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A guide to the Philippine Competition Act

On 21 July 2015, the president of the Philippines, Benigno Aquino III, signed into law the Philippine Competition Act (the Competition Act) advancing the Philippines' readiness for ASEAN Economic Integration. The Competition Act came into effect on 8 August 2015. This leaves only one ASEAN country without a comprehensive competition policy ahead of the December 2015 target date set out in the ASEAN Regional Guidelines on Competition Policy.

The Competition Act establishes the Philippines' first consolidated framework on competition policy, and has been over 20 years in the making. The Competition Act prohibits business practices that restrict market competition through anti-competitive agreements and abuse of a dominant position, and introduces a compulsory notification regime for certain mergers and acquisitions. It additionally prescribes administrative and criminal penalties for violations of the law. The Competition Act has extraterritorial effect, meaning that it is enforceable against acts committed within or outside the Philippines which affect trade, industry or commerce in the Philippines.

The Competition Act also establishes the Philippines Competition Commission (the Commission) as the authority with primary responsibility for implementing and enforcing national competition policy.

Background and timing

Competition law has long been part of the Philippines' legal system, but prior to the enactment of the Competition Act there was no single comprehensive competition law regime in the Philippines. Rather, the laws were scattered between the Revised Penal Code (the country's principal criminal statute) and various sector-specific legislation.

While earlier drafts of the Competition Act borrowed concepts from US antitrust law, many of the key provisions in the finalised version of the Competition Act are based on the EU model, particularly the provisions on anti-competitive agreements and abuse of a dominant position. This is more in line with antitrust regimes adopted in other ASEAN countries, as well as with countries in the wider Asia Pacific region.

Although the Competition Act came into effect on 8 August 2015, 15 days after its publication in the Government Gazette, it provides for a transitional period (with respect to liability for administrative, civil or criminal penalties) of two years for businesses to cure any existing structure, conduct, practice or act that is in violation of the Competition Act.

Key aspects of the new law

- Prohibits entities from entering into anti-competitive agreements
- Prohibits abuse of their dominant position by entities
- Sets out a framework for the compulsory notification of mergers and acquisitions where the value of the transaction exceeds PHP1 billion (approximately USD21.7 million)
- Prohibits mergers and acquisitions which substantially prevent, restrict or lessen competition
- Administrative fines and, in some cases, criminal penalties for breach of the law

Key features of the Competition Act

The Philippines Competition Commission and enforcement powers

The Competition Act provides for the establishment of the Commission, an independent quasi-judicial body with primary jurisdiction to oversee the implementation and enforcement of the Competition Act and its rules and regulations. The Commission will be composed of a chair and four commissioners who will each be appointed by the president.

The Commission will take on the role of regulator, and will have wide-ranging powers to conduct investigations, including powers to issue subpoenas to require the production of books, records, documents and other data, and the power to summon witnesses. The Commission may also carry out inspections of business premises and other offices, land and vehicles, under a court order.

The Commission can impose administrative fines and penalties (discussed under "Penalties" below). Decisions of the Commission shall be appealable to the Court of Appeals in accordance with the Rules of Court. The Department of Justice, which was previously designated as the Competition Authority, will be responsible for the preliminary investigation and prosecution of criminal offences under the Competition Act.

Extraterritorial effect

The Competition Act is intended to have extraterritorial effect, being enforceable against "*any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines*". It is likewise applicable to "*international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines*".

The definition of "*entity*" in the Competition Act also explicitly encompasses "*domestic or foreign*" entities.

Anti-competitive agreements

In common with most established competition law regimes, the Competition Act contains provisions prohibiting anti-competitive agreements. Unusually, the Competition Act makes adistinction between three types of anti-competitive agreement, prohibiting:

1. Agreements between or amongst competitors (which are prohibited *per se*) (Type 1):
   (a) restricting competition as to price, or components thereof, or other terms of trade; and
   (b) fixing prices at an auction or in any form of bidding - including cover bidding, bid suppression, bid rotation and market allocation - and other analogous practices of bid manipulation.
2. Agreements between or amongst competitors which have the object or effect of substantially preventing, restricting or lessening competition (Type 2):
   (a) setting, limiting, or controlling production, markets, technical development or investment; and
   (b) 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.
3. Agreements, other than Types 1 and Types 2 above, which have the object or effect of substantially preventing, restricting or lessening competition (although those 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, may not necessarily be deemed a violation of the Competition Act) (Type 3).

