



# ***INCORPORATION AND ORGANIZATION***

CIS2204 –  
Technopreneurship  
Marie Liza Navarrete, PhD

# HOW DO YOU INCORPORATE?

1. Not less than 15 incorporators to execute the Articles of Incorporation;
2. Reservation of corporate name;
3. File with the SEC the AOC, by-laws and the treasurer's affidavit together with your approved name reservation

# WHAT SHOULD BE CONTAINED IN THE ARTICLES OF INCORPORATION?

1. Name of the corporation;
2. Purpose
3. Principal Address
4. Term of Existence
5. Names, nationalities, residence of incorporators
6. The number of directors or trustees, which shall not be less than 5 nor more than 15
7. The names, nationalities and residences of the persons who shall act as directors or trustees until the first regular directors or trustees are duly elected and qualified in accordance with the Code
8. If it be a stock corporation, the amount of its authorized capital stock in lawful money of the Philippines, the number of shares into which it is divided, and in case the shares are par value shares, the par value of each, the names, nationalities and residences of the original subscribers, and the amount subscribed and paid by each on his subscription, and if some or all of the shares are without par value, such fact must be stated.
9. If non-stock, the amount of the capital, the names nationalities and residences of the contributors and the amount contributed by each; and
10. Such other matters as are not inconsistent with law and which the incorporators may deem necessary.

# NAME OF THE CORPORATION

## Requirements:

It must not be misleading or confusingly similar with the existing name of a corporation.

In intellectual property, generic names are not protected unless you can apply the doctrine of secondary meaning, where you associate it specifically with a product. Like apple, although it is generic, you already associate it with a cellphone so it's protected. Unlike in a corporate name, although it is generic, it is already protected. SEC only looks at whether the names are confusingly similar.

*“Change of name is not a change of being.”*

It is similar to a person changing his name. If you change your name, it does not mean that a new person is born. Just like corporations, it doesn't mean that if you change your name, there is a change in entity. The entity continues its existence even with the amendment. Change of name does not mean change of corporation.

# PURPOSE/PURPOSES OF THE CORPORATION

Other than the name, the purpose must be indicated in the articles of incorporation such that if there's more than one purpose for the corporation, the primary and secondary purposes must be cited in the articles.

## Why is it necessary to place the corporate purpose in the articles?

- As a corporation, it is important so you will know if the business transaction or contract you're entering into is in line with the purpose of the corporation.
- As a stockholder, it is important so you will know what risks you are taking in investing in that company
- As a member, it is important so that you know what you're getting yourself into.



# WHAT SHAPES THE POWER OF THE CORPORATION?

It's the purpose of the corporation. The powers of a corporation are determined by its purpose. If the purpose of the corporation is to sell real estate, it cannot engage in retail trade. So if you enter into a contract with a corporation for retail trade, that contract is **ultra vires**. The corporation does not have the power to enter into the contract. Because you judge the powers, rights and authorities of the corporation by its purpose.

It is important to know the purpose of the corporation, even if you're not investing but just transacting with the corporation because maybe what the corporation is doing is beyond its purpose, in which case it becomes **ultra vires**.



# **CLASSIFICATIONS OF PURPOSE:**

1. Primary
2. Secondary

Primary purpose - determines why the corporation was created in the first place and the secondary purpose states the other incidental purpose of the corporation.







# PRINCIPAL ADDRESS OF THE CORPORATION

**How should the address be stated? The requirement is it should be in the Philippines. Can I just say Cebu City, Philippines?**

No. It must be sufficient for the place of business to be identified. Cebu City does not exactly point out the specific address, so you include the floor number, the building name and number, the Barangay, the City, the province, and the country.



## *AMENDMENT OF ARTICLES OF INCORPORATION*

*In the amendment of  
the AOl you need two  
approvals:*

- The approval of the majority of the board and
- Approval of owners representing  $\frac{2}{3}$  of the outstanding capital stock.

# THE FOLLOWING ARE GROUNDS FOR SUCH REJECTION OR DISAPPROVAL:

That the articles of incorporation or any amendment thereto is not substantially in accordance with the form prescribed herein;

That the purpose or purposes of the corporation are patently unconstitutional, illegal, immoral, or contrary to government rules and regulations;

That the Treasurer's Affidavit concerning the amount of capital stock subscribed and/or paid is false;

4. That the percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution.

# ADOPTION OF BY-LAWS

*What happens upon the issuance of certificate of incorporation from the SEC?*

The corporation commences to have corporate existence and within 2 years the corporation must formally organize and commence its business, otherwise the corporation will be deemed dissolved.





