

ASSESSMENT OF MERGER CONTROL IN THE PHILIPPINES



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Preface

The Philippines has grown strongly over the past decades. Its economy grew 7.6% in 2022 and 5.7% in 2021 in a bounce back from its worst economic contraction in 2020 (-9.5%). Prior to the COVID-19 pandemic, the economy, which is the fifth largest in ASEAN, expanded at an average rate of 6.4% between 2010 and 2019 and, in 2023, it is projected to grow by 5.7%.

This sustained growth can be explained, at least in part, with the market reforms initiated in the early 90s aimed at liberalising and deregulating key sectors and leading the country towards a more open economy. With the market-based economy reforms came the need for a competition policy, the introduction of the Philippine Competition Act in 2015 and the creation of the Philippine Competition Commission (PCC) in 2016. Nevertheless, the country's efforts for more domestic competition are ongoing, as there remains work to do in terms of building a competition culture in the country through advocacy initiatives, as well as enforcing the competition law.

One of the PCC's priorities has been merger review. It has reviewed more than 200 cases, having intervened so far with remedies and prohibitions in five transactions. This shows the benefit of having a framework that allows the authority to review transactions that potentially have long-term, anti-competitive effects and prevent them from taking place with such effects: these were mergers that would otherwise have caused structural harm to the Filipino economy.

An effective notification system requires using a balanced approach between a sieve that is wide enough to capture all such potentially harmful mergers and narrow enough to not require undue resources from the competition authority and from business. Following the COVID-19 pandemic, where the thresholds for notification were temporarily put at a very high level, leading to very few notifications, the recent reversion to the pre-pandemic thresholds is a welcome development. This now requires the PCC to continue to develop its practice towards international good practices.

This publication reviews the legal framework and practice of merger control in the Philippines with the purpose of allowing it to continue to develop and strengthen its merger control rules and practice in that direction. This publication pushes forward the PCC's ongoing efforts under the *Capacity Building to Foster Competition Project*, supported by the Asian Development Bank (ADB). The project aims to boost the country's competitive environment, narrow the gap on competition expertise in the country, and build a domestic knowledge base for the effective implementation of the competition law.

We congratulate the Philippines on its interest and efforts to continue developing and improving its merger regime to the benefits of its economy and consumers. Following the request of the PCC and with the support of ADB, we are certain that this publication will be a relevant contribution to the future increased effectiveness of merger control in the Philippines.

ADB and the OECD look forward to continuing and broadening their co-operation with the Philippines to further support its reforms to the benefit of its citizens.



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Foreword

This publication reviews the Philippines' existing merger control regime and makes suggestions on the basis of OECD Recommendations on Competition Policy, particularly the 2005 Recommendation on Mergers, as well as on international good practices from across the globe. The Philippines competition policy has developed quickly and effectively since the Competition Authority was created in 2016. It has established a reputed merger control system. This publication acknowledges those important developments and can help serve as an important tool to continue to strengthen the Philippines' merger control regime based on principles of transparency, integrity, and procedural fairness. This, in turn, can help promote and protect economic competition, which increases productivity and overall economic performance.

This publication assesses the main characteristics of the merger regime, the review of relevant legislation, soft law, and case law. It also benefited from a wide fact-finding exercise with consultations and interviews with private and public stakeholders, including lawyers, in-house counsels, private firms, other regulators, and academic experts. This wide-ranging collection of views served as very relevant input to the analysis contained in this publication.

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All information in this publication is current up to September 2022, date in which the drafting was finalised. The findings are the result of an independent assessment by the OECD and ADB based on an analysis of legislation, stakeholder interviews and desk research. The recommendations are the result of this analysis and are non-binding.

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Executive summary

This publication reviews the current merger control regime in the Philippines and proposes recommendations for how it may evolve closer to international best practices.

The enactment of Republic Act No. 10667 in 2015 (Philippine Competition Act, PCA), brought for the first time a general merger control regime to the Philippines. The objective of the law was to contribute to attain more competition in the economy and thus achieve sustained growth and increased consumer welfare. Merger control constitutes an essential component of an effective competition system, and the Philippines merger control regime is to a significant extent very close to international best practices. The Philippine Competition Commission's (PCC) efforts and experience gained in such a short time has been notable. Nonetheless, whilst the PCC's experience has developed quickly, challenges still remain.

While many aspects of the merger control regime in the Philippines are in line with international good practices, others require adjustments to consolidate an effective, efficient, and transparent merger control regime. This publication examines these issues and suggests possible ways forward for consideration by the Philippines. For young authorities, such as the PCC, an acknowledgment of the benefits and importance of merger review, as well as a continuous improvement of the regime is fundamental, as it is the only instrument via which authorities can engage in ex ante prevention of anti-competitive market structures.

This publication analyses the legal framework for merger review, the current institutional design, the application of merger control rules and jurisdiction, and the substantive examination of transactions, as well as relevant cases and decisions on merger control, including those with remedies, prohibitions, fines, and penalties.

It proposes key recommendations related to the institutional design, particularly with respect to the decision-making process of the Commission; the merger control jurisdiction, regarding the functioning of the mandatory notification system with clear criteria and objective thresholds for notification; transparency in the procedure and the publication of decisions; and the imposition of remedies.

Key recommendations

Adjudication

1. **Set clear and binding rules of procedure for the adjudication of merger cases in cases of tied voting in Commission.** This is important considering that a tied vote at Board Level automatically leads to an approval of a given notified transaction.
2. **Establish guidance on the criteria for the recusal of Commissioners in the adjudication of merger matters.** This guidance should specify under which circumstances one or more Commissioners are required or allowed to refrain from voting.
3. **The Commission should rely on comprehensive technical assessments for its decisions on whether a merger should be cleared, prohibited, or cleared with remedies.** This could

be either by eliminating the current informal internal separation between investigative and decision-making bodies and relying on the assessment done by the Mergers and Acquisitions Office or by accompanying the internal separation with a full team with specialised knowledge to analyse and provide full technical support to Commissioners on the merger effects.

Notification system

1. **Preserve a mandatory pre-notification system.** This should include clear criteria defining the type of transactions that are caught by merger control, any exemptions, and the objective thresholds to notify transactions.
2. **Joint ventures should be explicitly included within the definition of mergers in the PCA.** Whilst this is currently in the Implementing Rules and Regulations (PCA-IRR) of the PCC a clarification of the PCA in this regard clearer for companies to understand that joint ventures are part of the transactions covered by merger control.
3. **Revert the notification thresholds to pre-Bayanihan 2 levels, adjusted to recent changes in the macroeconomic environment of the Philippines.** This would guarantee an efficient setting of threshold levels that reflect the reality of the Philippines economy and ensure a well-functioning and efficient merger control system.

Procedural fairness and transparency

1. **Offer State-of-play meetings to the merging parties at key stages of the merger review procedure, including in Phase I, to guarantee transparency and procedural fairness.** This would allow merging parties to respond to such concerns in a timely manner, for instance, by formulating a remedy package early in the process.
2. **Provide economic and legal reasoning both in Phase I and Phase II decisions, including further substantive detail on market definition and competition assessment.** To ensure transparency and procedural fairness, the PCC should provide more details on the reasoning for the decisions, including the economic analysis and grounds that led to the final conclusions, on aspects such as the definition of the relevant market, the theories of harm analysed and the effects of the transaction in the market(s).

Remedies

1. Make structural remedies the preferred option to solve competition issues, especially where competition concerns from horizontal effects have been identified. To make the imposition, implementation, and monitoring of remedies effective and less resource-intensive, structural remedies should be given more relevance and should be considered as an effective tool to solve competitive concerns in some transactions. This means that the PCA should be modified to recognise the possibility to impose them in more situations than only when no behavioural commitments are available, according to international good practices. Alternatively, the PCC should issue guidance on the possibility to more frequently use structural remedies, which in some cases have proven more useful and less costly, offering a narrower interpretation of the PCA.

The recommendations, when implemented, would allow mergers to be selected, notified, and reviewed in a timely, effective, and predictable manner with principles of transparency, integrity, and procedural fairness.

1 Introduction and economic context

1.1. Overview of merger control and objectives

Merger control plays an essential role in competition policy, as it is the only instrument via which authorities can engage in *ex ante* prevention of anti-competitive market structures. Merger control is therefore a crucial component of an effective competition system. The importance of merger control is why the OECD issued a Recommendation on Merger Review in 2005, which reflects best international practices, and aims to contribute to greater convergence of merger review procedures and co-operation among competition authorities. It focuses on ensuring that merger review is effective, efficient, and timely.

More than a hundred jurisdictions have merger control regimes as part of their competition laws. These jurisdictions recognise that competition problems of a structural nature can result from certain merger transactions, and that a merger control tool can thus help prevent the creation of market structures that can lead to significant and long-term anti-competitive effects. Generally, these effects are then difficult to tackle effectively with other tools – such as abuse of dominance – or have already caused significant distortive effects in the markets that are difficult to roll back – such as market exit or the impediment of new entry.

The purpose of merger control is not only to impede proposed anti-competitive mergers from taking place and changing the structural landscape. There is also a deterrence effect of merger control – meaning that there are transactions that are not negotiated, since firms know that they would not be cleared by the competition authority, as its anti-competitive effects are higher than its potential benefits or cleared only with substantial remedies. A study of 2007 for the Office of Fair Trading (OFT) provides evidence that suggests that the deterrence effect exceeds the direct effect of merger control: that for every merger prohibition or remedy decision five potential mergers are either abandoned or modified (Deloitte & Touche, 2007^[1]). A 2009 paper (using data on 28 competition jurisdictions over the period from 1992-2005) analysed the impact of the use of merger control and found that prohibitions by competition authorities have a significant deterrence effect with fewer mergers being proposed in the following year. The authors did not find that remedies lead to the same deterrence effect (Seldeslachts, 2007^[2]).

This publication has as object to review the legal framework as well as the practice of merger control in the Philippines, following the adoption of Republic Act No. 10667 on 21 July 2015, commonly referred to as the Philippine Competition Act (PCA), and to benchmark it with international good practices. The objective is therefore to allow the Philippines to continue to develop its merger control rules and practice even closer to international best practices.

The publication reaches the conclusion that merger control in the Philippines has developed very quickly and it makes recommendations to make it even more effective and closer to international good practices.

To do so, this publication analyses the legal framework, examining the scope and objects of laws governing anticompetitive mergers in the Philippines; it considers the current institutional design, including the legal framework, resources and staffing, and the judicial review system; it analyses the application of merger control rules, including an evaluation of the turnover thresholds as well as relevant cases and decisions on merger control, remedies, prohibition decisions, information requirements of merger regulations, fines and

penalties. Finally, it makes recommendations and proposals for how institutional settings for merger control can be improved.

This publication benefited from comments and factual checks from the Philippine Competition Commission as well as from interviews with numerous stakeholders in the Philippines.

1.2. Economic background in the Philippines

The Philippine economy stands to bounce back from its worst contraction of 9.5% in 2020 with gross domestic product (GDP) projected to grow at 5.7% in 2023, following strong growth of 7.6% in 2022 and 5.7% in 2021. Prior to the COVID-19 pandemic, the economy expanded by 6.4% on average during 2010-2019. The fiscal deficit ceiling is programmed at 6.1% of GDP in 2023, following an average of 7.9% of GDP deficit 2020-2022.

The Philippines' public debt had been on a rising trend from 37% of GDP in 2019 to 63.5% in 2022, due to the large fiscal deficits in response to the impacts of COVID-19. The public debt is projected to taper below 60% of GDP after 2024. The tapering of public debt dynamics reflects the government's credible commitment to rebuilding fiscal space in the medium term. Foreign reserves are ample at USD 100.8 billion—equivalent to over 7.5 months of imports— as of May 2023.

The government has consistently embarked on a wide array of reform efforts to build an economy conducive to inclusive growth and resilient to external shocks. Economic reform took off step-by step with increased public-private partnerships in infrastructure in 2011, enactment of the competition law in 2015, and the Build-Build-Build infrastructure development programme in 2016. Three transformative investment climate laws that liberalised foreign ownership were also enacted: (i) the Retail Trade Liberalization Act, which eliminates the requirement for pre-qualification clearance for foreign retailers and investors, reduces minimum paid up capital from USD 2.5 million to USD 500 000; reduces investment cost per store from USD 830 000 to USD 200 000; and abolishes equity divestment requirements; (ii) the Public Service Act now allows 100% foreign ownership in public services such as telecommunications, railways, air carriers, ship building among other sectors; and (iii) the Foreign Investments Act which reduced minimum paid up capital. Furthermore, to support enterprise competitiveness, the government implemented the 2019 Philippines Innovation Act by establishing the National Innovation Council and its Secretariat and through the Anti-Red Tape Agency reduced business regulatory compliance costs.

1.3. Importance of merger review in the Philippines

While the Philippines introduced the PCA in 2015 with the objective of achieving more competition in the domestic markets, their economy is still highly concentrated. In the most recent Global Competitiveness Ranking by the World Economic Forum, the country ranked 114 out of 141 economies in the pillar related to the extent of market dominance, with a score of 3.2 where 1 is the worst and 7 the best outcome possible, representing the highest degree of competitiveness.¹ This indicator is representative of different sectors in the economy and consistent with other studies on the topic. For instance, in an exercise done in 2020 by the PCC on concentration ratios for different manufacturing activities, the authority found that the average Herfindahl-Hirschmann Index for the sector between 2006 and 2014 was higher than 2 500, meaning that it was highly concentrated (PCC, 2020_[3]). This degree of concentration in multiple markets is another reason why a strong and effective merger control regime is needed in the Philippines.

One key task for competition authorities, mostly when they are young, is to communicate to the public the positive impact that their decisions can have on the country's economic and social welfare. This advocacy for the role of competition authorities can also help widen understanding of its purpose and to strengthen the case for limited public resources being allocated to the authority. This, in turn, will increase its

performance, maximise their benefit to society and increase their legitimacy. This exercise can also illustrate how the competition authority role outweighs its costs, particularly in authorities with small budgets, as it is the case in the Philippines (Davies, 2013^[4]).

One way of calculating the impact that a competition authority may have in the markets is by undertaking qualitative and quantitative evaluations deriving from its actions. Although anticipating the impact of a decision by a competition authority or being able to capture it in its entirety is a complex task, impact analysis is a fundamental tool for understanding and improving effectiveness of decisions that protect competition, the interest of consumers, guarantee economic and business freedom, and promote economic and social development. In the case of the evaluation of the impact of merger control, these should as a minimum include the impact of decisions that led to merger prohibitions or mergers approved with remedies.

In practice, due to information limitations, competition authorities adopt a standard consumer surplus criterion when evaluating their merger interventions (Björnerstedt and Verboven, 2014, p. 511^[5]). This methodology consists of assuming a conservative increase in prices if the merger takes place and multiplying it by the volume of sales (income) of the companies involved in the merger or the size of the relevant market to obtain an estimate of the loss of consumer welfare, because of the price increase. In addition, an assumption is made of the duration period of the price increase effect after the merger. This simplified and easily applicable methodology allows for a practical and regular assessment of the competition authority interventions and does not demand significant resources or time (OECD, 2014^[6]).

While it is suggested that specific information per case is used to calculate the benefits on consumers, following assumptions when the information is not available is also proposed. The idea behind such assumptions is that the estimates are deliberately conservative, hence considering the least possible outcomes from the intervention. Moreover, such estimates normally consider only static benefits and, therefore, are missing dynamic dimensions such as product innovation or increase in productivity that come with greater competition.

In merger cases, a very conservative assumption of a 1% increase in price effect is made;² however, estimates normally establish an interval that goes up to 3% increase in price (OECD, 2014^[6]). Assuming these increases in price is extremely conservative because it is difficult for a competition authority to find a significant decrease in competition in said market if the increase in prices as a result of the concentration is only 1% (Gonçalves, Mateus and Rodrigues, 2008^[7]). As for the duration of the price increase, one year is the most used assumption (OECD, 2014^[6]). Moreover, the estimates do not take into account the deterrence effect of the authority's decisions, because it is very difficult to quantify. Nevertheless, this effect is extremely important as the intervention gives incentives to firms in the market not to breach competition law (OECD, 2014^[6]).

Although the purpose of this publication is not to do impact analysis on the merger decisions taken by the PCC, a simple exercise on the potential impact of the only prohibition decision taken by the PCC was made to illustrate the benefits of an effective merger review (see Box 1.1). As the exercise relies on the most conservative assumptions mentioned above, it can give a clear and certainly underestimated idea of how significant the ex-ante decision of the PCC might have been in the relevant market. For instance, if compared with the PCC's budget for 2019, the same year of the intervention, the potential savings in surplus by the decision represent 108% of such budget.

Box 1.1. Illustrative exercise showing potential benefit to consumers of a PCC prohibition decision

For illustrative purposes of applying the methodology to a particular case in the Philippines, the example of the prohibition decision on the Universal Robina Corporation / Central Azucarera Don Pedro / Roxas Holdings has been used. This exercise relies exclusively on publicly available data and is meant only to exemplify how such an exercise can be made and to show the benefits of merger control in the Philippines.

In the decision prohibiting the acquisition of the assets of Central Azucarera Don Pedro and Roxas Holdings by Universal Robina Corporation, the PCC found that the transaction will likely result in a substantial lessening of competition in the market for provision of sugar cane services in four provinces due to unilateral horizontal effects. Particularly, the analysis of the PCC revealed that the planter's production share could be reduced by 3%, which in the relevant market would be the analogous to an increase in price of a similar magnitude. The Mergers and Acquisitions Office made these calculations on the decrease in planter's shares based on a Gross Upward Pricing Pressure test (GUPPI) and using the information available at the time of the review of the transaction.

Taking into account only the data in the decision, considering the most conservative duration of the price effect of only one year and the size of the relevant market for the production of sugar cane in Batangas, which refers to part of the geographic market identified by the PCC, it is possible to have an estimate of the impact of the PCC's decision. The potential savings from the intervention of the PCC could lie between PHP 483 and 1 450 million (Philippine pesos) (approximately USD 8-25 million), depending on whether the considered increase in price is as low as 1% or the estimated 3%.

Source: Commission Decision No. 03-M-021/2019 in PCC Case No. M-2018-006 and PCC Issues Paper 2020-04 on the Sugar Industry in the Philippines, <https://www.phcc.gov.ph/wp-content/uploads/2020/09/PCC-Issues-Paper-2020-04-Issues-Paper-on-the-Sugar-Industry-in-the-Philippines.pdf>. Methodology used in the exercise: OECD Guide for Helping Competition Authorities Assess the Expected Impact of their Activities (2014).

For young authorities, such as the PCC, this exercise is relevant to demonstrate that they are socially valuable and that it is worth having an ex-ante merger regime, that allows them to review transactions that potentially have anti-competitive effects without these effects distorting the markets. This is of particular relevance to countries like the Philippines, where the culture of competition policy is still relatively nascent (as the PCA is only from 2015). Reducing the reach and effectiveness of merger control or reducing the powers of the PCC to review relevant transactions may affect the importance of merger control. This is, the economic value of impeding anti-competitive market structures to crystallise, not through the most efficient firms growing organically, but via consolidation that might be anti-competitive. It is therefore important to build on the current strengths of the merger control regime in the Philippines and make them even more effective to ensure the benefits to society described above. For instance, reliance on a mandatory pre-merger notification system to provide advance notice of proposed transactions is based on the recognition that competition authorities have neither the time nor the resources to monitor all business transactions in an attempt to identify those that pose a threat to competition. Nor do they have the ability to detect those “midnight mergers” that are consummated without public notice (US Department of Justice, 2006^[8]).

2 Legal framework and institutional design

2.1. Overview of the current legal framework

This section discusses the legal framework and institutional design of the country's merger control regime. While the PCC shares the responsibility with the National Economic and Development Authority “*in the preparation and formulation of a national competition policy*” (Sec. 12(o) PCA), it has the sole jurisdiction for the review of mergers and acquisitions.

2.1.1. Legal framework for general competition law

In 1887, the Philippines Old Penal Code first recognised collusive manipulation of market prices as well as machinations in public auctions as crimes against property. This was reinforced in the ruling of the Supreme Court in *Diaz v. Kapunan* where it was held that public policy discountenances combinations or agreements on the part of bidders at execution sales which stifle competition.³ Since then, the Philippines competition policy went through various stages of development (Box 2.1).

Box 2.1. Historical background leading to the adoption of the PCA

In 1887, the Old Penal Code first recognised collusive manipulation of market prices as well as machinations in public auctions as crimes against property. This was reinforced in the ruling of the Supreme Court in *Diaz v. Kapunan* where it was held that public policy discountenances combinations or agreements on the part of bidders at execution sales which stifle competition.¹

In 1925, Act 3247² (Prohibition Against Monopolies and Combinations in Restraint of Trade) was passed into law. It prohibited every agreement, contract, conspiracy, or combination in the form of trust or otherwise, in restraint of trade or commerce or intended to prevent by artificial means free competition in the market. Following this, Act 3518³ (Amendment to Act no. 1459) was enacted in 1928. It amended the Corporation Law⁴ to include provisions prohibiting mergers and acquisitions that substantially lessen competition or tend to create a monopoly of any line of commerce.⁵

In 1930, Act 3815⁶ (Revised Penal Code) repealed portions of Act 3247. In particular, it superseded Sections 1, 2, 3, and 5 and replaced it with Article 186 which enumerated acts which constitute monopolies and combinations in restraint of trade.⁷ Following the revision of the Penal Code, the New Civil Code⁸ provided for a right of action for persons who suffer damage from unfair competition in agricultural, commercial, or industrial enterprises or in labour through the use of force, intimidation, deceit, machination or any other unjust, oppressive, or highhanded method.⁹

In 1973, the Constitution recognised the need for the State to regulate or prohibit private monopolies when the public interest so requires. As such, it provided that no combinations in restraint of trade or

unfair competition shall be allowed.¹⁰ In 1979, this provision was invoked for the first time in *Gokongwei, Jr. v. Securities and Exchange Commission*. In that case, the Supreme Court held that these anti-trust laws or laws against monopolies or combinations in restraint of trade were designed to preserve free and unfettered competition as the rule of trade and operate to forestall concentration of economic power.¹¹

The 1987 Constitution adopted the same provision against private monopolies.¹² This provision was referred to by the Supreme Court in *Tatad v. Secretary of the Department of Energy* where it struck down Republic Act No. 8180 for being unconstitutional because the same occluded the entry point of prospective players while enhancing the monopolist's ability to tamper with the mechanism of a free market.¹³ The same principle was followed in *Energy Regulatory Board v. Court of Appeals*.¹⁴

In 1997, Republic Act No. 8293¹⁵ (Intellectual Property Code of the Philippines) was enacted. It provided for unfair competition provisions in the field of intellectual property law, the application of which was seen in *Coca-Cola Bottlers, Phils., Inc. v. Gomez* in 2008,¹⁶ and *Willaware Products Corp. v. Jesichris Manufacturing Corp.* in 2014.¹⁷

Recognising the need to curb unfair competition outside the field of intellectual property law, Republic Act 10667¹⁸ (Philippine Competition Act) was passed into law in 2015.

Notes:

¹ *Diaz v. Kapunan*, [8 December 1923], 45 PHIL 482-488; ² Prohibition Against Monopolies and Combinations in Restraint of Trade, Act No. 3247, [1 December 1925]; ³ Amendment to Act no. 1459 (Corporation Law), Act No. 3518, [3 December 1928]; ⁴ The Corporation Law, Act No. 1459, [1 March 1906]; ⁵ Amendment to Act no. 1459 (Corporation Law), Act No. 3518, Section 20, [3 December 1928]; ⁶ Revised Penal Code, Act No. 3815, [8 December 1930]; ⁷ Revised Penal Code, Act No. 3815, Article 186, [8 December 1930]; ⁸ Civil Code of the Philippines, Republic Act No. 386, [18 June 1949]; ⁹ Civil Code of the Philippines, Republic Act No. 386, Article 28, [18 June 1949]; ¹⁰ Article XIV, Section 2, The 1973 Constitution (Amended); ¹¹ *Gokongwei, Jr. v. Securities and Exchange Commission*, G.R. No. L-45911, [11 April 1979], 178 PHIL 266-341; ¹² Article XIII, Section 19, The 1987 Constitution, [2 February 1987]; ¹³ *Tatad v. Secretary of the Department of Energy*, G.R. Nos. 124360 & 127867 (Resolution), [3 December 1997], 347 PHIL 1-38; ¹⁴ *Energy Regulatory Board v. Court of Appeals*, G.R. Nos. 113079 & 114923, [20 April 2001], 409 PHIL 36-60; ¹⁵ Intellectual Property Code of the Philippines, Republic Act No. 8293, [6 June 1997]; ¹⁶ *Coca-Cola Bottlers, Phils., Inc. v. Gomez*, G.R. No. 154491, [14 November 2008], 591 PHIL 642-662; ¹⁷ *Willaware Products Corp. v. Jesichris Manufacturing Corp.*, G.R. No. 195549, [3 September 2014], 742 PHIL 308-319; ¹⁸ Philippine Competition Act, Republic Act No. 10667, [21 July 2015].

Currently, the main legal framework for the promotion and protection of competition in the Philippines includes:

- Republic Act No. 10667 of 21 July 2015, commonly referred to as the Philippines Competition Act (PCA)
- Implementing Rules and Regulations of Republic Act No. 10667, commonly referred to as the Implementing Rules and Regulations (PCA-IRR).

Enacted in July 2015, the PCA is the first comprehensive competition law that promotes fair trade practices, prohibits formation of or regulates natural monopolies, and penalises arrangements that duly manipulate or restrict fair market competition. Before this milestone legislation, competition policy and law was scattered in about 30 different laws (e.g. the Philippine Constitution, Revised Penal Code, Consumer and Price Acts, and sector-specific regulations) mostly with outdated provisions and penalties on anti-competitive business practices that were hardly enforced/implemented.⁴ The consolidated competition law introduced the review of merger and acquisitions and provided for explicit prohibitions against anti-competitive agreement and abuse of dominant position. The PCA also provides for the creation of the Philippine Competition Commission (PCC) as well its power and functions (see section below).

