PHILIPPINE COMPETITION COMMISSION

Ensuring businesses compete and consumers benefit

GUIDE

Why competition is good for your business

Disclaimer

This document is not a substitute for the Philippine Competition Act (PCA) or its Implementing Rules and Regulations. In explaining the law, generalizations were made, and the examples given do not in any way restrict the enforcement or other powers of the Philippine Competition Commission (PCC). This document should not be taken as legal advice. If you have any doubt as to how you may be affected by the PCA, please consult a lawyer or contact us through queries@phcc.gov.ph.

Contents

Introduction 5

- Does the Philippine Competition Act (PCA) apply to your business?

Anti-Competitive Agreements 7

- Which agreements are prohibited under the PCA?
- Are all interactions between competitors necessarily collusive?

Abuse of Dominance 18

- When is a business considered dominant in the market?
- Is it illegal to be dominant?
- When can a business be held liable for abusing its market dominance?

Enforcing the PCA 26

- What will trigger an inquiry or investigation?

Anti-Competitive Mergers & Acquisitions 30

- Are all businesses required to notify PCC of impending M&As?

Competitionary 45

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 by the PCA 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.

Does the Philippine Competition Act (PCA) apply to your business?

Commercial activity

The 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.

Anti-competitive agreements

Which agreements are prohibited under the PCA?

As a general rule, the 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 happens when competitors agree on the prices of goods or services, rather than independently setting their respective prices.

CASE 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.

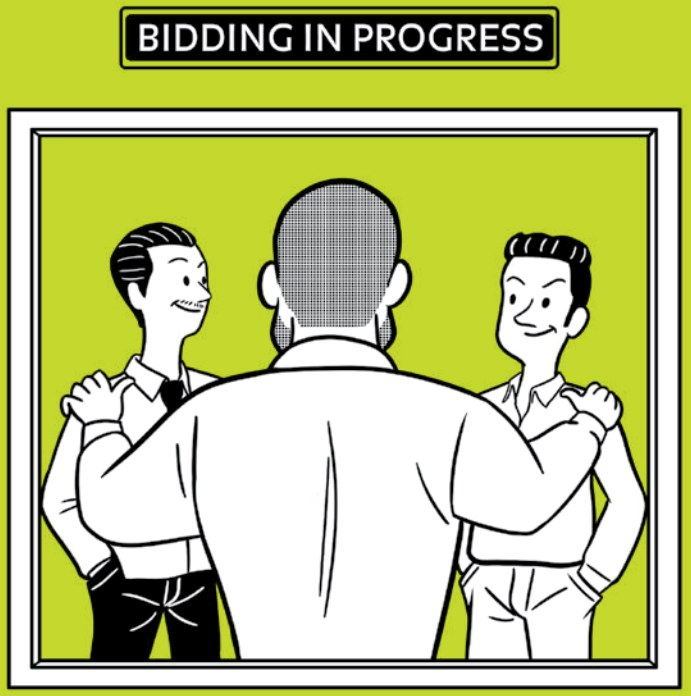
Aiming to penetrate the e-book market, Apple Inc. colluded with five major publishers to help it enter the market by launching its iPad tablet and iBookstore feature. It successfully encouraged all publishers to adopt an agency pricing model (i.e., publisher dictates the retail price, while the retailer 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 was ordered to pay USD450 million to the affected parties as settlement. Customers who purchased e-books from Apple 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

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 coordinate their bids rather than submit independent proposals.



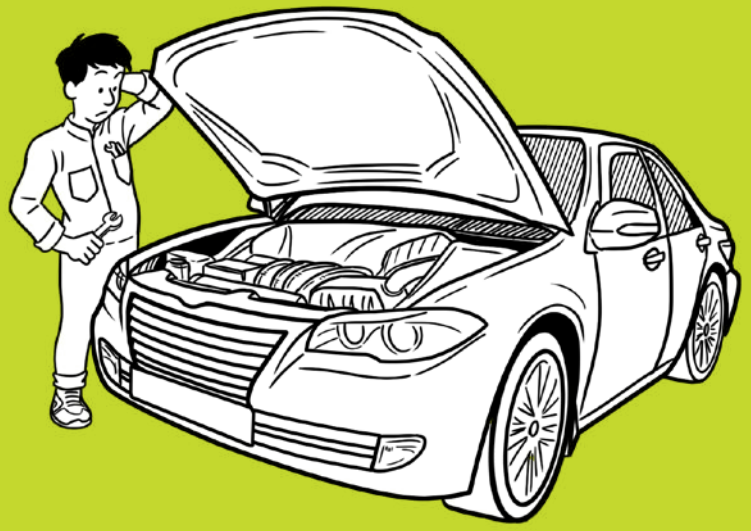
CASE Bid-rigging cartels in Canada's automobile industry, 2013

In 2013, the Ontario Superior Court of Justice fined a Japanese automobile parts company CAD5 million for conspiring with other suppliers to rig the bids for the supply of parts to the 2001 and 2006 Honda Civic models fabricated in Canada.

Furukawa Electric Co., Ltd., 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. When Honda called for supplier quotes, Furukawa coordinated with its Japan-based competitors regarding their price quotations or bids.

