Toward a Regime of a Real Competitive Market:
The Constitutional Policy on Competition and the Prohibited Conducts under the Philippine Competition Act

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Introduction

Philippine competition laws are primarily contained in Republic Act No. 10667, also known as the "Philippine Competition Act" ("PCA"). The PCA took effect on 8 August 2015,[1] and its Implementing Rules and Regulations on 3 June 2016.[2] Other competitions laws are found in earlier legislations, such as Act No. 3247,[3] Act No. 3518,[4] Article 186 of the Revised Penal Code,[5] Article 30 of the Civil Code of the Philippines, Commonwealth Act No. 138,[6](Republic Act Nos. 8293, 6675 and 5921, as amended by Republic Act No. 9502),[7] Republic Act No. 8479[8] and Republic Act No. 9136, among others.[9] Some of these legislations have been impliedly amended, modified and/or repealed by the PCA.[10]

The objective of competition laws is to protect consumer welfare and advance domestic and international trade and economic development.[11] By promoting competition, it is argued that consumers are materially better off because competition increases consumer choice and reduces the cost of purchasing goods and services.[12] Apart from improved consumer welfare, competition is also believed to improve market efficiency as a mechanism for allocating goods and services, promote entrepreneurial spirit, encourage private investments, facilitate technology development and transfer and enhance resource productivity.[13] 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.[14]

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[1] Published in the Manila Bulletin on 24 July 2015.

[2] Published in The Philippine Star and The Philippine Daily Inquirer on June 3, 2016.

[3] *An Act To Prohibit Monopolies And Combinations In Restraint Of Trade.*

[4] *An Act Amending The Corporation Law Act Numbered Fourteen Hundred And Fifty-Nine, As Amended, And For Other Purposes. (Section 20)*

[5] *Monopolies and combinations in restraint of trade.*

[6] *An Act to Give Native Products and Domestic Entities the Preference in the Purchase of Articles for the Government.*

[7] *An Act Providing for Cheaper and Quality Medicines, Amending for the Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6675 or the Generics Act of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes.*

[8] *Downstream Oil Industry Deregulation Act of 1998.*

[9] *An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes. (Electric Power Industry Reform Act).*

[10] *Section 55 of the PCA impliedly modified, amended and repealed Article 186 of the Revised Penal Code, Section 4 of Act No. 3247, Sections 24 and 25 of RA 9502, Section 43(u) of RA 9136*

[11] Section 2, PCA.

[12] Tony Ciro, Vivien Goldwasser and Reeta Verma, Law and Business (4th Ed.), Oxford University Press (Australia & New Zealand)

[13] Section 2, id.

[14] *Id.*

The PCA provides the legal framework to ensure that competition in business is protected from unfair practices and also promoted in Philippine industry. This objective of providing the legal framework is important because it has been suggested that it increases "competitiveness not only for domestic consumers, but also for industries that rely on efficient overseas trade and export markets."[15] In this sense, competition law and policy have an underlying economic objective – that is aimed at providing the framework for industry to improve its competitiveness and efficiency, and at the same time deliver rewards to consumers.[16]

To achieve this, the PCA mandates the State (1) to promote and enhance competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole,[17] (2) preventing and regulating acts and conducts that would amount to anti-competitive behavior[18] and (3) penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions.[19]

Constitutional Policy on Competition

The constitutional policy on competition is principally embraced in Section 19, Article XII of the 1987 Constitution. It provides:

> The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.[20]

There are four policy directions that can be drawn from the various Supreme Court decisions interpreting the said provision.[21] First, Section 19 promotes the desirability of, and encourages a multi-player competition as the means to regulate the market. Second, monopolies are not per se prohibited but may be allowed only when it would serve public interest. Third, Section19 prohibits only contracts or combinations in restraint of trade that are injurious to the public. And fourth, while Section 19 embraces the free market system as a creed, it does not endorse unfettered competition.

Competition as a means to regulate the market: prevention of monopoly and combinations in restraint of trade.

