# THE MERGERS & ACQUISITIONS REVIEW

SIXTEENTH EDITION

**Editor**
Mark Zerdin

THE LAWREVIEWS

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# PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, following the height of the covid-19 pandemic that tested the resilience of companies, the first half of 2021 had begun to tell a promising story for the M&A markets. This promise was realised with 2021 becoming a year for the record books with US$5.9 trillion in deals, a 62 per cent lift from 2020 and the highest value amount in more than a decade. Deal total also rose 0.4 per cent to 34,128.[1]

The figures for the first half of 2022 predictably dropped from 2021's record levels but the overall picture still remains a positive one. The value of global M&A transactions has dropped 21 per cent when compared to the record high of the first half of 2021, but deal values still broke US$2 trillion.[2] The decrease is understandable given macro events such as inflation, interest rates and the Ukraine war, which have created a more challenging market.[3]

Again, the Americas were the leading market for deal value in the first half of 2022 with a total of US$1.1 trillion from 4,771 deals. While these figures represent a 30.7 per cent and 18 per cent decrease, respectively, year-on-year, these figures should be put into the context, whereby not only was 2021 a record-breaking year, but by the fourth quarter activity was already beginning to normalise. In this respect, what has been witnessed to date in 2022 is a correction to more sustainable levels.[4] Across the Americas, the leading sectors for the first half of 2022 were technology, media and telecoms (1,712 deals totalling US$471 billion), energy, mining and utilities (316 deals totalling US$102.6 billion) and real estate (58 deals totalling US$96.6 billion).[5]

European dealmaking has experienced a similar decline in deal count with figures falling 19.7 per cent from 6,182 in the first half of 2021 to 4,963 in the first half of 2022. However, this decline was most prominent in the second quarter, following the invasion of Ukraine and as companies began to take a more risk off approach.[6] Interestingly, deal value has barely slipped at all and, in fact, rose quarter-on-quarter in the second quarter. Over the first half of 2022, there was €579 billion worth of transactions, down by only 6.5 per cent on last year. Private equity again played a large part in maintaining these values, with Blackstone Group

1 Bakertilly, 'Global dealmakers 2022: M&A market update'.
2 AllenOvery, 'M&A Insights H1 2022'.
3 ibid.
4 Mergermarket, 'Deal Drivers: Americas HY 2022'.
5 ibid.
6 ibid.

being particularly active in the megadeal for Atlantia (€42.7 billion) and the recapitalisation of logistics business Mileway (€21 billion).[7] Of the 10 largest deals across the EMEA, private equity accounted for no fewer than half.[8]

The year 2022 has been challenging and will likely continue to be so, with the Ukraine conflict showing no signs of end, inflation biting across the continent and cost of the living crisis drawing major attention. However, the M&A markets have thus far withstood these challenges, with dealmaking and value returning to a 'normal' level, following the heights of 2021. Should the M&A markets continue to remain resilient, the remainder of 2022 may follow the positive outlook displayed in the first half of 2022.

I would like to thank the contributors for their support in producing the 16th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 35 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

**Mark Zerdin**
Slaughter and May
London
November 2022

7 ibid.
8 ibid.

**Chapter 25**

# PHILIPPINES

*Nilo T Divina, Danny E Bunyi and Ciselie Marie T Gamo-Sisayan*[1]

## I OVERVIEW OF M&A ACTIVITY

M&A activity in the Philippines increased in 2021 since its decline during the covid-19 pandemic in 2020. The government played a pivotal role in reigniting M&A activity with legislative changes aimed to attract more foreign investors to the Philippines, such as temporarily narrowing regulatory compliance requirements, reducing corporate taxes and opening restricted market to global competition. These legislative measures, coupled with the new administration's commitment to support businesses, are anticipated to continue to stir interest and increase investments in the Philippines.

Most of the recent M&A activities occurred in the technology and logistics sectors as the Philippine digital economy boomed. The pandemic was a catalyst for the dramatic shift of consumer preference from brick-and-mortar shopping experience to e-commerce. The government also strongly promoted the shift to digital economy as it recognised digital transformation as an effective measure for economic recovery. Policies and plans were laid out to initiate and cultivate innovation and to invite global technology and ideas to the Philippine market.

Along with technology and logistics sectors, M&A deals are also notable in related sectors such as financial services, telecommunications, power and energy.

## II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Private M&A deals are primarily governed by the Revised Corporation Code (Republic Act No. 11232) and regulated by the Securities and Exchange Commission (SEC). The Revised Corporation Code was recently enacted with the aim of improving the ease of doing business in the Philippines and modernising provisions by adopting recently developed internationally recognised good business practices. M&A transactions involving public companies are also governed by the Securities and Regulation Code (Republic Act No. 8799).

