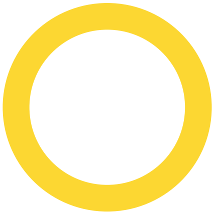
PHILIPPINE COMPETITION ACT

GUIDE FOR BUSINESSES



PHILIPPINE COMPETITION COMMISSION

Ensuring businesses compete and consumers benefit

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PREFACE

Competition plays a crucial role in promoting productivity and innovation as drivers of economic growth. It drives businesses to use their inputs in the most efficient way to supply goods and services at the lowest possible costs. Competition also stimulates businesses to innovate and create new products and services to gain market share; hence, eventually leading to technological progress.

With the enactment of the Philippine Competition Act (PCA) or Republic Act 10667, the country now has a comprehensive competition law that promotes fair trade practices, prohibits formation of or regulates natural monopolies, and penalizes arrangements that duly manipulate or restrict fair market competition. The PCA serves as a legal framework for developing a competitive business environment, resulting in affordable, high-quality products and services in the market.

Pursuant to the foregoing objectives as well as the mandate of the Philippine Competition Commission (PCC) to undertake an advocacy program, especially during the two-year transition period,[1] this Guide for Businesses intends to inform the public, particularly the businesses, of the provisions of the law. It is divided into three main parts, namely: general definitions of terms; discussion on anti-competitive practices prohibited under the PCA; and the ways and means afforded by the law to PCC to combat anti-competitive practices.

It is important to note, however, that this Guide neither serves as a substitute of R.A. 10667 and its Implementing Rules and Regulations (IRR) nor represents the full extent of the law, as well as the powers and functions of PCC. This Guide was written for an informational purpose; and generalizations were made in explaining the law. These and the examples given shall not in any way restrict the enforcement or other powers of the PCC. Nevertheless, this Guide hopes to inspire businesses to be PCC's partners in fostering a culture of competition in our country by pushing for economic growth that is more enduring and more inclusive.

[1] Section 53 of the PCA provides for a transition period of two (2) years after its effectivity.

01

INTRODUCTION

Republic Act No. 10667 (R.A. No. 10667) or the Philippine Competition Act (PCA) marks the realization of a decades-long legislative struggle for comprehensive competition reform. Enacted in July 2015, the PCA serves as the legal framework by which the government could develop a policy and regulatory environment that fosters a level playing field for businesses of all shapes and sizes. This reform is long overdue as the Philippines is among the last member states of the Association of Southeast Asian Nations (ASEAN) to have an antitrust law.

The Philippine Competition Commission (PCC) is the agency mandated to promote fair competition among companies across various industries to safeguard the welfare of both businesses and consumers in the country. It is an independent, quasi-judicial body with original and primary jurisdiction over issues relating to competition. As such, it prohibits exploitative business practices such as anti-competitive agreements, abuse of market dominance, and anti-competitive mergers and acquisitions.

Anti-competitive agreements

Anti-competitive agreements are those that substantially prevent, restrict, or lessen competition. It is illegal for business rivals to act together in ways that can limit competition, lead to higher prices, or hinder other businesses from entering the market. Price-fixing and bid-rigging are considered anti-competitive agreements.

Abuse of market dominance

There is abuse of market dominance when an entity with a significant degree of power in a market engages in conduct that restricts competition. Such conduct includes predatory pricing, imposing barriers to market entry, and the unfair exercise of monopsony power (where one business is the sole buyer for many sellers), among others.

Anti-competitive mergers and acquisitions

Anti-competitive mergers and acquisitions refer to the consolidation of companies that can substantially lessen competition, or significantly impede effective competition in a relevant market. While mergers and acquisitions are not illegal *per se*, merged entities can coordinate their market behavior and exercise market power unilaterally.

DOES THE PHILIPPINE COMPETITION ACT (PCA) APPLY TO YOUR BUSINESS?

Commercial activity

The Philippine Competition Act (PCA) applies to any person or entity engaged in trade, industry, and commerce in the Republic of the Philippines. In addition, international commercial activities that have direct, substantial, and reasonably foreseeable effects on national trade, industry, and commerce are also covered, including those that result from acts done outside the country.

Exclusions

The PCA does not cover agreements or arrangements between employees and employers (e.g. collective bargaining agreements) and other such acts affecting conditions of employment.

02

DEFINITION OF TERMS

The following are the definitions of key terminologies found in the Philippine Competition Act (PCA), as stated in Section 4 ("Definition of Terms"):

ACQUISITION

The purchase of securities or assets, through contract or other means, for the purpose of obtaining control by: (a) one entity of the whole or part of another; (b) two or more entities over another; or (c) one or more entities over one or more entities.

AGREEMENT

Any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral.

Some anti-competitive agreements may be classified into "horizontal" or "vertical" agreements.

Horizontal agreements are those entered into by and between two or more competitors. For example, two competing manufacturers could collude and agree to sell the same product at the same price.

