Foreign investment unlocked by PSA seen flowing first to airlines

By Arjay L. Balinbin
Senior Reporter

AIRLINES and telecommunications companies are likely to be among the first to benefit from the amended Public Service Act (PSA), which raised foreign ownership limits, an analyst said.

"The initial salvo of foreign investment, if they come given the current global uncertainty, will be in telecommunications and air carriers," Rene S. Santiago, former president of the Transportation Science Society of the Philippines, told *BusinessWorld* last week.

"Both sectors are far more internationalized than the other sectors, (and some) domestic companies (e.g., DITO Telecommunity and Philippine Airlines) are in dire need of rescue or equity infusion," he added in a phone message

Republic Act No. 11647, which amends the 85-year-old Public Service Act, excludes telecommunications, domestic shipping, railways and subways, airlines, expressways and tollways, and airports from the definition of a public utility. This means such industries will no longer be subject to the 40% foreign ownership cap for public utilities under the Constitution.

Mr. Santiago noted that shipping and railways also "badly need foreign investment, but these sectors have too many imponderables at the moment."

He said the privatization of the Ninoy Aquino International Airport could attract foreign investors if the public-private partnership (PPP) design is "solid and credible."

"Regional airports aren't attractive. Toll roads are doing fine even without foreign money," Mr. Santiago added.

Transportation Secretary Jaime J. Bautista recently invited foreign companies, especially those in Europe, to invest in Philippine transport infrastructure projects via PPP schemes.

Mr. Bautista said more private sector participation is needed in various infrastructure projects, including the privatization of the EDSA Carousel, seaport operations, the privatization of provincial airports, and the Cebu Bus Rapid Transit project.

"The country must erase first its bad reputation from past PPP deals for the Infrastructure program in PPP modes to gain traction. Railways would benefit most from foreign investment, if the obstacles beyond the PSA are (removed)," Mr. Santiago said.

According to Mr. Bautista, the revised implementing rules and regulations (IRR) for the Build-Operate-Transfer (BOT) Law ensure that PPP projects are not disadvantageous to Filipinos "by providing a balanced sharing of risks between government and the private sector project proponents while allowing reasonable rates of return on investments, incentives, support and undertakings."

The IRR, published on Sept. 27, sought to address concerns over the financial viability and bankability of PPP projects while clarifying ambiguous provisions that might have caused delays in the PPP process.

Mr. Santiago cited the recent arbitration case filed by Light Rail Manila Corp. (LRMC), operator of Light Rail Transit Line 1 (LRT-1), against the government for "non-compliance on key contract provisions, including fare adjustments."

"DoTr is focused on building the railway assets, but has not indicated the institutional (arrangements) for the long-term O&M (operations and maintenance). No clear track on how much private money is needed, how will these be recovered," he added.

"In other words, there is no PPP structure/modality — unlike in the Clark Airport where the government pays for the civil works, and the private sector adds the electromechanical systems and gets their RoI (return on investment) from O&M of the airport."

For railways, Mr. Santiago noted, the signal is "totally different," as "everything is government — loans for all components come from ODA (official development assistance)."

There is "no skin in the game for the private sector on all railway projects under construction. Unlike the structure for LRT-1 South Extension, which was awarded to LRMC," he added.

Foundation for Economic Freedom President Calixto V. Chikiamco said "all transport sectors" are now ripe for 100% foreign Investment.

These are "shipping, transport network vehicles, airlines, railways, subways, airports, and tollways," he said in an e-mail interview last week.

He also said that the amended IRR of the BOT Law "would be sufficient to make the Philippines attractive to foreign investors."

"The patently anti-market provisions in the amended IRR under the Duterte administration have been amended and removed," Mr. Chikiamco added.

The IRR was amended in response to concerns that the previous version of the rules compel private proponents to shoulder more risk while relieving the government of responsibility for delayed deliverables.

Rizal Commercial Banking Corp. Chief Economist Michael L. Ricafort said "better economic recovery prospects and increased infrastructure spending to pump-prime/stimulate the economy also help attract more foreign investment."

"These infrastructure projects help increase the country's competitiveness over the long term in terms of improved movement of goods (exports, imports), workers, tourists (both foreign and local)," he said in an e-mail last week.

