Philippines

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According to the National Economic Development Authority (NEDA), a Philippine government agency responsible for economic development and planning, the Philippines posted a full-year gross domestic product growth rate of 5.6% in 2023, which is below the 6–7% target of the government. While the Philippines performed stronger than most of the other markets in Southeast Asia, NEDA is cognizant that achieving 6.5–7.5% in 2024 will require implementing several economic measures, including improving the ease of doing business in the country to attract more investments.

Amid this landscape of cautious optimism and the pursuit of economic acceleration, a noteworthy development in the Philippine corporate sector has emerged – the delisting of Metro Pacific Investments Corporation (MPIC) from the Philippine Stock Exchange (PSE). This development draws attention to the intricacies of market dynamics and corporate governance.

The delisting of MPIC from the PSE

One of the major M&A transactions in 2023 involved the delisting of MPIC – a significant infrastructure holding company in the Philippines with diversified interests in utilities, infrastructure, healthcare, and toll roads – from the PSE. This decision followed a voluntary tender offer by Metro Pacific Holdings, Inc.; GT Capital Holdings, Inc.; Mit-Pacific Infrastructure Holdings, Inc.; and Manuel V Pangilinan-led MIG Holdings Incorporated.

The objective of the offer was to take the company private. The move triggered a mandatory delisting of MPIC under PSE rules on October 9 2023 because the concentration of ownership exceeded the minimum public flotation requirement of 5%.

The motivations behind strategic decisions such as the MPIC transaction range from the desire for greater operational flexibility to the pursuit of more favourable financing conditions. In particular, Pangilinan notes that Philippine companies tend to be smaller in size, partly due to a cultural aversion to large conglomerates. This preference influences the composition of the Philippine stock market, where smaller companies predominate.

While smaller companies play a vital role in the economy, a stock exchange dominated by them might struggle to attract the same level of investor interest and capital inflow as markets with larger entities.

The MPIC transaction could set a precedent for other large corporations contemplating similar moves, especially in a market environment characterised by volatility, regulatory challenges, and strategic realignments. These decisions can profoundly impact the broader market ecosystem and investor behaviour.

On one hand, strategic decisions by prominent market players can influence the composition of the stock market. For example, a wave of delistings could reduce the market's size and its attractiveness to domestic and international investors. This could lead to a more concentrated market, with fewer choices for investors, potentially affecting the market's overall health and its role in the economy. On the other hand, positive investor sentiment is crucial for a healthy market, as it encourages participation, investment, and the flow of capital.

Decisions that are perceived as limiting investor choice or reducing transparency may dampen enthusiasm for the market, leading to reduced liquidity and possibly discouraging new listings. Ultimately, understanding the motivations behind strategic corporate action such as the delisting of MPIC is crucial for stakeholders – including investors, regulators, and other market participants – in assessing the long-term implications of such corporate actions on the long-term health and attractiveness of the market.

Furthermore, transactions such as the MPIC deal must navigate complex regulatory landscapes that govern corporate actions, including tender offers and delistings.

When a significant shareholder seeks to consolidate control, the interests of minority shareholders are thrust into the spotlight, prompting scrutiny over fair valuation, tender offer prices, and the protection of minority interests. Ensuring fair exit terms for minority shareholders goes beyond mere compliance with legal requirements, it is also about upholding high ethical standards in corporate governance. In this regard, the Philippine Securities and Exchange Commission and the PSE play crucial roles in safeguarding market integrity and investor interests, which involves scrutinising the terms of significant M&A and delistings to ensure compliance with legal and ethical standards.

The structure of the MPIC deal, particularly the premium offered above the market price, highlights the critical importance of offering fair exit terms to minority shareholders. Such practice demonstrates a dedication to the equitable treatment of, and transparency to, shareholders, which are cornerstone principles of corporate responsibility and ethical business conduct.

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In addition to his transactional and advisory work, Jonathan has been a resource speaker on financing Philippine infrastructure and power projects at various conferences. He has been consistently cited as a leading lawyer in the field of project finance by IFLR 1000.

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Roberto has assisted clients in preparing, negotiating, and reviewing contracts and transaction documents. He has extensive experience in conducting due diligence and giving transaction advice in deals involving acquisitions, investments and divestments, capital restructuring, project financing, and corporate reorganisation in, among others, the energy and power, infrastructure, real estate, and retail industries. Roberto has advised and assisted clients in public and private biddings for infrastructure and energy projects. He also provides corporate secretarial services and offers advice on day-to-day corporate matters.