Vertical agreements are those entered into by and between two or more entities at different levels of the distribution or production chain. Examples of vertical agreements would be distribution agreements, agency agreements, or franchising agreements entered into by suppliers, manufacturers, distributors, and retailers.

CONDUCT

Any type or form of undertaking, collective recommendation, independent or concerted action or practice, whether formal or informal.

COMMISSION
The Philippine Competition Commission (PCC) created under the PCA.

CONFIDENTIAL BUSINESS INFORMATION
Information which concerns or relates to the operations, production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures.

CONTROL
The ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency, or otherwise.

DOMINANT POSITION
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 the following: competitors, customers, suppliers, or consumers.

ENTITY
Any person, natural or juridical, sole proprietorship, partnership, combination or association in any form, whether incorporated or not, domestic or foreign, including those owned or controlled by the government, engaged directly or indirectly in any economic activity.

MARKET
The group of goods or services that are sufficiently interchangeable or substitutable and are the object of competition, and the geographic area where said goods or services are offered.

MERGER
The joining of two or more entities into an existing entity or to form a new entity.

RELEVANT MARKET
The market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market, defined as follows:

A **relevant product market** comprises all the goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer by reason of the goods' and/or services' characteristics, their prices, and their intended use.

A **relevant geographic market** is the area where a business trades its goods and/or services to consumers, and where businesses experience a similar competition environment. The relevant geographic market is distinct from the conditions of competition in neighboring areas.

03

ANTI-COMPETITIVE AGREEMENTS

WHICH AGREEMENTS ARE CONSIDERED ANTI-COMPETITIVE AND PROHIBITED UNDER THE PCA?

As a general rule, the Philippine Competition Act (PCA) makes it illegal for business rivals to act together in ways that can limit competition, lead to higher prices, or hinder other businesses from entering the market.

The PCA prohibits the following agreements between or among competitors:

Price fixing

This involves restricting competition as to price, or components thereof, or other terms of trade. This usually happens when competitors collude with one another to fix the prices of goods or services rather than allow the prices to be determined by market forces.

Bid-rigging

This involves fixing prices at an auction or any form of bidding including cover bidding, bid suppression, bid rotation, and market allocation, among others. Bid-rigging usually occurs when parties participating in a tender process coordinate their bids rather than submit independent bid prices.

These acts or agreements are inherently illegal. Thus, no further inquiry into the intentions of the businesses that engage in these illegal activities and their actual effects on the market is necessary to impose sanctions.

#1

Price-fixing of electronic books in the United States, 2013

In July 2013, a U.S. district court found a large computer company guilty of violating the Sherman Antitrust Act for conspiring with five major publishing companies to fix the prices of electronic books (e-books) in 2010.

Aiming to penetrate the e-book market, Apple Inc. colluded with five major publishers to help it enter the market by launching its iPad tablet and iBookstore feature. It successfully encouraged all publishers to adopt an agency pricing model (i.e., publisher dictates the retail price, while the retailer sells as its agent) and to abandon the wholesale pricing model (i.e., publisher receives its designated wholesale price for each e-book, and the retailer sets the retail price). This arrangement forced Amazon to abolish its commitment to sell e-books at lower prices.

Apple Inc. was ordered to pay USD450 million to the affected parties as settlement. Customers who purchased e-books from Apple Inc. between April 1, 2010 and May 21, 2012 received USD400 million. National class action law firm Hagens Berman was paid USD30 million for legal fees. State attorney-generals involved in the case were paid USD20 million.

Source: U.S. v. Apple, Inc.; Hachette Book Group, Inc.; HarperCollins Publishers LLC; Verlagsgruppe Georg von Holtzbrinck GmbH; Holtzbrinck Publishers, LLC d/b/a Macmillan; The Penguin Group, a Division of Pearson PLC; Penguin Group (USA), Inc.; and Simon & Schuster, Inc.

#2

Bid-rigging cartels in the automobile industry in Canada, 2009

In 2013, a Japanese automobile parts company admitted to bid-rigging with other suppliers for the 2001 and 2006 Honda Civic models fabricated in Canada.

Furukawa Electric Co., Ltd. (Furukawa), a supplier of electrical boxes (i.e., fuse boxes, relay boxes, and junction blocks) used in motor vehicles, was among the pre-qualified suppliers of Honda Canada (Honda). When Honda called for price quotations from suppliers for bidding, Furukawa coordinated with its Japan-based competitors regarding their price quotations or bids.

These meetings resulted in the arrangement that Furukawa would earn the contract for the tender process. Consequently, Furukawa was awarded as the supplier for the automobile parts of the 2001 Honda Civic model. From 2000 to 2005, its estimated sales amounted to CAD16.5 million.

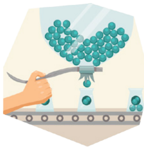
The Competition Bureau learned of the international bid-rigging conspiracy through its Leniency Program, where Furukawa joined and offered help to the Bureau for the investigation of the case. Investigations started in 2009.

In 2013, the Ontario Superior Court of Justice fined Furukawa CAD5 million for the bid-rigging conspiracy.