The Philippine Competition Commission (PCC), which is the country's antitrust agency, reviews and evaluates M&A deals to determine whether they could substantially prevent, restrict or lessen competition in the market. In relation to this review function, the Philippine Competition Act (Republic Act No. 10667) requires parties to any high-value M&A transactions to notify PCC of their transaction prior to their execution of the definitive agreements.

1 Nilo T Divina is founder of DivinaLaw, and Danny E Bunyi is a senior partner and Ciselie Marie T Gamo-Sisayan is a partner at DivinaLaw.

Tax consequences of M&A transactions are governed by the National Internal Revenue Code (Tax Code) and are regulated by the Bureau of Internal Revenue. The Tax Code was recently amended by the Tax Reform for Acceleration and Inclusion Act (TRAIN) of 2017, Bayanihan to Recover as One Act (Bayanihan 2) of 2020, and the Corporate Recovery and Tax Incentives for Enterprises Act (CREATE) of 2021.

Special laws similarly govern M&As of corporations engaged in certain regulated sectors. These special laws include the Public Service Act for public service companies, the General Banking Law for banks and the Insurance Code for insurance companies.

The relevant regulatory entities – the SEC, PCC, BIR, Bangko Sentral ng Pilipinas (BSP) and Insurance Commission – issue implementing rules and regulations and circulars to outline guidelines and procedures on the enforcement of their mandated functions.

## III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The Revised Corporation Code (the RCC) was signed on 21 February 2019 and took effect on 23 February 2019. It repealed the 38-year-old Batas Pambansa 68, otherwise known as the Corporation Code of the Philippines (the OCC).

The RCC substantially retained the corporate approvals mandated by the OCC for M&A deals. Unless a higher voting requirement is adopted in the by-laws of a corporation, each constituent corporation in a merger or consolidation deal shall require the approval of the majority of their respective boards of directors and the affirmative vote of stockholders representing at least two-thirds of the outstanding capital stock.[2] For acquisitions, the acquiring entity is also required to obtain the approval of the majority of its board of directors and affirmative vote of stockholders representing at least two-thirds of its outstanding capital stock.[3] Conversely, the seller is only required to obtain the majority vote of its board of directors, unless it intends to sell all or substantially all of its properties. In such a case, it is required to obtain the affirmative vote of stockholders representing at least two-thirds of its outstanding capital stock.[4]

The RCC encourages participation and involvement in approving corporate acts, such as mergers and acquisitions, as it takes advantage of technology to improve the conduct of business in the Philippines. The RCC authorises the sending of notices to stockholders electronically when allowed by the by-laws of the corporation or with the consent of the stockholders.[5] The SEC clarified that notices to directors sent through electronic mail will be allowed if such is provided in the by-laws or by board resolution.[6] The RCC similarly allowed directors and stockholders to participate and vote through remote communication, such as videoconferencing, teleconferencing or other similar modes of communication.[7] The SEC further requires the director or stockholder who intends to participate in a meeting through

2 Section 76, Revised Corporation Code. Also, Section 76, OCC.
3 Section 41, Revised Corporation Code. Also, Section 42, OCC.
4 Section 39, Revised Corporation Code. Also, Section 40, OCC.
5 Sections 39, 41 and 76 in relation to 49 of the Revised Corporation Code.
6 Section 6, SEC Memorandum Circular No. 6, series of 2020 issued on 12 March 2020.
7 Sections 49 and 52 of the Revised Corporation Code.

remote communication to notify the Presiding Officer and the Corporate Secretary of his or her intention, and the Corporate Secretary is tasked to note such fact in the minutes of the meeting.[8]

Additionally, the RCC allowed corporations to adopt a dispute resolution mechanism on issues relating to the implementation of the articles of incorporation or by-laws, or intracorporate relations.[9]

Another salient change introduced by RCC was the removal of certain requirements for incorporation. Under the OCC, at least five natural persons should organise themselves to form a corporation.[10] Majority of the incorporators should also be residents of the Philippines. The RCC now allows juridical entities, particularly corporations, partnerships, associations to incorporate.[11] The juridical entity seeking to form a corporation is required to obtain the approval of the majority of its board of directors and ratification of its stockholders representing at least two-thirds of the outstanding capital stock.[12] Furthermore, two or more persons, including corporations, partnerships and associations, but not more than 15 may organise themselves and form a corporation.[13] A single incorporator is also allowed but only to form a One Person Corporation (OPC).[14] The OPC is allowed to have a single stockholder who must be a natural person, trust or estate.

