Untangling the Interlocks: Establishing the Legal Parameters and Limitations for Horizontal and Vertical Interlocks in Line with the Philippine Competition Act

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I. INTRODUCTION

A. Background of the Study

1. The Emergence of Competition Law in the Philippines

During the 1970s, the government created the Philippine Cement Industry Authority (PCIA) to help the cement industry and regulate fierce competition.[1] PCIA worked with Philippine Cement Manufacturers' Corp. (Philcemcor), a cement industry association.[2] Philcemcor was assigned to set production quotas.[3] Firms within the cement market, together with Philcemcor, eventually started entering into informal agreements regarding such production quotas.[4] They also divided the geographic markets among themselves.[5] Such practice was a form of collusion and gave birth to the alleged cartel in the cement industry, which eliminated much of the competition which used to exist.[6] After the 1997 financial crisis, mergers and acquisitions occurred between the companies within the market.[7] As a result, prices

1. Rafaelita M. Aldaba & Geronimo S. Sy, Designing a Cooperation Framework for Philippine Competition and Regulatory Agencies (A Discussion Paper Published by the Philippine Institute for Development Studies) at 9, *available at* https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1431.pdf (last accessed Nov. 30, 2019).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Aldaba & Sy, *supra* note 1, at 9.

increased exorbitantly annually.[8] The public attempted to file a criminal case against those involved in the cartel but to no avail.[9]

Last June 2014 during former President Benigno Aquino III's term, consumers and government officials were surprised by the sudden spike in the prices of garlic.[10] In one year, there was a 74% increase.[11] To be more precise, it hit the price of ₱287 per kilogram.[12] Upon investigation, it was discovered that due to problems with regard to the issuance of plant quarantine clearances and certain forms of collusion, a cartel was formed.[13] Such cartel controlled 75% of the total garlic imports in the country.[14] Government officials involved in the scheme were charged for graft and corruption.[15] However, the anti-competitive behavior was not addressed.[16]

The aforementioned cases are examples of incidents wherein antitrust principles were clearly violated. However, those involved were not prosecuted.[17] The main reason for such a failure was that, at that time, the

8. *Id.*

9. *Id.*

10. Chris Schnabel, What consumers need to know about the PH Competition Act, *available at* https://www.rappler.com/business/economy-watch/98287-philippine-competition-act-part-1 (last accessed Nov. 30, 2019).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Schnabel, *supra* note 10.

17. *Id.*

Philippines had no comprehensive competition law yet.[18] The Philippine Competition Act[19] came about only in 2015.[20]

Before the Philippine Competition Act was enacted, competition policies were scattered across different laws.[21] There are provisions found in the Philippine Constitution,[22] Revised Penal Code,[23] Civil Code,[24] Price Act,[25] and other special laws for certain industries.[26] However, there was also a lack of jurisprudence on the matter.[27] The provisions were very broad and failed to list the specific prohibited acts and corresponding penalties that would constitute a violation of antitrust principles.[28] The lack of definite regulations made it difficult to sanction something that is clearly illegal.[29] Different agencies were assigned to deal with competition problems within different

18. *Id.*

19. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

20. *Id.*

21. Erlinda M. Medalla, Understanding the New Philippine Competition Act (A Discussion Paper Published by the Philippine Institute for Development Studies) at 2, *available at* https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1714.pdf (last accessed Nov. 30, 2019).

22. PHIL. CONST. art. XII, § 19.

23. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 186 (1932).

24. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 28 (1949).

25. An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions [Price Act], Republic Act No. 7581 (1992).

26. Medalla, *supra* note 21, at 2.

27. *Id.* at 1.

28. *Id.* at 20.

29. *See* Medalla, *supra* note 21, at 20.

industries.[30] There was no central authority to ensure that all the rules and regulations were not conflicting with each other, making it difficult to ensure proper implementation of antitrust principles.[31] Hence, for the longest time, many have advocated for an actual national comprehensive competition law.[32] Numerous House and Senate Bills were passed since the first Aquino administration but it was only about two decades later when the Philippine Competition Act was finally created.[33]

Competition is a "process of rivalry between firms seeking to win customers' business over time by offering them a better deal."[34] Competition laws are created to ensure that firms within the industry play fair to safeguard consumer welfare.[35] Playing fair means that companies should be prevented from obtaining market power in a manner that excludes others from competing in the industry and providing better quality and reasonably priced products.[36] If there is fair competition, no firm would dominate, which in turn forces individual corporations to try and surpass the other.[37] Some would focus on product development and innovate to attract consumers.[38] Others may opt to lower their prices to cater to those who have lower income-earning capacities.[39] Some may improve both the quality and prices of their products.[40] In general, competition gives consumers options.

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30. Aldaba & Sy, *supra* note 1, at 10.

31. *Id.*

32. Schnabel, *supra* note 10.

33. *Id.*

34. The Competition Commission of the United Kingdom & The Office of Fair Trading of the United Kingdom, Merger Assessment Guidelines at 19, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf (last accessed Nov. 30, 2019).

35. Medalla, *supra* note 21, at 6.

36. *Id.*

37. *Id.* at 3.

38. *Id.*

39. *Id.*

40. *Id.*

Although they may seem the same, there is a difference between competition law and competition policy. Competition law refers to the "framework of rules and regulations designed to foster the competitive environment in a national economy."[41] On the other hand, competition policy is broader since it pertains to the laws, regulations, and other policies created to protect competition in the market.[42] In short, the latter is more encompassing.

Competition laws also guarantee economic development since companies are forced to innovate and compete in terms of quality and prices, allowing industries to grow, making them more attractive to both local and foreign investors.[43] More players in the market also allot more job opportunities, increase productivity, and create greater consumer purchasing power.[44] This helps in eliminating poverty and fostering social equity.[45]

Competition law is vital in achieving different kinds of efficiencies, namely productive, allocative, and dynamic efficiencies.[46] Productive efficiency occurs when "goods are [made] at the lowest possible cost[.]"[47] Those who are not able to produce at such costs are eliminated from the market. Allocative efficiency is accomplished if goods are produced in line with how much

41. The Tariff Commission of the Philippines, Competition Policy: Primer at 2, *available at* https://tariffcommission.gov.ph/competition-policy-and-law (last accessed Nov. 30, 2019) (follow the hyperlink "Competition Policy: Primer" to access the cited page).

42. *Id.*

43. *See* U.N. Conference on Trade and Development Secretariat, *The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy*, 6th U.N. Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF.7/3 (Aug. 30, 2010).

44. United Nations Conference on Trade and Development, *The effects of anti-competitive business practices on developing countries and their development prospects*, at 150, UNCTAD/DITC/CLP/2008/2 (2008).

45. *Id.* at 134.

46. *Id.* at vii.

47. *Id.* at 5.

consumers need, with no one being better off than the other.[48] In short, market prices meet consumer preferences. Lastly, dynamic efficiency ensures innovation and technological growth.[49] This protects consumer welfare. In a competitive market, consumer surplus is at its greatest.[50]

In the Philippines, there are clearly some issues with regard to competition policies. A study was conducted about the state of the economy and competition in the Philippines.[51] It was shown that one of the reasons why the country is struggling economically is because of weak competition in the market.[52] There are industries dominated only by a few players in the market.[53] For instance, there was a time when there was even only one airline company — Philippine Airlines.[54] Since only one company offered such passenger flight services, it could set any price, subject only to government regulation, and consumers would not really have any choice but to pay such amount since no other company offered the same services. Before, a flight to Davao was priced at around ₱10,000.[55] However, later on, Cebu Pacific came into the picture.[56] The company marketed itself as a low-cost budget airline

48. *Id.*

49. *Id.* at 79 (citing Organisation for Economic Co-operation and Development, Glossary of Industrial Organisation Economics and Competition Law at 23, *available at* http://www.oecd.org/regreform/sectors/2376087.pdf (last accessed Nov. 30, 2019)).

50. *See* United Nations Conference on Trade and Development, *supra* note 44, at 44.

51. *See* Rafaelita M. Aldaba, Assessing Competition in Philippine Markets (A Discussion Paper Published by the Philippine Institute for Development Studies), *available at* https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps0823.pdf (last accessed Nov. 30, 2019).

52. Aldaba, *supra* note 51, at 1-2.

53. *See* Aldaba, *supra* note 51, at 25-54.

54. Myrna S. Austria, The State of Competition and Market Structure of the Philippine Air Transport Industry (A Discussion Paper Published by the Philippine APEC Study Center Network) at 12, *available at* https://pascn.pids.gov.ph/files/Discussions%20Papers/2000/pascndp0012.pdf (last accessed Nov. 30, 2019).

55. Schnabel, *supra* note 10.

56. *Id.*

that could provide the same services at cheaper prices.[57] Hence, air fare dropped.[58] Competition fostered more choices as seen in this example; therefore, laws which protect a competitive market, would definitely be for the consumers' and general economy's benefit.

2. Interlocking Directorates and its Relation to Competition Law

The current Philippine Competition Act focuses on the following: (1) anti-competitive agreements, (2) abuse of dominant positions, and (3) mergers and acquisitions.[59] Price-fixing and bid rigging are categorized as a *per se* violation.[60] Other prohibited acts in Sections 14 and 15[61] are subject to the rule of reason test.[62] Mergers and acquisitions are not prohibited but rather regulated to ensure that such are not used as a means to violate antitrust principles.[63] The Philippine Competition Act is definitely a step up from before. However, it is not perfect and could still be subject to further amendments.

A situation, which the current competition law has not yet clearly addressed, is the occurrence of horizontal and vertical interlocks. Horizontal interlocks refer to those between competing firms.[64] Vertical interlocks refer to those between companies in different levels of the production chain.[65] Among the multiple House and Senate bills that were drafted, there were actually a few which included a prohibition on horizontal interlocks.[66] However, the output submitted by Senator Paolo Benigno Aquino IV was the

57. *Id.*

58. *Id.*

59. Philippine Competition Act, §§ 14-16.

60. *Id.* § 14 (a).

61. Philippine Competition Act, §§ 14 & 15.

62. Medalla, *supra* note 21, at 14.

63. *Id.* at 16-19.

64. *See* Medalla, *supra* note 21, at 17.

65. *Id.*

66. Aldaba & Sy, *supra* note 1, at 5.

one finally approved by Congress.[67] Unlike the Philippines, the United States (US) clearly prohibits certain types of interlocks. Section 19 of the Clayton Act[68] provides for a *per se* prohibition for interlocking directorates between competing firms or horizontal interlocks, subject to certain *de minimis* exceptions.[69] Indonesia, Japan, and Korea also have provisions on interlocking directorates, which cover both horizontal and vertical interlocks.[70] However, they do not provide for *per se* prohibitions.[71] Instead, the rule of reason analysis is used to determine on a case-to-case basis whether or not the situation truly violates competition policies.[72]

In the Philippines, jurisprudence directly disallowing interlocking directorates does not exist but something close to it does. In the case of *Gokongwei, Jr. v. Securities and Exchange Commission*,[73] a substantial stockholder of a competing corporation sought to gain a seat in the board of directors of San Miguel Corporation.[74] Before he could do so, the by-laws were amended disallowing a competitor from becoming a board director.[75] The issue in the case was the validity of the amended by-laws.[76] The Court ruled that the

67. Senate of the Philippines, After Long Wait, Congress Ratifies Act Penalizing Cartels, Abuse of Dominant Positions (Press Release dated June 11, 2015), *available at* https://senate.gov.ph/press_release/2015/0611_aquino1.asp (last accessed Nov. 30, 2019).

68. The Clayton Antitrust Act of 1914 [Clayton Act], 15 U.S.C. § 19 (1914).

69. Laura A. Wilkinson, *Interlocking Directorates*, Practical Law The Journal - Litigation, February/March 2017, at 57.

70. Vidir Petersen, *Interlocking Directorates in the European Union: An Argument For Their Restriction*, 27 EUR. BUS. L. REV. 821, 824 (2016).

71. *Id.*

72. *Id.* n. 16 & 853. Michael E. Jacobs, *Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies*, 37 FORDHAM INT'L L.J. 643, 668 (2014).

73. Gokongwei, Jr. v. Securities and Exchange Commission, 89 SCRA 336 (1979).

74. *Id.* at 345-46.

75. *Id.* at 346.

76. *Id.* at 365.

amendment was valid.[77] Apart from discussing certain powers of a corporation, the Court also explained the possible violations of antitrust principles due to interlocking directorates between competing corporations.[78] It did not expressly prohibit interlocking directorates among rival firms, but it did recognize the anti-competitive dangers that exist in such a relationship.[79]

The issue on interlocking directorates is not something to be belittled. It has been something debated about for the longest time in different jurisdictions.[80] Some have included it specifically in their competition laws.[81] Others have not. Since the choosing of the members of a board of directors is an internal matter, it is hard to detect the collusion behind the scenes, making it easier to circumvent the very laws that aim to protect the economy from unfair competition practices.

This Note proposes to address the gaps in the current Philippine Competition Act, which does not specifically address the problem of horizontal and vertical interlocks. It aims to be able to properly resolve the insufficiency in the law in order to balance the requirements of the Revised Corporation Code[82] bestowing fiduciary duties upon the director and the mandates of fair competition in Philippine antitrust laws and policies.

II. INTERLOCKING DIRECTORATES

A. Defining Interlocking Directorates

Before a corporation acquires its legal personality, several requirements must usually be complied with.[83] One such requirement is the setting up of a board of directors.[84] The members of the board are usually subject to state

77. *Id.* at 390.

78. *Id.* at 377-78.

79. *Gokongwei, Jr.*, 89 SCRA at 377-78.

80. Petersen, *supra* note 70, at 835.

81. *Id.* at 824.

82. An Act Providing for the Revised Corporation Code of the Philippines [REV. CORP. CODE], Republic Act No. 11232 (2019).

83. REV. CORP. CODE, § 18.

84. *See* REV. CORP. CODE, § 22.

regulation.[85] The board may be composed of professionals, executives, non-executives, family, or independent members, depending on what the law dictates.[86] The board's main function involves the management and control over the business activities of the firm.[87] Board members are also considered fiduciary agents of the corporation.[88] It is because of this fact that the situation created by interlocking directorates under certain circumstances requires examination.

Interlocking directorates occur when persons who have executive responsibilities in one company sits in the boards of other companies which have a vertical or horizontal relationship with the former corporation.[89] Such interlocks have become more and more common in the past couple of years. In fact, it is usually common in large corporations.[90] A study was conducted in the US which showed that the average number of interlocks between large companies actually increased the asset value of the firms.[91] Interlocks usually

85. *Id*. *See also* Securities and Exchange Commission, Guidelines on the Nomination, and Election of Independent Directors, Memorandum Circular No. 16, Series of 2002 [SEC Memo. Circ. No. 16, s. 2002] (Nov. 28, 2002).