Changes to regulations impacting M&A transactions

The recent legislative amendments in the Philippines – encompassing changes to the Philippine Competition Commission's (PCC's) notification thresholds, the Implementing Rules of the Renewable Energy Law, the Public Service Act, the Foreign Investments Act, and the Retail Trade Liberalization Act – collectively signify a substantial shift towards liberalising the market to foreign investments while balancing national security and economic growth.

Increase in PCC notification thresholds

- The PCC has updated the mandatory notification thresholds for M&A to PHP 7.8 billion for the size of the party and PHP 3.2 billion for the size of the transaction, effective from March 1 2024. The purpose of establishing a notification threshold is to guarantee that mergers or acquisitions with a higher potential to significantly diminish market competition for goods and services are mandatorily notified under the Philippine Competition Act. The requirement for compulsory notification to the PCC is triggered when both thresholds are met, focusing on the assets or revenues of the ultimate parent entity of the parties involved in the transaction and the assets or revenues of the acquired entity and its controlled entities.

The increase in notification thresholds aims to streamline PCC's review process, focusing on transactions that might significantly affect market competition and exempting smaller deals less likely to impact market dynamics. This move is reflective of the evolving Philippine economic landscape, which has been notably influenced by inflation and the recovery efforts relating to the pandemic.

Specifically, adjusting the notification thresholds to account for inflation ensures that these thresholds remain relevant to market fluctuations and accurately represent the true value of businesses within the context of the economy's overall size. Moreover, the amendments recognise that many sectors experienced a downturn during the pandemic, leading to an increase in M&A activities as companies sought to consolidate, restructure, or expand their operations to adapt to the new economic reality.

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By raising the notification thresholds, the PCC is facilitating a smoother recovery process, allowing more transactions to proceed without the extensive review process.

Amendments to the Implementing Rules of the Renewable Energy Law

- Department of Energy (DOE) Circular No. DC2022-11-0034, issued on November 15 2022, amends the Implementing Rules (IRR) of the Renewable Energy Law to allow the Philippine government to enter into renewable energy (RE) service or operating contracts with Filipino citizens and foreign nationals, as well as corporations that are Filipino or foreign owned. This is a significant shift, as it opens up the RE sector to a broader range of investors and operators, potentially accelerating the development of RE projects. Prior to its amendment, the IRR imposed a 40% cap on foreign ownership in the RE sector based on the previous view that forms of RE are considered natural resources.
- The amendment is based on Department of Justice (DOJ) Opinion No. 21, Series of 2022 (the DOJ Opinion). The DOJ Opinion addresses the legal question of foreign equity participation in the exploration, development, and utilisation of RE resources in the Philippines. It explores whether solar, wind, hydro, and ocean or tidal energy fall under the constitutional definition of natural resources, which limits foreign ownership to 40%. The opinion outlines five key points raised by the DOE, including interpretations of natural resources and potential energy, the intent of the Philippine Constitution's framers, and the relevance of RE sources to national economic and ecological goals.
- The DOJ concludes that RE sources such as solar, wind, hydro, and ocean or tidal energy do not fall under the traditional definition of natural resources subject to foreign equity limitations. It argues that these are inexhaustible resources not intended for restrictive ownership under the Philippine Constitution. The opinion suggests that allowing greater foreign participation in RE projects could aid the Philippines in achieving a more sustainable and independent energy sector, less vulnerable to international market fluctuations.
- However, the DOJ notes the limitations on the appropriation of water resources for power generation by foreign entities are acknowledged to remain in force, as per the Water Code and relevant jurisprudence.
- The DOJ opinion suggests a path forward for the Philippines to leverage foreign capital and expertise in developing its RE sector while considering the constitutional mandate to protect and conserve the nation's patrimony.

Amendments to the Public Service Act

On March 21 2022, then president Rodrigo R Duterte of the Philippines signed Republic Act No. 11659 into law, amending the Public Service Act of 1936, a move aimed at modernising and refining the legal framework surrounding public services and utilities in the country. The amendment significantly narrows the definition of what constitutes a public utility, now specifically referring to entities involved in:

- Electricity distribution;
- Electricity transmission;
- Petroleum and petroleum products pipelines transmissions systems;
- Water pipeline distribution systems and wastewater pipeline systems;
- Seaports; and
- Public utility vehicles.