The RCC's alignment of the country's corporate environment with existing international best practices aims to cultivate a proactive director and shareholder engagement across borders.

## IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The Department of Foreign Affairs (DFA) reported that foreign direct investment (FDI) inflows reached a record high of US$10.5 billion in 2021.[15] BSP reported increasing investor confidence with an 18.8 per cent increase in FDI net inflows for January to May 2022 from the previous year's level.[16] However, cumulative net inflows in January to July 2022 were lower than the comparable net inflows for 2021; as foreign investors apparently remained

8 Sections 4 and 10, SEC Memorandum Circular No. 6, series of 2020 issued on 12 March 2020.

9 Section 181 of the Revised Corporation Code.

10 Section 10, OCC.

11 Section 10, Revised Corporation Code.

12 Section 5, SEC Memorandum Circular No. 16, series of 2019.

13 Section 1, SEC Memorandum Circular No. 16, series of 2019.

14 Section 1, SEC Memorandum Circular No. 16, series of 2019.

15 Diokno commends Congress for game-changing reforms, cites benefits of new tax laws, 22 August 2022, Department of Finance, https://www.dof.gov.ph/diokno-commends-congress-for-game-changing-reforms-cites-benefits-of-new-tax-laws/ accessed on 29 September 2022. Marcos' econ team to Singaporean investors: PH to be more business-friendly. 09 September 2022, Department of Finance, https://www.dof.gov.ph/marcos-econ-team-to-singaporean-investors-ph-to-be-more-business-friendly/ accessed on 29 September 2022.

16 Diokno commends Congress for game-changing reforms, cites benefits of new tax laws, 22 August 2022, Department of Finance, https://www.dof.gov.ph/diokno-commends-congress-for-game-changing-reforms-cites-benefits-of-new-tax-laws/ accessed on 29 September 2022. Marcos' econ team to Singaporean investors: PH to be more business-friendly. 09 September 2022, Department of Finance, https://www.dof.gov.ph/marcos-econ-team-to-singaporean-investors-ph-to-be-more-business-friendly/ accessed on 29 September 2022.

cautious amid continued adverse global conditions.[17] The decrease was attributed to the lower foreign net investments in debt instruments of their local affiliates, which more than offset the growth in their net investments in equity capital.[18] Equity capital infusions in July 2022 were mainly from Singapore, Japan and the United States, and were invested largely in construction, manufacturing and real estate.

To stimulate foreign investment, the Philippines relaxed FDI restrictions on certain key industries.

### i Retail trade

The first industry to be opened to foreign players was retail trade with the enactment of Republic Act No. 11595 (RA11595) on 10 December 2021. Prior to RA 11595, no foreign equity was allowed in corporations engaged in retail trade unless it has a minimum capital of US$2.5 million and minimum investment per store of US$830,000.[19] Under RA 11595, foreign retailers are now only required to have a minimum paid-up capital to approximately 25 million Philippine pesos, and a minimum investment per store to approximately 10 million Philippine pesos.[20]

The Implementing Rules and Regulations of RA 11595 (Retail IRR) was issued in March 2022. The Retail IRR notably defined 'foreign retailer' as 'a foreign national, partnership, association, or corporation of which more than 40 per cent of the capital stock outstanding and entitled to vote is owned and held by such foreign national, engaged in retail trade'.[21] The minimum paid-up requirement and minimum investment per store requirements shall not apply to corporations engaged in retail trade of which at least 60 per cent of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines.[22] This effectively allows foreign equity in retail enterprises that do not meet the minimum paid-up capital and investment per store requirements, provided that the foreign equity shall not exceed 40 per cent of the capital stock outstanding and entitled to vote.[23]

### ii Startups

There is also a restriction on foreign participation on micro and small domestic market enterprises. Under Republic Act No. 7042, otherwise known as the Foreign Investments Act (FIA), no foreign equity is allowed in enterprises catering to the domestic market, unless the enterprise has paid-in equity capital of at least US$200,000. A lower paid-in capital requirement of at least US$100,000 is allowed if the enterprise involves advanced technology or employs at least 50 direct employees.

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17 FDI Posts US$460 Million Net Inflows in July 2022; YTD Level Reaches US$5.1Billion, 10 October 2022, Bangko Sentral ng Pilipinas, https://www.bsp.gov.ph/SitePages/MediaAndResearch/MediaDisp.aspx?ItemId=6479 accessed on 29 September 2022.

18 ibid.

