

Equitable Distribution through the Philippine Competition Act (Republic Act No. 10667)

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A law should not, to a certain extent be immutable and must be able to adapt to the changing needs of society. The Philippine Competition Act (PCA) is a law that ultimately aims to protect the consumers by giving them a free choice in the market. In a free enterprise, healthy competition is always good because competitors are always challenged to come up with quality goods for the benefit of the public.

Section 2 of the PCA, provides:

xxx The State also recognizes that the provision of equal opportunities to all promotes entrepreneurial spirit, encourages private investments, facilitates technology development and transfer and enhances resource productivity. Unencumbered market competition also serves the interest of consumers by allowing them to exercise their right of choice over goods and services offered in the market. xxx

With the passage of the PCA, consumers would have a real choice in the market due to equitable distribution of opportunities, income and wealth, which hopefully would be able to curtail monopoly of certain businesses. It cannot be denied that our country has a robust economy and businessmen are becoming more and more aggressive with their investments to gain a stronghold in the economy. We often hear of mergers and acquisitions between and among companies which result to the elimination of small players in the market. This eventually leads to a scenario where consumers cannot help but patronize the goods, products or services of a certain company for lack of a better choice. The PCA seeks to address this concern for the benefit of the public. Below are the salient features of the PCA for a better understanding of its application:

Scope

- enforceable against any person or entity¹ engaged in any trade, industry and commerce in the Philippines.
- likewise applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Philippines.

Covered Acts

- Anti-competitive agreements
- Abuse of dominant position
- Anti-competitive mergers and acquisitions

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¹ “Entity” refers to any person, natural or juridical, sole proprietorship, partnership, combination or association in any form, whether incorporated or not, domestic or foreign, including those owned or controlled by the government, engaged directly or indirectly in any economic activity

A. Anti-Competitive Agreements²

- Prohibited Agreements between/among COMPETITORS³
 - Those restricting competition as to price, or components thereof, or other terms of trade
 - Those fixing price at an auction or in any form of bidding (cover bidding, bid suppression, bid rotation and market allocation, other analogous practices of bid manipulation)
- Prohibited Agreements between/among competitors **WHEN THE OBJECT OR EFFECT IS TO SUBSTANTIALLY PREVENT, RESTRICT OR LESSEN COMPETITION**
 - Those setting, limiting, or controlling production, markets, technical development, or investment.
 - Those dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means.
- Agreements which have the object or effect of substantially preventing, restricting or lessening competition⁴

B. Acts Constituting Abuse of Dominant Position⁵

- Selling goods or services below cost with the object of driving competition out of the relevant market⁶.

² Agreement refers to any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral.

³ An entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for purposes of this section.

Control is presumed to exist when the parent owns directly or indirectly, through subsidiaries, more than one half (1/2) of the voting power of an entity.

Control also exists even when an entity owns one half (1/2) or less of the voting power of another entity when:

- (a) There is power over more than one half (1/2) of the voting rights by virtue of an agreement with investors;
- (b) There is power to direct or govern the financial and operating policies of the entity under a statute or agreement;
- (c) There is power to appoint or remove the majority of the members of the board of directors or equivalent governing body;
- (d) There is power to cast the majority votes at meetings of the board of directors or equivalent governing body;
- (e) There exists ownership over or the right to use all or a significant part of the assets of the entity;
- (f) There exist rights or contracts which confer decisive influence on the decisions of the entity.

⁴ Provided, those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.

⁵ In determining whether or not there is dominant position, the PCC shall consider the following:

- 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;
- The existence of barriers to entry and the elements which could foreseeably alter both said barriers and the supply from competitors;
- The existence and power of its competitors;
- The possibility of access by its competitors or other entities to its sources of inputs;
- The power of its customers to switch to other goods or services;
- Its recent conducts; and
- Other criteria established by the regulations of the Act.

* rebuttable presumption of market dominant position - if the market share of an entity in the relevant market is at least fifty percent (50%)

⁶ The PCC shall consider whether the entity or entities have no such object and the price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality.

- Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner.⁷
- Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction.
- Price Differentials. Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services where the effect may be to lessen competition substantially.