These meetings resulted in an arrangement whereby Furukawa would earn the contract for the tender. Consequently, Furukuwa was awarded the contract to supply the automobile parts of the 2001 and 2006 models of the Honda Civic. From 2000 to 2005, the estimated sales amounted to CAD16.5 million.

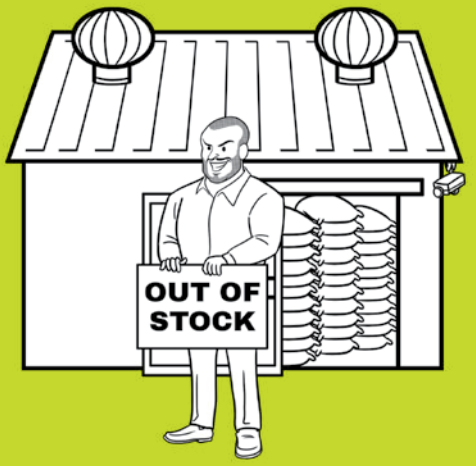
The Competition Bureau learned of the international bid-rigging conspiracy through its Leniency Program, where Furukawa offered to help the Bureau in the investigation of the case, which started in 2009.



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

Supply restriction

This is an agreement by two or more competing businesses to set or limit production levels and create an artificial supply shortage, thereby raising prices. Similar forms of anti-competitive agreements include restrictions in markets, technical development and investment.



CASE Output restrictions in India's cement industry

Ten cement manufacturing companies were found guilty of artificially restricting their output, which led to price hikes of cement products across 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.

Market sharing

This is a collusive agreement by two or more competing businesses to divide or allocate the market. Market sharing not only includes territories, but also customers, volume of sales or purchases, and type of goods or services, among other considerations.

CASE Market allocation by 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 (i.e., Quantum Pharmaceutical Limited and Total Medication Management), and Lloyds Pharmacy Limited, 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 fined Hamsard the amount of GBP387,856; however, under its Leniency Program, OFT 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. March 20, 2014. Case CE/9627/12.

What is a relevant market?
According to Rule 5 of the Implementing Rules and Regulations of the PCA, the following factors help determine the relevant market:

- Possibilities of substituting goods and services with other domestic or foreign products, considering technological possibilities, availability of substitute products to consumers, and the time required for such substitution;
- Cost of distribution of goods and services, along with its raw materials, and supplements and substitutes from other areas and abroad, considering freight, insurance, import duties, and non-tariff restrictions; the restrictions imposed by economic agents or by their associations; and the time required to supply the market from those areas;
- Cost and probability of users or consumers seeking other markets; and
- National, local or international restrictions which limit the access by users or consumers to alternate suppliers, or the access by suppliers to alternate consumers.

Are all interactions between competitors necessarily collusive?

No. There are 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 law. However, these venues can provide competitors an opportunity to discuss and exchange business information and enter into anti-competitive agreements. Whenever competitors communicate 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.

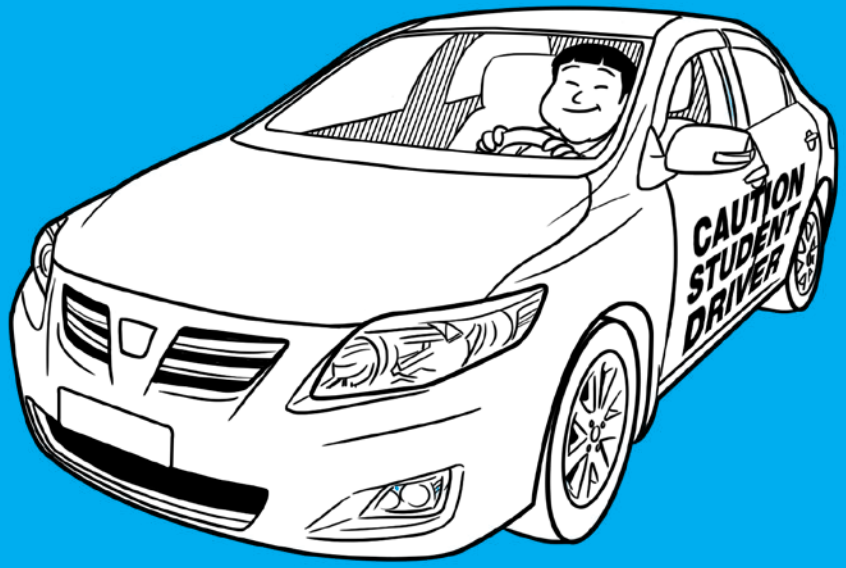
Joining trade associations does not make businesses liable for violation of antitrust law. While the PCA does not prohibit the existence and operation of trade associations, businesses which engage in cartel-like activities through trade associations will be penalized under the law.

What are cartels?
A cartel involves businesses in the same industry colluding with one another to substantially prevent, restrict, or lessen competition by entering into agreements to fix prices, rig bids, restrict output, and allocate markets, among others.

CASE Price fixing among three driving school associations in China, 2012
Three driving school associations imposed pricing schemes on their members, as shown in the investigation 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 to no more than 15 percent, or lower to no 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 Provincial Price Bureau Investigation into three driving school associations for price fixing.