19 Section 5, Republic Act No. 8762, otherwise known as the 'Retail Trade Liberalisation Act of 2000'.

20 Section 5, Republic Act No. 8762, as amended by RA 11595.

21 Section 1(d), Rule I, Implementing Rules and Regulations of Republic Act No. 8762 entitled the Retail Trade Liberalisation Act of 2000, as amended by Republic Act No. 11595.

22 Section 4, Rule III, Implementing Rules and Regulations of Republic Act No. 8762 entitled the Retail Trade Liberalisation Act of 2000, as amended by Republic Act No. 11595.

23 The author notes that the Twelfth (12th) Foreign Investment Negative List issued on 27 June 2022 through Executive Order No. 175, series of 2022 provides that no foreign equity is allowed for corporations engaged in retail without complying with the minimum paid-up capital requirement.

On 2 March 2022, the Philippines allowed the lower minimum paid-up capital requirement of US$100,000 (instead of the higher US$200,000) for startup or startup enablers, and lowered the mandatory Filipino direct hires from 50 to just a majority of the enterprise's employees, provided that the number of Filipinos shall not be less than 15.

Startup refers to any person registered in the Philippines who aims to develop an innovative product, process or business model.[24] Startup enabler, conversely, refers to any person registered under the Philippine startup development programme who provides goods, services or capital identified to be critical in supporting the operation and growth of startups.[25] Startup enablers include startup accelerators, incubators, co-working spaces, investors, funders, event or meetup organisers catered to startups and other support organisations.[26]

### iii Public service

The most monumental reform recently enacted was the amendment of the 85-year-old Public Service Act. The Public Service Act imposed a 40 per cent equity restriction on all public service establishments. This restriction was premised on Section 2, Article XII of the 1987 Constitution, which required at least 60 per cent Filipino ownership for corporations engaged in the operation of public utility.

Republic Act No. 11659, which was signed to law on 21 March 2022, defined which public service establishments are considered public utility. The amendment removed the 40 per cent FDI restriction on public service, such as subways, airports, airlines, railways, expressways and tollways. The restriction has been maintained for the following sectors identified as public utility:

*a* distribution of electricity;
*b* transmission of electricity;
*c* petroleum and petroleum products pipeline transmission systems;
*d* water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems;
*e* seaports; and
*f* public utility vehicles.

However, entities engaged in the operation and management of critical infrastructure are subject to a new FDI restriction of 50 per cent. Critical infrastructure refers to any public service establishment that owns, uses, or operates systems and assets that are so vital to the Republic of the Philippines that the incapacity or destruction of such systems or assets would have a detrimental impact on national security. Only telecommunications has been identified as critical infrastructure. However, the President has the authority to declare the sectors considered as critical infrastructure. Notably, foreign nationals may own more than the 50 per cent foreign equity if the country of such foreign national affords reciprocity to Philippine nationals.

24 Section 1 (oo), Rule I, Implementing Rules and Regulations of Republic Act No. 11647 or an Act Promoting Foreign Investments, amending thereby Republic Act No. 7042, otherwise known as the Foreign Investments Act of 1991, as amended, and for other purposes.

25 Section 1(pp), Rule I, ibid.

26 ibid.

The Philippines was ranked as the third most restrictive economy in the world based on the 2020 Organization for Economic Cooperation and Development (OECD) report. With the easing of the FDI restrictions, it is anticipated that foreign investors will initiate more M&A deals in the Philippines.

The Philippines is an emerging market with significant growth potential. Thus, local players are directing their investments and operations inward. However, outward M&A deals have occurred in the consumer[27] and infrastructure[28] sectors.

## V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

A considerable number of M&A deals on renewable energy have been announced in 2022, and these are expected to increase with the new administration's programmes to develop renewable energy. In his State of the Nation Address, delivered on 25 July 2022, President Ferdinand Marcos Jr pushed the transition to renewable energy and declared that the development of renewable energy will top his administration's climate change agenda.[29]

Confidence for Philippine renewable energy is further bolstered by an opinion released by the Department of Justice (DOJ) on 29 September 2022. The DOJ stated that foreign investors may fully own entities engaged in renewable energy projects. The 40 per cent FDI restriction imposed by the Constitution on the exploration, development and utilisation of natural resources only covers things that are susceptible to appropriation, and is not applicable to inexhaustible energy resources. The DOJ noted the need to amend the implementing rules and regulations of the Renewable Energy Act to give meaning and purpose to its opinion.

On the basis of the DOJ's opinion, the Department of Energy (DOE) amended Section 19 of the implementing rules and regulations of the Renewable Energy Law (Republic Act No. 9513) in a circular signed on 15 November 2022. The amendment allowed foreign citizens or foreign-owned entities to engage in the exploration, development and use of the country's renewable energy resources, such as solar, wind, biomass, ocean and tidal energy.