In *Tatad v. Secretary of the Department of Energy*,[22] the Supreme Court held that Section 19, Article XII is anti-trust in history and spirit. The fundamental principle Section 19

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15 Law and Business, *id.*

16 Law and Business, *id.*

17 Section 2(a), *id.*

18 Section 2(b), *id.*

19 Section 2(c), *id.*

20 Section 19, Article XII of the 1987 adopts Section 2, Article XIV of the 1973 Constitution save for the particular reference to "private" monopolies. Section 2, Article XIV of the 1973 Constitution provides:

> Section 2. The State shall regulate or prohibit private monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

21 The cases of *Red Line Transportation Corp. v. Bachrarch Motor Company*, G.R. No. L-45173, 27 April 1939; *Gokongwei Jr. v. Securities and Exchange Commission* (SEC), G.R. No. L-45911, 11 April 1979

22 G.R. No. 124360, 5 November 1997

espouses is essentially competition. The Court recognized that competition "alone can release the creative forces of the market," thus:

> Through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services, and thus matches their desires with society's opportunity costs... There is a reliance upon the operation of the 'market' system (free enterprise) to decide what shall be produced, how resources shall be allocated in the production process, and to whom the various products will be distributed. The market system relies on the consumer to decide what and how much shall be produced, and on competition, among producers to determine who will manufacture it.[23]

According to the Court, the desirability of competition serves as a justification for regulation, and even prohibition of unmitigated monopolies, the absolute prohibition against combinations in restraint of trade and the interdiction of unfair competition.[24] Consequently, the Court adopted a stringent policy against barriers to new players and viewed with suspicion monopolistic and oligopolistic markets, thus:

> The kind of competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistice or oligopolistic markets deserve our careful scrutiny and law which barricade the entry points of new players in the market should be viewed with suspicion. [25]

In *Tatad*, the Supreme Court struck down RA 8180[26] in its entirety for being violative of Section 19. The Court observed that at the time the downstream oil industry is controlled by a foreign oligopoly, namely, Shell, Petron and Caltex, which were then characterized as the only major league players in the oil market. The Court held that the core provisions of RA 8180[27] imposed substantial barriers to the entry and exit of new players in the downstream oil industry as they would entail prohibitive cost of setting up refineries for the prospective players who may wish to enter the market. These barriers, in effect, inhibit the formation of a truly competitive market and only reinforce the maintenance of oligopoly.[28]

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[23] citing Gellhorn, Anti-Trust Law and Economics in a Nutshell, 1986 ed. p. 45.

[24] *Id.*

[25] *Id.*

[26] *An Act Deregulating the Downstream Oil Industry and For Other Purposes.*

[27] (1) Section 5(b) which imposed a 4% tariff differential between imported crude oil (3%) and refined petroleum products (7%); (2) Section 6 which required refiners and importers to maintain a minimum inventory equivalent to 10% of their respective annual sales or forty days of supply; and (3) Section 9(b) which defined "predatory pricing" as "selling or offering to sell any product at a price unreasonably below the industry average cost so as to attract customers to the detriment of competitors"

[28] The tariff differential works for the benefit of the oligopoly as they already have existing refineries of various capacities while the new players may have to spend billions to set up their own, otherwise, they will suffer a huge disadvantage of increasing their product cost by 4%. The inventory requirement also works for the immense benefit of the oligopoly because of their storage facilities while a huge disadvantage to the new players because of the prohibitive cost of erecting their own storage facilities. Finally, "considering these significant barriers established by R.A. No. 8180 and the lack of players with the comparable clout of PETRON, SHELL and CALTEX, the temptation for a dominant player to engage in predatory pricing and succeed is a chilling reality. *(Tatad v. Secretary, id.)*

The desirability of competition was also a primary rationale for averting a possible (not actual) combination in restraint of trade and price fixing in the case of *Gokongwei, Jr.*[29] albeit set in a different context. It involved a stockholder of San Miguel Corporation ("San Miguel") who was the president and substantial stockholder of Universal Robina Corporation and CFC Corporations, the direct competitors of San Miguel. The stockholder acquired sufficient number of shares that would qualify him to sit in the Board of Directors of San Miguel. Prior to the election of directors, the by-laws of San Miguel were amended disqualifying a competitor from becoming a director. Thus, the core issue was whether the disqualification of a competitor to sit in the board of San Miguel is reasonable. Notably, there was no express statutory prohibition on a competitor to sit in the board of a competing corporation. Nevertheless, the Court upheld the amendment of the by-laws as reasonable ratiocinating that the election of a competitor of San Miguel in its board can bring about an illegal situation, *i.e.* combination in restraint of trade.