The primary objectives pursued by the PCA are provided for in its Section 2 which states that "Pursuant to the constitutional goals for the national economy to attain a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit

of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged and the constitutional mandate that the State shall regulate or prohibit monopolies when the public interest so requires and that no combinations in restraint of trade or unfair competition shall be allowed, the State shall:

(a) Enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole;

(b) Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and

(c) Penalise all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.”

The PCA is enforceable against any person or entity engaged in any trade, industry, and commerce in the Republic of the Philippines. It is also applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines (Sec. 3 PCA). The PCA does not apply to combinations or activities of workers or employees nor to agreements or arrangements with their employers when such combinations, activities, agreements, or arrangements are designed solely to facilitate collective bargaining in respect of conditions of employment (Sec. 3 PCA).

Section 50 of the PCA tasked the PCC to promulgate the necessary implementing rules and regulations for the implementation of the PCA. Accordingly, on 31 May 2016, the PCA adopted such implementing rules and regulations, commonly referred to as the PCA-IRR. In addition, the PCC has issued several soft law materials with a view to providing further clarities on the interpretation of the PCA as well as its practices.

2.1.2. Legal framework for the Philippines merger control

The merger control in the Philippines finds its legal basis in Chapter 4 of the PCA (Section 16-23) titled “Mergers and Acquisitions”. The PCC-IRR sets further implementing rules and regulations relating to the merger control. Furthermore, the PCA has adopted a number of *secondary regulations* with a view to providing guidance and clarification on its merger control regime. The table below provides a list of PCA’s major rules, guidelines, clarificatory notes, memorandum, resolutions applicable to its merger control.

Table 2.1. List of texts applicable to the Philippines merger control

2017 Rules on Merger Procedure
Merger Review Guidelines
Guidelines on the Computation of Merger Notification Thresholds
Revised Guidelines on Letters of Non-Coverage from Compulsory Notification
PCC Guidelines on Notification of Joint Ventures
Expedited Merger Review Procedure
Clarificatory Note 19-001 on the Coverage of Compulsory Notification in Land Acquisition
Clarificatory Note 18-001 on the Consolidation of Ownership
Clarificatory Note 17-001 on the Compulsory Notification in Voting Securities Acquisition
Clarificatory Note 16-002 on the Coverage of Compulsory Notification
Clarificatory Note 16-001 on the Definitive Agreements and Binding Preliminary Agreements in Mergers and Acquisitions
PCC Memorandum Circular 19-001: Process for Exemption from Compulsory Notification in Solicited Public-Private Partnership (PPP) Projects
PCC Memorandum Circular 20-002: Process for Exemption from Compulsory Notification of Unsolicited Public-Private Partnership (PPP) Projects
PCC Memorandum Circular 20-001: Process for Exemption from Compulsory Notification of Joint Venture Agreements entered into pursuant to “Guidelines and Procedures for Entering into JV Agreements between Government and Private Entities” issued by the National Economic Development Authority

2017 Rules on Merger Procedure

Guidance on Pre-Merger Exchanges of Information
PCC Memorandum Circular No. 20-003: Mergers and Acquisitions Entered into Prior to the Effectivity of the Bayanihan to Recover as One Act (R.A. No. 11494)
Commission Resolution No. 14-2019: Directing the Mergers and Acquisitions Office to File a Short Complaint with its Attached Recommendation for Cases Involving Violations of the Rules on Compulsory Notification and Waiting Periods
Memorandum Circular No. 17-002 Revised Rules on Payment of Fees for Notification and Review of Mergers and Acquisitions
Memorandum Circular No. 17-001: Determination of Fines for Failure to Comply with Merger Notification Requirements and Waiting Periods
Interim Guidelines During Periods of Community Quarantine

Source: PCC.

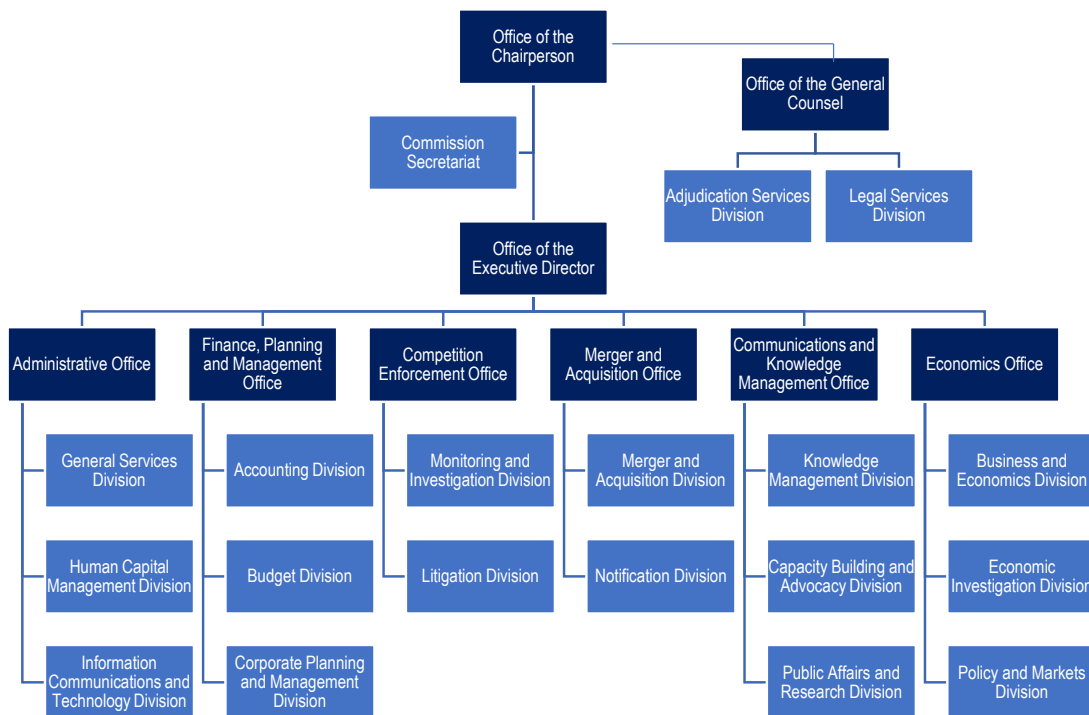
2.1.3. Institutional design

One of the major developments brought about by the PCA was the establishment of the Philippine Competition Commission (PCC), “an independent quasi-judicial body” (PCA, Sec. 5) attached to the Office of the President and tasked to enforce the PCA. In fact, Section 32 of the PCA provides that the PCC has “original and primary jurisdiction in the enforcement and regulation of all competition-related issues”.

PCC is an independent agency, and its decisions are not subject to review or veto of another executive or legislative body. While the PCC is attached to the Office of the President as part of the Executive Department of government, it does not involve itself in any of the matters handled by the PCC.

To carry out its role and mandate, the PCC has six core offices, headed by the Office of the Executive Director as illustrated in the chart below.

Figure 2.1. PCC’s Approved Organisational Structure by the Department of Budget and Management



Note: Currently, the interim organisation structure places three divisions under the Mergers and Acquisitions Office: The Notification, Review, and Monitoring Divisions.

Source: Department of Budget and Management – PCC.

The three Divisions that are most relevant for merger control are the Merger and Acquisition Office, the Economics Office, and the Adjudication Services Division, which are described below:

- **Mergers and Acquisitions Office (MAO):** The MAO reviews, investigates and evaluates mergers and acquisitions. It receives notifications of proposed mergers and acquisitions that reach the thresholds under the IRR, as well as cases referred to it by the Commission for a *motu proprio* review. The MAO works together with the Economic Office (EO) to investigate whether mergers and acquisitions are likely to result in a substantial lessening of competition in the market. Should it find that a merger or acquisition is likely to reduce competition and harm consumers through higher prices, lower quality of goods or services, or stifle innovation, it will submit a recommendation to the Commission for the proposed transaction's prohibition. The MAO also develops guidance for businesses on the compliance with competition law through publication of guidelines and clarificatory notes.
- **Economics Office (EO):** the EO is tasked to evaluate the impact of government policy on market competition and consumer welfare, and to provide economic analysis to support the detection and investigation of anti-competitive behaviour. EO members are typically assigned to all cases led by the Mergers and Acquisitions Office or the Competition Enforcement Office and support the advocacy and knowledge management activities of the Commission. The EO is organised between the Policy and Markets Division, and the Economic Investigation Division.
- **Adjudication Services Division:** The Adjudication Services Division belongs to the Office of the General Counsel and is tasked with writing the final decisions made by the Commission. The members of the division are exclusively lawyers.

Composition of the Commission and the rulemaking

Pursuant to Section 6 of the PCA, the Commission shall be composed of a Chairperson and four Commissioners. The Chairperson and the Commissioners who shall have the rank equivalent of cabinet secretary and undersecretary, respectively, shall be appointed by the President.

The term of office of the Chairperson and the Commissioners shall be seven years without reappointment. Of the first set of appointees, the Chairperson shall hold office for seven years and of the first four Commissioners, two shall hold office for a term of seven years and two for a term of five years. In case a vacancy occurs before the expiration of the term of office, the appointment to such vacancy shall only be for the unexpired term of the predecessor.

The Chairperson and the Commissioners shall be citizens and residents of the Philippines, of good moral character, of recognised probity and independence and must have distinguished themselves professionally in public, civic or academic service in any of the following fields: economics, law, finance, commerce, or engineering. They must have been in active practice of their professions for at least ten years and must not have been candidates for any elective national or local office in the immediately preceding elections. These composition rules also provide that at least one shall be a member of the Philippine Bar with at least ten years of experience in the active practice of law, and at least one shall be an economist.

Regarding the adoption of any rule, ruling, order, resolution, decision, or other acts of the Commission, three members (out of five) of the Commission constitute a quorum and the affirmative vote of three members is necessary. In case of a tied vote (this happens, for example, when one commissioner refrains from voting and the remaining four commissioners form a tied vote of 2-2), the act subject to the vote remains unadopted.

In Philippine merger control, a tied vote means that the merger is deemed approved pursuant to Section 17 of the PCA which provides that "*when [...] 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*".

The Chairperson and the Commissioners shall enjoy security of tenure and shall not be suspended or removed from office except for just cause as provided by law. A number of safeguards are also in place to avoid potential conflicts of interest. The Commissioners shall not, during their tenure, hold any other office or employment. They shall not, during their tenure, directly or indirectly practice any profession, except in a teaching capacity, participate in any business, or be financially interested in any contract with, or any franchise, or special privileges granted by the government or any subdivision, agency, or instrumentality thereof, including government-owned and -controlled corporations or their subsidiaries. They shall not be qualified to run for any office in the election immediately succeeding their cessation from office.⁵ Provided, they shall not be allowed to personally appear or practice as counsel or agent on any matter pending before the Commission for two years following their cessation from office. No spouse or relative by consanguinity or affinity within the fourth civil degree of any of the Commissioners, the Chairperson and the Executive Director of the Commission may appear as counsel nor agent on any matter pending before the Commission or transact business directly or indirectly therein during incumbency and within two years from cessation of office.

Powers and functions of the Commission

Section 12 of the PCA enumerates the powers and functions of the PCC. Of particular relevance for this publication are powers and functions to:

- Investigate, hear and decide cases involving any violation of this Act and other existing competition laws *motu proprio* or upon receipt of a complaint from an interested party or upon referral from a regulator, and institute appropriate civil or criminal proceedings.
- Review proposed mergers and acquisitions, and prohibit mergers and acquisitions if they would substantially prevent or lessen competition in the relevant market.
- Conduct administrative proceedings and impose sanctions, fines or penalties for any breach of the Act or any breach of its implementing rules and regulations (IRRs).
- Issue subpoenas *duces tecum* and subpoenas *ad testificandum* to require the production of books, records, or other relevant documents or data, or to require personal appearances and summon witnesses.
- Subject to court order, undertake inspections of business premises and other offices, land and vehicles used by the entity if the PCC reasonably suspects that books, tax records, or other relevant documents are kept there, in order to preserve any evidence.
- Issue adjustment or divestiture orders, including orders for corporate reorganisation, provided either that there is no equally effective behavioural remedy, or that any equally effective behavioural remedy would be more burdensome for the enterprise concerned than the structural remedy.
- Advocate pro-competitive policies by reviewing economic and administrative regulations, *motu proprio* or upon request, to assess whether they adversely affect competition –and counselling the concerned agencies against such regulations –and by advising the Executive on the competitive implications of government actions, policies and programmes.

Resources of the Commission

Pursuant to Section 11 of the PCA, the Commission shall appoint, fix the compensation, and determine the status, qualifications, and duties of an adequate staff, which shall include an Executive Director of the Commission. The Executive Director shall be appointed by the Commission and shall have relevant experience in any of the fields of law, economics, commerce, management, finance, or engineering for at least ten years. The members of the technical staff, except those performing purely clerical functions, shall

possess at least a bachelor's degree in any of the following lines of specialisation: economics, law, finance, commerce, engineering, accounting, or management.

The PCC formulates its budget based on strategic objectives/issues, priority areas and directives set by the Commission. Initially, the Department of Budget and Management (DBM) provides a guaranteed budget allocation (Tier 1 budget) based on the PCC's historical financial performance and absorptive capacity. Over and above the Tier 1 budget, additional budget proposals (Tier 2 budget) are likewise submitted depending on the set targets and requirements of the agency. The total Tier 1 and 2 budget proposals is submitted to the DBM for inclusion in the National Expenditure Program and thereafter submitted by the DBM to the legislature for enactment of the General Appropriations Act (GAA). With the GAA, the agency may proceed with its actual expenditures subject to the General Provisions of the GAA and the budgeting, auditing, accounting, and reporting rules and regulations set by the oversight agencies.

The table below provides the PCC's budget and the number of staff working in the MAO in the years 2017-21.

Table 2.2. PCC's total budget and the number of staff-working in MAO

Year	Budget	Number of people working in the Mergers and Acquisitions Office
2017	10 777 377	20
2018	8 810 000	23
2019	9 827 142	23
2020	8 395 409	28
2021	11 870 497	23

Source: PCC.

For the staff working in the MAO, the breakdown by academic background is set out in the table below.

Table 2.3. Academic background of the staff working in MAO in 2017 and 2021

Academic background	2017	2021
Law	14	16
Economics	4	N/A
Other university degree	5	6
Non-degree holder	1	1
TOTAL	24	23

Source: PCC.

The number of staff with academic backgrounds of law and economics for the two periods remain almost the same. The increase in the number of staff holding 'other university degrees' may be attributed to the approval by the management for the MAO to set aside a budget for additional personnel.

With Respect to the institutional setting that allows for the use of economic analysis in merger review, competition authorities have adopted a variety of organisational structures, including economists being directly involved in cases, independent economic units, or hybrid models.

In the case of the PCC, out of 23 people who were working in MAO in 2021, 6 of them were economists (representing 26% of their staff). Moreover, PCC has an independent economics unit. While this unit's main responsibilities are related to market studies, every merger review has at least one of the economists from the unit as part of the case team.

While there is not a model that seems more successful than the others, there are key aspects of an efficient use of economic analysis in merger review that applies regardless of the institutional setting selected by the authorities. These aspects relate to the existence of guidance on the objective of economic analysis, the assumptions underlying the analysis, the appropriateness of the techniques used, the type of data that is fit for purpose, the transparency and replicability of the analysis and the robustness of the results (OECD, 2020, p. 52^[9]).

Staff with ‘other university degree’ are mostly Legal Assistants who form part of the case teams and implement data management for the MAO, and administrative assistants who are assigned a variety of tasks. These personnel may be employed through the Human Capital Management Division.

Accountability of the Commission

Section 49 of the PCA provides that, to oversee the implementation of the PCA, the PCC’s work is to be overseen by the Congressional Oversight Committee on Competition (COCC). The Committee is jointly chaired by the Chairpersons of the Senate Committee on Trade and Commerce and the House of Representatives Committee on Economic Affairs. The Secretariat of the Committee is drawn from personnel of the committees comprising the Congressional Oversight Committee.

The PCC is accountable for its targets based on the submitted General Appropriations Act (GAA) Outcome Indicators and Output Indicators. These were submitted to Department of Budget and Management every year when requesting for budget allocation.

Separation between investigation and decision-making

Formally, there is no distinction in the PCA between the Commission and other parts of the PCC, such as the Mergers and Acquisitions Office. Section 12 of the PCA provides for investigative and decision-making powers to the PCC without discriminating which office is in charge of such functions. This means that the legislator in the Philippines provided for a single integrated agency model approach, where the powers were given to the PCC to investigate and adjudicate.

In practice, however, there seems to be a tendency towards a structure of separation of powers within the PCC, with investigate powers lying with the Mergers and Acquisitions Office, and the decision-making power with the Commission. It is the OECD’s understanding that communication between the two bodies, while informal, is limited to the presentation of the cases at the end of phase 1 reviews and prior the issuance of the Statement of Concerns.

2.2. Analysis of the review powers and procedure

2.2.1. Independence and accountability

Within the institutional design of a competition authority, aspects such as its independence, accountability and efficiency in the decision-making are fundamental. This seems to be a prerequisite for the effective enforcement of competition rules, as authorities make decisions based on legal and economic grounds solely, rather than on political considerations (OECD, 2016^[10]). The authority’s composition, organisational structure, appointment of officials and powers and functions assigned play a key role in achieving such institutional objectives.

The 2012 OECD Recommendation of the Council on Regulatory Policy and Governance recommends that there is a need to have an independent agency to maintain public confidence, when both government and private agencies are regulated under the same framework, and to protect the agency’s impartiality when its decisions have significant impact on regulated parties⁶ (OECD, 2012^[11]). Competition authorities fulfil the three conditions outlined in the OECD Recommendation cited above. Moreover, the recommendation

endorses that there should be public accountability that clearly defines that the agency performs its duties with the necessary expertise, as well as integrity, honesty, and objectivity.

This means that establishing the competition regulator with a degree of independence, both from those it regulates and from government, can provide greater confidence and trust that regulatory decisions are made with integrity. With respect to merger control, this involves complex legal and economic assessment that normally requires a degree of discretion to deal with case-specific facts, market dynamics and key developments. Furthermore, independence provides a more predictable merger regime.

The degree of independence of competition authorities varies considerably across jurisdictions and there is no one-size-fits-all structure or standards. The institutional setting of a competition authority highly depends on political, legal, cultural, and institutional history of each jurisdiction and the evolution of their competition culture and enforcement. However, there are some factors taken into account to evaluate the independence of agencies, such as the powers and functions of the authority, the appointment of the head of agency (or board of directors), the integration of the agency into the government structure and the autonomy in budget (OECD, 2016, p. 15_[12]). Fixed terms, clear rules for dismissing board members, as well as conflict of interest and cooling-off periods have been identified as crucial to minimise opportunities for undue pressure from third parties that undermine the independency of the authorities (OECD, 2016, p. 76_[12]).

Given that the Commission is the ultimate responsible for the decisions of the authority, the protection of their decision-making process from undue influence is crucial. The independence of the decision-making body can be affected by factors such as how the board/head is nominated, appointed, and dismissed, and the rules of transparency, objectivity and quality that are involved in such processes (OECD, 2016, p. 11_[10]).

There are different appointment processes that can assure transparency. One of them involves the existence of autonomous nominating committees, where candidates are selected, process after which either the central government or the senate make a final decision. This is the case of Mexico, where Commissioners undergo an impartial examination process through an autonomous committee that generates a list of candidates for the President of the country to select nominees that are later ratified by the Senate.⁷ Similarly, in Israel, a search committee nominates candidates first, among which the Minister of Economy makes the appointment for the head of the authority.⁸ In the United Kingdom, Board Members are appointed by the Civil Service offices after the advice of the Nominations Committee.⁹

Fixed terms for the appointments can also contribute to objectivity and impartiality of the decisions of the decision makers of the authorities. As regards the duration, longer terms are seen to be more in line with the principle of independence, particularly, those that are longer than the term of the appointing authority (OECD, 2014_[13]). Moreover, many jurisdictions have rules that allow dismissal only in limited and prescribed circumstances, such as gross misconduct, criminal conviction, severe breach of rules, or impossibility to perform the assigned duties (OECD, 2015, p. 6_[14]).

In the Philippines, as explained above, the PCC is an independent body that is attached to the Office of the President. Nevertheless, neither the Office of the President involves itself in any of the matters handled by the PCC, nor is the PCC required to elevate any matters to the Office of the President for approval.

Besides, there is clear criteria for the appointment and dismissal of the Commissioners by the President. There is a fixed term accompanied with protection for the appointment and tenure of the Chairperson and the Commissioners of the PCC. Furthermore, the directors undergo a standard selection process on the basis of merit, according to the procedures in the PCC Merit and Selection Plan.

Procedures to set budgets also play a crucial role on the degree of independence of the authorities. While sufficient budgets are a fundamental condition to ensure effectiveness, their size and source also affect the independence of the authority. Competition authorities' budgets generally come from general public revenues and are adjusted according to the authority's enforcement activities levels and performance (OECD, 2016, p. 14_[10]). Three main aspects to consider on budget allocation processes to guarantee

independence are the frequency of budget allocation, the sources of funding, and the persistence of the budget during economic constraints.

Firstly, it is observed that multi-annual allocation processes might be less contingent to short-term considerations and, thus, more difficult to influence (OECD, 2016^[12]). Secondly, a combination of different sources and including self-funding mechanisms that complement general public revenues or sources that are not entirely dependent on the government's discretion might provide protection from undue political interference (World Bank, 2019, p. 22^[15]). Competition authorities in jurisdictions such as Canada, Austria, Portugal, the United States and Zambia fund themselves partially through merger filing fees. In Portugal, for example, the competition authority receives some of its funding through the fines imposed¹⁰ and from other regulators. Finally, other authorities such as the Italian and Turkish ones involve certain taxes or contributions levied on undertakings.¹¹ It is important to take into account that these alternate sources might suffer variability and bias risks that should be assessed when defining the sources of the authority in a specific jurisdiction. Finally, it is imperative that competition authorities continue to be adequately equipped to perform their duties effectively in periods of economic downturn, where competition law enforcement is needed to prevent further harm to markets and incentivise economic growth (OECD, 2015, p. 7^[14]).

With respect to its budget, the PCC has an annual budget based on general public revenues. The authority formulates it based on the strategic objectives, directives, and priority areas. This proposal is submitted for inclusion in the National Expenditure Program and thereafter submitted to the legislature for enactment of the General Appropriations Act (GAA). With the GAA, the agency may proceed independently with its actual expenditures subject to the General Provisions of the GAA.

While in the Philippines there are merger filing fees, including fees to go to Phase II, these are not part of the authority's budget directly but go to the central government resources.

Another relevant aspect of the institutional setting is the staff dedicated to merger review. With regards to the appointment of staff that works at the Mergers and Acquisitions office and their background, as it could be seen from the above, they are appointed following procedures from the Human Capital Management Division and hold university degrees related to their tasks, such as economics and law. Stakeholders generally indicated that the MAO staff are highly professional and very responsive, which is a key element in a time-sensitive merger review. At the same time, a few stakeholders have indicated a perception that the turnover of the MAO is relatively high, which would seem to be affecting the accumulation of industry knowledge within the office. In this respect, consistency in MAO should further enhance its capacity to efficiently handle merger cases.

While ensuring that the competition authority hires appropriately qualified staff, it also should be able to retain it and build the necessary professional knowledge within the organisation. Human resources policies that give adequate incentives for staff to stay in the authority in a long-term basis are key for a well-functioning authority (OECD, 2016, p. 16^[10]). For instance, the creation of a work environment that supports and rewards professional development can help to compensate remuneration gaps with the private sector and, hence, keeping competition experts as part of the authority's staff (OECD-ADB, 2021, p. 44^[16]). This includes non-monetary incentives such as special attention to the sense of public service, a better work-life balance, career development opportunities within the authorities, possibility to switch between different policy areas, among others (OECD, 2015, p. 2^[14]). When the staff of the competition authority is part of the public service, movement between government agencies and retirement schemes might also be part of the tools to retain high quality staff (OECD, 2012, p. 45^[17]). The reputation of the authority within society is often another source to do so.

As for salary levels, the PCC salaries are set according to standardised salaries for all government employees in the Philippines.¹² The PCC has an employee retention programme that is focused on the development of practices to secure and retain skilled and valuable employees. The programme covers intrinsic rewards,¹³ as well as extrinsic rewards like direct and indirect compensations.¹⁴ Moreover, it considers variable compensations, such as grants on certain qualifications or special services and indirect

compensations that include paid leaves and social benefits. While there are provisions on rewards and recognition, which have been recognised as essential non-monetary incentives, these have not been implemented yet.

Taken together these safeguards, powers and resources mean that whilst the PCC has a high degree of independence, it needs to bolster its capacity to retain its employees.

2.2.2. Decision-making rules and recusal

In the Philippines, regarding the adoption of any rule, ruling, order, resolution, decision, or other acts of the Commission, three members (out of five) of the Commission constitute a quorum and the affirmative vote of three members is necessary. In case of a tied vote for a merger decision (this happens, for example, when one commissioner refrains from voting and the remaining four commissioners form a tied vote of 2-2), a tied vote means that the merger is deemed approved pursuant to Section 17 of the PCA.

Currently, there are no clear guidance rules for when recusal is applicable nor are there specific rules to avoid a tie. This could be improved by complementing the clear guidance on criteria for recusal with principles for tied voting, such as preferential or quality vote for the Chairperson.

Neither the PCA nor other relevant legal texts provide a list of circumstances where one or more Commissioners are allowed to or even required to refrain from voting. While the PCA provides that “[Commissioners] shall strictly avoid conflict of interest in the conduct of their office” (Section 8), it does not provide for any further guidance as to under which circumstances and the procedure to follow for when one or more commissioners are required to refrain from voting.

