Philippine Competition Act: first foray into antitrust legislation – key points

Project Finance Alert

Antitrust Alert

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The Philippine Congress has passed, and President Benigno Aquino III is expected to sign into law, the Philippine Competition Act. The law, which aims to safeguard fair and competitive market conditions, marks the nation’s first foray into antitrust legislation.

Under the new law, practices that allow entities to restrict market competition through anti-competitive agreements and abuse of a dominant position will be prohibited and parties will be required to obtain clearance for certain mergers and acquisitions. It additionally prescribes administrative and criminal penalties for violations of these prohibitions.

The act also creates the Philippine Competition Commission, which will implement and enforce the national competition policy.

Prohibitions

The new law will prohibit entities from entering into anti-competitive agreements, abusing dominant economic positions and engaging in unduly anti-competitive mergers and acquisitions.
**Anti-competitive agreements**

The law defines agreements between competitors as impermissibly anti-competitive if they restrict price competition or fix prices at an auction. Agreements that substantially lessen competition, in particular by controlling production or dividing the market, are likewise prohibited. Covered agreements can be formal or informal, explicit or tacit, and written or oral. However, an entity that controls or is controlled by another entity with which it has common economic interests shall not be considered its competitor.

**Abuse of dominant position**

Entities with a position that allows them to control their relevant market are prohibited from using that position to substantially prevent, restrict or lessen competition. The following applications of a dominant position are impermissibly abusive:

- selling goods or services below cost with the object of driving competition out of the market
- imposing barriers to entry or preventing competitors from growing within the market in an anti-competitive manner, except as a result of superior business ability
- making a transaction subject to acceptance of other obligations which, by their nature, have no connection with the transaction
- setting unreasonably discriminatory prices
- imposing restrictions on where and in what forms goods or services may be sold, traded or leased, and on which parties may engage in such transactions
- making supply of goods or services dependent upon the purchase of other, unrelated goods or services from the supplier
- imposing unfairly low purchase prices for the good or services of marginalized providers and producers and
- limiting production, markets or technical developments to the prejudice of consumers, except as a result of superior business ability.

**Mergers and acquisitions**

The Commission can review mergers and acquisitions based on factors it deems relevant. Parties to mergers or acquisitions valued over PHP 1 billion (approximately US$22.1 million) cannot consummate their agreement until 30 days after notifying the commission of their intentions. Failure to do so shall void the agreement and subject the parties to an administrative fine of between 1 and 5 percent of the value of the transaction. The information that must be supplied to the Commission is currently unstipulated and is expected to be developed and issued by the Commission.

During the 30-day review period, the Commission may request further information from the parties, effectively extending the period during which the agreement may not be consummated for an additional 60 days. However, the review period cannot exceed 90 days.

If these periods expire without decision from the Commission, the merger or acquisition shall be deemed approved and the parties may implement or consummate the transaction. However, in the case of mergers or acquisitions of banks, insurance companies, public utilities and other corporations governed by special laws, a favorable ruling by the Commission shall not dispense of the requirement for a favorable ruling by the appropriate government agency under Section 79 of the Corporation Code of the Philippines (e.g. Bangko Sentral for banks, Insurance Commission for insurance companies).

Also prohibited are mergers or acquisitions that “substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services.” These may be exempt from the prohibition if the parties establish that either:

- the concentration will bring about gains in efficiency that outweigh increased limitations on competition or
- a party to the deal is facing imminent financial failure and the agreement is the least anti-competitive arrangement known.

**Penalties**

The Commission may impose administrative fines of up to PHP 250 million (approximately US$5.5 million) on any
entity found to have entered into an anti-competitive agreement, abused its dominant market position, failed to properly notify the Commission, or engaged in a prohibited, nonexempt merger or acquisition.

Additionally, an entity that enters into a proscribed anti-competitive agreement is criminally liable for two to seven years imprisonment and a fine of between PHP 50 million (approximately US$1.1 million) and PHP 250 million (approximately US$5.5 million) for each and every violation. Imprisonment shall be imposed upon the responsible officers, and directors of the entity.

The statute of limitations for both administrative and criminal penalties under the law is five years.

Find out more about this groundbreaking law by contacting the authors.

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