The Department of Budget and Management (DBM) reported recently that expenditure on infrastructure and other capital outlays rose to P73.7 billion in August, from P70.9 billion a year earlier. The August total was 4.4% lower than the P77 billion spent in July.

Storm knocks out power to over 4 million Meralco customers

THE NUMBER of Manila Electric Co. (Meralco) customers that experienced power outages due to Severe Tropical Storm Paeng rose to 4.06 million, the power distributor said Sunday.

In a statement, Meralco said 504,234 customers remain without power, mostly in Laguna and Cavite. The remainder are in parts of Batangas, Metro Manila, Rizal, Bulacan, and Quezon.

"Our ground personnel and line crews are working round the clock to restore power the soonest possible time," Meralco Vice President and Head of Corporate Communications Joe R. Zaldarriaga said the statement.

The number of affected power customers was the highest this year. The previous high was 1.23 million customers affected following the passage of Typhoon Karding (international name: Noru) in September, Meralco said in a Viber message.

In a statement, the National Electrification Administration (NEA) reported to the Department of Energy that as of noon Sunday, 91 electric cooperatives (ECs) were affected by the storm.

The NEA said five of these ECs experienced total power interruption; 24 experienced partial interruption; 32 are back to normal operations, while 30 ECs have yet to report their status.

It said that affected ECs were based in Regions I, II, Cordillera Administrative Region, III, IV-A, IV-B, V, VI, VIII, X, Caraga and the Bangsamoro Autonomous Region in Muslim Mindanao.

The NEA reported an initial damage estimate of around P778,468 from Leyte V Electric Cooperative, Inc. and Province of Siquijor Electric Cooperative, Inc.

Meanwhile, the National Grid Corp. of the Philippines (NGCP) said restoration activities in areas affected by the storm are ongoing.

"NGCP mobilized a total of almost 600 personnel, or 73-line gangs, to expedite restoration works. Four choppers augmented foot patrols to expedite line inspections," the grid operator said.

The NGCP said transmission lines in Aurora, parts of Nueva Ecija, Pangasinan, Quezon, and Batangas are still being restored.

"Restoration schedules for the remaining affected lines will be released (when) damage assessments come in. When possible, restoration works are done simultaneously with the line patrols," it said.

Transmission lines in Camariñes Norte, Camariñes Sur, Albay, Laguna, Samar, Eastern Samar, Northern Samar, Leyte, Southern Leyte, Antique, and Aklan have been restored, it said. — **Ashley Erika O. Jose**

PHL to seek extension of EU GSP+ scheme, free trade agreement

THE DEPARTMENT of Trade and Industry (DTI) said the Philippines will seek to renew its participation in the European Union's (EU) Generalized Scheme of Preferences Plus (GSP+) and will continue to pursue a free trade agreement (FTA) with the trade bloc.

Trade Secretary Alfredo E. Pascual said during a presentation to the EU Parliament Committee on International Trade in Brussels on Oct. 27 that the GSP+ scheme has helped improve socio-economic development in the Philippines.

The Philippines is in the last month of a monitoring process to renew its GSP+ participation.

The scheme is set to expire at the end of 2023. The European Commission proposed a revised scheme in September 2021 to better meet the needs of participating countries.

GSP+ allows the Philippines to enjoy zero tariffs on 6,274 products or 66% of all EU tariff lines. Some of the top Philippine GSP+ exports to the EU are crude coconut oil, vacuum cleaners, prepared or preserved tuna, hairdressing equipment, and prepared or preserved pineapple.

According to Mr. Pascual, the Philippines posted a record utilization rate for GSP+ of 76% in 2021.

He added that the Philippines has undergone "significant" changes such as the new government, a shift to a preventive and rehabilitative approach to illegal drugs, and a new commitment to work against climate change.

The GSP+ scheme requires the Philippines to uphold commitments to 27 international conventions on human rights, labor, good governance, and environment.

The Philippines has been threatened with the loss of GSP+ status, with the European Parliament in February approving a resolution asking the previous government to address violence and human rights violations.

