PHILIPPINE COMPETITION COMMISSION

Ensuring businesses compete and consumers benefit

COMPETITION MATTERS

2018-2020

This publication is a compilation of the "Competition Matters" column articles published in Business Mirror from 2018 to 2020. Begun in March 2018, "Competition Matters" is one of the Philippine Competition Commission's (PCC) strategies to reach out to a broader audience and to explain competition policy and law to the general public. Given the novelty and complexity of competition concepts, the authors explain antitrust as it interfaced with social issues and everyday experiences. In so doing, the PCC hopes to generate interest in the benefits of competition policy and law, and foster a culture of competition among Filipinos.

COMPETITION MATTERS
2018-2020

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COMPETITION POLICY AND THE PHILIPPINE COMPETITION COMMISSION

The Philippines' first comprehensive competition law, Republic Act No. 10667 or the Philippine Competition Act (PCA), was enacted in 2015. Described as a game-changing law, the PCA upholds fair market competition, which in turn fosters innovation among businesses and boosts their competitiveness. In so doing, competition policy promotes consumer welfare through quality choices and affordable prices. Given the novelty of the PCA and its broad scope, the Philippine Competition Commission (PCC), which was organized in 2016 as a quasi-judicial body tasked with enforcing the law, has to navigate the boundaries of competition policy as they apply across different industries and sectors of the economy. The articles in this section help readers make sense of competition policy, illustrating its benefits and defining its intersection with the government's other policy objectives. They aim to clarify the PCC's important role vis-à-vis different sector regulators and other government entities in pursuing the long-term goal of inclusive development.

COMPETITION A GAME CHANGER IN PHL ECONOMY

MARCH 18, 2018

ARSENIO M. BALISACAN, PHD

It's high time we address the restrictive economic policies and anti-competitive business practices that have proven too costly for the Philippines and led to the highly unequal distribution of opportunities.

Studies have shown how more competition contributes to overall productivity and growth of firms or sectors of the economy. For the ordinary Filipino, greater competition means lower prices, better quality and more choices. Competition also promotes innovation, which improves the economy's efficiency and potential, especially with the advent of cutting-edge technologies.

In recent years, the Philippine economy has enjoyed a surge of growth and stability that has made it one of the fastest growing in the world. The country's economic growth rate of 6.3 percent from 2010 to 2017 was the highest eight-year average expansion since the late-1970s.

Yet, the conversion of this stellar economic performance to poverty reduction has been slower and weaker than expected. Part of the blame lay in the weak state of competition in industries or sectors that matter much to the poor.

Weak competition, in turn, arose from several decades of policy distortions, prohibitive regulations and underinvestment. Policies on import substitution, quantitative restrictions and high import duties, as well as restrictions on foreign investments have inoculated domestic industries from the tides of competition and innovation from abroad.

This led to the stagnation of local industries, nurturing in their stead monopolies and oligopolies in areas as diverse as manufacturing, utilities, telecommunications and transport—all at the expense of the Filipino consumer who has had to suffer a double whammy of high prices and poor quality of goods and services.

True, there was a rare period in the 1990s when some industries were opened up to competition, notably air transport, power and telecommunications. This wave of liberalization ushered in not only a healthy dose of economic growth but also a partial suppression of market power and industry concentration, in turn, leading to affordable services and improved quality (witness here budget airfares and the wider access to telecommunications).

Today market power continues to reign over vast areas of the economy. In some sectors or industries earlier opened up to competition, market power has returned with a vengeance.

A 2017 study by the World Bank shows that poor competition hampers several industries, including telecommunications, shipping, air and water transport, water, electricity distribution, agriculture, cement, pharmaceutical drugs and downstream oil. Dismantling these remaining concentrations of market power will help spur not just aggregate growth, but also improve consumer welfare.

Small and medium enterprises have also found it difficult to thrive in an environment where a level playing field is more of the exception than the norm, thus hindering their growth, and by extension, employment opportunities.

The Philippines has failed to become a significant player in the prospering Asian region, which is worrisome, amid the push for ASEAN economic integration. There is a need to step up the competitive environment in the Philippines to take advantage of the tectonic economic shifts occurring across the region.

That is why the passage of the Philippine Competition Act, and with it, the creation of the Philippine Competition Commission (PCC), are steps in the right direction. To perform its mandate of promoting market competition, the PCC is tasked to prohibit anti-competitive agreements and acts. Certain large firms

> "THERE IS A NEED TO STEP UP THE COMPETITIVE ENVIRONMENT IN THE PHILIPPINES..."

enjoying dominant market position are barred from abusing their position to limit competition.

The PCC is also tasked to prevent mergers and acquisitions that substantially lessen competition. Given these mandates, how can we build trust in the pursuit of a more competitive business environment?