Source: Canada's Competition Bureau. April 4, 2013. $5M Fine for a Japanese Supplier of Motor Vehicle Components. Court File No. 13086.

WHICH AGREEMENTS MAY BE POTENTIALLY ANTI-COMPETITIVE?

The law considers agreements as anti-competitive if their object or effect would substantially prevent, restrict, or lessen market competition. Examples of such agreements are supply restriction and market sharing.



Supply restriction

An agreement by two or more competing businesses to set or limit production levels to create artificial supply shortage, thereby raising the price levels. Similar forms of anti-competitive agreements include restrictions in markets, technical development, and investments.

Market sharing

A collusive agreement by two or more competing businesses to divide or allocate the market. Market sharing not only includes customers but also volume of sales or purchases, type of goods or services, buyers or sellers, or geographical territory, among other considerations.

#3

Output restrictions in the cement industry in India, 2010

Ten cement manufacturing companies were found guilty of artificially restricting their outputs, which eventually led to price hikes of cement products across different regions in India. Through the Cement Manufacturers' Association (CMA), competitors discussed various confidential business information, such as prices and quantity of production, which led to an agreement of controlling the supply of cement products in the region.

In 2010, the Builders' Association of India filed a complaint against the CMA and the cement manufacturing companies involved for engaging in a cartel arrangement. In 2012, the Competition Commission of India found the parties guilty of breaching the 2002 Competition Act of India and imposed penalties amounting to INR63.17 billion.

Source: Competition Commission of India. August 31, 2016. CCI imposes penalties upon cement companies for cartelization. Case No. 29/2010.

#4

Market allocation between pharmaceutical companies in England, 2011

In 2011, two pharmaceutical companies admitted to dividing the market between them in providing prescription medicines to care homes in England.

From May to November 2011, Tomms Pharmacy (Tomms), a trading company under the subsidiaries of Hamsard 3149 Limited (Hamsard) (i.e., Quantum Pharmaceutical Limited and Total Medication Management), and Lloyds Pharmacy Limited (Lloyds), a subsidiary of Celesio AG, agreed to distribute medical products in their pre-assigned markets only, resulting in limited choices of prescription medicines for consumers.

In 2014, the Office of Fair Trading (OFT) found that the arrangement breached the 1998 Competition Act of England. The OFT imposed a reduced fine of GBP387,856 to Hamsard; however, under the OFT Leniency Program, it granted 100 percent reduction to Lloyds for disclosing the agreement.

Source: Decision of the Office of Fair Trading. Market sharing agreement and/or concerted practice in relation to the supply of prescription medicines to care homes in England. 20 March 2014. Case CE/9627/12.

DOES THE PCC DETERMINE IF AN AGREEMENT IS ANTI-COMPETITIVE?

The PCC weighs the "efficiency benefits" of an act or agreement against its anti-competitive implications to determine whether the act or agreement is illegal under the law. In determining whether an anti-competitive agreement or conduct has been committed, the PCC shall, among others, determine if there is actual or potential adverse impact on competition in the relevant market, and if such impact is substantial and outweighs the actual or potential efficiency gains of the act or agreement.

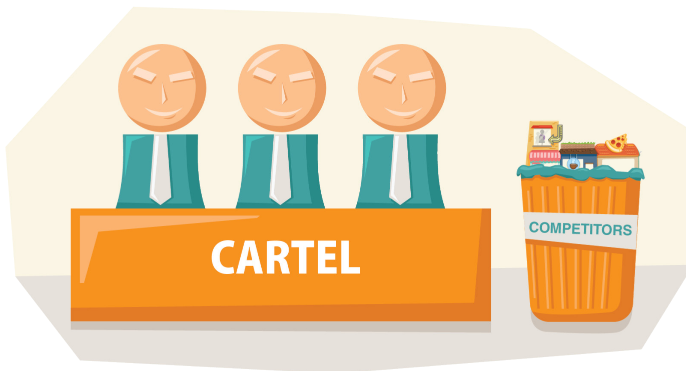
According to a hypothetical example given by the Comesa Competition Commission, two competing pharmaceutical companies agreed to develop a new medicinal drug. Since antitrust law states that the conduct of competing businesses must be done independently, the concerted action may constitute anti-competitive conduct in the medicine market. However, if the pooled investments of the two pharmaceutical companies would result in more robust drug synthesis and the timely delivery of medicine to the market, the concerted action would ultimately benefit consumers. Hence, the net effect of the agreement may not be anti-competitive.

ARE ALL INTERACTIONS WITH COMPETITORS CONSIDERED COLLUSIVE?

No. There are inevitable instances where businesses meet with their competitors for transactions (e.g., proposed mergers and joint ventures) and assemblies (e.g., regular meetings in trade associations). These are not prohibited by the law. However, these can provide competitors an opportunity to discuss and exchange confidential business information, resulting in agreements with anti-competitive intentions. Whenever competitors are talking with each other, they should be careful about the information they share and the agreements they reach, making sure they do not violate the PCA.

