

 THE PHILIPPINES

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The Philippines adopts a sectoral approach to competition policy and law enforcement with over 30 competition laws, industry-specific and consumer welfare laws addressing competition-related practices. The main sources are as follows:

1. The 1987 Constitution;
2. The Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247);
3. The Revised Penal Code (Act No. 3815), as amended;
4. The New Civil Code (Republic Act No. 386);
5. Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (Republic Act No. 4152); and
6. Executive Order No. 45, series of 2011, Designating the DOJ as the Competition Authority.

To whom does it apply?

The provisions of the Revised Penal Code, as amended, apply to **“any person”**. Special laws and statutes also apply to “any person”, while other civil and administrative provisions address both natural and legal persons.

Which practices does it cover?

The above legislations cover anti-competitive practices, both multilateral (such as combina-

tions in restraint of trade) and unilateral (such as monopolization, hoarding, profiteering).

Are there proposals for reform?

Recognizing the need to promote competition and level the playing field, President Benigno S. Aquino III signed Executive Order No. 45, series of 2011, designating the Department of Justice as the Competition Authority. E.O. No. 45 created the Office for Competition (OFC) under the Secretary of Justice to carry out, among others, the duty and responsibility to investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade.

Legislative efforts toward the adoption of a comprehensive competition law continue. The 15th Congress beginning in June 2010 saw the filing of several bills seeking to bring under one body authority over competition matters. The Senate had consolidated the various versions of the bills filed in its chamber with the DOJ serving as the competition authority. The House of Representatives had also consolidated bills seeking to establish a Commission.

The Authorities

Who is the enforcement authority?

Executive Order No. 45 designated the DOJ as the country’s competition authority and established the OFC. The sector regulators will continue to enforce their respective sector’s competition policies.

The functions of the DOJ-OFC under E.O. 45 are the following:

1. Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade;
 2. Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;
 3. Supervise competition in markets by ensuring that prohibitions and requirements of competition laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;
 4. Monitor and implement measures to promote transparency and accountability in markets;
 5. Prepare, publish and disseminate studies and reports on competition to inform and guide the industry and consumers; and
 6. Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements.
2. Electric Power Industry Reform Act - Energy Regulatory Commission (ERC);
 3. Public Telecommunications Policy Act - National Telecommunications Commission (NTC);
 4. Revised Charter of the Philippine Ports Authority - Philippine Ports Authority (PPA)
 5. Domestic Shipping Development Act - Maritime Industry Authority (MARINA);
 6. Consumer Act and Price Act - Department of Trade and Industry (DTI);
 7. Tariff and Customs Code of the Philippines - Tariff Commission (TC);
 8. Securities Regulation Code, Corporation Code and Revised Securities Act - Securities and Exchange Commission (SEC);
 9. Civil Aeronautics Act - Civil Aeronautics Board (CAB);
 10. New Central Bank Act - Bangko Sentral ng Pilipinas (BSP);
 11. Insurance Code - Insurance Commission (IC); and
 12. National Food Authority Act - National Food Authority (NFA).

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

Yes. Enforcement of competition-related laws/statutes and, consequently, regulation or monitoring of unfair trade practices and anti-competitive behaviour is vested in different agencies as mandated by several laws, some of which are the following:

1. Downstream Oil Industry Deregulation Act - Department of Energy (DOE);

Anticompetitive practices

Agreements

Which agreements are prohibited?

Article XII, Section 19, of the Constitution establishes that “the State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or un-

fair competition shall be allowed". It constitutes a statement of public policy on monopolies and on combinations in restraint of trade.

Article 186 of the Revised Penal Code, as amended, sanctions:

- "any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market".
- "any person who [...] shall combine with any other person or persons to monopolize and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market".
- "any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, or imported merchandise or object of commerce is used".

The Supreme Court has defined "combination in restraint of trade" as "an agreement or under-

standing between two or more persons, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority" (Francisco S. Tatad vs. The Secretary of the Department of Energy and the Secretary of the Department of Finance, G.R. No. 124360, November 5, 1997, and Edcel C. Lagman, et al. vs. Hon. Ruben Torres, et al., G.R. No. 127867, November 5, 1997). The concept of restraint of trade embraces "acts, contracts, agreements or combinations which restrict competition or obstruct due course of trade" (Avon Cosmetics Inc., et. al. vs. Leticia H. De Luna, G.R. No. 153674, December 20, 2006). The Supreme Court has also specified that "where two or three or a few companies act in concert to control market prices and resultant profits, the monopoly is called an oligopoly or cartel. It is a combination in restraint of trade" (Congressman Enrique Garcia vs. Hon. Renato Corona, G.R. No. 132451, December 17, 1999).