As the PCC takes initial steps toward a more level playing field, one of the most important challenges is establishing a broad support not only among industry players and fellow regulators, but also from the public, who, ultimately, will benefit from greater competition in the country.

Far from being an additional bureaucratic layer or cost to doing business, the Commission should be seen as an exponent of the welfare of both producers and ordinary Filipinos.

Rest assured, the PCC adheres to global best practices and listens to the needs and aspirations of the people. It establishes links with competition agencies abroad to gain insights from their rich experience and keep abreast of latest developments in competition law and economics. This spurred the recently organized 2018 Manila Forum on Competition in Developing Countries.

In sum, the country has waited for so long to see the establishment of a comprehensive and coherent competition law and policy. Now that we are on our third year of operation, we realize that the challenge before the Commission remains daunting.

It may take years before we could iron out long-established anti-competitive behaviors and practices in the country, and we are certainly bound to encounter much opposition along the way. In these, we can assure the public that the PCC is committed to ensuring the highest level of integrity, independence, and fairness in the performance of our duties. The competitive Filipino people deserve no less. ∎

PCC: QUASI-COURT IN FULL SWING

APRIL 3, 2018

STELLA A. QUIMBO, PHD

What do you do at the Philippine Competition Commission (PCC)? This has been the most common question asked of me since taking office last January 2016, and it deserves an answer.

Under the Philippine Competition Act (PCA), the Commission shall be composed of a chairperson and four commissioners. One must be a member of the Philippine bar and one must be an economist. The framers of the law must have recognized that the interplay between law and economics is necessary for the proper functioning of the Commission.

The Commission is an independent quasi-judicial body. Broadly speaking, it works like a court: it ascertains facts, holds hearings, weighs pieces of evidence, and makes conclusions based on the facts and evidence presented. For any decision to be adopted, three affirmative votes from the Commission members are needed.

This is the most interesting part of my job as Commissioner, and what follows is my take on this role of "quasi-judge," as seen through the lens of an economist.

The investigation of most prohibited acts under the PCA requires economic analysis to determine if they had or might have harmful effects on market competition. For instance, the Commission can disapprove a merger if the transaction can "substantially lessen competition" in the market.

How do we know if competition would be reduced substantially after the merger? To answer this, we assess whether prices are likely to increase, quality might deteriorate, innovation would slow down, or consumer choice would be restricted.

The assessment is based on economic reasoning and evidence. The first step is to determine the "relevant market" or the scope

> “DECISION-MAKING MUST ABIDE BY **SCIENTIFIC AND LEGAL STANDARDS** TO ENSURE A **ROBUST CASE**.”

of the assessment that will be conducted. In a relevant market, products are substitutable, which means that price increases would cause consumers to shift from one supplier to another.

Next, the economic analysis determines if there is ability or incentive to increase prices after the merger. When two competitors who offer substitutable products merge, a price increase by one may cause enough consumers to shift to the other, such that overall profit for the merged entity increases.

Deciding on a merger without going through the rigor of economic analysis might not only harm a market, but also may erode the Commission as an institution in the long run. Commission decisions that are not evidence-based could introduce uncertainty in the business environment and leave an impression of regulatory capture. Decision-making must abide by scientific and legal standards to ensure a robust case.

The Commission is likewise empowered to prohibit anti-competitive agreements and abuses of dominance.

When a case is opened, a preliminary inquiry is conducted by the Competition Enforcement Office (CEO). The Commission members take no part in the actual investigation. “Firewalls” are in place to differentiate the decision-making by the Commission from the fact-finding by the CEO. This is to ensure that the Commission remains an unbiased judge. It is only after CEO lodges a formal complaint before the Commission that its members hear the case.

Every case is thoroughly deliberated by the Commission. So far, I have found these deliberations to be a lively mix of professional debate and academic discussion, covering interpretations of the law and economic findings. An independent commission implies independence in thought among its members. Due to differences in perspective, deliberations can lead to various outcomes when it’s time to vote, particularly when a case is complex. In a few instances, there was no unanimity on how to dispose of a case.

Just like in regular courts, a Commissioner has the right to dissent from the majority position when they believe it necessary, but without upsetting the harmony of the institution. Dissenting opinion requires of the majority to fortify its position based on evidence, and to ponder on the implications of the decision. In a way, this insulates the Commission from whimsical and capricious decision-making, thereby ensuring its continued independence.

This is similar to what competition does in markets. When faced with competition from a new entrant with a disruptive technology, the incumbents have little choice but to strengthen their market position with an appropriate technological response. As such, some dissent is healthy. Steve Jobs, the maverick who changed the competition landscape in the market for computer hardware, reminds us that friction is needed to polish a stone:

“It’s that through the team, through that group of incredibly talented people bumping up against each other, having arguments, having fights sometimes, making some noise, and working together they polish each other and they polish the ideas, and what comes out are these really beautiful stones.” ∎

CONSTITUTIONALIZING COMPETITION

MAY 15, 2018

ARSENIO M. BALISACAN, PHD

The proposal of the Consultative Committee's (Con-Com) subpanel on economic reforms to create a federal competition body brings to the fore a long-standing debate about the role of competition regimes.