"Since the Philippines' successful application to the GSP+ in 2014, the country has benefited from increased market access to the EU. Philippine exports to the EU rose from 5.3 billion euros in 2014 under the standard GSP to 7.77 billion euros in 2021," the DTI said.

Mr. Pascual said that the Philippines is still keen on resuming negotiations for an FTA with the EU.

"The Philippines remains interested and therefore ready to work toward the resumption of negotiations of the Philippine-EU FTA. A 2020 study shows that 83% of German companies want to resume FTA negotiations, citing huge potential for EU companies, with the FTA positively affecting competitiveness," Mr. Pascual said. — **Revin Mikhael D. Ochave**

'Undas' period expected to dampen sales of neighborhood stores

SALES OF small neighborhood retailers, known in the trade as *sari-sari* stores, typically fall during the grave-tending holidays around Nov. 1, according to startup Packworks, a provider of technology to small stores.

Packworks said that daily sales from the Oct. 31 to Nov. 2, 2021 period, known in the Philippines as "Undas," showed a sales decline of 19.78% relative to the October average.

Citing its Sari IQ data service, Packworks said the pattern of lower sales "might be due to people leaving their houses to visit graves; thus, some sari-sari stores might be closed during this time to observe the long holiday," Packworks Chief Data Officer Andres Montiel said in a statement over the weekend.

Sari IQ found that cigarette sales lost 1.02 percentage points of market share during the Undas period. Normal-day cigarette market share of *sari-sari* store sales is about 21.91%.

Packworks said the share of sales of alcoholic beverages in *sari-sari* stores increases during Undas.

"Sales (share) of alcoholic beverages jumped up to 14.29% from Oct. 31 to Nov. 2, 2021 from 11.10% on Oct. 1-30, 2021," Packworks said.

"Different alcoholic drinks dominated the market share during the holiday last year, with brandy rising from 1.65% for normal days to 2.70% during the holiday; rum from 2.42% to 3.20%; gin from 5.32% to 5.94%; and beer from 1.14% to 1.61%," it added.

Packworks, which was founded in 2018, provides a business-to-business open platforms to *sari-sari* stores. It raised $2 million in August during a seed round. — **Revin Mikhael D. Ochave**

OPINION

Navigating Customs audit and prior disclosure

SUITS THE C-SUITE
LUCIL Q. VICERRA *and* **YZRAEL EDWIN V. PINEDA**

After more than three years from the time the Bureau of Customs (BoC) resumed the conduct of customs audits, many importers stepped forward and voluntarily paid deficiency duties and taxes by availing of the Prior Disclosure Program (PDP).

Based on international best customs practices, the PDP authorizes the BoC Commissioner to accept, as a potential mitigating factor, the prior disclosure by importers of errors and omissions in goods declaration that resulted in the deficiency in duties and taxes on past imports. It is both a compliance and revenue measure aimed to generate additional revenue with the least administrative cost both to government and importers. The PDP also helps importers avoid a full customs audit and the steep penalty in case of deficiency duty and tax findings in the course of an audit.

In availing of the PDP, the bigger question is — is it worth the potential risk of being exposed to closer scrutiny? We break down our observations to assist importers in navigating their customs audits and in deciding whether to avail of the PDP or not.

WHAT IS THE STATUS OF THE BOC POST CLEARANCE AUDIT?

Since January 2019, the BoC has issued almost a thousand Audit Notification Letters (ANLs) to conduct audits on importers, covering companies from various industries and groups such as oil and gas, automotive, pharmaceutical, consumer, and those in the Super Green Lane category, etc. Based on information from the BoC website as of June 2022, the BoC Post Clearance Audit Group (PCAG) has collected about P600 million from audit findings and P5 billion from PDP applications filed by importers, whether under audit or not. Based on these figures alone, around 90% of the PCAG's collection came from PDP applications.

It appears that there were several companies under audit who availed of the PDP. Moreover, there were also companies who, even without an ongoing audit, availed of the PDP. This goes to show that importers who are not under audit may come forward at any time and volunteer to pay their deficiency duties and/or taxes to show good faith and commitment to comply with the customs laws and its rules and regulations.

WHO MAY FILE AND WHEN TO FILE A PDP?