This redefinition is crucial as it directly impacts foreign ownership restrictions, aligning them with the provisions of the Philippine Constitution, which mandates that public utilities must be at least 60% Filipino owned. The law introduces a pivotal change by stating that entities not classified under the newly defined scope of public utilities can now be fully foreign owned, provided they are not considered "critical infrastructure".

The concept of critical infrastructure, introduced by Republic Act No. 11659, refers to vital public services essential to national security, such as telecommunications. Under the new law, enterprises owned or controlled by foreign governments are barred from holding any ownership stake in public utilities or critical infrastructure sectors. Furthermore, the law strictly prevents these entities from increasing their ownership in critical infrastructure after the enactment of the new law. It also sets a limit on the total ownership stake that sovereign wealth and pension funds from any country can have in these sectors at 30%. Additionally, foreign individuals are restricted from owning more than 50% of the capital in companies that operate and manage critical infrastructure. This ownership cap can only be exceeded if the foreign individual's home country offers similar ownership rights to Filipino nationals.

The changes to the Public Service Act open several sectors to increased foreign investment while aiming to safeguard national interests and security.

Amendments to the Foreign Investments Act

Republic Act No. 11647, signed into law on March 2 2022, amends the Foreign Investments Act of 1991 to further liberalise foreign investment regulations in the Philippines. Notably, the law reduces the required minimum paid-in equity capital for foreign investors to two new thresholds based on specific criteria:

- $200,000 for micro and small domestic market enterprises. This lower threshold makes it more accessible for foreign investors to enter and support small-scale businesses within the domestic market.
- $100,000 if the business:
- Incorporates advanced technology, as verified by the Department of Science and Technology;
- Is recognised as a startup or a startup enabler; or
- Employs a majority of Filipino workers, with a team of at least 15 people.

These adjustments aim to encourage foreign investment in sectors that are deemed beneficial for economic growth and innovation, such as technology-driven industries and startups, while also promoting job creation for Filipino citizens.

Additionally, foreign enterprises are mandated to implement understudy or skills development programmes for the transfer of technology or skills to Filipino workers, with the Department of Labour and Employment monitoring compliance. This move signifies a strategic effort to foster inclusive economic growth by integrating advanced technologies and startups into the national economy while ensuring the transfer of knowledge and skills to the local workforce.

The establishment of the Inter-Agency Investment Promotion Coordination Committee (IIPCC), led by the Department of Trade and Industry, marks another critical development. The committee is tasked with unifying and enhancing foreign investment promotion efforts, including the creation of a comprehensive investment marketing plan and coordinating investment development programmes across various agencies and local government units. The IIPCC is also responsible for vetting foreign investments in sensitive sectors such as military-related industries and cyber infrastructure, especially those by foreign government entities, to safeguard national security and public welfare.

Amendments to the Retail Trade Liberalisation Act

Republic Act No. 11595, enacted on December 10 2021, represents a significant shift in the Philippines' approach to foreign investment in the retail sector by amending the Retail Trade Liberalisation Act of 2000. This amendment substantially lowers the barriers for foreign retail enterprises looking to enter, or expand within, the Philippine market, primarily through the reduction of the minimum paid-up capital requirement from the previous tiered system to a more accessible PHP 25 million.

Additionally, it simplifies the entry process by eliminating the categorisation based on investment size and allowing a lower minimum investment per store of PHP 10 million, compared with the much higher thresholds set previously. The law also removes the requirement for certain types of foreign retailers, with foreign ownership exceeding 80%, to offer at least 30% of their equity to the public within eight years of operation, which was a significant obligation under the old law. This change facilitates a more straightforward approach for foreign entities to participate in the Philippine retail market.

Moreover, Republic Act No. 11595 updates regulatory and compliance frameworks to align with its liberalised stance. Specifically, it abolishes the need for foreign retailers to obtain a certificate of prequalification compliance from the Board of Investments, thereby streamlining the entry process.

These changes collectively aim to make the Philippines a more attractive destination for foreign retail investment, fostering economic growth and offering more choices to Filipino consumers, while ensuring that benefits extend to the local workforce and economy.

Looking ahead

With the above regulatory changes, the Philippines continues to position itself as an investor-friendly destination. There is even ongoing lobbying in the Philippine congress to amend the economic provisions of the 1987 Philippine Constitution to further ease economic restrictions, particularly the foreign equity ownership restrictions on firms engaged in nationalised or partly nationalised activities. Since the reforms aim to revise the constitution, these amendments are expected to be extensively deliberated by legislators in 2024.