By way of example, the French law n° 2013-907 of 11 October 2013 on transparency in public administration defines that conflict of interest constitutes any situation of interference between a public interest and public or private interests which is likely to influence or appear to influence the independent, impartial, and objective exercise of a function and, in case of conflict of interest, members of the authority’s college are required to refrain from voting.

Providing clear guidance on which conditions could constitute conflict of interest would minimise the over or under-usage of this recusal mechanism, as it can have implications on actual or perceived decision making. These could be provided for in the PCA or in the internal rules of procedure of the PCC.

2.2.3. Separation between investigation and decision-making

As explained before, there seems to be an informal distinction between the investigative and the decision-making bodies inside the PCC. This separate approach is used by some competition authorities around the world, while others follow a unified one, where the same body that investigates also makes the decision. Although there are advantages and disadvantages in each of the systems, it is clear from the wide experience internationally that it is possible to have an efficient and fair system based on an internal separation of functions within a single integrated agency model (OECD, 2018, p. 89^[18]).

While in the Philippines, this informal separation is accompanied with scarce contact between the two bodies, it is not supported by specific provisions in the law or sufficient resources, mainly for the decision-making. A separate decision-making structure would require distinct teams with sufficient technical staff to review the details of a transaction and its competitive effects. Although the offices of the Commissioners employ technical staff that usually have at least one economist and one lawyer, in practice, potential additional analysis has to be done by MAO given the lack of sufficient human resources at the Commissioners’ level to perform such studies. Moreover, the Adjudication Division, which is the one in charge of drafting the decisions made by the Commission, does not have any economists to analyse or help draft the economic analysis, an important component of merger control. At present, an economist, either from MAO or from the Commissioners’ offices, assists the Adjudication Division in this task.

However, this assistance is limited to specific circumstances. This is one of the reasons that may explain why the final decisions are very short and not reasoned, being limited to the legal conclusions (see section 4 or a discussion on how this impacts transparency).

There are two possible solutions: one is to maintain the investigation and decision-making unitary, with MAO serving the Commission with the technical analysis, with safeguards in place to ensure internal scrutiny and that merging and interested third parties can participate actively in the process and are actively heard. Another is to separate the adjudication from the investigate functions but ensuring a full team of economists and lawyers that can separately and effectively review mergers with specialised knowledge in both teams.

Moreover, at the Commission Level itself, according to the requirements in Section 6 of the PCA, at least one Commissioner must hold an economics degree and at least one must be a member of the Philippine Bar. This means that in practice, the requirement is fulfilled if only one Commissioner has a background in economics and one in law. Ensuring continued know-how of competition economics at Commission Level, either via appointment of more Economists or training programmes upon on-boarding could help ensuring economic reasoning in the PCC decisions.

Finally, multiple stakeholders highlighted that it is not clear how the decision-making process takes place once a transaction start being reviewed by the Commission. Therefore, providing general guidance and clear procedures on the decision-making process is also desirable.

Recommendations

Key Recommendation 2.1

Set clear and binding Rules of Procedure for the adjudication of merger cases in cases of tied voting in Commission. One possible solution could be to include the possibility for a quality vote to the Chairperson. This is important considering that a tied vote at Commission Level automatically leads to an approval of a given notified transaction.

Key Recommendation 2.2

The PCC should set clear guidance on the criteria for the recusal of Commissioners for decision making. This guidance should specify under which circumstances one or more Commissioners are required or allowed to refrain from voting, including criteria on how and when the recusal should be made.

Key Recommendation 2.3

The PCC should rely on comprehensive technical assessment for the decisions made by the Commission. This could either be done by accompanying the internal separation between investigative and decision-making bodies with a full team with specialised knowledge to analyse the mergers, or by eliminating the internal separation and relying on the assessment done by the Mergers and Acquisitions Office.

Recommendation 2.4

The PCC should ensure continued know-how of competition economics at Commission Level, either via appointment of more Economists or by competition economics training programmes upon on-boarding.

Recommendation 2.5

The PCC should ensure better knowledge management by developing and implementing a human resources policy capable of both attracting and retaining qualified staff. This policy should include staff retention schemes.

3 Merger control jurisdiction in the Philippines

3.1. Overview of the current legal framework

The current legal framework for merger control in the Philippines sets out a mandatory pre-notification system architecture. Section 16 of the PCA provides powers to the PCC to review mergers and acquisitions. Section 17 of the PCA makes notification to the PCC of mergers and acquisitions mandatory before any agreement or transaction is consummated, with suspensory effects until the decision has been made. An agreement consummated in violation of this requirement “*shall be considered void and subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction*”.

Section 17 also provides for value of a transaction thresholds for notification and gives powers to the PCC to add other criteria for notification. When the PCC has not taken a decision before the legal periods set out in the law (30 or 90 days) the merger or acquisition shall be considered approved. The Commission also has *motu proprio* review powers for non-notified transactions.

3.1.1. Types of transactions covered

Under Section 16 of the PCA, a merger in the Philippines includes transactions to combine two or more entities into an existing entity or to form a new one.¹⁵ According to the Implementing Rules and Regulations of Republic Act 10667 (PCA-IRR), joint ventures¹⁶ are also included in the definition of mergers and, thus, are subject to merger control.¹⁷ The PCC issued, in 2018, guidelines on Notification of Joint Ventures to offer clarification and explanation concerning such transactions and the application of thresholds under the PCA-IRR (PCC, 2018).

Acquisitions refer to the purchase of securities or assets, through contract or other means, for obtaining control by one entity of the whole or part of another; two or more entities over another; or one or more entities over one or more entities. The law defines control as the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise.

According to the PCA-IRR, control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than 50% of the voting power of an entity, unless in exceptional circumstances it can clearly be demonstrated that such ownership does not constitute control. It can also exist even when an entity owns 50% or less of the voting power of another entity if:

- there is power over more than 50% of the voting rights by virtue of an agreement with investors
- there is power to direct or govern the financial and operating policies of the entity under a statute or agreement
- there is power to appoint or remove the majority of the members of the board of directors or equivalent governing body

- there is power to cast the majority votes at meetings of the board of directors or equivalent governing body
- there exists ownership over, or the right to use all or a significant part of, the assets of the entity
- there exist rights or contracts which confer decisive influence on the decisions of the entity.¹⁸

As regards Joint Ventures, joint control refers to the ability of the partners in the joint venture to substantially influence or direct its actions or decisions, either by determining them (positive control) or by vetoing them (negative control) (PCC, 2018, p. 10_[19]). The guidelines on Joint Ventures present some examples of joint control and emphasises that a case-by-case analysis should be done by the PCC to evaluate if a joint venture is subject to merger notification.

According to multiple clarificatory notes issued by the PCC, the following transactions are exempt from the rules on compulsory notification:

- internal restructuring within a group of companies wherein the acquired and acquiring entity have the same ultimate parent entity¹⁹
- consolidation of ownership wherein the merger or acquisition involves several entities controlled by the same natural person and there is no change in control over the entity post-transaction²⁰
- land acquisition not for the purpose of obtaining control²¹
- joint ventures formed by winning bidder(s) in solicited public-private partnership (PPP) projects under the Build Operate Transfer Law, upon application by the procuring government agency.²²

The PCA provides no further exception, exclusion or exemption of the entities or sectors that could fall outside merger control.

3.1.2. Notification system

Should a notification of a merger or an acquisition to the PCC be required, then all acquiring and acquired pre-acquisition ultimate parent entities²³ or any entity authorised by the ultimate parent entity to file notification on its behalf must each submit a Notification Form and comply with the procedure. In the case of a joint venture, the contributing entities are considered as the acquiring ones and the joint venture as the acquired entity.

3.1.3. Notification threshold levels

Regarding the notification thresholds, Section 17 imposes compulsory ex ante notification when the value of a transaction exceeds PHP 1 billion. In such cases, the parties are prohibited from consummating their agreement until 30 days after providing notification to the PCC. In addition to the size-of-transaction threshold, the PCA allows for the PCC to set out “*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 PCC.

Under these powers, the PCA has determined that parties to a merger or acquisition are required to notify when: (i) the aggregate annual gross revenues or value of assets in the Philippines of the ultimate parent entity of at least one of the entities, including all the entities that the ultimate parent entity controls, exceeds PHP 1 billion (the so-called **size of person**) and (ii) one of the following situations apply referring to the value of the transaction (the so-called **size of transaction**):²⁴

- With respect to a proposed merger or acquisition of assets **in the Philippines** if the aggregate value of assets of the acquired entity exceeds PHP 1 billion **or** the gross revenues generated by the acquired assets exceed PHP 1 billion.
- With respect to a proposed merger or acquisition of assets **outside the Philippines** if the aggregate value of assets in the Philippines of the acquiring entity exceeds PHP 1 billion **and** the

gross revenues generated in or into the Philippines by the acquired assets outside the Philippines exceed PHP 1 billion

- With respect to a proposed merger or acquisition of assets **in and outside the Philippines** if the aggregate value of assets in the Philippines of the acquiring entity exceeds PHP 1 billion **and** the gross revenues generated in or into the Philippines by the acquired assets in or outside the Philippines collectively exceed PHP 1 billion
- With respect to a proposed acquisition of voting shares of a corporation or an interest in a non-corporate entity if the aggregate value of assets owned by the corporation or non-corporate entity other than assets that are shares of any of those corporations exceeds PHP 1 billion **or** the gross revenues from sales in, into or from the Philippines of the corporation or non-corporate unit other than the shares exceed PHP 1 billion **and if** as a result of the acquisition the acquirer would own voting shares or interest that carry the following percentages of all the votes or profits: 35% or 50% if it already own more than 35% before.

Moreover, it establishes that another notification will be required if an entity, that has already exceeded the 35% threshold for an acquisition of voting shares, or the 35% threshold for an acquisition of an interest in a non-corporate entity, will subsequently exceed 50% threshold after making a further acquisition of either voting shares or an interest in a non-corporate entity.

For joint ventures, mandatory notification is required if the aggregate value of assets to be combined exceeds PHP one billion or the gross revenues generated by the assets to be combined exceed PHP one billion. This should include all assets agreed to be transferred at any point and any amount of credit or obligations extended or guaranteed at any time.

To clarify the calculation of these thresholds, the PCC has issued Guidelines on the Computation of Merger Notification Threshold (the “Merger Rules”).²⁵

As for the values of the thresholds, the PCC has regularly adjusted them. In 2018, it released a Policy Statement²⁶ on the need for adjustment of the merger thresholds based on factors such as the number of notifications being filed to the PCC, number of past transactions that had entered Phase II review, and an adjustment needed based on GDP growth rates to maintain real value of the thresholds over time. Moreover, the Statement set the **size-of-person** thresholds higher than the **size-of-transaction** one to allow for a more effective filter of notified transactions. Consequently, on 1 March 2018, the PCC issued a Memorandum²⁷ increasing the thresholds. For **size-of-person**, it went from one to five billion and for **size-of-transaction** from one to two billion.

The Memorandum also considered an automatic adjustment of the threshold levels beginning in March 2019 every 1 March, using the Philippine Statistics Authority’s (PSA) official estimate of the Nominal Gross Domestic Product (GDP) growth of the previous year. By March 2020, prior to COVID-19, the thresholds were of 2.4 billion for the **size of transaction** and 6 billion for the **size of person**.²⁸ This accounted for 0.013% and 0.033% of its nominal GDP²⁹ for 2020 and were based on a GDP growth of 6.8% from 2018 to 2019.

On 15 September 2020, the Bayanihan to Recover as One Republic Act No. 11494, also known as Bayanihan 2, was enacted with the objective to stimulate economic recovery amidst the pandemic.³⁰ Section 4 of the law exempted from compulsory notification those mergers or acquisitions with transaction values below PHP 50 billion for the two years of effectivity of the law, starting on 15 September 2020. This represented an increase in the size of transaction threshold of 20 times with respect to the previous level. Additionally, it suspended PCC’s exercise its *motu proprio* review powers for one year, until September 2021. Parties below the threshold could choose to voluntarily notify their transaction to undergo merger review. This threshold represented 0.279% of the Philippines’ GDP for 2020.

3.2. Analysis of the legal instruments

This section will analyse the current legal framework and how it fares according to the OECD Recommendation on Merger Review, international good practices, making recommendations on how it may be improved.

3.2.1. Type of transactions covered

The definition of a transaction for the purpose of merger control review plays a key role in well-functioning regimes to identify those transactions that are suitable for review as they result in a more durable combination of businesses or assets and that have a reasonable likelihood of outcomes that could conflict with the policy goals of a competition law regime (OECD, 2013, p. 13_[20]).

Definitions of what constitutes a merger or an acquisition can either be based on objective, numerical criteria (percentage of shares' acquisition) or on more subjective or economic criteria with the purpose of aligning the definition to a situation where the relationship between the parties changes and leads to competition concerns (OECD, 2016, p. 5_[21]). Each approach has advantages and disadvantages, and some merger review regimes use a combination of both.³¹

In the Philippines, the PCA includes both subjective and objective criteria. Transactions are covered when it results in the acquirer owning more than 35% of the voting shares or if it acquires joint control over the target. This reflects an objective and clear approach that makes it easier to assess when minority interests' acquisitions need to be notified to the PCC. Under the PCA, joint ventures are not explicitly covered. Joint Ventures are however considered in the Implementing Rules and Regulations of Republic Act 10667 (PCA-IRR) as being within the definition of mergers and, thus, subject to merger control.

Furthermore, the PCC has issued different notes to clarify the type of transactions that are covered and exempt from the rules of compulsory notification.³² Different stakeholders agreed on the fact that, with time and experience, the PCC has made efforts to make it clearer which transactions are caught by merger control and which specific circumstances exempt them from notification. A general practice in such cases is for companies to ask the PCC for a non-coverage letter, setting out that the transaction did not need to be notified.

Some merger regimes such as those in Japan, Germany, Canada, and Brazil consider percentage thresholds for share acquisition that lie between 10% and 50%, depending on the jurisdiction.³³ The European Union Merger control uses subjective criteria with a definition of control that involves the possibility of exercising decisive influence on an undertaking.³⁴ This standard has also been adopted by other regimes such as the ones in the United Kingdom, Germany, and Canada, where the definition of control uses material or significant influence (OECD, 2013, p. 16_[20]).

With respect to joint ventures, there are generally two approaches. Some jurisdictions do not address them separately, as their definition of merger is wide enough as joint ventures will typically include the acquisitions of shares or assets previously independently owned will be used to form a new "enterprise" controlled by the parents, which would be sufficient to bring the transaction under the generally applicable definition of a merger transaction. Others will have joint venture-specific provisions to fit them into the merger transaction definition.

As regards the acquisition of a minority interest, there has been growing recognition that minority shareholdings may have anti-competitive effects in certain circumstances and that merger control regimes should cover those transactions. The OECD has identified the need to establish clear lines between these transactions when they could lead to harmful effects on competition and those that most likely will not to avoid unnecessary costs of reviewing them (OECD, 2013, p. 8_[20]). One common approach used by many jurisdictions is the use of fixed percentage thresholds to define when the acquisition of a minority interest

will be considered a merger. Another approach focuses on whether the holder of a minority interest can exercise a competitively significant influence over the target.

Conclusions

The Philippines follows international good practices on having clear criteria to define and explain the concept of transactions subject to merger review, as it first relies on general “catch-all” definitions of mergers and acquisitions but in the definition of control includes objective and subjective criteria that could trigger a duty to notify a transaction, assuming the notification thresholds are met. Nevertheless, the inclusion of joint ventures in the definition of mergers within the PCA would make it clearer and easier for companies to understand the complete set of transactions covered by merger control.

3.2.2. Notification system

A central issue to be addressed when defining a merger control policy is whether the notification of mergers should be mandatory, voluntary or a combination of both. The choice of a notification system may depend on the legal, institutional, and economic environment of each jurisdiction. In recent years, there have been increasing calls for stricter merger control rules to address the fast-evolving nature of markets and concerns of under-enforcement.³⁵ In the Philippines, some stakeholders have shown some concerns on some discussions on moving to a voluntary regime in the Philippines due to initiatives that were discussed by the Congress.

Comparative merger control law shows that, whether for policy, economic or pragmatic reasons, merger notification systems worldwide are predominantly mandatory, as is the case in the Philippines. Only a handful of jurisdictions have adopted and kept a voluntary notification system. Other jurisdictions in the Association of Southeast Asian Nations – ASEAN have introduced or are planning to introduce economy-wide mandatory merger control rules.

Three out of the four OECD member states which had voluntary merger regimes in 2016 (Australia, Chile, New Zealand, United Kingdom) have recently introduced (or plan to introduce) changes to their merger systems to bring them closer to a mandatory regime. Chile initially opted for a voluntary merger system on the assumption that it was a small economy with few businesses, and that these could be relied upon to self-assess their transactions and approach the Chilean competition authority, Fiscalía Nacional Económica (FNE), when necessary. However, a 2014 review by the OECD found that most stakeholders “*tend to agree that [Chile’s] voluntary notification system [did] not work. At the FNE level, very few mergers were proactively notified by the Parties.*” Thus, the OECD recommended that Chile adopt a mandatory merger regime.³⁶ In 2017, Chile shifted to a mandatory merger control regime.³⁷ The UK is currently analysing a new mandatory merger regime for acquisitions by digital firms that have a “Significant Market Status”.³⁸ In Australia, the leadership of Australia Competition and Consumer Commission (ACCC), noted that the country’s voluntary merger regime is “out of place next to the formal, mandatory and suspensory regimes in most jurisdictions, including the US, Europe and Canada,” and that the current system has resulted in a position where “[ACCC is] forced to negotiate with the merger parties to obtain sufficient information and time to conduct [its] review.” This has prompted the recommendation to shift to a prior notification regime where merger parties must receive clearance from the ACCC before proceeding with the transaction.³⁹

Malaysia, which currently does not have a merger review system, has initiated the process of amending the Competition Act of 2010 to introduce merger control regulations. Once in force, mergers and acquisitions that exceed certain thresholds have to be reviewed by the Malaysia’s Competition Authority.⁴⁰ Cambodia has likewise adopted a merger control regime in its new competition law.⁴¹ The Study on Merger Control Framework prepared by the country’s competition authority, the Consumer Protection, Competition, and Fraud Repression Directorate (CCF), recommended implementing a mandatory

pre-merger notification regime for transactions that breach a certain threshold and requiring transactions that fall below the threshold to be registered with the CCF.⁴²

The following table summarises the main pros and cons of mandatory and voluntary notification systems, in light of the OECD Merger Recommendation (OECD, 2005^[22]) and other international best practices (ICN, 2018^[23]).

Table 3.1. Pros and Cons of mandatory and voluntary notification systems

Notification system	Pros	Cons
Mandatory	<ul style="list-style-type: none"> Does not rely on businesses' own substantive assessment: brighter line with notification thresholds determining notifiability of mergers. Allows concentrating enforcement resources on merger review, rather than on merger detection. Higher potential to prevent anticompetitive mergers occurring in non-transparent or private industries. Raises overall antitrust awareness. Legal certainty. 	<ul style="list-style-type: none"> Potential to focus on problematic or complex mergers since the trigger for notification is a substantive merger assessment.
Voluntary	<ul style="list-style-type: none"> Highly dependent on notification thresholds. Risk of notification resources being spent on unproblematic mergers (type I errors). 	<ul style="list-style-type: none"> Highly dependent on businesses' antitrust awareness and enforcers' screening tools. Triggered by, and highly dependent on, companies' own substantive assessment. Resources needed to screen and detect potentially harmful mergers Higher risk of missing potentially harmful mergers that went unnoticed (type II errors).

Source: Based on OECD (2014^[24]), Assessment of Merger Control in Chile, <https://www.oecd.org/daf/competition/chile-merger-control-2014-en.pdf>.

The OECD has identified and compared the minimum conditions that are required for mandatory and voluntary notification systems to be operational and effective.⁴³ One key finding is that voluntary merger regimes are heavily dependent on businesses' awareness of competition law and policy. Without wide-spread business awareness and a culture of compliance, a voluntary system would solely rely on the competition authority's effective and expansive screening and information gathering resources.

Chile's experience illustrates that voluntary notification systems do not always save the resources of competition authorities and may ultimately add significant costs. FNE spent a substantial part of its resources on screening public information to detect problematic transactions (OECD, 2014, pp. 64-67^[24]). The lack of legal certainty caused by potential ex-officio merger reviews of non-notified transactions by the FNE also proved costly for the transacting parties, FNE, and consumers.

Conclusions

The Philippines' current mandatory notification system follows good international practices. In light of the pros and cons of each notification system and, given the Philippines' current experience and its economic and institutional landscape, keeping a mandatory system may prove more effective, provided that the thresholds are set in clear and objective criteria (see next section). The PCC, having been founded merely 5 years ago, is still in the early stages of promoting awareness about competition law and policy in the Philippines and securing buy-in from stakeholders in the private and public sectors. Absent a strong culture of compliance, shifting to a voluntary merger regime would expose the Philippines to a high risk of missing potentially harmful mergers and acquisitions and to increasing needs for already scarce resources to be allocated to screening for compliance.

3.2.3. Notification threshold levels

Notification thresholds are an essential factor in selecting the mergers that will actually be subject to merger control. Jurisdictional thresholds attempt to strike a balance between the desire to review transactions that are sufficiently material and may harm competition through durable change, and the need to keep merger control manageable and the costs proportionate and reasonable both to the government and to private parties, while focused on transactions that might have a significant impact (OECD, 2016, p. 5^[21]). Their aim is to establish a sufficient nexus with the jurisdiction and to filter transactions that are potentially more likely to raise competition concerns. That does not mean that all notified mergers raise concerns, but that, above the thresholds, they belong to a category of transactions that is presumed to potentially have an impact on competition and therefore require scrutiny. The purpose of notification thresholds is thus to trigger notification and eliminate transactions that will most probably have no material impact in a given jurisdiction. Thresholds that are set too high will result in a number of anticompetitive mergers avoiding merger control scrutiny. On the other hand, if thresholds are set too low, there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and competition authorities (OECD, 2016, p. 5^[21]).

Best international practices show that merger control thresholds should be clear and objective, so that they can be easily assessed by companies and merger control agencies alike. This is echoed by the 2005 Recommendation of the OECD Council on Merger Review (OECD, 2005^[22]). The criteria must clearly establish *what*, *where*, *who*, and *when*.

As for *what*, turnover or value-based thresholds, and size of the company or size of the transaction criteria, as the ones imposed in the Philippines, are generally considered to meet this objective standard and are the most common around the world. One of the reasons is that this information is quantifiable and generally readily available in company accounts.

Moreover, the thresholds should ensure an appropriate local nexus with the jurisdiction, the *where* in the set of objective criteria. The Guidelines on the Computation of Merger Notification Thresholds in the Philippines provide the rules for the geographic allocation of turnover or assets for merger control purposes. The local nexus is provided by the need for revenues from sales in, into or from the Philippines and of assets in the Philippines. As for mergers or acquisitions of assets outside the Philippines, to satisfy the size of the transaction test, both the assets in the Philippines of the acquired entity and the gross revenues in or into the Philippines by the assets to be acquired must exceed the thresholds. In other words, the PCA-IRR clarified the local nexus of assets needed to calculate the value of transactions. In a Policy Statement issued,⁴⁴ the PCC concluded that these clarifications had the effect of limiting notified transactions to those larger in size and with a significant impact in the Philippines.

The *who* refers to whose turnover or assets is relevant. Many jurisdictions require that the thresholds are met at least by the acquired company, others by both parties, among other options. In the Philippines, for the size of person threshold, at least one of the entities' ultimate parent companies must meet the thresholds in annual gross revenues or value of assets. With respect to the size of transaction test, the thresholds need to be met by the revenues generated or assets of the acquired entity.

Finally, to avoid circumvention, successive transactions between the same parties may be captured by the thresholds (*when*). In the Philippines, staggered acquisitions are accounted for in the PCA. Section 17 establishes that successive transactions, or acquisition of parts of one or more entities that take place within a one-year period between the same parties, or any entity they control or are controlled by or are under common control with another entity or entities, shall be treated as one transaction.

Before 2018 two cases were investigated and sanctioned by the PCC for non-compliance with the notification requirements (see Box 3.1). In response to a perceived uncertainty as to how to calculate both size of transaction and size of person of a transaction, the PCC issued Guidelines for the Calculation of Thresholds in the Philippines in March 2018. Stakeholders agreed that after the issuance of the guidelines,

the criteria for calculating the thresholds became clearer and the investigations started by the PCC on violations of compulsory notification were reduced.

Box 3.1. Violation of the compulsory notification requirement under Section 17 of the PCA

Since the merger control regime entered into force in the Philippines, the PCA has sanctioned companies for the violation of the compulsory notification requirement under Section 17 of the PCA in two cases.¹ Both involved the same ultimate parent company, Udenna Corporation. The investigations focused on whether the transactions were covered by the compulsory notification requirements, particularly on whether they breached the thresholds for notification under Rule 4, Section 3 of the PCA-IRR.

In the first case, the issue behind the investigation related to the companies that were under control of the merging parties and whether the value of shares in those companies should be excluded from computing the acquired company's aggregate value of assets for the calculation of the size of transaction threshold. In its decision, the PCC made it clear that for such purposes, the acquired company's shares in entities it controls are indeed excluded but that assets of said controlled corporations are still included in the valuation. Conversely, the value of the acquired company's shares in entities it does not control are included in the computing, but their assets are not.

In the second case, the discussion also referred to the calculation of the size of transaction. Particularly, the parties argued that the purchasing price of the shares of the acquired company were below the thresholds. In its decision, the PCC highlighted that the value of transaction should not be interpreted as the purchase price of the acquired shares, as the PCA-IRR defines the value of transaction as either the aggregate value of assets or the gross revenue from sales.