27 Keepers Holdings Inc, the largest imported liquor distribution in the Philippines reported that it executed an agreement on 15 September 2022 to acquire 50 per cent interest in Spain-headquartered winery Bodegas Williams & Humbert SA for €88.75 million. The acquisition is a strategic move to secure the Philippine company's supply line of Alfonso brandy, its flagship brand and category, and expand their line to liquor manufacturing from importation and distribution.
In a disclosure filed to the Philippine Stock Exchange on 6 September 2022, it was reported that the Board of Directors of Macay Holdings, Inc (MACAY) approved today a proposed acquisition by the company of 100 per cent of the shareholdings in RC Global Beverages, Inc (RCGBI). RCGBI owns the rights to the RC Cola brand globally, and has the ability to grant bottling and distribution licences to bottlers in the continents of Asia, Europe, Africa, the Middle East, and in North and South America, except for the United States. Today, RCGBI has existing relationships with 32 bottlers in 49 countries (including the Philippines).

28 Metro Pacific Investments Corporation, a listed utilities and infrastructure Philippine corporation, has also recently reported that it is nearing a deal to acquire 40 per cent of the concession holder of the 38-kilometer Jakarta-Cikampeke elevated expressway for 16.2 billion Philippine pesos. Camus, Miguel R., Metro Pacific unit to buy 40 per cent of Jakarta expressway, Inquirer.net, https://business.inquirer.net/351855/metro-pacific-unit-to-buy-40-of-jakarta-expressway last accessed on 21 October 2022.

29 Gita-Carlos, Ruth Abbey, Renewable energy tops Marcos admin's climate change agenda, 25 July 2022, Republic of the Philippines Philippine News Agency, https://www.pna.gov.ph/articles/1179678 last accessed on 21 October 2022.

M&A deals continue to grow in the banking industry. Citi announced this year that it has completed the sale of its Philippine consumer business to UnionBank of the Philippines.[30] The transaction covers Citi's local credit card, unsecured lending, deposit and investment businesses, as well as Citicorp Financial Services and Insurance Brokerage Philippines Inc, which provides insurance and investment products and services to retail customers.[31]

The merger between state-run Land Bank of the Philippines (LBP) and United Coconut Planters Bank likewise took effect in March this year.[32] The merger solidified LBP's ranking as the second-largest bank in the country in terms of assets and increased LBP's agricultural loan portfolio.[33]

One of the largest Philippine universal banks has been recently reported to be entering into a merger with a commercial bank owned by a conglomerate with interests in food, airlines, and real estate development. Bank of the Philippine Islands (BPI), a listed banking company, recently announced its proposed merger with Robinsons Banking Corporation (RBC), with BPI as the surviving entity.[34]

BSP encourages banks to merge and consolidate to gain higher capital and resources and achieve better economies of scale. On 27 May 2022, it laid out a streamlined procedure for applications for mergers, consolidations and acquisitions for banks.

M&A deals in the industry have been stimulated by the digitalisation of banking and financial services. BSP has been actively supporting the move towards digitalisation and has laid out legal grounds for the establishment and operation of digital banks and virtual asset service providers. Furthermore, BSP institutionalised the Regulatory Sandbox Framework that is aimed at fostering an enabling environment for the development of an inclusive digital financial ecosystem. The Sandbox Framework applies to those who intend to offer or use an emerging or new technology for the delivery of financial products and services pertaining to activities falling under the regulatory purview of BSP.[35] It allows a controlled, time-bound, live testing environment that may feature regulatory waivers at the regulators' discretion.[36]

These developments have fueled financial institutions' demand to gain access to innovative technology, intellectual property rights, and even regulatory licences and approvals to operate in the digital arena. As a result, there is an increasing trend for financial institutions to acquire fin-tech companies.

The government's programme for the development of the country's digital economy similarly extends to policies strengthening internet connectivity. This includes the adoption of the Common Tower Policy to initiate the establishment of independent tower

30 Citi completes Sale of Philippines Consumer Business to Unionbank of the Philippines, 1 August 2022, Citigroup: For Immediate Release, https://www.citigroup.com/citi/news/2022/220801a.htm last accessed on 21 October 2022.

31 ibid.

32 LANDBANK-UCPB merger starts on 1 March, 28 February 2022, Landbank News, https://www.landbank.com/news/landbank-ucpb-merger-starts-on-march-1 last accessed on 21 October 2021.

33 ibid.