Joining trade associations does not make businesses liable for violation of antitrust laws. While the PCA does not prohibit the existence and operation of trade associations, businesses who engage in cartel-like activities through trade associations will be sanctioned according to the law.

WHAT ARE CARTELS?



Generally speaking, a cartel involves businesses in the same industry colluding with one another to substantially prevent, restrict, or lessen competition.

There may be collusion in cases where there is an explicit or tacit agreement among competing firms in an industry that will allow them to dominate the market, control the market price, and ultimately act like a monopoly or duopoly.

Cartels and collusive agreements are illegal. They result in anti-competitive practices like price-fixing and market-sharing which, in turn, reduce output and raise prices.

#5

Price fixing among three driving school associations in China, 2012

Three driving school associations set and imposed pricing schemes on their members, as shown in the investigations of the Guangdong Provincial Price Bureau (GPPB).

The Guangzhou driving school association prescribed a specific price range which allowed each member to raise their prices but not more than 15 percent, or lower it but not less than 5 percent. Another association in Shenzhen prescribed its members not to charge prices below their recommended minimum price. One association in Foshan set rates for its member driving schools.

The GPPB fined these associations at CNY350,000 each for conspiring to fix prices, which is against China's Anti-Monopoly Law.

Source: Policy and Regulatory Report. 2012. Guangdong Price Bureau Investigation into three driving school associations for price fixing.

04

ABUSE OF DOMINANCE

WHEN CAN BUSINESSES BE CONSIDERED DOMINANT IN THE MARKET?

As stated in Section 27 of the PCA, the Commission will consider the following factors to determine whether a firm has a market dominant position:

- The firm's share in the relevant market and whether it can fix prices on its own or restrict supply in the relevant market;

"There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least 50 percent, unless a new market share threshold is determined by the Commission for that particular sector."

- Existence of barriers to entry and the elements which could change both the barriers and the supply from competitors;
- Existence and power of competitors;
- Possibility of access by competitors or other enterprises to its sources of inputs;
- Power of its customers to switch to other goods or services;
- Recent conduct; and
- Other criteria established by the regulations of the PCA.

IS IT ILLEGAL TO BE DOMINANT?

It is not illegal to have a dominant position in the market; however, it is illegal to abuse one's dominance. The acquisition, maintenance, and increase of market share does not violate the PCA if:

(i) it is acquired through legitimate means such as having superior skills, rendering superior service, producing or distributing high-quality products, having business acumen, and using and enjoying protected intellectual property rights; and
(ii) it does not substantially prevent, restrict, or lessen competition in the market.

IN WHAT INSTANCES CAN BUSINESSES BE HELD LIABLE FOR ABUSING THEIR MARKET DOMINANCE?

As stated in Section 15 of the PCA, entities are prohibited from abusing their dominant position in the market by engaging in conduct that would substantially prevent, restrict, or lessen competition such as, but not limited to, the following:

VIOLATION	EXCEPTION
1. Selling goods or services below cost for the purpose of driving competition out of the market	Price was established in good faith, i.e., to compete with the lower price of a competitor
2. Imposing barriers to entry or committing acts that prevent competitors from growing within the market	Acts or practices that develop in the market as a result of a superior product or process, business acumen, or legal rights or laws
3. Making a transaction subject to the acceptance of parties that have no connection with the transaction	

VIOLATION	EXCEPTION
4. Setting prices or other terms or conditions that discriminate between customers or sellers of the same goods or services	• Socialized pricing for the poor and marginalized sector • Price differential which reasonably or approximately reflect the differences in the cost of manufacture, sale, or delivery which result from different methods, technical conditions, or quantities • Price differential or terms of sale offered in response to the competitive price of payments, services, or changes in the facilities provided by a competitor • Price changes in response to changing market conditions, marketability of goods or services, or volume
5. 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. Examples of these are fixing prices, giving preferential discounts or rebates, or imposing conditions not to deal with competing firms, if such restrictions will prevent, restrict, or lessen competition	• Permissible franchising, licensing, exclusive merchandising, or exclusive distributorship agreements • Agreements protecting intellectual property rights, confidential information, or trade secrets
6. Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier	
7. Imposing unfairly low purchase prices for the goods or services of marginalized service providers and producers such as farmers, fisherfolk, and micro, small and medium enterprises (MSMEs)	
8. Imposing unfair purchase or selling price on competitors, customers, suppliers, or consumers	Prices that develop in the market as a result of a superior product or process, business acumen, or legal rights or laws
9. Limiting production, markets, or technical development to the prejudice of consumers	Limitations that develop in the market as a result of a superior product or process, business acumen, or legal rights or laws

#1

Predatory pricing among freely distributed newspapers in the United States, 2010

A newspaper company was sued for selling advertisement spots at below-cost prices to drive away small business competitors in California.