In addition, Section 5, Paragraph 3, of the Price Act prohibits "cartels", which are defined as "any combination of or agreement between two or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price".

Furthermore, Section 11 of the Downstream Oil Industry Deregulation Act prohibits "cartelization", defined as "any agreement, combination or concerted action by refiners, importers and/or dealers, or their representatives, to fix prices, restrict outputs or divide markets, either by products or by areas, or allocate markets, either by products or by areas, in restraint of trade or free competition, including any contractual

stipulation which prescribes pricing levels and profit margins”.

Which agreements may be exempted?

Combinations in restraint of trade are illegal per se. No exemption is allowed.

Is there any formal notification requirement and to which authority should a notification be made?

There are no notification requirements.

Monopoly and dominant position

Is monopoly or dominant position regulated?

Article XII, Section 19, of the Constitution provides that the State shall regulate or prohibit monopolies when the public interest so requires. Therefore, it does not prohibit monopolies per se, but requires a previous determination as to whether the public interest requires a monopoly.

Article 186(2) of the Revised Penal Code, as amended, sanctions “any person who shall monopolize any merchandise or object of trade or commerce”.

None of the applicable provisions refers to a dominant position. A special case exists, however, for the energy sector. Section 45 of the Electric Power Industry Reform Act mandates the regulator to enforce the following safeguard: “No company or related group can own, operate or control more than thirty percent (30%) of the installed generating capacity of a grid and/or twenty-five percent (25%) of the national installed generating capacity. “Related group” includes a person’s business interests, including its subsidiaries, affiliates, directors or officers or any of their relatives by consanguinity or affinity, legitimate or common law, within the fourth civil degree”.

What is a monopoly or a dominant position?

The Supreme Court has defined monopoly as „a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of a particular commodity” (Demosthenes Agan vs. Philippine International Air Company, et.al., G.R. No. 155001,155407, 15566, May 5, 2003).

When are monopoly and dominant positions prohibited?

According to Article XII, Section 19 of the Constitution, it is for the government (“the State”) to prohibit specific monopolies, based on the public interest. Article 186(2) of the Revised Penal Code, as amended, prohibits monopolization without exceptions. The Supreme Court has made it clear that “monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public”, and has specified that “a determination must first be made as to whether public interest requires a monopoly. As monopolies are subject to abuses that can inflict severe prejudice to the public, they are subject to a higher level of state regulation than an ordinary business undertaking” (Agan case, quoted above).

Can abuses of monopoly or dominant position be exempted?

To reiterate, the Revised Penal Code, as amended, prohibits monopolization without exceptions.

Other unilateral practices

Section 5 of the Price Act prohibits:

- Hoarding, which is defined as “the undue accumulation by a person or combination of persons of any basic commodity beyond his or their normal inventory levels or the unreasonable limitation or refusal to dispose of, sell or distribute the stocks of any basic necessity of prime commodity to the general public or the unjustified taking out of any basic necessity or prime commodity from the channels of reproduction, trade, commerce and industry” (Paragraph 1); and
- Profiteering, which is defined as “the sale or offering for sale of any basic necessity or prime commodity at a price grossly in excess of its true worth”.

Section 11 of the Downstream Oil Industry Deregulation Act prohibits predatory pricing, defined as “selling or offering to sell any oil product at a price below the seller’s or offeror’s average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market”. However, pricing below average variable cost in order to match the lower price of a competitor and not for the purpose of destroying competition is not deemed to be predatory pricing.

Merger control

Mergers of listed companies require the prior approval of the Securities and Exchange Commission (SEC) before becoming effective. Title IX of the Corporation Code of the Philippines prescribes the process for mergers and consolidations. In particular, Section 79 (effectivity of merger or consolidation) states that “The articles of merger or of consolidation,

signed and certified as herein above required, shall be submitted to the SEC in quadruplicate for its approval: Provided, That in the case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favourable recommendation of the appropriate government agency shall first be obtained.” If the SEC is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of this Code and existing laws, it shall issue a certificate of merger or of consolidation, at which time the merger or consolidation shall be effective.

If, upon investigation, the SEC has reason to believe that the proposed merger or consolidation is contrary to or inconsistent with the provisions of this Code or existing laws, it shall set a hearing to give the corporations concerned the opportunity to be heard. Written notice of the date, time and place of hearing shall be given to each constituent corporation at least two (2) weeks before said hearing. The Commission shall thereafter proceed as provided in this Code.

