A Merger Control and Competition Law in the Philippines

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I. INTRODUCTION

In March 2011, telecommunications giant Philippine Long Distance Telephone Company (PLDT) announced that it had entered into a deal with JG Summit Holdings, Inc. and other sellers to acquire 51.55% of Digital Telecommunications Philippines, Inc.,[1] a rival telecommunications company

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which owns Digitel Mobile Philippines, Inc., the operator of Sun Cellular. Following the announcement, concerned sectors raised fears of anti-competitive behavior in the telecommunications industry,[2] clamoring for the need to ensure a "level playing field" and reviving interest in the passage of a comprehensive anti-trust legislation in the Philippines.[3]

Recently, President Benigno C. Aquino III issued Executive Order (E.O.) No. 45 designating the Department of Justice (DOJ) as the Competition Authority tasked to, among others, investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain, and punish monopolization, cartels, and combinations in restraint of

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1. Vernadette Joven, *PLDT Acquires Digitel at P74.1 Billion*, PHIL. STAR, Mar. 29, 2011 *available at* http://www.philstar.com/Article.aspx?articleId=670981&publicationSubCategoryId=200 (last accessed Aug. 31, 2011).
2. *See* Doris Dumlao, *Globe urges gov't to prevent PLDT-Digitel deal*, PHIL. DAILY INQ., Apr. 27, 2011, *available at* http://business.inquirer.net/money/topstories/view/20110427-333309/Globe-urges-govt-to-prevent-PLDT-Digitel-deal (last accessed Aug. 31, 2011).
3. *See* GMA News, PLDT: Digitel deal not anti-competition, *available at* http://www.gmanews.tv/story/217802/technologoy/pldt-digitel-deal-not-anti-competition (last accessed Aug. 31, 2011).

trade.[4] The legality of this designation is, however, the subject of much debate.

With the exception of the Energy Regulatory Commission (ERC) Competition Rules and Complaint Procedures,[5] which regulates competition in the electric power industry, there is currently no comprehensive merger control regime in the Philippines. There are, however, as of the time of this writing, several versions of the Competition Bill pending before Congress — notable among which is an unnumbered draft Senate Bill titled "Competition Act of 2011," originally introduced by Senator Juan Ponce Enrile (the Senate Bill).[6] There is also yet an unnumbered House Bill (the House Bill)[7] in substitution of several

4. Office of the President, Designating the Department of Justice as the Competition Authority, Executive Order No. 45 [E.O. No. 45], § 1, June 6, 2011. Section 1 of E.O. No. 45 provides:

> SECTION 1. Designation of Competition Authority. The DOJ is hereby designated as the Competition Authority with the following duties and responsibilities:
>
> (a) Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain[,] and punish monopolization, cartels[,] and combinations in restraint of trade;
>
> (b) Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;
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> (c) Supervise competition in markets by ensuring that prohibitions and requirements of competition laws are adhered to, and[,] to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;
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> (d) Monitor and implement measures to promote transparency and accountability in markets;
>
> (e) Prepare, publish[,] and disseminate studies and reports on competition to inform and guide the industry and consumers; and
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> (f) Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements.

Id.

5. Energy Regulatory Commission, Competition Rules and Complaint Procedures Implementing the Electric Power Industry Reform Act, § 45 (2001).

6. An Act Penalizing Anti-Competitive Agreements, Abuse of Dominance, and Anti-Competitive Mergers and Establishing an Office for Competition under the Department of Justice and Appropriating Funds therefore, and for other Purposes, Draft Bill [hereinafter Senate Bill], *on file with the Authors*.

7. H.B. No. 4835, An Act Penalizing Anti-Competitive Agreements, Abuse of Dominant Position, and Anti-Competitive Mergers, Establishing the Philippine

Congressional bills,[8] approved by the House Committee on Trade and Industry and Committee on Economic Affairs on 18 May 2011, which shall be filed as a Committee Report on the Substitute Bill on Anti-Trust.[9]

In an attempt to establish a merger control regime, both Draft Bills prohibit and penalize anti-competitive mergers but recognize permissible stock or asset acquisitions.[10]

Fair Competition Commission and Appropriating Funds therefor, and for other Purposes, 15th Cong., 1st Sess. (June 8, 2011) [hereinafter House Bill].

8. These bills include House Bill No. 549, House Bill No. 913, House Bill No. 1007, House Bill No. 1583, House Bill No. 1733, House Bill No. 1980, House Bill No. 3100, House Bill No. 3134, House Bill No. 3244, House Bill No. 3476, House Bill No. 3534, and House Bill No. 3985.

9 House Bill No. 3534, Legislative History, *available at* http://www.congress.gov.ph/legis/search/hist_show.php?congress=15&save=1&journal=&switch=0&bill_no=HB03534 (last accessed Aug. 31, 2011).

10. *See* Senate Bill, § 7 (a) & House Bill, § 10. A detailed comparison of the merger control provisions of both Bills are discussed in the following sections. Section 7 (a) of the Senate Bill prohibits anti-competitive mergers but recognizes permissible stock or asset acquisitions:

> SEC. 7. *Anti-Competitive Mergers* — No firm engaged in commerce, trade[,] or industry shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, assets[,] or voting rights of one or more firms engaged in any commerce, trade[,] or industry where the object or effect of such conduct is to prevent, restrict[,] or lessen competition.
>
> (a) Permissible Stock or Asset Acquisition or Ownership — Nothing contained herein, however, shall be construed to prohibit:
>
> (1) A firm from purchasing the stock or other share capital of one or more corporations solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition;
>
> (2) A corporation from causing the formation of [a] subsidiary corporation, for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof; and
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> (3) A firm from acquiring, 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 [A]ct.

Senate Bill, § 7 (a).

Likewise, Section 10 of the House Bill proscribes anti-competitive mergers but enumerates exceptions, thus:

II. MERGER CONTROL

A merger occurs when two or more corporations combine so that only one corporation remains.[11] While the remaining firm retains its identity, the absorbed firm is deemed merged into the surviving firm.[12] The latter's separate existence thus ceases by operation of law and its assets, liabilities, rights, privileges, and obligations are automatically assumed by the surviving corporation upon the effectivity of the merger.[13] In contrast, a consolidation is the union of two or more corporations to form a new corporation, having the combined rights, privileges, franchises, and properties of the constituent companies, all combining to lose their corporate existence.[14]

Firms undertake mergers for various reasons including growth, expansion, operational or cost efficiencies. Mergers often result in operational efficiency, but they may also create monopolies and eliminate free competition:

> SEC. 10. Anti-Competitive Mergers — No firm engaged in commerce or trade shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or the whole or any part of the assets, of one or more firms engaged in any line of commerce or trade where the effect of such acquisition of such stocks, share capital, or assets, or of the use of such stock by voting or granting of proxies or otherwise may be to substantially lessen competition, or tend to create a monopoly.
>
> (a) Permissible Stock or Asset Acquisition or Ownership — Nothing contained herein, however, shall be construed to prohibit:
>
> (1) A firm from purchasing the stock or other share capital of one or more corporations solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition;
>
> (2) A corporation from causing the formation of [a] subsidiary corporation, for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof; and
>
> (3) A firm from acquiring, 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.
>
> House Bill, § 10.