## **WHAT IS COVERED BY FORMAL ORGANIZATION AND COMMENCEMENT OF BUSINESS? [POST-INCORPORATION REQUIREMENTS]**

1. Adoption of by-laws and filing of by-laws with the SEC if there is still no by-laws,
2. Election of officers by the board,
3. Apply for business permits with the LGU,
4. Register with BIR,
5. Pay documentary stamp tax for the subscription,
6. Open office in the place stated in the AOI,
7. Hire employees,
8. Start transacting business.

# BY-LAWS

By-laws are a set of internal set of rules for the governance of a corporation

**Not being a legal requirement**, It is more of a practical requirement. It is necessary as it is set of rules and guidelines for the corporation and its stockholders.



# WHAT SHOULD BE IN THE BY-LAWS?

1. Time and place and manner of conduct of regular and special meeting of the board.
2. Quorum requirements provided it does not go below the statutory requirement.
3. Stockholders meeting
4. Penalties for violation of by-laws
5. Manner of election of corporate officers
6. Qualification and duties and compensations of directors, officers, and employees
7. Other matters which are necessary

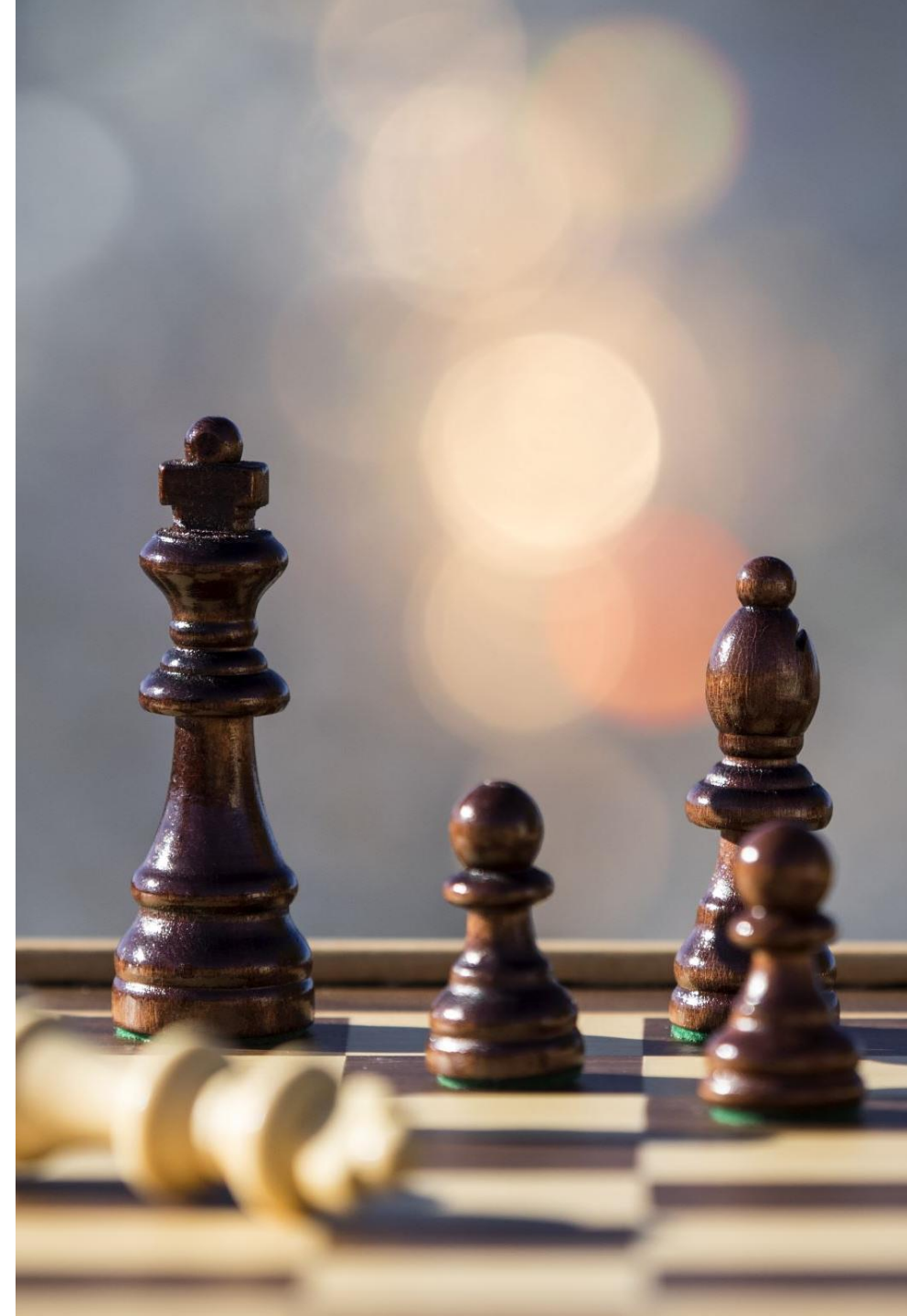




# ***AMENDMENT OF BY-LAWS***

**Two ways:**

1. **BY DELEGATION:** Majority of the board of directors.  
(The 2/3 refers to the delegation of this power to the board)
2. Majority vote of the BOD and the owners of at least a majority of the outstanding capital stock.



# ***BOARD OF DIRECTORS***

## **QUALIFICATIONS TO BE ELECTED AS DIRECTOR OR TRUSTEE OF A CORPORATION**

Every director must own at least one share of the capital stock; said share must be registered in his name on the books of the corporation

2. Majority of the directors should be resident of the Philippines.

## **DISQUALIFICATIONS**

1. A person convicted by final judgment of an offense punishable by imprisonment for a period exceeding 6 years
2. A person who has committed a violation of the Corporation Code, committed within 5 years prior to the date of his election or appointment as director or trustee.

# ELECTION OF DIRECTORS

1. There must be a meeting where there is a quorum
  - This means that there must be present the owners of the majority of the outstanding capital stock of the corporation
  - Majority is 50% plus 1
  - Note: there is no quorum, the meeting is NOT valid
2. There will now be voting
  - How voting is made:
  - The manner of voting is CUMULATIVE VOTING
3. You then report what transpired in the elections through the filing of the GENERAL INFORMATION SHEET.