Abuse of dominance

When is a business considered dominant in the market?

Under Rule 8, Sec.1 of the Implementing Rules and Regulations of the PCA, dominance can exist either on the part of one firm (single dominance) or of two or more firms (collective dominance).

In determining whether a business has a market dominant position, the Commission will consider the following factors:

- The firm's share in the relevant market and whether it can fix prices on its own or restrict supply in the relevant market;
- The competitors' shares in the relevant market;
- Existence of barriers to entry and the elements which could change both the barriers and the supply from competitors;
- Existence and power of competitors;
- Credible threat of future expansion by competitors or entry by potential competitors;
- Market exit of competitors;
- Bargaining strength of customers;
- 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 market behavior;
- Ownership, possession, or control of infrastructure which are not easily duplicated;
- Technological advantages or superiority, compared to other competitors;
- Access to capital markets or financial resources;
- Economies of scale and scope;
- Vertical integration; and
- Existence of a highly developed distribution and sales network.

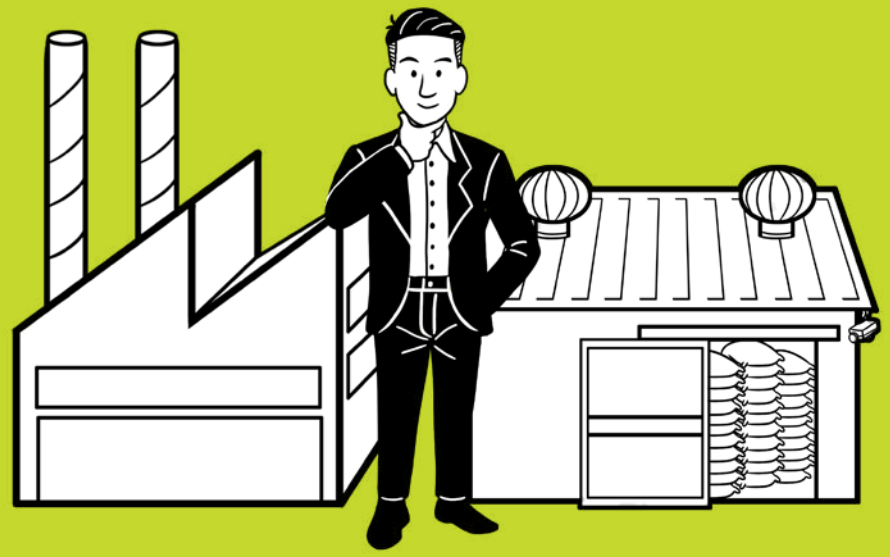
"There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least fifty percent (50%), unless a new market share threshold is determined by the Commission for that particular sector."

-Rule 8, Sec. 3 of the Implementing Rules and 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:

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



When can a business be held liable for abusing its market dominance?

Section 15 of the PCA prohibits entities 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:

- **x** Selling goods or services below cost to drive competition out of the market
- **x** Imposing barriers to entry or committing acts that prevent competitors from growing within the market
- **x** Making a transaction subject to acceptance by other parties who have no connection to the transaction
- **x** Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services
- **x** 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 are fixing prices, giving preferential discounts or rebate, or imposing conditions not to deal with competing firms, if such restrictions will prevent, restrict or lessen competition
- **x** Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier
- **x** 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)
- **x** Imposing unfair purchase or selling price on competitors, customers, suppliers or consumers
- **x** Limiting production, markets or technical development to the prejudice of consumers

CASE Predatory pricing among newspapers in the United States, 2010

A newspaper company was sued for selling advertisement spots at below cost to drive away small 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 money. 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 despite incurring 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 on 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

CASE Excessive pricing by pharmaceutical firms in the United Kingdom, 2012

Immediately after price caps were lifted, pharmaceutical companies Pfizer and Flynn Pharma abused their dominance in the healthcare market by jacking up prices for anti-epilepsy drugs by 2,600 percent.

Previously, Pfizer directly sold to wholesalers and pharmacies at a 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 780-1,600 percent higher than its offer to previous distributors. In turn, Flynn distributed the drug to U.K. wholesalers and pharmacies at prices 2,300-2,600 percent higher than what they previously charged.

In 2016, the Competition and Markets Authority 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 cut prices.

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

CASE Imposing barriers to entry in New Zealand's medical industry, 1997

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

In 1996, Southland Health had a backlog in performing cataract operations. Since it received additional funding, Southland Health negotiated with two Australian ophthalmologists to perform the surgeries. However, the local eye surgeon opposed this and colluded with other South Island-based ophthalmologists to protect their financial standing in the market. They then 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 their 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 Commerce Commission for its legal expenses worth NZD467,870.

Source: Commerce Commission v. Ophthalmological Society of New Zealand. 2004. 10 T.C.L.R. 994.

The Philippine Competition Act marks the realization of a decades-long legislative struggle for comprehensive competition reform.

Enforcing the PCA

What will trigger an inquiry or investigation?

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

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

What should a business do if it is under investigation for possible violation of the PCA?

Comply with the orders of the Commission

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

The PCC may require personal apperance before the Commission, summon witnesses, and issue interim orders (i.e., injunctions, cease and desist orders, etc.).