11. DONALD M. DEPAMPHLIS, MERGERS, ACQUISITIONS, AND OTHER RESTRUCTURING ACTIVITIES 18 (5th ed. 2010).

12. *Id.*

13. *Id.*

14. *Id.*

> Corporate combinations may prevent cutthroat competition, improve marketing facilities, economize on costs of operation, by making such operations more efficient. These combinations therefore meet economic needs which justify their legal recognition. On the other hand, indiscriminate combinations can produce undesirable effects by creating monopolies and eliminating free and healthy competition, to the ultimate prejudice of the consuming public.[15]

Mergers can reduce the level of competition in a market, making them anti-competitive.[16] Horizontal mergers,[17] for instance, lessen the number of competing firms in the market and increase the merged entity's market concentration — a change in market structure which can be detrimental to consumers if the merged entity abuses its dominant position[18] by increasing price and restricting output, or causing an increase in price as a result of a tacit agreement to compete less aggressively with other firms.[19]

To address these adverse economic effects, many jurisdictions, including those in developing countries, have adopted merger control regimes[20] designed to investigate or to vet in advance mergers from an anti-trust perspective. The prevention of acquisitions or structural combinations from achieving a level of concentration that would impede free competition in a market predicates the rationale for merger control:

> As a rule, merger control aims at preventing the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. Mergers that are in

15. JOSE C. CAMPOS, JR. & MARIA CLARA LOPEZ-CAMPOS, CORPORATION CODE: COMMENTS, NOTES AND SELECTED CASES 941 (1981).

16. Asian Development Bank (ADB), Economic Foundations of the Economic Analysis of Anti-Competitive Behavior and Merger Analysis, *available at* http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/documents/chap2.pdf#cm (last accessed Aug. 31, 2011) [hereinafter Merger Analysis].

17. DEPAMPHLIS, *supra* note 11, at 19.

18. *See* Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, *available at* http://www.competition-regulation.org.uk/conferences/southafrica04/lee.pdf (last accessed Aug. 31, 2011).

19. *See generally* Merger Analysis, *supra* note 16.

20. China enacted the Anti-Monopoly Law of the People's Republic of China on Aug. 30, 2007, which took effect on Aug. 1, 2008. More recently, the merger control provisions of the Indian Competition Act of 2002 finally came into force on June 1, 2011. Global Competition Forum (CGF), *available at* http://www.globalcompetitionforum.org/asia.htm (last accessed Aug. 31, 2011).

> unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition.[21]

Various juridical tests are available to ascertain whether a merger is anti-competitive or not. Lately, the trend among many competition law systems has been towards evaluating a merger or an acquisition in terms of the transaction's actual or potential effects on competition.[22] The United States, for instance, considers mergers that result in a "substantial lessening of competition" anti-competitive.[23]

Merger control practices vary across jurisdictions. Some countries retain a mandatory system of notification after consummation of the merger and a few countries submit a merger only to a voluntary notification process.[24] Convergence, however, in modern merger control practices have led to the prevailing system of pre-merger notification to the relevant competition authority in case prescribed thresholds are breached.[25]

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21. *See* United Nations Conference on Trade and Development, Model Law on Competition: Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation (TD/RBP/CONF.7/8) 51, *available at* http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf (last accessed Aug. 31, 2011) [hereinafter UNCTAD Model Law on Competition].

22. *See* LEONARD WAVERMAN, WILLIAM S. COMANOR, AKIRA GOTO, COMPETITION POLICY IN THE GLOBAL ECONOMY 121 (1997).

23. *See* Clayton Act, 15 U.S.C. § 18 (2000) (U.S.). Section 7 of the Clayton Act, as amended, provides:

> Sec. 7. No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.

24. *Id.* On one hand, Argentina, Greece, and the Republic of Korea are some of the countries that have a mandatory post-closing merger notification system. On the other hand, the United Kingdom, Australia, and New Zealand are among the few jurisdictions that subscribe to a voluntary merger notification system. *See* Manish Agarwal & Bronwyn Gallacher, What factors influence the competitive investigation of mergers in a voluntary notification system?, *available at* http://ace2011.org.au/ACE2011/Documents/Abstract_Manish_Agarwal_Bronwyn_Gallacher.pdf (last accessed Aug. 31, 2011).

25. *See* United Nations Conference on Trade and Development, Competition Law and Policy Legislation (TD/B/RBP/INF. 37) 17, *available at* http://www.unc

The other facet of merger control concerns the treatment of anti-competitive mergers. Competition authorities deal with anti-competitive mergers in various ways, one of which is to provide for an outright prohibition of anti-competitive mergers.[26] Other methods include the imposition of more drastic structural remedies such as divestiture[27] and behavioral remedies that constrain the use of property rather than facilitate their transfer.[28]

III. REGULATORY SAFEGUARDS IN THE ABSENCE OF A MERGER CONTROL REGIME IN THE PHILIPPINES

Despite the absence of a comprehensive competition law, it would be simplistic to conclude that there are no anti-competition laws in the Philippines. At present, Philippine anti-trust legislation revolve around three primary laws: the 1987 Philippine Constitution (the Constitution),[29] the Revised Penal Code[30] and the Civil Code,[31] with a few scattered provisions found in other laws such as The Price Act,[32] The Intellectual Property Code,[33] and The Consumer Act,[34] to name a few. None of these directly

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tad.org/en/docs/tbrbpint37.en.pdf (last accessed Aug. 31, 2011). *See also* International Comparative Legal Guide Series, Merger Control, *available at* http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publication_id=170&chapters_id=4059 (last accessed Aug. 31, 2011). Other jurisdictions that have adopted a mandatory pre-merger notification system include the United States of America and the European Union.

26. Organization for Economic Cooperation and Development, Merger Remedies (DAF/COMP(2004)21) 17, *available at* http://www.oecd.org/dataoecd/61/45/34305995.pdf (last accessed Aug. 31, 2011) [hereinafter OECD Merger Remedies].

27. DEPAMPHLIS, *supra* note 11, at 20.

28. *See generally* OECD Merger Remedies, *supra* note 26.

29. PHIL. CONST. art. XII, § 19.

30. An Act Revising the Penal Code and other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 186 (1932).

31. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], art. 28 (1950).

32. An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures against Undue Price Increases during Emergency Situations and Like Occasions [The Price Act], Republic Act No. 7581, § 5 (1992).

33. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, providing for its Powers and Functions, and for other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293, § 168 (1997).

34. The Consumer Act of the Philippines [Consumer Act], Republic Act No. 7394, art. 52 (1992).

address the issue of merger control, but this does not mean that the existing body of Philippine laws and regulations is completely inadequate in the face of a potentially anti-competitive merger.

A. Corporate Combinations, Merger, and Consolidation under the Corporation Code

Although not anti-trust in character, there are provisions in the Corporation Code[35] that safeguard against monopolies, unfair competition, and restraint of trade. The sale of all or substantially all of a corporation's assets, for example, in addition to the majority vote of the corporation's directors and ratification by its shareholders, shall be subject to the provisions of existing laws on illegal combinations and monopolies.[36] In addition, the Corporation Code proscribes voting trust agreements entered into for the circumvention of the law against monopolies and illegal combinations in restraint of trade, or used for purposes of fraud.[37]

Sections 76 to 80 of the Corporation Code govern mergers and consolidations.[38] One must observe and comply with the procedures or requirements outlined in Sections 76 to 80 of the Corporation Code to

35. The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68 (1980).

36. *Id.* § 40.

> SECTION 40. Sale or Other Disposition of Assets. — Subject to the provisions of existing laws on illegal combinations and monopolies, a corporation may, by a majority vote of its board of directors or trustees, sell, lease, exchange, mortgage, pledge[,] or otherwise dispose of all or substantially all of its property and assets, including its goodwill, upon such terms and conditions and for such consideration, which may be money, stocks, bonds[,] or other instruments for the payment of money or other property or consideration, as its board of directors or trustees may deem expedient, when authorized by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock; or in case of non-stock corporation, by the vote of at least two-thirds (2/3) of the members, in a stockholders' or members' meeting duly called for the purpose. Written notice of the proposed action and of the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, [t]hat any dissenting stockholder may exercise his appraisal right under the conditions provided in this Code.
>
> *Id.*

37. *Id.* § 59. The said Section provides that, "[n]o voting trust agreement shall be entered into for the purpose of circumventing the law against monopolies and illegal combinations in restraint of trade or used for purposes of fraud." *Id.*

38. *Id.* §§ 76-80.

legally effect a statutory merger or consolidation.[39] A majority of the board of directors of each party to the merger must approve a plan and articles of merger or consolidation setting forth the terms of the merger or consolidation,[40] which in turn must be approved by the affirmative vote of stockholders representing at least two-thirds of the outstanding capital stock of each of the constituent corporations.[41] Section 79 of the Corporation Code requires the submission of the plan and the articles of merger or consolidation to the Philippine Securities and Exchange Commission (SEC) for its approval and the issuance of a certificate of merger or consolidation:

> Section 79. Effectivity of merger or consolidation. — The articles of merger or of consolidation, signed and certified as herein above required, shall be submitted to the Securities and Exchange Commission in quadruplicate for its approval: Provided, That 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. If the Commission is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of this Code and existing laws, it shall issue a certificate of merger or of consolidation, at which time the merger or consolidation shall be effective.[42]

Otherwise, the merger or consolidation shall not be effective.