In both investigations, the decisions of the PCC confirmed the violation of the notification requirements and fined the companies with values representing 1% and 2% of the value of the transaction. Moreover, the first transaction was declared void.

Note: 1. PCC Cases No. M-2017-001 and M-2018-003.

Source: Commission Decisions No. M-2017-001 and 021-M-02/2018.

Another relevant point of discussion with respect to the thresholds being clear and objective in the Philippines has been the timeframe and type of balance sheets to use for their calculation. On a case decided in 2019, the PCC clarified concepts and timing considerations on this respect (see Box 3.2).

Box 3.2. PCC's decision on the SPARC / Just Solar case

In 2019, the PCC opened an investigation for a potential violation of Section 17 of the PCA for failure to comply with the compulsory notification requirements in the acquisition of shares by Just Solar Corporation of SPARC-Solar Powered Agri-Rural Communities Corporation comprised by individual sellers, part of the Soriano Group.

One of the issues raised to the Commission referred to which instrument was the proper basis to determine if the aggregate value of assets of the acquired company breached the size of transaction thresholds. Four instruments were probable to be considered and while one of them led to a breach in the thresholds, the others did not: 2016 Audited Financial Statements, 2016 Re-issued Audited Financial Statement, 2017 Audited Financial Statement, and the Interim Balance Sheets. The discussion as for the use of the latter was also related to the use of the last regularly prepared balance sheet, contained in the PCA-IRR, and the definition of “regularly prepared”.

For its decision, the Commission applied the rule on availability and proximity, this is, to use the financial data that was available proximately before or at the time of the transaction. The PCC concluded that the most accurate and usable data was that of the balance sheets, as it was proved that they were regularly prepared. The PCC found that monthly balance sheets were regularly prepared and even used by the board of the company in multiple occasions, and hence, that they reflected the financial reality of the company.

Based on these, the PCC concluded that the parties did not breach the thresholds.

The use of the financial instruments to calculate thresholds and definitions applicable to them were clarified by the PCC in the Threshold Guidelines issued in March 2018.

Source: Commission Decision No. 05-M-008/2021.

Once the criteria are clear as to their objective and nature, one key consideration is the setting of the numerical levels. The obvious question that arises is above what levels of turnover or transaction value should the parties notify their transaction? Although there is no unique rule or general principle for the determination of the numerical threshold levels, there is some consensus on the need to consider various factors such as Gross Domestic Product (GDP), size of companies operating within the territory, and average number of transactions that can be effectively reviewed (OECD, 2014, p. 79^[24]) and (Botta, 2011, p. 149^[25]).

One first analysis that can be done is to look for the size of companies operating in the Philippines. For instance, small and medium-sized enterprises (SMEs) are defined in the Philippines by number of workers and total assets. To be considered a large enterprise, a company must have assets of more than PHP 100 million and with such threshold, SMEs represented in 2020 99.53% of the total number of businesses in the formal sector in the Philippines.⁴⁵ This means that a merger control threshold of PHP 2.4 billion for size of the person, already captures less than 0.5% of the companies in the jurisdiction.⁴⁶

If revenue were considered instead of assets, the landscape would be similar. According to the 2018 Census of Business and Industry in the Philippines,⁴⁷ the average revenue by formal establishment was just over PHP 73 million, going to up to PHP 241 million in the industry sector. Although these represent only averages, they can account for the fact that thresholds close to PHP 2 billion already capture only a small subset of the companies in the country.

Another way to assess the adequate levels of thresholds, apart from analysing internal market statistics on the size of person, is to look at thresholds of countries with similar GDP levels and effective merger

control mechanisms. This criterion, normally, relates to the previous one on the size of the companies. For instance, smaller economies tend to have firms that are smaller compared to firms that are in bigger economies. This may explain why thresholds are lower in smaller economies than in larger economies.

In 2017, when setting the 1 billion thresholds, the PCC issued a policy statement⁴⁸ with an exercise of this nature. On a cross-country comparison, the PCC found that 1 billion thresholds were similar to economies of comparable size such as Colombia and South Africa. In the same statement, it also concluded that given the size of companies in the Philippines, less than 1% would be subject to mandatory notification, similar conclusions as the ones presented above.

As mentioned before, the thresholds in force in 2020, before COVID-19, represented 0.013% of the GDP in 2020 for the size of transaction and 0.033% for the size of person. Once adjusted by the Bayanihan 2, the size of transaction represented 0.279% of the GDP for 2020, as the new threshold represented close to 20 times the previous ones.

The table below summarises the countries that use size of person thresholds in either revenues or assets within the territory,⁴⁹ their level, and the jurisdictions' GDP, as well as the thresholds as a percentage of GDP.

Table 3.2. Size of person thresholds in different jurisdictions and their percentage of GDP in 2020

Jurisdiction	GDP 2020 (Current USD in millions)	Threshold level (USD)	% GDP
Philippines	USD 361 489	USD 48 363 605	0.013%
Honduras	USD 23 662	USD 24 849 717	0.105%
Viet Nam	USD 271 158	USD 129 263 718	0.048%
Indonesia	USD 1 058 325	USD 171 425 818	0.016%
Mexico	USD 107 392	USD 21 496 127	0.020%
Canada	USD 1 645 423	USD 298 251 447	0.018%
Colombia	USD 271 438	USD 16 238 801	0.006%
Costa Rica	USD 61 847	USD 23 706 585	0.038%
India*	USD 2 660 245	USD 269 450 999	0.010%
		USD 1 077 803 994	0.041%
Korea**	USD 1 637 896	USD 254 180 033	0.016%
		USD 25 418 003	0.002%
South Africa ***	USD 335 442	USD 36 453 966	0.011%
		USD 400 993 621	0.120%
United States	USD 20 953 030	USD 403 900 000	0.002%

Notes: some of the threshold levels above consider both individual and combined assets for all the parties involved in the transaction while others only require one of the parties to meet the threshold.

* India has one threshold for the size of the enterprise and one for the size of the economic group.

** The first threshold represents the size of at least one party, while the second one refers to the size of the other parties involved in the transaction.

*** South Africa considers the first threshold for the obligation to notify a merger but considers a second threshold for mergers to be classified as large.

Source: Thresholds were obtained for the latest updates published in the competition authorities' websites. GDP data and Exchange Rates were taken from the World Bank National Accounts Database.

It is important to note that most of the jurisdictions have additional considerations or alternative thresholds, as it is common for countries to rely on two or more criteria simultaneously. The criteria could be used either cumulatively or alternatively. In this sense, the previous exercise does not account for the possible multiplicity of tests or for particularities of their application in each of the jurisdictions presented, but it has an illustrative purpose. It allows presenting how the size of person threshold levels can compare to the size of the economies, considered by using the GDP of such jurisdictions.

While the size of person thresholds in the sample represents on average 0.031% of the jurisdictions' GDP, the median is only 0.017%. Compared to the 0.013% that the threshold level in the Philippines represent of its GDP, and without considering any other variables, it could be seen that the levels in the Philippines are consistent to the ones set by other jurisdictions. This exercise is relevant as most of the countries presented above can also relate to the Philippines in contexts such as geographical proximity or regional association,⁵⁰ size of the economy (in terms of either GDP or GDP per capita)⁵¹ or size of the population.⁵²

As for the size of the transaction, the table below summarises the countries that use size of transaction thresholds, their level, and the jurisdictions' GDP, as well as the thresholds as a percentage of GDP.

Table 3.3. Size of transaction thresholds in different jurisdictions and their percentage of GDP in 2020

Jurisdiction	GDP 2020 (Current USD in millions)	Threshold level (USD)	% GDP
Philippines (before Bayanihan 2)	USD 361 489	USD 120 909 012	0.033%
Philippines (Bayanihan 2)		USD 1 007 575 098	0.279%
Argentina	USD 389 288	USD 9, 527, 708	0.002%
Viet Nam	USD 271 158	USD 43 087 906	0.016%
Germany	USD 3 846 414	USD 456 878 444	0.012%
Mexico	USD 107 392	USD 8 061 048	0.008%
Austria	USD 433 258	USD 228 439 560	0.053%
Canada	USD 1 645 423	USD 69 343 462	0.004%
South Africa	USD 335 442	USD 6 075 661	0.002%
		USD 11 543 756	0.003%
United States	USD 20 953 030	USD 101 000 000	0.000%

Note: South Africa considers the first threshold for the obligation to notify a merger but considers a second threshold for mergers to be classified as large.

Source: Thresholds were obtained for the latest updates published in the competition authorities' websites. GDP data and Exchange Rates were taken from the World Bank National Accounts Database.

As value of transaction thresholds are, again, often used simultaneously with other criteria, this exercise also presents limitations but allows for comparisons between jurisdictional thresholds. The size of transaction thresholds in the sample represent on average 0.013% of the jurisdictions' GDP, while the median proportion is 0.006%. Compared to the 0.033% that the threshold level in the Philippines represented of its GDP before the Bayanihan 2 Act, and without considering any other variables, it could be seen that the levels in the Philippines were already slightly higher than the sample.

Likewise, some of the jurisdictions considered in this case have other similarities with the Philippines. Argentina is comparable in terms of GDP, Viet Nam in terms of GDP per capita, and Germany and Mexico in terms of population size.

As it can be seen, while the threshold set by the PCC in 2020 seem to be already above the average from countries that apply the same criteria (and even higher considering the median), the levels set by the Bayanihan 2 were even significantly higher. The PHP 50 billion (approximately USD 1 billion) threshold dwarfs not only the thresholds of Argentina and Viet Nam, but also all of the countries in the list. It represents more than twice the threshold for Germany, even though the Philippines' economy is less than a tenth of Germany's economy.

Many jurisdictions also determine their notification thresholds in part based on looking back on several years of notified transactions. This helps the country determine whether thresholds could be raised substantially without undermining the effectiveness of the merger regime.

Belgium, for example, faced a flood of notifications, mostly from non-problematic transactions with insufficient local nexus, in the early 90s. An impact analysis on the historical information, together with

comparisons of thresholds from similarly sized and neighbouring economies, allowed the Belgian Competition Authority (“BGA”) to modify thresholds in 1999 and base them in local turnover, achieving a reduction of the number of mergers by around 80% (ICN, 2008^[26]). The BGA continuously reviews historical data to determine the number of likely filings that would result at differing threshold levels to consider whether to adjust them and how.

Table 3.4 illustrates the number of transactions notified to the PCC for each year since 2016, as well as the moments in time where the threshold levels have been adjusted.

As it can be seen from the table, the different adjustments through time to the threshold levels, both size of person and size of transaction, have had few impact on the number of transactions notified to the PCC, except for the one introduced by the Bayanihan 2. While the general trend for the number of notifications in the country seems to be decreasing, it is evident that the drop after the introduction of the 50 billion threshold is significantly steeper than the trend.

Considering the value of the transactions, only six transactions decided by PCC between 2017 and 2020 would have been notifiable to the PCC. This is significantly lower than the merger notifications received within the same period by the average in the region, other regions, OECD jurisdictions and world averages.

Table 3.4. Number of transactions notified to the PCC between 2016 and 2021, threshold values and dates of adjustments of thresholds

Year	Date of adjustment of thresholds	Notification threshold (in PHP)		Number of notifications
		Size of Person	Size of transaction	
2016		> 1 billion	> 1 billion	77
2017		> 1 billion	> 1 billion	53
2018	20 Mar 2018 ¹	> 5 billion	> 2 billion	40
2019	20 Mar 2019 ²	> 5.6 billion	> 2.2 billion	46
2020	20 Mar 2020 ³	> 6 billion	> 2.4 billion	26
	15 Sept 2020 ⁴	= 50 billion	= 50 billion	
2021		= 50 billion	= 50 billion	4

Notes: ¹ Memorandum Circular 18-001, ² Commission Resolution 03-2019, ³ Commission Resolution 02-2020, ⁴ Republic Act no. 11494.

Table 3.5. Average number of transactions in selected jurisdictions and average number of transactions that would have been notified in the Philippines if the thresholds were PHP 50 billion

	2017	2018	2019	2020
Philippines: number of notifications received per year	53	40	46	26
Philippines: number of notifications if the threshold was PHP 50 billion	0	1	3	2
Average number of notifications per jurisdiction in:				
Asia-Pacific	164	178	183	214
Europe	119	129	132	113
Americas	223	229	228	186
OECD Jurisdictions	210	225	227	198
World	153	162	165	148

Source: OECD CompStats database (OECD, 2022^[27]).

Further, the highest size of transaction for Phase II amounted only to approximately PHP 47 billion, meaning that none would have been notifiable under the PHP 50 billion threshold. Indeed, to date, the average transaction value for cases decided by PCC under Phase II per year does not surpass PHP 45 billion. Thus, none of the transactions, which PCC has identified as potentially giving rise to competition concerns, would have been covered by such a threshold.

This suggests that merger control relying on Bayanihan 2 levels of thresholds would not capture potentially harmful transactions and would not be acting as an efficient tool to impede monopolistic or oligopolistic market structures to be created or reinforced.

One last group of variables that can be analysed towards an efficient setting of thresholds is the ones related to the resources available for the authority to perform merger control. The number of staff working in merger review is relevant for determining the capacity of the authority to conduct the investigations. This needs to be complemented with the average length of merger investigations to account for how intensive the use of such resources is.

In a sample of 30 jurisdictions, the GCR Rating Enforcement Survey 2021 found that on average, competition authorities dedicate 42 people to review mergers (GCR, 2021^[28]). The median is only 28 people, given the high dispersion of the information. In the Philippines, there are 23 people working for the Mergers and Acquisitions office, which is below both the median and the average of the sample reviewed. Moreover, the same survey found that, on average, Phase II or in-depth review of mergers lasted 146.75 days. In the case of the Philippines, the average duration for Phase II cases in 2019, which represented 6.5% of the total merger notifications in the same year, was 46.75 days.⁵³ Besides, the average length of Phase II cases in the Philippines has been constant since 2017. Stakeholders manifest as well that the PCC is recognised for making its merger decisions ahead of the time limit to do so. This could show that the PCC does have the possibility to manage the number of transactions that were being notified before Bayanihan 2.

Furthermore, the number of cases per staff member of the authority working for merger review can also be representative on whether the authority is evaluating too many or too few cases. In the GCR Survey sample for 2021, on average, each member of the mergers team was handling 8.5 cases. The median was 4.9 cases per staff member. In the Philippines, in 2019, a member of the Mergers and Acquisitions team handled two cases on average, number that went to 0.17 after the introduction of the new threshold levels in Bayanihan 2.

In sum, a combination of more than one of the factors described above is key to guarantee an efficient setting of threshold levels.

Another question that might be raised is whether separate thresholds should apply to separate industries. Section 17 of the PCA provides for the possibility of the PCC setting differentiated criteria for some sectors on this regard. The OECD has identified that separate thresholds by sector might generate uncertainties related to the definition of the scope of an industry or sector for the purposes of setting the distinct levels. Moreover, it increases the difficulty on evaluating transactions that involve various sectors and on adapting for changes on the dynamics of those industries.

Finally, as the determination of the level of thresholds raises concerns as to which levels are optimal, OECD standards recommend indeed the periodic review of their merger laws and practices to seek improvement and convergence towards best practices. The threshold levels should be monitored and adapted over time to reflect the changing economic context of the jurisdiction.

Many jurisdictions regularly update merger notification thresholds to reflect realities in their economies. One example is the US, where the US Federal Trade Commission annually updates the “Size of Transaction Thresholds for Premerger Notification Filings” based on changes the US’ gross national product.⁵⁴ The Italian Competition Authority annually adjusts merger control thresholds based on Italy’s GDP deflator index.⁵⁵ Meanwhile, Mexico’s merger notification thresholds follow changes in the “Unit of Measure and Adjustment” which is regularly updated by National Institute of Statistics and Geography.

The PCC follows a similar exercise by regularly indexing the size of transaction and size of person thresholds based on the Philippine Statistics Authority’s estimates of the Philippines’ GDP growth.⁵⁶ For 2021, PCC’s proposed size of transaction threshold is lower than that for 2020 since the nominal GDP

growth rate between 2019 and 2020 was – 8.09%. However, given the timeframe for the effects of the Bayanihan 2, these adjustments were not made.

In the current landscape, new thresholds are expected to be set in September 2022, once the two-year period for the application of Bayanihan 2 expires. If set according to international best practices, the thresholds should reflect realities in the Philippines' economy, as discussed above. This would potentially mean going back to 2020 levels and adjust them for recent changes in the macroeconomic environment accordingly.

Recommendations

Key recommendation 3.1

The Philippines should preserve a mandatory notification system with clear criteria defining the type of transactions that are caught by merger control, the exemptions to it, and the objective thresholds to be considered to notify transactions.

This includes maintaining Sections 16 and 17 of the PCA that describe the mandatory pre-notification merger system with suspensory effects, the types of transactions covered by the merger regime, as well as the thresholds considered for notification (this is, size of transaction and size of person).

Key recommendation 3.2

The definition of mergers in the PCA should be the same as the definition in its Implementing Rules and Regulations (PCA-IRR). Particularly, it should include joint ventures explicitly to make it clearer for companies to understand that joint ventures are part of the transactions covered by merger control. Moreover, making clear the type of transactions that are exempt from the rules on compulsory notifications, such as internal restructuring within a group, consolidation of ownership with no change of control, land acquisition without the purpose of obtaining control, and joint ventures formed by winning bidders in public-private partnership projects.

Key recommendation 3.3

The notification thresholds should revert to the levels pre-Bayanihan 2, adjusted to recent changes in the macroeconomic environment of the Philippines. This would guarantee an efficient setting of threshold levels that reflect the reality of the Philippines economy and ensure a well-functioning and efficient merger control system. The setting of threshold levels should be subject to periodic review to reflect the changes in the economic context of the jurisdiction.

4 Review powers, procedures and transparency

4.1. Overview of the current legal framework

Under the PCA, the PCC has “*the power to review mergers and acquisitions based on factors deemed relevant by the Commission*” (Sec. 16 PCA). While the PCC shares the responsibility with the National Economic and Development Authority “*in the preparation and formulation of a national competition policy*” (Sec. 12(o) PCA), it has the sole jurisdiction for the review of mergers and acquisitions. The PCC exercises this power in the following separate procedures:

- **Compulsory notification:** The PCC has the jurisdictions to review mergers and acquisitions that meet the prescribed thresholds (Sec. 17 PCA). The relevant thresholds are discussed in section 3.
- **Voluntary notification:** The parties to a merger or acquisition that does not meet the relevant thresholds for the compulsory notification can nevertheless voluntarily notify the transaction to the PCC. The PCC may, in its discretion, give due course to the voluntary notification (Sec. 3.2. PCC Rules on Merger Procedure (hereinafter referred to as PRMP)).
- **Motu proprio merger review:** The PCC can also conduct investigation of any merger that the PCC has reasonable grounds to believe is likely to substantially prevent, restrict or lessen competition in the market (Rule 4, Sec. 1 IRR, Sec. 13.1 PRMP). This procedure referred to as the “Section 20 merger review”.

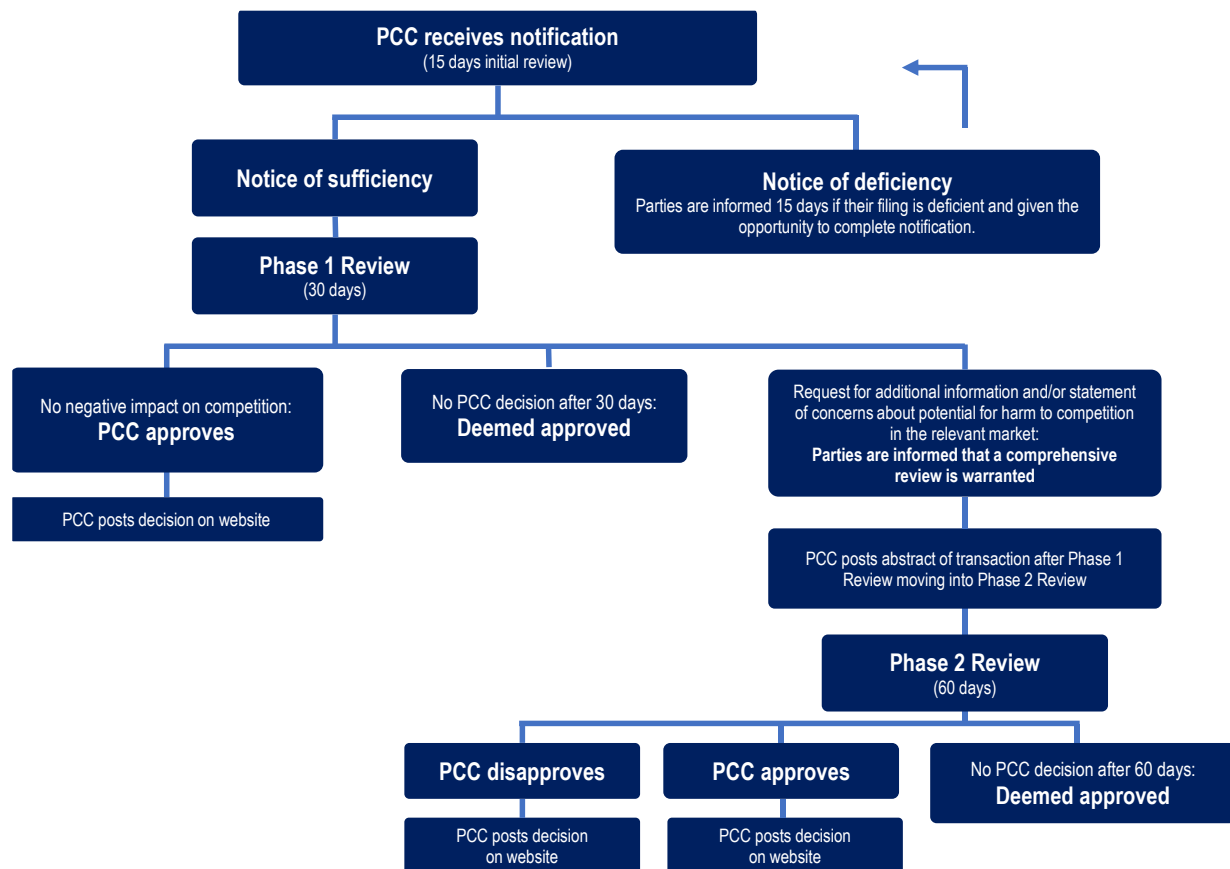
This section discusses the procedure applicable to the PCC’s review of the compulsory notification. Within the PCC, the merger review is handled by its Mergers and Acquisitions Office (MAO) who leads the merger investigation. Upon MAO’s recommendation, the Commission takes the final decision.

While there is no regulatory procedure imposed on the review of the voluntary notification and the *motu proprio*, the PCC indicates that it “*will endeavour to follow the same process for [compulsorily] notified mergers*” (PRMP, Sec. 13.3). However, guidance on when the authority will use its *Motu Proprio* powers to review transactions and potential differences in the assessment is needed. This is particularly important given circumstances that might differ from compulsory notification such as the possibility of the transactions being already consummated.

4.1.1. Review procedure for compulsory notifications

The review procedure for compulsory notifications is primarily governed by Section 17 of the PCA and further elaborated in the IRR and other various legal texts. The figure below illustrates general steps followed by the PCC in its review of mergers and acquisitions.

Figure 4.1. PCC's procedure for merger notifications at the Mergers and Acquisitions office (MAO)



Source: Based on data provided by the PCC.

Parties to the merger or acquisition that meet the prescribed thresholds are required to notify it to the PCC within 30 days⁵⁷ from signing of definitive agreements relating to the merger (PRMR, Sec. 2.1). In practice, the parties to a notifiable transaction must each submit a complete Notification Form which is available on the PCC's website.⁵⁸ The review procedure comprises the following main steps:

- Pre-notification consultation (PNC)
- Sufficiency period
- Phase I review
- Phase II review

Pre-notification consultation

Prior to filing a notification, parties to a proposed merger or acquisition that would be required to notify may inform the PCC of their proposed merger or acquisition and request a pre-notification consultation (PNC) with the staff of the PCC. During the PNC, parties may seek clarification on the information required under the Notification Form, inquire what other additional information may be required for the review, and discussed their identified markets. A draft Notification Form may be attached to the request for a PNC. The parties are given non-binding advice on the specific information that is required in the Notification Form. Parties can also request a PNC to seek guidance on the notifiability of the transaction.

Sufficiency period

Upon receipt of the Notification Form, the PCC verifies whether the information documents provided are complete within a sufficiency period of 15 days. If the PCC determines that the Notification Form is complete, an Order of Payment for the filing fees is issued, followed by a notice of sufficiency served to the parties after payment. The Notification Form is considered filed upon payment of the filing fee. The period for Phase I review starts on the first business day following the date of payment of the filing fee.

If the Notification Form is deemed deficient, the PCC sends a notice of deficiency to the Parties. The notice suspends the running of the sufficiency period and identifies the information and documents to be provided by the parties. The parties then have 15 days to respond by providing the information requested in the notice of deficiency. If one of the notifying parties fail to provide the requested information within the given period, the Notification Forms to all the parties are returned. In this case, no notification is considered to have been made and the parties are required to re-file their transactions.

Phase I review

During the Phase I review of 30 days, the PCC endeavours to determine if the notified transaction is likely to give rise to competition concerns or may be cleared within the Phase I. The PCC assesses the information provided by the notifying parties and contact third parties, such as customers, suppliers, or competitors, by means of market calls or inquiry letters in order to obtain relevant information regarding the market, their views on the merger, any competition issues it may raise and how they will be affected. Third parties may also include other governmental entities, sectoral regulators, industry associations, consumer bodies, think-tanks, market research firms or centres for information.