86. Florence Thépot, et al., Interlocking Directorates and Anti-Competitive Risks: An Enforcement Gap in Europe? at 2, *available at* https://poseidon01.ssrn.com/delivery.php?ID=029123122124117028115078110011086086046017064042000030023122070104123103009110017098059042125003033000013010028064031086076091045061037061029008103124111065099088112041086012110006099025069112066114106021025082070005096113023092093103080117019109024117&EXT=pdf (last accessed Nov. 30, 2019).

87. *Id*.

88. *See* TIMOTEO B. AQUINO, PHILIPPINE CORPORATE LAW COMPENDIUM 351 (2018 ed.).

89. Jacobs, *supra* note 72, at 648.

90. Wissam Nawfal, Interlocking Directors: Impact on Canadian Merger and Acquisition Outcomes, at 14-15 (unpublished M.S. thesis, The John Molson School of Business, Concordia University) (on file with the Concordia University Library Spectrum Research Repository, Concordia University) (citing Peter C. Dooley, *The Interlocking Directorate*, 59 AM. ECON. REV. 314, 315-16 (1969)).

91. Dooley, *supra* note 90, at 316.

occur when several other firms begin hiring these same directors.[92] These companies employ such people as a way of improving their reputation.[93] Hiring experienced people makes the company seem legitimate and dependable enough to attract investments.[94]

1. Horizontal and Vertical Interlocks

a. Horizontal Interlocks

Horizontal interlocks refer to interlocks between two or more competing corporations within the same industry and in the same level of the production chain.[95] A person or his agent basically sits as a board member of at least two competing companies.[96] This type of interlock is usually the most problematic as the conflict of interest situation is much more evident, especially in the context of competition law. In some States, this type of interlock is actually directly prohibited or regulated.

b. Vertical Interlocks

Vertical interlocks are those between companies in different levels of the production chain.[97] An example would be interlocks between buyer and supplier corporations.[98] It may also refer to interlocks between a manufacturer company and a distributor corporation.[99] Although such a relationship is not between competing firms, it may still cause certain problems as it may influence, for instance, how the supplier corporation services other companies

92. *See* Dooley, *supra* note 90, at 316.

93. Mark S. Mizruchi, *What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates*, 22 ANN. REV. SOCIOL. 271, 276 (1996).

94. *Id.*

95. Wilkinson, *supra* note 69, at 60.

96. *Id.* at 59.

97. Petersen, *supra* note 70, at 822.

98. *See* Petersen, *supra* note 70, at 854-55.

99. Petersen, *supra* note 70, at 822.

competing with the buyer corporation, where the aforementioned interlocking director holds a position.[100]

B. Interlocking Directorates: A Problem in Competition Law

Since over a century ago, interlocking directorates were already considered controversial in the realm of competition law.[101] The root of the problem actually lies in the fiduciary nature of the position of a board member.[102] Fiduciary duty is an Anglo-American corporate law concept that distinguishes the rights and obligations of a director from a manager.[103] In order to be able to run a business, trust is an important factor to consider.[104] Directors of a company are vested with the powers of management.[105] They are the representatives of corporations in all its business activities.[106] They have countless responsibilities that give them access to vital information necessary to keep the company alive and competitive.[107] They are obliged to act in the best interest of the corporation and other shareholders.[108] Directors, as fiduciary agents, are obliged to ensure that they do not get involved in matters, which would cause them to be in a conflict of interest situation.[109] In the case of *Wardell v. Railroad Company*,[110] the US Supreme Court stated that

> [d]irectors of corporations, and all persons who stand in a fiduciary relation to other parties and are clothed with power to act for them, are subject to

100. *See* Petersen, *supra* note 70, at 855.

101. *Id.* at 836.

102. Petersen, *supra* note 70, at 825.

103. Giri Singgih Hartarto, The Application of Fiduciary Duty by the Interlocking Directors: A Comparative Perspective between Indonesia and Singapore in the Regulation of the Interlocking Directors, at 6 (unpublished LL.M. thesis, Tilburg University) (on file with Tilburg University).

104. *Id.*

105. REV. CORP. CODE, § 22.

106. AQUINO, *supra* note 88, at 243.

107. *Id.* at 243-44.

108. *See* AQUINO, *supra* note 88, at 351.

109. *Id.*

110. Wardell v. Railroad Company, 103 U.S. 651 (1880).

> this rule; they are not permitted to occupy a position which would conflict with the interest of parties they represent, and are bound to protect. [111]

Currently, many States provide for certain rules to address these kinds of conflict of interest situations. However, more often than not, these regulations focus on restricting corporate transactions that may be entered into by the board of directors of a corporation with another party, when one of the directors of the former stand to be personally benefited by the agreement.

C. Per Se Prohibition Approach vs. Rule of Reason Analysis

There are two types of prohibitions in competition law. The first is the *per se* prohibition.[112] The *per se* prohibition makes particular arrangements absolutely illegal, unless there are exceptions stipulated for in the rules.[113] No further examinations of the facts and circumstances of the case are necessary.[114] The only thing that needs to be proven is the fact that the restraint exists.[115] Some believe the *per se* rule is too restrictive.[116] Others think that it is the best way to address issues arising from anti-competitive behavior that is difficult to detect.[117] In the US, the Clayton Act provides for a specific *per se* prohibition of horizontal interlocks.[118] This rule is simple, straight to the point, and requires less administrative costs on the part of the competition authority.[119] However, some critics believe it is too obstructive since not all horizontal

111. *Id.* at 658.

112. James T. Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, if so, What Kind?*, 45 ANTITRUST L.J. 341, 347 (1976).

113. *See* Halverson, *supra* note 112, at 347.

114. Halverson, *supra* note 112, at 347.

115. Lourdes C. Echavez-De Leon, The Legal Framework for Reform of the Philippine Law on Unfair Methods of Business Competition, at 36 (1999) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

116. *See* Petersen, *supra* note 70, at 825.

117. *Id.* at 852.

118. Clayton Act, § 19.

119. Petersen, *supra* note 70, at 853.

interlocks are anti-competitive.[120] It also propagates interference with the corporation's freedom to choose who it wants to represent its interests.[121]

On the other hand, the rule of reason analysis may involve a notification process.[122] It requires the analysis of facts and the effect of restraint on competition.[123] It is usually what is used to regulate mergers and acquisitions.[124] Competition authorities must first be notified about the relationship allegedly in restraint of trade.[125] Such State agents would then determine whether or not there truly is anti-competitive behavior.[126] If there is, it severs the relationship and imposes the appropriate penalties.[127] Much of the rules or regulations in competition laws make use of the rule of reason analysis as many violations depend on the factual circumstances of each case.[128] Certain countries like Japan, South Korea, and Indonesia provide for stipulations addressing interlocking directorates in line with the rule of reason analysis.[129] This would, however, require more expenses, as a more comprehensive economic analysis of the industry is necessary to hold the firms liable.[130] Enforcement is not easy since evidence cannot be acquired outright.[131] More often than not, competition authorities merely rely on indirect evidence to determine whether or not competition principles are being violated.[132]

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120. *Id.*

121. *Id.* at 853-54.

122. *Id.* at 583.

123. *Id.*

124. *See* Petersen, *supra* note 70, at 853.

125. Petersen, *supra* note 70, at 853.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at n. 16 & 853.

130. *Id.*

131. Petersen, *supra* note 70, at 831.

132. *Id.* at 832.

III. INTERNATIONAL AND FOREIGN COMPETITION LAW OR POLICIES ON INTERLOCKING DIRECTORATES

A. European Union

At present, there is no specific provision or regulation addressing interlocking directorates under the European Union competition rules. The Treaty on the Functioning of the European Union (TFEU)[133] provisions that may be relevant to the topic are Articles 101 and 102.

1. Article 101 of the TFEU

Article 101 basically addresses anti-competitive agreements. Article 101 (1) provides —

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[134]

The law focuses on one thing: agreements. In order to become liable under this provision, the parties must have actually come to an agreement.[135]

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133. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C326) 47 [hereinafter TFEU].

134. *Id.* art. 101 (1).

135. Thépot, et al., *supra* note 86, at 10.

There must be an understanding. The appointment of a director in two competing firms does not necessarily connote concerted action.[136] More often than not, it is done unilaterally by the companies.[137] As stated earlier, there are coordinated and unilateral risks that come with interlocking directorates between competing firms.[138] Some competition authorities argue that some coordinated risks may be addressed by this provision.[139] However, it cannot be used to tackle unilateral risks, because an agreement, whether direct or indirect, is required under Article 101 before prosecution.[140] Also, although parallel behavior is a coordinated risk, it cannot be covered by Article 101 unless evidence of an agreement to collude is shown.[141] It is also important to point out that interlocks are not *per se* violations under Article 101 (1).[142] This means that should an actual agreement to create such an interlock be found, the European Commission must still conduct an economic analysis of the anti-competitive effects of the interlock before liability may be imposed.[143]

In the case of *British Telecom/MCI*,[144] decided by the European Commission, British Telecommunications (BT) acquired 20% of the share capital of MCI Communications Corporation.[145] This allowed BT to appoint its own representative as director in the board of MCI.[146] The Court held that such board representation could lead to collusion between the companies

136. *Id.* (citing Tommy Staahl Gabrielsen, et. al., *Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention*, 35 EUR. L. REV. 837, 856-58 (2011)).

137. *Id.*

138. *Id.* at 4 (citing Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004/C, 2004 O.J. (C31), §§ 24 & 39).

139. *See* Thépot, et al., *supra* note 86, at 4.

140. *Id.* at 10.

141. *Id.* at 4.

142. Petersen, *supra* note 70, at 830.

143. *Id.*

144. British Telecom/MCI, Case No. IV/M.353, Sep. 13, 1993 (Eur.).

145. *Id.* at 5.

146. *Id.*

through information exchange.[147] However, in order to support such a ruling, it made use of US antitrust and corporate law.[148] This shows that there really is no provision directly addressing director interlocks since the European Commission had to refer to American laws to determine the implications of the scenario.[149]

2. Article 102 of the TFEU

Article 102 provides —

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.[150]

Article 102 addresses issues involving abuse of dominant position.[151] It can only be a means of regulating interlocks if the companies involved held a dominant position in the market.[152] If the interlock creates anti-competitive effects but does not involve corporations that could make a large impact on the industry, Article 102 cannot be invoked.[153] Neither does it directly fall under Article 101 because as was mentioned earlier, Article 101 can only be used if the existence of an agreement can be proven.[154]

To supplement the rules provided in the TFEU, the European Commission came up with the Horizontal and Vertical Guidelines.[155] In both

147. *Id.* at 4.

148. Thepot, et al., *supra* note 86, at 11 (citing British Telecom/MCI, Case No. IV/M.353).

149. Thepot, et al., *supra* note 86, at 11.

150. TFEU, *supra* note 133, art. 102.

151. Thépot, et al., *supra* note 86, at 3.

152. *Id.* at 3 & 12.

153. *See* Thépot, et al., *supra* note 86, at 12.

154. Thépot, et al., *supra* note 86, at 10.

155. Slaughter & May, An Overview of the EU Competition Rules at 10-12, *available at* https://www.slaughterandmay.com/media/64569/an-overview-of-the-eu-competition-rules.pdf (last accessed Nov. 30, 2019).

of the aforementioned guidelines, the European Commission uses the "effects-based" approach.[156] The Horizontal Guidelines addresses situations involving information exchange, agreements on research and development, production agreements, purchasing agreements, commercialization agreements, and standardization agreements.[157] The European Court has acknowledged that information exchange must be investigated when "the undertakings concert together on a regular basis over a long period."[158] It can be anti-competitive if the information relayed to competitors involves individual price structures or future production plans.[159]

Europe also has what is known as the EU Merger Regulation (EUMR).[160] It determines whether or not certain mergers should be prohibited, depending on its effects on competition in the market.[161] In the analysis of merger cases, the European Commission may look into the subject of interlocking directorates.[162] However, the EUMR may only investigate interlocks if it would allow the acquiring company to assert "decisive influence" over the target company.[163] More often than not, the European Commission orders the severance of the interlock before granting the merger.[164]

In *Thyssen/Krupp*,[165] Thyssenkrupp, the market leader, had a 10% share and also certain interlocking directorships in Kone, the second largest

156. *Id.* at 10 & 12.

157. *Id.* at 10–11.

158. Hüls AG v. Commission of the European Communities, Case C-199/92P, 199 ECR I-4336, ¶ 162.

159. Thepot, et al., *supra* note 86, at 4.

160. Slaughter & May, *supra* note 155, at 16.

161. *See* Francisco González-Díaz, *Minority Shareholdings and Interlocking Directorships: The European Union Approach*, CPI ANTITRUST CHRONICLE, Jan. 2012, at 11–12.

162. González-Díaz, *supra* note 161, at 5.

163. *Id.* at 7.

164. Petersen, *supra* note 70, at 833.

165. Thyssen/Krupp, Case M.1080, June 2, 1998 (Eur.).

competitor.[166] Although the European Commission does not have precise laws addressing minority shareholdings and interlocking directorates, the European Commission still demanded that such a situation be rectified as it may reduce competition.[167] It ordered the removal of Krupp's right to be represented in the board of Kone.[168] It feared that the merger would subject Kone to the strategy of Thyssenkrupp and grant the latter access to sensitive information through the interlocking director.[169] In the case of *AXA/GRE*,[170] one of the conditions imposed for the approval of the merger was also the elimination of all interlocks.[171] The same thing happened in the case of *Nordbanken/Postgirot*,[172] wherein all the current representatives of Nordbanken in Bankgiro's Board of Directors were forced to resign in order for the merger to push through.[173] In this case, Nordbanken, a large Swedish banking company, acquired Postgirot, one of the only two corporations offering giro payment systems.[174] Nordbanken also held shares and board seats in Bankgirot, Postgirot's only competitor.[175] The European Commission wanted to avoid the anti-competitive effects of such a relationship.[176] Such an interlock allows access to confidential business information of the only competing company

166. European Commission, Commission clears THYSSEN / KRUPP merger, *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_98_503 (last accessed Nov. 30, 2019).

167. European Commission, Antitrust Issues involving Minority Shareholding and Interlocking Directorates (A Submission to Working Party No. 3 of the Competition Committee of the Organisation for Economic Co-operation and Development) at 4, *available at* http://ec.europa.eu/competition/international/multilateral/2008_feb_antitrust_issues.pdf (last accessed Nov. 30, 2019) [hereinafter Antitrust].

168. *Thyssen*, Case M. 1080.

169. González-Díaz, *supra* note 161, at 7.

170. AXA/GRE, Case No. COMP/M.1453, Apr. 8, 1999 (Eur.).

171. *Id.* at 9.

172. Nordbanken/Postgirot, Case COMP/M.2567, Nov. 8, 2001 (Eur).

173. *Id.* at 15.

174. *Id.* at 1 & 5.

175. *Id.* at 11-12.

