reviewed under these procedures may no longer be subsequently reviewed on their merits.[92] Section 23 thereof expressly provides that "[m]erger or acquisition agreements that have received a favorable ruling from the PCC, except when such ruling was obtained on the basis of fraud or false material information, may not be challenged under this Act."[93] Note that the foregoing rule applies even to mergers which are passed by virtue of being deemed approved. This raises some conflict with the practice of "conditional approval" by the PCC, as will be shown in the subsequent Parts of this Article.

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87. Rules on Merger Procedure, ¶ 7.15.

88. *Id.* § 7.18.

89. *Id.* §§ 3.4-3.5.

90. Section 17 of the Philippine Competition Act provides —

> When the above periods have expired and no decision has been promulgated for whatever reason, the merger or acquisition shall be deemed approved and the parties may proceed to implement or consummate it. All notices, documents and information provided to or emanating from the Commission under this section shall be subject to confidentiality rule under Section 34 of this Act except when the release of information contained therein is with the consent of the notifying entity or is mandatorily required to be disclosed by law or by a valid order of a court of competent jurisdiction, or of a government or regulatory agency, including an exchange.

Philippine Competition Act, § 17, para. 4.

91. *Id.* § 18.

92. *Id.* § 23.

93. *Id.*

V. PROHIBITED MERGERS AND ACQUISITIONS

Market definition is merely the first step in the process of reviewing a merger. The PCA, in addition to the supplemental rules and regulations which were issued pursuant thereto, has laid down the particular standard to be used in order to achieve a comprehensive and holistic assessment of the effects a merger may have on the competitive environment. In particular, the PCA provides that "[m]erger or acquisition agreements that substantially prevent, restrict[,] or lessen competition in the relevant market or in the market for goods or services as may be determined by the [PCC] shall be prohibited."[94]

Hence, the basic test may be said to be that a merger must not substantially prevent, restrict, or lessen competition in the relevant market (or the so-called SLC Test).

VI. EXEMPTED MERGERS AND ACQUISITIONS

However, the law itself also provides which mergers, despite being found to produce a substantial lessening of competition, are likewise to be deemed exempt from the Section 20 prohibition on the grounds of public policy —

> Merger or acquisition agreement prohibited under Section 20 of this Chapter may, nonetheless, be exempt from prohibition by the Commission when the parties establish either of the following:
>
> (a) The concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement; or
>
> (b) A party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets:
>
> *Provided*, That an entity shall not be prohibited from continuing to own and hold the stock or other share capital or assets of another corporation which it acquired prior to the approval of this Act or acquiring or maintaining its market share in a relevant market through such means without violating the provisions of this Act:
>
> *Provided*, *further*, That the acquisition of the stock or other share capital of one or more corporations solely for investment and not used for voting or exercising control and not to otherwise bring about, or attempt to bring

94. *Id.* § 20.

about the prevention, restriction, or lessening of competition in the relevant market shall not be prohibited.[95]

The statutory exemptions can be considered to consist of two affirmative defenses and two exemptive defenses. The affirmative defenses comprise of: (1) the efficiency gain defense, which is recognized in a variety of jurisdictions[96] and serves as an acknowledgement that an improvement in over-all welfare may be achieved through an otherwise anti-competitive merger;[97] and (2) the failing firm defense, which considers that an otherwise anti-competitive merger may nevertheless serve as the most pro-competitive course of action in view of an impending loss of a player in the market.[98]

The law likewise acknowledges that a party may not raise such exemption lightly, and, as a consequence, upon them falls the burden of proving the existence of such an exemption.[99]

In addition to the abovementioned defenses, another modality presently exists by which a merger with identified competition concerns or by which the PCC has reasonable grounds to believe may result in a substantial lessening of competition may be approved for parties which does not satisfy the requirements of Section 21, and this is through the execution of a voluntary commitment.[100]

VII. VOLUNTARY COMMITMENTS DURING MERGER REVIEW

Voluntary commitments are not expressly provided for in the PCA but are instead founded on the PCC's residual or implementing powers.[101] The PCC has stated in Commission Decision No. 36-M-032/2017, the first such decision authorizing voluntary commitments, that the legal bases for the same

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95. *Id.* § 21.

96. Lin Bian & D. G. McFetridge, *The Efficiencies Defence in Merger Cases: Implications of Alternative Standards*, 33 CAN. J. ECON. 297, 297-98 (2000).