SF Weekly and Bay Guardian are freely distributed newspapers which solely depend on advertisements for revenue. SF Weekly decided to lower its advertisement rates relative to its competitor, the Bay Guardian. Both companies were losing revenues. However, unlike the Bay Guardian, SF Weekly is owned by Village Voice Media, a large media company. Hence, the latter could remain in the newspaper industry in spite of the incurred losses.

Although SF Weekly argued that it did not aim to monopolize the newspaper industry, the Court decided that the intention of selling advertisement below-cost was to force the Bay Guardian out of the market. Village Voice Media was fined a total of USD21 million for infringing the California's Unfair Practices Act.

Source: Bay Guardian Co. Inc. v. New Times Media LLC et al., Case Number S186497, in the Supreme Court of California.

#2

Imposing barriers to entry in the medical industry in New Zealand, 1997

The Wellington High Court penalized the Ophthalmological Society of New Zealand Inc., and two New Zealand ophthalmologists for opposing the entry of Australian ophthalmologists in the market for cataract surgery.

In 1996, Southland Health had numerous backlogs in performing cataract operations. Since it received additional funding, it negotiated with two Australian ophthalmologists to perform the surgery operations. However, the local eye surgeon opposed this and colluded with other South Island-based ophthalmologists to protect their financial stance in the market. They then collectively agreed to not perform pre- and post-surgery care for the cataract patients, and to not offer professional support for surgical activities. These forced the two Australian ophthalmologists to cancel their proposals to perform surgery in 1997.

The Commerce Commission sanctioned the New Zealand ophthalmologists and its Society for violating the Commerce Act. With the entry of the Australian ophthalmologists in the cataract surgery market, competition would have significantly decreased prices. This could have translated into benefits for Southland Health's patients in the next 18 to 24 months.

The high court fined the Society NZD100,000, while Dr. Brett Rogers and Dr. Mark Elder were fined NZD25,000 and NZD467,870, respectively. The other ophthalmologists included in the case were ordered to compensate the legal cost of the Commerce Commission at NZD467,870.

Source: Commerce Commission v Ophthalmological Society of New Zealand. 2004. 10 TCLR 994.

#3

Excessive pricing among pharmaceutical companies in the United Kingdom, 2012

Pharmaceutical companies Pfizer and Flynn Pharma (Flynn) abused their dominance in the healthcare market by charging higher prices for anti-epilepsy drugs by 2,600 percent overnight after the lifting of a price regulation.

Pfizer previously directly sold to wholesalers and pharmacies at a regulated lower price. In 2012, Pfizer sold the U.K. distribution rights to Flynn. When the drug was eventually de-branded (i.e., offered in its generic form), it was exempted from price regulation. Consequently, Pfizer supplied to Flynn at prices higher than its offer to previous distributors by 780 percent to 1,600 percent. In turn, Flynn distributed the drug to U.K. wholesalers and pharmacies at prices higher than what they previously charged by 2,300 to 2,600 percent.

In 2016, the Competition and Markets Authority (CMA) fined Pfizer and Flynn GBP84.2 million and GBP5.2 million, respectively, for breaching the Competition Act of 1998. They were found guilty of abusing their market dominance by charging excessively high prices since 2012 and were ordered to decrease their price levels.

Source: Unfair pricing for phenytoin sodium capsules in the United Kingdom, CE/9742-13, Competition and Markets Authority.

05

ANTI-COMPETITIVE MERGERS & ACQUISITIONS

Mergers and acquisitions (M&As) can benefit consumers because these may lead to businesses that operate more efficiently, resulting in lower prices. M&As can result in economies of scale and scope, enable transfer of technologies, broaden access to capital, and increase productivity.

There are M&As, however, that harm competition and can be disadvantageous to consumers. Anti-competitive M&As, especially those that create companies with dominant market power, could potentially lessen, restrict, or prevent market competition.

The PCC reviews M&As to determine if these will result in a substantial lessening of competition. The PCA gives the PCC the authority to regulate business transactions to protect competition in a market.

ARE ALL BUSINESSES REQUIRED TO NOTIFY THE PCC OF IMPENDING MERGERS AND ACQUISITIONS?

Under the PCA and its Implementing Rules and Regulations, parties to the M&A agreement where the PHP1 billion threshold is breached must notify the PCC before consummating the transaction.

In instances where parties are required to notify the PCC, the parties are not allowed to consummate their agreement without the approval of the PCC.

M&As where parties are required to notify the PCC but fail to do so are considered void and will lead to an administrative fine of between 1 percent to 5 percent of the value of the transaction.

MY TRANSACTION DOES NOT REQUIRE NOTIFICATION. DOES THIS MEAN THE PCC CANNOT REVIEW IT?

No. The PCC has the authority to review or investigate, on its own initiative, any transaction that may result in substantial lessening or restriction of competition in a market.

WHAT ARE THE PROCEDURES FOR THE NOTIFICATION AND REVIEW OF MERGERS AND ACQUISITIONS?