During the Phase I, the PCC may also require parties to provide additional data, information, or documents necessary for its review. Parties shall provide the requested information within the period specified by the PCC. In case a merger party cannot submit the requested information within such a period, it can file a request for extension of time prior to expiration of the specified period using the Model Request for Extension and Waiver.⁵⁹

The Phase I ends in either of the following manners:

- **Tacit approval:** If no decision is taken by the PCC within the Phase I, the notified transaction is deemed approved.
- **Explicit approval:** If the PCC finds that the notified transaction does not appear to give rise to competition concerns, the PCC shall render a favourable decision that the notifying parties may proceed to consummate the transaction. A non-confidential version of the decision and the abstract of the transaction will be published on the PCC's website. The decision can be subject to a set of commitments while, in practice, the PCC rarely renders decisions with commitments during Phase I (3 decisions as of 1 January 2022).
- **Opening of Phase II:** In the event that (i) the PCC identifies competition concerns in Phase I review such that a favourable decision cannot be rendered or (ii) on the basis of all information before it, the PCC is unable to form a conclusion that the transaction does not raise competition concerns, the transaction will be subject to a Phase II review.

Phase II review

If the PCC decides to open a Phase II review, it notifies the notifying parties that a more detailed extensive review is needed by way of a Phase II Notice and issue a Phase II Request for Additional Information ("Phase II Request"). The Phase 2 review commences on the day after service of the Phase II Notice for a period of 60 days.

The purpose of the Phase II review is to determine whether the notified transaction is likely to substantially prevent, restrict or lessen competition (SLC) in the relevant market or in the market for goods or services. The notifying parties are required to respond to the Phase II Request within 15 days from receipt thereof. Failure to submit a complete response within such period or failure to pay the filing fee for phase II result in the expiration of their notification, meaning that the notifying parties must re-file their notification forms. In practice, the notifying parties request an extension of time within which to comply with the Phase II Request.

State-of-play meetings

During the phase II review process, with a view to ensuring transparency and communication and enhancing the quality and efficiency of the review process, a state of play meeting may be held between the PCC and the notifying parties. The PCC may offer a state-of-play meeting at key stages of the case, including:

- Shortly after the opening of a Phase II review: to discuss the Phase II Request and the issues identified.
- At a sufficiently advanced stage during the Phase II: to discuss the PCC's preliminary views on the transaction following its investigation and the competition concerns identified.
- When the notifying parties propose commitments to discuss the PCC's feedback on the results of its evaluation of the proposed commitments.
- After the Statement of Concerns is issued, as described below.

Other procedural steps when a statement of concern is issued

Statement of concern: If, based on the information gathered during the investigation, the PCC's analysis leads to a conclusion that the merger is likely to give rise to SLC, a Statement of Concerns (SOC) shall be filed with the Commission not later than the 45th day of the Phase II review period. The SOC sets out the MAO's finding on the likelihood of the transaction giving rise to SLC and may include any recommendations or remedial actions that the MAO proposes to apply.

State-of-play meeting: Upon receipt of the SOC, the notifying parties are entitled to request the Commission to hold a state of play meeting. The Commission may then direct the MAO to conduct such a meeting for the benefit of the notifying parties to have the opportunity to clarify matters which the MAO has identified as giving rise to competition concerns.

Access to file: Upon receipt of the SOC, the notifying parties may request access to the supporting documents of the SOC for the purpose of preparing their defence in the proceedings. Supporting documents refer to documents substantially relied upon the MAO in preparing the SOC and do not include unrelated or irrelevant documents nor internal documents of the PCC.

Reply to the SOC: The notifying parties then have 10 days from receipt of a SOC to file a verified written comment on the SOC containing all the facts, arguments, evidence, and analysis that are relevant to their defence against the concerns identified by the MAO.

Conference: The notifying parties are entitled to request to make oral presentations to the Commission after the submission of their verified comment to the SOC. The Commission has discretion in accepting such a request. If the request for a hearing is granted, the Commission's decision shall be promulgated not more than 15 days from the date of the last hearing or submission of the parties.

The phase II ends in either of the following manners:

- **Tacit approval:** If no decision is taken by the PCC within the phase II, the notified transaction is deemed approved.

- **Explicit approval:** If the PCC finds that the notified transaction does not appear to give rise to competition concerns, the PCC shall render a favourable decision the notifying parties may proceed to consummate the transaction. A non-confidential version of the decision and the abstract of the transaction will be published on the PCC's website. The decision can be subject to a set of voluntary commitments if competition concerns are identified, and the parties propose sufficient remedies to address such issues.
- **Prohibition:** if the PCC finds that the notified transaction gives rise to competition concerns and no voluntary commitments proposed by the parties or remedies are considered sufficient to address such concerns. A non-confidential version of the decision and the abstract of the transaction will be published on the PCC's website.

Publication of decisions

In case of a favourable decision approving the merger during Phase 1 review, a non-confidential version of the decision and the abstract of the merger shall be published on the PCC's website (PMR, 6.16).

4.1.2. Expedited procedure

To streamline the review of mergers and acquisitions for a more efficient use of the PCC's resources, the PCA introduced the Rules on Expedited Merger Review in May 2019. The expedited merger review will take 15 working days instead of 30 calendar days under the regular phase 1 merger assessment. Pursuant to these rules, the following mergers are qualified for expedited review:

1. **No overlaps:** There are no actual or potential horizontal or vertical (including complementary) business relationship in the Philippines between the acquiring entity, including its Notifying Group, and the acquired entity and the entities it controls.
2. **Global transaction with the Philippines as assemblers, export manufacturers:** The merger is a global transaction where the acquiring and acquired entities identified in the definitive agreement are foreign entities, and their subsidiaries in the Philippines act merely as manufacturers or assemblers of products with at least 95% of such products exported to the foreign parents, subsidiaries, affiliates or third parties located outside the Philippines, provided that the remaining 5% product sales in a market in the Philippines is minimal in relation to the entirety of such Philippine product market.
3. **Global transaction with limited presence in the Philippines:** The candidate relevant geographic market of the merger is global and the acquiring and acquired entities have negligible or limited presence in the Philippines.
4. **Joint ventures for real estate projects:** Joint ventures, whether incorporated or not, formed purely for the construction and development of a residential and/or commercial real estate development project.

To avail of expedited review, the notifying parties must submit their Expedited Forms within 30 days after the signing of definitive agreements relating to the merger, but prior to any acts of consummation. During the review of the notifying parties' Expedited Forms, the PCC will verify if the merger may be qualified for expedited review and determine if the information and documents provided are complete. Within the Expedited Review period, if an Expedited Form is determined to be deficient, it cannot be determined if the merger qualified for expedited review, or there is a substantial competition issue that requires additional information, the Expedited Forms of both notifying parties will be return meaning that no notification is considered to have been made.

4.1.3. Judicial review

Motion for reconsideration

The parties to the merger can file a motion in writing for reconsideration of a decision, order, or resolution of the PCC within 15 days from receipt thereof. A motion for reconsideration can be based on the following grounds: (i) the evidence on record is insufficient to justify the decision, order, or ruling; or (ii) the decision, order, or ruling is contrary to law. A pending motion for reconsideration shall stay the order, ruling, or decision sought to be reconsidered.

Appeal

The PCA and the Rules of Court (ROC) provide that PCC merger decisions may be challenged before the Court of Appeals (CA): 1) by way of an appeal (Petition for Review) under Rule 43, ROC or 2) by way of a special civil action (Petition for Certiorari) under Rule 65, ROC.⁶⁰ In case of an adverse decision from the Court of Appeals, the same may be further appealed (Petition for Review on Certiorari) under Rule 45, ROC to the Supreme Court.

There are no specialised competition courts or competition chambers. However, the Philippine Supreme Court and the Philippine Court of Appeals have undergone specialised training for competition law and economic concepts, including in a number of instances by the OECD / KPC. Given the lack of specialised competition courts, it is desirable that the Philippine Supreme Court and the Philippine Court of Appeals continue to undergo specialised training on competition law and economic concepts.

Appeal (petition for review)

Section 39 of the PCA provides that decisions of the Commission shall be appealable to the CA in accordance with the ROC. Under Section 1 of Rule 43 of the ROC, the proper remedy when appealing from “awards, judgments, final orders, or resolution of or authorised by any quasi-judicial agency in the exercise of its quasi-judicial functions”, is through an Appeal under Rule 43. Therefore, the decisions of the PCC, being a quasi-judicial body, may be properly appealed to the CA via a Rule 43 Petition for Review. Further, this appeal “*should be made within fifteen (15) days from notice of the award, judgment, final order, or resolution, or of the denial of petitioner’s motion for new trial or reconsideration duly filed in accordance with the governing law of the court or agency a quo*”.

The PCA does not restrict matters that may be appealed under Rule 43; however, they must be final in character i.e. judgments or final orders, pursuant to Rule 43 of the ROC.

The Court of Appeals may perform a review on questions of fact, questions of law, or a mix of questions of fact and of law (Section 3, Rule 43, ROC) raised by the parties. The law and the rules do not provide for specific grounds for an appeal, however, basic rules of fair play, justice, and due process, require that arguments or issues not raised [in the trial court] may not be raised for the first time on appeal.

Currently, there are no merger decisions that have been the subject of appeal. Matters pending before the Court of Appeals mostly deal with matters incidental to the approval of the merger decision, and not the decision itself, such as jurisdictional issues.

Civil Action (Petition for Certiorari)

On the other hand, a special civil action under Rule 65 may also be used to challenge the “judgments, final orders or resolutions of the PCC before the Court of Appeals”. The second paragraph of Section 4 of the same Rule provides that if the petition involves an act of a quasi-judicial agency, unless otherwise provided by law or these rules, the petition shall be filed with and be cognisable only by the CA. A Petition for Certiorari may only be resorted to when the quasi-judicial agency acts without or in excess of jurisdiction,

or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no other plain, speedy, and adequate remedy in the ordinary course of law. The petition should be filed not later than sixty (60) days from notice of the judgment, order, or resolution, or from the notice of denial of a motion for reconsideration or new trial in case of a motion for reconsideration or new trial.

For Rule 65 Petition, only matters regarding jurisdiction are addressed, specifically only when an act was done without or in excess of the PCC's jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and when there is no other plain, speedy, and adequate remedy in the ordinary course of law. Judgments, final orders, or resolutions, as well as interlocutory orders may be the subject of the said Petition.

Appeal to the Supreme Court

If in case an adverse decision is acquired from the Court of Appeals, the same may be further appealed before the Supreme Court by way of Appeal by Certiorari under Rule 45, within fifteen (15) days from notice of the judgment or final order or resolution appealed from, or of the denial of the petitioner's motion for new trial or reconsideration filed in due time after notice of the judgment.

4.2. Analysis of the review powers, procedure, and transparency

4.2.1. Review procedure for mandatory notifications

According to the 2005 OECD Recommendation of the Council on Merger Review (OECD, 2005^[22]), the review of mergers should be effective, efficient, and timely. This involves ensuring that the merger laws allow authorities to assess the competitive effects while ensuring that the laws avoid imposing unnecessary costs and burdens on merging and third parties. Moreover, it recommends that the competition authorities provide clear and transparent procedures, where decisions are made within a reasonable time frame.

The PCC follows, according to the PCA, a two-stage merger procedure that recognises that not all notifiable mergers deserve in-depth analysis and scrutiny. This is also the system followed by the majority of jurisdictions with an active merger regime. According to the OECD CompStats database, from a sample of 65 jurisdictions, 55 had a two-phase review procedure in 2020 (OECD, 2022, p. 76^[27]). The first phase allows for a prompt review and approval of clear and unproblematic mergers with or without remedies, according to the 2005 OECD Recommendation of Merger Procedure (OECD, 2005^[22]) and the ICN Best Practices (ICN, 2018^[23]); and the second extended phase allows for the full scrutiny of complex or problematic mergers and may lead to remedies or even to the prohibition of the merger where competition concerns cannot be solved.

The PCA, as detailed above, provides for a specific procedure with determined timeframes for notification, analysis of the information provided (sufficiency period), Phase I, and Phase I reviews. Moreover, following international good practices (ICN, 2018, p. 9^[23]), the PCC provides for the possibility of pre-notification consultation with the merging parties.

According to the PCC and multiple stakeholders, between 10-20% of the cases go through pre-notification consultation (PNC). However, a draft of the Notification Form is not often provided by the parties at this stage. While firms familiar with the PCC's merger control tend to request a PNC and submit the draft Notification Form, in the majority of the cases the PCC receives notifications without going through the PNC.

Regarding the use of information, as a best practice, the competition authorities should be in a position to assess the merger, at least in Phase I, on the basis of the information in the notification form. The notification form should specify clearly and objectively the type of information required for the substantive assessment and the level of information required may vary between affected and unaffected relevant

markets. It should not go beyond what is necessary to start an investigation, and thus enough information to understand anti-competitive harm may result from the transaction, as well as the theories of harm that underlie how such anti-competitive harm can come about.

In the Philippines, Phase II reviews last for a maximum of 60 days, with 15 days to respond to the phase 2 request of information, which initiates the second phase, that can also be extended upon request from the parties.

The following table presents the average time in days of merger review in the Philippines for Phase II reviews, per year, including the waivers requested by the parties. Stakeholders agreed that, in general, PCC reviews transactions in a timely way.

Table 4.1. Average time in days for merger review in the Philippines for Phase II reviews, including waivers

Year	Average number of days
2016	55
2017	59
2018	46
2019	56
2020	59
2021	34

Source: PCC.

4.2.2. Procedural fairness

“Procedural fairness should be a basic attribute of all merger review procedures” (ICN, 2018^[23]). The 2021 OECD Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement (OECD, 2021^[29]) recommends that, to ensure procedural fairness for merging parties, competition authorities should inform parties and offer them opportunities to engage meaningfully in the review process. This can be achieved by including in the procedures the opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger (OECD, 2005^[30]). In general, the competition authority should be available for meetings or discussions with the merging parties at key points in the investigation when competitive concerns are identified (ICN, 2018, p. 18^[23]).

While the PCC offers state-of-play meetings at key stages during Phase II review, during Phase I, a number of stakeholders indicated that the information on potential competition concerns is scarce. In particular, they indicated that although meetings are held in early stages of the investigations, these have the objective of understanding the transaction and market(s) affected, but that until the issuance of the statement of concerns, they do not know precisely what competitive concerns the MAO is investigating.

By way of example, under the EU merger control, the European Commission offers a state-of-play meeting where it appears that serious competitive concerns are likely to be present before the expiry of 3 weeks into Phase I. In addition to informing the notifying parties of the preliminary result of the initial investigation, this meeting provides an opportunity for the notifying parties to prepare the formulation of a possible remedy proposal in Phase I.

A state-of-play meeting before the opening of Phase II, when the investigation is deepened, would be important to allow the parties to a merger to understand what is being investigated by the PCC and what the preliminary concerns may be.

4.2.3. Expedited procedure

For making merger review effective, efficient, and timely, competition authorities should guarantee that mergers that do not raise material competitive concerns are subject to expedited review and clearance (OECD, 2005^[22]).

There are different approaches to provide flexibility in the review of information. Some jurisdictions use alternative notification formats that vary with the potential competitive analysis of the transaction. This includes the possibility of having short and long notification forms that enable parties to submit abbreviated information in transactions that do not represent material competitive concerns. Another strategy involves discretionary waivers of information that might not be relevant in specific cases and might be more burdensome to the parties. One last approach could be to implement procedures providing the competition authority's staff discretion to seek supplementary information during the initial review period, while allowing for abbreviated initial notification requirements (ICN, 2018, p. 16^[23]). Whichever mechanism is chosen, the main idea is that depending on each case, the authority should seek to limit the information from the parties in transactions that do not present material competitive concerns, being admissible to ask for support to demonstrate the absence of such concerns.

The ICN has identified as a good practice that, in addition to the possibility to have a two-phase review process where most of the transactions are cleared after a phase 1 review, or a single-phase one that allows for an expedite clearance of non-problematic transactions, some authorities also have an expedited or abbreviated procedure for a specific set of transactions (ICN, 2018, p. 11^[23]).

The ICN Recommended Practices on initial notification requirements recommend that limiting the information requests in transactions that do not present material competitive concerns avoid imposing unnecessary burdens to the merging parties in such cases (ICN, 2018, p. 15^[23]).

As discussed above, in May 2019, the Expedited Merger Review was introduced in the Philippine merger control. However, since then, the PCC has not yet received notifications under this expedited review. Several stakeholders indicated that the Expedited Merger Review in its current form would not be substantially attractive to the business considering that (i) the Expedited Notification Form still requires a quite extensive amount of information and (ii) the time review of the Expedited Merger Review – 15 working days – is not materially different from that of the ordinal merger review in practice.

Since the duty to notify applies to transactions covering a wide range of possible competitive effects, no single set of initial notification requirements will be optimal for all transactions. To enable the competition agency to accomplish its mission without imposing unnecessary burdens on merging parties, jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification.

While the Expedited Notification Form does not appear to be overly extensive, the type and scope of the information requested under the Expedited Merger Review requires flexibility on a case-by-case basis, for example by being subject to the discussion between the notifying parties and the PCC on the basis of which the authority could waive provision of certain information that is not clearly required for the purposes of analysing the transaction notified under the Expedited Merger Review.

The PCC could consider being more flexible with the requests while engaging more with the parties in order to promote further use of the Expedited Merger Review, for instance during the PNC.

4.3. Transparency and confidentiality

Transparency is a key aspect of the merger review process, as it ensures consistency, predictability, and fairness in the review process (ICN, 2018^[23]). Moreover, it allows for public scrutiny of the decisions and enables merging and third parties to provide useful and timely comments, as well as to understand the

type of analysis made by the PCC and incorporate this knowledge in future transaction notifications, increasing the legal certainty for business.

One relevant aspect related to both transparency and procedural fairness is the publication of decisions. Reasoning should be provided for decisions to challenge, block or condition the clearance of transaction, as well as for clearance decisions that set a precedent or represent a shift in enforcement policy or practice. This also allows the public to monitor consistency, predictability, and fairness in the application of the merger review process (ICN, 2018, p. 26^[23]).

As stated above, in both Phase I and Phase II, the PCC publishes non-confidential versions of the decisions on its website. However, these decisions made publicly available are very short and contain no reasoning on the analysis of the relevant market nor competitive assessment. While Phase II decisions provide the conclusions of the PCC regarding the relevant market, the theories of harm analysed and the effects of the transaction, they do not contain detailed analysis on the legal and economic grounds and evidence for such conclusions.

A number of stakeholders consulted during the review considered this information insufficient to allow them to understand the competition issues raised nor how the analysis was conducted by the PCC, meaning that they could not rely on those precedent cases to form an opinion on how future cases may be considered.

The PCC could consider providing more details about its analysis of the case in order to share its own decisional practices with the general public. This would be in line with the provisions of the recommendation of the 2021 OECD Council on Transparency and Procedural Fairness in Competition Law Enforcement. In particular, it provides that “[a]dherents should ensure that competition law enforcement is **transparent and predictable**, by: [...] publishing the facts, legal basis and sanctions relating to decisions, including decisions to settle cases, subject to the protection of confidential information (emphasis added).” (OECD, 2021^[29]). While there is no consensus on how detailed public decisions are among different authorities, Box 4.1 provides examples from selected jurisdictions.

Box 4.1. Publication of merger decisions in selected jurisdictions

In jurisdictions around the world with an active merger control regime, many competition authorities publish their decisions. The degree of specificity in the public, non-confidential enforcement and non-enforcement decisions that are published vary across jurisdictions, from fully detailed decisions to summaries, but normally include sufficient information with respect to the criteria used to apply the substantive review standard.

In the **European Union**, Article 20(1) of the Council Regulation No. 139 of 2004 (the EC Merger Regulation), establishes that the European Commission shall publish the decisions it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2). In practice, this means that it publishes public versions of decisions regarding clearances in both phase I and II, clearances with remedies and prohibitions.¹ Such decisions contain all the reasoning, including assessment on the relevant market, considerations on the parties’ views; the competitive assessment, with an analytical framework, analysis of the market(s) structure and study of the theories of harm; and its conclusion on the transaction’s competitive effects, determining whether it is compatible with the internal market.

Other authorities in Europe follow a similar approach. In **France**, for instance, the French Competition Authority, publishes its final decisions with public versions that contain full reasoning, including assessment of the market and the competitive effects of the transaction to support the authority’s decision on it.² This is done based on Articles R430-6 to R430-8 of the Trade Code (Code de Commerce).

In Asia, **Singapore** maintains a public register on merger notifications accessible online.³ It contains a summary of the nature and objectives of every merger or anticipated merger, as well as a document with the grounds for the decision, as well as details of all commitments. These documents contain public information on the proposed transaction, competition issues, counterfactual used, relevant market defined, and the competition assessment. Before announcing either a favourable or unfavourable decision on its website, the Singaporean Competition Authority enables the mergers parties to indicate any information they may deem confidential. Once the confidentiality request is deferred, a redacted version of the decision is disclosed to the public, as set out in the Guidelines on Merger Procedures.

In **Japan**, only decisions on mergers whose review proceeded to Phase II are published. Analysis regarding transactions cleared in Phase I remain confidential unless the Japanese Competition Authority decides to release their summaries. This is done, according to the JFTC Guidelines to the Application of the Monopoly Act concerning Review of Business Combination, whenever the decisions provide relevant guidance for companies planning business combinations or they represent major combination cases.⁴ These decisions contain detailed analysis on the definition of the relevant markets, their structure, the competitive concerns raised by the transaction, the economic analysis performed to assess the effects of the transaction, including the use of econometric tools, and the conclusions of the authority.

Finally, as a general rule, in the **United States**, the competition authorities publish detailed summaries of the mergers where parties entered into a negotiated consent agreement that include provisions that will restore competitions or when the transactions were challenged in courts⁵. Each summary provides a public version of the initial complaint with a brief description of the proposed merger, including the party's names, the transaction value, the way the authorities defined the markets, as well as the economic grounds for reaching the competitive concerns.

Notes:

¹ EC Merger Decisions: https://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2.

² Merger decisions: https://www.autoritedelaconurrence.fr/fr/liste-des-decisions-et-avis?search_api_fulltext=&sort_by=created&type%5Bdecision%5D=decision&created%5Bmin%5D=&created%5Bmax%5D=&field_proceedings%5B45%5D=45.

³ CCCS Public Register on Mergers: <https://www.cccs.gov.sg/cases-and-commitments/public-register/mergers-and-acquisitions>.

⁴ JFTC's Major Combination Cases: <https://www.jftc.go.jp/dk/kiketsu/jirei/index.html>.

⁵ Merger filings in the United States Department of Justice: https://www.justice.gov/atr/antitrust-case-filings?f%5B0%5D=field_case_type%3Acivil_merger and merger cases and procedures in the Federal Trade Commission: https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&items_per_page=20&search=&field_competition_topics=708&field_consumer_protection_topics=All&field_federal_court=All&field_industry=All&field_case_status=All&field_enforcement_type=All&search_matter_number=&search_civil_action_number=&start_date=&end_date=.

As it can be seen, different strategies can be followed by the PCC to publish its decisions, guaranteeing transparency, and providing enough information for the parties and the general public to understand the legal and economic basis for such decisions, whilst safeguarding confidentiality (e.g. of business secrets).

On handling confidential information, classification and alternative uses of such information is of extreme relevance. The ICN Recommended Practices for Merger Notification and Review Procedures highlight the importance of protecting business secrets and safeguarding confidentiality while ensuring that confidential information submitted by merging parties and third parties will not be used for purposes other than for allowing the agency to discharge its merger review mandate effectively, in connection to other authorised law enforcement purposes of the authority, and to provide merging parties with adequate procedural fairness (ICN, 2018^[23]). For this, promotion of the confidentiality laws, policies and practices applicable to merger control procedures is desired.

While there is a general agreement that MAO carefully classifies information that is confidential, concerns have been raised by some stakeholders that it is unclear whether the information provided for a merger

review could be used for other procedures. This is linked with requests of information being considered as disproportionate. A specific concern raised related, for instance, to the fact that members of the Economics Unit can act both as case handlers (in mergers and enforcement investigations) and as part of the team that elaborates market studies. While the PCA-IRR include a provision on how all the information provided to the PCC in the framework of merger control is subject to confidentiality rules, guidance as to how the PCC can and does use the information received in the context of a merger investigation procedure, including clear procedures on the use of the information, is also desirable.

This has been done by other competition authorities, which in addition to rules governing merger review, publish non-binding documents or guidelines to provide further clarity. For example, the Commerce Commission in New Zealand issued in 2018 the Investigation Guidelines, where it describes the Commission's approach and practice to its obligations under the Official Information Act, including treatment of confidential information in merger proceedings and the criteria for sharing information within the authority for other investigations.⁶¹ With a similar approach, the European Commission included confidentiality of information as part of its DG Competition best practices on the conduct of EC merger control proceedings.⁶²

Recommendations

Key Recommendation 4.1

State-of-play meetings should be offered to the merging parties at key stages of the merger review procedure, including in Phase I, to guarantee transparency and procedural fairness. This would allow merging parties to respond to such concerns in a timely manner, for instance, by formulating a remedy package early in the process. This would be in line with the 2021 OECD Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement and the ICN Recommended Practices for Merger Notification and Review Procedures.

Key Recommendation 4.2

Provide economic and legal reasoning both phase I and phase II decisions, including further substantive detail on market definition and competition assessment. Non-confidential versions of the decisions are already published by the PCC, but they are very short, essentially sharing the conclusions, and lack any substantive detail or reasoning. To ensure transparency and procedural fairness, the PCC should provide more details on the legal and economic analysis and grounds that led to the final conclusions, on aspects such as the definition of the relevant market, the theories of harm analysed and the effects of the transaction in the market(s). This would be in line with the provisions of the recommendation of the 2021 OECD Council on Transparency and Procedural Fairness in Competition Law Enforcement that provides that “[a]dherents should ensure that competition law enforcement is transparent and predictable, by: [...] **publishing the facts, legal basis and sanctions relating to decisions, including decisions to settle cases, subject to the protection of confidential information.**”

Recommendation 4.3

Improve the expedited procedure by reviewing and making more flexible the information required. To encourage its use, the expedited procedure should be improved both in terms of timing, but in particularly regarding information requests. The PCC should adopt mechanisms that allow for flexibility in the content of the initial notification of transactions to go under the expedited procedure.