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

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

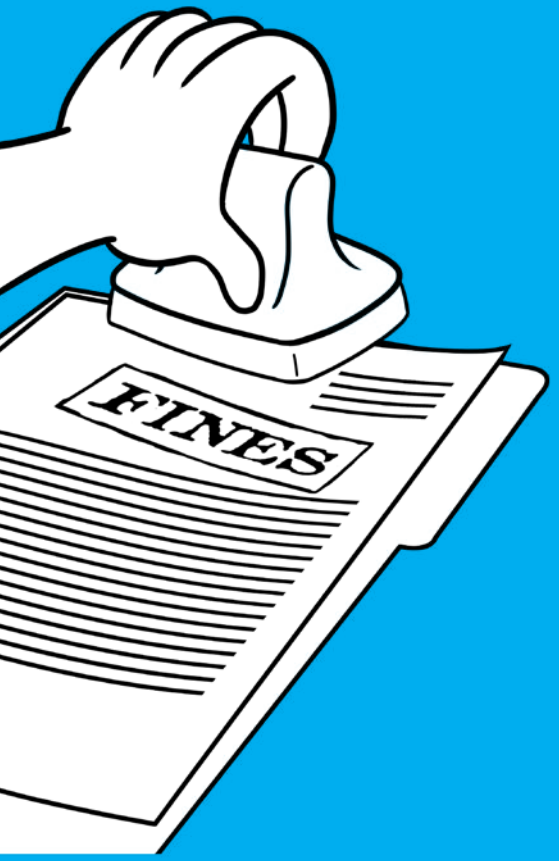
The PCC may issue an order (i.e., *subpoena duces tecum* and *subpoena ad testificandum*) to require the production of books, records, or other documents or data, which relate to any matter relevant to the investigation. Providing false and misleading information can result in penalties.

Can a business appeal the decision of the PCC?

Decisions of the Commission can be appealed before the Court of Appeals in accordance with the Rules of Court (Section 39 of the PCA).

What fines and penalties will be meted for violations of the PCA?

The PCA imposes four kinds of administrative penalties as follows:



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

In fixing the amount of fines, the Commission shall consider both the gravity and duration of the violation. In cases involving basic necessities and prime commodities as defined in the Price Act of 1992 (Republic Act No. 7581), the final fine shall be tripled.

Fines ranging from PHP50,000 to PHP2 million 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.

Fines of up to PHP1 million for the supply of incorrect or misleading information

This fine is applicable to any entity that wittingly or unwittingly supplies incorrect or misleading information in 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.

Fines worth at least PHP50,000 for any other violation 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 they were set.

Can a business consult the PCC if it suspects that its contemplated transaction violates the PCA?

Yes. Businesses can approach the PCC for queries. Under Sec. 37 (a) of the PCA, the Commission can be requested, in writing, to render a binding ruling, provided that it is for a specified period, subject to extension as may be determined by the Commission, and based on substantial evidence.

If the Commission issues an adverse binding ruling, the applying entity will be given up to 90 days to abide by the ruling and shall not be subject to administrative, civil, or criminal action, unless the applicant fails to comply with the provisions of the PCA.

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 consumers. Anti-competitive M&As, especially those that create companies with dominant market power, could 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 PCC of impending M&As?

Parties to a merger or acquisition agreement where the size of transaction (SoT) and size of person/party (SoP) exceed the thresholds set annually by the PCC, pursuant to PCC Memorandum Circular No 18-001, are required to notify the PCC of such agreement before consummating the transaction.

PCC MC No 18-001, released in 2018, provides for the annual adjustment of thresholds for compulsory notification based on the nominal gross domestic product (GDP) of the previous year[1].

Joint ventures of private entities formed for a solicited public-private partnership (PPP) project may be exempted from compulsory notification. For more information on the process, PCC Memorandum Circular No. 19-001 can be accessed at *https://phcc.gov.ph/pcc-mc19-001-exemption-solicited-ppp-projects/.*

What are SoT and SoP?
Section 3 of the PCA Implementing Rules and Regulations defines transaction value on the basis of the size of transaction (SoT) or the value of the assets or revenues of the acquired entity, and the size of person/party (SoP) or the value of assets or revenues of the ultimate parent entity (UPE) of at least one of the parties, including entities it controls.

