

Vertical Agreements

Contributing editor
Patrick J Harrison



2018

GETTING THE
DEAL THROUGH 

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Contributing editor
Patrick J Harrison
Sidley Austin LLP

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CONTENTS

Argentina	5	Mozambique	132
Julián Peña Allende & Brea		Fabricia de Almeida Henriques Henriques, Rocha & Associados Pedro de Gouveia e Melo Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Australia	11	Netherlands	138
Charles Coorey and Liana Witt Gilbert + Tobin		Sarah Beeston and Anouk Rutten Van Doorne	
Austria	20	Philippines	146
Guenter Bauer and Robert Wagner Wolf Theiss		Franco Aristotle G Larcina and Arlene M Maneja SyCip Salazar Hernandez & Gatmaitan	
Brazil	27	Russia	153
Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo Levy & Salomão Advogados		Alexander Egorushkin and Igor Panshensky Antitrust Advisory	
Canada	35	Serbia	161
Kevin Ackhurst, Matthew Zedde and Erin Brown Norton Rose Fulbright Canada LLP		Guenter Bauer, Maja Stankovic and Marina Bulatovic Wolf Theiss	
China	43	South Africa	168
Lei Li Sidley Austin LLP		Heather Irvine Falcon & Hume Inc	
European Union	52	Spain	173
Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP		Pedro Callol, Manuel Cañadas and Laura Moya Callol, Coca & Asociados SLP	
France	65	Sweden	180
Marco Plankensteiner Kramer Levin		Mats Johnsson Hamilton Advokatbyrå	
Germany	73	Switzerland	186
Markus M Wirtz and Silke Möller Glade Michel Wirtz		Franz Hoffet, Marcel Dietrich and Martin Thomann Homburger	
India	84	Thailand	196
Rahul Rai, Rahul Satyan and Aakarsh Narula AZB & Partners		Chotika Lurpongkukana Blumenthal Richter & Sumet	
Indonesia	92	Turkey	202
HMBC Rikrik Rizkiyana, Anastasia Pritahayu R Daniyati and Wisnu Wardhana Assegaf Hamzah & Partners		Gönenç Gürkaynak and Hakan Özgökçen ELIG, Attorneys-at-Law	
Ireland	99	Ukraine	209
Ronan Dunne Philip Lee		Igor Svehkar and Oleksandr Voznyuk Asters	
Japan	106	United Kingdom	217
Nobuaki Mukai Momo-o, Matsuo & Namba		Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP	
Macedonia	115	United States	229
Vesna Gavriloska CAKMAKOVA Advocates		Joel Mitnick, Peter Huston and Karen Kazmerzak Sidley Austin LLP	
Malaysia	124		
Sharon Tan and Nadarashnaraj Sargunraj Zaid Ibrahim & Co			

Preface

Vertical Agreements 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Vertical Agreements*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Canada, India, the Netherlands, the Philippines, Russia, South Africa, Spain and Thailand.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Philippines

Franco Aristotle G Larcina and Arlene M Maneja

SyCip Salazar Hernandez & Gatmaitan

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The key statute is Republic Act No. 10667, otherwise known as the Philippine Competition Act (PCA), which was enacted on 21 July 2015 and which became effective on 8 August 2015. In respect of vertical restraints, the PCA is implemented primarily by the Rules and Regulations to Implement the Provisions of Republic Act No. 10667 (Philippine Competition Act) (IRR) and the Rules of Procedure of the Philippines Competition Commission (Rules), both of which were promulgated by the Philippine Competition Commission (PCC).

However, in respect of the PCA's effectivity against anticompetitive agreements (including vertical restraints) that were pre-existing prior to its effectivity, the PCA provided for a two-year grace period starting from the date of its effectivity on 8 August 2015, during which parties to such agreements were not exposed to the penalties provided under the act, as long as they corrected such agreement to be compliant with the PCA during said two-year period. That two-year period ended on 8 August 2017.

Thus, there is very little, if any, precedent or local enforcement history in respect of vertical restraints.

