ANTI-TRUST LAWS:

A Glance at the Philippine Competition Act

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Anti-trust laws, also referred to as "competition laws", are statutes developed to protect consumers from predatory business practices by ensuring that fair competition exists in an open-market economy. Competition laws regulate and prohibit several questionable business activities such as market allocation/ de facto monopoly whereby companies agree to steer clear of each other's identified geographical market or territories; bid rigging whereby conspiring entities manipulate the market with a view of retaining current market share and price for each entity; and price fixing whereby two or three entities agree on the same selling price. Competition laws are designed to maximize consumer welfare by regulating or preventing business activities which stifle competition.[1]

Signed into law on 21 July 2015, Republic Act No. 10667, otherwise known as the Philippine Competition Act ("PCA")[2] is the first consolidated framework regulating competition in the Philippines.

With the key objective of regulating and prohibiting monopolies and combinations in restraint of trade or unfair competition to improve the overall welfare of consumers by giving them more choices at possibly lower prices, the key features of the PCA include:

- Prohibition on: (1) anti-competitive agreements, (2) abuse of dominant position, and (3) anti-competitive mergers and acquisitions
- The creation of the Philippine Competition Commission, the regulatory body tasked with the enforcement of the PCA
- Establishment of a framework for compulsory notification of mergers and acquisitions wherein the value of the transaction exceeds PHP 1 billion
- Development of a system of fines and penalties for violations of the provisions of the PCA

Who or what is covered by the PCA?

The provisions of the PCA are applicable to any individual or entity engaged in trade, industry and commerce in the Philippines.[3] It is likewise applicable to international trade, industry or commerce or acts done outside the Philippines if the same can reasonably have a direct impact on trade, industry and commerce in the Philippines. Hence, the acts punishable under the PCA may be committed by both domestic and foreign entities.

What is the role of the Philippine Competition Commission

The PCA provides for the creation of The Philippine Competition Commission ("PCC"), the government entity tasked to implement and enforce the provisions of the PCA and its implementing rules and regulations. The PCC has the power to conduct inquiries, investigate and hear and decide cases involving violations of the PCA and other competition laws, including the power to issue subpoenas for documents or testimonies of persons.[4] Inquiries, investigations and cases may

be undertaken by the PCA on its own, upon the complaint of an interested party or referral of a concerned government agency. Additionally, The PCC may also issue advisory opinions and guidelines on matters involving competition.

Distinguished among the powers of the PCC is its authority to **review and prohibit** proposed mergers and acquisitions. If it finds a merger and/or acquisition to be anti-competitive, the PCC may do any of the following: (a) prohibit the implementation of the agreement contemplating such merger and/or acquisition, (b) require modifications in the terms of the agreement contemplating such merger and/or acquisition by specifying such changes; or (c) require parties thereto enter into otherwise legally enforceable agreements.[5]

What are anti-competitive agreements?

Broadly, anti-competitive agreements[6] are those which substantially hamper or stifle competition. Anti-competitive agreements may be divided into two (2) types: (1) an agreement which by itself is prohibited ("per se prohibited"); (2) an agreement which has the objective or effect of substantially preventing, restricting or lessening competition.

Agreements that are per se prohibited are those which restrict competition as to price, components of price or other terms of trade. Thus, if an agreement contemplates price fixing then it is considered anti-competitive under the PCA.

Other agreements which are per se prohibited include price-fixing at an auction or in any form of bidding, and other forms of bid manipulation. Bid manipulation contemplates acts which allow each player in an industry to maintain their stronghold over the price or market share.

The second type of anti-competitive agreements include those which contemplate controlling or setting production, markets, technical developments or investment; and dividing or sharing the market, by volume or sales or purchases, territory, type of goods or services, buyers or sellers or any other means. These pertain to schemes undertaken by competing entities in order to keep a geographical area, market share, sales or other market factors within their control. An example of this would be when Entity A operates in Luzon while Company B agrees to solely cater to the market in the Visayas region. This type of scheme is usually designed to prevent competition especially when the costs of entering the industry in a particular area are high.

The PCA also provides for a catch-all provision wherein any agreement other than those expressly enumerated under the law which shall have the same object or effect of substantially preventing, restricting or lessening competition shall be considered anti-competitive.[7]

Conversely, agreements among the entities in a certain group having common economic interests shall not be considered as agreements between competitors.

What does an "abuse of dominant position" mean?

Under the PCA, an entity or group of entities has a dominant position if it possesses economic strength which renders it capable of controlling the relevant market independently from competitors, customers, suppliers or consumers.