34 SEC Form 17-C (Current Report under Section 17 of the Securities Regulation Code and SRC Rule 17.2(c) thereunder) and PSE Disclosure Form 4-23 – Mergers and Consolidations References – SRC Rule 17 (SEC Form 17-C) and Section 4.4 and/or Section 5 of the Revised Disclosure Rules filed by the Corporate Secretary of Bank of the Philippine Islands on 30 September 2022 to the Securities and Exchange Commission and Philippine Stock Exchange.

35 Section 1, Circular No. 1153, s 2022.

36 Section 1, Circular No. 1153, s 2022.

companies (ITCs). The ITC is expected to pioneer the development of shared information communications technology (ICT) infrastructure for more comprehensive coverage and better quality service for telecommunications, broadband and other ICT services, and to effectively address the growing connectivity needs in the Philippines, especially the unserved or underserved areas.[37] The Common Tower Policy is aimed at minimising the unnecessary duplication of ICT infrastructure and reducing delays and costs for ICT infrastructure deployment, while freeing up the capital of mobile network operators and other ICT service providers for other strategic investments.[38]

In support of the government's Common Tower Policy, PLDT Inc (PLDT), the country's largest integrated telecommunications company, pioneered the sale and leaseback of towers in the Philippines. In a disclosure filed with the Philippine Stock Exchange on 3 October 2022, PLDT announced that it had transferred a total of 4,435 towers by sale and leaseback transaction to ITCs.[39] The towers were sold to companies owned by foreign edotco Group Sdn Bhd,[40] and Edgepoint.[41] PLDT expects additional closings before the end of the year, with final closing anticipated to be completed by the first quarter of 2023.[42]

## VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

M&A transactions are commonly funded by the private investor's own capital. Bank financing is commonly resorted to only on high value transactions. Consideration for shareholders of absorbed or acquired companies is typically in the form of cash or shares in the surviving company, or a combination of both.

Private equity firms are showing interest in digital finance and renewable energy. Voyager Innovations, a technology corporation, obtained funds from various private equity firms and investment holding firms to support its e-wallet platform PayMaya and digital financial institution Maya Bank.[43] Earlier this year, KKR, a leading global investment firm, invested in GrowSari, a digital company that connects mom and pop stores to retailers.[44] In the power sector, JERA acquired a 27 per cent stake in Aboitiz Power, a generation company that plans to significantly increase its renewable capacity.[45]

37 Department of Information and Communications Technology Circular No. 008 issued on 29 May 2020.

38 ibid.

39 SEC Form No. 17-C and PSE Disclosure Form No. 4-31 filed by PLDT, Inc on 3 October 2022.

40 edotco acquires Tower Portfolio from PLDT to become the leading TowerCo in the Philippines, 19 April 2022, edotco, https://edotcogroup.com/media/edotco-acquires-tower-portfolio-from-pldt-to-become-the-leading-towerco-in-the-philippines/ accessed on 7 October 2022.

41 EdgePoint Enters Philippine Market with Purchase of Tower Portfolion from PLDT Group, 19 April 2022 edgepoint, https://edgepoint*infra*.com/edgepoint-enters-philippines-market-with-purchase-of-tower-portfolio-from-pldt-group/ last accessed on 21 October 2022.

42 SEC Form No. 17-C and PSE Disclosure Form No. 4-31 filed by PLDT, Inc. on 3 October 2022.

43 Piad, Tyrone Jasper C., Voyager bags $210M in fresh equity for PayMaya, Maya Bank, Inquirer.Net, https://business.inquirer.net/345829/voyager-bags-210m-in-fresh-equity-for-paymaya-maya-bank/amp last accessed on 21 October 2022.

44 KKR Leads Series C Round in Philippine BV2B Platform GrowSari with us$45 Million Investment, Businesswire, https://www.businesswire.com/news/home/20220125005949/en/KKR-Leads-Series-C-Round-in-Philippine-B2B-Platform-GrowSari-with-US45-Million-Investment last accessed on 21 October 2021.

45 JERA to Invest in Aboitiz Power, a Major Power Utility in the Philipines, to Promote Clean and Renewable energy in the Country, 27 September 2021, https://www.jera.co.jp/english/information/20210927_765

## VII EMPLOYMENT LAW

The consolidated or surviving corporation in a merger or consolidation transaction acquires all the liabilities and obligations of each constituent corporation.[46] Necessarily, the surviving corporation assumes the employment liabilities of each constituent. Thus, in *Sumifru (Philippines) Corporation v. Bernabe Baya*,[47] the Supreme Court declared the surviving corporation to be solidarily liable to an employee of the constituent judgment-debtor corporation.