The practice of regulators in other jurisdictions is to declare anti-competitive *per se* agreements, or those which have an anti-competitive purpose or object, as void upon mere proof of their existence. On the other hand, regulators must still analyse the effect of a particular agreement in the market if it is only alleged to be anti-competitive by effect. The Competition Act is, however, silent on both this point and how the Commission intends to deal with the three categories of anti-competitive agreements (although such agreements would be void under the Civil Code of the Philippines). Much will therefore depend on the implementing regulations or guidelines that are to be issued by the Commission.

A broad definition of "agreement" is adopted in the Competition Act, encompassing any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral. It is not, however, clear whether the provisions on anti-competitive agreements apply to vertical agreements (i.e. entities operating at different levels of the supply chain). The Type 1 and Type 2 prohibitions only apply to agreements between competitors (i.e. entities operating at the same level of the market), whereas the Type 3 prohibition may arguably extend to both agreements between competitors and vertical agreements. Intragroup agreements, on the other hand, are exempted from being treated as agreements between competitors (although they are not explicitly exempted from the application of all provisions on anti-competitive agreements).

Abuse of a dominant position

The Competition Act also prohibits entities from abusing their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition.

Is there a dominant position?

The Competition Act defines a "dominant position" as a position of economic strength that an entity (or entities) hold, which makes it capable of controlling the relevant market independently from any, or a combination of any, competitors, customers, suppliers or consumers.

The Commission will determine whether or not an entity has a dominant position in a relevant market by taking into account a number of factors specified in the Competition Act, including market share. The Competition Act does, however, create a rebuttable presumption of dominance with a 50% or more market share in the relevant market. Going forward, the Commission may revise the threshold for establishing a dominant position or minimum level of share in the relevant market that could give rise to a presumption of dominance.

Is there an abuse?

Having a dominant position is not in itself prohibited by the Competition Act. As is the case in most established competition regimes, it is the abuse of a dominant position that is prohibited.

The Competition Act sets out a list of conduct that is considered abuse, including:

- 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 anti-competitive manner
- making a transaction subject to acceptance by the other parties of obligations which, by their nature or according to commercial usage, have no connection to the transaction
- setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services
- making the 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 upon goods or services provided by marginalised service providers and producers
- directly or indirectly imposing an unfair purchase or selling price on competitors, customers, suppliers or consumers
- limiting production, markets or technical development, to the prejudice of consumers.

It is not clear whether the extensive list of abusive conduct set out in the Competition Act should be considered exhaustive. While a number of these examples of abusive conduct are familiar from established competition law regimes, the Competition Act is unusual in pursuing social policy goals by giving explicit protection to marginalised and "less fortunate" sectors of Philippines society and the economy.

The Competition Act also allows for the same pro-competitive effects exception as set out above in relation to Type 3 agreements, to be applied in the context of abuse of dominance. The wording of the exception is very similar to the wording

of the pro-competitive effects exception in the EU, but in the EU its application is reserved to anti-competitive agreements. The Competition Act also allows certain conduct to be justified on efficiency or objective necessity grounds.

Mergers and acquisitions – a mandatory notification regime

The Competition Act establishes a pre-completion mandatory notification regime for merger or acquisition agreements where the value exceeds PHP1 billion (approximately USD21.7 million). It is not clear in the Competition Act how this value threshold should be calculated, although guidance from the Commission is anticipated. The Competition Act also provides scope for the Commission to introduce additional notification thresholds, such as market shares, that could apply in specific sectors or across all sectors.

Transactions that exceed the threshold cannot be completed until 30 days after the parties have provided a notice to the Commission (the Notification Period). The Commission can extend the Notification Period to 90 days should it require further information to assess the merger or acquisition. Under the Civil Code, "days" means calendar days.

