Philippines: Amendment to the Public Service Act

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Amendment to the Public Service Act

On 21 March 2022, the Philippines finally approved the long-awaited amendment to the 86 year old law, Commonwealth Act No. 146, otherwise known as the Public Service Act ("PSA"). The amendment to the PSA ("PSA Amendment") is a major development in Philippine foreign investment regulations as it relaxes foreign ownership restrictions and effectively allows non-Filipinos to completely own businesses considered as public services in the country. The PSA Amendment will take effect on 7 April 2022.

1. Under the PSA, only operators of "public services" for which a Certificate of Public Convenience is required by the relevant government agency are subject to foreign investment restrictions. Under the 1987 Philippine Constitution, all operators of "public utilities" are required to be Filipino or entities that are at least 60% owned by Filipinos.[1] Neither the 1987 Philippine Constitution nor any other law however defines a "public utility" so Philippine regulators began interpreting "public utility" to mean any kind of "public service". As a result, any entity which engaged in "public services" such as telecommunications, railways, and transportation network companies (e.g. ride hailing apps), were required to have at least 60% Filipino ownership. This was regardless of whether or not the relevant government agency required a Certificate of Public Convenience for its operation.

To address this confusion and narrow down the scope, the PSA Amendment defines a "public utility" and removes any foreign investment restrictions imposed upon any "public service" which is not considered a "public utility", including those for which a Certificate of Public Convenience is required for its operation. A public utility is a public service that operates, manages, or controls for public use any of the following:

a. distribution of electricity,
b. transmission of electricity,
c. petroleum and petroleum products pipeline transmission systems,
d. water pipeline distribution systems and waste water pipeline systems, including sewerage pipeline systems,
e. seaports, and
f. public utility vehicles.[2]

2. Notably, the PSA Amendment specifically states that no other person can be considered a public utility unless otherwise subsequently provided by law.[3] As a result, activities which fall under the definition of public services under the PSA but are not any of the above is not a public utility and, upon effectivity of the PSA

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1 PHIL. CONST. art. XII, § 2.

2 Section 4, PSA Amendment.

3 Section 4, PSA Amendment.

Amendment, is no longer subject to foreign ownership restrictions. Once the PSA Amendment takes effect, non-Filipinos may, without any shareholding restrictions, own up to 100% of a business which is considered a public service but is not a public utility. These include telecommunication (subject to reciprocity requirements discussed below), freight forwarders, railway operators, and ride hailing app operators.

To implement this regulation, the PSA Amendment directs government agencies to issue, within 6 months from the effectivity of the law, the implementing rules and regulations in relation to the public service within their jurisdiction.[4] Hence, investors are advised to monitor any related issuances in their industry in the upcoming months.

3. Other significant amendments to the PSA are as follows:

(1) Businesses affected with public interest

The PSA Amendment clarifies that a public service which is not classified as a public utility is considered a business affected with public interest for purposes of Sections 17 and 18 of Article XII of the 1987 Philippine Constitution.[5] These provisions allow the State to:

i. in times of national emergency, when the public interest so requires, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest, and

ii. in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the Government.

Effectively, this means that the State has the power to take over a public service under the above circumstances.

(2) Critical Infrastructure

The PSA Amendment introduces the definition of a critical infrastructure which refers to any public service which owns, uses, or operates systems and assets, whether physical or virtual, 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. The PSA Amendment specifically identifies telecommunications as a critical infrastructure and allows the President to declare other vital services as a critical infrastructure.[6] Telecommunications under the PSA Amendment refers to any process which enables a telecommunications entity to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible signals or any control signals of any design and for any purpose by wire, radio or other electromagnetic, spectral, optical or technological means. It does not include passive telecommunications tower infrastructure and components, such as, but not limited to, poles, fiber ducts, dark fiber cables, and passive telecommunications tower infrastructure and value-added services.[7]

Obligations are imposed upon entities operating critical infrastructures in case of interruption including acting on customer complaints within 10 days or providing an action plan and filing monthly reports to the appropriate government agency.[8]

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[4] Section 30, PSA Amendment.