Importers who are not undergoing an audit may file a PDP at any time. Those undergoing audit should file the PDP within 90 days from the receipt of the ANL as provided under Customs Administrative Order (CAO) 1-2019. In this case, the PDP application may be amended within 30 days from the filing of the initial PDP.

Some of the common issues covered by the PDP applications filed include dutiable royalties, upward transfer pricing adjustments, error in value declared, excise tax on sweetened beverages, industry specific issues, among others.

Moreover, importers may avail of the PDP for the following reasons without penalty and interest: dutiable royalty payments; other proceeds of any subsequent resale, disposal, or use of the imported goods that accrue directly or indirectly to the seller; or any subsequent adjustment to the price paid or payable. For these, the PDP application should be filed within 30 calendar days from the date of payment or accrual of subsequent proceeds to the seller or from the date of the adjustment to the price paid or payable is made.

PENALTIES TO BE PAID FOR AVAILING OF PDP AND HOW TO AVOID OR MINIMIZE THEM

While the PDP provides for a facility to pay deficiency duties and taxes, the same is subject to penalty and/or interest depending on whether the importer is under audit or not. If the importer is under audit, the availment of the PDP with the 90-day period is subject to a 10% penalty and 20% interest per year.

On the other hand, an importer who is not under audit will only be subject to 20% interest per year. Since the penalty and/or interest may be significant, importers availing of the PDP normally request for its waiver pursuant to the power of the BoC Commissioner to compromise any administrative case arising under the Customs Modernization and Tariff Act (CMTA) involving the imposition of fines and surcharges, including those arising from the conduct of a post clearance audit. The BoC Commissioner's power to compromise, however, is subject to the approval of the Secretary of Finance.

Since there is no specific guidance on the parameters or requirements for the approval of PDP applications with request for waiver of penalty and/or interest, the PCAG has to consider on a case-to-case basis the PDP applications that they will endorse to the Commissioner and ultimately to the Secretary of Finance for approval. We understand that for PDP applications of importers without an audit and which are found to be complete and accurate, the same are being approved by PCAG and endorsed to the Commissioner for approval.

Meanwhile, PDP applications of importers with an audit which are also found to be complete and accurate will be subject to evaluation by PCAG. These applications may or may not be endorsed for approval depending on the issues applied for PDP and the relevant facts and circumstances.

To ensure the approval of PDP applications, the same should be filed on time and should include a full disclosure of the relevant issues. Moreover, the same should comply with the documentary requirements provided under CAO 1-2019. If importers fail to comply with these, the PDP application may be denied.

THE BEST TIME TO AVAIL OF THE PDP

Given the greater certainty in the approval of the PDP filed by importers not undergoing an audit, it seems more prudent to avail of the PDP while the company is not yet under audit. Though some importers think that availing of the PDP when they are not yet under audit may expose them to additional risks and potential liabilities, it seems this is not the case based on previously filed applications.

We are not aware of an importer who is not under audit and availed of PDP who was subsequently subjected to a full-blown customs audit. It appears that the BoC recognizes the good faith of the voluntary payment made given that there is no on-going audit that may possibly result in deficiency findings.

PROACTIVITY IS THE KEY

It is prudent for importers to review their customs practices and procedures without waiting for an ANL. Upon determination of the actual exposure, importers may consider availing of the PDP considering that the benefits far outweigh the risks, if any. The filing of PDP without awaiting an ANL may potentially save importers from the customs audit for a certain period. This may also help importers avoid the hassle of going through a three-year audit, saving time, effort, steep penalties and interest.

This will also enable importers to contribute to the collection efforts of government while complying with customs laws and regulations. Moreover, importers who are aware of their exposure and risk areas can better implement corrective measures to strengthen compliance with existing customs rules and regulations.

To encourage more importers to avail of the PDP, the BoC and the DoF should continue to exert their best efforts in expediting the processing of filed PDP applications. In the end, success in any initiative will undoubtedly be achieved when all stakeholders work together.

This article is for general information only and is not a substitute for professional advice where the facts and circumstances warrant. The views and opinion expressed above are those of the authors and do not necessarily represent the views of SGV & Co.

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