In upholding the amendment, the Court highlighted the desirability of competition as a policy to regulate the economy, thus:

> Basically, these anti-trust laws or laws against monopolies or combinations in restraint of trade (referring to Section, Article XIV of the 1973 Constitution and Article 186 of the RPC) are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unfettered competition as the rule of trade. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices and the highest quality ..." They operate to forestall concentration of economic power. The law against monopolies and combinations in restraint of trade is aimed at contracts and combinations that, by reason of the inherent nature of the contemplated acts, prejudice the public interest by unduly restraining competition or unduly obstructing the courtse of trade. [30]

It was then concluded that a person cannot serve as a director in any two or more corporations, if such corporations are, by virtue of their business and location of operation, competitors so that the elimination of competition between them would constitute violation of any provision of the anti-trust laws.[31] It is thus clear in the mind of the Court that "there is a statutory recognition of the anti-competitive dangers which may arise when an individual simultaneously acts as a director of two or more competing corporations. A common director of two or more competing corporations would have access to confidential sales, pricing and marketing information and would be in a position to coordinate policies or to aid one corporation at the expense of another, thereby stifling competition."[32] Moreover, the Court

[29] *Supra,* 24.

[30] *Id.*

[31] Citing Clayton Act.

[32] *Id.* The Court further explained:

> The argument for prohibiting competing corporations from sharing even one director is that the interlock permits the coordination of policies between nominally independent firms to an extent that competition between them may be completely eliminated. Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result. Suppose X is a director of both Corporation A and Corporation B. X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B at the same time he could hardly abstain from

observed that "shared information on cost accounting may lead to price fixing. Certainly, shared information on production, orders, shipments, capacity and inventories may lead to control of production for the purpose of controlling prices."[33]

In *Red Line Transportation*,[34] the Supreme Court disallowed the enforcement of an agreement which tended to create monopolies. In that case, the petitioner and respondent entered into an agreement that prohibited each other from operating in any of the territory covered by the routes of the other, as well as acquiring any certificate of Public Convenience of any operator who may have a route in the said territory. The Court pointed out that the kind of agreement that the parties (which were public utilities) have entered has impaired public convenience and interest. The Court observed that public utilities are more strictly limited in the kinds of contracts in restraint of the free flow of trade, commerce and communication because of their duty to give equal service to the public.

They can make no contracts inimical to that duty. As a general proposition, all contracts and agreements, of every kind and character, made and entered into by those engaged in an employment or business impressed with a public character, which tend to prevent competition between those engaged in like employment, are opposed to the public policy and are therefore unlawful. All agreements and contracts tending to create monopolies and prevent proper competition are by the common law illegal and void.[35]

In *Energy Regulatory Board v. Court of Appeals*,[36] the Supreme Court debunked the oppositor's position that the establishment of a service station near its vicinity would cause ruinous competition. In allowing Shell's construction and operation of a gasoline station, the

> voting without depriving A of his best judgment. If the firms really do compete — in the sense of vying for economic advantage at the expense of the other — there can hardly be any reason for an interlock between competitors other than the suppression of competition.

[33] The Court elucidated the implications of the unwanted scenario, thus:

> Obviously, if a competitor has access to the pricing policy and cost conditions of the products of San Miguel Corporation, the essence of competition in a free market for the purpose of serving the lowest priced goods to the consuming public would be frustrated, The competitor could so manipulate the prices of his products or vary its marketing strategies by region or by brand in order to get the most out of the consumers. Where the two competing firms control a substantial segment of the market this could lead to collusion and combination in restraint of trade. Reason and experience point to the inevitable conclusion that the inherent tendency of interlocking directorates between companies that are related to each other as competitors is to blunt the edge of rivalry between the corporations, to seek out ways of compromising opposing interests, and thus eliminate competition. As respondent SMC aptly observes, knowledge by CFC-Robina of SMC's costs in various industries and regions in the country win enable the former to practice price discrimination. CFC-Robina can segment the entire consuming population by geographical areas or income groups and change varying prices in order to maximize profits from every market segment. CFC-Robina could determine the most profitable volume at which it could produce for every product line in which it competes with SMC. Access to SMC pricing policy by CFC-Robina would in effect destroy free competition and deprive the consuming public of opportunity to buy goods of the highest possible quality at the lowest prices. *(Gokongwei v. SEC, id.)*

[34] *Supra*, 24.