[5] Section 4, PSA Amendment.

[6] Section 2(e), PSA Amendment.

[7] Section 2(m), PSA Amendment.

[8] Section 12, PSA Amendment.

The PSA Amendment also imposes a reciprocity clause wherein foreign nationals are not allowed to own more than 50% of the capital of entities engaged in the operation and management of critical infrastructure unless the country of such foreign national grants similar rights to Philippine nationals.[9]

(3) Power to Suspend or Prohibit Foreign Investments

If it is in the interest of national security, the President may suspend or prohibit any proposed merger or acquisition, or any investment in a public service that effectively results in the grant of direct or indirect control to a foreigner or a foreign corporation.[10]

(4) Investments by foreign governments or foreign state-owned enterprises

Entities controlled by or acting on behalf of the foreign government or foreign state-owned enterprises are prohibited from owning capital in a public utility or critical infrastructure. This however only applies to investments made after the PSA Amendment takes effect. Foreign state-owned enterprises which own capital prior to the effectivity of PSA Amendment are prohibited from investing in additional capital after the PSA Amendment. Notwithstanding, sovereign wealth funds and independent pension funds of each foreign country may collectively own up to 30% of the capital of such public services.[11]

(5) Telecommunications business

Persons and companies engaged in the telecommunications business are required to obtain and maintain certifications from an accredited certification body attesting to compliance with relevant ISO standards on information security, as prescribed by the Department of Information and Communications Technology.[12]

(6) Penalties

The PSA Amendment modifies the penalties for violations under the PSA by first giving precedence to any specific fine or penalty imposed under the charter of the government agency who exercises regulatory authority over the relevant public service.[13] In the absence of a specific fine or penalty or if such fine or penalty imposed by the relevant government agency is lesser, the PSA Amendment modifies the penalties as follows:

i. If the operator of a public service violates or fails to comply with the terms and conditions of any certificate or any orders, decisions, or regulations of the relevant government agency, the PSA Amendment increases the penalty from PhP200 per day to PhP5,000 to PhP2,000,000 per day.

If the rate collected by a public service exceeds the rate authorized by the relevant government agency, the government agency may order a refund to consumers instead of or in addition to the fine.[14]

ii. For other violations, the PSA Amendment sets a standard penalty of a maximum fine of PhP2,000,000 and/or imprisonment of 6 years and 1 day to 12 years, at the discretion of the court.

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9 Section 25, PSA Amendment.

10 Section 23, PSA Amendment.

11 Section 24, PSA Amendment.

12 Section 26, PSA Amendment.

13 Section 11, PSA Amendment.

14 Section 11, PSA Amendment.

If the violation is committed by a juridical person, the penalty of imprisonment will be imposed on its officers, directors, or employees holding managerial positions, who are knowingly and willfully responsible for such violation.[15]

(7) Change of prescriptive period

Under the PSA, the time to file an action for violation of the law expires after 60 to 180 days depending on the violation. The PSA Amendment amends this by applying Act No. 3326 which extends the period to file an action to 12 years from the occurrence of the violation or if not known at the time, from the discovery thereof.[16]

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[15] Section 12 to 17, PSA Amendment.

[16] Section 16, PSA Amendment.

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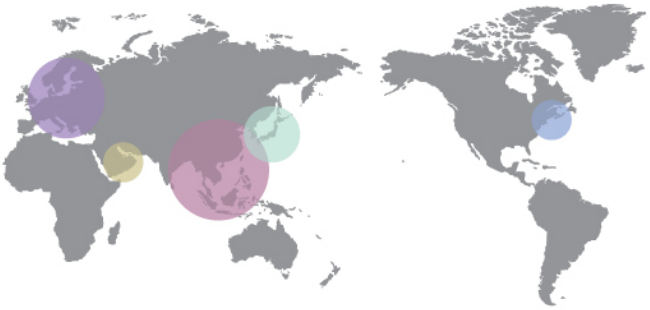

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