

Legal Bulletin: Competition Law

New Philippine Competition Act

What it is about

The Philippine Competition Act (Republic Act 10667 or the "Act") defines, prohibits and penalizes three types of anti-competitive conduct: *anti-competitive agreements*, *abuse of dominant position*, and *anti-competitive mergers and acquisitions*. It also creates the Philippine Competition Commission ("PCC"), which will have the original and primary authority to conduct inquiries or investigations and to hear and decide cases involving violations of the Act. The Act seeks to **(i)** enhance economic efficiency and promote free and fair competition in trade, industry and all commercial activities; **(ii)** prevent economic concentration that will control production, distribution or trade, which will unduly stifle competition or lessen, manipulate or construct the discipline of free markets; and **(iii)** penalize all forms of anti-competitive conduct with the object of protecting consumer welfare and advancing domestic and international trade and economic development.

What it covers

The Act covers any person or entity engaged in trade, industry and commerce in the Philippines. The Act also applies to international trade having direct, substantial, and reasonably foreseeable effects in the Philippine trade industry or commerce, including those resulting from acts done outside of the Philippines. The Act, however, excludes combinations or activities of workers or employees as well as agreements or arrangements with employers when designed solely to facilitate collective bargaining in respect of conditions of employment.

Key Provisions

- *Anti-Competitive Agreements*. The Act covers both horizontal and vertical agreements and include **(1)** agreements that are *per se* violative of the Act, *i.e.* agreements between competitors that **(i)** restrict competition, as to the price or components thereof, or as to other terms of trade; or **(ii)** fix the price at an auction or in any form of bidding, including cover bidding, bid suppression, bid rotation, market allocation and other analogous practices of bid manipulations; and **(2)** agreements that are prohibited if shown to have the object or effect of substantially preventing, restricting or restricting competition, *e.g.* setting, limiting or controlling production, markets, technical development, or investment, dividing or sharing the market

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(whether by volume of sales or purchases, territory, type of goods and services, buyers or sellers or any other means). For this purpose, entities that have *control* over or are under common *control* with another entity are not deemed competitors. Control is defined under the Act as the ability to substantially influence or direct the actions or decisions of an entity.

- *Abuse of Dominant Position.* This refers to conduct that would substantially prevent, restrict or lessen competition and includes, among others, predatory pricing, imposing barriers to entry, discrimination in price or other terms, tying and bundling. There is a rebuttable presumption that an entity is in a “market dominant position” if the market share of such entity in the relevant market is at least fifty percent (50%), unless the PCC determines a new market share threshold for a particular sector.
- *Anti-Competitive Mergers and Acquisitions.* These refer to those mergers and acquisitions that substantially prevent, restrict or lessen competition. By way of exception, the PCC may exempt mergers and acquisitions if the parties are able to prove that **(i)** the concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effect of any limitation on competition that result or likely to result from the merger or acquisition; or **(ii)** a party thereto is faced with actual or imminent financial failure and the agreement represents the least anti-competitive alternative among the known alternative uses for the failing entity’s assets. Further, under the Act, parties to mergers or acquisitions, the transaction value of which exceeds Php1 Billion are prohibited from consummating the same until thirty (30) days after the PCC has been notified thereof in the form and containing the information specified in the regulations to be issued by the PCC. Failure to comply with such notification requirement renders the merger or acquisition void and the parties thereto liable to pay an administrative fine equivalent to 1%-5% of the transaction value.
- *Defenses.* With respect to anti-competitive agreements and abuse of dominant position, an agreement or conduct that improves the production or distribution of the goods or services or promotes technical or economic progress, while allowing consumers a fair share in the benefits thereof, shall not be considered violative of the Act.
- *Liability.* Only anti-competitive agreements give rise to administrative, civil and criminal liabilities. Abuse of dominant position and anti-competitive mergers and acquisitions give rise to administrative and civil liabilities only. Administrative liability consists in the payment of the fines provided under the Act while civil liability consists in the payment of damages for any direct injury suffered by any person arising from the commission of the prohibited acts. Such civil liability may be enforced through the institution of an independent civil action after the PCC shall have completed its preliminary inquiry on the alleged violation of the Act.
- *Remedies.*
 - ◆ The Act mandates the PCC to develop a Leniency Program where entities that violate the prohibition against anti-competitive agreements but voluntarily disclose information to the PCC may be granted immunity from suit or reduction of fines under certain conditions enumerated in the Act.

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- ◆ Where no prior complaint or investigation has been initiated, an entity that is in doubt as to whether a contemplated act, course of conduct, agreement or decision, is in compliance with, is exempt from, or is in violation of any of the provisions of the Act or other competition laws, may request the PCC to render a binding ruling thereon.
- ◆ An entity criminally charged with a violation of the prohibition against anti-competitive agreements may enter a plea of *Nolo Contendere*, wherein the entity, without admitting responsibility for the acts charged, agrees to accept punishment as if it had pleaded guilty. The plea is inadmissible in evidence to prove liability against the entity in a civil case arising from the same acts charged in the criminal case.
- ◆ An entity under administrative inquiry may, without admitting responsibility for the imputed acts, submit to the PCC a written proposal for the entry of a consent order. The proposal should include, among others, provisions for the payment of fines and damages to third persons who may have suffered injury. The proposal, including all the information contained therein or subsequently disclosed by the entity, the evidence presented, and the judgment thereon, are inadmissible in evidence to prove the liability of such entity in a criminal proceeding involving the same acts.

Of interest

To allow affected parties time to renegotiate agreements or restructure their business to comply with the provisions of the Act, an existing business structure, conduct or practice or any act that may be in violation of the Act shall be subject to administrative, civil and criminal penalties only if it is not cured or is continuing upon the expiration of two (2) years after the effectivity of the Act. This shall, however, not apply to those administrative, civil and criminal proceedings already initiated prior to the effectivity of the Act.

About SyCip Salazar Hernandez & Gatmaitan

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Within this structure, we have specialists in key practice areas such as mergers and acquisitions, energy, power, infrastructure, natural resources, government contracts, real estate, insurance, international arbitration, mediation, media, business process outsourcing, and technology.

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