In determining whether a certain entity has a dominant position, the following factors shall be considered:

1. The share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market;
2. The existence of barriers to entry and the elements which could alter those barriers and the supply from competitors;
3. The existence and power of its competitors;
4. The possibility of access by its competitors or other entities to its sources of inputs;
5. The power of its customers to switch to other goods or services; or
6. Recent conducts of the entity[8].

If the market share of an entity in the relevant market is at least fifty (50%), it shall be presumed that the entity concerned has a dominant position. This presumption shall however be rebuttable.

Conduct which shall be considered as an abuse of dominant position in the market includes acts that would substantially prevent, restrict or lessen competition such as:

1. Selling goods or services below cost with the object of driving competition out of the relevant market;
2. Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner;
3. Imposing conditions or other obligations which do not bear a direct relation to the transaction on the other contracting party;
4. Imposing restrictions on the contract of lease or sale of goods or services such as fixing prices, giving preferential discounts or rebates upon such price, or imposing conditions not to deal with competing entities;
5. Making the supply of a particular product dependent on the purchase of other products from the supplier which do not bear a direct relation to the main good to be supplied;
6. Imposing unfairly low purchase prices for the products of marginalized agricultural producers, small to medium scale enterprises, and the like; and
7. Limiting production, markets or technical development to the prejudice of consumers[9].

It is worthy to note that having a dominant position in a market or sector is not by itself prohibited as long as it was acquired or maintained through legitimate means.

What types of mergers and/or acquisitions will require compulsory notification to the PCC?

Parties to a merger or acquisition are required to notify the PCC before the execution of agreements relating to the following transactions:

- wherein the aggregate annual gross revenues in, into or from the Philippines, or the value of the assets in the Philippines of one of the entities, whether directly or indirectly through parent entities, exceeds One Billion Pesos (Php1,000,000,000.00); and
- the value of the transaction exceeds One Billion Pesos (Php1,000,000,000.00).[10]

Thus, chiefly there are two (2) requirements for notification. First, one of the entities to the transaction must possess assets or generate revenues in the aggregate amount exceeding One Billion Pesos (Php1,000,000,000.00). Second, the value of the proposed merger or acquisition must also exceed One Billion Pesos (Php1,000,000,000.00).

The following serve as guidelines in determining whether the value of the transaction exceeds One Billion Pesos (Php1,000,000,000.00).[10]

1

For a proposed merger or acquisition of assets in the Philippines:

- the aggregate value of the assets in the Philippines to be acquired exceeds One Billion Pesos (Php1,000,000,000.00); or
- the gross revenues generated in the Philippines by assets acquired in the Philippines exceeds One Billion Pesos (Php1,000,000,000.00).

Simply, if the total value of the asset to be acquired in the Philippines exceeds One Billion Pesos (Php1,000,000,000.00) or the gross revenues generated by those assets exceed One Billion Pesos (Php1,000,000,000.00), the value of the transaction shall be considered as exceeding One Billion Pesos (Php1,000,000,000.00).

2

For a proposed merger or acquisition of assets outside the Philippines:

- an acquiring entity has assets in the Philippines with an aggregate value exceeding One Billion Pesos (Php1,000,000,000.00); and
- the gross revenues generated in or into the Philippines by those assets acquired outside the Philippines exceeds One Billion Pesos (Php1,000,000,000.00)

To illustrate how this works: first, the acquiring entity must possess assets in the Philippines with an aggregate value exceeding One Billion Pesos (Php1,000,000,000.00). Second, the assets acquired outside of the Philippines by the acquiring entity must generate gross revenues in the Philippines exceeding One Billion Pesos (Php1,000,000,000.00).

3

For a proposed merger or acquisition of assets inside and outside the Philippines:

- an acquiring entity has assets in the Philippines with an aggregate value exceeding One Billion Pesos (Php1,000,000,000.00); and
- the aggregate gross revenues generated in or into the Philippines by those assets acquired in the Philippines and any asset acquired outside the Philippines collectively exceeds One Billion Pesos (Php1,000,000,000.00)

This is similar to the second scenario wherein an acquiring entity has assets in the Philippines with an aggregate value exceeding One Billion Pesos (Php1,000,000,000.00). However, the second requirement is that the aggregate gross revenues, whether generated by assets acquired in the Philippines or outside, collectively exceed One Billion Pesos (Php1,000,000,000.00).