[35] Citing People vs. Chicago Trust Co., 130 Ill., 268; 22 N. E., 798; 8 L. R. A., 497; 17 Am. St. Rep., 319; Dunbar vs. American Telephone & Telegraph Co., 87 N. E., 521, 533.

[36] G.R. No. 113079, 20 April 2001.

Court held that it is a policy of the government to allow the interplay of market forces with minimal government intervention as a solution to the problems of the oil industry, thus:

> The policy of the government in this regard has been to allow a free interplay of market forces with minimal government supervision. The purpose of governing legislation is to liberalize the downstream oil industry in order to ensure a truly competitive market under a regime of fair prices, adequate and continuous supply, environmentally clean and high-quality petroleum products. Indeed, exclusivity of any franchise has not been favored by the Court, which is keen on promoting free competition and the development of a free market consistent with the legislative policy of deregulation as an answer to the problems of the oil industry.

Monopolies are allowed only to serve public interest but are subject to regulation.

The 1987 Constitution, as it is worded, does not necessarily prohibit monopolies. The use of the word "regulate" in the Constitution indicates that some monopolies may be allowed if properly regulated by the State.[37] A determination must first be made whether public interest requires that the State should regulate or prohibit private monopolies.[38] To illustrate, by their very nature, certain public services or public utilities such as those which supply water, electricity, transportation, telegraph, etc. must be given exclusive franchises if public interest is to be served. Such exclusive franchises are not violative of the law against monopolies.[39]

The cases of *Anglo-Fil Trading Corporation v. Hon. Lazaro*, *Philippine Ports Authority v. Hon. Mendoza* and *Agan v. PIATCO*[40] (and allied cases) are illustrative of the establishment of monopolies was sanctioned by the Court on the belief that these monopolies will serve the interest of the public. All these cases are in unison to declare that monopolies are not *per se* prohibited.

In these cases, the Philippine Ports Authority passed a circular requiring the integration of cargo handling (stevedore and *arrastre*) services providers into one entity, which was granted a special permit to the exclusion of all other existing operators. The net effect is the creation of a monopoly. The Court justified the establishment of the monopoly on the basis of public interest. The Court held that "Competition can best regulate a free economy. Like all basic beliefs, however, that principle must accommodate hard practical experience. There are areas where for special reasons the force of competition, when left wholly free, might operate too destructively to safeguard the public interest."[41] The Court accepted the posture of the PPA that the integration was expected to produce to following advantages (1) optimum utilization of equipment, facilities, and labor; (2) improved and stabilized labor compensation; (3) larger capital base; (4) increased borrowing base; (5) savings in overhead costs; (6) flexibility of operations; (7) maintenance program improvement; (8) uniform reporting and accounting system; and (9) better dealing with the government.[42]

In *Agan*, what was involved was the Build–Operate-and-Transfer contract for the construction,

[37] *Philippine Ports Authority v. Hon. Mendoza, id.*

[38] *Anglo-Fil Trading Corp. v. Lazaro*, G.R. No. 54966, 2 September 1983.

[39] *Id.*

[40] *Id,* G.R. No. 155001, 21 January 2004.

[41] Philippine Ports Authority v. Hon. Mendoza, id.

[42] *Id.*

operation and maintenance of NAIA IPT III. PIATCO, the concessionaire, argued on the strength of its amended concession agreement that certain fees are no longer subject to the regulation of Manila International Airport Authority ("MIAA"). The Supreme Court held that the amended concession agreement is not valid because the Constitution provides that monopolies must be regulated in the public interest:

Monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public. The operation of an international passenger airport terminal is no doubt an undertaking imbued with public interest. In entering into a Build–Operate-and-Transfer contract for the construction, operation and maintenance of NAIA IPT III, the government has determined that public interest would be served better if private sector resources were used in its construction and an exclusive right to operate be granted to the private entity undertaking the said project, in this case PIATCO. Nonetheless, the privilege given to PIATCO is subject to reasonable regulation and supervision by the Government through the MIAA, which is the government agency authorized to operate the NAIA complex, as well as DOTC, the department to which MIAA is attached.