97. Sheldon Kimmel, *The Supreme Court's Efficiency Defense*, 12 SUP. CT. ECON. REV. 209, 209-10 (2004).

98. Lars Persson, *The Failing Firm Defense*, 53 J. INDUS. ECON. 175, 175-76 (2005).

99. Philippine Competition Act, § 22. The provision states that "[t]he burden of proof under Section 21 lies with the parties seeking the exemption. A party seeking to rely on the exemption specified in Section 21 (a) must demonstrate that if the agreement were not implemented, significant efficiency gains would not be realized." *Id.*

100. Rules on Merger Procedure, ¶ 12.3.

101. *See generally* Philippine Competition Act, § 12.

are Sections 16 and 20 of the PCA, as well as Section 1, Rule 4 of its Implementing Rules and Regulations.[102] The PCC has provided notifying entities with a template for such proposals, which ties into the periods established in the PCA.[103]

A. PCC's Model Request and Waiver Form

In case the PCC finds cause to prohibit any merger or acquisition based on competition concerns, the PCC has the power to "impose remedies to address the potential negative effect of the merger."[104] On the other hand, the parties may submit a proposal of measures that any of them will undertake in order to address the issues raised by the PCC.[105] In fact, the PCC has released a Model Request and Waiver Form that merger parties are required to submit together with their voluntary commitments.[106]

The proposal template begins with a request by the submitting party for a 60-day suspension of the PCC's merger review period.[107] The party commits to submit any relevant document or information which the PCC may request in the assessment of the proposed commitments.[108] If the PCC rejects the proposal by the end of the 60 days, the period for Phase II Review shall commence.[109] More importantly, the submitting party waives the review

102. Philippine Competition Commission, Acquisition by TQMP Glass Manufacturing Corp. of AGC Glass Philippines Inc. and Republic Asahi Realty Corporation, Commission Decision No. 36-M-032/2017, at 1 (Dec. 1, 2017).

103. Philippine Competition Commission, Model Request for Consideration of Comments and Waiver (A Template Document for a Merger Party's Request for Consideration of Voluntary Commitments), *available at* https://phcc.gov.ph/model-request-waiver-voluntary-commitments/?fbclid=IwAR3VfTXh_Go-qTaU8_4DARVTqb4SFZ7j7BG5qxuRGLjGDcp-Vol2sfaQ5lE (last accessed Nov. 30, 2019). Note, however, that the PCC may decide to reduce or extend the 60-day period for 30 days. Rules on Merger Procedure, ¶ 12.4.

104. Rules on Merger Procedure, ¶ 12.1.

105. *Id.* ¶ 12.3.

106. *Id.* ¶ 12.4. *See* Philippine Competition Commission, Model Request for Consideration of Commitments and Waiver, *available at* https://phcc.gov.ph/model-request-consideration-commitments-waiver-motu-proprio-merger-review (last accessed Nov. 30, 2019).

107. Model Request for Consideration of Comments and Waiver, *supra* note 103, para. 1.

108. *Id.*

109. *Id.* para. 2.

periods under Section 17 of the PCA, thereby agreeing to suspend the consummation of the transaction under review until the PCC has promulgated its decision.[110]

The cases discussed in the next Part involve voluntary commitments are particularly noteworthy, as they show examples of conditional approval, denial, and continuing monitoring of merged entities.

B. Illustrative Voluntary Commitments Cases in the Philippines

1. SM-Goldilocks Deal

In the middle of 2017, major holding group SM Investments Corp. (SM) revealed that it was negotiating the acquisition of Goldilocks Bakeshop (Goldilocks).[111] The PCC commenced with Phase I review but concerns with respect to retail space in SM malls and data privacy prevented the issuance of an approval.[112] The transaction underwent Phase II review,[113] and the parties submitted their proposed voluntary commitments, but the PCC found that the proposal did not adequately resolve the competition issues raised.[114] After receiving a Statement of Concerns from the PCC,[115] SM submitted a revised proposal for their voluntary commitments[116] which included an undertaking to protect the data of competitor-bakeshops of Goldilocks which were also tenants of SM mall spaces.[117]

The PCC eventually approved the transaction, subject mainly to SM's compliance with its undertaking and regular submission of reports to the PCC,[118] "fair, reasonable, and non-discriminatory" treatment of Goldilocks'

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110. *Id.* para. 3.

111. Iris Gonzales, *SM in talks to acquire Goldilocks*, PHIL. STAR, Aug. 29, 2017, *available at* https://www.philstar.com/business/2017/08/29/1733909/sm-talks-acquire-goldilocks (last accessed Nov. 30, 2019).

112. Philippine Competition Commission, Acquisition by SM Retail, Inc. of Goldilocks Bakeshop, Inc., Commission Decision No. 42-M-017/2017 [PCC Case No. M-2017-002], whereas cl., para. 1 (Dec. 29, 2017).

113. *Id.* whereas cl., para. 2.

114. *Id.* whereas cl., para. 3.

115. *Id.* whereas cl., para. 4.

116. *Id.* whereas cl., para. 5-6.