It is significant to note, however, that the PCA was borrowed from foreign sources, and following precedents on similar laws, the PCC and local courts may be inclined to consider foreign laws, precedents and best practices on vertical restraints as having at least a persuasive effect.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The PCA prohibits all agreements 'which have the object or effect of substantially preventing, restricting or lessening competition' (PCA, section 14(c)). In addition, the PCA enumerates the following as prohibited acts constituting abuse of dominant position (subject to certain specific exemptions):

- selling goods or services below cost with the object of driving competition out of the relevant market;
- imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anticompetitive manner;
- 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;
- setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially;
- 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: (i) fixing prices, or (ii) giving preferential discounts or rebate upon such price, or (iii) imposing conditions not to deal with competing entities; where the

object or effect of the restrictions is to prevent, restrict or lessen competition substantially;

- making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which 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, marginalised agricultural producers, fisherfolk, micro-, small-, medium-scaled enterprises, and other marginalised service providers and producers;
- directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers, or consumers; and
- limiting production, markets, or technical development to the prejudice of consumers.

(PCA, section 15)

The term 'vertical restraints' is not expressly defined under the laws and regulations.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The PCC has not issued any guidelines specific to vertical restraints that expressly set out the policies and objectives pursued by prohibitions on vertical restraints. The immediate objective of the PCA is to promote free and fair competition. However, a reading of the various provisions of the law, as well as various pronouncements of the PCC, reveals an underlying objective of consumer protection (achieved by ensuring competition in the marketplace). Certain provisions also highlight an intent to protect small business, such as the express prohibition against abuse of dominant position by imposing unfairly low purchase prices for the goods or services of, among others, marginalised agricultural producers, fisherfolk, micro-, small- and medium-scale enterprises, and other marginalised service providers and producers.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The principal regulator in respect of the PCA is the PCC, which was created under the PCA precisely to 'implement the national competition policy and attain the objectives and purposes of [the PCA]' (PCA, section 5). Other sector regulators, such as the Energy Regulatory Commission, which deals with the regulation of the electric power industry, may also enforce prohibitions against anticompetitive agreements.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

The PCA, including its prohibitions against anticompetitive vertical restraints, is applicable and enforceable: (i) ‘against any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines’; and (ii) ‘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 Republic of the Philippines’ (PCA, section 3).

While the PCA has extraterritorial application and may be applicable to business conducted purely through the internet, to date, we are not aware of the regulators or the courts having applied the PCA extraterritorially or in a pure internet context.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

There is no express exemption under the law and regulations in respect of agreements concluded by public entities. Thus, unless the PCC adopts a different policy or issues regulations that provide for such an exemption, Philippine antitrust law should apply in full to agreements concluded by public entities relating to the conduct of trade, industry or commerce in the Philippines.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Yes, some special laws governing specific sectors have provisions that seek to ensure or enhance competition in that sector. The Energy Regulatory Commission, which regulates the electric power industry, enforces the competition-related provisions of the Electric Power Industry Reform Act and its implementing rules and regulations. Also, the National Telecommunications Commission, which regulates the public telecommunications industry, enforces competition-related provisions of the Public Telecommunications Policy Act of the Philippines.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The general prohibition under section 14(c) of the PCA on anticompetitive agreements allows for the possible exemption of agreements 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’.

For the specific acts that constitute abuse of dominant position under section 15 of the PCA, certain acts are subject to specific exemptions. In particular:

- imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anticompetitive manner. Exempted here are 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;
- setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially. Exempted here are permissible price differentials, which consist of: (i) socialised pricing for the less fortunate sector of the economy; (ii) price differential which reasonably or approximately reflects differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions or quantities in which the goods or services are sold

or delivered to the buyers or sellers; (iii) price differential or terms of sale offered in response to the competitive price of payments, services or changes in the facilities furnished by a competitor; and (iv) price changes in response to changing market conditions, marketability of goods or services or volume;

- 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. Notwithstanding this provision, the following are still lawful: (i) permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or (ii) agreements protecting intellectual property rights, confidential information, or trade secrets;
- directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers. Notwithstanding this provision, prices that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws are not considered unfair prices; and
- limiting production, markets or technical development to the prejudice of consumers. Notwithstanding this provision, limitations that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws are not unlawful.

In addition, the PCA provides that any conduct that contributes to improving the production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit is not necessarily prohibited.

Agreements

9 Is there a definition of ‘agreement’ – or its equivalent – in the antitrust law of your jurisdiction?

Yes. The term ‘agreement’ is defined in section 4(a) of the PCA as being ‘any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral’.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

A formal written agreement is not necessary, since the PCA defines the term ‘agreement’ as being ‘any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral’.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

The PCA recognises the concept of a ‘single economic unit’: entities that control, are controlled by or are 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, but expressly provides only that they ‘not be considered competitors’ (PCA section 1(d)). It is not clear, however, whether or not this concept will be applied to vertical restraints, and the PCC has not yet issued any guidance on this.