> While it is the declared policy of the BOT Law to encourage private sector participation by "providing a climate of minimum government regulations," the same does not mean that Government must completely surrender its sovereign power to protect public interest in the operation of a public utility as a monopoly. The operation of said public utility cannot be done in an arbitrary manner to the detriment of the public which it seeks to serve. The right granted to the public utility may be exclusive but the exercise of the right cannot run riot. Thus, while PIATCO may be authorized to exclusively operate NAIA IPT III as an international passenger terminal, the Government, through the MIAA, has the right and the duty to ensure that it is done in accord with public interest.[43]

Section 19 prohibits only contracts or combinations that unduly restrain competition.

A categorical declaration has been made by the Supreme Court that combinations in restraint of trade and unfair competition are *outrightly* prohibited by the Constitution.[44] However, there are early cases, e.g. *Del Castillo v. Richmond*,[45] *Ollendorf v. Abrahamson*,[46] and *Ferrazini v. Gsell*[47] which upheld contractual obligations prohibiting a contracting party from engaging in a business similar to that of their former employer as long as the restriction on the exercise of trade is limited as to time, place and trade. At the time, the authorities cited by the Supreme Court were primarily based on foreign jurisprudence and its analysis was purely legalistic without touching the implications in the market competition.

It was only in *Avon Cosmetics, Inc., et al. vs. Leticia H. Luna*[48] where the Supreme Court clarified the principles enunciated in the earlier cases in the context of contract law. The Court considered the particular circumstances of the case, the nature of the contract and the possibility of foreclosing competition. In said case, what was being challenged was an

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43 *Id.*

44 *Id.*

45 G.R. No. L-21127, 9 February 1924.

46 38 Phil. 585.

47 34 Phil. 697.

48 G.R. No. 153674, 20 December 2006

exclusivity contract prohibiting the respondent from selling products of Avon's competitors.

The Court interpreted the phrase "restraint of trade or occupation" to embrace acts, contracts, agreements or combinations which restrict competition or obstruct due course of trade. However, those which are prohibited by the Constitution are contracts which are against public interest. In other words, contracts restricting trade or business, taking into account the particular circumstances of the case and the nature of the contract involved, may not be covered by the constitutional proscription if it is a reasonable protection to the party in whose favor it is imposed.

The question then is when should a stipulation be considered unreasonable. The Court held that "only those arrangements whose probable effect is to foreclose competition in a substantial share of the line of commerce affected can be considered as void for being against public policy. The foreclosure effect, if any, depends on the market share involved. The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations."

The State has a right to intervene in competition when public interest so requires.

While the Philippines adhere to the free enterprise system, our kind of free market system allows the hand of the government to intervene when public interest so requires. As held by the Supreme Court in *Tatad*:

> Beyond doubt, the Constitution committed us to the free enterprise system but it is a system impressed with its own distinctness. Thus, while the Constitution embraced free enterprise as an economic creed, it did not prohibit per se the operation of monopolies which can, however be regulated in the public interest. Thus too, our free enterprise system is not based on a market of pure and unadulterated competition where the State pursues a strict hands-off policy and follows the let-the-devil devour the hindmost rule. Combinations in restraint of trade and unfair competitions are absolutely proscribed and the proscription is directed both against the State as well as the private sector. This distinct free enterprise system is dictated by the need to achieve the goals of our national economy as defined by section 1, Article XII of the Constitution which are: more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged. It also calls for the State to protect Filipino enterprises against unfair competition and trade practices.

By far, there has been no Supreme Court ruling applying the foregoing. The closest case is *Republic of the Philippines v. MERALCO*[49] where the Supreme Court upheld the regulatory rate approved by the then Energy Regulatory Board (now, Energy Regulatory Commission or "ERC") which reduced the rate adjustment applied for by MERALCO to be collected from its consumers.[50] The Court held:

> The business and operations of a public utility are imbued with public

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49 G.R. No. 141314, 9 April 2003.

50 The case cannot be considered on point as MERALCO is a distribution utility whose rates are within the statutory power of the ERC to regulate.

> interest. In a very real sense, a public utility is engaged in public service--providing basic commodities and services indispensable to the interest of the general public. For this reason, a public utility submits to the regulation of government authorities and surrenders certain business prerogatives, including the amount of rates that may be charged by it. It is the imperative duty of the State to interpose its protective power whenever too much profits become the priority of public utilities.

