

October, 2023 No.70

**This issue covers the following topics:**

Malaysia

**Introduction of Capital Gains Tax on Sale of Unlisted Shares****Yuan Yao Lee**

Philippines

**Guidelines for Review of M&As in Digital Markets****Patricia O. Ko**

Malaysia

**Introduction of Capital Gains Tax on Sale of Unlisted Shares**

従前マレーシアではキャピタル・ゲインに対する課税は、不動産取引又は不動産保有会社の株式売買に対してのみ行われていたが、2023年10月13日、マレーシア首相は2024年度の国家予算の説明の中で非上場株式に対するキャピタル・ゲイン課税の導入を発表した。詳細については未定であるものの、2024年3月1日以降の株式売買に対して適用される予定であることから現段階で判明している事項について速報する。

**Background of Capital Gains Tax in Malaysia**

In Malaysia, capital gains tax was generally associated with the disposal of real property and the sale of shares in real property companies, which is governed by the Malaysian Real Property Gains Tax Act 1976 (“**RPGT Act**”). Under the RPGT Act, every person, whether or not resident of Malaysia, is subject to Real Property Gains Tax on gains arising from the disposal of real property, including shares in a real property company.

The rate of the Real Property Gains Tax is between 0% to 30%, depending on, amongst others, the years of ownership of the real property prior to its disposal, and the status of the seller (such as whether the seller is an individual who is a citizen or permanent resident of Malaysia, or a company incorporated in or outside Malaysia).

**New Capital Gains Tax on Unlisted Shares**

On 13<sup>th</sup> October 2023, the Prime Minister of Malaysia presented the country’s Budget for the year 2024 and amongst the measures announced was the implementation of capital gains tax on unlisted shares from 1<sup>st</sup> March 2024. During the tabling of the Budget, it was announced that effective from 1<sup>st</sup> March 2024, a capital gains tax (“**CGT on Unlisted Shares**”) will be imposed on the net gains derived from the disposal of unlisted shares in local companies as follows:

Share acquisition date	Capital Gains Tax Rate		
	On net gains		On gross sales value
Before 1 <sup>st</sup> March 2024	10%	or	2%
From 1 <sup>st</sup> March 2024	10%		Not applicable

The Prime Minister also announced that there may be exemptions on the implementation of the CGT on Unlisted Shares above and at this stage, the exemptions being considered are disposal of shares related to:

- (i) Initial Public Offering (IPO) approved by the Malaysian stock exchange authority;
- (ii) internal restructuring of shares within the same group of companies; and
- (iii) venture capital companies.

Pending the issuance of further legislation and relevant guidelines on this implementation and exemption of CGT on Unlisted Shares by the Malaysian authorities, the applicability of the exemptions above may be subject to fulfilment of certain conditions and the scope of applicability of CGT on Unlisted Shares will require further review.

For example, the question remains whether the Seller may deduct their capital losses in respect of sale of shares in other unlisted local companies, against the net gains in respect of sale of shares in a company to reduce the imposition of CGT on Unlisted Shares, and whether such capital losses can be carried forward.

### **Interplay of CGT on Unlisted Shares with Relevant Existing Legislation**

As set out above, the current Real Property Gains Tax is chargeable upon the gains obtained in respect of the sale of shares in a real property company ("RPC"). RPC is generally a controlled company where its total tangible assets consist of 75% or more in real property and/or shares in another RPC. A controlled company is a company having not more than 50 members and controlled by not more than 5 persons.

As the scope of CGT on Unlisted Shares covers disposal of shares in local companies, this seems to also cover sale of shares in an RPC. Therefore, the upcoming legislation and guidelines on CGT on Unlisted Shares and the RPGT Act will need to be reviewed to avoid double imposition of tax on a share sale transaction involving RPC.

### ***Level-Playing Field***

If the relevant Real Property Gains Tax involving RPC is repealed following the commencement of CGT on Unlisted Shares to avoid the double imposition of tax, this appears to draw a more level-playing field for foreign investors in RPC. This is because currently, non-Malaysian citizens, non-Malaysian permanent residents and companies not incorporated in Malaysia are subject to generally higher Real Property Gains Tax rate (e.g. up to 30% rate against a Malaysian citizen who may be subject to 15% rate for the disposal after the same period of ownership), as compared to Malaysian citizens, Malaysian permanent residents and Malaysia-incorporated companies, when they dispose of their shares in an RPC.