What is a merger?

A merger is the fusion of two or more corporations into a single corporation which shall be one of the constituent corporations, or into a new single corporation which shall be the consolidated corporation. A merger only becomes effective upon the issuance by the SEC of a certificate of merger.

Are foreign-to-foreign mergers included?

Foreign to foreign mergers are not included. However, one or more foreign corporations authorized to transact business in the Philippines may merge or consolidate with any domestic corporation or corporations if it is permitted un-

der Philippine laws and by the law of its incorporation, provided that the requirements on merger or consolidation as provided in the Corporation Code are followed. The domestic corporation shall be the surviving entity.

Do mergers need to be notified?

Mergers of listed companies need notification. As noted above, notification on merger is done when the articles of merger or of consolidation, signed and certified, are submitted to the SEC in quadruplicate for its approval. In case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favourable recommendation of the appropriate government agency shall first be obtained.

Are there any filing fees?

Yes. Filing fees at the SEC shall be based on the net asset to be transferred by or the shareholders' equity of the absorbed corporation.

Each sector regulator has its own process for obtaining a favourable recommendation for mergers. The filing fees, if any, are dependent on their own regulations.

Are there sanctions for not notifying?

In the absence of a notification, the merger shall not be recognized, as if no merger took place. The concerned corporations may also be held liable for violating the Philippine Corporation Code.

Section 144 of the said Code states that "Violations of any of the provisions of this Code or its amendments not otherwise specifically penalized therein shall be punished by a fine of not less than one thousand (P1,000.00) pesos but not more than ten thousand (P10,000.00) pesos or by imprisonment for not less than thirty (30) days but not

more than five (5) years, or both, in the discretion of the court. If the violation is committed by a corporation, the same may, after notice and hearing, be dissolved in appropriate proceedings before the SEC: Provided, That such dissolution shall not preclude the institution of appropriate action against the director, trustee or officer of the corporation responsible for said violation: Provided, further, That nothing in this section shall be construed to repeal the other causes for dissolution of a corporation provided in this Code".

How long does it take for approval or exemption?

It takes two weeks to one month for the SEC to approve a merger, depending on the adequacy of the submissions.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

Under Section 79 of the Corporation code, the merger or consolidation shall be effective only after the SEC has issued a certificate of merger or of consolidation.

Which mergers are prohibited?

Prohibited mergers are those that are inconsistent with or violate the Corporation Code and other relevant laws as provided under Section 79 of the Code, and those that are established for the purpose of putting up cartels and the promotion of combinations in restraint of trade or unfair competition.

What happens if prohibited mergers are implemented?

Prohibited mergers will not be recognized, as if no merger took place. The concerned corporations may also be penalized with administrative sanctions, including the payment of fines and revocation of their certificate of registration.

Procedure

Investigations

How does an investigation start?

The DOJ-Office for Competition (OFC), by virtue of Executive Order No. 45, may commence an investigation upon complaint under oath from any person or motu proprio. Investigations for criminal violations under the Revised Penal Code, as amended, and other special laws with penal provisions are undertaken by the National Prosecution Service (NPS) of the DOJ. The sector regulators, in the exercise of their administrative powers, generally conduct investigations upon complaint or motu proprio.

What are the procedural steps and how long does the investigation take?

The OFC as competition authority shall undertake an initial assessment of all cases received to determine the necessity of further investigation. During this phase, the OFC may make use of investigative measures such as request for information. The OFC shall conduct investigation within 90 calendar days. Complaints involving purely technical regulation filed with the OFC shall be formally endorsed to the appropriate sector regulator.

There shall be an ad hoc team composed of sector regulators and chaired by the OFC, to undertake joint investigation of cases, consistent with existing laws. The procedure for joint investigation shall be governed by the Guidelines for OFC – Sector Regulators Cooperation and Guidelines for Complaints Intake and Case Handling.

Based on the OFC's investigation report, as approved by the Secretary of Justice, the filing of administrative, civil and/or criminal charges,

may be recommended. Within 15 calendar days, the OFC shall prepare and file the appropriate complaint/s.

Administrative cases shall be filed with the appropriate government agency while civil cases shall be filed with the court of competent jurisdiction. Criminal complaints shall be filed with the NPS of DOJ for preliminary investigation.

What are the investigation powers?

The OFC has the authority to request for information addressed in writing to the respondent or any person or entity which may have information relevant to the case, indicating the legal basis and the purpose of the request as well as the sanctions for supplying incorrect information as provided by law. It may require the submission of additional documents from the complainant.