Admittedly, Section 79 of the Corporation Code fails to expound on what constitutes an anti-competitive merger. Neither does the provision prescribe preventive measures nor remedies in such a case. It does leave the determination of whether a merger or consolidation is inconsistent with the provisions of the Corporation Code and existing laws to the SEC before it gives its approval.[43] The SEC's findings, however, are not automatically conclusive. The Corporation Code expressly requires the SEC to set a hearing to give the merging parties the opportunity to be heard should the former, upon investigation, find reason to believe that the proposed merger or consolidation is inconsistent with the provisions of the Corporation Code and existing laws.[44]

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39. ROSARIO N. LOPEZ, THE CORPORATION CODE OF THE PHILIPPINES 929 (1994) (citing Securities and Exchange Commission, SEC Opinion (July 26, 1989)).

40. CORPORATION CODE, § 76.

41. *Id.* § 77.

42. *Id.* § 79.

43. *Id.*

44. *Id.*

Section 79 of the Corporation Code contains another safeguard. In case of mergers or consolidations of banks, building and loan associations, trust companies, insurance companies, public utilities, educational institutions, and special corporations governed by special laws, the SEC requires that the favorable recommendation of the proper regulatory agency must be obtained:

> *Provided*, [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.[45]

It bears stressing that the above-enumerated industries are imbued with public interest,[46] hence the need for a separate layer of regulatory review and endorsement by the appropriate regulatory agencies in situations involving mergers and consolidations between corporations in these industries. The following sections discuss this requirement in more detail.

B. Tax-Free Merger under the National Internal Revenue Code

There is a similar safeguard found in the National Internal Revenue Code (NIRC)[47] in the case of mergers between two or more corporations under Section 40 (C) (2) to the extent that the transaction must be undertaken for a *bona fide* business purpose for it to be considered tax-free.[48]

Section 40 (C) (2) provides that no gain or loss shall be recognized if pursuant to a plan of merger or consolidation:

> (1) a corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation; or

45. *Id.*

46. *See, e.g.*, Citibank, N.A. v. Ernesto S. Dinopol, 635 SCRA 649, 659 (2010), where the Court ruled that "Citibank should have been more cautious in dealing with its clients since its business is imbued with public interest;" Peralta v. De Leon, 636 SCRA 232, 244 (2010) (citing Maria Luisa Park Association, Inc. v. Almendras, 588 SCRA 663 (2009)), where it was held that "[t]he business of developing subdivisions and corporations are imbued with public interest"); & Chevron Philippines, Inc. v. Bases Conversion Development Authority, 630 SCRA 519, 529 (2010), where the Court held that "there can be no doubt that the oil industry is greatly imbued with public interest as it vitally affects the general welfare."

47. An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes [TAX REFORM ACT OF 1997], Republic Act No. 8424 (1997).

48. *Id.* § 40 (C) (6) (b).

(2) a shareholder exchanges stock in a corporation, which is a party to the merger or consolidation, solely for the stock of another corporation also a party to the merger or consolidation; or

(3) a security holder of a corporation, which is a party to the merger or consolidation, exchanges his securities in such corporation, solely for the stock or securities in another corporation, a party to the merger or consolidation.[49]

Moreover, to regard a transaction as a tax-free merger, not only must the transaction fall within the coverage of Section 40 (C) (2). Section 40 (C) (6) (b) also requires that it must be undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation:

Sec. 40. Determination of Amount and Recognition of Gain or Loss. —

...

(b) The term 'merger' or 'consolidation' when used in this Section, shall be understood to mean: (i) the ordinary merger or consolidation, or (ii) the acquisition by one corporation of all or substantially all the properties of another corporation solely for stock; *Provided*, [t]hat for a transaction to be regarded as merger or consolidation within the purview of this Section, it must be undertaken for a *bona fide* business purpose and not solely for the purpose of escaping the burden of taxation: *Provided, further*, [t]hat in determining whether a *bona fide* business purpose exists, each and every step of the transactions shall be considered and the whole transaction or series of transactions shall be treated as a single unit: *Provided, finally*, [t]hat in determining whether the property transferred constitutes a substantial portion of the property of the transferor, the term 'property' shall be taken to include cash assets of the transferor.

The determination of whether a merger is for a *bona fide* business purpose is ultimately left to the discretion of the Bureau of Internal Revenue (BIR), which confirms its findings through the issuance of a tax-free ruling.[50] If the BIR's findings are to the contrary, the transaction will be considered a taxable merger, hence, subject to applicable internal revenue taxes.[51] Said tax-free ruling is initiated by filing an application with the BIR Law Division[52] and is a prerequisite to the issuance by the Revenue District Officer or an authorized Revenue Officer of a Certificate Authorizing Registration or Tax Clearance for the real property or shares involved in the exchange.[53]

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49. *Id.* § 40 (C) (2).

50. *Id.* § 40 (C) (6) (b); *See* Bureau of Internal Revenue, Revenue Memorandum Order No. 32-01 [BIR RMO No. 32-01], Part I (A) (Nov. 28, 2001).

51. *Id.*

52. *See* BIR RMO No. 32-01, Part I (A).

53. *See* Bureau of Internal Revenue, Revenue Regulations No. 18-01 [BIR Rev. Reg. No. 18-01], § 5 (Nov. 13, 2001).

Section 40 (C) (6) (b) of the NIRC does not provide a quantitative test in determining whether a merger is for a *bona fide* business purpose or merely for the purpose of escaping the burden of taxation. Neither does it elaborate on what constitutes a *bona fide* business purpose. Typically, transactions entered in order to achieve operational and cost efficiencies or to provide better-integrated services to customers have been considered as undertaken for a *bona fide* business purpose,[54] while those entered into for the sole purpose of evading taxes are not. Section 40 (C) (6) (b) of the NIRC does not require BIR approval for a merger to be effective. The BIR's role is limited to issuing a tax ruling confirming that the merger is a tax-free merger under Section 40 (C) (2) in relation to Section 40 (C) (6) (b) of the NIRC and that it is undertaken for a *bona fide* purpose.[55]

As with its counterpart provision in the Corporation Code, Section 40 (C) (6) (b) of the NIRC is equally silent on the treatment of anti-competitive mergers and neither allows nor disallows such transactions. For this reason, it is not, in the strictest sense, a merger control provision.

C. Mandatory Tender Offer and Disclosures under the Securities Regulation Code and its Implementing Rules and Regulations

The Securities Regulation Code (SRC)[56] and its Amended Implementing Rules and Regulations (IRR)[57] do not specifically address anti-competitive

54. *See, e.g.*, Bureau of Internal Revenue, BIR Ruling No. S-40-023-05 [BIR Ruling No. S-40-023-05] (Nov. 24. 2005).

> The above reorganization of AL-NCTO and ALPLUS, the latter as the surviving corporation, is a merger within the contemplation of Section 40 (C) (6) (b) of the Tax Code of 1997, as amended, for the reason that ALPLUS will acquire/assume all the assets, franchise, licenses, powers, rights, interests, titles, equities, privileges, immunities[,] and liabilities of AL-NCTO, for the purpose of allowing the said companies to avail of and benefit from the various operational advantages that will be realized from the consolidation of their respective businesses, such as, but not limited to, integration of the administrative facilities of the two corporations that will result in economies of scale and efficiency of operations and the more productive use of their properties. Hence, the merger is being undertaken for a *bona fide* business purpose, and not for the purpose of escaping the burden of taxation.