117. *Id.* whereas cl., para. 7.

118. PCC Case No. M-2017-002, ¶ I.

competitors with respect to mall space tenancy,[119] and maintenance of an information firewall to protect the data privacy of Goldilocks' competitors.[120]

Although the deal was stalled sometime in February 2018 due to "changes in the general business environment,"[121] SM Investments Corp. confirmed in August of the same year that it was nearing the conclusion of the acquisition of 34% of Goldilocks.[122]

2. Grab-Uber Deal

Grab Holdings, Inc. and MyTaxi.PH, Inc. (Grab), collectively operating the Grab network of Transportation Network Vehicle Services (TNVS), sought to acquire the key assets of Uber B.V. and Uber Systems, Inc., the lone rival TNVS operator in the Philippines.[123] While the transaction was undertaken on 25 March 2018,[124] the PCC on 3 April 2018 issued a directive to review the transaction *motu propio* based on an assessment by the MAO that grounds existed to believe that the same would "result in a substantial lessening ... of competition[.]"[125] During the pendency of the review, on 6 April 2018, the PCC issued an order imposing interim measures on the deal preventing the full consummation of the same.[126] The Statement of Concerns issued by the MAO on 22 May 2018[127] later identified a likelihood that the market for TNVS will be adversely affected by the transaction, leading the parties to submit on 1 June 2018 a Request for Consideration of Commitments.[128]

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119. *Id.* ¶ II.

120. *Id.* ¶¶ IV-VII.

121. CNN Philippines, SM Retail stops plans to acquire Goldilocks, *available at* https://cnnphilippines.com/business/2018/02/01/SM-Retail-stops-plans-to-acquire-Goldilocks.html (last accessed Nov. 30, 2019).

122. Arra B. Francia, *SM to acquire 34% of Goldilocks*, BUSINESSWORLD, Aug. 13, 2018, *available at* https://www.bworldonline.com/sm-to-acquire-34-of-goldilocks (last accessed Nov. 30, 2019).

123. Philippine Competition Commission, Acquisition by Grab Holdings Inc. and MyTaxi.PH Inc. of Assets of Uber B.V. and Uber Systems Inc., Commission Decision No. 26-M-12/2018 [PCC Case No. M-2018-001], whereas cl., para 1 (Aug. 10, 2018).

124. *Id.*

125. *Id.* whereas cl., para. 2.

126. *Id.* whereas cl., para. 3.

127. *Id.* whereas cl., para. 4.

128. *Id.* whereas cl., para. 6.

The commitments extended across the Grab platform, prohibiting exclusivity agreements between TNVS riders and the platform,[129] requiring monitoring of incentives,[130] mandating that Grab continue to provide licensing assistance to drivers,[131] and requiring the removal of the "See Destination" feature on the mobile application,[132] among others. The same was likewise subject to a duration of one year.[133]

The PCC eventually approved the merger subject to the commitments on 10 August 2018, allowing the full consummation of the platform.[134] However, the PCC thereafter imposed a series of fines on Grab pertaining to violations of its merger commitments, which were reckoned per quarter of the violations as determined by the PCC.[135] These amounts reached ₱23.45 Million for the commitment violations and an additional ₱5.05 Million in mandated refunds arising from non-compliance with pricing provisions in the merger commitments.[136] Prior to this, the commitments, which were slated to expire on 10 August 2018, were extended for a period of 71 days in order to provide the parties to renegotiate the same.[137]

3. Universal Robina-Roxas Holdings Deal

Universal Robina Corporation (URC) and two sugar millers in Luzon, Central Azucarera Don Pedro, Inc. (CADPI) and Roxas Holdings, Inc. (RHI), had earlier notified the PCC on 1 June 2018, about their prospective

129. PCC Case No. M-2018-001, ¶ I.

130. *Id.* ¶ II.

131. *Id.* ¶ III.

132. *Id.* ¶ V.

133. *Id.* ¶ XII.

134. *Id.* ¶¶ I-XII.

135. Elijah Felice Rosales, *PCC fines Grab P23.45 million, orders it to refund P5 million to its passengers*, BUS. MIRROR, Nov. 19, 2019, *available at* https://businessmirror.com.ph/2019/11/19/pcc-fines-grab-p23-45-million-orders-it-to-refund-p5-million-to-its-passengers (last accessed Nov. 30, 2019).