A more level-playing field can be achieved with the same CGT rate applying across disposal of shares in companies (including RPC) irrespective of nationality and residency of the sellers.

### ***Requirements to Withhold Cash Consideration***

Under the current RPGT Act, a purchaser of real property or shares in an RPC is required to withhold certain percentage of cash consideration from the total purchase price, to be remitted to the Director General of the Malaysian Inland Revenue Board and such amount will be applied against the Real Property Gains Tax payable by the Seller.

It is currently not determined whether the upcoming legislation on CGT on Unlisted Shares will adopt the same framework as the RPGT Act as above, but the adoption of such withholding provision may have some bearing on the Seller's request for deposit or advance payment in a share sale transaction.

### **Conclusion**

As at the date of this newsletter, there is no publicly available draft bill and/or guidelines issued by the Malaysian authorities on the conditions and requirements in respect of the implementation of CGT on Unlisted Shares. Nonetheless, stakeholders should be mindful of the potential cost implications and effects on their investment strategy that may arise from the introduction of CGT on Unlisted Shares.

[Author]



**Yuan Yao Lee** (Nagashima Ohno & Tsunematsu Singapore LLP)

yuan\_yao\_lee@noandt.com

Yuan Yao is an associate with Nagashima Ohno & Tsunematsu (Singapore office). His practice focus is on public and private M&A, take-overs, capital markets (equity), regulatory compliance and general corporate advisory matters.

Before joining Nagashima Ohno & Tsunematsu, Yuan Yao read law at University of Warwick between 2013 – 2016 and was called to the Bar of England of Wales (2017) and the High Court of Malaya (2018). He also practiced at one of the top-tier law firms in Malaysia from 2018 till 2023.

## Philippines

## Guidelines for Review of M&amp;As in Digital Markets

2023年8月、フィリピン競争委員会は、デジタル市場におけるM&Aの自発的審査に関するガイドラインを発表した。本ガイドラインは、今後一層の拡大が予想されるデジタル市場における反競争的行為についてより注力して監視・検討するという競争当局の意図を示すものであり、今後フィリピンにおいてこの事業分野でのM&Aを検討する際には企業結合届出の要否についてより慎重な判断が求められることになる。本稿では本ガイドラインについて概説する。

On 4 August 2023, the Philippine Competition Commission (“PCC”) issued the Guidelines for the Motu Proprio Review of Mergers and Acquisitions in the Digital Markets (the “Guidelines”).

The Guidelines are consistent with the PCC’s market surveillance function, and its mandate under the Philippine Competition Act to review, motu proprio (or *suo moto* or on its own accord) or upon notification, mergers and acquisitions having a direct, substantial and reasonably foreseeable effect on trade, industry, or commerce in the Philippines. The focus on digital markets may be due in part to the accelerated growth of the digital economy in the past few years, with the PCC acknowledging in its 2022 Annual Report, that it has devoted its enforcement efforts to sectors most relevant during the pandemic, including e-commerce. As the digitalization trend continues, an increase in digital market transactions is anticipated, which will need to be monitored and reviewed for anti-competitive conduct.

### Indicators of potential competition issues

Through the Guidelines, the PCC provides a non-exhaustive list of indicators of competition issues in mergers or acquisitions in the digital market, which if present, may trigger the PCC to initiate a motu proprio review of the transaction even if such transaction is not subject to compulsory notification requirements (i.e., such transaction did not breach the prevailing thresholds of the size-of-party test and size-of-transaction test<sup>1</sup>). The indicators that were identified and explained by the PCC in the Guidelines are summarized as follows:

#### *a) Transactions involving a gatekeeper*

The Guidelines based the concept of “gatekeepers” on Article 3.1 of the EU Digital Markets Act, which provides that an undertaking shall be designated as a gatekeeper if it (a) has a significant impact on the internal market, (b) provides a core platform service that is an important gateway for business users to reach end-users, and (c) enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.

In evaluating whether a transaction involves a gatekeeper, the PCC will consider factors such as an entity’s size, the creation of direct and indirect network access, and access to and use of data relevant to competition, among others. An example given is a gatekeeper providing e-commerce services acquiring a small company providing logistics and transportation services. As gatekeepers could limit switching by bundling services and foreclose a competitor’s access to platforms, transactions that involve one or more gatekeepers with competitive significance in the digital market may trigger a motu proprio review.