176. *Id.* at 13.

offering giro payment systems, which could affect the strategic decisions both firms may undertake in the future.[177]

Despite the lack of provisions that directly addresses interlocking directorates, the European Commission has recognized the danger such a situation poses to free trade and competition.[178] It recognized that it may facilitate collusions due to the sensitive information that may be exchanged between the corporations.[179] The drive for profit-maximization may be severely affected as co-existence instead of competition replaces the corporations' goals.[180] The director generally has an incentive to reduce competition so that both companies he works for would benefit equally.[181] The fact that there are merger regulations dealing particularly with the situation of interlocking directorates show that the EU is aware of the possible anti-competitive effects of such a structural link between companies with a horizontal or vertical relationship with each other.[182]

B. United States

As early as the late 19th century, monopoly was a problem in the US economy.[183] In response to competition issues, the Sherman Antitrust Act of 1890[184] was created.[185] More than 20 years later, in 1914, President Woodrow Wilson wanted to enact State legislation in order to address the concern brought by Louis Brandeis.[186] Brandeis attacked director interlocks among

177. González-Díaz, *supra* note 161, at 8.

178. Antitrust, *supra* note 167, at 2.

179. *Id.*

180. *Id.*

181. González-Díaz, *supra* note 161, at 4.

182. *See* González-Díaz, *supra* note 161, at 5-6.

183. Hiroshi Iyori, *A Comparison of U.S.–Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM L. & POL'Y J. 59, 62 (1995).

184. The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890).

185. Iyori, *supra* note 183, at 62.

186. Halverson, *supra* note 112, at 347.

large corporations through written articles in Harper's Weekly.[187] Certain wealthy individuals, known as the "money trust" or "inner group," were engaged in anti-competitive behavior.[188] There was increased concentration of wealth in the financial, industrial and manufacturing industry.[189] Basically, Wilson and Brandeis were concerned over the political, economic, and conflict of interest effects that interlocking directorates created.[190] There were also Congressional investigations conducted which reinforced the view taken by President Wilson and Brandeis.[191] The investigations revealed that in the railroad industry, Central Pacific Railroad Company had four directors who controlled other companies that had contracts with Central Pacific.[192] Further investigations also revealed similar occurrences in other markets.[193] It was because of these issues that gave rise to the enactment of the Clayton Act of 1914.[194]

The particular provision involving interlocking directorates is Section 8 of the Clayton Act. Section 19 states:

> (a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are:
>
> (1) engaged in whole or in part in commerce; and
>
> (2) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws; if each of the

187. Richard P. Murphy, *Keys to Unlock the Interlocks: Dealing with Interlocking Directorates*, 11 U. MICH. J.L. REFORM 361, 362 (1978).

188. Halverson, *supra* note 112, at 344.

189. Robert Jay Preminger, *Deputization and Parent-Subsidiary Interlocks Under Section 8 of the Clayton Act*, 59 WASH. U. L.Q. 943, 943-44 (1981).

190. Halverson, *supra* note 112, at 344.

191. *Id.*

192. *Id.* (citing Report of the Commission and of the Minority Commissioner of the United States Pacific Railway Commission, S. Exec. Doc. No. 51, Vol. I, at 143, 50th Cong., 1st. Sess. (1887) (U.S.)).

193. Halverson, *supra* note 112, at 344.

194. *Id.* at 34-45.

corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection.

(a)(2) Notwithstanding the provisions of paragraph (1), simultaneous service as a director or officer in any two corporations shall not be prohibited by this [S]ection if[:]

(1) the competitive sales of either corporation are less than $1,000,000, as adjusted pursuant to paragraph (5) of this subsection;

(2) the competitive sales of either corporation are less than 2 per centum of that corporation's total sales; or

(3) the competitive sales of each corporation are less than 4 per centum of that corporation's total sales. For purposes of this paragraph, 'competitive sales' means the gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year. For the purposes of this paragraph, 'total sales' means the gross revenues for all products and services sold by one corporation over that corporation's last completed fiscal year.

(a)(3) The eligibility of a director or officer under the provisions of paragraph (1) shall be determined by the capital, surplus and undivided profits, exclusive of dividends declared but not paid to stockholders, of each corporation at the end of that corporation's last completed fiscal year.

(a)(4) For purposes of this [S]ection, the term 'officer' means an officer elected or chosen by the Board of Directors.

(a)(5) For each fiscal year commencing after September 30, 1990, the $10,000,000 and $1,000,000 thresholds in this subsection shall be increased (or decreased) as of October 1 each year by an amount equal to the percentage increase (or decrease) in the gross national product, as determined by the Department of Commerce or its successor, for the year then ended over the level so established for the year ending September 30, 1989. As soon as practicable, but not later than January 31 of each year, the Federal Trade Commission shall publish the adjusted amounts required by this paragraph.

(b) When any person elected or chosen as a director or officer of any corporation subject to the provisions hereof is eligible at the time of his [or her] election or selection to act for such corporation in such capacity, his eligibility to act in such capacity shall not be affected by any of the provisions hereof by reason of any change in

> the capital, surplus and undivided profits, or affairs of such corporation from whatever cause, until the expiration of one year from the date on which the event causing ineligibility occurred.[195]

Section 8 basically prohibits an individual from serving as a director of two or more companies, engaged in commerce, that are competing with one another. The following must be satisfied in order to constitute a violation under the provision:

(1) The two or more companies should be engaged in whole or in part commerce;[196]

(2) The two or more companies compete with one another by virtue of their business or location so that the elimination of competition between them would be a violation of antitrust laws;[197]

(3) The interlocks must be between two or more companies other than banks, banking associations, trust companies, and common carriers;[198]

(4) The person serves as an officer or director of two corporations;[199] and

(5) The corporation's financial records must exhibit that it has capital, surplus, and undivided profits aggregating $34,395,000 or more (as of January 2018),[200] adjusted annually by the FTC based on changes in the gross national product.[201]

195. Clayton Act, § 19.

196. Murphy, *supra* note 187, at 363 (citing Clayton Act, § 19).

197. *Id.*

198. *Id.*

199. Murphy, *supra* note 187, at 363-44.

200. Federal Trade Commission, Federal Register Vol. 83, No. 19 (Jan. 29, 2018).

201. Murphy, *supra* note 187, at 373-77.

1. *Per Se* Prohibition

As established by *U.S. v. Sears, Roebuck & Co*,[202] the statute is a *per se* prohibition.[203] In this case, the government claimed that the interlock between Sears and B.F. Goodrich Company violated the Clayton Act.[204] The defendants, however, argued that they did not satisfy the "so that" clause in the law.[205] They claimed that although there was a common director between them, such a situation did not eliminate competition.[206] The Court ruled that the defendant's contention was incorrect and established the *per se* rule on interlocking directorates.[207]

This interpretation has been further supported by the decision of the US Court of Appeals in the case of *Protectoseal Co. v. Barancik*.[208] It was held that Section 8 "establishes rather simple objective criteria for judging the legality of the interlock"[209] and that a "market-wide analysis of competition was unnecessary."[210] Hence, whether or not the interlock actually encourages anti-competitive behavior does not really matter. As long as the person sits in the board of two competing firms, he may immediately be sanctioned or removed from one or both boards.

202. U.S. v. Sears, Roebuck & Co, 111 F. Supp. 614 (S.D.N.Y. 1953) (U.S.).

203. *Id.* at 621.

204. *Id.* at 616.

205. *Id.*

206. *Id.*

207. *Id.* at 621.

208. Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973) (U.S.).

209. *Id.* at 589.

210. *Id.*

2. Elements of Violation of Section 8

a. Commerce Test

To determine whether or not the corporations are actually engaged in commerce, the US makes use of the commerce test.[211] This test is satisfied if corporations are engaged in whole or in part in commerce, including either interstate commerce or US commerce with foreign countries.[212]

b. Competitors

Section 8 is confined to horizontal interlocks.[213] This means the interlock must occur between two or more competing corporations in the same level of the production chain.[214] Basic economic principles are used to determine who are competitors. It is important to know the relevant product or geographic market.[215] There are disagreements regarding the right tests to determine competitors in the market.[216] But many courts and the Federal Trade Commission usually use the quantitative market definition analysis. This refers to standards set by Section 7 of the Clayton Act for merger cases,[217] which was introduced in the case of *Brown Shoe Co. v. US*.[218] In this case, it was held that the relevant product market is "determined by the reasonable interchangeability of use or the cross price-elasticity of demand between the product itself and substitutes for it."[219] On the other hand, the relevant geographic market must "both correspond to the commercial realities' of the

211. U.N. Conference on Trade and Development, *Model Law on Competition (2018): Revised chapter VI*, at 9, U.N. DOC. TD/B/C.I/CLP/L.10 (May 25, 2018).

212. *See* Powell v. Shelton, 386 F.Supp.3d 842, 847 (2019) (U.S.) (citing Gulf Oil Corp. v. Cop Paving Co., Inc., 419 U.S. 186, 195 (1974)).

213. Halverson, *supra* note 112, at 342 (citing Clayton Act, § 19).

214. Wilkinson, *supra* note 69, at 60.

215. Preminger, *supra* note 189, at 948.

216. *Id.*

217. *Id.* at 948-49 (citing Clayton Act, § 7 & Brown Shoe Co. v. U.S., 370 U.S. 294 (1962)).

218. Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

219. *Id.* at 325.

industry and be economically significant."[220] This geographic market may be global, regional, or national.[221] At the same time, it may be limited by "transportation costs ... , language, regulation, tariff and non-tariff trade barriers, custom, and familiarity, reputation, and service availability."[222]

c. Relevant Product Market

There are a few tests that US jurisprudence has introduced to determine the relevant product market. These tests are:

(1) Demand Side Substitutability Test or Du Pont Test;[223]

(2) Hypothetical Monopolist Tests or Small but Significant and Non-Transitory Increase in Price (SSNIP) Test;[224]

(3) Submarkets Test;[225] and

(4) Supply Side Substitutability Test.[226]

(1) Demand Side Substitutability / Du Pont Test

220. *Id.* at 336-37 (citing American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387, 398 (S.D.N.Y. 1957) (U.S.) & S. Rep. No. 1775, at 5-6, 81st Cong., 2d Sess. (U.S.)).

221. ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY 9 (2010) [hereinafter ASEAN Regional Guidelines].

222. EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 211 (2011).

223. U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

224. U.S. Department of Justice & the Federal Trade Commission, Horizontal Merger Guidelines, § 4.1.1, *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (last accessed Nov. 30, 2019).

225. *Brown Shoe Co.*, 370 U.S. at 325 (citing U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95 (1957)).

226. John J. Flynn et al., Free Enterprise and Economic Organization: Antitrust, at 138 (July 28, 2017) (unpublished draft).

In the case of *U.S. v. E.I. du Pont de Nemours & Co.*,[227] E.I Du Pont was a large cellophane producer in the US.[228] The government believed that the company monopolized the cellophane industry.[229] However, the US Supreme Court disagreed, claiming that the cellophane market constituted only 20% of the whole packaging material market.[230] The Court depended on the cross price-elasticity of demand.[231] The Du Pont test basically explains that "commodities reasonably interchangeable by consumers"[232] compose the products in the same market.[233] Products in the market do not have to be identical.[234]

Cross price-elasticity of demand refers to demand sensitivity of one product to price changes of another product.[235] It is the quotient of a percentage change in the quantity of one good and a one percent change in the price of another.[236] If the quotient is high, this means that the products belong to the same market.[237] In the aforementioned case, cellophane was discovered to be highly interchangeable with other types of flexible packaging

227. U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

228. *Id.* at 379.

229. *Id.*

230. *Id.* at 405.

231. *Id.* at 417-18.

232. *Id.* at 395.

233. *E.I. Du Pont de Nemours & Co.*, 351 U.S. at 395.

234. *Id.* at 393-94.

235. European Commission, *Commission Notice on the definition of relevant market for the purposes of Community competition law*, 40 O.J. 5, ¶ 39.

236. Organisation of Economic Co-operation and Development, Market Definition (A Compilation Under the Competition Policy Roundtables series by the Organisation of Economic Co-operation and Development) at 35, *available at* http://www.oecd.org/daf/competition/Marketdefinition2012.pdf (last accessed Nov. 30, 2019).

237. George Stigler & Robert Sherwin, *The Extent of the Market*, 28 J.L. & ECON. 555, 562 (1985).

materials so cellophane producers alone do not comprise the entire industry.[238] Du Pont could not be considered a monopolist.[239]

(2) Hypothetical Monopolist Tests or Small but Significant and Non-Transitory Increase in Price (SSNIP) Test

This test is the most widely used test around the world.[240] The US Department of Justice and Federal Trade Commission originally used it for merger cases alone but such has been expanded to define markets in general.[241] It has been defined in the Horizontal Merger Guidelines as follows —

> [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, was the only present and future seller of those products[,] ... likely would impose at least a small amount but significant and non-transitory increase in price [ ] on at least one product in the market, including at least one product sold by one of the merging firms.[242]

A five percent SSNIP is usually used as a reference point to determine price increases while a one year period is considered as non-transitory.[243] There are cases, however, wherein a SSNIP of 10% is used if explicit or implicit prices can be identified.[244] If a SSNIP provokes an unprofitable substitution for a hypothetical monopolist upon deviation of demand to other products, then these goods are considered part of the same product market.[245]

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238. *E.I. Du Pont de Nemours & Co.*, 351 U.S. at 404.

239. *Id.*

240. *See* Kaushal Sharma, *SSNIP Test: A Useful Tool, Not A Panacea*, COMPETITION L. REPORTS, May-June 2011, at 189 (2011).

241. John D. Harkrider, Operationalizing the Hypothetical Monopolist Test at 1, *available at* http://www.justice.gov/atr/public/workshops/docs/202598.pdf (last accessed Nov. 30, 2019).

242. U.S. Department of Justice & the Federal Trade Commission, *supra* note 224, § 4.1.1.

243. *Id.* § 4.1.2.

244. *See* U.S. Department of Justice & the Federal Trade Commission, *supra* note 224, § 4.1.2.

245. GEORGE BERMANN, ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 873 (3d ed. 2010).

The SSNIP test involves: (1) determining the cross price-elasticity of demand between the hypothetical monopolist's products and substitute products,[246] (2) computing for the diversion ratio by comparing the cross price-elasticity of demand with the hypothetical monopolist's elasticity of demand,[247] (3) rendering a critical loss analysis of the substitute goods,[248] and (4) determining the profitability of the SSNIP by a comparison of the Diversion Ratio and break-even Critical Loss point.[249] If the Diversion Ratio or Actual Loss is greater than the Critical Loss, the products are within the same market.[250] If Critical Loss is greater than the Diversion Ratio, the goods in question do not belong to the same market.[251]

(3) Submarkets Test

The submarkets test applies in cases of complementary goods.[252] It was introduced in the case of *Brown Shoe Co.* The court held in that case that

> [t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes.[253]

To determine the relevant market, an examination of certain practical indicia such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique

246. Claudia Gabriella R. Squillantini, Demystifying Dominance: Establishing Legal Parameters for Abuse of Dominance, at 55 (2015) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

247. European Commission, *supra* note 235, ¶ 39.

248. Squillantini, *supra* note 246, at 55.

249. Organisation of Economic Co-operation and Development, *supra* note 236, at 36-37.

250. *See* Organisation of Economic Co-operation and Development, *supra* note 236, at 38.