136. *Id.*

137. Press Release *by* Philippine Competition Commission, *PCC extends Grab's commitment period as year-long monitoring lapses* (Aug. 13, 2019), *available at* https://phcc.gov.ph/press-releases/pcc-extends-grabs-commitment-period-as-year-long-monitoring-lapses (last accessed Nov. 30, 2019).

merger.[138] The Phase I review of the same identified several competition concerns, which resulted in the need for conducting a Phase II review to more thoroughly study the transaction, which was duly transmitted to the notifying entities on 7 August 2018.[139]

The identified concerns were centered primarily on the elimination of any potential competitive constraint on the merged entity due to the acquisition of its lone rival, which would immediately eliminate the only competitor[140] under circumstances where "[b]arriers to entry [were] high and the possibility of [another player coming in were quite] ... remote."[141] Thus, the MAO concluded that the unilateral market power which the deal would confer on the merged entity gives it a strong capability to impose unfavorable terms on the planters who relied on the same for the sale of their raw materials.[142]

URC thus provided a series of voluntary commitments involving increased efficiency in sugar recovery at its facilities, as well as increasing the planter's share in the final output and to provide loan, machinery, and fertilizer assistance to farmers.[143] Despite the same, on 14 February 2019, the PCC blocked the merger on the grounds that the commitments provided did not satisfactorily address competition grounds.[144] This likewise may be considered as the first merger reviewed by the PCC to be blocked upon a substantive review on its competitive merits.

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138. Philippine Competition Commission, Executive Summary: Statement of Concerns on the Proposed Acquisition by Universal Robina Corporation of Assets of Central Azucarera Don Pedro, Inc. and Roxas Holdings, Inc., ¶ 1, *available at* https://phcc.gov.ph/press-releases/executive-summary-statement-of-concerns-on-the-proposed-acquisition-by-universal-robina-corporation-of-assets-of-central-azucarera-don-pedro-inc-and-roxas-holdings-inc (last accessed Nov. 30, 2019).

139. *Id.* ¶ 3.

140. *Id.* ¶ 4 (a).

141. *Id.* ¶ 4 (d).

142. *Id.* ¶ 4 (b).

143. Jennifer B. Austria, URC vows to upgrade 2 acquired sugar mills, *available at* http://www.manilastandard.net/mobile/article/284989 (last accessed Nov. 30, 2019).

144. Press Release *by* Philippine Competition Commission, *PCC blocks merger-to-monopoly deal between URC, Don Pedro-RHI sugar millers* (Feb. 14, 2019), *available at* https://phcc.gov.ph/press-releases/pcc-blocks-merger-to-monopoly-deal-between-urc-don-pedro-rhi-sugar-millers (last accessed Nov. 30, 2019).

As can be seen from the above cases, the scope and nature of the commitments required by PCC may vary. Likewise, the duration of commitments appear to be subject to modification by negotiation between the parties or unilaterally by the PCC in certain instances. This particular exercise by the PCC of its conditional approval power certainly raises interesting constitutional points for discussion.

C. Constitutional Issues Involving Voluntary Commitments

While there are no jurisprudential guidelines or similar legal rules in the Philippines, the exercise of voluntary commitments may be construed to be an extension of previously acknowledged legal powers of public authorities to validly impair the obligations of contracts in pursuit of the public good. In various cases on the subject, the Supreme Court has ruled on the purpose of the non-impairment clause, which has generally served as a safeguard against state intervention —

> The purpose of the non-impairment clause of the Constitution is to safeguard the integrity of contracts against unwarranted interference by the State. As a rule, contracts should not be tampered with by subsequent laws that would change or modify the rights and obligations of the parties. Impairment is anything that diminishes the efficacy of the contract. There is an impairment if a subsequent law changes the terms of a contract between the parties, imposes new conditions, dispenses with those agreed upon[,] or withdraws remedies for the enforcement of the rights of the parties.[145]

At first glance, the imposition of voluntary commitments may appear contrary to the non-impairment clause, as voluntary commitments by their very nature impose new commercial conditions on contracts. Indeed, they do the same not only for singular contracts, but for entire categories of contracts affecting multiple parties in a market. In addition, they impose durations upon these commitments which match, if not surpass, the duration of contracts to which a committing entity is a party. Further, unlike ordinary commercial contracts, for which the effects on the broader market are generally only an incidental effect, voluntary commitments before the PCC have an outright stated purpose for their imposition, as embodied in the various whereas clauses contained in PCC decisions involving conditionally approved mergers.