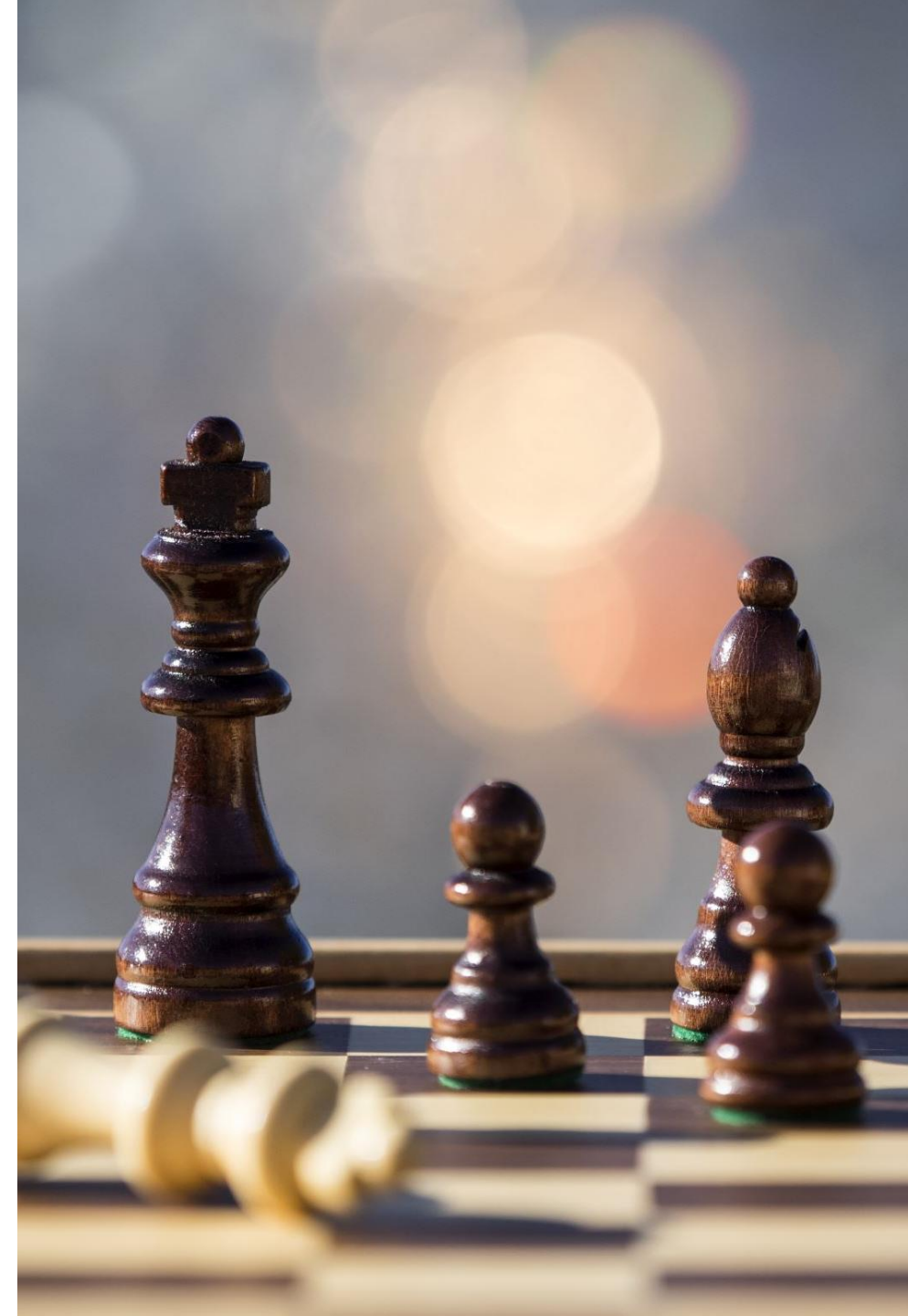




# BUSINESS JUDGEMENT RULE

**Business Judgment Rule** - the directors in the performance of their duties cannot be held liable. The Courts cannot suspend or substitute their judgment to the judgment of the directors.

Even the stockholders cannot say that “This contract is wrong and should be invalid” just because the directors chose wrongly, the stockholders do not have that kind of authority. For as long as the directors act in good faith, all transactions entered into by the directors are binding and they cannot be held liable for it.



# HOW MAY DIRECTORS BE REMOVED FROM OFFICE?

- (a) May be removed from office by a vote of the stockholders holding or representing at least (2/3) of the outstanding capital stock.
- (a) Directors may be removed through a regular meeting OR a special meeting called for that purpose
- (a) In either case, there should notice given to all stockholders or members of such corporation of the intention to propose such removal.





# HOW ARE VACANCIES IN THE BOARD FILLED?

As a general rule, stockholders have the inherent right to fill in the Board for whatever is the ground/reason of the vacancy. But the right to fill in the vacancy may be delegated to the BOD (by a majority vote of the BOD).

The law says “**MAY**” so it doesn’t have to be in the Board all the time. It may be given, even to the Board, if the ground of the vacancy is NOT: [REIn]

1. Due to Removal
2. Due to Expiration of Term
3. Due to Increase in BOD by amendment of articles