251. *Id.* at 36-39.

252. *Brown Shoe Co.*, 370 U.S. at 325.

253. *Id.* (citing *E.I. du Pont de Nemours & Co.*, 353 U.S. at 593-95).

production facilities, distinct customers, distinct prices, sensitivity to product changes, and specialized vendors"[254] must be made.

(4) Supply Side Substitutability Test

The Supply Side Substitutability Test is the opposite of the Du Pont Test.[255] This test refers to the reaction of other suppliers to price increases.[256] The question that must be answered is whether or not "suppliers are able to switch production to the relevant products and market them in the short term."[257] A switch, which does not result to large additional costs or risks, would mean that the product is part of the same relevant market.[258]

3. Interlocking Directorates and Mergers

Section 8 of the Clayton Act was meant to deal with interlocks within or outside the context of a merger.[259] The case of *U.S. v. CommScope, Inc.*[260] is an example of the use of Section 8 in a merger process. CommScope, Inc. and Andrew Corporation came up with an agreement wherein the former would acquire the latter.[261] CommScope is involved in the manufacture of cable products such as drop cables and hardware products required for the

254. *Brown Shoe Co.*, 370 U.S. at 325.

255. John J. Flynn, et al., Free Enterprise and Economic Organization: Antitrust, at 138 (July 28, 2017) (unpublished draft).

256. *Id.*

257. European Commission, *supra* note 235, ¶ 20.

258. *See* European Commission, *supra* note 235, ¶ 20.

259. *See* Jacobs, *supra* note 72, at 666.

260. U.S. v. CommScope, Inc., et al., Case No: 1:07-cv-02200, June 20, 2008 (U.S.), *available at* https://www.plainsite.org/dockets/download.html?id=3003589&z=bb10e12d (last accessed Nov. 30, 2019).

261. Organisation of Economic Co-operation and Development, Antitrust Issues Involving Minority Shareholding and Interlocking Directorates (A Compilation Under the Competition Policy Roundtables series by the Organisation of Economic Co-operation and Development) at 181, *available at* https://www.oecd.org/competition/mergers/41774055.pdf (last accessed Nov. 30, 2019).

installation of the aforementioned type of cable.[262] On the other hand, Andrew produces antennas and cable products including drop cables but it sold its drop cable business to Andes Industries, Inc.[263] It also has a 30% share in Andes.[264] The Department of Justice was concerned that competition between CommScope and Andes could be deterred by the acquisitions.[265] Andrew was ordered to remove any ownership interest in Andes and give up any contractual governance rights to address the interlock problem.[266]

4. Exceptions to the *Per Se* Prohibition

Section 8 applies if the competing corporations have capital, surplus, and undivided profits of more than $10 Million each.[267] There are *de minimis* exceptions to the general rule, namely:

> (1) Either corporation's competitive sales are less than $3,291,400, as adjusted annually by the FTC based on changes in the gross national product[;]
>
> (2) Either corporation's competitive sales are less than 2% of that corporation's total sales (meaning its gross revenues for all products and services in the most recent fiscal year)[; and]
>
> (3) Each corporation's competitive sales are less than 4% of its total sales.[268]

The monetary thresholds are revised every year. As of 29 January 2018,

> if each of the competing companies has capital, surplus[,] and undivided profits of over $34,395,000, the interlock is unlawful unless (1) the competitive sales of either firm are under $3,439,500 or represent less than

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 182.

267. Clayton Act, § 19 (a) (1) (B).

268. Wilkinson, *supra* note 69, at 59-60.

2% of that firm's total sales, or (2) the competitive sales of each firm are less than 4% of that firm's total sales.[269]

Section 8 also has a one-year grace period from when the interlocking director is asked to resign from his position.[270] This is available subject to the following requirements:

(1) The person was eligible to serve in that position at the time of election, meaning that person's participation was lawful under Section 8.

(2) The person becomes ineligible for that position due to an intervening event that makes continued participation unlawful under Section 8, such as:

  (a) a change in one of the corporation's capital, surplus, and undivided profits that causes it to exceed the threshold for exemption; or

  (b) a development that causes the two corporations to become competitors [271]

Further, the prohibition does not apply to the following types of interlocks:

(1) Between suppliers and customers (known as vertical interlocks);

(2) Between potential competitors;

(3) Involving entities other than corporations, such as partnerships (see below Application to Other Entities);

(4) Involving related individuals or close friends; and

(5) Where individuals from competing corporations both sit on a board of a non-competing company.[272]

269. Perkins Coie, FTC Increases HSR and Clayton Act Thresholds, *available at* https://www.perkinscoie.com/en/news-insights/ftc-increases-hsr-and-clayton-act-thresholds-1.html (last accessed Nov. 30, 2019).

270. Wilkinson, *supra* note 69, at 59.

271. *Id.*

272. *Id.* at 60.

5. Enforcement of Section 8

Section 8 does not impose criminal penalties.[273] Upon the filing of an administrative case, more often than not, the motion for summary judgment or a decision on the merits is not granted.[274] Instead of pursuing a full-blown litigation process, the Federal Trade Commission and the Department of Justice prefers to settle the issue through consent orders.[275] The director is asked to resign from his position.[276] After the director resigns, the companies usually ask for the motion for summary judgment claiming that the case is moot.[277] If the motion is not granted, cease and desist orders may be issued to prohibit similar future activities.[278] A consent agreement may be signed to ensure the creation of a monitoring program to prevent prohibited interlocks.[279] Should the court find that the voluntary resignation of the director does not eliminate all future anti-competitive dangers, it may issue injunctive orders.[280] Injunctive relief may be used by: (a) the Federal Trade Commission under Section 11 of the Clayton Act; (b) the Department of Justice under Section 15 of the Clayton Act; or (c) private plaintiffs under Section 16 of the Clayton Act.[281] Private parties may also ask for damages under Section 16 of the Clayton Act.[282]

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273. Simpson Thacher, Federal Trade Commission makes inquiries into Interlocking Boards (A Memorandum Published by Simpson Thacher) at 3, *available at* http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub830.pdf?sfvrsn=2 (last accessed Nov. 30, 2019).

274. Preminger, *supra* note 189, at 953.

275. *Id.*

276. *Id.* at 954.

277. *Id.*

278. *Id.* at 953.

279. *Id.* at 953-54.

280. U.S. v. W.T. Grant Co., 345 U.S. 629, 631 (1953) (citing Clayton Act, § 25).

281. Wilkinson, *supra* note 69, at 61.

282. *Id.*

C. ASEAN Competition Guidelines

The ASEAN Guidelines do not have a specific provision addressing general interlocks. The only reference to it is found in the definition of a merger. A merger is said to include

> transactions whereby two companies legally merge into one ('mergers'), one firm takes sole control of the whole or part of another ('acquisitions' or 'takeovers'), two or more firms acquire joint control over another firm ('joint ventures') and other transactions, whereby one or more undertakings acquire control over one or more undertakings, such as interlocking directorates.[283]

Regulations for interlocks outside the merger process do not exist in the Guidelines.

IV. RELEVANT PROVISIONS RELATED TO INTERLOCKING DIRECTORATES IN THE PHILIPPINE CONTEXT

Since the topic at hand deals with the board of directors of corporations, a study of the relevant provisions in the Revised Corporation Code should be done to clarify the issue that this Note seeks to present and address. A look into the concept of independent directors will also be done. Afterwards, there will be a rundown of the legislative history of competition principles in the Philippines before the 2015 competition law was enacted. Then, there will be a discussion on the relevant provisions in the Philippine Competition Act and other relevant special laws.

A. Corporation Code of the Philippines

According to the Revised Corporation Code, "[a] corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incidental to its existence."[284] The corporation is merely an instrument through which people can engage in commercial activities.[285] The Revised Corporation Code requires a total of five to fifteen directors to sit on the board.[286] How a

283. ASEAN Regional Guidelines, *supra* note 221, ch. 3.4.1.1.

284. REV. CORP. CODE, § 2.

285. *See* Quisumbing Torres, Doing Business in the Philippines at 8, *available at* https://www.bakermckenzie.com/-/media/files/dbg/ap/guide_doingbusinessphilippines_2018.pdf?la=en (last accessed Nov. 30, 2019).

286. *Id.* at 10.

corporation makes decisions and conducts its activities is actually through this board of directors.[287] According to the case of *Mendezona v. Philippine Sugar Estates Development Co.*,[288] "[t]he general rule is that officers of corporations acting within the scope of their authority may bind the corporation in the same way and to the same extent as if they were the agents of natural persons, unless the charter of by-laws otherwise provide."[289]

One of the theories surrounding the source of the power of the Board is known as the Theory of Delegated Power.[290] Such a theory states that the stockholders delegates power to the board.[291] Thus, the directors of the board function as agents of the stockholders, who are the real owners of the company.[292] This is also the reason why it is the latter who has the power to elect the members of the board.[293] On the other hand, former Dean Cesar Villanueva describes the corporate system as one that relies on business trust.[294] In this scenario, the corporation, itself, is the trustor.[295] The Board would be the trustee.[296] The stockholders would be the beneficiaries.[297] Whether the relationship is that of an agency or trust is not really relevant for this Note. What is important is that both bestow a fiduciary duty on the members of the board to the corporation.[298]

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287. AQUINO, *supra* note 88, at 243.

288. Mendezona v. Philippine Sugar Estates Development Co., 41 Phil. 475 (1921).

289. *Id.* at 491-92.

290. CESAR VILLANUEVA & TERESA VILLANUEVA-TIANSAY, PHILIPPINE CORPORATE LAW 306 (2013 ed.).

291. *Id.*

292. *Id.*

293. *Id.* at 307.

294. *Id.* at 310.

295. *Id.*

296. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 310.

297. *Id.*

298. *Id.*

There are three main duties of a board member namely: (a) duty of obedience, (b) duty of diligence, and (c) duty of loyalty.[299] The duty of obedience requires directors to act only in accordance with the law and the obligations imposed upon them.[300] It involves the exercise of one's powers only for the purposes for which they were created.[301] This is in line with the law, which defines a corporation as an entity with only limited powers.[302] Violating this duty of obedience has consequences. The acts may be considered void, if they were illegal.[303] On the other hand, merely acting outside the scope of one's powers would be considered ultra vires and unenforceable unless ratified.[304] The director's liability would depend on whether or not he acted with good faith.[305]

The duty of diligence requires at least ordinary diligence, which, in the Philippines, is referred to as the diligence of a good father of a family.[306] The required care is also dependent on the nature of the obligation and factual circumstances.[307] This duty is said to be exemplified in Section 30 of the Revised Corporation Code.[308] The provision basically states that directors who willingly or knowingly agreed to unlawful acts, was grossly negligent or acted in bad faith shall be jointly and severally liable for damages.[309] The law

299. *Id.* at 381.

300. *Id.* at 388.

301. *Id.*

302. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 387 (citing The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Blg. 68, § 2 (1980)).

303. Soledad M. Cagampang, *The Fiduciary Duties of Corporate Directors under Philippine Law*, 46 PHIL. L.J. 513, 555 (1971).

304. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 287.

305. Cagampang, *supra* note 303, at 554.

306. *Id.* at 527.

307. *Id.* at 528.

308. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 389 (citing CORP. CODE, § 31) & REV. CORP. CODE, § 30.

309. REV. CORP. CODE, § 30.

clearly specifies "willingly," "gross," and "bad faith."[310] This shows that the standards for violation are quite high.[311] A simple mistake or negligence is not enough to make the director liable.[312]

Lastly, the duty of loyalty or fidelity requires the director to ensure that the corporation always comes first before himself.[313] His own pecuniary interests will always be subordinate to that of the corporation's.[314] This duty is derived from certain rules provided in the Civil Code governing agency relationships.[315] According to the Civil Code, an agent may be held liable if: (1) there is a conflict between his own and his principal's interests and he chooses the former,[316] or (2) he or she does not render an account of his transactions and deliver them to the principal as required by law.[317]

The Revised Corporation Code has three provisions dealing with the duty of loyalty. These are Sections 31 to 33.[318] Section 31 basically states that a corporate contract with a director is voidable unless the following requisites are complied with: (1) the director was not needed to constitute a quorum, (2) the director's vote was not required to approve the contract, and (3) the contract was fair and generally reasonable.[319] If either of the first two requirements is not satisfied, the contract may still be ratified by the votes of the stockholders who represent at least two-thirds of the total outstanding capital stock.[320] Next, Section 32 deals with interlocking directorates.[321] The

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310. *Id.*

311. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 389.

312. *See* VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 389.

313. Cagampang, *supra* note 303, at 541.

314. *Id.*

315. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 394 (citing CIVIL CODE, arts. 1889 & 1891).

316. CIVIL CODE, art. 1889.

317. *Id.* art. 1891.

318. REV. CORP. CODE, §§ 31-33.

319. *Id.* § 31.

320. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 399.

321. REV. CORP. CODE, § 32.

law states that a contract between companies with interlocking directorates is not necessarily invalid on its face so long as the contract is fair and reasonable.[322] However, if (1) in case of fraud, or (2) the director has a substantial interest (at least 20% stockholdings) in one corporation and a nominal one in the other, the contract must be ratified before it may be considered valid.[323] Lastly, Section 33 involves a situation wherein the director takes a business opportunity from the corporation for his own benefit.[324] In this scenario, he is required to account for all the earnings and refund the same to the corporation, unless his actions are ratified by the board.[325]

While the Revised Corporation Code has provisions which address conflict of interests situations, it fails to discuss the possible consequences of interlocking directors, who are forced to work for the best interests of two corporations due to their fiduciary duties to both entities, on market competition. The provisions merely focus on conflicts between a director's own interests and that of the corporation he is serving.[326] Although the Revised Corporation Code does not seem to touch upon competition issues, jurisprudence has somewhat dealt with the problem. This was seen in the case of *Gokongwei, Jr.*, wherein a stockholder of San Miguel Corporation wanted to sit in its board despite also being the President of Universal Robina Corporation, a competitor of San Miguel.[327] The issue was technically whether or not the amended by-laws of San Miguel Corporation is valid as it prohibited a stockholder who is affiliated with a competitor company from sitting in the board of San Miguel.[328] The Court held that the by-laws were valid.[329] It discussed the fiduciary nature of the director and the doctrine of corporate opportunity by emphasizing that "a director or officer of a corporation may not enter into a competing enterprise which cripples or

322. *Id.*

323. *Id.*

324. *Id.* § 33.

325. *Id.*

326. *Id.* §§ 31-33.

327. *Gokongwei, Jr.*, 89 SCRA at 349-50.