With respect to the argument, therefore, that voluntary commitments may serve as an impairment of the obligations of contracts, the following discussion

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145. Goldenway Merchandising Corporation v. Equitable PCI Bank, 693 SCRA 439, 450-51 (2013).

by the Supreme Court may serve as a general method of framing the appropriate parameters —

> The concept of police power is well-established in this jurisdiction. It has been defined as the 'state authority to enact legislation that may interfere with personal liberty or property in order to promote the general welfare.' Its scope, ever-expanding to meet the exigencies of the times, even to anticipate the future where it could be done, provides enough room for an efficient and flexible response to conditions and circumstances thus assuming the greatest benefits.
>
> The freedom to contract is not absolute; all contracts and all rights are subject to the police power of the State and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity. Settled is the rule that the non-impairment clause of the Constitution must yield to the loftier purposes targeted by the Government. The right granted by this provision must submit to the demands and necessities of the State's power of regulation. Such authority to regulate businesses extends to the banking industry which, as this Court has time and again emphasized, is undeniably imbued with public interest.[146]

Hence, it may be argued that the Supreme Court has already laid down the appropriate foundation for the exercise of the voluntary commitment power insofar as the same has been embodied in the Constitution, enacted by the Legislature, and further enabled by the duly constituted executive agencies.

Notably, the Constitution itself expressly states that combinations in restraint of trade are expressly prohibited and that laws with a tendency to support the same are equally void for running afoul of the Constitutional mandate.[147] In *Tatad v. Secretary of the Department of Energy*,[148] the Supreme Court opined as follows —

> To recapitulate, our Decision declared [Republic Act No.] 8180 unconstitutional for three reasons: (1) it gave more power to an already powerful oil oligopoly; (2) it blocked the entry of effective competitors; and (3) it will sire an even more powerful oligopoly whose unchecked power will prejudice the interest of the consumers and compromise the general welfare.
>
> A weak and developing country like the Philippines cannot risk a downstream oil industry controlled by a foreign oligopoly that can run riot.

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146. *Id.* at 454.

147. PHIL. CONST. art. XII, § 19.

148. Tatad v. Secretary of the Department of Energy, 282 SCRA 337 (1998).

> Oil is our most socially sensitive commodity and for it to be under the control of a foreign oligopoly without effective competitors is a clear and present danger. A foreign oil oligopoly can undermine the security of the nation; it can exploit the economy if greed becomes its creed; it will have the power to drive the Filipino to a prayerful pose. Under a deregulated regime, the people's only hope to check the overwhelming power of the foreign oil oligopoly lies on a market where there is fair competition. With prescience, the Constitution mandates the regulation of monopolies and interdicts unfair competition. Thus, the Constitution provides a shield to the economic rights of our people, especially the poor. It is the unyielding duty of this Court to uphold the supremacy of the Constitution not with a mere wishbone but with a backbone that should neither bend nor break.[149]

Hence, it may be said that the regulation of monopolies, which are not expressly prohibited by the organic law, is permissible. In fact, on the related issue of the power of the courts to regulate economic laws and related issuances with an economic component, the Supreme Court has declared as follows —

> Public respondents insist on their thesis that the cases at bar actually assail the wisdom of [Republic Act] No. 8180 and that this Court should refrain from examining the wisdom of legislations. They contend that [Republic Act] No. 8180 involves an economic policy which this Court cannot review for lack of power and competence.
>
> ...
>
> We hold that the power and obligation of this Court to pass upon the constitutionality of laws cannot be defeated by the fact that the challenged law carries serious economic implications. This Court has struck down laws abridging the political and civil rights of our people even if it has to offend the other more powerful branches of government. There is no reason why the Court cannot strike down [Republic Act] No. 8180 that violates the economic rights of our people even if it has to bridle the liberty of big business within reasonable bounds.
>
> ...
>
> It is to be admitted of course that property rights find shelter in specific constitutional provisions, one of which is the due process clause. It is equally certain that our fundamental law framed at a time of 'surging unrest and dissatisfaction,' when there was the fear expressed in many quarters that a constitutional democracy, in view of its commitment to the claims of property, would not be able to cope effectively with the problems of poverty and misery that unfortunately afflict so many of our people, is not susceptible to the indictment that the government therein established is impotent to take the necessary remedial measures. The framers saw to that. The welfare state

149. *Id.* at 358-59.

> concept is not alien to the philosophy of our Constitution. It is implicit in quite a few of its provisions. It suffices to mention two.
>
> There is the clause on the promotion of social justice to ensure the well-being and economic security of all the people, as well as the pledge of protection to labor with the specific authority to regulate the relations between landowners and tenants and between labor and capital. This particularized reference to the rights of working men whether in industry and agriculture certainly cannot preclude attention to and concern for the rights of consumers, who are the objects of solicitude in the legislation now complained of. The police power as an attribute to promote the common weal would be diluted considerably of its reach and effectiveness if on the mere plea that the liberty to contract would be restricted, the statute complained of may be characterized as a denial of due process. The right to property cannot be pressed to such an unreasonable extreme.[150]