# CORPORATE POWERS

## Types of Corporate Powers:

1. **Express** – Those specifically mentioned in the AOI, particularly in the primary purpose; and those expressly provided by the law.
1. **Incidental** - Reasonably necessary in order to achieve the primary purpose or to accomplish the express powers.
1. **Inherent/ Implied** – Those that are present by virtue of the corporation's existence as a juridical entity.

So **express powers** are unique to the corporation. It depends on their primary purpose. Primary purpose of a corporation determines its express powers.



# EXAMPLE

SM Primary (SM Primary is a real estate company)

A real estate company is engaged in buying, selling, leasing and development of real property, that is their express powers.

Basically, the express power of the corporation depends on the type of business that the corporation intends to engage in, it has to be expressly provided in its AOI. That would be the primary purpose in its AOI

**Implied powers**, on the other hand, they are may not be expressly provided for in the articles but they are necessary to achieve the primary purpose.

**Incidental powers**, on the other hand, they may be common to all types of corporations because they are incident to its existence as a juridical entity.

# ***CORPORATE BOOKS AND RECORDS***

## **TYPES OF CORPORATE BOOKS**

1. Books of minutes of stockholders' meetings
2. Books of minutes of board meetings
3. Record or Book of all business transactions
4. Stock and transfer book

These are the books that are required to be kept by the corporation.