Recommendation 4.4

The PCC should issue a clarification on how the information gathering in a merger review process will be used, including confidentiality treatment and the possibility and scope of information-sharing within the agency and with other regulatory agencies.

Recommendation 4.5

The PCC should issue guidance on when the authority will use its *Motu Proprio* powers to review transactions and potential differences in the assessment. This might be relevant in given circumstances where the analysis that might differ from that of a compulsory notification, such as when the review transaction has already been consummated.

Recommendation 4.6

The Philippine Supreme Court and the Philippine Court of Appeals should continue to benefit from specialised training on competition law and economic concepts, being part of the regular judge education system.

5 Substantive analysis

5.1. Overview of the current substantive analysis of merger cases in the Philippines

In reviewing transactions, the PCC has a defined substantive test. The criteria for the analytical review of mergers and acquisitions are explicitly defined in the PCA and the PCA-IRR. According to Section 1 of Rule 4 on mergers and acquisitions in the PCA-IRR, in conducting merger review, the PCC shall (i) assess whether a proposed transaction is likely to substantially prevent, restrict, or lessen competition in the determined relevant market; and (ii) take into account any substantiated efficiencies likely to arise from the transaction and put forward by the parties. Moreover, the rules indicate that the PCC shall compare the competitive conditions that would likely result from the merger or acquisition with those that would have likely prevailed without such transaction (i.e. the counterfactual scenario).

This involves a case-by-case analysis where the PCC needs to consider specific conditions that apply to each transaction such as the structure of the relevant market, the market position of entities, actual and potential competition, alternatives to suppliers and users, access to supplies or markets, and any other barriers to entry.

The PCC evaluates two broad categories of merger effects: horizontal and non-horizontal. Guidance on the assessment of mergers is only available in its Merger Review Guidelines (PCC, 2016^[31]). According to these guidelines, the PCC will consider that a merger gives rise to a substantial lessening of competition when it has a significant effect on the competitive pressure on firms in the relevant market or markets, which would likely lead to an adverse effect on consumers.

According to the guidelines, in a first step, the PCC generally defines the relevant market or markets for the operation.⁶³ Market definition includes both relevant product and geographic markets. The guidelines set out Hypothetical Monopolist Test or SSNIP Test (“HMT”) as the methodology to be used, using prevailing prices as a starting point in the exercise of defining a relevant market for merger review, the PCC focuses on demand-side substitution, but supply considerations also play a key role in understanding the competitive constraints on the merging firms.

The Merger Review Guidelines consider market definition transaction-specific, as it responds to particular facts and circumstances related to the merger under review and that it is only an intermediate tool to assess the effects of the transaction.

The next step consists in assessing the effects of the transaction on the relevant markets defined. The PCC considers elements such as the structure of the relevant markets concerned, the market position of the parties, actual and potential competition, alternatives viable to suppliers and users, and legal or other barriers to entry (PCC, 2016, p. 8^[31]).

As to the competitive assessment, the PCC considers both unilateral effects and co-ordinated effects. Entry and expansion considerations are also made in the evaluation of horizontal mergers. The PCC considers whether there could be entrance that is likely, timely and sufficient in nature, scale, and scope.

For this, the PCC relies on evidence of potential entrants, as well as on the existence and significance of barriers in the relevant markets.

While there are no guidelines referring to the assessment of vertical or conglomerate mergers, PCC have examined such cases, and evaluates whether a merger could result in foreclosure of the merged firm's competitor (including potential rivals).⁶⁴

In the Philippines, anti-competitive mergers may be exempted from prohibition by the PCC⁶⁵ when the parties establish that the merger has brought about or is likely to bring about efficiencies that are greater than the anti-competitive effects. Section 11 of Rule 4 of the PCA-IRR determines that the burden of proof lies with the parties seeking the exemption. The efficiencies must be demonstrable, with detailed and verifiable evidence of anticipated price reductions or other benefits. They must be merger-specific, and consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur (PCC, 2016, p. 30_[31]).

Another exemption from the prohibition of mergers and acquisitions by the PCC are those where one party to the transaction is faced with actual or imminent financial failure (failing-firm defence) and the transaction represents the least competitive option among the possible alternative uses for the assets.⁶⁶ Here also, the burden of proof lies with the parties seeking the exemption. The PCA-IRR and Guidelines provide detailed guidance as to which evidence is needed for the failing-firm to defence (PCC, 2016, p. 31_[31]).

5.2. Information requirements for merger review in the Philippines

Several stakeholders have indicated that the amount of information requested by MAO is quite extensive and sometimes do not appear to be directly relevant to the assessment of the transaction under review. Some of them further indicated that there are few possibilities to discuss the scope of such request.

The OECD understands that this refers to some of the information that is formally required by the Notification Form. An analysis of the Form does not seem to require excessive amount of information for a fairly complex case. As for further requests of information, stakeholders and the PCC agree that the majority of such requests are discussed with the parties prior to their issuance and generally have a specific purpose.

While it is legitimate for the PCC to request enough information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation, these requests of information should be limited with the purpose of reducing the burden for merging parties, mainly on transactions that do not present material concerns (ICN, 2018, p. 15_[23]).

One source of detailed information that minimises the burden upon parties for certain industries, are sector regulators. This specialised knowledge on the industries allows regulators to contribute information that may be useful for the PCC to assess the effects of a transaction (see section below).

5.3. Substantive analysis in merger review in the Philippines

The purpose of the substantive merger analysis is to “*identify and prevent or remedy only those mergers that are likely to harm competition significantly*” (ICN, 2018, p. 1_[32]).

The PCC substantive test for review mergers is the substantial lessening of competition test, widely used across jurisdictions and is determined by hard legal instruments (PCA and the PCA-IRR) with comprehensive guidance provided – if only for horizontal effects – in the Merger Review Guidelines. The test also for consideration of efficiencies.

The PCC's Merger Review Guidelines cover all the basic substantive aspects of merger analysis in the Philippines. The Guidelines, as stated in their introduction, are adapted from the ICN Recommended

Practices for Merger Analysis, tailored to fit the PCA and the PCA-IRR. In this sense, their scope and content are according to international good practices.

Economic analysis is a fundamental part of merger control in every stage of the process. It underpins the theories of harm that guide merger reviews, and it provides the tools to interpret evidence when assessing these theories, as well as to design appropriate remedies when needed (OECD, 2020^[9]).

5.3.1. Market definition

As to the definition of the relevant markets, the test used (HMT) is also aligned with international best practices (ICN, 2018, p. 5^[32]). While market definition is not essential from an economic perspective, it provides helpful discipline to identify the area of close competition over which it might be possible to exercise market power. Furthermore, it is often a legal requirement of the competition test for mergers (OECD, 2020, p. 10^[9]). In practice, the PCC uses both qualitative and quantitative evidence to apply the HMT (See Box 5.1). This includes considerations on whether products are functional or economic substitutes, own and cross price elasticity of demand estimations, and calculation of diversion ratios. As for the evidence used to define relevant markets, the PCC relies on characteristics and function of the products, prices (levels and changes), technological considerations, evidence from consumers including surveys, price-cost margins, sellers decisions, compatibility standards, information on brand loyalty and preferences, legal or regulatory requirements, costs of inputs and of distribution, sunk costs, transportation considerations, capacity of production, among others. The PCC also follows more recent practices in the OECD, such as for example, two-sided considerations when defining relevant markets.⁶⁷

Box 5.1. The role of market definition in the GSK/Pfizer merger

In the GlaxoSmithKline's acquisition of Pfizer's consumer health care business in 2019, the PCC used qualitative and quantitative considerations to define the relevant markets affected by the transaction.

As a framework for the exercise, the PCC used the SSNIP test. Their market investigation started with an analysis on the different classifications of the products of the merging parties, including chemical compositions; requirements for their prescription; and their effective uses. Moreover, exercises through the application of surveys to consumers and interviews to stakeholders were done to analyse consumers' substitutability of the products of the merging parties, as well as of competitors.

Factors such as perspective on product characteristics, intended use and market positioning of the parties' products and brands were used. An analysis of the way companies advertised their products and internal documents on marketing and pricing strategies was also relevant for the PCC's decision.

Quantitative tools such as price correlations and tests for stationarity, integration and structural breaks were also conducted. Their use aimed at determining the closeness of substitution between products, positive correlations, and any potential relationship between changes in their volumes of sales and strategies followed by competitors.

Supply-side substitutability was also considered by the PCC. The conclusions led to no supply-side substitutability due to existing and strong regulatory requirements to engage in the production and sales of such medicines and the time needed for completing those requirements.

After all the considerations, the PCC concluded that the relevant markets for the purposes of the competitive assessment were (i) adult cough medicine, (ii) paediatric cough medicine, (iii) paediatric analgesics, and (iv) paediatric nutritive health (vitamins) products, all sold in the Philippines.

Source: MAO Case No. M-2019-005 and Commission Decision No. 20-M-005/2019.

While all the merger investigations of the PCC involve the definition of the relevant market or markets for the transaction, details on how such exercises were conducted were not made widely available. In the case presented above, for instance, the MAO performed multiple quantitative analysis, including price correlations and tests to support its conclusions on the relevant market. However, the analysis was not made public and was only known by the parties through the Statement of Concerns (see also section 4).

5.3.2. *Competitive assessment*

Theories of harm in horizontal and non-horizontal mergers are normally underpinned by the economic theory that higher levels of concentration brought about by mergers reduce the options available to consumers and can allow suppliers to exercise increased market power, either unilaterally or collectively (OECD, 2020, p. 10^[9]).

For the assessment of the effects of mergers and the evaluation of the different theories of harm, calculation of market shares and concentration ratios are usually part of the evaluation of the PCC. As found across jurisdictions, the PCC calculates market shares and concentration ratios as only the starting point of the assessment. Also, it uses low concentration levels (using the Herfindahl-Hirshman Index (HHI)) and/or low changes in it to “screen-out” mergers that are highly unlikely to raise competition concerns.

The effect in each relevant market is analysed with the calculation of market shares and concentration levels, using units and monetary values to calculate them, as well as volume of sales, production, number of customers, depending on the case. The PCC also considers variation of market shares over time and other indicators such as profit margins when needed and available to complete the assessment of companies’ market power. The case discussed in Box 5.2 illustrates the use of such indicators by the PCC.

Box 5.2. Calculation of market concentration in the Chelsea Logistics/KGLM-NM case

In the Chelsea Logistics (Udenna as ultimate parent company) acquisition of shares in KGLM-NM, one of the key elements of the Commission’s decision regarding whether the transaction would bring a substantial lessening of competition in the relevant markets was related to the calculation of market shares and the concentration levels.

MAO reported potential horizontal concerns in six passenger routes. One of the arguments relied upon market shares and concentration ratios using current capacity in number of passengers. The parties argued that the capacity was neither the single nor the most important indicator of market power and would fail to portray the degree of competitive constraints exercised by competitors.

According to the Commission’s decision, the use of capacity as the variable for the calculation of market shares was reasonable as it reflected the best indicator of a firm’s significance in each route. In any case, the Commission found that alternative ways of measuring market shares of the merging parties would in any event result in a significant increase in market concentration post-transaction and that market shares were used only as an initial indication of the merged entity’s competitive significance in the market.

Source: PCC Case No. M-2018-002 and Commission Decision No. 022-M-039/2018.

Whilst many final decisions made by the Commission disclose the theory of harm evaluated and the conclusion reached, no detailed analysis on how the PCC reached such a conclusion is provided.

As to the theories of harm used by the PCC (unilateral and co-ordinated horizontal effects, vertical and conglomerate effects), these are in line with international best practices (ICN, 2018^[32]). Moreover, the use of economic analysis seems consistent to the recent developments in economic theory and practice (OECD, 2020^[9]).

In the case of horizontal overlaps, the PCC assesses whether the merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power independently. Box 5.3 presents a case where unilateral effects were analysed. It corresponds to the only prohibition decision issued so far by the PCC.

Box 5.3. PCC's prohibition decision based on unilateral horizontal effects

The Universal Robina Corporation's acquisition of the assets of Central Azucarera Don Pedro and Roxas Holdings is the first and only transaction that has so far been prohibited by the PCC. Its prohibition relied on the Commission finding that the acquisition will likely result in a substantial lessening of competition in the market for provision of sugar cane services in four provinces due to horizontal unilateral effects.

Particularly, the PCC found that the transaction referred to a merger-to-monopoly situation that would allow the merged entity to unilaterally reduce planters' share in the planter-miller sharing agreements, the theoretical recovery rates quoted to planters, and the incentives provided to planters. These three were considered by the PCC the most important variables for competing in the market. This increased market power was strengthened by a lack of potential substitution and high barriers to entry.

In the assessment of the theories of harm, the PCC considered a counterfactual scenario where the parties kept engaged in a head-to-head competition to secure their share in the supply of sugar cane from the planters based on the competitive variables mentioned above. The PCC found that even before the transaction, the parties had power to negotiate shares with the planters, which would be enhanced with the monopoly. In addition, that there was already excess capacity of the plants due to insufficient supply of sugar cane, which would increase its ability to affect the competitive conditions in the market.

To reach its conclusions on the incentives of the firm to modify its behaviour post-transaction, the PCC, in addition to multiple qualitative considerations, used the Gross Upward Pricing Pressure test (GUPPI), finding values of over 10%.

An analysis on entry and expansion barriers as well as potential competition from agents in other geographical markets or possibilities of substitution by the affected agents were also key. The PCC concluded that there was little to no evidence of the possibility of a new entrant in the market that could be considered as a sufficient competitor for the merged entity. Moreover, that there were no viable alternatives for sugar cane planters to shift their sales.

Given that the proposed commitments by the parties were considered insufficient to address the PCC's concerns, the transaction was prohibited under Section 18 (a) PCA.

Source: Commission Decision No. 03-M-021/2019 in PCC Case No. M-2018-006.

The PCC has also evaluated, in line with its Guidelines, horizontal co-ordinated effects (see Box 5.4). While the full analysis made by the MAO and presented to the Commissioners in the Statement of Concerns is not publicly available, the PCC published an executive summary and the main elements of the theories of harm.

Box 5.4. Co-ordinated effects in the SMC / Holcim case

In 2019, the MAO of the PCC issued a Statement on Concerns on the proposed acquisition of shares in Holcim Philippines by First Stronghold Cement Industries. The investigation continued under a Phase II review given a potential substantial lessening of competition in the market for the supply of grey cement in three geographic markets in the Philippines. Even though the transaction was ultimately withdrawn by the parties, clear potential effects of the transaction on competition were identified by the PCC.

One of the theories of harm analysed referred to the increased likelihood that competitors in the relevant markets will co-ordinate their behaviour or strengthen their existing co-ordination, harming competition. For the assessment of co-ordinated effects, the PCC considered market conditions, namely few players; repeated interaction between cement manufacturers and their customers; low demand elasticity; high degree of product homogeneity; high barriers to entry and expansion; market transparency through a trade association; and stable market characteristics with limited innovation.

Moreover, the PCC found that instead of four significant players, the market post-transaction would have only three with excess capacity that would allow them to discipline further the market. Given all the factors described, the PCC concluded that the transaction increased the likelihood of co-ordination between the firms in the three relevant geographic markets, leading to a substantial restriction of competition.

Source: Executive summary of the Statement of Concerns dated 02 December 2019 Issued by the Mergers and Acquisitions Office – PCC Case No. M-2019-018; https://www.phcc.gov.ph/wp-content/uploads/2020/01/FINAL-PCC_ExecSummary_SMC-Holcim_Cement_31Jan2020.pdf.

As stated above, the PCC has not issued guidelines on the analysis of vertical mergers. However, there have been at least seven cases where vertical effects have been analysed, including two cases where the PCC accepted voluntary commitments from the parties.

In these non-horizontal cases, the PCC evaluates whether a merger could result in foreclosure of the merged firm's competitor (including potential rivals). When assessing potential foreclosure effects, PCC examines whether the merged entity would have the ability and incentive to substantially foreclose access to inputs or customers and whether such behaviour would have a significant impact in competition upstream or downstream. Although these assessments seem in line with international best practices, none of the published decisions contains a detailed analysis of the theory of harm that allows the market and the public to understand how it is done and what to expect for future review of mergers with vertical effects.

So far there has only been one case considering conglomerate effects (see Box 5.5). As for vertical mergers, there is also no guidance on how the PCC will develop theories of harm potentially leading to such effects.

As such, the PCC should issue in the future guidance that could make it clearer for future transactions involving vertical and conglomerate effects, the assessment that can be expected from the PCC in this regard.

Box 5.5. Conglomerate effects: assessment of potential tying and bundling practices in the GSK/Pfizer merger

The GlaxoSmithKline's acquisition of Pfizer's consumer health care business in 2019 is the only case where PCC analysed conglomerate effects. In addition to the analysis of unilateral and co-ordinated horizontal effects, the PCC evaluated the possibility of the transaction resulting in tying and bundling of products, given the portfolio of GSK.

The PCC considered elements such as the regulatory regimes for the different products, their characteristics, the possibility of consumers considering any of the products as a must-have and the way they were distributed. Countervailing power from retailers was also considered to analyse potential incentives to bundle consumer health care products, as the PCC found that retailers' negotiation power was high enough that they were able to negotiate specific levels of discounts and margins. In this case, the Commission found that tying and bundling was unlikely to happen post-operation.

Source: MAO Case No. M-2019-005 and Commission Decision No. 20-M-005/2019.

As to the two types of cases where anti-competitive mergers may be exempted from prohibition by the PCC (efficiency considerations and failing firm), none of them has yet in practice being analysed by the PCC.

5.3.3. Evidence used

With respect to the evidence used to consider the competitive effects, the most common sources used by the PCC are the information given by the parties in the notification form, customers, and other industry participants' responses to requests of information, as well as government offices and industry observers' expertise. This includes documents, testimony, and economic data on business decisions.

While qualitative evidence coming from documents or first-hand observations of market participants are the most used, the PCC also considers quantitative evidence such as statistical analysis of price, quantities and other competitive variables and information from prior market events (so-called natural experiments). Box 5.6 presents a case where the PCC's conclusions relied on detailed quantitative and qualitative analysis.

Box 5.6. Evidence-based decision on the Chelsea Logistics' acquisition of shares in KGLI-NM Holdings

A group of transactions in the shipping transport sector were evaluated by the PCC between 2017 and 2018. In one of the decisions, related to the acquisition of shares of Trans-Asia Shipping Lines by Chelsea Logistics, the PCC declared a transaction voided given that the parties failed to notify it. Relying on the transaction being voided, in a posterior transaction, the proposed acquisition of shares in KGLI-NM Holdings by Chelsea Logistics, the Commission decided that it will take no further action on the transaction. The main argument was that the Trans-Asia acquisition being voided eliminated the horizontal overlaps of the merging parties. However, it presented a detailed analysis on the potential unilateral, horizontal effects of the transaction if the previous transaction had been consummated and such overlaps existed.

One of the issues analysed by the Commission referred to the determination of the relevant markets by the Mergers and Acquisitions Office. While the latter considered that the relevant product markets were the provision of passenger shipping services and the provision of cargo shipping services, the merging parties argued that in both scenarios, long-haul and short-haul services do not belong to the same relevant market. For cargo shipping services, the substitutability of containerised and bulk services was also disputed.

In order to reach its conclusions on further segmentation of the market, the PCC used qualitative analysis complemented by a consumer survey to assess demand substitutability.

As to the competitive assessment, the PCC calculated market shares and then conducted regression analysis to evaluate the closeness of competition between the merging parties and a route-by-route analysis of the likelihood of price increases. For the closeness of competition, they used data from the notification form, the Maritime Industry Authority (MARINA) and Cebu Ports Authority. They concluded that Trans-Asia prices are on average 22% lower when they were both present in a route. Profit margins of both firms by route were calculated and found to be high and econometric analysis to calculate own and cross price elasticities and diversion ratios was also done. For instance, to find that a 10% in one of the parties' prices would lead to combined revenues increasing by close to 33% in all routes.

Finally, the PCC used a natural experiment to conclude on the ability and incentives of the merged company to raise prices. In November 2014, there was a temporary cease in operations in two routes by one of them. This natural experiment helped the PCC show that prices in these routes were 15% higher than the average of those where the operations were not ceased.

For all of the above, the PCC concluded that the transaction would give strong incentives to the merged entity to increase prices in all six routes for passenger shipping services, resulting in harm to competition and consumers. Similar exercises were conducted for the cargo shipping services routes, finding that the transaction would result in substantial lessening of competition in all the seven relevant legs.

Source: Full Case Report on Commission Decision No. 022-m-039/2018 on PCC Case No. M-2018-002 and PCC Case No. M-2018-003.

As can be observed, quantitative economic techniques used by the PCC range from the calculation of concentration ratios to more sophisticated tools such as calculation of price elasticities and regression analysis. In general, several practical considerations and questions arise when using economic analysis in merger control, including how data-intensive the exercises can be, how to integrate economists into case handler teams, and how to ensure economic analysis is easily comprehensible by decision-makers, parties, and courts, among others.

It can then be seen that at least for some cases the tools used by the PCC rely heavily on very detailed and individualised data. However, given that the reasoning of the PCC is made available to merging parties only when there is Statement of Concerns in Phase II, there seems to be a perception by some stakeholders that the amount of information requested by the PCC is vast and that generally there is a lack of clarity as to how it is used. One way to assuage such concerns would be to increase transparency as to how the information is used, in particular by publishing non-confidential versions of the decisions, which currently are not published (see Recommendation 4.2.).

As mentioned above, one potential source of detailed economic evidence can derive from sectoral regulators. This specialised industry knowledge allows such regulators to contribute know-how and technical expertise to the assessment of the effects of a transaction in a regulated market or the potential solutions for an anti-competitive concern. Although the PCC has in force multiple Memorandums of Understanding with some regulatory agencies, it has been identified that there potentially is a lack of co-operation between authorities in the Philippines to share information in this regard.

With Respect to the institutional setting that allows for the use of economic analysis in merger review, competition authorities have adopted a variety of organisational structures, including economists being directly involved in cases, independent economic units or hybrid models.

In the case of the PCC, out of 23 people who were working in the Mergers and Acquisitions office in 2021, 6 of them were economists (representing 26% of their staff). Moreover, PCC has an independent economics unit. While this unit's main responsibilities are related to market studies, every merger review has at least one of the economists from the unit as part of the case team.

While there is not a model that seems more successful than the others, there are key aspects of an efficient use of economic analysis in merger review that applies regardless of the institutional setting selected by the authorities. These aspects relate to the existence of guidance on the objective of economic analysis, the assumptions underlying the analysis, the appropriateness of the techniques used, the type of data that is fit for purpose, the transparency and replicability of the analysis and the robustness of the results (OECD, 2020, p. 52^[9]).

In sum, the substantive test performed by the PCC, that refers to a substantial lessening of competition test, is characterised by:

- An analysis case-by-case that considers particularities that apply to each transaction, such as the structure of the relevant market, the market position of entities, actual and potential competition, alternatives to suppliers and users, access to supplies or markets, and any other barriers to entry.
- The consideration of any substantiated efficiencies likely to arise from the transaction that might overweight its anticompetitive effects.
- The assessment of the effects of a transaction, for which the PCC considers a counterfactual scenario and compares the competitive conditions that would likely result from the merger or acquisition with those that would have likely prevailed without such transaction.
- Generally, the use of use quantitative and qualitative information to define the relevant markets affected by the transaction. This includes the application of the SSNIP test to define product and geographic markets.
- A calculation of market shares and concentration ratios, which is also common in the assessment of mergers in the Philippines.
- Furthermore, to determine whether there are overlaps in the parties' activities and define possible theories of harm, the analysis of horizontal and vertical relationships between the parties in the relevant market.
- In horizontal mergers, the PCC looks at unilateral and co-ordinated effects. Guidelines on which factors play key roles in the assessment of these effects have been published by the PCC and the

case law applies them accordingly. Guidance is scarcer with respect to vertical and conglomerate mergers. However, from case law, it is possible to determine how the PCC assess such transactions.

- Statistical evidence is also present in PCC's substantive analysis. Natural experiments as well as basic econometric techniques, such as the estimation of price elasticities, are tools used to assess the competitive effects of a transaction.
- Efficiencies are also fundamental in the substantive analysis of a merger. The efficiencies must be demonstrable, with detailed and verifiable evidence of the benefits. They must be merger-specific, and consumers should not be worse off as a result of the merger. However, they will only be analysed when they are brought by the parties, and this has never happened in practice.

Recommendations

Recommendation 5.1

The PCC should issue guidance on the assessment of non-horizontal effects (i.e. vertical and conglomerate effects). This could be done either by following recommendation 4.2, that increases transparency on the reasoning underlying the decisions, or by issuing guidelines such as the Merger Review Guidelines from 2018 that focus only on horizontal transactions.

Recommendation 5.2

The PCC should increase its interaction with sector regulators. This with the purpose of information-gathering and transmission of technical knowledge, as the specialisation of the regulators could facilitate the understanding of the market, its dynamics and the potential competitive effects of the transactions, as well as potential solutions to anti-competitive concerns.

6 Remedies, prohibitions and sanctions

6.1. Overview of the use of remedies, prohibitions, and sanctions in the merger regime in the Philippines

A transaction that substantially prevents, restricts, or lessens competition in the relevant market, and does not qualify for any of the exemptions (efficiencies or failing firm) may be prohibited under Section 20 of the PCA. This means that the PCC may prohibit its implementation, prohibit the implementation unless and until it is modified by changes specified by the PCC, or prohibit the implementation unless and until the pertinent party or parties enter into legally enforceable agreements specified by the PCC.