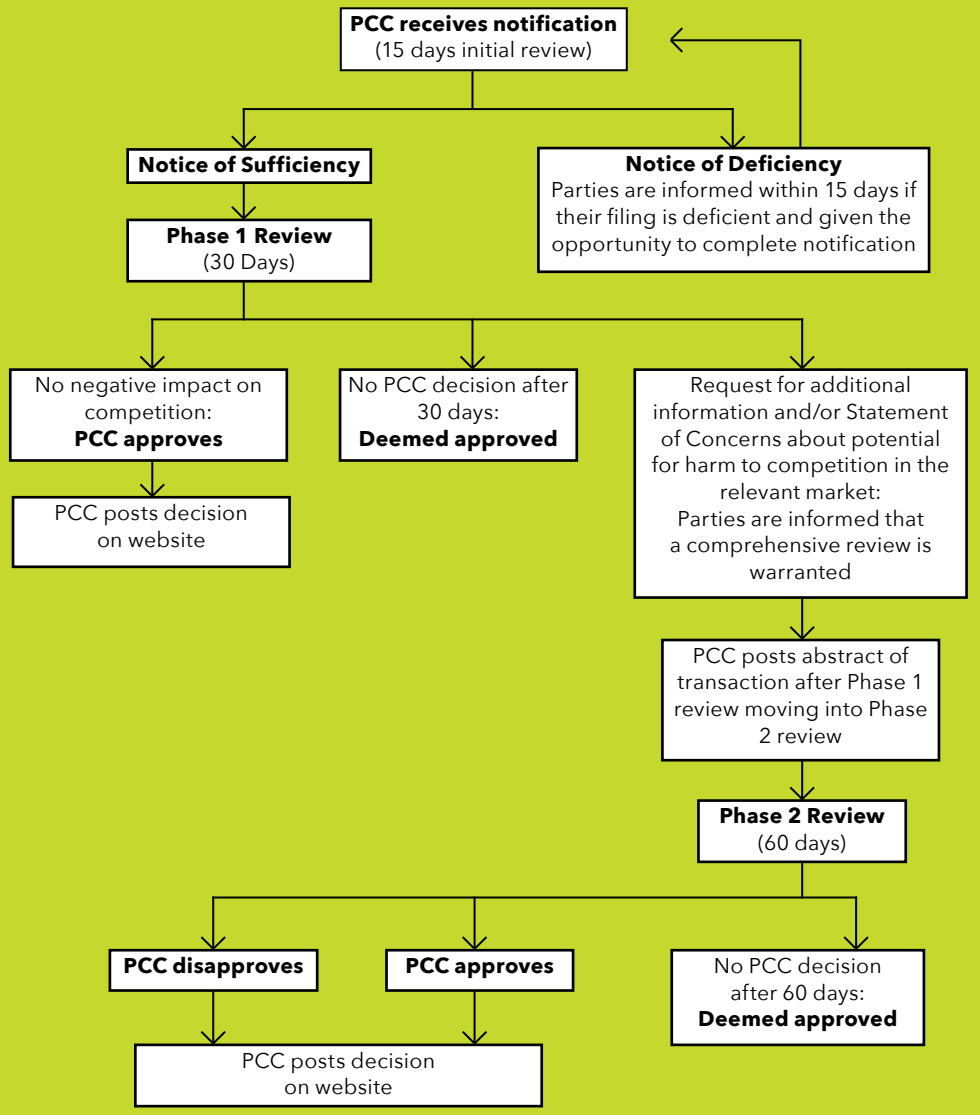
[1] Sec. 19 (a) of the PCA authorizes the PCC to revise the thresholds.

What is the procedure for notification and review of M&As?

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:

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

Procedure for Notification



[1] Notification Each party to an M&A that requires notification shall submit a Notification Form together with the information and documents required thereby and pay the filing fee. Submission of the Notification Form must be made within 30 days from signing the definitive agreement.

[2] Determination of Sufficiency After the merging parties submit the accomplished Notification Form, the PCC has 15 days to determine if the Form and other requirements have been completed in accordance with its rules and guidelines.

[3] Review After informing the parties of sufficiency, Phase 1 review begins. It is a 30-day assessment wherein the PCC shall determine 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 transaction shall proceed to Phase 2 review. The 60-day period for a Phase 2 review commences on the day after service of a Phase 2 Notice to the parties.

Should the PCC determine that a Phase 2 review is necessary, payment of an additional filing fee of one percent of one percent of the transaction value is required. For example, if the transaction value is PHP20 billion, the filing fee amounts to PHP2 million. The filing fee shall not be less than PHP1 million nor more than PHP5 million.

The entire period for the review of a transaction must not exceed 90 days from the time the submitted Notification Forms were deemed sufficient.

[4] Release of Commission Decision Should the Commission fail to decide or complete its analysis within 30 days (for Phase I) or within the additional 60-day period (for Phase II), 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 PCA or its Rules and Regulations, except when such ruling was obtained based on fraud or false material information.

What is an expedited merger review process?

In line with Philippine government efforts to improve ease of doing business in the country, the PCC launched an expedited review process for M&As.

Under the rules that took effect on July 2, 2019, expedited review for qualified M&A transactions will take only 15 working days, down from the 30 calendar-day turnaround time for regular Phase 1 review prescribed by the PCA.

Expedited review will be available to four (4) types of transactions:

- Parties with no actual or potential overlapping business relationships;
- Foreign entities whose subsidiaries in the Philippines only act as manufacturers or assemblers of products, at least 95% of which are exported;
- Parties with a global scale but with negligible or limited presence in the Philippines; and
- Joint ventures formed purely for the construction and development of residential and/or commercial real estate projects.

Merging parties may apply for the expedited review within 30 days after signing the definitive agreement on the deal, but prior to any acts of consummation.

The full text of the PCC Rules on Expedited Merger Review can be accessed at *https://phcc.gov.ph/expedited-merger-review-rules/.*

What criteria is used in reviewing M&As?

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 from third parties, such as suppliers and customers, among other sources.