# DOCUMENTS REQUIRED TO BE KEPT BY THE CORPORATION

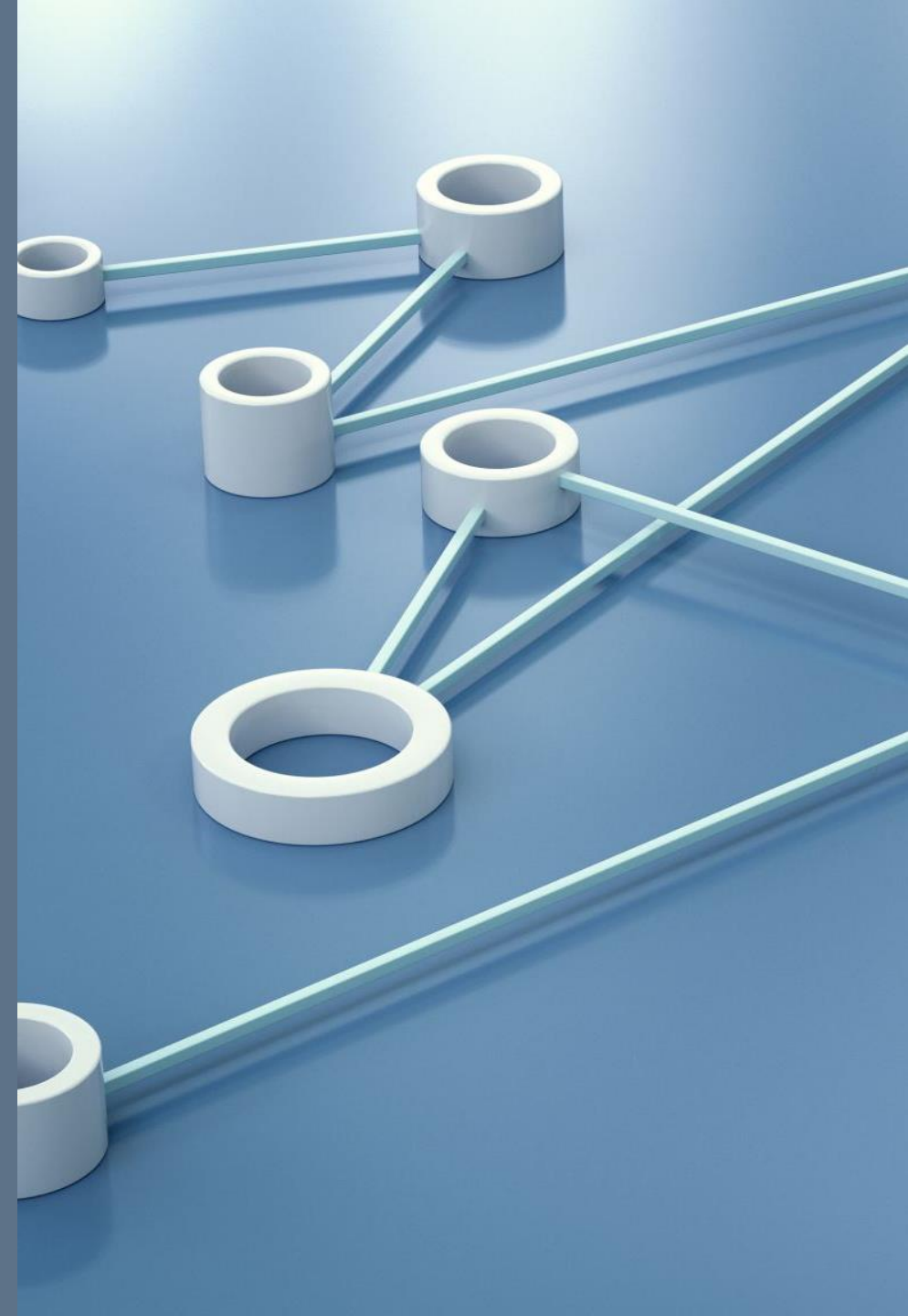
1. The articles of incorporation and bylaws of the corporation and all their amendments;
2. The current ownership structure and voting rights of the corporation, including lists of stockholders or members, group structures, intra-group relations, ownership data, and beneficial ownership;
3. The names and addresses of all the members of the board of directors or trustees and the executive officers;
4. A record of all business transactions;
5. A record of the resolutions of the BOD/BOT and of the stockholders or members;
6. Copies of the latest reportorial requirements submitted to the SEC; and
7. The minutes of all meetings or stockholders or members, or of the board of directors or trustees.



# *MERGER AND CONSOLIDATION*

**Merger** is when two corporations combine, whereby one is dissolved and the other one is the surviving corporation. It is  $A + B = A \text{ or } B$

**Consolidation** is when two corporations combine; the new identity is a totally different corporation. None of the combining corporations survived. A new corporation is created in this case. It means,  $A + B = C$ .