328. *Id.* at 365.

329. *Id.* at 390.

injures the business of the corporation of which he is an officer or director."[330] In relation to competition, on the other hand, the Court cited the Constitutional provision in Article XIV,[331] Article 186 of the Revised Penal Code,[332] and even the Clayton Act of the US. To be specific, the Supreme Court cited a US academic journal to explain the conflict brought about by the interlock —

> The argument for prohibiting competing corporations from sharing even one director is that the *interlock permits the coordination of policies between nominally independent firms to an extent that competition between them may be completely eliminated*. Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result. Suppose X is a director of both Corporation A and Corporation B. X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B at the same time he could hardly abstain from voting without depriving A of his best judgment. *If the firms really do compete* [—] in the sense of vying for economic advantage at the expense of the other [—] *there can hardly be any reason* for an interlock between competitors other than the suppression of competition.[333]

B. Philippine Competition Act of 2015

The Philippine Competition Act aims to be able to protect market competition as it assures proper allocation of goods and services for the consumers.[334] The law created the Philippine Competition Commission (the Commission).[335] It is the quasi-judicial body with original jurisdiction over the implementation and enforcement of the provisions in the competition

330. *Id.* at 370 (citing Hall v. Dekker, 115 P.2d 15, 17 (Cal. Ct. App. 1941) (U.S.)).

331. PHIL CONST. art. XIV.

332. REVISED PENAL CODE, art. 186.

333. *Gokongwei, Jr.*, 89 SCRA at 377-78 (citing Arthur H. Travers, *Interlocks in Corporate Management and the Anti Trust Laws*, 46 TEX. L. REV. 819, 840-41 (1968)).

334. Philippine Competition Commission, The Philippine Competition Act: A Primer at 22-23, *available at* https://phcc.gov.ph/wp-content/uploads/2017/03/PCC-Primer_WITH-COVER-1.pdf (last accessed Nov. 30, 2019).

335. Philippine Competition Act, § 5.

law.[336] The Commission has inquisitorial functions.[337] They can conduct preliminary inquiries to determine whether there is a reasonable ground for a full-fledged administrative investigation.[338] They can also conduct the administrative investigation, itself, before finding the entities guilty of violating the competition law.[339] The Commission may also issue injunctions, divestment orders, or orders for corporate reorganization.[340] The Office of Competition of the Department of Justice only takes over if: (1) a criminal case is filed, and (2) after the Commission files a complaint before it.[341] It can conduct the preliminary investigations and prosecution of the criminal offenses.[342]

> According to Section 3 of the law, the current law applies to
>
> > any person or entity engaged in any trade, industry[,] and commerce in the Republic of the Philippines. It shall likewise be applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines [(Philippines)], including those that result from acts done outside the [Philippines].[343]

Entity is defined as "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[.]"[344] The law is broad so it covers almost everything except combinations of workers or agreements with employers for collective bargaining purposes.[345]

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336. Medalla, *supra* note 21, at 12.

337. Philippine Competition Act, § 12 (a).

338. Philippine Competition Commission, Rules of Procedure of the Philippine Competition Commission [2017 Rules of Procedure of the Philippine Competition Commission], rule I, § 1.3 (Sep. 11, 2017).

339. *Id.* rule II, art. II, § 2.8.

340. Philippine Competition Act, § 12 (d).

341. *Id.* § 31.

342. *Id.* § 13.

343. *Id.* § 3, para. 1.

344. *Id.* § 4 (h).

345. *Id.* § 3, para. 2.

Trade associations are not prohibited by the law unless it is used as a means through which violations are committed.[346] The law is also fairly new so there is not much case law based on its provisions. There are still many factors that have not been taken into proper consideration.

The prohibited acts specified in the law involve: (a) anti-competitive agreements, (b) abuse of domination positions, and (c) mergers and acquisitions.[347] Anti-competitive agreements are embodied in Section 14.[348] Section 14 is divided into three parts. Section 14 (a) are *per se* prohibitions.[349] As explained earlier, *per se* prohibitions are those that are illegal on its face.[350] No further analysis is needed. In the Philippines, the only *per se* prohibited agreements are price fixing and bid rigging.[351] Section 14 (b) discusses output limitation and market sharing.[352] These are only prohibited if they have "the object or effect of substantially preventing, restricting[,] or lessening competition[.]"[353] The agreement must foreclose competition. Both Section 14 (a) and (b) are applicable to horizontal agreements only.[354] Both are also the only two provisions in the Act that have a criminal consequence in line with Section 30 of the law.[355] Imprisonment is inflicted on those "officers, directors, or employees holding managerial positions who are knowingly and

346. FRANCISCO LIM & ERIC RICALDE, THE PHILIPPINE COMPETITION ACT: SALIENT POINTS AND EMERGING ISSUES 71 (2016).

347. Philippine Competition Act, § 2 (c).

348. *Id.* § 14.

349. *Id.* § 14 (a).

350. Echavez-De Leon, *supra* note 115, at 36.

351. Philippine Competition Act, § 14 (a).

352. Philippine Competition Commission, On Anti-Competitive Agreements at 1, *available at* https://phcc.gov.ph/wp-content/uploads/2017/04/PCC-MODULE-2-1.pdf (last accessed Nov. 30, 2019).

353. Philippine Competition Act, § 14 (b).

354. LIM & RICALDE, *supra* note 346, at 69.

355. Gabriel Guy Olandesca, *Toward a Regime of a Real Competitive Market: The Constitutional Policy on Competition and the Prohibited Conducts under the Philippine Competition Act*, BEDAN REV., Mar. 2017, at 28-29.

willfully responsible for such violation."[356] Lastly, Section 14 (c) is the "catch-all provision[.]"[357] It prohibits "other [agreements,] which also have the object or effect of substantially preventing, restricting, or lessening competition[.]"[358] If the agreement ensures consumer welfare, it will not fall under Section 14 (c) since there is no foreclosure effect.[359] Violation of any of the prohibited activities under Section 14 is punishable by fines.[360]

The second type of conduct that is regulated by the Philippine Competition Act is abuse of dominant position, which is specified in Section 15.[361] Abuse of dominance occurs "when an entity with a significant degree of power in a market engages in conduct that substantially prevents, restricts or lessens competition."[362] It is important to note that the Act does not prohibit dominance but merely the misuse and abuse of it. In fact, the law is specific when it states that acquiring a dominant position is allowed if done through "legitimate means" and does not "substantially prevent, restrict, or lessen competition[.]"[363] The provision further adds that conduct, which basically improves economic progress and upholds consumer welfare, will not be classified as abuse of dominance.[364] Section 15 is definitely not a *per se* prohibition and requires a rule of reason analysis on the alleged illegal conduct's effects on competition.[365] The law specifies the types of conduct that constitute abuse of dominant position such as predatory pricing, imposing

356. Philippine Competition Act, § 30.

357. Olandesca, *supra* note 355, at 30.

358. Philippine Competition Act, § 14 (c).

359. *See* LIM & RICALDE, *supra* note 346, at 36.

360. Philippine Competition Act, § 29 (a).

361. *Id.* § 15.

362. Philippine Competition Commission, On Abuse of Dominant Position at 1, *available at* https://phcc.gov.ph/wp-content/uploads/2017/04/PCC-MODULE-4-1.pdf (last accessed Nov. 30, 2019).

363. Philippine Competition Act, § 15.

364. *Id.*

365. LIM & RICALDE, *supra* note 346, at 91.

barriers, tying and bundling, monopsony, and many more.[366] Violations under Section 15 result to merely administrative fines or penalties.[367]

The fines imposed for violations under Sections 14 and 15 "shall be up to thirty percent (30%) of the Relevant Turnover of the Respondent, depending on the gravity of the violation and multiplied by the duration of the infringement in years[.]"[368] The Relevant Turnover refers to the "sales of the Respondent in the Philippines in the Relevant Market/s affected by the violation for the applicable financial year, after deduction of the output value-added taxes and excise taxes[.]"[369] The Commission shall also take the following into consideration: "nature of the infringement[, c]ombined market share of all entities involved[, g]eographic scope of the violation[, the] implementation of the agreement [in case of violations of Section 14 (a) of the Act, and the d]irect or indirect impact and effect of the violation on the Relevant Market/s."[370]

Lastly, the law also governs mergers and acquisitions in Sections 16 to 23. The Commission has the power to review mergers and acquisitions.[371] A merger is "the joining of two [ ] or more entities into an existing entity or to form a new entity[.]"[372] Acquisition, on the other hand,

> refers to the purchase of securities or assets, through contract or other means, for the purpose of obtaining control by[ ] (1) [o]ne [ ] entity of the whole or part of another[,] (2) [t]wo [ ] or more entities over another; or (3) [o]ne [ ] or more entities over one or more entities[.][373]

366. Philippine Competition Commission, *supra* note 362, at 2.

367. Philippine Competition Act, § 29.

368. 2017 Rules of Procedure of the Philippine Competition Commission, rule VI, art. I, § 6.3.

369. *Id.* § 6.2 (a).

370. *Id.* § 6.3.

371. Philippine Competition Act, § 16.

372. *Id.* § 4 (j).

373. *Id.* § 4 (a).

Mergers and acquisitions are not prohibited *per se*.[374] The prohibitions are *ex ante* in nature since it would entail more costly measures to tear down the merger once it is completed.[375] Only mergers and acquisitions that would "substantially prevent, restrict, or lessen competition" will be prohibited.[376] However, there are certain prohibited mergers or acquisitions that may be exempt from the law. Exemptions include (1) those mergers or acquisitions, which would result to more efficiency gains than hindrances to competition, and (2) those used as a means to resolve financial issues.[377]

Parties to a merger would have to go through a notification process.[378] Notification can be compulsory or voluntary.[379] Whether or not compulsory notification is necessary is subject to the size of the person and size of the transaction tests.[380] If the merger or acquisition involves firms or activities that satisfy the thresholds set, then notification is required.[381] For the size of the person test, the aggregate value of the assets should exceed at least ₱5,000,000,000.[382] For the size of the transaction, the aggregate value of assets should exceed ₱2,000,000,000.[383] Despite not meeting the thresholds, the parties may also opt for voluntary notification.[384] Notification must come from both the acquired and acquiring entities' notifying groups.[385] The

374. *See* LIM & RICALDE, *supra* note 346, at 33.

375. Petersen, *supra* note 70, at 848.

376. Philippine Competition Act, § 20.

377. *Id.* § 21.

378. *Id.* § 16.

379. *Id.* § 17.

380. LIM & RICALDE, *supra* note 346, at 125.

381. *Id.* at 122.

382. Philippine Competition Commission, Amendment of Rule 4, Section 3 of the Implementing Rules and Regulations and Republic Act. No. 10667 (Threshold Adjustment), PCC Memorandum Circular 18-001 [PCC Memo. Circ. No. 18-001, s. 2018], § 1 (Mar. 1, 2018).

383. *Id.*

384. LIM & RICALDE, *supra* note 346, at 123.

385. *See* LIM & RICALDE, *supra* note 346, at 123.

Commission also has the power to conduct *motu propio* investigations should it be necessary.[386] These merger reviews require extensive economic analysis and must take into consideration the determination of the relevant markets and factors such as the competitors in the market, barriers to entry, switching costs, and many more.[387] The Commission may either: (1) approve the merger, (2) prohibit the merger or acquisition completely, or (3) prohibit it, unless certain changes be made to ensure competition despite the merger or acquisition.[388] Once the merger or acquisition has been approved by the Commission, it can no longer be contested unless evidence of fraud may be shown.[389]

C. Special Rules on Interlocking Directorates in Certain Industries

Although as a general rule, there is currently no law that prohibits all types of interlocks in the Philippines, there are certain industry-specific legislations that address interlocks. Section 187 of the Insurance Code[390] prohibits a person from being a director in an insurance company and an adjustment company.[391] Insurance corporations are also governed by the Corporate Governance Principles and Leading Practices[392] issued by the Philippine Insurance Commission.[393] The law requires them to have at least two independent directors in their boards.[394] Another law which has provisions on director

386. The Philippine Competition Act: A Primer, *supra* note 334, at xix.

387. *Id.* at 36-37.

388. Philippine Competition Act, § 18.

389. *Id.* § 23.

390. The Insurance Code of the Philippines [INS. CODE], § 187, Presidential Decree No. 612 (1974).

391. INS. CODE, § 193.

392. Insurance Commission, Corporate Governance Principles and Leading Practices, Circular No. 31-2005 [IC Circ. No. 31-2005] (2005).

393. *See* Jesus P. Estanislao, et al., The Role of the Board of Directors: Philippine Legal & Regulatory Framework, and Practice (A Paper Published by the Institute of Corporate Directors) at 2, *available at* http://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873206.pdf (last accessed Nov. 30, 2019).

394. IC Circ. No. 31-2005, pt. II (B) (2).

interlocks is the Investment House Law.[395] According to Section 6 of P.D. No.129,[396] a director of an Investment House cannot be a director also of a bank at the same time unless (1) allowed by the Monetary Board or (2) the Investment House is substantially owned by the bank.[397] Lastly, the Bangko Sentral ng Pilipinas (BSP) has also issued regulations prohibiting interlocking directorates between banks or between a bank and a quasi-bank or a non-bank financial institution, unless allowed by the Monetary Board, subject to certain conditions.[398] But in a recent amendment in 2017, the BSP has relaxed the rules for government representatives. The rule only applies to "representatives of the government or government-owned or controlled entities holding voting shares of stock of banks/quasi-banks/non-bank financial institutions/trust corporations unless otherwise provided under existing laws."[399] The regulations also require the institution of independent directors.[400] The number of independent directors should be one-third of the total board or at least two directors, whichever will bring about more independent directors.[401]

395. Governing the Establishment, Operation and Regulation of Investment Houses [The Investment Houses Law], Presidential Decree No. 129 (1973) (as amended).

396. *Id.* § 6.

397. *Id.*

398. Bangko Sentral ng Pilipinas, Manual of Regulations for Banks Volume 1, § X145 (Oct. 31, 2015).

399. Bangko Sentral ng Pilipinas, Amendment to the Regulation on Interlocking Directorships and /or Officerships of Representatives of Government, BSP Circular No. 953, Series of 2017 [BSP Circ. No. 953, s. 2017], § 1 (Mar. 27, 2017).

400. Bangko Sentral ng Pilipinas, *supra* note 398, § X141.1 (c).

401. Bangko Sentral ng Pilipinas BSP Raises Bar on Corporate Governance, *available at* http://www.bsp.gov.ph/publications/media.asp?id=4450&yr=2017 (last accessed Nov. 30, 2019).

V. LEGAL ANALYSIS

A. Overview

As was discussed earlier, the 1987 Philippine Constitution prohibits illegal monopolies, combinations in restraint of trade, or unfair competition.[402] The Philippine Competition Act has similar goals as it aims to ensure market efficiency for the benefit of the consumers.[403] Philippine laws have basically been created to safeguard competition and to counter activities or conducts, which may lead to its foreclosure. Since the national comprehensive competition law is fairly new, there has not been much jurisprudence on it that could help in the interpretation of the provisions.