In practice, according to Rule 11.4 of the Rules on Merger Procedure, the PCC may issue a commitment decision that is binding to the parties in order to obtain a favourable decision on the transaction and if they fail to abide by their commitment, the PCC may also impose fines, additional remedies and even nullify the commitment decision. In other words, if PCC concludes that a merger is likely to result in a significant lessening of competition, it might accept and impose conditions to remedy, mitigate or prevent such negative effects.

The PCA identifies two types of possible remedies: structural and behavioural. Section 12 of Chapter 2 of the PCA explicitly establishes that one of the powers of the PCC is to issue adjustment or divestiture orders including orders for corporate reorganisation or divestment. However, it emphasises that such structural remedies should only be imposed when there is no equally effective behavioural remedy or when there is one, but it would be more burdensome for the enterprise concerned than the structural remedy. Even though these powers are not particular of merger control, such measures may be imposed in the merger context.

In the Philippines, according to the Rules on Merger Procedure, remedies can be presented at any stage of the merger review, as early as Phase I and as late as the review of the case by the Commission, once the MAO has issued the Statement of Concerns explaining the potential anti-competitive effects of the transaction. The submission of voluntary commitments suspends the review period for sixty days. If the remedy package is proposed before the Statement of Concerns, the MAO would review how appropriate and sufficient it is to address its concerns and discussions would be held with MAO. If the proposal is made after the Statement of Concerns, the negotiation is carried out directly with the Commissioners.

Some further guidance on the remedies can be found in the Merger Review Guidelines. There, the possibility of imposing structural, behavioural or a combination of both types of remedies is contemplated. Their adequacy and effectiveness in preventing, remedying, or mitigating the anti-competitive effects of the mergers are the factors considered by the PCC to determine whether a set of remedies is appropriate, reasonable, and practicable. Whenever there are no remedies that comply with these conditions, the PCC would prohibit the consummation of the transaction.

The process of proposing and evaluating remedies in *motu proprio* reviews follows the same approach. They can be presented at any time during the investigation and the PCC would proceed to evaluate their suitability. No further guidance on the way they are analysed is provided.

The PCC is responsible for monitoring compliance with remedies. There is usually a timeframe within which the remedies must be complied with and after which the PCC may initiate proceedings for failure to comply with remedies.

The PCA grants powers to the PCC to impose sanctions, fines, or penalties, for noncompliance with or breach of the act and the PCA-IRR. In the case of mergers and acquisitions, all the merging parties, including their ultimate parent companies are jointly liable for the fines, according to Rule 16 on Section 16.13 of the PCC's Rules on Merger Procedure.

Particularly, Section 17 of the PCA and Rule 4, Section 5 of the PCA-IRR and Section 2.1. of the Rules on Merger Procedure contain specific considerations for some circumstances, such as failure to notify the transaction, failure to do so within the prescribed 30-day period after the agreement has been reached or consummating mergers either without notifying them or before PCC's decision (gun jumping).

Under Section 16.1 of the PCC's Rules on Merger Procedure, failure to notify and gun jumping cases, include declaring the agreement void and the parties being subject to fines between 1 to 5% of the value of the transaction, starting from 3%⁶⁸ and adjusting it on a case-by-case analysis. For the basis of the fine, Section 16.4 states that the value of the transaction shall be set with reference to the aggregate value of the assets in the Philippines or the gross revenues generated by such assets, whichever is higher.

Moreover, Section 16.2 of the PCC's Rules on Merger Procedure establish that the late notification of non-consummated mergers could represent a fine equivalent to either ½ of 1% of 1% of the transaction value or PHP 2 million, whichever is higher.

Furthermore, Section 16.3 of the PCC's Rules on Merger Procedure determines that violations of Section 20 of the PCA through the consummation of prohibited mergers shall result in administrative fines. For first offences, it considers fines of up to PHP 1 million, for second offences of no less than 100 and up to 250 million and third and succeeding offenses of no less than PHP 150 million and up to 250 million.

The Rules on Merger Procedure include considerations on the computation of fines. Some of the factors considered by the PCC in fixing the amount of fines, according to Rule 16.7 are the gravity of the conduct, the time the parties took to carry the merger into effect and how long has it been in place. Aggravating factors include previous violations of the PCA, continuing the conduct or committing other acts of consummation of the merger after being informed of the PCC's proceedings, among others. Mitigating circumstances include co-operation with the authority during the investigation and compliance with the PCC's orders or resolutions.

Finally, for any other violations that are not explicitly penalised, Section 29 of the PCA considers administrative fines for first offences for up to PHP 100 million and for second offences of no less than PHP 100 and up to 250 million. In cases of failure to comply with an order, the sanction could be between PHP 50 000 and 2 million for each violation and a similar amount for each day until the party fully complies. Additionally, it considers fines of up to PHP 1 million for the supply of incorrect or misleading information. All these fines disposed are general to the application of the PCA, this is, they are not merger-specific, and are meant to be updated every five years but may apply, for instance, for infringements such as obstruction or misleading information when notifying a transaction and non-compliance with remedies.

In 2021, the PCC issued Memorandum Circular 21-001 increasing the fines for anti-competitive agreements, abuses of dominance, anti-competitive mergers, and violations of compulsory merger notification by 10%.

In the case of non-compliance with remedies, the PCA provides for the possibility of imposing periodic penalties until compliance.

6.2. Analysis of the use of remedies, prohibitions, and sanctions in the Philippines

According to the OECD CompStats database, between 2015 and 2020 in a sample of 73 jurisdictions, 2.2% of the mergers notified to the competition authorities were authorised with remedies, while only 0.7% were prohibited, meaning there has been an average intervention rate of 2.9% (OECD, 2022^[27]). If only the Asia-Pacific jurisdictions from the sample are considered, the average intervention rate for the same period was 1.4% (OECD, 2021^[33]).

The imposition of remedies and prohibition of transactions has followed a similar pattern in the Philippines. Between 2017 and 2021, 2.37% of the mergers notified were approved with remedies and 0.59% (which refers to only one transaction) were prohibited, leading to an intervention rate of 2.96%, very similar to the world's average.

Competition authorities around the world with an active merger regime use remedies to eliminate the competitive concerns that might result from the analysis of a merger or an acquisition. They are viewed as way of preserving transaction benefits and efficiencies, while addressing harm to competition identified (OECD, 2011, p. 11^[34]).

In the Philippines whilst remedies can be proposed to the PCC at any stage, in practice, most of the proposals are brought to the PCC once the Statement of Concerns has been issued. According to many stakeholders this is due to the fact that only after the Statement of Concerns is issued, do the parties have certainty on the concerns of the MAO and thus, can design more accurately the remedy package. Although at the beginning of Phase II the MAO holds a meeting with the parties to explain the reasons why the transaction will be reviewed in a second phase, stakeholders perceive this as only preliminary and not concrete enough to start the exercise of designing remedy proposals (see section 4).

As for the type of merger remedies that are considered, they could be classified as either structural, when they require some form of divestiture of assets, behavioural, when they create conditions or obligations on the conduct of the merged entity, or hybrid, when they combine both. While structural remedies are one-off measures that aim at restoring the competitive structure of a market, behavioural, or conduct remedies, are designed to modify, or constrain the behaviour of the merged entity (OECD, 2022, p. 21^[35]).

There has been an extensive discussion, both theoretically and empirically, on the benefits and drawbacks of each type of remedy and the situations where each of them is more suitable. The table below summarises some of the pros and cons of each of them.

Table 6.1. Benefits and drawbacks of structural and behavioural remedies

Type of remedy	Benefits	Drawbacks	Frequently Used for
Structural	<ul style="list-style-type: none"> - One-off nature and relative straightforward character - Permanent changes to the structure of the industry - No need for subsequent long-term monitoring after they have been implemented 	<ul style="list-style-type: none"> - High costs to the merging parties - potential disruptions of relationships between the parties and their customers - Irreversible action 	Horizontal concerns
Behavioural	<ul style="list-style-type: none"> - They preserve the potential efficiencies from the transaction - Useful when there is need for a more flexible or less permanent solution in rapidly evolving markets 	<ul style="list-style-type: none"> - Does not change the incentives of the merger entity that derive from market structure - Difficult to design to capture future eventualities and circumventing conduct - Monitoring is required to ensure compliance - Monitoring is time and resource intensive - If not sufficiently flexible, risk hampering the firm's ability to adapt effectively to changes in the market conditions - Need of revision when significant changes in the market dynamics occur 	<ul style="list-style-type: none"> - Vertical or conglomerate concerns - Complements to structural remedies

Source: (OECD, 2022^[35]), [Disentangling Consummated Mergers – Experiences and Challenges](https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges-2022.pdf), (OECD, 2019^[36]), [The divestiture of assets as a competition remedy: Stocktaking of international experiences](https://www.oecd.org/daf/competition/divestiture-of-assets-competition-remedy-ENG-web.pdf), (OECD, 2011^[34]), [Remedies in Merger Cases](https://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf), (OECD, 2003^[37]) [Merger Remedies](https://www.oecd.org/daf/competition/34305995.pdf), and (ICN, 2018^[23]), [Recommended Practices for Merger Notification and Review Procedures](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf).

While almost all jurisdictions with an active merger regime have issued guidelines related to their review, many jurisdictions have issued guidelines on remedies in merger cases. These guidelines often include discussions of potential issues that might arise with different types of remedies, including the advantages/disadvantages of imposing structural remedies or behavioural ones and the scenarios where behavioural remedies might be used or could act as complements to divestitures.

Such guidelines increase predictability and provide important guidance for companies as to how the competition authority analyses remedies. Although the analysis of suitability and appropriateness of remedies is done on a case-by-case basis, they can provide guidance on the type of remedies that would be favoured depending on some circumstances, what considerations are used to evaluate their sufficiency and what should they expect from the authority's assessment.

Generally, competition authorities around the world recognise the utility of having all the options available as a tool to remedy concerns from transactions, but they mostly favour structural over behavioural remedies. For example, the competition authorities in the United States issued a merger remedies manual where they disclose their preference for divestitures to achieve their goal of preserving competition (US DOJ, 2020, p. 13^[38]). Similarly, the European Commission, in its Notice on Remedies, recognises as a general principle that structural commitments from merging parties are preferable to address the competition concerns raised by the transaction (European Commission, 2008, p. 6^[39]). Other jurisdictions that have expressed their preference for structural remedies in merger review are Australia, Brazil, Canada, Colombia, Korea, Singapore, and the United Kingdom, among others.⁶⁹ This does not mean that they do not use or accept remedies of a behavioural nature. Indeed, their guidelines suggest that behavioural remedies might be more useful to complement structural measures, or in transactions with non-horizontal concerns. The ICN has highlighted this preference over structural remedies, particularly for horizontal mergers, as a good practice to restore the competitive structure of a market with a durable remedy that is easier to administer and do not require intensive monitoring to ensure compliance (ICN, 2018, p. 38^[23]).

Studies on the efficacy of remedies, including the type of remedies that have proven to be more suitable, implementable, and effective, have been made in multiple jurisdictions. For instance, in 2005, the European Commission published the Merger Remedies Study (European Commission, 2005^[40]) where it analysed the remedies that had been applied and how they had worked (or not) in practice with the objective to understand any design and implementation flaws. The study analysed a sample of 96 remedies, covering 40 transactions between 1996 and 2000, looking at several types of remedies. It found that most had serious design and/implementation flaws and that commitments that are structural in nature were significantly more effective than behavioural ones. Similarly, in the United States, the Federal Trade Commission (FTC) found that complete divestitures succeeded at higher rates than divestitures of selected assets and other non-structural remedies (FTC, 2017^[41]).

6.2.1. Remedy cases in the Philippines

With respect to the nature and scope of remedies in the Philippines, from the four transactions that have been approved by the PCC subject to voluntary commitments from the parties since 2017, three (75%) of them corresponded to behavioural remedies only and one (25%) to a hybrid of both structural and behavioural ones. The table below summarises the remedies imposed by the PCC in all those cases.

Table 6.2. Summary of the cases approved by the PCC with voluntary commitments

Case number	Case name	Type of concern	Type of remedies	Summary of the remedies imposed	Duration
M-2017-002	Acquisition by SM Retail, Inc. of Goldilocks Bakeshop, Inc.	Vertical	Behavioural	<ul style="list-style-type: none"> - FRAND terms to mall tenants and lease applicants in the sale of products similar to those sold by Goldilocks. - Separate operation of businesses, data protection protocols and firewall systems to prevent the ability to access detailed sales data of tenants and alternative uses of it. 	5 Years
M-2017-032	Acquisition by TQMP Glass Manufacturing Corp. of AGC Flat Glass Philippines, Inc.	Vertical	Behavioural	<ul style="list-style-type: none"> - FRAND terms for setting prices and provide services to customers. - Sell products or services to glass distributors on terms no less favorable than similar customers, despite them being competitors of AGC or despite them buying products or services from competitors. - Prohibition to impose discounts or rebates that are exclusionary or result in foreclosure. Moreover, such rebates or discounts shall be made known to customers at the start of every year. 	10 Years
M-2018-012	Acquisition by Grab Holdings, Inc., and MyTaxi PH of Assets of Uber B.V. and Uber Systems, Inc.	Horizontal – unilateral	Behavioural	<ul style="list-style-type: none"> - Prohibition of exclusivity provisions in agreements with drivers and operators that would prohibit multi-homing, would result in exclusive membership or use of the Grab app or would penalise drivers or operators solely by having been found to be registered with or operating under other TNCs. - Report all the incentives given to drivers or operators and their amendments. - Continue providing licensing and regulatory support to drivers and operators (help desks) regarding app requirements, processes to obtain certificates, etc. In case a driver or operator wishes to cease operating under Grab app, Grab should return any original documents with the application for the certificates of operation within 5 working days of receiving the request. - Grab shall maintain the changes made to the app unless replaced with others that provide equal or greater benefit to riders or drivers and operators (such as reduction in booking radius, mandatory identity disclosure, acceptable cancellation rate, etc.). - Remove the see destination feature or any other that allows drivers to see destination before accepting a ride request (to improve customer experience) for drivers with acceptance rate under 65%. - Implement driver performance standards, adopt an emergency SOS feature, adopt passenger code of conduct, upgrade customer support, and adopt a driver welfare and rewards programme that is consistent with the other undertakings. - Keep the following quality metrics: allocation rate higher than 65%, driver cancellation rate less than 5%, a response time to rider complaints of no more than 6 hours for non-serious and 3 hours for serious complaints. - Show in the receipts the fare breakdown per trip. - Deviation measures monitoring the price behaviour will be calculated. If higher than 22% with respect to the baseline sample, they should provide explanation. 	1 year*
M-2018-033	Acquisition by Chelsea Logistics Holdings Corporation of shares in Trans-Asia Shipping Lines, Inc.	Horizontal – Unilateral	Behavioural	<ul style="list-style-type: none"> - Price monitoring on passenger and cargo rates on the remaining critical routes and determination of extraordinary increases. - Submission of data on all trips including vessel, ports, route distance, dates, passenger or cargo volume, revenue, wages, fuel expenses, vessel depreciation, insurances, maintenance expenses, port expenses, and other costs. - Submission of an explanation of extraordinary increase in prices with evidence - Appointment of a monitor trustee to guarantee maintenance of service quality based on a customer satisfaction index. - Report of any approval on increase the capacity or frequency of their operations in the withdrawn routes. 	4 years

Note: *The PCC initially approved the transaction subject to commitments with a duration of one year. In November 2019, the PCC extended the commitments for another year, with the exception of the non-exclusivity ones, that were extended for four years.

Source: PCC Cases No. M-2017-020, M-2017-032, M-2018-012 and M-2018-033.

As can be observed, so far, only behavioural remedies have been imposed in the Philippines, not only to address vertical concerns (in two cases) but also to address horizontal unilateral effects in two other transactions. They have been imposed both pre- and post-merger, as it is the case in motu proprio investigations (see Box 6.1).

Box 6.1. Commitments in the motu proprio review of the consummated acquisition of Uber by Grab

The acquisition of Uber's Southeast Asia business by Grab took place on 25 March 2018. This included Uber's assets in the Philippines and other seven countries in the region. The announcement was made by Grab in 26 March and, immediately after this, both companies began efforts to migrate Uber's drivers and riders to the Grab platform since the former was planned to shut down in a two-week period after the acquisition.¹

On 3 April 2018, the PCC issued Resolution No. 08-2018, directing the Mergers and Acquisitions Office to commence a motu proprio review of the consummated transaction. Three days after, it also issued an order imposing interim measures on the parties for the duration of the review. Finally, it accepted voluntary undertaking from the parties that were considered sufficient to address the competition concerns raised by the Mergers and Acquisitions Office.

According to the PCC, the transaction would likely result in a substantial lessening of competition in the market for on-demand private transportation online booking service through a mobile ride-hailing application. This is, a theory of harm related to the existence of unilateral, horizontal concerns given the elimination of Grab's main competitor and insufficient competitive pressure from other agents.

After multiple consultations with the PCC, the authority considered that the voluntary commitments proposed by the parties were sufficient to address the competition concerns identified. Although the remedy package consisted of a series of behavioural remedies only (see summary of the commitments in Table 1.2), the PCC considered that they assured the public that quality and price levels that would prevail were those that had been when they still faced competition from Uber. Moreover, that the merger would not make it more difficult for new players to enter and grow in the market.²

Grab has been sanctioned for non-compliance, first by violating the interim measures imposed by the PCC and second by not complying with the voluntary commitments accepted by the PCC. In October 2018, the PCC fined both companies for failure to keep their businesses separated and for not delaying Uber's assumption of a board seat in Grab during the merger review period. Moreover, Grab was fined for failure to maintain the conditions before traction, such as pricing policies, rider promotions, incentives, and service quality. In total, 10 acts of violation referring to two out of the seven measures in order were committed.³

Regarding compliance with the commitments, the companies were fined multiple times in 2019 for violating price and service quality conditions, such as exceeding 5% of driver cancellation rates and pricing outside the allowed fare ranges.⁴ The penalties imposed were in the form of a refund to affected passengers.⁵

Notes: ¹ Press release: "Grab Merges with Uber in Southeast Asia", <https://www.grab.com/sg/press/business/grab-merges-with-uber-in-southeast-asia/>; ² PCC Press Release "PCC binds Grab to service quality, price conditions for Uber takeover", <https://www.phcc.gov.ph/press-releases/pcc-binds-grab-to-service-quality-price-conditions-for-uber-takeover/>; ³ PCC Press Release "PCC fines Grab, Uber P16M for violating Interim Measures Order", <https://www.phcc.gov.ph/press-releases/pcc-fines-grab-uber-p16m-for-violating-interim-measures-order/>; ⁴ It is relevant to note that Grab's pricing commitments to the PCC are independent from the fare structure imposed by the Land Transportation Franchising and Regulatory Board. While some of the fares charged by Grab were considered a violation of the commitments to the PCC, they might not necessarily represent over charges based on the fares imposed by the regulator. ⁵ PCC Press Release "PCC fines Grab P16.15M for violating commitments in May-August rides", <https://www.phcc.gov.ph/press-releases/pcc-grab-fine-16-15m-eod-sdf-q4/>.

One of the challenges identified by stakeholders with respect to the design of commitments to propose to the PCC is the lack of current guidance. These ranged from the type of commitments that would be suitable to solve certain types of competition concerns to the criteria considered by the PCC when evaluating their proposals. Although the Merger Review Guidelines describe the type of remedies possible (behavioural and structural), the description is very general, lacks examples and does not provide guidance on how they might fit different theories of harm. It is therefore recommended that the PCC issues further guidance on how it evaluates remedy packages.

6.2.2. Remedy implementation

One relevant aspect in the discussion of merger remedies is the implementation phase, including monitoring of compliance of such remedies. Effective monitoring is crucial to guarantee the effectiveness of remedies, particularly given that incentives to comply with orders are closely related to the perception of effective monitoring (ICN, 2016, p. 24^[42]). In general, remedy packages include a set of rules that facilitate authorities' monitoring process, as the competition authority should have the means to investigate implementation and compliance with the remedies and to require periodic obligations to report this (ICN, 2018, p. 40^[23]).

Monitoring of remedies is very resource-intensive and requires the use of complex tools and specialised knowledge. For instance, when implementing behavioural remedies, the authorities normally require a complex design process to ensure that the merging firms are not circumventing the remedies and monitoring their compliance for a long period, making the monitoring of its implementation a difficult and highly resource intensive task.

This monitoring can be achieved through the setting of a Remedy Order that is transparent and sets out stages at which the firm's compliance will be assessed, what information the entity will be required to produce and report and provisions detailing and requiring access to information that the authority considers necessary to effectively monitor compliance.

While in some jurisdictions, like the European Union, the merger units are the ones also in charge of monitoring compliance of remedies, recently, some others have created specialised monitoring units for agreements between parties and the competition authority, including remedies in merger review.⁷⁰ Both settings have advantages and disadvantages but in either of those, the need to guarantee enough resources for an adequate monitoring is crucial.

As lack of sufficient resources is often an issue for competition authorities to properly monitor compliance of remedies on a daily basis, the use of third-party trustee oversight is also common to assist in different aspects of the implementation, including monitoring. Competition authorities benefit from the use of third parties as trustees as they often have specialised expertise and lessen the burden on the authority's resources affected by the merger (ICN, 2016, p. 25^[42]).

One of the advantages of using the figure of monitoring trustees comes from the sources to fund them. In most jurisdictions, the trustee is paid by the merging parties, guaranteeing that such payments do not imply dependence and that the trustee acts solely on behalf of the competition authority (ICN, 2016, p. 25^[42]).

The role of monitoring trustees may include the interpretation of the application of remedies, the provision of non-binding opinions to the authority on the implementation or effectiveness of the Remedy Order and the presentation of reports on the process. When involving divestitures, the trustee may also oversee this process, including non-binding opinions on the suitability of the buyer and the management of hold-separate businesses when considered. Authorities such as the European Commission have developed standard models for trustee mandates that include provisions on duties and obligations of the trustees and the parties, including the remuneration of the trustee and provisions to ensure its independence and absence of conflicts of interests.⁷¹ It is important to note that while competition authorities benefit from the

expertise of trustees and their opinions, final decisions on non-compliance or effectiveness of remedies still remain the sole competence of the authority.

Implementation has been a challenge in the Philippine merger regime. Out of the four cases where undertakings were accepted by the PCC, in only one case they were fully implemented and, in it, sanctions for non-compliance were imposed, including periodic penalties (see Box 6.1 the Uber/Grab case). This shows that while the PCC requested the appointment of a third-party monitoring trustee to report on the commitments' compliance, in practice, its appointment did not guarantee compliance with the commitments by the parties.

In the SM Retail/Goldilocks case, the parties notified the withdrawal of the transaction to the PCC after its issuance of the commitment decision. Subsequently, the parties modified the transaction and reduced the percentage of shares to a level that was no longer subject to notification. In 2021, under the new thresholds from Bayanihan 2, the parties pursued another transaction that was not subject to compulsory notification because the transaction value did not meet the 50Billion threshold. In the Chelsea/TransAsia case, the commitments to be accepted by the PCC could only be implemented with the approval of all stakeholders. As one of them failed to approve the commitments agreed with the PCC, the transaction was reverted to review status. However, no Commission Decision was issued during the period of review, thus, the transaction was deemed approved.

Finally, in the TQMP/Flat Glass case, the merged entity secured an injunction order from the Court of Appeals that impeded the appointment of a monitor trustee and the subsequent full implementation of the commitments. TQMP filed in 2021 an application for the release of the commitments or for the reduction of their duration from 10 to 5 years, as well as the modification of some of the remedies.

The difficulties on implemented behavioural remedies that the PCC have faced are similar to those faced by other jurisdictions in their initial steps in merger control. In those jurisdictions these experiences resulted in structural remedies becoming the main types of remedies accepted for horizontal effects from mergers. This difficult experience the PCC has had with implementation of behavioural remedies is another argument in favour of the PCC making structural remedies the preferred option to solve identified competition issues in mergers.

6.2.3. Remedy review

Post-implementation revisions and periodic reviews are relevant to assure that the remedies can be implemented and have the desired effect in the market. The range of modifications can be broad, from changes in deadlines to substitutions or waivers to implement specific commitments. The key consideration in this aspect is that such revisions should be justified and carefully analysed so that they do not impede the implementation of the remedies, relate to changes in market conditions and that those changes require that the remedy packages is adjusted in order for it to remain effective (ICN, 2016, p. 28^[42]).

In the Philippines, the only remedy package that has been implemented, have been also subject to revisions. In the Grab/Uber case, the PCC first extended the commitment period in August 2019, one year after the conditional clearance, to give way to negotiations for a new or amended set of commitments to address the competition concerns arising from the acquisition.⁷² A new set of commitments were then approved, while also extending their duration for one year with the exception of non-exclusivity commitments who were extended to four years. The new commitments maintained the same framework as the previous ones but introduced more objective metrics to facilitate monitoring and compliance.⁷³

6.2.4. Remedies and international co-operation

Essential to secure the effectiveness of merger commitments or remedies is also in some cases international co-operation. Cross-border merger cases have become increasingly common and competition effects of such transactions often require considerations across jurisdictions. Discussions

between competition authorities could go from sharing public information on the transaction, remedies proposal and details related to the structure of the relevant markets, to a co-ordinated design of the remedies and their negotiation with the merging parties or reliance on remedies from other authorities to approve a transaction (ICN, 2016, p. 20^[42]). For instance, authorities could realise that when imposing commitments to address domestic concerns, they might want to incorporate divestitures or changes in conduct of the merged entity in other jurisdictions. Sometimes, remedies that involve multiple jurisdictions could be more effective or complete, as they require more structural changes in the merged entity structure or conduct (OECD, 2011, p. 22^[34]).

While the PCC has signed Memoranda of Understanding with competition authorities from the People's Republic of China (hereafter 'China'); Hong Kong (China); and, Singapore, there has not been remedies imposed in co-ordination with those authorities. In the Grab/Uber transaction, the PCC discussed the case with the Competition and Consumer Commission of Singapore. However, due to confidentiality issues, only general discussions on timelines and potential theories of harm took place and not discussions on remedies.