The PCC uses the gathered information to determine which markets will be affected by the transaction. The agency looks into the number of actual and potential players in those markets, and their respective market shares, among others. Besides the number of competitors, other factors to consider may include the following: barriers to entry, current level of competition, switching costs (e.g., pre-termination fees, early contract termination fees) for consumers, the elimination of a maverick, and the potential for collusion.

Current level of competition

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

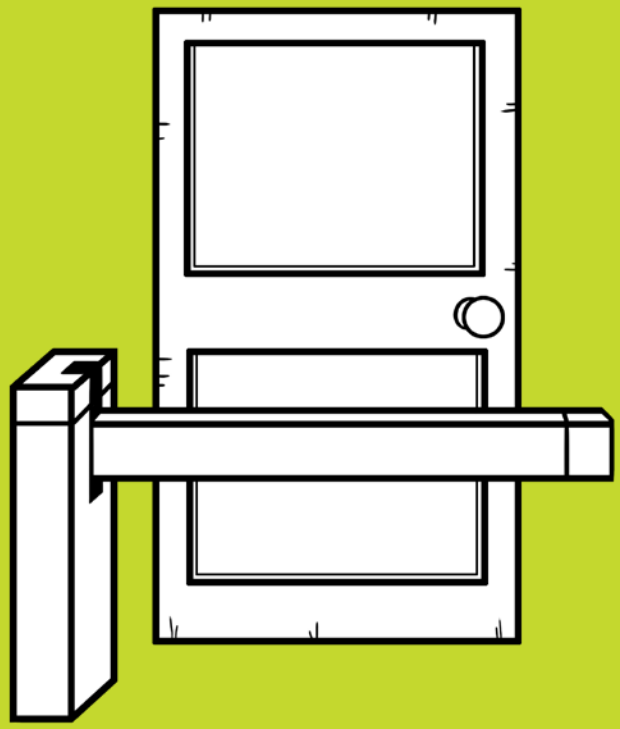
Number of competitors in a market

A market of few players raises a concern, since any merger will reduce the number of competitors. This gives any of the surviving entities more leverage in deciding on the price and/or supply of goods in that market, possibly at the expense of customers who now have fewer options before them.

Barriers to entry

Barriers to entry are factors which prevent or deter new competitors from entering a market. These include regulation, ownership restrictions, high cost of initial investments, and cost advantage of incumbent firms, among others. The higher the barriers to entry, the more circumspect a competition authority will be in approving a merger in a market of few players.

Actual and perceived switching costs (e.g., pre-termination fees, early contract termination fees) 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.



Elimination of a maverick

In markets where a market participant has become a maverick – i.e. a creator of competition – there is an incentive for established players to try and remove this competitor by simply acquiring 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 acquiring the maverick will help them recover lost customers and market share. Acquiring a maverick takes away the pressure of having to invest in technological upgrades and improvements. This is convenient for competitors, but disadvantageous to 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 fewer competitors with similar market shares, the potential for collusion, and therefore the threat to competition, is much higher.

How does PCC classify information in the course of M&A review?

The PCC classifies as confidential any information regarding the operations, production, sales, shipments, purchases, transfers, customer identity, inventories, or amount or source of any income, profits, losses, expenditures, as submitted by notifying parties, that were submitted by entities relevant to any inquiry or investigation as well as any deliberation in relation thereto. The PCC may also require the notifying parties to identify any part of a decision or case summary, if any, which contains confidential information.

Under Rule 4, Sec. 13 of the Implementing Rules and Regulations of the PCA, notifying parties who supplied information and documents to the PCC must clearly identify any confidential business information, provide a justification for such request, and submit a separate non-confidential version.

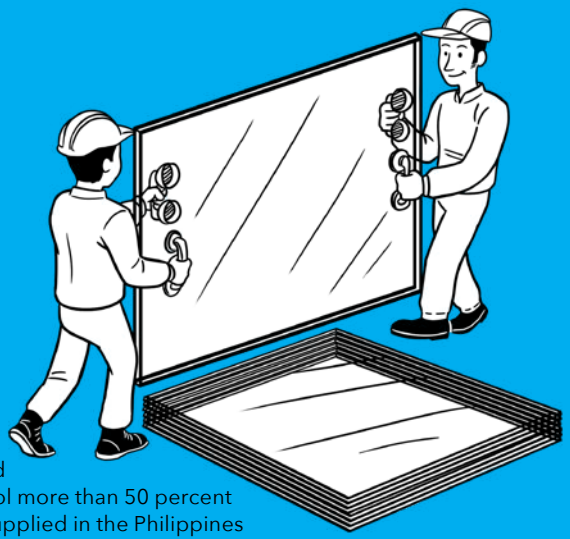
Information identified as confidential by the entities will not be published in any of the Commission's issuances (e.g., notices, bulletins, and rulings). However, the confidentiality rule does not apply when the notifying parties consented to the disclosure or when a court or regulatory agency orders the disclosure of the information.

In cases where the M&A in question is under review in multiple jurisdictions, notifying parties may waive the said confidentiality protection to allow the Commission to exchange otherwise protected information with competition authorities in other countries.

What happens if a proposed M&A is found to be anti-competitive?