If the Notification Period expires and the Commission has issued no decision, the transaction shall be deemed approved and the parties shall be free to complete the transaction. If, during the Notification Period, the Commission determines that the agreement entails a merger or acquisition that substantially prevents, restricts or lessens competition in the relevant market or in the market for goods or services, it may:

An "*acquisition*" is defined as the purchase of securities or assets, through contract or other means, for the purpose of obtaining control by: (i) one entity of the whole or part of another; (ii) two or more entities over another; or (iii) one or more entities over one or more entities. "*Control*" is defined by reference to a concept of decisive influence that is similar to that found in EU legislation.

(a) prohibit the implementation of the agreement;
(b) prohibit the implementation of the agreement unless and until it is modified by changes specified by the Commission; or
(c) prohibit the implementation of the agreement unless and until the pertinent party or parties enters into legally enforceable agreements specified by the Commission.

The Competition Act also sets out possible exemptions for otherwise prohibited mergers, including where the merger brings about gains in efficiency that are greater than any anti-competitive effects, or where a party to the merger is faced with actual or imminent financial failure. The acquisition of stocks or shares solely for investment purposes, and which are not used for voting or exercising control, is also explicitly exempt from prohibition.

Any transaction completed in violation of the above notification requirement shall be considered void and the parties subject to an administrative fine of 1% to 5% of the value of the transaction. Additional fines may also be imposed for engaging in an anti-competitive merger or acquisition (as set out in further detail below).

Penalties – both civil and criminal

The Commission can impose administrative penalties of up to PHP100 million (approximately USD2.2 million) for first offences, and up to PHP250 million (approximately USD5.4 million) for second offences on entities - found to have entered into an anti-competitive agreement, abused their dominant position, or engaged in a prohibited merger or acquisition. This is significantly higher than the previous penalties imposed under the Revised Penal Code, and should provide a significant deterrent for anti-competitive practices. In addition, fines can be tripled if the violation involves the trade or movement of basic necessities and prime commodities, defined in The Price Act (Republic Act No. 7581) as including an extensive list of consumer goods, pharmaceuticals and construction materials.

Additional administrative penalties may be imposed for failure to comply with an order of the Commission or for supplying incorrect or misleading information to the Commission. The Commission may also apply remedies including injunctions, forced divestments and disgorgement of excess profits. Non-adversarial administrative remedies may also be adopted to encourage voluntary compliance with the Competition Act.

The most serious types of anti-competitive agreements (i.e. Type 1 and Type 2 agreements as set out above) may also attract criminal sanctions of imprisonment from two to seven years, and a fine of between PHP50 million (approximately USD1.1 million) and PHP250 million (approximately USD5.4 million). Such penalties would be imposed on the responsible officers and directors of the entities involved.

The Competition Act also stipulates that the Commission shall develop a leniency programme. This would, in certain specified circumstances, grant immunity from suit or a reduction of any fines that would otherwise be imposed on a participant in any Type 1 or Type 2 agreements. Unusually, the Competition Act also indicates that the leniency programme will provide for immunity from third party damages actions and criminal prosecutions.

Furthermore, entities facing criminal prosecution may advance a plea of *nolo contendere*, which enables an entity to agree to accept punishment as if a guilty plea has been submitted but without accepting or denying culpability. Such a plea can not then be used against the entity to prove liability in any follow-on civil or other cause of action.

The Competition Act also allows for civil actions to be brought by any person who suffers direct injury by reason of any violation of the Competition Act. Such actions may be initiated after the Commission has completed a preliminary inquiry.

Actions for companies

The Competition Act sets out a comprehensive framework for, and provides the Commission with, significant investigative and enforcement powers in the form of both administrative and criminal sanctions. While it may have taken over 20 years to pass this law, president Aquino has long been a strong advocate of the need for a comprehensive competition law, and it is expected that the implementation of the Competition Act will be expedited and strictly enforced.

Businesses, including foreign companies that conduct business with Filipino companies and consumers, are well-advised to use the two-year transition period to review their pricing strategies, market approaches, contractual arrangements, and commercial transactions, to ensure compliance with the provisions of the Competition Act.

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