4

For a proposed acquisition of (1) voting shares of a corporation or of (2) an interest in a non-corporate entity:

- the corporation; or non-corporate entity whose shares or interest are to be acquired; or entities controlled by it, either:
    1. owns assets in the Philippines with an aggregate value exceeding One Billion Pesos (Php1,000,000,000.00). The said assets do not include shared assets among the corporation, non- corporate entity and entities controlled by the corporation or non-corporate entity; or
    2. generates gross revenues from sales in, into or from the Philippines exceeds One Billion Pesos (Php1,000,000,000.00)

and

- as a result of the proposed acquisition of either 4(i) or 4(ii) above, the acquiring entity or entities, together with their affiliates, would aggregately own voting shares or aggregately hold an interest, as the case may be, in the corporation or entity to be acquired:
    1. thirty five percent (35%); or
    2. if the acquiring entity or entities already own more than 35% before the proposed acquisition, fifty percent (50%).

To simplify, a proposed acquisition of shares in a corporation or interest in a non-corporate entity are covered by the compulsory notification rule if, first, the entity whose shares or interest are to be acquired, singly possess assets with an aggregate value which exceeds One Billion Pesos (Php1,000,000,000.00); OR if the entity to be acquired singly generates gross revenues originating from the Philippines exceeding One Billion Pesos (Php1,000,000,000.00). Second requirement is that, as a result of the proposed acquisition, the acquiring entity would own or posses interest in the entity of at least 35%. However, If prior to the said acquisition, the acquiring entity already owned 35% of the entity to be acquired, then the threshold percentage would be 50%, i.e., as a result of the proposed acquisition, the acquiring entity should own 50%.

For a joint venture transaction, an acquiring entity must notify the PCC of the proposed venture if the aggregate value of the assets to be combined or to be contributed to the joint venture exceeds One Billion Pesos (Php1,000,000,000.00) or if the gross revenues generated in the Philippines by those assets exceed One Billion Pesos (Php1,000,000,000.00).

It is important to note that mergers or acquisitions consisting of successive transactions or acquisition of parts of one or more entities which shall take place within a one- (1) year period between the same parties or parties controlled by or controlling parties shall be considered as one transaction for purposes of the compulsory notification rule.

In calculating the notification thresholds, the aggregate value of assets in the Philippines shall be the amount stated in the last regularly prepared annual balance sheet or the most recent audited financial statements in which the said assets are accounted for. The gross revenues shall be the amount stated on the last regularly prepared annual statement of income and expense of that entity.

Parties covered by the compulsory notification are prohibited from consummating the agreement until thirty (30) days after giving the PCC the notification.

What are the applicable fines/ penalties that may be imposed for violations under the PCA?

The PCA imposes administrative, civil and criminal liabilities[11], with all three applying to anti-competitive agreements. Only administrative and civil liabilities shall be imposed to violations of the abuse of dominant position and anti-competitive mergers.

Agreements consummated in violation of the compulsory notice requirement shall be considered void. The parties to such merger or acquisition shall likewise be subject to pay an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction.

Administrative liability consists of payment of fines using the schedule provided by the PCA. The fines range from 100 Million Pesos to 250 Million Pesos, depending on the gravity and duration of the violation. Additional administrative penalties include failure to comply with an order of the PCC and intentional or negligent supplying of incorrect or misleading information.

As for criminal liability, imprisonment and a fine are imposed on entities entering anti-competitive agreements if they fall within the first two distinctions created by the PCA, i.e., per se prohibited agreements and those which have the object or effect of substantially preventing, restricting or lessening competition. The penalty of imprisonment shall be imposed upon the responsible officers, and directors of the violating juridical entity.

End Notes

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[1] *Bynum, Justin. What is an antitrust law? available at http://www.investopedia.com/ask/answers/09/antitrust-law.asp (last viewed 30 September 2016).*
[2] *An Act Providing For A National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse Of Dominant Position And Anti-Competitive Mergers And Acquisitions, Establishing The Philippine Competition Commission And Appropriating Funds Therefor, (Competition Act), RA 10667, 21 July 2015.*
[3] *Section 3, PCA.*
[4] *Section 12, PCA.*
[5] *Section 18, PCA.*
[6] *Section 14, PCA.*
[7] *Section 14(c), PCA.*
[8] *Section 2, Rule 8, Implementing Rules and Regulations of Republic Act No. 10667.*
[9] *Section 15, PCA.*
[10] *Section 3, Rule 4, Implementing Rules and Regulations of Republic Act No. 10667.*
[11] *Sections 29- 30, PCA.*

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