BIR Ruling No. S-40-023-05.

55. TAX REFORM ACT OF 1997, § 40 (C) (6) (b) & *See* BIR RMO No. 32-01.

56. The Securities Regulation Code [SECURITIES REGULATION CODE], Republic Act No. 8799 (2000).

57. Securities and Exchange Commission, Amended Rules and Regulations Implementing the Securities Regulation Code (2003) [hereinafter Amended SRC Rules].

mergers involving publicly-listed companies. Strict disclosure and mandatory tender offer rules, however, compensate for the lack of merger control provisions insofar as the protection of minority shareholder rights is concerned.

1. Mandatory Tender Offer

A tender offer is an offer by the acquiring person to stockholders of a public company for them to tender their shares therein on the terms specified in the offer. The purpose of a tender offer is to protect minority shareholders against any scheme that dilutes the share value of their investments and to allow the minority shareholders the chance to exit the company under reasonable terms, giving them the opportunity to sell their shares at the same price as those of the majority shareholders.[58]

Mergers and consolidations as contemplated under the Corporation Code are among the transactions exempt from the mandatory tender offer requirement under the SRC and Amended SRC Rules.[59] However, an acquisition of shares, in certain circumstances is not. Thus, under the SRC and the Amended SRC Rules, a mandatory tender offer is required when any person or group of persons intends to acquire at least 35% of any class of equity security of a listed corporation or of any class of equity security of a

58. Cemco Holdings, Inc. v. National Life Insurance Company of the Philippines, Inc., 529 SCRA 355, 369-70 (2007).

59. *See* Amended SRC Rules, rule 19 (3) (A). The Rule provides that:

> The mandatory tender offer requirement shall not apply to the following:
>
> (i) any purchase of shares from the unissued capital stock provided that the acquisition will not result to a fifty percent (50%) or more ownership of shares by the purchaser;
>
> (ii) any purchase of shares from an increase in authorized capital stock;
>
> (iii) purchase in connection with foreclosure proceedings involving a duly constituted pledge or security arrangement where the acquisition is made by the debtor or creditor;
>
> (iv) purchases in connection with privatization undertaken by the government of the Philippines;
>
> (v) purchases in connection with corporate rehabilitation under court supervision;
>
> (vi) purchases through an open market at the prevailing market price;
>
> (vii) merger or consolidation.

Id.

public company[60] or who intends to acquire at least 35% of such equity over a period of 12 months.[61] The same shall also be required when the acquisition of even less than 35% would result in ownership of over 51% of the total outstanding equity securities of a public company.[62]

The announcement by the person making the tender offer (the Bidder) of his intention in a newspaper of general circulation, prior to commencement of the offer, initiates the tender offer process.[63] In addition, the Bidder shall be required under Amended SRC Rules to file SEC Form 19-1,[64] including all exhibits, with the prescribed filing fees to the SEC,[65] as well as copies of additional tender offer materials and amendments in case of a material change in the information set forth in the Form.[66] The Bidder shall publish, send, or disclose to security holders in the manner provided under the Amended SRC Rules, a report containing among others

60. *See* Amended SRC Rules, rule 19 (2) (A). Such Rule provides that:

> Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%) or more of equity shares in a public company shall disclose such intention and contemporaneously make a tender offer for the percent sought to all holders of such class, subject to paragraph (9) (E) of this Rule.

Id.

61. *See* Amended SRC Rules, rule 19 (2) (B). The Rule provides that:

> Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%) or more of equity shares in a public company in one or more transactions within a period of twelve (12) months, shall be required to make a tender offer to all holders of such class for the number of shares so acquired within the said period.

Id.

62. *See* Amended SRC Rules, rule 19 (2) (C). The Rule provides that:

> If any acquisition of even less than thirty five percent (35%) would result in ownership of over fifty one percent (51%) of the total outstanding equity securities of a public company, the acquirer shall be required to make a tender offer under this Rule for all the outstanding equity securities to all remaining stockholders of the said company at a price supported by a fairness opinion provided by an independent financial advisor or equivalent third party. The acquirer in such a tender offer shall be required to accept any and all securities thus tendered.

Id.

63. Amended SRC Rules, rule 19 (5).

64. SEC Form 19-1, *available at* http://www.sec.gov.ph/index.htm?Annexes-Forms (last accessed Aug. 31, 2011).

65. Amended SRC Rules, Rule 19 (6) (A).

66. *Id.* Rule 19 (6) (B).

information on the identity of the Bidder, the target company, amount and class of securities being bought, type and amount of consideration, and the expiration date of the tender offer.[67]

The Bidder shall offer the highest price paid by him for such shares during the past six months[68] and shall either pay the consideration offered or return the tendered securities, not later than 10 business days after the termination or withdrawal of the offer.[69] No tender offer shall be made unless the tender offer is open to all security holders of the class of securities subject to the tender offer and that the consideration paid to any security holder pursuant to the tender offer be the highest consideration paid to any other security holder during such tender offer.[70]

2. Unstructured Disclosure Reports

Reporting and public companies are required to file structured annual[71] and quarterly reports[72] as well as unstructured current reports.[73] A current report on SEC Form 17-C is required to be submitted, as necessary, to make a full, fair, and accurate disclosure to the public of every material fact or event that occurs, which would reasonably be expected to affect investors' decisions in relation to those securities.[74]

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67. *Id.* Rule 19 (7).

68. *Id.* Rule 19 (9) (B).

69. *Id.* Rule 19 (9) (G).

70. Amended SRC Rules, rule 19 (9) (H).

71. *Id.* rule 17.1 (A) (i). Reporting and public companies are required to submit an annual "report on SEC Form 17-A for the fiscal year in which the registration statement was rendered effective by the Commission, and for each fiscal year thereafter, within one hundred five (105) days after the end of the fiscal year." *Id.*

72. *Id.* rule 17.1 (A) (ii). Reporting and public companies are also required to submit:

> [a] quarterly report on SEC Form 17-Q, within forty five (45) days after the end of each of the first three (3) quarters of each fiscal year. The first quarterly report of the issuer shall be filed either within forty five (45) days after the effective date of the registration statement or on or before the date on which such report would have been required to be filed if the issuer had been required previously to file reports on SEC Form 17-Q, whichever is later.

Id.

73. *Id.* rule 17.1.

74. Amended SRC Rules, rule 17.1. *See also* Philippine Stock Exchange, Revised Disclosure Rules, § 4 [hereinafter PSE Revised Disclosure Rules] providing that, "[t]he purpose for requiring unstructured disclosures is for the Issuer to

The Philippine Stock Exchange (PSE) has adopted the reportorial requirements under the SRC and the Amended SRC Rules. Thus, listed companies are also required to provide the PSE copies of all reports made to the SEC.[75]

Acquisitions, mergers, or consolidations are among the events mandating prompt disclosure under the PSE's Revised Disclosure Rules.[76] Thus, in such transactions, disclosure should be made by the issuer:

(a) promptly to the public through the news media;

(b) if the issuer is listed on the PSE, to the PSE within 10 minutes after occurrence of the event and prior to its release to the public through the news media, copy furnished the SEC; and

(c) to the SEC on SEC Form 17-C within 5 days after occurrence of the event being reported, unless substantially similar information as that required by Form 17-C has been previously reported to the SEC by the registrant.[77]

D. Regulatory Review in Specific Industries

In addition to SEC approval, mergers, consolidations, and share acquisitions between and among corporations engaged in certain regulated activities may require the concurrent approval of the relevant regulatory authority before they can take effect. This is the case of certain transactions in the banking and telecommunications industry. Mergers, consolidations, and acquisitions in the electric power industry, however, are subject to an industry-specific merger control regime regulated by the Electricity Regulatory Commission (ERC).[78]

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update the investing public with any material fact or event that occurs which would reasonably be expected to affect investors' decision in relation to trading of its securities." *Id.*

75. PSE Revised Disclosure Rules, § 3.

76. *Id.* § 4.4. These events include:

> (a) A change in control of the issuer;
>
> ...
>
> (q) Merger, consolidation or spin-off of the issuer;
>
> ...
>
> (v) A joint venture, consolidation, tender offer, take-over[,] or reverse take-over and a merger, among others.