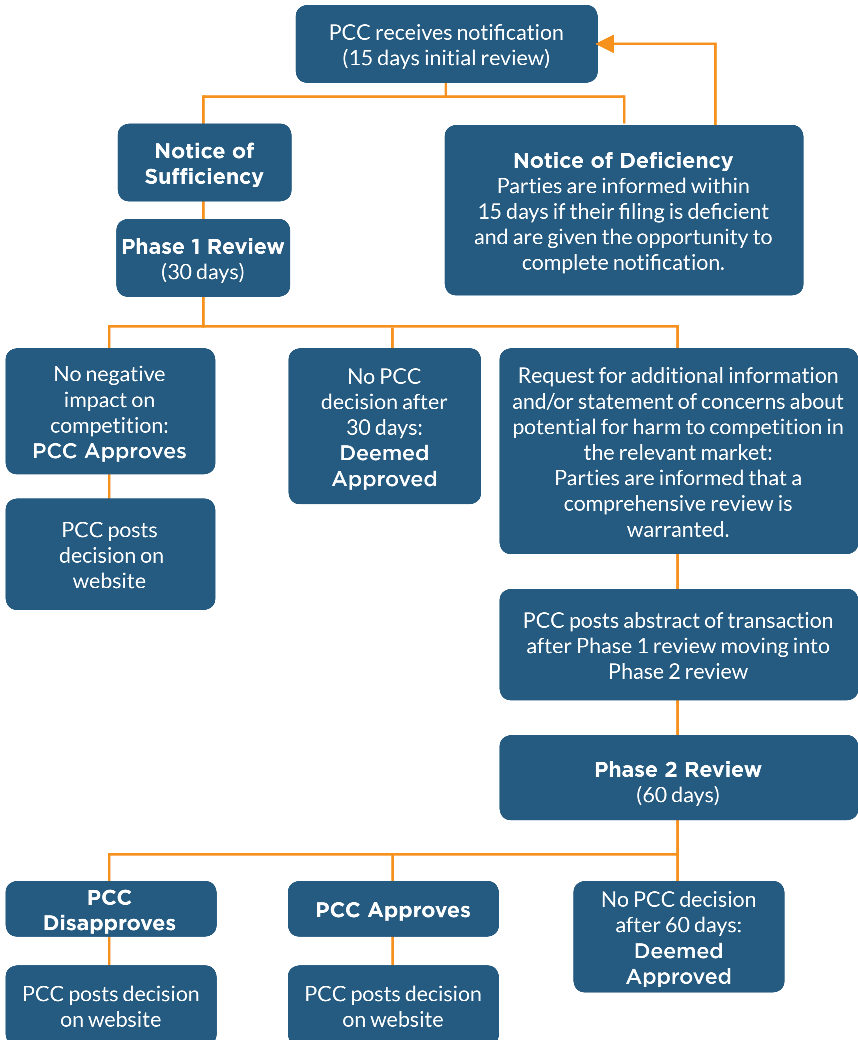
Prior to filing a notification, parties that are required to notify may inform the PCC of their proposed M&A and request a pre-notification consultation. During consultations, the parties may seek non-binding advice on the specific information needed for the notification. To request a meeting, the parties must provide the following information:

1. Names and contact information of the concerned entities;
2. Type of transaction; and
3. Markets covered or lines of businesses affected by the proposed M&A.

PROCEDURE FOR NOTIFICATION

Mergers and Acquisitions Office (MAO)

Source: PCC Website



NOTIFICATION

Each party to an M&A that is required by law to notify the PCC shall submit the notification as prescribed by the PCC and pay the filing fee. Parties may notify based on a binding preliminary agreement or prior to the execution of definitive agreement/s.

DETERMINATION OF SUFFICIENCY

The PCC has 15 days from submission of the Notification Form to determine if the Form and other requirements have been completed in accordance with the rules and guidelines.

REVIEW

After informing the parties of sufficiency, 'Phase 1' review begins. It is a 30-day period for assessment wherein the PCC shall review whether the proposed M&A has a negative impact on competition. If, after the initial review, more comprehensive and/or detailed analysis is needed, the PCC will proceed to 'Phase 2'. It starts an additional 60-day period for review that begins after a request for supplementary documents and/or information by the PCC is received by the parties. The review must not exceed 90 days from the time of determination of sufficiency.

If parties fail to provide the requested information within 15 days from receipt of request, the notification shall be deemed expired and the parties must refile it, unless they request an extension of time to comply. The period for review will be correspondingly extended.

Should the PCC determine that a 'Phase 2' review is necessary, payment of an additional filing fee of 1 percent of 1 percent of the transaction value is required. Such filing fee shall not be less than PHP1 million nor more than PHP5 million.

RELEASE OF COMMISSION DECISION

Should the Commission fail to decide or complete its analysis within 30 days (for Phase 1) or within the additional 60-day period (for Phase 2), the proposed M&A shall be deemed approved and parties may proceed to implement or consummate it.[2]

[2] Agreements that have received a favorable ruling from the Commission may not be challenged under the Act or its Rules and Regulations, except when such ruling was obtained based on fraud or false material information.