# REQUIREMENTS IN CASE OF MERGER OR CONSOLIDATION:

**First:** The BOD of the corporation should first draw up and approve a **plan of merger/ consolidation**. That is the first document that they need to create. There has to be a plan. The plan must specify what will happen to the surviving corp or the newly created corp.

**Second:** Approval of this plan should be by the stockholders representing at least 2/3 of the outstanding capital stock (OCS) of each corporation or 2/3 of the members, if non stock.  
A merger/consolidation is one of the grounds for the appraisal right for any dissenting stockholder.

**In case of amendments:**  
If there are amendments to the plan of merger/approval, same approval as above. Majority vote of the BOD and vote of the stockholders representing 2/3 OCS or 2/3 of the members.

**Third:** The articles of or merger/consolidation should be **signed** by the president or VP and certified by the secretary.

**Fourth:** It should also be submitted to the SEC.

# EFFECTIVITY OF MERGER/CONSOLIDATION

Only upon approval by SEC. No approval, No valid merger/consolidation.

Any mergers or acquisition **in excess of 1 million pesos** now requires application with the PCC and has the power to deny such application and deny the merger or acquisition.

## If approved:

If merger, the constituent corps become a single entity.

If consolidation, there is now created a consolidated corp. The corporate existence of the constituent corporations shall now cease except of that of the consolidated corporation.



# **PHILIPPINE COMPETITION ACT**

**There are three things prohibited:**

1. Anti-Competitive Agreements
2. Abuse of Dominant Position
3. Anti-Competitive Mergers and Acquisitions





# ANTI-COMPETITIVE AGREEMENTS

There are generally two types of anti-competitive agreements:

**Vertical:** A supplier or producer of certain goods with enter into an agreement with the supplier of the raw materials for that certain goods. Its vertical because it goes up or down the supply chain.

**Horizontal:** Agreements between parties who are similarly situated. A supplier of a certain commodity entering into an agreement with another supplier of the same commodity.

*It can be between competitors or between supplier and producer.*

Those agreements are generally not prohibited. They become prohibited if they become agreements between competitors that restrict competition as to the price component thereof or as to the other terms or trade.





# EXAMPLE

Globe and Smart agree that they will now charge 5peso/text

If they fix the price no one can go against them because they are the major players in the market. So, if they agree, people have no choice but to pay-up.

Clearly, if Globe increases, and Smart does not, people will go to Smart. But if they both agree; the market has **no choice**.

Any agreement that will **restrict competition** as to the price component, since you are not given a choice. That is supposedly the essence of competition. Any agreement that restricts a choice of the public, in terms of price or any terms of trade, that can be considered as an anti-competitive agreement.

# FORMS OF BID MANIPULATION

## Cover Bidding

It is when the participants in an auction will agree to basically pad their bid price in order to allow one competitor to win.

## Bid Suppression

They agree that the competitor will not submit their bid again to allow whoever it is that they want to win the bid. When the other competitors will not bid, automatically, as the sole bidder, the person they want to win will win the bid.

## Bid Rotation

It is similar to cover bidding and bid suppression except that the parties agree that for this bidding, this competitor will win, for the next bidding, another will win, and for the third bidding, the other bidder will win.

Basically, the parties agree and fix as to who will win the bidding or auction and they take turns in winning.


Those aforementioned are considered as manipulative practices, which if there are any, will be considered as anti-competitive agreements and are **prohibited under the Philippine Competition Act**.

# ABUSE OF DOMINANT POSITION

In Abuse of Dominant Position, it is basically a situation wherein a company is a dominant position or has 50% or more of the market share- hence it is dominant.

**Being in a dominant position is not illegal *per se*, in the same manner that being an insider is not illegal *per se*.** What is illegal if there is an abuse of the dominant position in such a way that you do predatory pricing, impose barriers to entry, or discriminate in price and you do tying and bundling.



A background image of a chessboard with several chess pieces. The image is overlaid with a semi-transparent blue filter. The pieces are dark, and the board has a light and dark square pattern. The text is white and positioned in the upper left area.

# ***MERGERS AND ACQUISITIONS WHICH ARE CONSIDERED AS ANTI-COMPETITIVE***

**Anti-competitive** - any merger or consolidation that restricts or lessens competition.

**Example:**

If Globe or Smart will merge, this leaves the public with no choice. That is the essence of anti-competitive mergers or acquisition.



**“SUCCESS IS NOT  
FINAL; FAILURE IS NOT  
FATAL: IT IS THE  
COURAGE TO CONTINUE  
THAT COUNTS.” —  
WINSTON CHURCHILL**