Upon the enactment of the law, certain questions have arisen. One of them is the legal issue presented in this Note: Does the existence of horizontal and vertical interlocks violate the current Philippine Competition Act and general competition policies that the 1987 Constitution upholds? Is the current law sufficient to cover the anti-competitive effects that arise out of interlocks? This question was originally posed by Atty. Francisco Lim in his book, but his inquiry was limited to horizontal interlocks.[404] It has also been a question in other jurisdictions. Some have addressed it like the countries mentioned earlier and others have not. Under Philippine laws, it seems that it is still subject to interpretation.

Interlocking directorates, in general, are not anti-competitive. Antitrust issues arise on a case-to-case basis depending on factors such as the type of interlock. Horizontal and vertical interlocks pose antitrust concerns. Horizontal interlocks are currently the most problematic type of interlock under competition law. It has already been touched upon by *Gokongwei, Jr.*, as already mentioned before. The Court acknowledged the anti-competitive effects of such an interlock.[405] It explained that

> [s]hared information on cost accounting may lead to price fixing. Certainly, shared information on production, orders, shipments, capacity and inventories may lead to control of production for the purpose of controlling prices.

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402. PHIL. CONST. art. XII, § 19.

403. Philippine Competition Act, § 2.

404. LIM & RICALDE, *supra* note 346, at 75.

405. *Gokongwei, Jr.*, 89 SCRA at 378.

> Obviously, if a competitor has access to the pricing policy and cost conditions of the products of San Miguel Corporation, the essence of competition in a free market for the purpose of serving the lowest priced goods to the consuming public would be frustrated. The competitor could so manipulate the prices of his products or vary its marketing strategies by region or by brand in order to get the most out of the consumers. Where the two competing firms control a substantial segment of the market this could lead to collusion and combination in restraint of trade. Reason and experience point to the inevitable conclusion that the inherent tendency of interlocking directorates between companies that are related to each other as competitors is to blunt the edge of rivalry between the corporations, to seek out ways of compromising opposing interests, and thus eliminate competition.[406]

Despite this ruling, however, the case is not enough to conclude that horizontal interlocks are completely prohibited in the Philippines. The basis of the Court in its ruling, Article 186 of the Revised Penal Code, has already been repealed by the enactment of the Philippine Competition Act of 2015.[407] Furthermore, the issue in *Gokongwei, Jr.* was actually the validity of the by-laws so the explanation related to antitrust issues was merely a supplement to the actual corporate dispute involved.[408] As of today, horizontal interlocks are technically still allowed despite the obvious anti-competitive concerns such a relationship creates, which is a problem because it creates a means through which antitrust principles are violated. Globally, interlocks have been recognized as a detriment to fair competition. This is why some countries actually specifically regulate it, such as the US through the Clayton Act.

The anti-competitive effects arising from vertical interlocks are not as prominent as horizontal interlocks, but they exist. It leads to preferential treatment in the form of exclusive dealings, tying and bundling arrangements, price discriminations, and the like between the companies with the interlocking director so as to benefit them both to the detriment of competitors in the same industry.[409] This type of interlock is regulated by countries like Japan, Indonesia, and Korea.[410]

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406. *Id.*

407. Philippine Competition Act, § 55 (a).

408. *Gokongwei, Jr.*, 89 SCRA at 361.

409. Halverson, *supra* note 112, at 348.

410. Petersen, *supra* note 70, at 861.

B. Conflict Between Corporate Law and Competition Principles

In the Philippines, the problem of interlocks is due to the conflict between the requirements of corporate law and competition law. As already explained before, under the Revised Corporation Code, a director has a fiduciary duty to the corporation.[411] He is specifically elected by the stockholders to do what is best for the corporation.[412] The duty entails obedience, diligence, and loyalty to the company.[413] The trust relationship requires the trustee — the directors — to work for the benefit of the beneficiary — the stockholders.[414] Breach of the fiduciary duty entails consequences, such as the filing of derivative suits by a stockholder.[415] If an individual serves as a director in two or more companies, he is required to observe the same fiduciary duties towards each and every one of these companies.[416] Conflict of interest situations are unavoidable in these instances, especially if the companies involved have a horizontal or vertical relationship.[417] There is what was labeled earlier as "fiduciary tension."[418] As explained in *Gokongwei, Jr.*, "A person cannot serve two hostile and adverse master, without detriment to one of them. A judge cannot be impartial if personally interested in the cause. No more can a director. Human nature is too weak for this."[419] For competing corporations with interlocking directorates, the directors would be forced to find a way to compromise in a manner that is always best for all the companies they serve, in order to prevent a breach of their fiduciary duties. Using information from both companies, such directors may end up causing the companies to collude or at least engage in parallel behavior, as it is usually the best way to compromise, despite not agreeing to do so. With regard to vertical interlocks, conflicts of interests would not necessarily cause collusion since the

411. VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 310.

412. *Id.*

413. *Id.* at 381.

414. *Id.* at 310.

415. *Id.* at 474.

416. *See* VILLANUEVA & VILLANUEVA-TIANSAY, *supra* note 290, at 310.

417. Petersen, *supra* note 70, at 846.

418. *Id.*

419. *Gokongwei, Jr.*, 89 SCRA at 368 (citing Cross v. W. Virginia Cent. & P. Ry. Co., 16 S.E. 587, 588 (W. Va. 1892) (U.S.)).

corporations are not competitors. However, fiduciary duties may also force the director to get the best deals for both companies so it is possible for him to be the means through which the two firms can dominate the industry through exclusive dealings.

The Revised Corporation Code did try addressing the conflict brought about by interlocks. However, the provisions focused on situations wherein the director would have to choose between benefiting the company or himself. But, what if the interlocking director finds a way to benefit both corporations? From the corporate aspect, that would be good because the director would still be fulfilling his fiduciary duties. The provisions regulating the conflicts brought about by interlocks would not be needed in this instance since the director still works for what is best for all the companies involved. In the US, the overall fairness test is used to evaluate contracts between companies with an interlocking director.[420] If the contract would be beneficial for both firms, it would not be invalidated and the director will not be punished for breach of fiduciary duties.[421] It is similar in the Philippines because Section 32 of the Revised Corporation Code does not invalidate the contract right away but determines first whether it is fair and reasonable.[422] From the competition aspect, however, this is problematic. The interlock intervenes with fair competition. Because the director has access to sensitive information from both firms, it affects his decisions and how the two companies perform in the market.[423] If there was no interlock, neither firm could accurately predict the other firm's actions so both would do their best in trying to come up with strategies that would be better than the other's in the form of product innovations, better price offers, and the like.[424]

The Revised Corporation Code provides certain remedies in cases of interlocks. If the company deals with another corporation, which the interlocking director also works for, such director can be inhibited from participating in discussions relating to transactions between such corporations. Such is unrealistic especially in the context of competing companies or

420. Paul Obo Idornigie, *Interlocking Directorate and Corporate Governance*, 32 INT. BUS. LAWYER 75, 78 (2004).

421. *Id.*

422. REV. CORP. CODE, § 32.

423. Petersen, *supra* note 70, at 834.

424. *Id.* at 835.

horizontal interlocks because everything the board discusses would be useful information for the other company. They are in the same industry, after all, and engaged in providing the same, similar, or related products or services. The director cannot be excluded from all discussions; otherwise, it would be better to have him removed as director instead. Hence, the Revised Corporation Code remedies cannot be deemed sufficient to regulate conflicts arising from horizontal and vertical interlocks. There is a need to generally find a balance between the director's fiduciary duties to his or her companies and ensuring fair competition in the market. Currently, there is still a conflict between the two that is not properly addressed by the existing laws; hence, compliance with the corporate requirements may lead to violation of antitrust principles. In order to ensure acquiescence to fiduciary duties without violating competition laws, horizontal and vertical interlocks have to be regulated.

C. Insufficiency of the Current Philippine Competition Act

To reiterate, the current Philippine Competition Act prohibits: (a) anti-competitive agreements, (b) abuse of dominant position, and (c) certain mergers and acquisitions.[425] There is no specific prohibition of interlocking directorates under any circumstances. The questions now are: (1) Can interlocking directorates be considered a violation of any of the aforementioned prohibited activities or conducts? (2) Is the current competition law enough to address the issues arising from horizontal and vertical interlocks? The Commission has not yet addressed this situation so there is no specific Philippine case law to determine the answers to these questions.

1. Anti-Competitive Agreements (Section 14 of the Philippine Competition Act)

First, what are anti-competitive agreements exactly? In order to be liable under Section 14 of the Philippine Competition Act for anti-competitive agreements, the following must be complied with:

(1) Parties are competitors, i.e., they do not belong to a single economic entity;

(2) [t]here must be an understanding between or among parties towards the accomplishment of a particular object;

425. Philippine Competition Act, § 2 (c).

(3) [t]he agreement must have substantial foreclosure effect on the relevant market; [and]

(4) [t]here is no objective justification for such understanding.[426]

Under the Philippine Competition Act, an 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[.]"[427] Hence, based on the definition, an agreement does not have to be written. In fact, more often than not, agreements are not in contractual printed form. They are usually informal and orally done in order to avoid detection. What is important is that there is an understanding between the companies involved towards a particular anti-competitive goal.

Horizontal and vertical interlocks do not fall under Section 14 (a) or (b) as there are already specific acts that fall under these provisions. However, Section 14 (c) is generally broad as it refers to all other anti-competitive agreements that substantially foreclose competition.[428] Horizontal interlocks may be indirectly addressed under this, if the effects of such an interlock satisfy the aforementioned elements for violating Section 14. The difficult part is determining whether or not an interlock could be considered an agreement.

As was already mentioned earlier, horizontal interlocks have coordinated and non-coordinated or unilateral risks.[429] Coordinated risks include actual collusions wherein two or more companies purposely use or elect the director as a means to control competition in the market.[430] Section 14 (c) of the Philippine Competition Act may be used as basis to indirectly penalize horizontal interlocks producing these coordinated risks if: (1) there is an agreement, whether actual or implied, (2) the agreement is between competitors, and (3) the agreement is used for an anti-competitive purpose.[431] To clarify, however, it is the effect of the interlock — the agreement to collude through the interlock — that is actually being punished. The interlock,

426. LIM & RICALDE, *supra* note 346, at 68.

427. Philippine Competition Act, § 4 (b).

428. *See* LIM & RICALDE, *supra* note 346, at 68.

429. Thépot, et al., *supra* note 86, at 4.

430. *Id.*

431. *See* LIM & RICALDE, *supra* note 346, at 68.

itself, is not. It is merely indirectly addressed as a consequence of the agreement or collusion.

Coordinated risks may also include parallel behavior, which refers to similar conduct between two companies in the market.[432] Parallel behavior is not necessarily unlawful under Article 101 of the TFEU, the basis of Section 14 of the Philippine Competition Act.[433] The European Union has held that "[t]he finding of common or parallel courses of conduct of undertakings may not, in itself, be sufficient to amount to a concerted practice."[434] There must be proof of agreements. Parallel behavior does not equate to collusion. This is further affirmed by jurisprudence in the US. In *Bell Atlantic Corp. v. Twombly*,[435] the Court basically held that a complaint alleging antitrust conspiracy could be dismissed if it is based only on allegations of parallel activities.[436] To be specific, it stated that "while a showing of 'parallel business behavior is admissible circumstantial evidence from which' agreement may be inferred, it falls short of 'conclusively establish[ing] agreement or ... itself constitute[ing] a Sherman Act offense.'"[437] Orlando Polinar, Director of the Competition Enforcement Office of the Commission, also confirmed in an interview that parallel behavior is not enough to constitute a violation of Section 14 (c) of the Philippine Competition Act.[438] He further added that with regard to interlocking directorates, because there is no specific provision on the matter, the Commission cannot immediately investigate without proof that it resulted to anti-competitive agreements.[439] Evidence of agreement,

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432. *See* Petersen, *supra* note 70, at 840.

433. Petersen, *supra* note 70, at 840.

434. Suiker Unie and Others v. Commission, Judgment, Case C-40/73, EU:C:1975:174 (CJEU Dec. 16, 1975).

435. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

436. *Id.* at 545.

437. *Id.* (citing Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954)).

438. Interview *with* Orlando Polinar *in* Quezon City, Metro Manila (Aug. 1, 2018).

439. *Id.*

through direct or indirect evidence, must be shown before liability may be imposed.[440]

The existence of unilateral risks of interlocks is the reason why certain jurisdictions prefer to address interlocks specifically in their laws.[441] It is important to remember that not all interlocks are planned ahead of time. Companies may choose the same director coincidentally and they cannot be faulted for that since a corporation has a right to choose who will represent it. They may also not actually come to any agreement to collude despite the interlocking director and yet competition remains stifled. Critics of the European Competition Law have actually debated about this matter already.[442] Article 101 of the TFEU, which is the basis for Section 14 of the Philippine Competition Act, was considered insufficient in tackling the anti-competitive risks of horizontal interlocks because it is limited to dealing with certain forms of coordinated risks.[443] Unilateral risks of such interlocks do not fall under Article 101 (and Section 14 of the PCA) because one of the essential ingredients for the violation — an agreement — is absent in this scenario.[444] An agreement requires at least a tacit meeting of the minds.[445]

Unilateral risks include exchange of information between the companies without collusion, which may soften competition between the rival companies.[446] Second, it is also possible to interfere with competition even without the disclosure of such information to the two corporations.[447] As explained earlier regarding the conflict between corporate and competition law requirements, the interlocking director, himself, can manipulate corporate action based on knowledge acquired from the two firms, without disclosing such sensitive information to the other firm, in order to benefit all the

440. *Id.*

441. *See* Thépot, et al., *supra* note 86, at 5.

442. *See* Thépot, et al., *supra* note 86, at 10.

443. Thépot, et al., *supra* note 86, at 14.

444. *Id.* at 10

445. *Id.*

446. Petersen, *supra* note 70, at 844.

447. *Id.*

companies, which may affect competition in the market.[448] Hence, under the current competition law, Section 14 (c) on Anti-Competitive Agreements does not seem to sufficiently cover or address all problems, particularly unilateral risks and parallel behavior, created by horizontal interlocks.