Agent-principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent-principal agreements in which an undertaking agrees to perform certain services on a supplier’s behalf for a sales-based commission payment?

The PCC has not issued any guidance on this issue.

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

The PCC has not issued any guidance on this issue.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Agreements protecting intellectual property are exempt from the prohibition against abuse of dominant position by 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 (PCA, section 15(e)). Other than that, however, the general provisions of the PCA apply.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Vertical restraints are not per se unlawful and are always subject to a ‘rule of reason’ – in particular, to be unlawful, they must have the ‘object or effect of substantially preventing, restricting or lessening competition’.

The PCA provides that in determining whether an anticompetitive agreement or conduct substantially prevents, restricts, or lessens competition, the PCC shall, among others:

- define the relevant market allegedly affected by the anticompetitive agreement or conduct, following the principles laid out the PCA and the IRR;
- determine if there is actual or potential adverse impact on competition in the relevant market caused by the alleged agreement or conduct, and if such impact is substantial and outweighs the actual or potential efficiency gains that result from the agreement or conduct;
- adopt a broad and forward-looking perspective, recognising future market developments, any overriding need to make the goods or services available to consumers, the requirements of large investments in infrastructure, the requirements of law, and the need of our economy to respond to international competition, but also taking account of past behaviour of the parties involved and prevailing market conditions;
- balance the need to ensure that competition is not prevented or substantially restricted and the risk that competition efficiency, productivity, innovation, or development of priority areas or industries in the general interest of the country may be deterred by overzealous or undue intervention; and
- assess the totality of evidence on whether it is more likely than not that the entity has engaged in anticompetitive agreement or conduct, including whether the entity’s conduct was done with a reasonable commercial purpose, such as but not limited to, phasing out of a product or closure of a business, or as a reasonable commercial response to the market entry or conduct of a competitor.

The PCC has not yet issued any guidelines on vertical restraints, and there is a lack of local precedent or local enforcement history as to how the PCC will assess vertical restraints.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

For vertical restraints constituting abuse of dominant position, market shares are particularly relevant because dominance is presumed to exist if an entity’s market share is at least 50 per cent, unless a new market share threshold is determined by the PCC for that particular sector.

However, whether for abuse of dominant position or for the general prohibition on anticompetitive vertical restraints, market shares are not the only consideration. For example, to determine dominance, the PCC may consider the following factors, among others:

- existence of barriers to entry and the elements which could foreseeably alter both the said barriers and the supply from competitors;
- existence and power of its competitors;
- the credible threat of future expansion by its actual competitors or entry by potential competitors (expansion and entry);
- market exit of actual competitors;
- bargaining strength of its customers (countervailing power);
- possibility of access by its competitors or other entities to its sources of inputs;
- power of its customers to switch to other goods or services;
- recent conduct;
- ownership, possession or control of infrastructure that is not easily duplicated;
- technological advantages or superiority, compared to other competitors;
- its easy or privileged access to capital markets or financial resources;
- economies of scale and of scope;
- its vertical integration; and
- existence of a highly developed distribution and sales network.

We think the same factors as described above will be considered by the PCC in assessing the legality of anticompetitive agreements even where no abuse of dominant position is involved.

As noted in question 18, however, the PCC has not yet issued any guidelines on vertical restraints, and there is a lack of local precedent or local enforcement history as to how the PCC will assess vertical restraints.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

See discussion in question 16.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

None.

Types of restraint

19 How is restricting the buyer’s ability to determine its resale price assessed under antitrust law?

Restriction of the ability to determine resale price may constitute an anticompetitive agreement, and also abuse of dominant position. The PCC has not yet issued any decisions or guidance on the matter of resale price maintenance. However, the PCC, in its press statements, has stated that it supports efforts by the Department of Trade and Industry and industry ‘to promote industry efficiency and consumer welfare by allowing market forces to dictate the prices of goods instead of issuing Suggested Retail Prices or (SRPs)’ (<http://phcc.gov.ph/pcc-let-market-forces-dictate-prices-not-srps/>).

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a ‘loss leader’?