Generally, the consolidated or surviving corporation continues the employment of the constituent's employees. As stated by the Supreme Court in *Bank of the Philippine Islands v. BPI Employees Union-Davao Chapter-Federation of Unions in BPI Unibank*,[48] it is in keeping with the dictates of social justice and the state policy of according full protection to labour to deem employment contracts as automatically assumed by the surviving corporation, even in the absence of an express stipulation in the articles of merger or merger plan. As the merger does not operate to dismiss them, the absorbed employees are not entitled to separation pay on account of such merger in the absence of any other ground for its award.[49]

## VIII TAX LAW

Tax implications of an M&A deal depends on the structure of the transaction and the nature of the assets involved. Registration of the transfer of shares and real estate must be supported by a certificate authorising registration (CAR) issued by the BIR.[50] The CAR is issued by the BIR to certify that proper taxes have been paid on the sale.

Generally, acquisitions of unlisted shares in the Philippines are subject to 15 per cent final tax on net capital gains realised from sale of shares,[51] and documentary stamp tax (DST) of 0.75 per cent of the par value of the shares.[52] Sale of listed shares is subject to stock transaction tax of 0.6 per cent of the gross selling price.[53]

Asset acquisitions are taxed depending on the nature and classification of assets. Sale of real property held as capital assets are subject to a final capital gains tax of 6 per cent of the gross selling price or fair market value, whichever is higher.[54] It is also subject to DST of 1.5 per cent of the gross selling price or market value of the property.[55]

last accessed on 21 October 2022.

46 Section 79(E) of the Revised Corporation Code.

47 *Sumifru (Philippines) Corporation (Surviving Entity in a Merger with Davao Fruit Corporation and Other Companies) v. Bernabe Baya*, G.R. No. 188269, 17 April 2017.

48 G.R. No. 164301, 19 October 2011.

49 *The Philippine Geothermal, Inc v. Unocal Philippines, Inc (now known as Chevron Geothermal Philippines Holdings, Inc)*, G.R. No. 190187, 28 September 2016.

50 Section 58(E), Tax Code.

51 Sections 24(C) and 25(A)(3) of the Tax Code as amended by TRAIN, and Sections 27(D)(3) and 28 (A)(7)(c) and 28(B)(5)(c) of the Tax Code as amended by CREATE.

52 Section 175 of the Tax Code, as amended by TRAIN.

53 Section 127(A) of the Tax Code, as amended by TRAIN.

54 Sections 24(D), 25(A)(3), 25(B), and 27(D)(5) of the Tax Code, as amended by TRAIN.

55 Section 196 of the Tax Code, as amended by TRAIN.

Conversely, acquisitions of assets held as ordinary assets are generally subject to income tax, 12 per cent value-added tax,[56] 1.5 per cent DST.[57] Notably, the Philippines recently reduced corporate income tax from 30 per cent to 25 per cent of net income for domestic and resident foreign corporations.[58] Income received by non-resident foreign corporations was reduced from 30 per cent to 25 per cent of the gross income,[59] subject to exemptions or preferential tax rates under applicable tax treaties.

In a decision issued in *Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue*,[60] the Supreme Court held that a tax treaty relief application filed with the BIR should not negate the availment of the reliefs provided for under international agreements. Prior to said pronouncement, the BIR required the tax treaty relief application as a condition precedent to the availment of the preferential tax rates under applicable tax treaties.

Following said decision, the BIR streamlined the procedures and availments of tax treaty benefits. In Revenue Memorandum Order No. 14-2021 issued on 31 March 2021, the BIR allowed the withholding agent or income payor to a non-resident foreign corporation to apply the tax treaty benefits based on an application form to BIR, Tax Residency Certificate and the applicable tax treaty provision. However, it required the withholding agent or income payor to file a confirmatory request with the BIR no later than the last day of the fourth month following the close of each taxable year. Failure to file within the said period exposes the withholding agent to penalties.

M&A transactions for reorganisation or restructuring purposes are exempt from tax (TFE Transactions).[61] The latest tax reform clarified that a prior ruling from the BIR shall not be required for purposes of availment of the tax exemption for TFE Transactions. The tax reform further expanded the structures considered as TFE Transactions to include recapitalisation and reincorporation.

Philippine Finance Secretary Benjamin Diokno has credited the recent tax reforms, particularly the reduction of income tax rates, for enabling the Philippines to withstand the harsh effects of the pandemic and chart a clear path to recovery and renewed expansion.[62] He said that the tax reforms were a critical factor in maintaining fiscal sustainability.[63]

## IX COMPETITION LAW

As part of the country's measures for economic recovery from the pandemic, the mandatory notice requirement and initiation of a PCC review procedure for M&A deals were temporarily eased.