WHAT DOES THE PCC TAKE INTO CONSIDERATION WHEN REVIEWING MERGERS AND ACQUISITIONS?

An M&A review involves rigorous economic analysis and investigation.

The PCC obtains relevant information and data from the parties to the merger, as well as third parties such as suppliers and customers, and generates necessary information and data on its own.

The PCC uses the information gathered to determine what markets will be affected by the transaction. It looks at the number of actual and potential players in those markets, and their respective market shares, among others. In its analysis of the effect of an M&A on competition, key factors to consider may include: number of competitors in a market, barriers to entry, current level of competition, "pre-termination" fees or "early contract termination" fees for consumers, eliminating a "Maverick," and potential for collusion.

NUMBER OF COMPETITORS IN A MARKET

A market with only a handful of players raises a concern. Fewer players in a market obviously have an implication on the level of competition. Mergers that result in a lessening of the number of competitors in a market therefore concern the competition authority.

BARRIERS TO ENTRY

Barriers to entry are factors which prevent or deter new competitors from entering a market. These include regulatory barriers, ownership restrictions, high cost of initial investment, and cost advantage of incumbent firms, among others (OECD[3] , 1993). The higher the barriers to entry are, the more circumspect a competition authority will be in approving a merger in a market with only a few players.

CURRENT LEVEL OF COMPETITION

Markets with a vibrant competition culture, where market participants actively compete on price and quality of service, may raise fewer concerns when reviewed.

[3]Organisation for Economic Cooperation and Development

"PRE-TERMINATION" FEES OR "EARLY CONTRACT TERMINATION" FEES FOR CONSUMERS

Both actual and perceived switching costs can be a barrier to entry and growth of existing and potential competitors. The higher the switching costs for consumers, the more concerns a merger raises, as the flexibility of the market and the potential for new entrants are limited.

ELIMINATING A "MAVERICK"

In markets where a market participant has become a "maverick"–that is, a creator of competition–there is an incentive for established players to try and remove this competitor by simply buying it. A maverick creates a vibrant market by winning consumers over with competitive prices, new products and services, and the latest technologies, among others.

Large players may find that simply buying the maverick will help it recover lost customers and market share. Acquiring a maverick relieves the pressure from future investments in technological upgrades and improvements. This is convenient for competitors, but is a disadvantage for consumers.

In markets with few players, a merger between a large player and a maverick can substantially lessen competition.

POTENTIAL FOR COLLUSION

If a merger results in the emergence of fewer competitors with similar market shares, the potential for collusion, and therefore the threat to competition, is much higher.

WHAT HAPPENS IF, UPON REVIEW BY THE PCC, THE PROPOSED MERGER OR ACQUISITION IS FOUND TO BE ANTI-COMPETITIVE?

Where the PCC determines that a given merger or acquisition could substantially prevent, restrict, or lessen competition in the market, the PCC has the authority to prohibit or impose conditions on the merger or acquisition.

CASE STUDIES

#1

Acquisition involving sprinkler inspection firms denied in New Zealand, 2016

The proposed acquisition of the fire sprinkler and alarm inspection business of Fire Protection Inspection Services Limited (FPIS) by Aon New Zealand (Aon) was prohibited by the Commerce Commission of New Zealand.

Per Commission Chairman Dr. Mark Berry, the impending agreement was found to be potentially anti-competitive as it may significantly reduce the number of players in the market, resulting in higher prices or lower quality of sprinkler inspection services in all three regional markets of New Zealand–the upper North Island, the lower North Island, and the South Island.

FPIS and Aon are the two largest national sprinkler inspection firms in New Zealand. Additionally, should the acquisition be allowed, the resulting company will become a dominant player, employing majority of sprinkler inspectors in the country.

Source: Commerce Commission New Zealand. March 3 2017. Commission declines clearance for sprinkler inspection services merger.

MAY M&AS THAT SUBSTANTIALLY LESSEN COMPETITION BE ALLOWED?

M&A agreements which substantially lessen competition may be allowed if the parties are able to prove that (a) the concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or are likely to result from the merger or acquisition agreement; or (b) a party is faced with actual or imminent financial failure and the agreement represents the least anti-competitive arrangement among the known alternative uses of its assets.

CASE STUDIES

#2

Approval of Colombian airline merger using "failing firm" nature as defense, 2002

In 2002, the proposed merger transaction between Colombia's two main airlines, Aces and Avianca, was opposed by the Superintendence of Industry and Commerce (SIC) after finding that the airlines, through the said merger, would massively dominate the airline market and would therefore unduly restrict competition. However, the Aviation Authority took a different view and accepted a "failing industry" defense from the said parties. In this case, potentially anti-competitive mergers which involve failing firms may still lead to approval if the proposed transaction shall improve general welfare, either through capacity building, improving labor conditions, or yielding socially beneficial results.

Source: United Nations Conference on Trade and Development. 2003. Recent Competition Cases.

06

ENFORCEMENT

WHAT WILL TRIGGER AN INQUIRY OR INVESTIGATION?