Subject to the necessary processes, including the issuance of search warrants by the court, the OFC may enter premises and inspect any pertinent document and/or record pursuant to the purpose of the investigation and secure certified true copies of any document necessary for the conduct of the investigation and/or the preparation of the investigation report.

As allowed by law, the OFC shall sanction any act committed by the respondent under investigation or by any of its directors, officers, employees or agents that is intended to or shall prevent, impede or obstruct the exercise by the investigator/s of the foregoing authority.

On the other hand, the preliminary investigation power of the public prosecutor refers to a determination whether probable cause exists to hold the respondent for trial for criminal violations.

Each sector regulator, in the exercise of its administrative powers, has its own process for conducting investigations.

What are the rights and safeguards of the parties?

Parties have the right to due process, both procedural and substantive. The rights and safeguards of the parties in civil and criminal procedures are provided for in the Rules of Court, Revised Penal Code, as amended, and the New Civil Code.

Is there any leniency programme?

The leniency programme is being formulated and is expected for completion by the end of 2013.

Is it possible to obtain any informal guidance?

Yes, the OFC, in accordance with the implementing guidelines of Executive Order No. 45, series of 2011, may issue advisory opinion/s to provide guidance to businesses, industry associations, consumers and other related stakeholders.

Adjudication

What are the final decisions?

Final decisions vary according to the jurisdiction. Violations prosecuted under the Revised Penal Code, as amended, and proceedings under the New Civil Code are decided by the court. Parties are allowed judicial recourse up to the Supreme Court. Other violations will be adjudicated by an administrative decision of the competent authority.

What are the sanctions?

For violations of criminal laws and other special laws with penal provisions, the sanctions are either imprisonment and/or fines.

Those convicted for violating Article 186 of the Revised Penal Code, as amended, shall suffer the penalty of prison correctional in its minimum

period and/or a fine ranging from two hundred to six thousand PHP. The penalty of prison mayor in its maximum and medium periods applies where "the offence affects any food substance, motor fuel or lubricants, or other articles of prime necessity".

Those convicted for violating the Downstream Oil Industry Deregulation Act shall suffer penal sanctions under Section 24 of the Act (i.e. three months to one year imprisonment and a fine ranging from fifty thousand PHP to three hundred thousand PHP).

Those convicted for violating the Price Act shall suffer penal sanctions under Sections 15 and 16 of the Act (i.e. five to fifteen years imprisonment and a fine ranging from five thousand PHP to two million PHP for price manipulation and one to ten years imprisonment and/or a fine ranging from five thousand PHP to one million PHP, or both, for violating price ceilings).

Violations of the Corporation Code, particularly on merger and consolidation, are sanctioned under Section 144 of the Code.

Any person who is found guilty of any of the prohibited acts pursuant to Section 45 (Cross Ownership, Market Power Abuse and Anti-Competitive Behavior) of the Electric Power Industry Reform Act (EPIRA) shall suffer the penalty of prison mayor and fine ranging from ten thousand PHP to ten million PHP, or both, at the discretion of the court.

The EPIRA further states that "If the offender is a government official or employee, he shall, in addition, be dismissed from the government service with prejudice to reinstatement and with perpetual or temporary disqualification from holding any elective or appointive office. If the offender is an alien, he may, in addition to the penalties prescribed, be deported without further proceedings after service of sentence".

Judicial review

Can the enforcement authorities' decisions be appealed?

The appeal system varies according to the authority in charge of the adjudication. Reference may be made to the Rules of Court.

Nonetheless, decisions of lower courts and administrative bodies are appealable. In case of lower courts, their decisions are appealable to higher courts. In case of administrative bodies, the appeal process is governed by the rules related to their jurisdiction. Appeals can also be brought to the Office of the President, following the principle of exhaustion of administrative remedies.

Private enforcement

Are private actions for damages available?

Private actions are available under Article 28 of the New Civil Code, which establishes that “unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage”. This includes the right to prove a breach in order to seek damages

In addition, Section 6 of the Act Prohibiting Monopolies and Combinations in Restraint of Trade provides for recovery of treble damages for civil liability arising from anti-competitive behavior, plus the costs of the suit and a reasonable attorney's fee.

Exclusions

Is there any exclusion from the application of the Law?

Article 8 of the Cooperative Code establishes that “no cooperative or method or act thereof which complies with this Code shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily in violation of any of the laws of the Philippines”.

Section 45 of the Electric Power Industry Reform Act provides an exemption for isolated grids that are not connected to the high voltage transmission system regarding the ownership, operation and control limitations of the installed generation capacity.