The PCC has not yet issued any decisions or guidelines on resale price maintenance. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

The PCC has not yet issued any decisions or guidelines on resale price maintenance. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

The PCC has not yet issued any decisions or guidelines on resale price maintenance. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

The PCC has not yet issued any decisions or guidelines on resale price maintenance. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

MFNs may constitute an anticompetitive agreements, and also abuse of dominant position. The PCC has not yet issued any decisions or guidance on the matter of MFNs. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

27 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

28 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

29 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

Territorial restrictions may be prohibited as anticompetitive agreements or abuse of dominant position under the PCA. There is yet no guidance or decisions relating to businesses conducted via the internet.

It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

30 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Customer restrictions may be prohibited as anticompetitive agreements or abuse of dominant position under the PCA. There is yet no guidance or decisions relating to these types of restrictions. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

31 How is restricting the uses to which a buyer puts the contract products assessed?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

32 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

33 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

34 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

35 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

36 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

37 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

No.

38 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

Update and trends

Anticipated developments

The PCC has exhibited political will in the implementation of the PCA and its implement rules and regulations. For example, it has been very active in the area of merger control and has been investigating several industries where allegation of cartelisation and other violations of Philippine competition laws have been made (eg, cement industry and garlic industry). It has also announced that it will start looking into other industries, such as logistics and transport network vehicle services (TNVS). In addition, the PCC has been consistently promulgating various administrative issuances necessary for the implementation of the PCA.

Thus, we expect to see further developments in this field in the immediate and near future, whether through the issuance of guidelines, additional implementing rules, or the opening of administrative investigations. This field should therefore be closely monitored.

39 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

40 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

41 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Non-compete agreements may be prohibited as anticompetitive agreements or abuse of dominant position under the PCA. The PCC has not yet issued any decisions or guidelines on anticompetitive agreements. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

42 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

43 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

45 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

The PCC has not yet issued any decisions or guidelines on this. It is likely that the PCC will consider rules, jurisprudence and best practices in major foreign jurisdictions on this point.

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No.

Notifying agreements

47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Agreements containing vertical restraints are not required to be notified to the PCC.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Yes, an application for binding ruling may be made with the PCC.

A binding ruling application is a non-adversarial remedy that may be availed of by any party to an act or agreement who is in doubt as to whether or not such act or agreement is compliant with, or in violation of, the Philippine competition laws.

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes.

Any entity with an interest over the assailed vertical restraints may file a complaint with the PCC. Upon the filing of a verified complaint, the PCC shall either deny it or give due course. If the PCC decides to give due course to the complaint, the PCC shall, through the Enforcement Office, commence a Preliminary Inquiry within 10 days from receipt of the complaint.

The Preliminary Inquiry shall be completed within 90 days from commencement. The Enforcement Office may:

- find that there is no violation of Philippine competition laws and regulations;
- close the Preliminary Inquiry without prejudice, if the facts or information available at the end of the 90-day period are insufficient to proceed, on the basis of reasonable grounds, to the conduct of a Full Administrative Investigation; or
- issue a resolution to proceed, on the basis of reasonable grounds, to the conduct of a Full Administrative Investigation. The complaint shall be notified of the results of the Preliminary Inquiry within 15 days from the termination of the Preliminary Inquiry.

If the Enforcement Office decides to proceed to a Full Administrative Investigation, the entity subject of the complaint shall be notified and a notice on the commencement of the Full Administrative Investigation shall be uploaded in the PCC's website.

The Full Administrative Investigation may be concluded with the Enforcement Office either issuing a Statement of Objections (SO), which charges the concerned entity with having violated the PCA, or closing the Investigation without finding any violation. If an SO is issued, it shall be filed with the PCC en banc (ie, the Chairman and the Commissioners of the PCC).

Within 15 days from the receipt of the SO, the PCC en banc may either: (i) dismiss the SO; or (ii) issue the corresponding summons (with a copy of the SO) to the respondent. The respondent would be given the opportunity to file a verified answer during the period prescribed by the PCC en banc, which may not be less than 30 days but not more than 60 days. The Enforcement Office may file a reply within 20 days from receipt of the verified answer.

Upon receipt of the verified answer, the PCC en banc may submit the case for a decision, in which case, a decision shall be rendered within 45 days. Alternatively, the PCC en banc may hold further proceedings, which shall include a preliminary conference and submission of preliminary conference briefs and position papers. During

this period, the PCC en banc may conduct clarificatory conferences, require the submission of additional documents, require the submission of additional pleadings such as positions papers, and consult sector regulators, relevant Philippine government agencies, and agencies from foreign jurisdictions if appropriate.

After the filing of the last pleading or the conduct of the last hearing, the PCC en banc shall issue an order submitting the case for decision. A decision shall be made within 60 days from the time the case is submitted for decision. A decision may be the subject of a motion for reconsideration, and afterwards, may be appealed to the Philippine Court of Appeals.