6.2.5. Prohibition decision(s)

Given the efficiencies that arise from mergers and acquisitions, in most jurisdictions around the world, there are significantly more conditional clearances than prohibitions (OECD, 2016, p. 8^[43]). As mentioned above, only one transaction has been blocked by the PCC since the merger regime entered into force. In that case, the parties presented voluntary commitments but that the PCC deemed these "insufficient to completely address or remedy the harms identified in the Statement of Concerns" and hence, rejected them prohibiting the merger.⁷⁴

6.2.6. Sanctions

Sanctions in competition law might pursue different objectives: deterrence, punishment, disgorgement, or compensation. Some regimes may place more emphasis in one of the objectives, while others consider them as complementary (OECD, 2016, p. 9^[44]). Sanctions against violations of merger control rules and decisions represent a strong deterrent from non-compliant behaviours and provide a strong signal to the public, including the parties and third parties, that merger rules are effective and enforceable (OECD, 2014, p. 102^[24]).

Prior-notification Merger control regimes should set forth a framework of sanctions and enforcement tools that, at least, include:

- Failure to notify a reportable merger under mandatory notification system. In jurisdictions such as the European Union or South Africa, fine thresholds are percentages of the companies' turnover. Moreover, fines for late notification or the imposition of periodic fines such as the case in the United States⁷⁵ might increase incentives for companies to notify the transaction at some point. Failures to notify transactions can also result in transactions deemed invalid or authorities imposing remedies or ordering their unwinding.⁷⁶
- Consummation of a merger before approval by the authority (gun jumping). Sanctions for the violation of the suspensory effects of the merger review process or a standstill obligation are meant to preserve the effectiveness of merger control. In some jurisdictions, the sanctions for gun jumping are the same as for failure to notify (OECD, 2018^[45]).
- Obstructing the information gathering or the merger review process. Merging parties, as well as third parties, should respond accurately and in a timely fashion to requests for information from the competition authority to guarantee a correct review of the transaction. Sanctioning inaccurate, incomplete, or misleading information generates incentives for parties to co-operate and provide information the agency needs to undertake its analysis of the effects of the transaction.

- Non-compliance with remedies. Since if the remedies are not complied with, anticompetitive effects would result, competition laws often entrust the enforcer with the power to sanction non-compliance with remedies, including the possibility of periodic penalties to compel compliance.

Administrative penalties imposed in violations regarding the merger regimes typically involve fines on companies that are calculated either as a percentage of the company's turnovers, being 10% the most common one, or as absolute figures. These latter range between USD 32 400 in Chinese Taipei to USD 1.3 million in Brazil from a survey done in different jurisdictions. Other authorities impose fines per day the parties failed to comply (such as Canada, with fines close to USD 7 500 per day and the United States with fines of up to USD 42 530) and some others impose fines contingent on the profits gained by the parties by committing the infraction (such as Colombia). Common factors taken into account for determining levels of fines are willingness to co-operate, history of compliance and the duration of the non-compliance, for instance, in case of violations related to remedies (ICN, 2020^[46]). Moreover, multiple jurisdictions have the ability to unwind a merger that was implemented prior to notification and/or obtaining clearance, or when there have been severe remedy violations.

As identified, the PCA includes a complete framework that explicitly sets out sanctions for all of the above. Further, in practice, most of the powers to sanction related to merger review have already been used by the PCC.

With respect to non-notification of consummated mergers or gun jumping, the PCC has sanctioned companies in two related cases. In the first case, the Chelsea / KGLI-NM acquisition (see Box 5.2. Calculation of market concentration in the Chelsea Logistics/KGLM-NM case and Box 5.6), the PCC declared void the transaction and imposed an administrative fine of 1% of its value.⁷⁷ The main reason behind the non-compliance was that the companies did not include the assets of controlled entities by acquired company in the calculations of the size of transaction and, thus, did not notify it. Nevertheless, the PCC acknowledged that the parties co-operated in the investigation. In the second case, Chelsea was also involved, this time in the acquisition of Trans-Asia Shipping Lines.⁷⁸ In this case, the parties argued that the size of transaction was not met because the purchasing price of the shares was below the thresholds. The PCC clarified in its decision that the value of transaction, as stated in the PCA, needed to be calculated based on the assets of the acquired company and that, in this case, they were superior to the threshold, making the notification of the transaction mandatory. The parties were sanctioned with 2% of the value of the transaction.

Late notification has been sanctioned five times.⁷⁹ In these cases, parties have notified after the 30 days period from the signing of the definite agreements for multiple reasons, including incomplete forms that were not accepted and needed to be re-filed several times, or because one of the parties did not file the notification-form as they believed that notification should only come from one of the merging entities. In these situations, the PCC has sanctioned the companies with fines of 1/2 of 1% of 1% of the value of the transactions and, in one case, with 2 billion since the former percentage was above that limit.⁸⁰

The PCC has also imposed multiple fines for non-compliance of voluntary commitments in the Grab/Uber case. For violation of an interim measures order during the merger review period of the PCC, a total fine of PHP 16 million (close to USD 285 000) was imposed to the parties in 2018, with individual fines of PHP 1 million per infraction (USD 18 000)⁸¹ from a maximum of PHP 2 million (USD 36 000) per infraction, according to Section 29(b) of the PCA. Similar sanctions were imposed for the violation of commitments in 2019. These levels seem to be in the range of maximum sanctions in other jurisdictions. No other measures were used, such as the possibility to unwind the merger if recurring infractions occur.

Finally, no sanctions have been imposed for obstruction to the PCC's merger review. Moreover, the PCC has not used its powers to nullify decisions if parties fail to abide by their commitments, as established in Rule 11.2 of the Rules on Merger Procedure. Nevertheless, in the Acquisition by Chelsea Logistics Holdings Corporation of shares in Trans-Asia Shipping Lines, Inc.,⁸² the parties failed to abide by its commitments and the Commission directed that the transaction needed to go through merger review for a

second time. After the filing of a Statement of Concerns, the Commission failed to decide on the case, having the effect of approving the transaction.

Recommendations

Key Recommendation 6.1

Make Structural remedies the preferred option to solve competition issues, especially where competition concerns from horizontal effects have been identified. This would increase alignment with international good practices. This may require modifying the PCA, or alternatively, and to the extent that it is equally effective and possible, the PCC should issue guidance on the possibility to more frequently use structural remedies.

Recommendation 6.2

Issue guidance on remedies choice and implementation. The PCC should issue guidance on the type of remedies it might consider and the criteria to evaluate if they are adequate and sufficient. These guidelines should include examples and assist on how the different types of remedies might fit different theories of harm.

7 Conclusions

This publication analyses key issues arising from the Philippines' current merger control system and provides suggestions for improvement in light of OECD Recommendations and other international good practices. It also takes into account the economic ADB expertise in the Philippines. While a number of aspects of the merger control regime in the Philippines seem to be in line with international good practices, others require amendments in order to establish and consolidate an effective, efficient, and transparent merger control regime.

Recommendations proposed in this publication relate to the legal framework of the Philippines' merger regime, the current institutional design, the application of merger control rules and jurisdiction and the substantive examination of transactions. They include an analysis of cases and decisions by the PCC, comprising those with remedies, prohibitions, fines and penalties.

Key recommendations focus on:

1. Setting clear rules and guidance on the adjudication process, particularly for the voting procedures of the Commissioners and the comprehensive technical assessments for their decisions.
2. Maintaining the mandatory pre-notification system with objective criteria for defining transactions covered and the notification thresholds.
3. Guaranteeing procedural fairness and transparency by offering state-of-play meeting to the parties, as well as providing economic and legal reasoning behind the merger decisions.
4. Making structural remedies the preferred option to solve competition issues.

All the recommendations are summarised below. Their full and correct implementation would allow mergers to be selected, notified, and reviewed in a timely, effective, and predictable manner with principles of transparency, integrity, and procedural fairness, leading to better decisions and better outcomes for the Filipino economy. The ADB-OECD may provide further collaborative support in implementation.

Key recommendations

Key Recommendation 1

Set clear and binding Rules of Procedure for the for the adjudication of merger cases in cases of tied voting in Commission. One possible solution could be to include the possibility for a quality vote to the Chairperson. This is important considering that a tied vote at Commission Level automatically leads to an approval of a given notified transaction.

Key Recommendation 2

The PCC should set clear guidance on the criteria for the recusal of Commissioners for decision making. This guidance should specify under which circumstances one or more Commissioners are required or allowed to refrain from voting, including criteria on how and when the recusal should be made.

Key Recommendation 3

The PCC should rely on comprehensive technical assessment for the decisions made by the Commission. This could either be done by accompanying the internal separation between investigative and decision-making bodies with a full team with specialised knowledge to analyse the mergers, or by eliminating the internal separation and relying on the assessment done by the Mergers and Acquisitions Office.

Key Recommendation 4

The Philippines should preserve a mandatory notification system with clear criteria defining the type of transactions that are caught by merger control, the exemptions to it, and the objective thresholds to be considered to notify transactions.

This includes maintaining Sections 16 and 17 of the PCA that describe the mandatory pre-notification merger system with suspensory effects, the types of transactions covered by the merger regime, as well as the thresholds considered for notification (this is, size of transaction and size of person).

Key Recommendation 5

The definition of mergers in the PCA should be the same as the definition in its Implementing Rules and Regulations (PCA-IRR). Particularly, it should include joint ventures explicitly to make it clearer for companies to understand that joint ventures are part of the transactions covered by merger control. Moreover, making clear the type of transactions that are exempt from the rules on compulsory notifications, such as internal restructuring within a group, consolidation of ownership with no change of control, land acquisition without the purpose of obtaining control, and joint ventures formed by winning bidders in public-private partnership projects.

Key Recommendation 6

The notification thresholds should revert to the levels pre-Bayanihan 2, adjusted to recent changes in the macroeconomic environment of the Philippines. This would guarantee an efficient setting of threshold levels that reflect the reality of the Philippines economy and ensure a well-functioning and efficient merger control system. The setting of threshold levels should be subject to periodic review to reflect the changes in the economic context of the jurisdiction.

Key Recommendation 7

State-of-play meetings should be offered to the merging parties at key stages of the merger review procedure, including in Phase I, to guarantee transparency and procedural fairness. This would allow merging parties to respond to such concerns in a timely manner, for instance, by formulating a remedy package early in the process. This would be in line with the 2021 OECD Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement and the ICN Recommended Practices for Merger Notification and Review Procedures.

Key Recommendation 8

Provide further substantive detail on market definition and competition assessment in decisions by the PCC for Phase I and Phase II. Non-confidential versions of the decisions are already published by the PCC, but they are very short, essentially sharing the conclusions, and lack any substantive detail or reasoning. To ensure transparency and procedural fairness, the PCC should provide more details on the legal and economic analysis and grounds that led to the final conclusions, on aspects such as the definition of the relevant market, the theories of harm analysed and the effects of the transaction in the market(s). This would be in line with the provisions of the recommendation of the 2021 OECD Council on Transparency and Procedural Fairness in Competition Law Enforcement that provides that “[a]dherents should ensure that competition law enforcement is transparent and predictable, by: [...] **publishing the facts, legal basis and sanctions relating to decisions, including decisions to settle cases, subject to the protection of confidential information.**”

Key Recommendation 9

Make Structural remedies the preferred option to solve competition issues, especially where competition concerns from horizontal effects have been identified. This would increase alignment with international good practices. This may require modifying the PCA, or alternatively, and to the extent that it is equally effective and possible, the PCC should issue guidance on the possibility to more frequently use structural remedies.

Other recommendations

Recommendation 1

The PCC should ensure continued know-how of competition economics at Commission Level, either via appointment of more Economists or by competition economics training programmes upon on-boarding.

Recommendation 2

The PCC should ensure better knowledge management by developing a human resources policy, which is capable of both attracting and retaining qualified staff. This policy should include staff retention schemes.

Recommendation 3

Improve the expedited procedure by reviewing and making more flexible the information required. To encourage its use, the expedited procedure should be improved both in terms of timing, but in particularly regarding information requests. The PCC should adopt mechanisms that allow for flexibility in the content of the initial notification of transactions to go under the expedited procedure.

Recommendation 4

The PCC should issue a clarification on how the information gathering in a merger review process will be used, including confidentiality treatment and the possibility and scope of information-sharing within the agency and with other regulatory agencies.

Recommendation 5

The PCC should issue guidance on when the authority will use its *Motu Proprio* powers to review transactions and potential differences in the assessment. This might be relevant in given circumstances where the analysis that might differ from that of a compulsory notification, such as when the review transaction has already been consummated.

Recommendation 6

The Philippine Supreme Court and the Philippine Court of Appeals should continue to benefit from specialised training on competition law and economic concepts, being part of the regular judge education system.

Recommendation 7

The PCC should issue guidance on the assessment of non-horizontal effects (i.e. vertical and conglomerate effects). This could be done either by following recommendation 4.2, that increases transparency on the reasoning underlying the decisions, or by issuing guidelines such as the Merger Review Guidelines from 2018 that focus only on horizontal transactions.

Recommendation 8

The PCC should increase its interaction with sector regulators. This with the purpose of information-gathering and transmission of technical knowledge, as the specialisation of the regulators could facilitate the understanding of the market, its dynamics and the potential competitive effects of the transactions, as well as potential solutions to anti-competitive concerns.

Recommendation 9

Issue guidance on remedies choice and implementation. The PCC should issue guidance on the type of remedies it might consider and the criteria to evaluate if they are adequate and sufficient. These guidelines should include examples and assist on how the different types of remedies might fit different theories of harm.

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Notes

¹ For more detail, see: World Economic Forum (2019). The Global Competitiveness Report, https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf

² For example, by the competition authorities in the United States (both the Federal Trade Commission and the Department of Justice when information for simulation is not available) and the Dutch Competition Authority.

³ Diaz v. Kapunan, [8 December 1923], 45 PHIL 482-488.

⁴ <https://www.think-asia.org/handle/11540/7248>

⁵ Exceptions apply, namely the election for a Barangay election or a Sangguniang Kabataan election.

⁶ This also goes in line with the 2021 OECD Recommendation of the Council on Competitive Neutrality, as competition authorities should enforce regulations with equal rigour, appropriate deadlines, and equivalent transparency with regard to all current or potential market participants.

⁷ The Rules for the appointment and dismissal of the heads of the competition authorities in Mexico are contained in Article 28 of the Constitution.

⁸ Section 41 (a) of the Economic Competition Law 5748 of 1988.

⁹ Contained in Annex D: Nominations Committee Terms of Reference the CMA Board: rules of procedure. This document also includes a conflicts of interest policy applicable to the members.

¹⁰ The PCA receives 40% of the fines imposed while the remaining 60% goes to the state budget. Funding through fines is not exclusive to the PCA but is a common practise for all administrative authorities. The financing of the Portuguese Competition Authority is also supported by transfers from national regulatory authorities (NRAs), fees charged within the scope of the PCA's activities.

¹¹ In Türkiye, tax revenues are 0.04% of the capitals of all partnerships to be newly established with the status of an incorporated and limited company, and that of the increase portion in case of capital increase. In Italy, there are mandatory contributions levied on companies with an annual turnover above 50 million EUR (adopted by Decree No. 1 of 2012) (OECD, 2016_[10]).

¹² Republic Act No. 11466 of 2019, known as the Salary Standardization Law of 2019, includes the most recent standardised salaries for all government employees across agencies. This includes basic pay per grade and step, allowances, benefits, and performance-based incentives. It covers all personnel in the Executive, Legislative and Judicial branches, Constitutional Commissions and other Constitutional Offices, Government-owned and controlled corporations not covered by Republic Act 10149 and Local Government Units. It excludes military and uniformed personnel, as well as Government-owned and controlled corporations covered by Republic Act 10149. These provisions also include employees from the

central bank (Bangko Sentral NG Pilipinas) that fall under salary grade 19 and below, according to Republic Act No. 7653.

¹³ Such as career growth, quality of work life, sense of belonging and communication and leadership.

¹⁴ Particularly, direct compensations include fixed amounts, such as basic pay of a monthly salary and fringe benefits that supplement the basic pay, including allowances.

¹⁵ The PCA covers the transactions between entities engaged in trade or industry in the Philippines or international transactions, which have direct, substantial, and reasonably foreseeable effects in trade in the Philippines.

¹⁶ The PCA-IRR defines Joint Ventures as *business arrangements whereby an entity or group of entities contribute capital, services, assets, or a combination of any or all of the foregoing, to undertake an investment activity or a specific project, where each entity shall have the right to direct and govern the policies in connection therewith, with the intention to share both profits and risks and losses subject to agreement by the entities.*

¹⁷ In Section 2(k).

¹⁸ Section 1, Rule 6, PCA-IRR.

¹⁹ Clarificatory Note No. 16-002.

²⁰ Clarificatory Note No. 18-001.

²¹ Clarificatory Note No. 19-001.

²² Memorandum Circular No. 2019-001.

²³ An ultimate parent entity is the juridical entity that, directly or indirectly, controls a party to the transaction, and is not controlled by any other entity.

²⁴ See Section 3 of Rule 4 of the PCA-IRR.

²⁵ These Guidelines include, for instance, that to calculate the aggregate value of assets or revenues in the Philippines, the most recent audited financial statements should be used. If the entity is not required to prepare audited financial statements, the last regularly prepared balance sheet in which those assets are accounted for should be considered. If the financial statements are in a foreign currency, values should be converted to Philippine peso according to the average, over the 12 months of that financial year, of the foreign exchange rate quoted by the BSP.

²⁶ Policy Statement 18-01.

²⁷ Memorandum Circular No 18-001.

²⁸ According to Commission Resolution No. 02-2020.

²⁹ According to their National Accounts of the Philippines published by the Philippine Statistics Authority, <https://psa.gov.ph/national-accounts/base-2018/data-series>.

³⁰ Republic Act No. 11494 of 2020.

³¹ A summary of the different approaches can be found in (OECD, 2016^[21]).

³² For example, the Merger Review Guidelines, with the aim of making more predictable the standard to define control, sets out some elements that the assessment would consider, such as the legal effect of any agreement or other instrument between the parties, the source of financing for the acquisition, family links and economic relationships.

³³ For example, in Japan, there is a threshold of 50% interest threshold for share acquisitions, but their Antimonopoly Act and guidelines concerning its application to the review of mergers consider lower thresholds of 20% or 10% if the holder is the largest shareholder or if other criteria that suggests some ability to influence the target is present. See Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (2004, revised as of December 2019), https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf

³⁴ See Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. L 2004/1 (2004) (EUMR), Article 3 (1) and (2).

³⁵ This topic has been addressed in different Competition Committee roundtables in the past years. See, for example, (OECD, 2022^[35]) and (OECD, 2020^[47]).

³⁶ OECD (2014, pp. 64-68^[24])(2014), Assessment of Merger Control in Chile.

³⁷ Contribution from Chile, Global Forum on Competition, Merger Control in Dynamic Markets, see [https://one.oecd.org/document/DAF/COMP/GF/WD\(2019\)55/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2019)55/en/pdf).

³⁸ See Recommendations 10 and 11 of the UK CMA Digital Markets Taskforce Advice, at <https://www.gov.uk/cma-cases/digital-markets-taskforce>.

³⁹ Protecting and promoting competition in Australia, speech by Rod Sims, 27 August 2021, https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia#_ftn6.

⁴⁰ GCR (2021) Malaysia Enforcer Reiterates Call for Merger Review Powers, at <https://globalcompetitionreview.com/malaysian-enforcer-reiterates-call-merger-review-powers> and OECD (2019), Global Forum on Competition Roundtable on Merger Control in Dynamic Markets: Contribution from Malaysia, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2019\)28/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2019)28/en/pdf).

⁴¹ See <https://asean-competition.org/read-news-cambodia-adopts-the-law-on-competition-to-curb-anti-competitive-practices-and-promote-competitive-markets> and <https://www.dfdl.com/resources/legal-and-tax-updates/cambodias-competition-law-enacted-by-national-assembly-and-senate/>.

⁴² See Consumer Protection Competition and Fraud Repression Directorate-General “CCF” (2021), Background Paper on Competition Policy and Law in General Context for Cambodia, https://www.ccfhg.gov.kh/en/pdf-view/?filename=https://www.ccfhg.gov.kh/wp-content/uploads/2021/08/Final_25June2021_Cambodia_Competition_Law_Backgrounder_Translation.pdf

⁴³ The conditions, based on the OECD Merger Recommendation and ICN Recommended Practices for Merger Notification Procedures, are summarised in OECD (2014^[24]).

⁴⁴ Policy Statement 17-001, https://www.phcc.gov.ph/wp-content/uploads/2017/02/Policy-Statement-17-001_20170220-light-1.pdf.

⁴⁵ Data from the ADB SME Monitor 2021 Database for the Philippines, <https://data.adb.org/dataset/asia-small-and-medium-sized-enterprise-monitor-2021-volume-1-country-and-regional-reviews>

⁴⁶ This calculation does not consider that the thresholds account for assets of controlled companies and subsidiaries.

⁴⁷ Statistics available at: <https://psa.gov.ph/content/2018-census-philippine-business-and-industry-economy-wide>

⁴⁸ Policy Statement 17-001, https://www.phcc.gov.ph/wp-content/uploads/2017/02/Policy-Statement-17-001_20170220-light-1.pdf

⁴⁹ Although merger control thresholds based on assets may refer to worldwide assets, local assets or a combination of both, local nexus criteria is always present.

⁵⁰ Such as the case of Viet Nam, Indonesia, India, and Korea.

⁵¹ Particularly, Honduras, Viet Nam, and Indonesia have similar levels of GDP per capita as the Philippines.

⁵² As it is the case with Mexico.

⁵³ The exercise was done for 2019 given that after Bayanihan 2 was implemented, zero cases have gone to Phase II in the Philippines.

⁵⁴ In 2021, the US FTC reduced the SOT notification threshold from USD 94 million to USD 92 million. See <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-announces-annual-update-size-transaction-thresholds-premerger>.

⁵⁵ See <https://en.agcm.it/en/media/press-releases/2006/6/alias-1286>.

⁵⁶ PCC Policy Statement 18-01: On the Adjustment of the Thresholds for Compulsory Notification of Mergers and Acquisitions, and PCC Memorandum Circular No. 18-001.

⁵⁷ Unless specified otherwise days in this section refer to calendar days.

⁵⁸ <https://www.phcc.gov.ph/notification-form/>

⁵⁹ <https://www.phcc.gov.ph/model-request-extension-time-waiver/>

⁶⁰ Rule 65 may also be availed for any adverse decision of the CA if the decision was rendered with grave abuse of discretion amounting to lack or excess of jurisdiction.

⁶¹ See Commerce Commission New Zealand, Investigation Guidelines, available at: https://comcom.govt.nz/data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf

⁶² See European Commission, 'Best practices on the conduct of EC merger control proceedings' (20 January 2004) available at: <https://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>.

⁶³ However, the PCC Guidelines on Merger Review also consider scenarios where the analysis starts from the competitive effects of the transaction as those can also inform market definition (PCC, 2016, p. 8_[31]).

⁶⁴ See case M-005-2017.

⁶⁵ According to Section 21 (a) of the PCA and Rule 4, Section 10 of the PCA-IRR.

⁶⁶ Under Section 21 (b) of the PCA and Rule 4, Section 10 of the PCA-IRR.

⁶⁷ See case No. M-2017-005. These considerations go in line with recent discussions held by the OECD on Killer Acquisitions (OECD, 2020_[47]) and the use of antitrust tools for multi-sided platforms (OECD, 2018_[48]).

⁶⁸ According to Section 16.5 of the PCC's Rules on Merger Procedure.

⁶⁹ See the respective merger guidelines: (ACCC, 2008_[49]), (CADE, 2018_[50]), (Competition Bureau, 2006_[51]), (Superintendencia de Industria y Comercio, 2019_[52]), (KFTC, 2017_[53]), (CCCS, 2016_[54]) and (CMA, 2018_[55]).

⁷⁰ This is the case of the United States Department of Justice that created in 2020 an Office of Decree Enforcement and Compliance inside the Antitrust Division. Similarly, in Colombia, in 2022, the competition authority created the Compliance Division inside the Office for the Protection of Competition with the same

purposes of having a specialised unit to monitor compliance of instruments such as settlements, commitments and merger remedies.

⁷¹ See (European Commission, 2013^[57]).

⁷² PCC Press Release “PCC extends Grab’s commitment period as year-long monitoring lapses”, <https://www.phcc.gov.ph/press-releases/pcc-extends-grabs-commitment-period-as-year-long-monitoring-lapses/>

⁷³ PCC Press Release “PCC extends Grab’s commitments, offers way to refund riders”, <https://www.phcc.gov.ph/press-releases/pcc-grab-extended-undertaking-disgorgement-refund/>

⁷⁴ Commission Decision No. 03-021/2019 in PCC Case No. M-2018-006.

⁷⁵ USD 46 517 is the maximum daily civil penalty for violations of the HSR Act in 2022 and is updated yearly based on the percentage change in the Consumer Price Index.

⁷⁶ For instance, in the European Union, Article 7(4) of the Merger Regulation establishes that transactions carried out in contravention of the standstill obligation are invalid unless declared compatible with the internal market. In Mexico, the competition authority, in addition to fines, can impose remedies or order the dissolution of the transaction.

⁷⁷ Commission Decision on PCC Case No. M-2017-001.

⁷⁸ PCC Case No. M-2018-003.

⁷⁹ PCC Cases No. M-2018-004, M-2018-005, M-2019-001, M-2019-006 and M-2020-001.

⁸⁰ PCC Case No. M-2019-00.1

⁸¹ Resolution of 11 October 2018 on the PCC Case No. M-2018-001 and MAO Case No. M-2018-012.

⁸² Case No. M-2018-033.