Bayanihan 2 exempts parties to M&A deals with transaction value of P50 billion from filing the notice to PCC for a period of two years from the date of effectivity of Bayanihan 2

56 Section 106 of the Tax Code.
57 Section 196 of the Tax Code, as amended by TRAIN.
58 Sections 27(A) and 28(A)(1) of the Tax Code, as amended by TRAIN.
59 Section 28(B)(5) of the Tax Code, as amended by CREATE.
60 G.R. No. 188550, 19 August 2013.
61 Section 40(C)(2) of the Tax Code, as amended by CREATE.
62 Diokno commends Congress for game-changing reforms, cites benefits of new tax laws, 22 August 2022, Department of Finance, https://www.dof.gov.ph/diokno-commends-congress-for-game-changing-reforms-cites-benefits-of-new-tax-laws/ accessed on 29 September 2022.
63 ibid.

(15 September 2020). Prior to Bayanihan 2, parties to M&As were required to notify PCC if the transaction exceeded 6 billion Philippine pesos for size of party and 2 billion Philippine pesos for size of transaction.

The two-year period under Bayanihan 2, which provided for a higher notification threshold, having lapsed, PCC has adjusted the notification thresholds based on the country's nominal gross domestic product (GDP) growth of the previous calendar year.[64] In a resolution issued on 13 September 2022, the PCC adjusted the compulsory notification threshold to:

*a* 6.100 billion Philippine pesos for size of party; and

*b* 2.500 billion Philippine pesos for size of transaction.[65]

The PCC said that it will undertake further studies to consider all factors relevant to the adjustment of notification thresholds. It is expected to adjust the compulsory notification threshold at the beginning of 2023.

## X OUTLOOK

M&A activity is anticipated to increase in the Philippines as its economy continues to rebound from the pandemic. The National Statistician and Civil Registrar reported a growth of 7.4 per cent in GDP in the second quarter of 2022. The Asian Development Bank (ADB) expects the Philippine economy to grow by 6.3 per cent in 2023.[66] The strong economic growth of Philippines is expected to attract more investments into the country. The DOE expects an investment of US$153 billion on the renewable energy sector to reach its reduced carbon footprint target by 2040.[67] With the government easing foreign restrictions, we expect more M&A activity in the renewable energy sector in the medium term.

In addition to the recent measures taken by the government to attract more investments, the encouragement given by President Marcos Jr to the private sector, particularly in the revitalisation of public–private partnerships (PPPs) in construction and infrastructure projects, is expected to move M&A activity. Notably, President Marcos Jr included the amendment of the Build-Operate-Transfer Law for the improved implementation of PPPs as one of the priority bills of his administration.[68] The amendment is intended to reduce bottlenecks and remove ambiguities in existing law, potentially increasing M&A activity for infrastructure and related sectors, and sustaining the country's long-term economic growth.

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64 Philippine Competition Commission Resolution No. 18-2022 issued on 13 September 2022.

65 ibid.

66 ADB Sees Robust 2022 GDP Growth for the Philippines, 21 September 2022, ADB News Release, News and Events, Asian Development Bank, https://www.adb.org/news/adb-sees-robust-2022-gdp-growth-philippines last accessed on 21 October 2022.

67 Towards a Sustainable and Clean Energy Future, Philippine Energy Plan 2020-2040, Department of Energy, https://www.doe.gov.ph/sites/default/files/pdf/pep/PEP_2020-2040_signed_01102022.pdf?withshield=1 last accessed on 21 October 2022.

68 Cruz, Maricel, BBM pushes 19 priority bills for better government, Manila Standard, 26 July 2022, Public-Private Partnership Center, https://ppp.gov.ph/in_the_news/bbm-pushes-19-priority-bills-for-better-government/ last accessed on 21 October 2022.

**Appendix 1**

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Nilo T Divina is the founder and managing partner of DivinaLaw Offices. He is a recognised expert in commercial law. Since 2018, Atty Divina has consistently been named in the Top 100 Lawyers in the Philippines listed by *Asia Business Law Journal*. He was also awarded by *Asian Legal Business* (*ALB*) as 'Managing Partner of the Year' in 2021 and included in *ALB*'s 10 Philippines Client Choice Lawyers for 2021 and 2022. In 2022, he was also included in *ALB*'s Asia Super 50 Disputes Lawyers for 2022 and awarded 'Executive of the Year (Legal)' in the International Business Awards.

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