If it finds a merger or acquisition could substantially prevent, restrict, or lessen competition in the market, the PCC can prohibit or impose conditions on the merger or acquisition. Alternatively, the merging parties can propose voluntary commitments meant to curtail the anti-competitive effects of the transaction. If the Commission accepts these commitments, then the transaction can proceed, on condition that the PCC will monitor the parties post-merger to determine if they have followed through on those commitments.

CASE Voluntary commitments by dominant flat glass manufacturers in Philippines, 2017



In 2017, the PCC accepted voluntary commitments from TQMP Glass Manufacturing Corp. (TQMP) as a precondition to TQMP's acquisition of AGC Flat Glass Philippines, Inc. (AGPH), the sole domestic manufacturer of clear and bronze flat glass. The said commitments prevent TQMP from engaging in anti-competitive conduct such as restricting supply to competitors of its related entities.

The PCC found that, after acquisition of AGPH, TQMP and its related entities would control more than 50 percent of clear and bronze flat glass supplied in the Philippines either via importation or domestic manufacture. PCC also noted that TQMP had the ability and incentive to increase prices of clear and bronze flat glass supplied to competitors of its related entities post-acquisition, as TQMP had related entities involved in the downstream industries of glass processing and distribution.

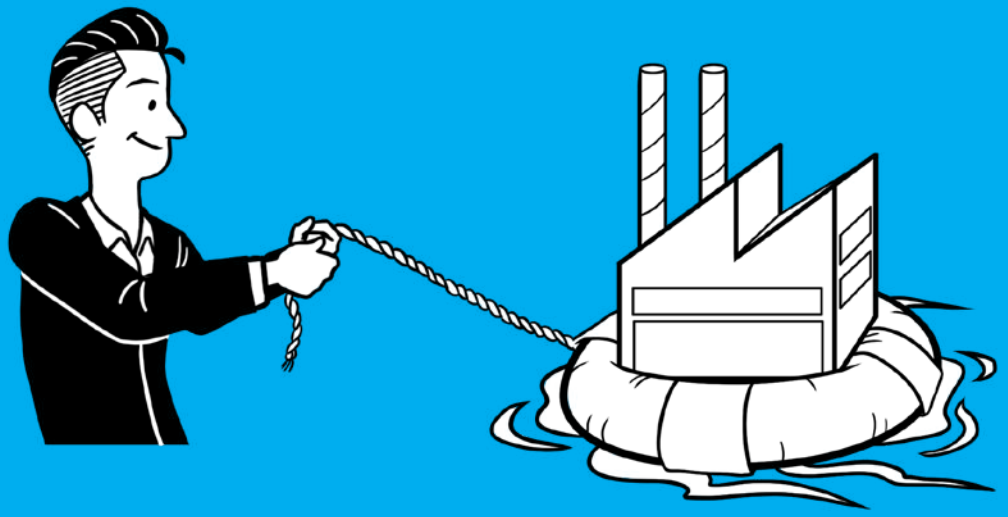
The PCC approved the said acquisition on the basis of the following voluntary commitments offered by TQMP:

- TQMP shall cause AGPH to set prices and provide services to customers in a fair, reasonable, and non-discriminatory manner, and maintain a non-discriminatory practice in the processing of purchase orders and delivery of products and services;
- TQMP shall cause AGPH to sell its products or services to glass distributors on terms no less favorable than similarly situated customers despite such entity being a competitor of a related entity of TQMP; or such entity purchasing products or services from the competitors of AGPH;
- TQMP shall not impose discounts or rebates that are exclusionary or result in foreclosure. Discounts or rebates shall be made known to customers; and
- TQMP shall report to the PCC, in an expeditious manner, any application with any government agency for the imposition or extension of any duties or quotas that may affect the prices of imported clear or bronze flat glass.

The PCC also required the parties to submit reports to monitor the results of the acquisition.

Source: Philippine Competition Commission. 2018. Handbook on CPL in ASEAN for Business 2017: Philippines case study.

Can an M&A that substantially lessens competition still be allowed?



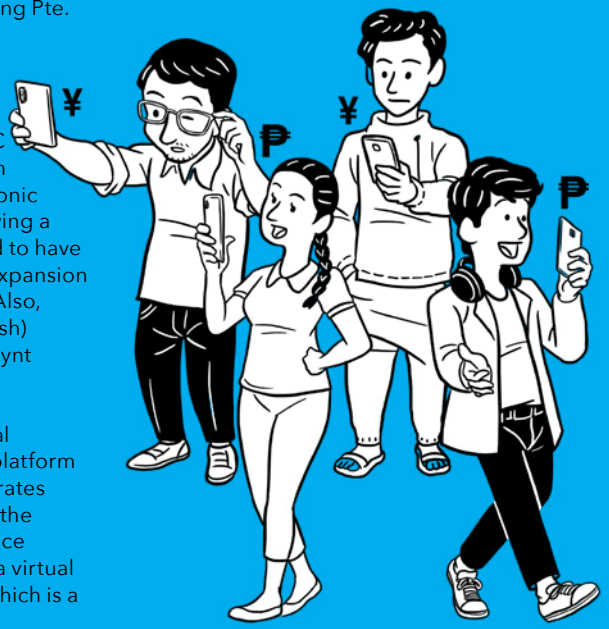
M&A agreements which substantially lessen competition may be allowed if the parties are able to prove that (a) the concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or are likely to result from 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 Efficiency gains of digital finance acquisition in the Philippines, 2017

In 2017, Alipay Singapore Holding Pte. (Alipay) proposed to acquire Globe Fintech Innovations, Inc. (Mynt).