Notably, established jurisprudence already recognized by means of judicial notice that business enterprises may naturally be resistant to legal or regulatory impositions which restrict their commercial abilities.[151] In *Tatad*, the Supreme Court characterized its nullification of legislation it deemed anti-competitive on the grounds that social justice and public interest adequately justified the same.[152] More relevant to the present discussion is the fact that the Supreme Court likewise included various types of legislative impositions in this case, including labor clauses, tenancy rules, and compulsory arbitration clauses —

> It is understandable though why business enterprises, not unnaturally evincing lack of enthusiasm for police power legislation that affect them adversely and restrict their profits could predicate alleged violation of their rights on the due process clause, which as interpreted by them is a bar to regulatory measures. Invariably, the response from this Court, from the time the Constitution was enacted, has been far from sympathetic. Thus, during the Commonwealth, we sustained legislations providing for collective bargaining, security of tenure, minimum wages, compulsory arbitration, and tenancy regulation. Neither did the objections as to the validity of measures regulating the issuance of securities and public services prevail.[153]

Thus, if the voluntary commitments entered into by merging entities before the PCC are to be considered as the same kind and character as the foregoing, it follows that legal ground exists to support their imposition. In

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150. *Id.* at 346-48 (citing Alalayan v. National Power Corporation, 24 SCRA 172, 181-82 (1968)).

151. *Id.* at 348-49.

152. *Id.* at 348.

153. *Id.* (citing Alalayan v. National Power Corporation, 27 SCRA 172, 182-83 (1968)).

that respect, there is a need to examine the characterization of administrative issuances such as those issued by the MAO.

Note that as previously discussed,

> [the] constitutional provision does not declare an outright prohibition of monopolies. It simply allows the State to act '*when public interest so requires*[;]'[154] even then, no outright prohibition is mandated, as the State may choose to regulate rather than to prohibit. Two elements must concur before a monopoly may be regulated or prohibited:
>
> (1) There in fact exists a monopoly or an oligopoly[;] and
>
> (2) Public interest requires its regulation or prohibition.
>
> Whether a monopoly exists is a question of fact. On the other hand, the questions of (1) what public interest requires and (2) what the State reaction shall be essentially require the exercise of discretion on the part of the State.[155]

Administrative agencies and specialist bodies have performed quasi-legislative functions through their implementing rules and regulations. To illustrate, the Energy Regulatory Commission, the quasi-judicial body entrusted by law to implement the antitrust provisions of the Electric Power Industry Reform Act,[156] has formulated both its own rules of procedure and adopted methods for estimating of monopoly power when determining the allowance of rate hikes for power generation.[157] This may be because the decisions of administrative agencies with respect to technical matters under their cognizance are accorded great respect by the court when it pertains to the laws they are in charge of implementing.[158]

Indeed, it is well established that courts are proscribed from challenging the wisdom but only the legality of legislation. This has been best illustrated in *Energy Regulatory Board v. Court of Appeals*,[159] wherein the Supreme Court

154. PHIL. CONST. art. XII, § 19.

155. Garcia v. Executive Secretary, 583 SCRA 119, 131 (2009).

156. An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001], Republic Act No. 9136, § 43 (r) (2001).

157. *See, e.g.*, Energy Regulatory Commission, A Resolution Initially Setting the Installed Generating Capacity Per Grid, National Grid and the Market Share Limitations Per Grid and the National Grid for 2014, Resolution No. 3, Series of 2014 (Mar. 10, 2014).

158. Cosmos Bottling Corporation v. Nagrama, Jr., 547 SCRA 571, 586-87 (2008).

159. Energy Regulatory Board v. Court of Appeals, 357 SCRA 30 (2001).

struck down the decision of the Court of Appeals on the ground that the courts should not interfere with the decision of a regulatory body which has a recognized expertise in oil economics.[160]

Thus, it is important to benchmark the exercise by administrative agencies of their delegated power. On that score, a substantial number of principles exist. The critical rule, as identified by the Supreme Court, actually enumerates all relevant elements for its validity —

> The fundamental rule in administrative law is that, to be valid, administrative rules and regulations must be issued by authority of law and must not contravene the provisions of the Constitution. The rule-making power of an administrative agency may not be used to abridge the authority given to it by Congress or by the Constitution. Nor can it be used to enlarge the power of the administrative agency beyond the scope intended. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by administrative agencies and the scope of their regulations.[161]

Restated, an administrative rule (and, by extension, orders or issuances promulgated according to said rule) must:

(1) be issued by authority of law;

(2) not contravene the Constitution;

(3) not delimit the power of Congress, and

(4) not enlarge their power beyond the constitutional mandate.

To the foregoing and in the particular case of the PCC, it may be added that it must also ensure that its intervention must not be overzealous or undue.[162]

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160. *Id.* at 46.

161. Department of Agrarian Reform v. Uy, 515 SCRA 376, 399 (2007) (citing Department of Agrarian Reform v. Sutton, 473 SCRA 392, 299 (2005)).