Id.

77. Amended SRC Rules, rule 17.1 (A) (iii) (2).

78. *See* An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [EPIRA], Republic Act No. 9136 (2001).

1. The Banking Industry

The Philippine banking sector was witness to a series of mergers and acquisitions over the past few years.[79] In fact, many of the country's top private banks such as Banco De Oro, Unibank, Metropolitan Bank and Trust Co., and the Bank of the Philippine Islands were the result of merger and consolidation activities since 1999.[80]

Despite the substantial combined asset shares of these banks, the *Bangko Sentral ng Pilipinas* (BSP) believes that there is "enough room for further industry consolidation to develop stronger and economically viable financial institutions in the Philippine banking system" and "expects that the next wave of merger and consolidation activities across banking groups would be forthcoming."[81] These expectations are an articulation of the BSP's policy to promote mergers and consolidations among banks and other financial intermediaries as a means to develop larger and stronger financial institutions.[82]

Under Section X108.3 of the BSP Manual of Regulations for Banks (MORB), mergers and consolidations of banks require prior BSP approval.[83] This requirement is consistent with Section 79 of the Corporation Code requiring the favorable recommendation of the BSP, the relevant regulatory authority, in the case of mergers and consolidations of banks and banking institutions.[84]

As with the Corporation Code, the relevant sections of the MORB are silent with respect to the treatment of anti-competitive mergers. Rather than

79. Gerard S. de la Peña, Bank Mergers dependent on Market Trends, *available at* http://www.gmanews.tv/story/93265/business/bank-mergers-dependent-on-market-trends (last accessed Aug. 31, 2011). These include the mergers between: (1) the Bank of Philippine Islands and Prudential Bank; (2) Banco de Oro Unibank and Equitable PCI Bank; (3) International Exchange Bank and Union Bank of the Philippines; (4) China Banking Corporation and Manila Banking Corporation; and (5) Philippine National Bank and Allied Banking Corporation. *Id.*

80. *See* Jimmy Calapati, BSP Sees More Bank Mergers, *available at* http://www.malaya.com.ph/06162010/busi3.html (last accessed Aug. 31, 2011).

81. *Id. See also* Lawrence Agcaoili, *BSP Expects More Bank Mergers*, PHIL. STAR, Mar. 20, 2010 *available at* http://www.philstar.com/Article.aspx?articleId=559447&publicationSubCategoryId=66 (last accessed Aug. 31, 2011).

82. Bangko Sentral ng Pilipinas, Manual of Regulations for Banks, § X108.3 (2010) [hereinafter MORB].

83. *Id.* § X108.1. The Section provides that "[m]ergers and consolidations including the terms and conditions thereof shall comply with the provisions of applicable law and are subject to approval by the BSP." *Id.*

84. CORPORATION CODE, § 79.

review a bank merger along strict anti-competition criteria, the BSP's approach is to apply prudential regulation — i.e., close ongoing supervision primarily consisting of meeting capital adequacy requirements or restraints on lines of business[85] in its review of bank mergers and consolidations with the end view of developing larger and stronger financial institutions.[86] The requirement of BSP approval for bank mergers and consolidations is, therefore, not a merger control provision, but an adequate safeguard to the extent that it serves a compelling public interest by eliminating market failure.[87]

2. The Telecommunications Industry

The Public Telecommunications Policy Act of the Philippines (Telecommunications Act)[88] recognizes the role of telecommunications in the economic development, integrity, and security of the Philippines.[89] Thus, the growth and development of telecommunications services must be pursued with the objective of fostering a healthy competitive environment, "one in which telecommunication carriers are free to make business decisions and to interact with one another in providing telecommunications services, with the end in view of encouraging their financial viability while maintaining affordable rates."[90]

The National Telecommunications Commission (NTC) is the regulatory agency principally charged with the administration of the Telecommunications Act with authority to take necessary measures to implement the policies and objectives thereunder.[91] As such, the NTC shall, in accordance with Section 5 (d) of the Telecommunications Act, "foster fair and efficient market conduct through, but not limited to, the protection of

85. *See* OECD Policy Roundtables, Mergers in Financial Services, *available at* http://www.oecd.org/dataoecd/34/22/1920060.pdf (last accessed Aug. 31, 2011) [hereinafter OECD Mergers in Financial Services].

86. *See* Bangko Sentral ng Pilipinas, Key Prudential Regulations on Mergers and Consolidations, *available at* http://www.bsp.gov.ph/regulations/key/MergersandConsolidation.pdf (last accessed Aug. 31, 2011) (citing Bangko Sentral ng Pilipinas, BSP Circular No. 172 (Sep. 3, 1998); BSP Circular No. 193 (Mar. 22, 1999); BSP Circular No. 207 (July 21, 1999); BSP Circular No. 225 (Feb. 3, 2000); & BSP Circular No. 237 (Apr. 19, 2007)).

87. *See* OECD Mergers in Financial Services, *supra* note 85.

88. An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunications Services [Telecommunications Act], Republic Act No. 7925 (1995).

89. *Id.* § 4.

90. *Id.* § 4 (f).

91. *Id.* § 5.

telecommunications entities from unfair trade practices of other carriers."[92] The NTC shall, pursuant to Section 5 (f) of the Telecommunications Act, also "protect consumers against [the] misuse of a telecommunication entity's monopoly or quasi-monopolistic powers by, but not limited to, the investigation of complaints and exacting compliance with service standards from such entity."[93]

While the focus of the above policies and provisions on free and fair competition is anti-trust in character, the Telecommunications Act does not specifically address anti-competitive mergers. It can be argued, however, that despite the absence of any merger control policy or guidelines, the NTC may block anti-competitive mergers between public telecommunications entities pursuant thereto.

Another safeguard can be found in Section 20 (h) of the Public Services Act,[94] requiring public service operators to secure the approval of the then Public Service Commission (now the NTC) for the sale of shares if the result of such transaction would be to vest in the transferee more than 40% of the subscribed capital of the said public service.[95] Although this provision expressly deals with an acquisition rather than a merger, it reaffirms the prevailing policy of requiring regulatory review to effect these types of transactions.

Moreover, under the Telecommunications Act, a public telecommunications entity must first obtain a congressional franchise before it can commence doing business as such.[96] These congressional franchises set forth the terms and conditions of the franchise — i.e., the nature and scope of the franchise, manner of operation, rates, term, fiscal incentives as well as other rights, privileges, and obligations of the franchisee, including the necessity of congressional approval for a transfer of controlling interest by the franchisee to another person, firm, corporation or entity, unless specifically exempted by law.[97] The need for congressional approval is not a merger

92. *Id.* § 5 (d).

93. *Id.* § 5 (f).

94. An Act to Reorganize 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, and for other Purposes [Public Services Act], Commonwealth Act No. 146 (1936).

95. *Id.* § 20 (h).

96. Telecommunications Act, § 16. This Section provides that, "[n]o person shall commence or conduct the business of being a public telecommunications entity without first obtaining a franchise." *Id.*

97. *See, e.g.*, An Act Granting the Radio Communications of the Philippines, Inc. a Franchise to Construct, Establish, Install, Maintain and Operate Wire and/or Wireless Telecommunications Systems throughout the Philippines, Republic

control provision *per se*, but it does provide another layer of review which can be considered an additional safeguard in these types of transactions.