After its Phase I review, the PCC flagged a potential competition concern in the non-bank electronic money market. However, following a Phase 2 review, Mynt was found to have no incentive to block entry or expansion of other players in the market. Also, other payment options (e.g., cash) limit the market power which Mynt may exercise.

Alipay is owned by Ant Financial Group, which provides digital platform on financial services. Mynt operates G-Xchange Inc., which handles the "G-cash," a micropayment service making the mobile phone into a virtual wallet; and Fuse Lending Inc, which is a tech-based lending company.



Source: Philippine Competition Commission. August 23, 2017. Acquisition by Alipay Singapore Holding Pte. Ltd. of shares in Globe Fintech Innovations Inc. Commission Decision No. 21-M-005-2017

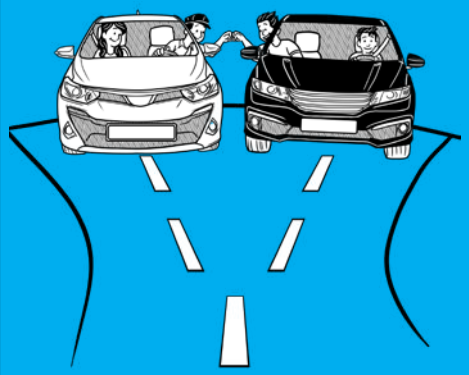
If a transaction requires no notification, can the PCC still review it?

Yes. The PCC has the authority to review or investigate, *motu proprio* or on its own initiative, any transaction that may result in substantial lessening or restriction of competition in a market. *Motu proprio* means that, even without notification, the PCC may commence a review on its own initiative.

CASE Merger of dominant ride-hailing firms in the Philippines, 2018

In 2018, the PCC began a *motu proprio* review of the acquisition by ride-hailing service provider Grab Holdings, Inc. (GHI) and MyTaxi.PH, Inc. (MTPH) of its competitor, Uber B.V. (UBV) and Uber Systems, Inc. (USI).

PCC's Mergers and Acquisitions Office issued a Statement of Concerns (SOC) in May. The competition concerns flagged by the SOC included price increases and service deterioration arising from the merger of the country's two biggest ride-hailing apps. Amid the review, Grab offered to address the competition concerns, which were the basis of PCC's subsequent decision clearing the merger subject to conditions.



In its Commitment Decision, the PCC emphasized that any breach of the conditions will subject Grab to fines of up to PHP2 million per breach, if not the unwinding of the transaction. Violations or arrangements intended to circumvent the application of the commitments may likewise result in appropriate penalties on the parties.

To ensure that the quality of service and pricing of Grab is not unreasonably different before and after it acquired Uber, the PCC issued a commitment decision detailing Grab's undertaking to address competition issues, namely: service quality commitment, fare transparency commitment, commitment on pricing, removal of "see destination" feature, driver/operator non-exclusivity commitment, incentives monitoring commitment, and improvement plan commitment.

The offer of voluntary commitments made by Grab led to the suspension of the *motu proprio* merger review that started in April.

Source: Philippine Competition Commission. August 10, 2018. PCC binds Grab to service quality, price conditions for Uber takeover.

Competitionary

Acquisition refers to 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 refers to 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 such as those entered into by suppliers, manufacturers, distributors, and retailers. Examples of vertical agreements would be distribution agreements, agency agreements, or franchising agreements.

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

Conduct refers to any type or form of undertaking, collective recommendation, independent or concerted action or practice, whether formal or informal.

Confidential business information refers to information which concerns or relates to the operations, production, sales, shipments, purchases, transfers, customer identity, inventories, or amount or source of any income, profits, losses, expenditures of parties to an M&A.

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

Dominant position refers to 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 refers to 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 refers to the group of goods or services that are sufficiently interchangeable or substitutable and the object of competition, and the geographic area where said goods or services are offered.

Market sharing refers to 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.

Merger refers to the joining of two or more entities into an existing entity or to form a new entity.

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

Relevant market refers to 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:

Relevant product market comprises all those 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.

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.

Supply restriction refers to 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 investment.

Report violations

of the PCA

If you know of any business that is behaving in an anti-competitive manner, report to PCC by calling **87719 722** or by emailing **queries@phcc.gov.ph**. You may also come to our office at 25/F Vertis North Corporate Center 1, North Avenue, Quezon City 1105.

Do you want to learn more about competition policy and law? You may download other publications from www.phcc.gov.ph.

Contact Us

The Philippine Competition Commission is open Mondays through Fridays, from 8:00 a.m. to 5:00 p.m.

Submissions of notifications and complaints are accepted during these hours.

25/F Vertis North Corporate Center 1, North Avenue,
Quezon City 1105

(+632) 8771-9PCC (+632 8771-9722)

www.phcc.gov.ph

queries@phcc.gov.ph

Philippine Competition Commission

@CompetitionPH