2. Abuse of Dominant Position (Section 15 of the Philippine Competition Act)

As for vertical interlocks, the antitrust violations that may arise are usually activities that are normally classified under abuse of dominance.[449] But horizontal interlocks may also be used to conduct these types of anti-competitive conduct.[450] For this part of the analysis, it must first be determined whether or not the list of abuse of dominance activities in the law is exclusive. Congress removed the original phrase "includes, but is not limited to the following" in the final draft of the law itself, which implies that the list is exclusive.[451] There is no catch-all provision for this particular anti-competitive conduct in the law. During deliberations, Representative Rodriguez held that

> [i]t [is] always good for those who will be regulated to exactly know what are really prohibited because we are talking here of prohibited acts. We're not only defining what are the elements of or what is dominant position or what. Senator Villar is right, if we want to be clear to the regulated that these are the acts they should not do, then we should do it, it should be here.[452]

He further clarified that because penalties are involved in the violation of Section 15, even if merely in the form of administrative fines, "there should be, you know a listing that if it's not there, then you don't give the commission so much discretion on defining what the crime is."[453] Representative Gutierrez supported Representative Rodriguez by emphasizing that —

448. *Id.*

449. *See* LIM & RICALDE, *supra* note 346, at 85.

450. *Id.*

451. LIM & RICALDE, *supra* note 346, at 92.

452. Deliberations on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No. 5286 (Fair Competition Act of 2015), Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No. 5286 (Fair Competition Act of 2015), at 9-10, 16th Cong. (June 5, 2015).

453. *Id.*

> The problem with including a catch[-]all provision in a law which has administrative penalties is that it can be subject to [—] well, attack constitutionally. Because the idea here is you [are] imposing a penalty but you're basing the penalty on a vague provision of law. There should be a certain degree of specificity here.[454]

The basis for the arguments of the Congressmen is the penal nature of the Philippine Competition Act. Not all the provisions impose criminal penalties. In fact, most violations result to administrative fines. However, in the case of *Buenaseda v. Flavier*,[455] the Court held that "the test in determining if a statute is penal is imposed for the punishment of a wrong to the public or for the redress of an injury to an individual[.]"[456] It does not distinguish between criminal and administrative penalties.[457] According to statutory construction, penal laws must be strictly construed.[458] Hence, if the law provides a listing without a catch-all clause, the principle of *expressio unius est exclusio alterius* applies.[459] As a result, only those explicitly listed under Section 15 can be considered as abuse of dominance under the current legal framework. In the Indonesian Competition Law,[460] there is a specific provision on interlocking directorates as a form of abuse of dominance.[461] However, in the Philippines, because the list in Section 15 is exclusive, it does not adequately cover the abuse of dominance effects of interlocking directorates.

The only time Section 15 can possibly apply is through indirect means. If the director is used as a means through which prohibited activities listed in the law are violated, the Philippine Competition may be used. As an example, if

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454. *Id.* at 73.

455. Buenaseda v. Flavier, 226 SCRA 645 (1993).

456. *Id.* at 652-53 (citing 59 Corpuz Juris, Sec. 568 & Crawford, Statutory Construction 496-97).

457. *See Buenaseda*, 226 SCRA at 652-53.

458. *Buenaseda*, 226 SCRA at 652 (citing Crawford, Statutory Construction, Interpretation of Laws, pp. 460-461 & Lacson v. Roque, etc., et al., 92 Phil. 456, 488 (1953)).

459. Centeno v. Villalon-Pornillos, 236 SCRA 197, 203 (1994).

460. Concerning Ban on Monopolistic Practices and Unfair Business Competition, Law of the Republic of Indonesia No. 5 of 1999 (1999) (Indon.).

461. *Id.* art. 26.

horizontal or vertical interlocks are used to conduct discriminatory behavior, which may serve as barriers to entry, the companies may be liable for the abuse of dominance activity conducted through the interlock, assuming all the elements constituting violation of Section 15 are satisfied.[462] But, again, what is punished is not the interlock itself, but the acts resulting from the interlock, which constitute abuse of dominance. The interlock is merely indirectly taken into consideration for playing a role in the violation of the law. If the abuse of dominance activity caused by the interlock is not covered by the list in the law, the interlock cannot be penalized for violation of Section 15.

The elements constituting a violation of Section 15 of the Philippine Competition Act on Abuse of Dominance are:

(1) The entity must have market power (specifically, a dominant position in the relevant market);

(2) [t]he entity commits abusive conduct;

(3) [t]he conduct must have substantial foreclosure effect on the relevant market; [and]

(4) [t]here is no objective justification for the conduct.[463]

What is important to remember is that the law requires that the party or parties (in cases of collective dominance) involved have a dominant position in the market.[464] Dominant position is defined as "a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers[.]"[465] Furthermore, under the law, dominance can be presumed if the entity has a market share of at least 50% within the relevant market.[466] It can be said that Section 15 is very specific. If the parties allegedly accused of abusive conduct do not have a dominant position in the market, they cannot be held liable under Section 15.[467] In relation to interlocks, only interlocks between

462. Petersen, *supra* note 70, at 834.

463. LIM & RICALDE, *supra* note 346, at 84.

464. *Id.*

465. Philippine Competition Act, § 4 (g).

466. *Id.* § 27.

467. *See* LIM & RICALDE, *supra* note 346, at 84.

companies with dominant positions may be covered by the provision.[468] Horizontal or vertical interlocks between companies, who do not possess a dominant position in the market, cannot be punished under Section 15.[469]

3. Mergers and Acquisitions (Sections 16 to 23 of the Philippine Competition Act)

With regard to mergers or acquisitions, the Commission has the power to address interlocking directorates.[470] In an interview with Attorney Krystal Uy, Director of the Mergers and Acquisitions Office of the Commission, she explained that, although the Merger Review Guidelines do not specifically mention director interlocks, if the Commission deems that such a relationship would make the merger or acquisition anti-competitive, the Commission may consider such merger prohibited, unless the anti-competitive structures are addressed.[471] Normally, the acquiring and to-be acquired entities, in response to this, would simply remove the interlocking directorate from the two companies.[472] The Commission could also ask for a divestment of shares, which could in return affect the position of the interlocking director.[473] However, it is important to remember that this only applies in the context of mergers.

D. Insufficiency of the Other Competition-Related Laws

Article XII, Section 19 of the 1987 Constitution[474] can be interpreted to cover interlocks because it is meant to fight any form of unfair competition. However, it is not a self-executing provision so Congressional legislation is required to breathe life into the constitutional mandate.[475] The Revised Penal Code cannot be used to address interlocking directorates because it has been

468. *Id.*

469. *Id.*

470. Philippine Competition Act, § 12 (a).

471. Interview *with* Krystal Uy, *in* Quezon City, Metro Manila (Aug. 1, 2018).

472. *Id.*

473. Philippine Competition Act, § 12 (h).

474. PHIL. CONST. art. XII, § 19.

475. *See* Manila Prince Hotel v. Government Service Insurance System, 267 SCRA 408, 431 (1997).

expressly repealed by the Philippine Competition Act.[476] The Civil Code provision has not been repealed by the new competition law but Article 28 is not sufficient. It is limited only to the "agricultural, commercial, industrial enterprises or in labor."[477] Another important thing to note is that the Civil Code grants damages to private persons.[478] The same goes for Act No. 3247 with regard to its rules on treble damages.[479] What happens if the interlock does not really cause injury to a particular private injured party? Unlike the Civil Code, the Philippine Competition Act punishes entities for anti-competitive activities conducted to the detriment of consumer welfare.[480] No particular person has to be injured.[481] The administrative fine is a penalty, meant to deter anti-competitive conduct in the market.[482] The Civil Code is only meant to compensate the private party.[483] The Philippine Competition Act aims to be able to compensate the affected market. As for the BSP Regulations, the Investment House Law, and the Insurance Code, they address interlocks but only in the financial sector.[484]

E. Summary

To summarize, since the current competition law and jurisprudence after the enactment of such law do not specifically address horizontal and vertical interlocks, some, especially in the private sector, believe that these types of interlocks are not violative of competition principles. They are considered legal in light of the fact that the corporation has the right to choose the members of its board, without interference from the State, so long as the requirements of corporate law are complied with. But the interlocks may serve

476. Philippine Competition Act, § 55 (a).

477. CIVIL CODE, art. 28.

478. *Id.*

479. An Act to Prohibit Monopolies and Combinations in Restraint of Trade, Act No. 3247, § 6 (1925).

480. LIM & RICALDE, *supra* note 346, at 183.

481. *Id.*

482. *Id.* at 167.

483. *See* CIVIL CODE, art. 20.

484. *See* BSP Circ. No. 953, s. 2017, § 1; The Investment Houses Law, whereas cl. para. 1; & INS. CODE, § 2 (1)-(2).

as instruments through which individuals can circumvent the law and contravene the very competition principles that the 1987 Constitution and the Philippine Competition Act aim to protect. As of today, the only regulations specifically addressing interlocking directorates are industry-specific. The financial industry, as already discussed earlier, provides certain rules on interlocking directorates for insurance companies, banks, and investment houses. The old laws in the Civil Code and Act No. 3247, on the other hand, are also not sufficient as they are meant to merely compensate private parties. This is not enough to deter anti-competitive conduct.

Because interlocks are not specifically regulated by law, the Commission can only look into these structural links after they produce anti-competitive behavior punishable by the law in the form of anti-competitive agreements, abuse of dominant positions, and prohibited mergers and acquisitions. The law basically does not really address the interlocks themselves, but the effects of the interlocks, if they can be classified under Sections 14 to 23. Interlocks are only indirectly regulated in these situations. This method, however, is insufficient and fails to address anti-competitive issues created by interlocks outside the scope of those explicitly prohibited by law such as the unilateral risks of horizontal interlocks in the form of information exchange or director manipulation, coordinated risks in the form of parallel behavior, and other forms of abuse of dominance. It is important to take note of the fact that interlocks, themselves, are conducive to all sorts of antitrust violations. The fiduciary tension the interlocking director faces due to conflicting requirements of corporate and competition law influences how the companies he serves act in the market. Since the anti-competitive effects of interlocks are evident, there is no reason why specific rules or guidelines governing its existence should not be created to ensure compliance with the Constitutional obligation to protect fair competition and to address the conflict between corporate and competition law. Under the current law, anti-competitive interlocks can only be assailed once the economy is already adversely affected.

Some competition authorities have pointed out that interlocks are similar to mergers or acquisitions so both should be specifically addressed by law. Like mergers, interlocks create structural links between corporations that could affect how they perform in the market.[485] The only difference is that mergers involve larger transactional costs and "destroy the autonomy of the firms"[486]

485. Petersen, *supra* note 70, at 822.

486. *Id.*

since the previously separate companies become one juridical entity. Interlocks, however, still preserve the corporations' independence.[487] Like interlocks, not all types of mergers are unlawful. It would depend on the factual circumstances. But unlike interlocks, mergers are actually specifically regulated. They are investigated even before they produce anti-competitive effects on the economy. Why should not interlocks also be directly regulated in the same manner? Both pose threats to competition and the Constitutional mandate against anti-competitive behavior. The anti-competitive risks of interlocks have already been confirmed by jurisprudence in different jurisdictions, including the Philippines in the case of *Gokongwei, Jr.* Horizontal and vertical interlocks are generally difficult to detect, especially if the interlocks are indirect. This is what makes them so dangerous from inception. Even if eventually detected, the anti-competitive effects must then be proven to fall under Section 14, 15 or 16 to 23 and this process may take a while. The failure of the law to properly regulate horizontal and vertical interlocks leaves the conflict between corporate fiduciary duties and competition policies unresolved. It also allows entities to engage in certain anti-competitive conducts through the interlock free from any form of liability despite causing damage to consumer welfare and the general relevant market, which is against the policy stipulated in the Philippine Competition Act and 1987 Philippine Constitution, propagating fair competition.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

For the longest time, the Congress of the Philippines strove for the enactment of a comprehensive competition law.[488] The 1987 Constitution provided that competition must be fostered.[489] Monopolies and any other form of restraint of trade should be prohibited.[490] Because competition policies were scattered across different statutes, it was difficult to enforce. No central authority existed to ensure protection of antitrust principles. The enactment of the Philippine Competition Act of 2015 was supposed to pave the way towards a better enforcement of competition policies, especially in a country where major

487. *Id.* at 835.

488. Schnabel, *supra* note 10.

489. PHIL. CONST. art. XII, § 19.

490. PHIL. CONST. art. XII, § 19.

industries are controlled by only a few players in the market. Since the law is still generally novel, jurisprudence to help interpret the provisions is still lacking. Hence, as of today, decisions of the Commission are still highly influenced by global practices.

Despite there being no specific provision in the competition laws of the Philippines addressing interlocks, the existence of horizontal and vertical interlocks still violates general competition principles and the Philippine Competition Act under certain conditions. Interlocks may be indirectly penalized under the law. If the horizontal interlock results to coordinated risks in the form of anti-competitive agreements, it can be punished under Section 14.[491] If a vertical interlock is the means through which abuse of dominance activities listed in the law are conducted, Section 15 may be applied, on the assumption that the companies involved hold a dominant position in the market.[492] In cases of mergers or acquisitions, a merger may be considered prohibited until the interlocking director is removed from his position.[493] It is important to emphasize, however, that what the law addresses are the effects of the interlock in Sections 14 to 15. It does not really regulate the interlock itself. Hence, if the anti-competitive effects of the interlock are outside the coverage of the current law, the interlock would not be considered anti-competitive. This is why the law is still insufficient because there are other types of anti-competitive risks that do not fall under the prohibited acts in the Philippine Competition Act. Such risks include unilateral ones, such as exchange of sensitive information and director manipulation, parallel behavior, and other forms of abuse of dominance not included in the list found in the law. These risks do not fall under Section 14 due to the lack of an agreement, Section 15 because the enumerated list is exclusive, or Sections 16 to 23, which only apply if in the context of a merger or acquisition. The Civil Code, on the other hand, is limited to certain industries and merely provides remedies for private injured parties.[494] It does not address the need to deter anti-competitive behavior to protect general consumer welfare, unlike the Philippine Competition Act, which imposes penalties for the damage to the industry or market.

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491. Philippine Competition Act, § 14.

492. *Id.* § 15.

493. *Id.* §§ 16-23.

494. CIVIL CODE, art. 28.

Again, the 1987 Philippine Constitution prohibits illegal monopolies, combinations in restraint of trade, and unfair competition.[495] The Supreme Court has clarified this to be "anti-trust in history and in spirit[.]"[496] The provision basically mandates fair competition. Anything in violation of that would be unconstitutional.[497] Congressional laws should be enacted in accordance with the constitutional requirement. Horizontal and vertical interlocks have been established to create anti-competitive risks that have not been addressed sufficiently by the current law. The failure of the law to regulate this structural link creates a gap that leaves the conflict between corporate fiduciary duties and competition policies unresolved. It also allows entities to engage in certain anti-competitive conducts through the interlock free from any form of liability despite causing damage to consumer welfare and the general relevant market, which is against the policy stipulated in the Philippine Competition Act propagating fair competition.