Permissible Price Differentials

1. Socialized pricing for the less fortunate sector of the economy;
 2. Those that reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery;
 3. Those offered in response to the competitive price of payments, services or changes in the facilities furnished by a competitor.
- Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially.

Permissible

1. Permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or
 2. Agreements protecting intellectual property rights, confidential information, or trade secrets;
- Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier that have no direct connection with the main goods or services to be supplied.
 - Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers.
 - Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers.
 - Limiting production, markets or technical development to the prejudice of consumers.

⁷ Except those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws

C. When Notification Is Required For Mergers and Acquisitions

- Notice to the Philippine Competition Commission (PCC) of **Mergers or Acquisitions** is required when the following conditions are met:
 - (a) The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity⁸ of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds One Billion Pesos (PhP1,000,000,000.00),

and

- (b) The value of the transaction exceeds One Billion Pesos (PhP1,000,000,000.00), as determined in subsections (1), (2), (3) or (4), as the case may be.

How Value Is Determined Under (b):

1. When it comes to a merger or acquisition of assets inside and/or outside the Philippines, the controlling amounts are [the aggregate value of the assets in the Philippines being acquired or the aggregate value of the assets in the Philippines of the acquiring entity] OR [the gross revenues generated in and into the Philippines by assets acquired in and outside the Philippines].
2. When it comes to the acquisition of (i) voting shares of a corporation or of (ii) an interest in a non-corporate entity:
 - If the aggregate value of the assets in the Philippines that are owned by the corporation or non-corporate entity or by entities it controls, other than assets that are shares of any of those corporations, exceed One Billion Pesos (PhP1,000,000,000.00); or
 - The gross revenues from sales in, into, or from the Philippines of the corporation or non-corporate entity or by entities it controls, other than assets that are shares of any of 10 those corporations, exceed One Billion Pesos (PhP1,000,000,000.00); AND
 - as a result of the proposed acquisition of the voting shares of a corporation, the entity or entities acquiring the shares, together with their affiliates, would own voting shares of the corporation that, in the aggregate, carry more than the following percentages of the votes attached to all the corporation's outstanding voting shares:
 - Thirty-five percent (35%), or
 - Fifty percent (50%), if the entity or entities already own more than the percentage set out in subsection I above, as the case may be, before the proposed acquisition.

- Notice to the PCC of **Joint Venture Transaction** is required when the following conditions are met:

- (a) The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of

⁸ "Ultimate parent entity" is the juridical entity that, directly or indirectly, controls a party to the transaction and is not controlled by any other entity.

the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds One Billion Pesos (PhP1,000,000,000.00);

and

- (b) In a notifiable joint venture transaction, an acquiring entity shall be subject to the notification requirements if either (i) the aggregate value of the assets⁹ that will be combined in the Philippines or contributed into the proposed joint venture exceeds One Billion Pesos (PhP1,000,000,000.00) or (ii) the gross revenues generated in the Philippines by assets to be combined in the Philippines or contributed into the proposed joint venture exceed One Billion Pesos (PhP1,000,000,000.00).

- Successive Transactions

- (a) The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds One Billion Pesos (PhP1,000,000,000.00);

and

- (b) A merger or acquisition consisting of successive transactions, or acquisition of parts of one or more entities, which shall take place within a one-year period between the same parties, or any entity they control or are controlled by or are under common control with another entity or entities, shall be treated as one transaction. If a binding preliminary agreement provides for such successive transactions or acquisition of parts, the entities shall provide notification on the basis of such preliminary agreement. If there is no binding preliminary agreement, notification shall be made when the parties execute the agreement relating to the last transaction which, when taken together with the preceding transactions, satisfies the thresholds under this Section.

The passage of the PCA should not be viewed as a restriction on the conduct of business. On the contrary, the PCA should be considered as a welcome change in the way we do business, in the hopes of elevating our status to be at par with international business practice and help attract foreign investors for the benefit of our country.

⁹ In determining the assets of the joint venture, the following shall be included:

- All assets which any entity contributing to the formation of the joint venture has agreed to transfer, or for which agreements have been secured for the joint venture to obtain at any time, whether or not such entity is subject to the requirements of the act; and
- Any amount of credit or any obligations of the joint venture which any entity contributing to the formation has agreed to extend or guarantee, at any time.