162. According to PCA,

> [i]n determining whether anti-competitive agreement or conduct has been committed, the [PCC] shall:
>
> ...
>
> (d) Balance the need to ensure that competition is not prevented or substantially restricted and the risk that competition efficiency, productivity, innovation, or development of priority areas or industries

That the orders promulgated pursuant to PCA have been issued by authority of law cannot be doubted. As to whether they contravene the Constitution, this remains to be an open question in its entirety given the vast coverage of the law. However, insofar as the PCA incorporates the Constitutional mandate in its own preamble and that existing jurisprudence supports such an exercise of economic police power, the same may generally be deemed satisfied. Likewise, that it does not delimit the power of Congress may be seen as the law itself provides for a Joint Congressional Oversight Committee to review the actions of the PCC.[163]

This restricts the question as to whether the practice of voluntary commitments enlarges the power of the PCC beyond its constitutional mandate and whether its intervention through this mechanism may be deemed overzealous or undue. If the exercise of the execution of voluntary commitments may be deemed to merely be the implementation of both the existing constitutional mandate, as sanctioned by both legislative enactment and jurisprudential policy, then it therefore follows that no constitutional infirmity may be found in their use in principle. However, as each merger may be deemed qualified by their unique factual milieu, it may be that it is

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> in the general interest of the country may be deterred by overzealous or undue intervention[.]

Philippine Competition Act, § 26 (d).

163. Philippine Competition Act, § 49. The provision states that

> [t]o oversee the implementation of this Act, there shall be created a Congressional Oversight Committee on Competition (COCC) to be composed of the Chairpersons of the Senate Committees on Trade and Commerce, Economic Affairs, and Finance, the Chairpersons of the House of Representatives Committees on Economic Affairs, Trade and Industry, and Appropriations and two (2) members each from the Senate and the House of Representatives who shall be designated by the Senate President and the Speaker of the House of Representatives: Provided, That one (1) of the two (2) Senators and one (1) of the two (2) House Members shall be nominated by the respective Minority Leaders of the Senate and the House of Representatives. The Congressional Oversight Committee shall be jointly chaired by the Chairpersons of the Senate Committee on Trade and Commerce and the House of Representatives Committee on Economic Affairs. The Vice Chairperson of the Congressional Oversight Committee shall be jointly held by the Chairpersons of the Senate Committee on Economic Affairs and the House of Representatives Committee on Trade and Industry.

Id.

not the legal basis but the individual enactments which may transgress established legal parameters.

D. Voluntary Commitments and Conditional Approvals as Areas of Concern

In view of the broad effects that voluntary commitments may impose on a merged entity, a view may be reasonably entertained that at least in some instances of its application, the regulatory body may be going beyond the express terms of the statute. For instance, as may be seen in the PCC decisions concerning the Grab-Uber and the SM-Goldilocks transactions, the decisions qualify the approval by stating that "any breach of the conditions set forth herein will subject the acquiring party to fines, additional remedies, and such other measures as the Commission may deem necessary, *including nullification of this Decision*."[164]

In addition, the PCC may likewise set the duration of the commitments it requires for its conditional approval, as can be seen in the one year period for the initial Grab deal,[165] or the 10-year commitments provided for in the rejected URC commitments.[166] Read in relation to the abovementioned clause, this would provide that the PCC may continue to disapprove the mergers it has conditionally approved. It bears remembering that the PCA itself has expressly provided that mergers which are approved by the PCC may no longer be subject to review on their substance or merit, unless the approval was secured through fraud.[167] By contrast, Sections 16 and 20 of the PCA, which the PCC cites in its merger decisions, only generally state the merger review power of the PCC.[168]

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164. PCC Case No. M-2018-001, at 7 & PCC Case No. M-2017-002, at 6 (emphasis supplied).

165. PCC Case No. M-2018-001, ¶ XII.

166. Austria, *supra* note 143.

167. Philippine Competition Act, § 23. The law provides that

> [m]erger or acquisition agreements that have received a favorable ruling from the Commission, except when such ruling was obtained on the basis of fraud or false material information, may not be challenged under this Act.

Id.

168. Section 16 states that "[t]he Commission shall have the power to review mergers and acquisitions based on factors deemed relevant by the Commission." Philippine Competition Act, § 16. On the other hand, Section 20 provides that [m]erger or acquisition agreements that substantially prevent, restrict or lessen

It may then be argued that perhaps in the implementation of its merger review mandate, the PCC has gone beyond the express intent of the Legislature through the creation of the scheme of conditionally approved mergers, primarily through the extension of its ability to approve or disapprove a merger, or the bypassing of the restriction in the "no look back" provision through the practice of monitoring or re-negotiation of merger commitments. If such were the case, then certainly the system of voluntary commitments as presently practiced would not satisfy the requirements laid down in existing jurisprudence for the validity of administrative issuances.