3. The Electric Power Industry

Section 45 of the Electric Power Industry Reform Act of 2001 (EPIRA)[98] proscribes anti-competitive behavior in the electricity industry and has entrusted the ERC with the task of monitoring and penalizing abuse of market power, cartelization, and anti-competitive or discriminatory behavior by any electric power industry participant.[99] More specifically, Section 45 of the EPIRA provides:

> SEC. 45. *Cross Ownership, Market Power Abuse and Anti-Competitive Behavior.* — No participant in the electricity industry or any other person may engage in any anti-competitive behavior including, but not limited to, cross subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.[100]

The ERC has the power under the EPIRA to monitor and penalize anti-competitive behavior and redress the same by instituting actual merger control remedies including price controls, injunctions, divestment, disgorgement of excess profits, and the impositions of fines and penalties.[101]

Act No. 8677, § 15 (1998); An Act Granting the Sear Telecommunications, Inc. a Franchise to Construct, Establish, Install, Maintain and Operate Wire and/or Wireless Telecommunications Systems throughout the Philippines, Republic Act No. 8678, § 15 (1998); & An Act Granting the Schutzengel Telecom, Inc. a Franchise to Construct, Install, Establish, Operate and Maintain Telecommunications Systems throughout the Philippines, Republic Act No. 9857, § 16 (2009).

98. EPIRA, § 45.

99. *Id.* § 43 (k).

100. *Id.* § 45.

101. *Id.* Section 45 of the EPIRA specifically provides:

> SEC. 45. *Cross Ownership, Market Power Abuse and Anti-Competitive Behavior.* — No participant in the electricity industry or any other person may engage in any anti-competitive behavior including, but not limited to, cross subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of contestable markets.
>
> ...
>
> The ERC shall, within one (1) year from the effectivity of this Act, promulgate rules and regulations to ensure and promote competition, encourage market development and customer choice and discourage/penalize abuse of market power, cartelization and any anti-competitive or discriminatory behavior, in order to further the intent

Section 45 of the EPIRA authorizes the ERC to promulgate rules and regulations to promote competition and penalize anti-competitive or discriminatory behavior. Pursuant to such mandate, the ERC promulgated the ERC Competition Rules and Complaint Procedures (the ERC Competition Rules) on 3 August 2006.[102]

Unlike other regulatory issuances, Rule 6, Section 1 of the ERC Competition Rules prohibits outright mergers, consolidations, and acquisitions that have or likely to have the effect of substantially lessening competition in a market:

> Rule 6 — Acquisitions, Mergers and Consolidations
>
> Section 1. Prohibition. Subject to Rules 8, 9 and 10, a Person shall not:
>
> (a) directly or indirectly acquire shares in the capital stock of a corporation; or
>
> (b) directly or indirectly acquires assets of a Person; or

> of this Act and protect the public interest. Such rules and regulations shall define the following:
>
> (a) the relevant markets for purposes of establishing abuse or misuse of monopoly or market position;
>
> (b) areas of isolated grids; and
>
> (c) the periodic reportorial requirements of electric power industry participants as may be necessary to enforce the provisions of this Section.
>
> The ERC shall, *motu proprio*, monitor and penalize any market power abuse or anti-competitive or discriminatory act or behavior by any participant in the electric power industry. Upon finding that a market participant has engaged in such act or behavior, the ERC shall stop and redress the same. Such remedies shall, without limitation, include the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits[,] and imposition of fines and penalties pursuant to this Act.
>
> The ERC shall, within one (1) year from the effectivity of this Act, promulgate rules and regulations providing for a complaint procedure that, without limitation, provides the accused party with notice and an opportunity to be heard.

Id.

102. *See generally* Energy Regulatory Commission, Competition Rules and Complaint Procedures Implementing the Electric Power Industry Reform Act, § 45 (2001) [hereinafter ERC Competition Rules] & Energy Regulatory Commission, Competition Guideline, *available at* http://powertracker.doe.gov.ph/archive/category_marketioperations/anticompetitive/Competition Guidelines.pdf/download (last accessed Aug. 31, 2011) [hereinafter ERC Competition Guideline].

(c) merge with another corporation; or

(d) consolidate with another corporation to form a new corporation, if the acquisition, merger, or consolidation would have, or likely to have, the effect of substantially lessening competition in the Market.[103]

The term "merger" is used rather broadly in Rule 6, Section 1 the ERC Competition Rules to refer to an acquisition of shares or assets, a merger with another corporation, or a consolidation of a corporation to form a new corporation.[104] The merger prohibition provision does not directly regulate anti-competitive conduct but instead regulates market structure, in order "to prevent the creation of, or an increase in, market power" and "to avoid the creation of a situation in which anti-competitive behavior (such as collusion or predatory pricing) can successfully occur."[105] For this purpose, Rule 6, Section 1 of the ERC Competition Rules is concerned with whether the acquisition, merger, or consolidation would have, or is likely to have, the effect of "substantially lessening competition" in the market.[106] Absent the application of any shareholding threshold, this would necessitate a comparison by the ERC of the nature and extent of the competition in the market both with or without the merger,[107] taking into account other factors, especially control manifested in the distribution of voting rights, special rights attached to certain shares, the composition of the board of directors, and related party transactions such as long-term supply contracts or contracts of strategic significance, among others.[108]

Pre-merger notification under the ERC Competition Rules is voluntary.[109] Unless parties to a proposed merger wish to apply for clearance or authorization under the ERC Competition Rules, there is no formal requirement that the parties notify the ERC prior to entering or effecting said transaction.[110] The ERC may, upon application, give clearance with respect to a proposed merger that will not, or is not likely to have, the effect of substantially lessening competition in a market.[111] The ERC may also

103. ERC Competition Rules, rule 6, § 1.

104. ERC Competition Guideline, § 6.1.2.

105. *Id.* § 6.1.4.

106. ERC Competition Rules, rule 6, § 1.

107. ERC Competition Guideline, § 6.2.5.

108. *Id.* § 6.3.3.

109. *Id.* § 6.1.6.

110. *Id.*

111. ERC Competition Rules, rule 8, § 2.

authorize an anti-competitive merger, where such merger will in the circumstances result, or will likely result, to benefit the public.[112]

Finally, Rule 11 of the ERC Competition Rules enumerates the range of remedial and punitive orders that the ERC may issue against violators of the merger prohibition which include, among others, the issuance of a cease and desist order, the payment of fine or penalty, disgorgement of excess profits, and divestiture.[113]

The ERC Competition Rules are unique not only because they are anti-trust in character, but because unlike other regulations for highly-regulated industries, they actually institute and implement a merger control regime.

IV. PENDING LEGISLATION ON MERGER CONTROL

By proscribing anti-competitive mergers, the Senate Bill and House Bill attempt to establish a merger control regime in the Philippines. The following discussions compare and contrast the various key provisions in the Draft Bills relating to merger control.

A. Covered Transactions

Both the Senate and House Bills prohibit acquisitions where the effect of such transaction is to lessen competition. Despite the Sections being titled "Anti-Competitive Mergers," the term "merger" in both Bills is misleading. Except for the reference to regulatory approval for mergers of corporations governed by special laws provided in the final paragraph of Section 7 of the Senate Bill,[114] the transactions subject to merger control contemplated under

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112. *Id.* rule 9, § 3.

113. *Id.* rule 11, § 2. More specifically, these remedies and punishments include:

> (a) an order requiring rectification or mitigation of its consequences;
>
> (b) an order requiring payment of a fine or penalty of up to Php 50 Million;
>
> ...
>
> (c) an order fixing or controlling the price at which electricity (or related goods or services) may be supplied or acquired by the offender;
>
> (d) an order revoking or modifying a certificate of public convenience and/or necessity, or a license or permit held by the offender;
>
> (e) an order requiring the offender to divest assets or shares.

Id.