#### *b) Transactions involving companies with data-centric operations*

Because accessing data is a key element in determining market power and generating competitive advantage for data-centric entities, mergers or acquisitions involving entities with data-centric operations affect the amount and nature of data available to competitors, which may raise competition issues. An example given is when a social media platform with advertising services acquires a messaging application provider, the merged entity will be able to consolidate and use the data collected from both services to improve targeted advertising,

<sup>1</sup> The prevailing thresholds (effective since 1 March 2023) are Php 7 billion for the size-of-party test, and Php 2.9 billion for the size-of-transaction test. Note that such thresholds are adjusted by the PCC on March 1<sup>st</sup> of every succeeding year based on the GDP.

and gain advantage over other advertising service providers post-transaction.

c) *Transactions that might significantly reinforce network effects*

Transactions that result in increased network effects (i.e., an increase in the number of platform users, which leads to an increase in its value and attractiveness to all users), such as the acquisition of competitors, may tip the market in favor of the dominant provider and limit competition and users' choices. An example given is when a ride-hailing company acquires a competitor, the former would strengthen its platform's network effects regardless of the competitor's size or revenues, since it would be able to connect to an increased number of drivers and riders.

d) *Transaction involving parties considered innovators*

Based on the Guidelines, an entity may be considered an innovator when it participates in a market where R&D is essential or there is continuous competition for innovation. Transactions involving innovators, especially disruptive innovators, may require further review by the PCC since it may limit incentives to innovate, interoperate with other market players, or license patents.

e) *Conglomerate transactions involving digital players*

Although a conglomerate merger or acquisition does not involve competitors or parties with a customer-supplier relationship, such type of transaction could allow a party to expand into downstream markets and expand digital ecosystems, which can lock in consumers to its products and services, limit switching to competitors, or promote anti-competitive tying and bundling strategies. An example given is when a ride-hailing company acquires a brick-and-mortar retail chain, it may adopt a bundling strategy to provide delivery services only to its own retail stores, limiting the user's access to competing options.

f) *Transactions of parties involved in subsequent acquisitions*

This refers to successive or a series of transactions within a one-year period by a digital market operator which may involve the same acquirer and different acquired entities (i.e., different notifying group). Such transactions may raise red flags with the PCC because, while the size of the parties and the transactions taken individually may not be substantial enough to trigger compulsory notification requirements, successive transactions could still have an aggregate impact on market competition.

g) *Transactions involving parties under investigation*

Mergers or acquisitions involving parties already under investigation by the PCC for possible violations of the Philippine Competition Act may necessitate a motu proprio review to preclude any further anti-competitive effects.

h) *Transactions with a value of the transaction close to the notification thresholds*

The PCC may also review a non-notifiable merger or acquisition, where the value of the consideration or the contract price is close to the size-of-transaction test threshold. In addition, the PCC may also consider the non-monetary benefits (e.g., board seat, management position, etc.) in the transaction to determine whether motu proprio review is appropriate.

i) *Transactions involving parties with a significant share of the supply of a goods or service*

The Guidelines state that a share supply of 30% in any of the involved goods or services would signal the significant participation of parties in the market. An example given is a when a digital ecosystem providing mapping services acquires a real-time navigation application, which supplies more than 30% of its market, the PCC may consider this to be a "transaction of interest" based on the market relevance of the parties to the supply of such services.

**Conclusion**

The PCC has emphasized that the Guidelines are not intended to set a limit on its power to conduct a motu proprio review of mergers and acquisitions in general, and the PCC may apply such Guidelines flexibly, or where appropriate, deviate from such Guidelines considering the attendant circumstances of each transaction.

Notwithstanding, parties to mergers or acquisitions in the digital market should take note of the above typical indicators, which may trigger a motu proprio review of their transaction. In order to manage the risks that the PCC may exercise their authority to conduct a motu proprio review, parties may wish to consider consulting with the PCC's Mergers and Acquisitions Office prior to the execution of any definitive agreements on whether their transaction would raise competition issues and/or explore the option of filing a voluntary notification of their transaction, especially if any of the indicators are present.