E. Behavioral and Structural Remedies

However, this is not clearly the case as other provisions in the PCA itself do point to the PCC as having such a power. Section 12 (h) of the PCA expressly provides that the PCC has the power to

> [i]ssue adjustment or divestiture orders including orders for corporate reorganization or divestment in the manner and under such terms and conditions as may be prescribed in the rules and regulations implementing this Act. Adjustment or divestiture orders, which are structural remedies, should only be imposed:
>
> (1) Where there is no equally effective behavioral remedy; or
>
> (2) Where any equally effective behavioral remedy would be more burdensome for the enterprise concerned than the structural remedy. Changes to the structure of an enterprise as it existed before the infringement was committed would only be proportionate to the substantial risk of a lasting or repeated infringement that derives from the very structure of the enterprise.[169]

Curiously, the PCA did not define either behavioral or structural remedies, although these have acquired a definition in international practice. For academic purposes, University of Porto's Economics Professor Helder Vasconcelos' definition and distinction between the two may be adopted due to their simplicity. *Structural remedies* are those which "modify the allocation of property rights and create new firms: they include the divestiture of an entire ongoing business, or partial divestiture."[170] On the other hand, "*behavioral remedies* set constraints on the merged firms' property rights: they

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competition in the relevant market or in the market for goods or services as may be determined by the Commission shall be prohibited." *Id.* § 20.

169. Philippine Competition Act, § 12 (h).

170. Helder Vasconcelos, *Efficiency Gains and Structural Remedies in Merger Control*, 58 J. INDUS. ECON. 742, 743 (2010).

might consist of engagements by the merging parties not to abuse of certain assets available to them, or to enter into specific contractual arrangements."[171]

From the foregoing definition, the exercise of voluntary commitment powers and the monitoring thereof may be deemed to be in the nature of a behavioral remedy, whereas the denial or subsequent disapproval of a conditionally approved merger due to commitments violations may be considered as a structural remedy. It thus appears to still be within the ambit of the PCC's formidable powers.

Yet, one factor still remains which complicates this final analysis. The second condition for the exercise of such a power states that "[c]hanges to the structure of an enterprise as it existed before the *infringement was committed*[.]"[172] It would thus appear that the Legislature may have imposed as a condition precedent for such a remedy to be used that an infringement exists or has been committed, something which has not yet occurred in a merger only currently under review for the possibility of a substantial lessening of competition. It appears that the Legislature may have created a gray area in the law owing to the complexity and comprehensive nature of a substantive merger review scheme, and this is an area where the PCC may have ample grounds to innovate.

F. Rule Making by the PCC

It is already a hornbook principle in administrative law that technical regulatory agencies have the power to implement their own rules, within the confines of the enabling law, to carry out their declared mandate. The Supreme Court has declared that

> [t]he rules and regulations that administrative agencies promulgate, which are the product of a delegated legislative power to create new and additional legal provisions that have the effect of law, should be within the scope of the statutory authority granted by the [L]egislature to the administrative agency. It is required that the regulation be germane to the objects and purposes of the law, and be not in contradiction to, but in conformity with, the standards prescribed by law. They must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by an administrative body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which

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171. *Id.* (emphasis supplied).

172. Philippine Competition Act, § 12 (h) (2) (emphasis supplied).

> created it, or which are in derogation of, or defeat, the purpose of a statute. In case of conflict between a statute and an administrative order, the former must prevail.[173]

As the enabling law appears to acknowledge the existence of remedies of such voluntary commitments, including their propriety where needed, it does not appear that the usage of the same is entirely objectionable to the Legislature. However, the restrictions placed on merger review proceedings likewise hint that the Congress is also of the view that it is not in the public interest to have multibillion-peso commercial transactions existing in a state of uncertainty.

VIII. CONCLUSION

In the case of voluntary commitments, the Legislature has left both substantial latitude and no small degree of uncertainty as to the full scope of the PCC's powers. Insofar as the practice has yet to be subject to any judicial challenge at the high court nor the subject of any inquiry before the Joint Congressional Oversight Committee, it remains to be an open question whether the PCC's implementation of the system of conditional approvals and voluntary commitments adequately represents the intention of the framers of the law when it was passed in 2015. On the merits of both practice and the express wording of the law, it will certainly be a lively debate in either forum. The only thing that remains certain is that the effects of the PCC's voluntary commitment shall continue to be felt by the consumers and the broader market until such a time.

173. SMART Communications, Inc. (SMART) v. National Telecommunications Commission (NTC), 408 SCRA 678, 686-87 (2003).