114. Senate Bill, § 7. This essentially reproduces the final paragraph of Section 79 of the Corporation Code: "In the case of merger or consolidation of banks or

both Bills are limited to acquisitions of either shares or assets. Section 7 of the Senate Bill, in particular, provides:

> SEC. 7. *Anti-Competitive Mergers* — No firm engaged in commerce, trade[,] or industry shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, assets[,] or voting rights of one or more firms engaged in any commerce, trade[,] or industry where the object or effect of such conduct is to prevent, restrict[,] or lessen competition.[115]

In addition, Section 10 of the House Bill specifically states:

> SEC. 10. *Anti-Competitive Mergers* — No firm engaged in commerce or trade shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or the whole or any part of the assets, of one or more firms engaged in any line of commerce or trade where the effect of such acquisition of such stocks, share capital, or assets, or of the use of such stock by voting or granting of proxies or otherwise maybe to substantially lessen competition, or tend to create a monopoly.[116]

Prescinding from the foregoing, it would appear that mergers and consolidations under the Corporation Code are not expressly covered by the anti-competitive merger prohibitions in both Bills. This could be attributed to the fact that the language of these provisions was largely patterned after Section 7 of the Clayton Act:

> Sec. 7. No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[117]

Note, however, that while "mergers" and "consolidations" are nowhere referenced in Section 7 of the Clayton Act, subsequent United States Supreme Court decisions interpreting the 1950 Celler-Kefauver amendments stress the inclusion of "incipient" mergers, vertical and horizontal mergers, as

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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." CORPORATION CODE, § 79.

115. Senate Bill, § 7.

116. House Bill, § 10.

117. Clayton Act, § 18.

well as conglomerate acquisitions.[118] This interpretation does not appear to be carried over into the anti-competitive merger provisions in both Draft Bills.

B. Permissible Stock or Asset Acquisitions

Both Bills recognize permissible stock or asset acquisitions if these are merely for investment and not for the purpose of bringing about or attempting to bring about the substantial lessening of competition.[119] The formation of subsidiaries for the carrying out of immediate lawful business is also considered permissible ownership.[120] As such, Section 7 (a) of the Senate Bill and Section 10 (a) of the House Bill provide:

> (a) Permissible Stock or Asset Acquisition or Ownership — Nothing contained herein, however, shall be construed to prohibit:
>
> (1) A firm from purchasing the stock or other share capital of one or more corporations solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition;
>
> (2) A corporation from causing the formation of subsidiary corporation, for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof; and
>
> (3) A firm from acquiring, 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.[121]

Note, further, that the provisions of the Draft Bills are meant to be applied prospectively and do not cover acquisitions made prior to their approval.

C. Standard of Review

Section 7 of the Senate Bill prohibit acquisitions whose object or effect is "to prevent, restrict[,] or lessen competition."[122] This implies that an acquisition resulting in the slightest, and not necessarily substantial, lessening of competition would be considered anti-competitive and hence, prohibited. In contrast, Section 10 of the House Bill adopted wholesale the "substantial

118. *See* Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers under Section 7 of the Clayton Act*, 45 STA. CLARA L. REV. 41, 51 (2005) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962) (U.S.)).

119. Senate Bill, § 7 (a).

120. House Bill, § 10 (b).

121. Senate Bill, § 7 (a) & House Bill, § 10 (b).

122. Senate Bill, § 7.

lessening of competition" test codified in Section 7 of the Clayton Act. Thus, acquisitions of shares of stock or assets by a firm tending to substantially lessen competition are considered anti-competitive and are prohibited by the latter.

D. Notification Prior to Stock or Asset Acquisition

Section 10 (b) of the House Bill requires prior notification before the conclusion of the agreement for any acquisition, directly or indirectly, of shares of stock or assets of any other firm to the proposed Philippine Fair Competition Commission (the Commission) if as a result of the acquisition, the acquiring firm will own 20% or more of the shares or assets of the acquired firm.[123] The contemplated acquisition shall be deemed approved, unless the Commission, within 30 days from receipt of the notification, orders the acquiring firm to show cause why the proposed acquisition shall not be declared as prohibited under the Draft Bill.[124] Either the acquiring or selling firm may contest the show cause order, in which case, the proposed acquisition shall be considered enjoined until the Commission shall render a decision on the proposed acquisition within 60 calendar days.[125] If the Commission fails to make a decision within the 60 calendar day limit, the acquisition shall be deemed approved and the parties may proceed with its implementation.[126] There is no corresponding provision in the Senate Bill.

The House Bill identifies permissible stock or asset acquisitions[127] as well as the following exempt transactions to wit —

(1) Acquisition of goods or realty transferred in the ordinary course of business;

(2) Acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) Acquisitions of voting securities of an issuer at least fifty percent (50%) of the voting securities of which are owned by the acquiring firm prior to such acquisition;

(4) Transfers to, or from, government agencies or instrumentalities, including government-owned or controlled corporations;

(5) Transactions exempted from the provisions of this Act and other proper and applicable laws;

123. House Bill, § 10 (b).

124. *Id.*

125. *Id.*

126. *Id.*

127. House Bill, § 10 (a).

(6) Transactions which require the approval of a specialized agency which regulates the particular industry;

(7) Acquisitions, solely for the purpose of investment, of voting securities, if as a result of such acquisition the securities acquired or held do not exceed ten percent (10%) of the outstanding voting securities of the issuer;

(8) Acquisitions of voting securities pursuant to the preemptive rights of the acquiring firm; or if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring firm's per centum share of outstanding voting securities of the issuers; or

(9) Such other acquisitions, transfers[,] or transactions which the Commission may declare as are not likely to violate the provisions of this Act or any other proper and applicable law.[128]

However, it does not make any qualification as to the types of firms covered by the prior notification requirement. The coverage must therefore be understood to encompass all firms, regardless of business purpose, size, and capitalization. Moreover, because the 20% threshold for the acquisition of shares and assets is set quite low, the frequency that acquiring firms will need to notify the Commission and respond to a show cause order is anticipated to be quite high.

It is also interesting to note that the acquiring firm is "required to make the notification in a tender offer."[129] This requirement is confusing because the situation contemplated under the Draft Bill is not among those instances where a mandatory tender offer is triggered under the Amended Rules and Regulations Implementing the Securities Regulation Code.[130]

E. Confidentiality of Information

The confidentiality provision in Section 12 of the Senate Bill and Section 18 of the House Bill appears to apply only to any document or information submitted by firms, as determined and marked confidential by the Commission, relevant to any investigation being conducted pursuant to both Bills, and not to information obtained by the Office of Competition for the DOJ or the Commission as a result of the submission of a pre-acquisition notification.[131]

Transactions involving the acquisition of shares and assets are often entered into with the expectation of confidentiality and privacy, more often

128. House Bill, § 10 (c).

129. H.B. No. 1007, 13th Cong., 1st Sess. (July 7, 2010), § 9 (b).

130. *See generally* Amended SRC Rules, rule 19 (2).

131. Senate Bill, § 12 & House Bill, § 18.

embodied in a non-disclosure agreement, in order for the acquiring and the acquired firm to maintain a market or competitive advantage. To require an acquiring firm meeting the 20% threshold to notify the Commission of the acquisition will potentially expose it to liability for breach of its obligations under a non-disclosure agreement, where applicable, or cause it to lose its market advantage by "tipping off" its competitors.