The following may trigger an inquiry or investigation by the PCC:

- On the PCC's own initiative (*motu proprio*);
- Receipt of a verified complaint filed by an interested party; or
- Referral by a regulatory agency.

WHAT SHOULD WE DO IF THE PCC INVESTIGATES OUR COMPANY FOR ANY POSSIBLE VIOLATION OF THE PCA?

Comply with the orders of the Commission.

The PCA gives the PCC extensive powers to investigate suspected violations of the Act; to conduct administrative proceedings; to impose sanctions, fines, or penalties for any non-compliance with or breach of the PCA and its IRR; and punish contempt.

The PCC may require personal apperance before the Commission, summon witnesses, and issue interim orders such as show cause orders, and cease and desist orders, among others.

The PCC may undertake inspections of business premises and other offices, land, and vehicles used by your company where the Commission reasonably suspects that books, tax records, or other documents which relate to any matter relevant to its investigation are kept.

Some examples of orders that the PCC might issue include:

- **Show cause order.** An order requiring an entity or entities to explain within a certain period why no order shall be issued requiring such person or persons to cease and desist from continuing with its identified business conduct, or pay the administrative fine therein specified, or readjust its business conduct or practices.
- **Cease and desist order.** After due notice and hearing, and on the basis of facts and evidence presented, the PCC may issue an order for the temporary stoppage of certain acts by the respondent entity.

Provide correct information or an explanation on any information as required by the Commission.

The PCC may issue an order (e.g., *subpoena duces tecum* and *subpoena ad testificandum*) to require the production of books, records, or other documents or data which relate to any matter relevant to the investigation.

- ***Subpoena duces tecum.*** An order requiring a person to attend a court hearing and bring relevant documents.
- ***Subpoena ad testificandum.*** An order compelling a person's attendance.

CAN BUSINESSES FILE AN APPEAL TO CONTEST THE DECISION OF THE PCC?

Decisions of the Commission are appealable to the Court of Appeals in accordance with the Rules of Court (Section 39 of the PCA).

WHAT ARE THE FINES AND PENALTIES FOR VIOLATIONS OF THE PCA?

The PCC imposes administrative penalties to PCA violators. There are four kinds of fines that the PCC can impose. These are:

i. **Administrative fines for violations of Sections 14 (Anti-competitive Agreements), 15 (Abuse of Dominant Position), 17 (Compulsory Notification), and 20 (Prohibited Mergers and Acquisitions) of the PCA.**

In fixing the amount of fines, the Commission shall consider both the gravity and duration of the violation.

ii. **Fines worth at least PHP50,000 for failure to comply with an order of the Commission.**

Businesses that fail or refuse to comply with a ruling, order, or decision issued by the Commission are required to pay the above penalty for each violation, and a similar amount of penalty for each day afterwards, until the business fully complies.

These fines shall only accumulate daily starting on the 45th day from the time that the Commission's ruling, order, or decision was received.

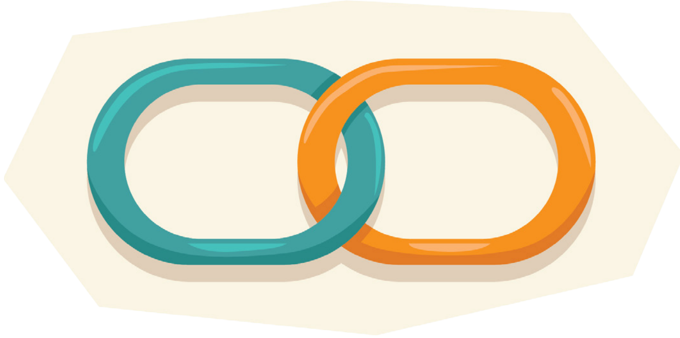
iii. **Fines for the supply of incorrect or misleading information.**

This fine is applicable to any entity that intentionally or negligently supplies incorrect or misleading information on any document, application, or other paper filed with or submitted to the Commission; or supplies incorrect or misleading information in an application for a binding ruling, a proposal for a consent judgment, proceedings relating to a show cause order, or application for modification of the Commission's ruling, order, or approval, as the case may be.

iv. **Fines worth at least PHP50,000 for any other violations not specifically penalized under the relevant provisions of the PCA.**

This schedule of fines shall be increased by the Commission every five years to maintain their real value from the time it was set.

WHAT IS A BINDING RULING?



A binding ruling is a decision rendered by the PCC that determines if an entity's contemplated act, conduct, agreement, or decision complies with, is exempted from, or is in violation of any provision of the PCA, its IRR, and other competition laws. It is issued, upon written request of any entity, when no prior complaint or investigation has been initiated yet on the subject act, conduct, agreement, or decision; provided that, such ruling is for a specified period, subject to extension as may be determined by the Commission, and based on substantial evidence.

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Ensuring businesses compete and consumers benefit

Contact Us

The Philippine Competition Commission is open Mondays through Fridays, from 9:00 a.m. to 5:00 p.m. Submissions of notifications and complaints are accepted during these hours.