Notably, MERALCO is a distribution utility, a regulated entity whose rate is subject to the approval by the ERC.[51] What about those competitive and open businesses, e.g. like generation?

There is a case decided by the ERC which invalidated the prices in the Wholesale Electricity Spot Market ("WESM") for the months of November and December 2013. In *ERC Case No. 2014-21*, the ERC intervened in the market pricing mechanism in the WESM by voiding the trading prices of the several trading intervals. In said intervals, the bid caps set by the ERC had been breached by price spikes, which do not ordinarily occur in the absence of anti-competitive conducts or behavior. The ERC found tightness of energy supply in the market between the months of November and December 2013 which coincided during the Malampaya shut down.

Notably, the intervention by the ERC in the market was made in the regime of the EPIRA which defines "generation" as a competitive market albeit with the reservation for the interest of the public.

The lack or failure of competition necessitates government intervention to protect the consumers from unreasonably high market prices as shown by the fact that the bid cap of Php62,000/MWh became the market clearing price even during off-peak hours. In this case, "regulation is necessary because social and private costs and benefits, and hence incentives, are misaligned." Government intervention is needed if there is a failure in the market to correct any inefficiency and prevent these from happening again. As pointed out by John Stiglitz (2009, Regulation & Failure), "the purpose of government intervention is to address potential consequences that go beyond the parties directly involved, in which private profit is not a good measure of social impact.[52]

Overview of the PCA

The key provisions of the PCA are found in Chapters III (Prohibited Acts), Chapter IV (Mergers and Acquisitions), Chapter V (Disposition of Cases), Chapter VI (Fines and Penalties) and Chapter VII (Enforcement). The PCA enumerates the types of restrictive practices that are illegal and the relevant penalties for persons who engage in such conduct. These conducts can be the subject of administrative, civil or criminal proceedings.

For example, persons violating Chapter III (Sections 14 and 15) and Chapter IV (Sections 17 and 20) can be liable to pay fine from P100 million to P250 million.[53] Other violations are penalized by a fine of not less than P50 thousand up to P2 million.[54]

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[51] Section 4(q) and Section 22, RA 9165.

[52] ERC Case No. 2014-21, 3 March 2014.

[53] Section 29(a), id.

[54] Section 29(d),id.

Violations of Sections 14(a) and (b) can attract criminal penalty on corporate officers, directors, or employees holding managerial positions, who are knowingly and willfully responsible for such violation.[55] The Office for Competition (OFC) of the Department of Justice is responsible for conducting preliminary investigation and prosecution of criminal cases.[56] However, it is the PCC which initiates the criminal action by filing the criminal complaint with the OFC after conducting a preliminary inquiry in accordance with Section 31 of the PCA.[57]

A private party, regardless of the amount involved, can institute a separate and independent civil action before the RTC if he suffers direct injury by reason of any violation of PCA. But this can be done only *after* the Philippine Competition Commission ("PCC") has completed the preliminary inquiry under Section 31.[58] Notably, the PCC in the exercise of its administrative power can issue a consent order for payment of damages to any private party/ parties who may have suffered injury.[59]

Apart from the foregoing, there is a variety of remedies that are available to the PCC against a conduct that is found to be anti-competitive. These remedies include injunctions, requirement of divestment, disgorgement of excess profits and adjustment or divestiture orders including orders for corporate reorganization.

The PCA and its IRR are enforced by the PCC, which is composed of a Chairman and four (4) Commissioners. Similar to other jurisdictions, the PCC has the primary jurisdiction over competition matters. The initiation of a civil or criminal action for breaches of the PCC, and even in competition related issues not expressly covered by the PCA, is subject to the PCC's power to conduct preliminary inquiry.[60]

Prohibited Acts[61]

Broadly speaking, the PCA prohibits the following anti-competitive trade practices: (1) anti-competitive agreements between and among competitors and those agreements which have the object or effect of substantially preventing, restricting or limiting competition;[62] (2) abuse of market dominance;[63] and (3) mergers and acquisitions that would have the effect or likely effect of substantially preventing, restricting or lessening competition in the relevant market or in the market for goods and services as may be determined by the PCC.[64]

Anti-competitive agreements

There are three (3) types of anti-competitive agreements, namely: (1) agreements which are prohibited *per se*, like restricting competition as to price, or components thereof,

[55] Section 30, id.