F. Relationship between Competition Authority and Regulators

The designated competition authority in the Senate Bill is the Office for Competition in the DOJ.[132] The House Bill, on the other hand, provides for the creation of the Commission.[133] Both Bills allow overlapping regulation between the designated competition authority and the different government agencies over an industry or an industry sub-sector. These government agencies are required to coordinate with one another "to prevent overlap, to share confidential information, or for other effective measures."[134] Section 14 of the House Bill, however, goes one step further by vesting the Commission with primary and sole jurisdiction over competition issues, while the regulatory body shall continue to exercise jurisdiction over all matters with regard to the firm's operation and existence.[135]

G. Non-adversarial Administrative Remedies

While Section 14 of the Senate Bill simply empowers the DOJ upon termination of preliminary inquiry to issue a resolution to impose penalties, order the rectification of certain acts or omissions, or order restitution to affected parties,[136] Section 22 of the House Bill authorizes the Commission to encourage voluntary compliance with the provisions of the Draft Bill by making available non-adversarial and non-adjudicatory administrative remedies prior to the institution of administrative, civil, or criminal action.[137] These include a request for binding ruling where any person is in doubt as to whether a contemplated act, conduct, decision, or agreement is in

132. Senate Bill, § 8.

133. House Bill, § 5.

134. Senate Bill, § 9. This Section provides that, "[a]ll government agencies shall cooperate and coordinate with one another in the exercise of their powers and duties to prevent overlap, share information or such other effective measures." *See also* House Bill, § 14, providing that, "[t]he government agencies shall cooperate and coordinate with one another in the exercise of their power in order to prevent overlap, to share confidential information, or for effective measures. The Commission can seek technical assistance from sectoral regulators." *Id.*

135. House Bill, § 14.

136. Senate Bill, § 14.

137. House Bill, § 22.

compliance with the Draft Bill, other competition laws or issuances, the issuance of a show cause order, the written proposal for the entry of a consent judgment, written consultations regarding matters that should be included or excluded in a request for a binding ruling, or proposal for consent judgment.[138] If the Commission finds that there is substantial evidence tending to show that the act, course of conduct, agreement, decision, or practice of the person or persons concerned is prohibited, it shall include in its decision an order requiring the person or persons concerned:

> (a) to cease and desist from continuing with the identified act, conduct, agreement[,] or practice found to be anti-competitive or in violation of the draft bill;
>
> (b) to pay an administrative penalty or fine; or
>
> (c) to readjust within a reasonable period its method of doing business, including a corporate reorganization or even divestment if deemed proper for the protection of public interest.[139]

V. IS THE PHILIPPINES READY FOR A MERGER CONTROL ENVIRONMENT?

For certain sectors, the inclusion of merger control provisions in the case of certain acquisitions in both Draft Bills is a step forward in the development of a comprehensive competition law system in the Philippines. Merger control is part of competition policy, which is but part of a broader public policy affecting business, markets, and the economy.[140] As to whether the Philippines is ready for this environment, the following should be considered.

A. Covered Transactions Do Not Include Mergers and Consolidations

In their present incarnations, mergers and consolidations under the Corporation Code are not explicitly covered by the anti-competitive merger prohibitions in the Senate Bill and the House Bill. This exclusion is understandable, especially in certain industries such as banking where mergers and consolidations are encouraged.

B. Pre-Merger Notification Is Not Necessary in Regulated Industries and Listed Companies

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138. *Id.*

139. *Id.* § 22 (e).

140. *See generally* International Competition Network, The Analytical Framework for Merger Control (A Final Paper for the ICN Annual Conference in London), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf (last accessed Aug. 31, 2011).

In the Philippines, mergers, consolidations, and acquisitions in most regulated industries are already subject to overlapping regulation by the SEC and the appropriate regulatory authorities before they can be effected. Moreover, the shares resulting from a merger or consolidation involving a publicly listed company are required to be registered with the SEC, unless exempt.[141] In addition, if parties to a merger or consolidation involving public or listed companies wish to list the shares resulting from the merger on the PSE post-closing, the PSE Revised Listing Rules require the submission of a listing application together with additional documentary requirements[142] before the listing can be evaluated and approved by the PSE Board of Directors. This serves as another layer of review to ensure that public interest is not undermined by allowing the listing of the merger shares.

Thus, to require firms party to the aforementioned transactions to notify and to obtain approval from the proper Philippine competition authority before the conclusion of the agreement or before closing in addition to securing the approval of the appropriate regulatory agency as is the practice in other jurisdictions might be unduly burdensome. The fact that Section 10 (c) of the House Bill already excludes acquisitions, although not mergers, "which require the approval of a specialized agency which regulates the particular industry" from the prior notice requirement[143] is a recognition that another layer of review is not necessary.

C. Merger Review Should Be Reasonable and Efficient

Merger review, however, should be limited to identifying, preventing, or reviewing anti-competitive mergers.[144] Consequently, merger control legislation should take pains to provide the competition authority and the regulators with the ability to differentiate mergers that are unlikely to have significant anti-competitive effects from those that require more analysis.[145] Congress can lend certainty and predictability to merger review by providing clear notification thresholds based on quantifiable criteria,[146] identifying

141. SECURITIES REGULATION CODE, § 8.1. As a general rule, securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the SEC. *Id.*

142. *See generally* Philippine Stock Exchange, Listing at PSE, *available at* http://www.pse.com.ph/ (last accessed Aug. 31, 2011).

143. House Bill, § 10 (c).

144. *See* International Competition Network, ICN Recommended Practice for Merger Analysis, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (last accessed Aug. 31, 2011) [hereinafter International Competition Network].

145. *Id.*

146. *See* International Competition Network, *supra* note 144.

elements such as the amount of shares, assets or market share concentration or other measurement tools, the scope of geographic area to which the measurement tool is to be applied, as well as a time component.[147]

Due to the time-sensitive nature of merger transactions, merger review periods should be completed within a reasonable period of time taking into consideration the complexity of the transaction and preventing delays that could jeopardize its consummation.[148] Moreover, the conduct of merger investigations should be marked by effectiveness, efficiency, transparency, predictability, and procedural fairness.[149] Business secrets and other confidential information obtained by the competition authority over the course of merger review should likewise be subject to strict confidentiality safeguards.[150]

The imposition of remedies resulting from merger review should avoid being unnecessarily strict to maintain competition at, or restore competition at the required level in order to be effective.[151] In case of divestiture, the

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147. *Id.*

148. *Id.* The International Competition Network notes the need for merger review to be completed within a reasonable time:

> Merger transactions may present complex legal and economic issues. In such cases, competition agencies need sufficient time to properly investigate and analyze them in order to reach a well-informed decision. At the same time, merger transactions are almost always time sensitive, and the completion of merger reviews by relevant competition agencies is often a condition to closing either by operation of law or contract. Delay in the completion of such reviews may give rise to a number of risks. Delay may jeopardize the consummation of the transaction itself due to intervening developments and/or other time-sensitive contingencies such as financing arrangements. Delay may also have an adverse impact on the merging parties' individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty. In addition, it defers the realization of any efficiencies arising from the transaction. Merger reviews should therefore be completed within a reasonable time frame. A reasonable period for review should take into account, *inter alia*, the complexity of the transaction and possible competition issues, the availability and difficulty of obtaining information, and the timeliness of responses by the merging parties to information requests.

International Competition Network, *supra* note 144.

149. *Id.*

150. *Id.*

151. OECD Merger Remedies, *supra* note 26.

> Remedies should not be used to 'improve' deals that do not rise to the level of a violation, or to make the competitive landscape better than it was before the transaction. Competition authorities should not use

parties' compliance requirements must be so specific as to define business or assets covered by the remedy as well as the terms under which divestiture is to be carried out.[152]

VI. CONCLUSION

In advocating a competition law policy for merger control in the Philippines, there must be a balancing of interests. Too much regulation can have the unintended effect of restraining trade and consequently, prove to be anti-competitive in the long run. Mergers and acquisitions are part of the competitive process and should not be unduly interfered with.[153] Thus, the law should be designed in a way that only transactions that could produce serious anti-competitive effects within a particular jurisdiction should be investigated in depth by the authority of that jurisdiction.[154]

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merger review to engage in industrial policy or to become a market regulator, even if the outcome of such an intervention could be more desirable from a competition point of view.

Id.

152. *Id.*

153. Asian Development Bank, Competition Law Toolkit, *available at* http://www.adb.org/Documents/Others/OGC-Toolkits/CompetitionLaw/complaw050300.asp (last accessed Aug. 31, 2011).

154. *Id.*