B. Recommendations

Japan and Korea have provisions specifically addressing interlocks but usually in the context of mergers and acquisitions.[498] Indonesia, on the other hand, classifies interlocks as a form of abuse of dominance.[499] The US through the Clayton Act is the only statute that addresses interlocks even outside the context of mergers and is seen as an anti-competitive conduct on its own.[500] However, it is a *per se* prohibition and limited only to horizontal interlocks.[501] A *per se* prohibition is not recommended for the Philippines because horizontal and vertical interlocks are not anti-competitive at all times. They threaten competition in the market, but sometimes the benefits override the disadvantages to competition. As advocates of interlocking directorates would

495. PHIL. CONST. art. XII, § 19.

496. Tatad v. Secretary of Department of Energy, 281 SCRA 330, 358 (1997).

497. *See* Olandesca, *supra* note 355, at 21.

498. *See* Petersen, *supra* note 70, at 824.

499. *See* Wimbanu Widyatmoko, et al., Antitrust and Competition in Indonesia, *available at* https://globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-indonesia (last accessed Nov. 30, 2019).

500. *See* Petersen, *supra* note 70, at 823.

501. Petersen, *supra* note 70, at 823.

argue, interlocking directorates may occur simply because the director is sought after by many companies due to his professional skill and experience.

This Note recommends that a provision on interlocks be added as a prohibited activity in the Philippine Competition Act. The proposed provision would be in this form —

Section XX. *Horizontal and Vertical Interlocks*. No person or his agent shall, at the same time, serve as a director in any two or more corporations that are competitors or in a vertical relationship with each other, if such person's doing so has the object or effect of substantially preventing, restricting, or lessening competition in any particular field of trade: *Provided*, those which contribute to improving production or distribution of goods or services within the relevant market, or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.

For this provision to apply, each of the corporations must have capital, surplus, and undivided profits aggregating more than (*an amount to be set by the Philippine Competition Commission, in accordance with the current state of the national economy*). This amount will be adjusted annually.

An entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for purposes of this Section.

This Section shall also not cover horizontal or vertical interlocks that are already regulated by other industry specific legislations.

1. Applicability to Different Types of Interlocks

The question now would be, to which types of interlocks will this provision apply? The provision will apply to both horizontal and vertical interlocks. Even vertical interlocks have anti-competitive risks that are not properly addressed by the law. The Section will also apply to both direct and indirect interlocks. In the US, the Clayton Act was, in the beginning, limited to direct horizontal interlocks but jurisprudence eventually declared that it should be applicable as well to indirect interlocks.[502] With regard to deputization, because of the nature of an agency relationship which must be proven to exist, an agent is merely a representative of the principal and the former's actions

502. Square D Co. v. Schneider S.A., 760 F. Supp. 362, 365-66 (S.D.N.Y 1991) (U.S.).

equate to the latter's.[503] Even if a person does not directly sit as a board member of two boards of different companies with a horizontal or vertical relationship, if his agents do so instead, the anti-competitive risks are the same. The agent's knowledge is the principal's knowledge since the former basically works for the latter.[504] As for indirect interlocks through parent-subsidiary relationships, because the companies involved constitute a single economic entity, knowledge of the subsidiary company is generally the knowledge as well of the parent company and vice versa. The control over the subsidiary, however, must be proven for there to be an indirect interlock. Section 25 of the current law entitled "Control of an Entity" may be used as reference.[505] If indirect interlocks were allowed, it would be a means of circumventing the law.

2. Defining the Relevant Markets

In order to constitute an illegal horizontal interlock, it must be proven that the companies are competitors. To prove this, a determination of the relevant market is necessary. In the US, the relevant product market is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[506] On the other hand, the relevant geographic market must "both correspond to the commercial realities of the industry and be economically significant."[507] There are several tests created by US jurisprudence to identify the relevant product and geographic market. One of them is the Hypothetical Monopolist Test or the Small but Significant and Non-Transitory Increase in Price (SSNIP) Test.[508] This is the most common method of ascertaining the relevant market all over the world. In fact, it is used in the analysis of the legality of mergers and acquisitions in

503. CIVIL CODE, art. 1910.

504. *See* Cosmic Lumber Corporation vs. Court of Appeals, 265 SCRA 168, 180 (1996).

505. Philippine Competition Act, § 25.

506. *Brown Shoe Co.*, 370 U.S. at 325.

507. *Id.* at 336-37 (citing American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387, 398 (S.D.N.Y. 1957) (U.S.) & S. Rep. No. 1775, at 5-6, 81st Cong., 2d Sess. (U.S.)).

508. Harkrider, *supra* note 241, at 2.

the Philippines.[509] The SSNIP test can be used for interlocks since such is what is used in the US, and the Commission is already familiar with the method.[510] Jurisprudence applying Section 8 of the Clayton Act mostly applies the quantitative analysis, which makes use of the cross-price elasticity of demand and the reasonable interchangeability of use test to determine whether or not the companies involved are in a horizontal relationship.[511]

The Commission uses the SNIPP test in this manner to identify the relevant product market —

> The Commission applies the SNIPP test to a candidate market of each product produced or sold by each of the merging firms, assessing what would happen if a hypothetical monopolist of that product imposed at least a SSNIP on that product, while the terms of sale of all other products remained constant. If the hypothetical monopolist would not profitably impose such a price increase because of substitution by customers to other products, the candidate market is not a relevant product market by itself. The Commission then adds to the product group the product that is the next-best substitute for the merging firm's product and apply the SSNIP test to a candidate market of the expanded product group. This process continues until a group of products is identified such that a hypothetical monopolist supplying the product(s) would be able to exercise market power and profitably impose a SSNIP in the candidate market. The relevant product market generally will be the smallest group of products that satisfies this test.[512]

To identify the relevant geographic market

> [t]he Commission applies the SSNIP test to a candidate market of each location in which each merging firm produces or sells the relevant product, assessing what would happen if a hypothetical monopolist in that location imposed at least a SSNIP on sales of the product in that location, while the terms of sale in all other locations remained constant. If the hypothetical

509. Philippine Competition Commission, Merger Review Guidelines at 8-9, *available at* https://phcc.gov.ph/wp-content/uploads/2017/03/PCC_Merger_Guidelines_MAO_03232017.pdf (last accessed Nov. 30, 2019).

510. U.S. Department of Justice & the Federal Trade Commission, *supra* note 224, § 4.1.1.

511. Benjamin M. Gerber, *Enabling Interlock Benefits while Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act*, 24 YALE J. ON REG. 107, 124 (2007).

512. Philippine Competition Commission, *supra* note 509, at 9.

> monopolist would not profitably impose such a price increase because of substitution by customers to products from other geographic areas, the candidate market is not a relevant geographic market by itself.[513]

A 5% to 10% SSNIP is usually used as a reference point to determine price increases while a one year to three-year period is considered as non-transitory in the Philippines.[514] To reiterate, the SSNIP test involves (1) determining the cross price-elasticity of demand between the hypothetical monopolist's products and substitute products,[515] (2) computing for the diversion ratio by comparing the cross price-elasticity of demand with the hypothetical monopolist's elasticity of demand,[516] (3) a critical loss analysis of the substitute goods,[517] and (4) determining the profitability of the SSNIP by a comparison of the Diversion Ratio and break-even Critical Loss point.[518] If the Diversion Ratio or Actual Loss is greater than the Critical Loss, the products are within the same market.[519] If Critical Loss is greater than the Diversion Ratio, the goods in question do not belong to the same market.[520]

The cross-price elasticity of demand basically refers to "the rate at which the quantity of a product sold changes when the price of another product goes up or down."[521] The goods are substitutes if the cross-price elasticity is positive.[522] A negative result means that the goods are complements.[523] Lastly,

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513. *Id.* at 10.

514. LIM & RICALDE, *supra* note 346, at 54.

515. Squillantini, *supra* note 246, at 55.

516. *See* European Commission, *supra* note 235, ¶ 39.

517. Squillantini, *supra* note 246, at 55-56.

518. Organisation of Economic Co-operation and Development, *supra* note 236, at 55.

519. *See* Organisation of Economic Co-operation and Development, *supra* note 236, at 38.

520. *Id.* at 36-39.

521. Philippine Competition Commission, *supra* note 509, at 10.

522. *Id.*

523. *Id.*

if there is zero-elasticity then that means the goods are not related at all.[524] Diversion Ratios, on the other hand, is basically "percentage of lost sales of product A which are diverted to product B, should A increase its price."[525] A higher diversion ratio means that the companies offering products A and B are most likely competitors.[526]

After a determination of the relevant market, it can be much more easily assessed whether or not the two companies are competitors. It is the same with abuse of dominance cases perpetuated through interlocks. The relevant market must be identified so as to be able to determine whether or not the company exerts a dominant position over the market and is susceptible to abuse of dominance conduct.[527]

Another important thing to note is that the proposed provision also includes a paragraph similar to Section 14 of current law that explains the single economic entity doctrine. Basically, if the interlock is between a parent company and a subsidiary in which the parent company holds a substantial share or control, no violation can occur because the two entities are not competitors.[528] They are considered as a single economic entity with the same interests.[529]

3. *Per Se* Prohibition or Rule of Reason Analysis

This provision would be based on the rule of reason analysis. Again, like mergers and acquisitions, interlocks need to be analyzed on a case-to-case basis. Under the rule of reason analysis, the entities accused of anti-competitive behavior will not immediately be considered guilty of violating the provision in the law.[530] After being notified of the alleged illegal interlock, the Commission is required to first and foremost investigate the actual effects of such interlocks on the market before charging or punishing the parties

524. *Id.*

525. *Id.*

526. *Id.*

527. LIM & RICALDE, *supra* note 346, at 50 (citing European Union Competition Commission, *supra* note 235, ¶ 2).

528. Wilkinson, *supra* note 69, at 58.

529. *Id.*

530. Petersen, *supra* note 70, at 853.

involved.[531] Mere existence of the horizontal or vertical interlock is not enough to constitute a violation of the law.

4. Substantial Lessening of Competition Test (SLC Test)

Earlier, it was explained that the current law is only able to indirectly address interlocks if the effects can be considered covered under Sections 14 and 15. The problem is that not all types of anti-competitive behavior are sufficiently addressed by these two provisions. Hence, this Note proposes that horizontal and vertical interlocks should be subject to the general SLC test. This is usually used in the context of mergers and acquisitions in different jurisdictions, including the Philippines.[532] Under this test, a merger is considered anti-competitive if it would "substantially prevent, restrict, or lessen" competition in the market.[533] The focus is on the possible effects of the merger to be able to determine whether it should be prohibited or not.[534] The Philippine Competition Act also uses the same test for Sections 14 and 15.[535]

It is proposed that interlocks be governed in the same manner. The SLC test is broader and would encapsulate all types of anti-competitive behavior even those outside the scope of Sections 14 and 15 of the Philippine Competition Act. It would also be a way of striking a balance between the competitive benefits and disadvantages interlocks can bring. Interlocks that facilitate more anti-competitive conducts than economic advantages would be prohibited while those that contribute more to the improvement of the economy than to its detriment will be considered legal. The Commission will be charged with the economic analysis of the facts and circumstances surrounding the interlock.

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531. *Id.*

532. *See* Organisation of Economic Co-operation and Development, The Standard for Merger Review, with a Particular Emphasis on Country Experience with the Change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test (A Compilation Under the Competition Policy Roundtables series by the Organisation of Economic Co-operation and Development) at 22, *available at* https://www.oecd.org/competition/mergers/45247537.pdf (last accessed Nov. 30, 2019).

533. *Id.* at 7.

534. Philippine Competition Commission, *supra* note 509, at 4.

535. Philippine Competition Act, §§ 14-15.

a. Some Tools to Facilitate in SLC Analysis

i. Efficiency Gains Test

As explained earlier, the proposed provision seeks to ensure that only illegal interlocks will be prohibited by law. In the Merger Review Guidelines of the Commission, companies who are able to satisfy the efficiency test may be exempt from the requirements of the law.[536] The efficiency test is basically proof that "the merger 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."[537] The burden of proof, however, is on the entities involved in the merger or acquisition, not the government.[538] This can be applied to horizontal and vertical interlocks. Interlocks, which would result to more gains than anti-competitive effects, are valid as it fosters competition, rather than deters it.

ii. Market Concentration

Another factor that must be considered in determining the legality of the interlock is market concentration.[539] Interlocks in markets, which are more concentrated, would have a more detrimental effect on competition.[540] An economic tool used by experts is the Herfindahl-Hirshman Index (HHI).[541] It is computed by adding the squares of the market shares of all the companies in the industry.[542] The higher the HHI, the more concentrated the market is.[543] In merger or acquisition cases, the Commission takes note of the HHI before and after the merger or acquisition to determine the implications of such kinds of combinations.[544] This may be applied in analyzing interlocks. A comparison of the HHI of the market before and after the horizontal and

536. Philippine Competition Commission, *supra* note 509, at 23.

537. *Id.*

538. *Id.*

539. *Id.* at 15.

540. *Id.*

541. *Id.* at 15–16.

542. Merger Review Guidelines, *supra* note 509, at 15–16.

543. *Id.* at 16.

544. *Id.*

vertical interlock may be done in order to assess whether or not the interlock had an anti-competitive effect on the market.[545]

5. Exceptions

In the US, certain exceptions were provided for in the law. Smaller companies generally have lesser impact on the market so they are excluded from complying with the prohibition.[546] The Clayton Act provided thresholds for "capital, surplus[,] and undivided profits" of the corporations involved as basis for whether or not the companies are exempt from the prohibition.[547] The proposed provision also includes a similar exception. The thresholds have not been set and may be left to the Commission to set, as it has more in-depth knowledge about the economic state in the country. The second exception provided for in the proposed rules applies to industries, which are already governed by specific regulations regarding interlocking directorates. This is to ensure that there will be no conflict between the proposed provision and existing special laws.

6. Administrative Sanctions and Remedies

In line with the proposed provision presented above, the current rules on administrative fines must be amended. The original states —

> (a) Administrative Fines. — In any investigation under Chapter III, Sections 14 and 15, and Chapter IV, Sections 17 and 20 of this Act, after due notice and hearing, the Commission may impose the following schedule of administrative fines on any entity found to have violated the said [S]ections[548]

The amended version will include the new provision aside from the current Sections 14-15 and 17 and 20 of the law. Section 12[549] of the Philippine Competition Act discussing the powers of the Commission will also be amended to look like this —

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545. *Id.*

546. Clayton Act, § 19.

547. *Id.*

548. Philippine Competition Act, § 29.

549. *Id.* § 12 (d).

(d) Upon finding, based on substantial evidence, that an entity has entered into an anti-competitive agreement, has abused its dominant position, *or has engaged in illegal horizontal or vertical interlocks* after due notice and hearing, stop or redress the same, by applying remedies, such as, but not limited to, issuance of injunctions, requirement of divestment, *removal of the interlocking director*, and disgorgement of excess profits under such reasonable parameters that shall be prescribed by the rules and regulations implementing this Act

Other remedies in the current Philippine Competition Act will also apply. The companies guilty of violating the proposed provision can avail of consent orders. A consent order is a way through which the entity guilty of violating the provisions of this Act can minimize its administrative fines.[550]

550. LIM & RICALDE, *supra* note 346, at 195.