[56] Section 13, id.

[57] Section 31, *id.*

[58] Section 45, *id.*

[59] Section 37(c), *id.*

[60] Section 31, *id.*

[61] See Lim & Recalde (2016), *The Philippine Competition Act: Salient Points and Emerging Issues*, Rex Bookstore, Quezon City

[62] Section 14, *id.*

[63] Section 15, *id.*

[64] Section 20, *id.*

or other terms of trade, and price fixing at an auction or any form of bidding, and market allocation and other practices of bid manipulation;[65] (2) agreements whose object or effect will substantially prevent, restrict or lessen competition, such as setting, limiting or controlling production, markets technical development or investment, and 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;[66] and (3) a catch-all provision (agreements that do not fall under Section 14[a] and [b]) on anti-competitive agreements which have the object or effect of substantially preventing, restricting or lessening competition.[67]

The general elements of anti-competitive agreements are: (1) the parties are competitors; (2) there is an understanding between or among the parties towards the accomplishment of a particular object; (3) the agreement must have substantial foreclosure effect on the relevant market; and (4) there is no objective justification for such understanding.[68]

Price fixing is included in the first type of anti-competitive agreements (*per se* prohibited agreements). The rationale of prohibiting price fixing arrangements is based on the effects on consumers. It is advanced that price fixing arrangements are deemed to lessen competition and lead to inflated prices for consumers.[69] Bid manipulation is likewise included in the first type of agreement. Section 14(a) covers private and public bidding. In *per se* prohibited agreements, substantial foreclosure effect is not required and objective justification may not be raised as defense.

The second and third types of anti-competitive agreements are considered as measures of protecting competition. The phrase "substantially prevents, restricts or lessens competition" means that the act must have or can have the effect of competitors from competing (preventing), growing (restricting) or stating (lessening in the market).[70] In other words, act must have a foreclosure effect on competition.[71]

Abuse of market dominance

There are ten (10) kinds of acts or conducts under Section 15 that are considered as abuse of market dominance. The general elements are: (1) the entity must have market power (or a dominant position in the relevant market); (2) the entity takes advantage of this power through abusive conduct; (3) the conduct must have substantial foreclosure effect on the relevant market; and (4) there is no objective justification for the conduct.[72]

In general terms, abusive conducts under Section 15 includes refusals to supply, predatory pricing, market leveraging, price squeezes and vertical restraints, among others. Third line forcing or exclusive dealing is also prohibited because it limits the ability of the buyer to choose between suppliers of another product. This absence of choice distorts the

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65 Section 14(a), *id.*

66 Section 14(b), *id.*

67 Section 14(c), *id.*

68 Lim and Recalde, *supra.*

69 Law and Business, *supra.*

70 Lim and Recalde, *The Philippine Competition Act: Salient Points and Emerging Issues*, Rex Book Store, Manila.

71 *Id.*

72 Lim and Recalde, *id.*

market and is harmful to competition because it removes potential customers away from rivals in favor of a particular supplier.[73]

It should be noted that Section 15 does not prohibit monopoly or substantial market power or the accumulation of that power by competitive means, such as superior efficiency or economic performance.[74] The proviso under Section 15 expressly stipulates that "nothing shall be construed or interpreted as a prohibition on having a dominant position in a relevant market or on acquiring, maintaining and increasing market share through legitimate means that do not substantially prevent, restrict or limit competition."

Prohibited mergers

Mergers and acquisitions play an important role on the growth of businesses. While business expansion can be achieve through internal or "organic" growth, many enterprises prefer mergers and acquisitions "to improve shareholder wealth and allow the new larger entity to enjoy synergistic benefits that flow from the merger."[75]

The law on mergers and acquisitions aims to ensure that while growth of business is encouraged, the proposed merger or acquisition will not have the effect or likely effect of substantially lessening competition in a market. This aim can be implied from the notification requirement of the proposed merger under Section 17. Under Section 20, merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services as may be determined by the PCC shall be prohibited.

[73] Tony Ciro, *et al, supra.*

[74] *Id.*

[75] *Id.*