[Author]



**Patricia O. Ko** (Nagashima Ohno & Tsunematsu Singapore LLP Counsel)  
patricia\_ko@noandt.com

Patricia O. Ko is a Philippine qualified lawyer in the Singapore office. Prior to joining NO&T, she was a Senior Associate in one of the top law firms in the Philippines. Her areas of practice include mergers and acquisitions, foreign direct investment, public-private partnership, securities, general corporate matters, immigration, trademarks, and data privacy. She is experienced in advising clients in commercial transactions involving acquisition of businesses and real estate, joint ventures, corporate restructuring, and regulatory and compliance matters.

## [EDITORS' PROFILES]

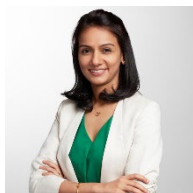


**Nobuo Fukui** (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

nobuo\_fukui@noandt.com

Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.

He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.



**Rashmi Grover** (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

rashmi\_grover@noandt.com

Rashmi Grover is an attorney in the Singapore Office. She is qualified in India and the UK. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian market and advising clients on corporate commercial and finance transactions including transactions involving mergers, acquisitions, formation of joint ventures, private equity investments, business/asset acquisition transactions, regulatory filings and debt issuances.



This newsletter is given as general information for reference purposes only and therefore does not constitute our firm's legal advice. Any opinion stated in this newsletter is a personal view of the author(s) and not our firm's official view. For any specific matter or legal issue, please do not rely on this newsletter but make sure to consult a legal adviser. We would be delighted to answer your questions, if any.

[www.noandt.com](http://www.noandt.com)

## NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan

Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: [info@noandt.com](mailto:info@noandt.com)



Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes locations in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi, Jakarta and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including about 40 experienced attorneys from various jurisdictions outside Japan, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

### Singapore Office

(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road Level 41  
Singapore 049909  
Tel: +65-6654-1760 (general)  
Fax: +65-6654-1770 (general)  
Email: [info-singapore@noandt.com](mailto:info-singapore@noandt.com)

### Bangkok Office

(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)



34th Floor, Bhira Tower at EmQuartier  
689 Sukhumvit Road, Klongton Nuea  
Vadhana, Bangkok 10110, Thailand  
Tel: +66-2-302-4800 (general)  
Fax: +66-2-302-4899 (general)  
Email: [info-bangkok@noandt.com](mailto:info-bangkok@noandt.com)

### HCMC Office

(Nagashima Ohno & Tsunematsu HCMC Branch)



Suite 1801, Saigon Tower  
29 Le Duan Street, District 1  
Ho Chi Minh City, Vietnam  
Tel: +84-28-3521-8800 (general)  
Fax: +84-28-3521-8877 (general)  
Email: [info-hcmc@noandt.com](mailto:info-hcmc@noandt.com)

### Hanoi Office

(Nagashima Ohno & Tsunematsu Hanoi Branch)



Suite 10.04, CornerStone Building  
16 Phan Chu Trinh, Hoan Kiem District  
Ha Noi City, Vietnam  
Tel: +84-24-3266-8140 (general)  
Fax: +84-24-3266-8141 (general)  
Email: [info-hanoi@noandt.com](mailto:info-hanoi@noandt.com)

### Jakarta Office (\*Associate office)

(IM & Partners in association with

Nagashima Ohno & Tsunematsu)



Jakarta Mori Tower 14th Floor, Unit 1401  
Jalan Jenderal Sudirman Kav. 40-41  
Jakarta 10210, Indonesia  
Tel: +62-21-25098080 (general)  
Fax: +62-21-25098090 (general)  
Email: [info-jakarta@noandt.com](mailto:info-jakarta@noandt.com)

### Shanghai Office

(Nagashima Ohno & Tsunematsu

Shanghai Representative Office)



21st Floor, One ICC, 999 Middle Huaihai Road  
Xuhui District, Shanghai 200031, China  
Tel: +86-21-2415-2000 (general)  
Fax: +86-21-6403-5059 (general)  
Email: [info-shanghai@noandt.com](mailto:info-shanghai@noandt.com)

For more details on our global practice

If you would like to receive future editions of the NO&T Asia Legal Review by email directly to your Inbox, please fill out our newsletter subscription form at the following link: [https://www.noandt.com/en/newsletters/nl\\_asia\\_legal\\_review/](https://www.noandt.com/en/newsletters/nl_asia_legal_review/)

Should you have any questions about this newsletter, please contact us at [asia-legal-review@noandt.com](mailto:asia-legal-review@noandt.com).

Please note that other information related to our firm may be also sent to the email address provided by you when subscribing to the NO&T Asia Legal Review.