Enforcement

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Due to the circumstances described in question 1, there are yet no decisions on vertical restraints. That said, the PCC has announced it has commenced an investigation of the cement industry for alleged violations of, among others, the prohibition on abuse of dominant position. The PCC has not yet issued any decision or ruling on this.

51 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The PCA does render void agreements containing vertical restraints. The Philippine Civil Code, however, provides that agreements whose cause, object or purpose is contrary to law are void. At the same time, however, the Philippine Civil Code also provides that in cases of divisible contracts, the legal provisions may be enforced if they can be separated from the illegal provisions. The Philippine Supreme Court has applied this in a number of cases to uphold the validity of the remaining provisions agreements, minus the void or illegal provisions, for as long as the provisions are separable and the intention of the parties under the agreement can still be fulfilled. In any event, it would be advisable to include a severability clause in the agreement so that the vertical restraint, if found to be illegal, can be severed with the rest of the agreement remaining intact and valid.

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

Anticompetitive vertical restraints, or vertical restraints constituting abuse of dominant position are penalised by administrative fines in the following amounts:

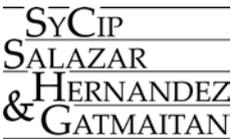
- first offence: fine of up to 100 million pesos;
- second offence: fine ranging from 100 million pesos to 250 million pesos; and
- third and succeeding offences: fine ranging from 150 million pesos to 250 million pesos.

However, if the violation involves basic necessities and prime commodities as defined under the Philippine Price Act, the damages shall be tripled. Basic necessities are essentially goods that are vital to the sustenance and existence of consumers during certain events, such as calamities, emergencies, rebellion or war. Examples of basic necessities are rice, corn, root crops, bread; fresh, dried or canned fish and other marine products; fresh pork, beef and poultry meat; fresh eggs; potable water in bottles and containers; fresh and processed milk; fresh vegetables and fruits; locally manufactured instant noodles; coffee; sugar; cooking oil; salt; laundry soap and detergents; firewood; charcoal; household liquefied petroleum gas (LPG) and kerosene; candles; drugs classified as essential by the Department of Health. Prime commodities are goods, which while not being basic necessities, are nevertheless essential during certain events, such as calamities or emergencies. Examples of prime commodities are flour; dried, processed or canned pork, beef and poultry meat; dairy products not falling under basic necessities; onions, garlic, vinegar, patis, soy sauce; toilet soap; fertiliser, pesticides and herbicides; poultry, livestock and fishery feeds and veterinary products; paper; school supplies; nipa shingles; sawali; cement; clinker; GI sheets; hollow blocks; plywood; plyboard; construction nails; batteries; electrical supplies; light bulbs; steel wire; and all drugs not classified as essential drugs by the Department of Health.

In addition to the imposition of administrative fines, the PCC can also impose:

- behavioural remedies, which oblige the concerned entity to act in a specific way, or to cease or refrain from engaging in specific conduct;
- structural remedies, which effectively change the structure of the market in order to maintain, enhance or restore the market's structure;
- an injunction, which either orders the concerned entity to perform a particular act or to stop or refrain from doing an act or continuing a particularly activity or course of action;
- disgorgement, which requires the concerned entity to disgorge excess profits or any other form or benefit or gain reasonably connected to the violation of Philippine competition laws; and
- divestiture, which requires the concerned entity to change its structure through partial or full disposal of businesses, shareholdings, business units, or tangible or intangible asset.

As no decisions on vertical restraints have been made, there is yet no history in the Philippines as to the amounts of fines levied or types of remedies imposed.

	
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Investigative powers of the authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The PCC has the power to issue subpoenas to compel testimony and the production of documents.

Private enforcement

54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

The PCA provides that 'any person who suffers direct injury by reason of any violation of [the PCA] may institute a separate and independent

civil action after the [PCC] has completed its preliminary inquiry.' (PCA, section 45) The broadness of the provision seems to allow both parties and non-parties to the agreements to bring actions for damages. While not provided for under the PCA, general laws on the matter allow claimants to claim and recover legal costs.

We are not aware of any private enforcement having been filed and resolved by the courts, and consequently, there is yet no precedent that can serve as guidance on how long it will take before a private action can be resolved. In general, however, court cases in the Philippines take a long time and are susceptible to delays.

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

None.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
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Tax Controversy
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