Basic economic theory suggests that competition is crucial to the proper functioning of markets. Insufficient competition allows some market participants to dominate and, in turn, enable them to set prices independently and inhibit efficient resource allocation. This fundamental principle has gained wide acceptance that many national economies have established competition regimes to go after abusive monopolies and cartels.

Despite this economic rationale, the question persists: what should be the ultimate objective of competition regimes? One view holds that their main aim is to promote the welfare of different groups in the economy. This view limits the function of competition agencies to preventing unreasonable restraints of trade, thereby achieving efficiency in resource allocation. For consumers, the goal is to receive better goods and services at the lowest cost.

Another view, however, suggests that competition agencies do not have an exclusively economic rationale. While agreeing on the economic objective of competition law, scholars of this second view also try to establish a link between competition and democracy. According to this theory, concentrated economic power can lead to centralized political power. By dispersing it, economic power becomes shared by many rather than a select few who could exert undue influence over political decision-making. Put simply, the dispersal of economic power translates to the diffusion of political power.

This is not a novel view. The American Revolution was said to be as much about escaping from monarchy and dispersing political power as it was about avoiding monopoly and diffusing economic power. The rise of the Nazis in Germany had been attributed to the role played by business cartels. After the Second World War, the Germans were compelled to adopt an effective antitrust regime.

In his introduction to what came to be known as the Sherman Antitrust Act, Senator John Sherman argued before the US Congress: "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity."

Competition law and policy favors a plurality of economic actors and interests. This bias is consistent with the Philippine Constitution's social justice provision, mandating the State to reduce economic inequality and diffuse wealth for the common good. The overconcentration of wealth is a huge concern that the framers deemed State intervention necessary to temper economic inequality.

This preference for economic pluralism is mirrored in the constitutional doctrine of ensuring a diversity of political interests, as expressed in the separation of powers, term limits, and ban on political dynasties.

The need to level the economic and political playing fields may well explain the Con-Com's move to include self-executing provisions against political dynasties in the new Charter and create a stronger competition authority with federal powers. The twin objectives are crucial in a federal setup. As our past experience painfully demonstrates, the oligopolistic structure of the economy is paralleled by the political dominance of the few.

"COMPETITION LAW AND POLICY FAVORS A PLURALITY OF ECONOMIC ACTORS AND INTERESTS."

While the Constitution already prohibits political dynasties, the constitutional prohibition remains ineffective without an enabling law. Similarly, while it bans unfair competition, the Charter did not create a central authority to oversee the implementation of competition law and policy.

Before the passage of the Philippine Competition Act (PCA) in 2015, competition laws were largely fragmented and uncoordinated, despite an economy dominated by businesses with substantial market power. Studies found that regulatory conflicts often arose because several agencies with competition mandates enact conflicting policies. The danger of regulatory capture was more likely, as regulators beholden to the incumbent firms issue protectionist regulations. There was also a lack of expertise in the appreciation and implementation of competition principles, resulting in failure to enforce competition laws.

The enactment of the PCA was meant to bring order to the chaos. Among its salient provisions is the creation of the Philippine Competition Commission (PCC), a quasi-judicial body with original and primary jurisdiction over all competition-related issues. The law eliminated the prevailing sector-specific approach to competition, which was insufficient and ineffective. Congress meant the PCC to be independent, guaranteeing its members a fixed term and security of tenure. This independence clothes the Commission with authority to challenge both private and public acts that harm competition.

We therefore welcome the proposal of the Con-Com subpanel to elevate the PCC to a federal constitutional body. If it is to be effective in leveling the economic playing field, PCC has to be insulated from political pressure, owing accountability only to the Constitution and the public. ∎

COMPETITION AUTHORITIES AND REGULATORS: TWINNING OR TWEENING?

MAY 29, 2018

STELLA A. QUIMBO, PHD

The Philippine Competition Commission (PCC) is the country's competition authority. It is not a sector-specific regulator like the Bangko Sentral ng Pilipinas, which regulates all types of banks, or the Securities and Exchange Commission, which is the regulator and registrar of the corporate sector. The Land Transportation Franchising and Regulatory Board, which regulates all types of public land-based transportation, is also a sector regulator.

Often, there is confusion on what the PCC's mandate is vis-à-vis that of sector regulators. For high-profile cases that involve, for example, mergers of firms that operate in a highly regulated sector, we are often asked: what can and should the PCC do in this situation? Is the PCC stepping into the jurisdiction of the sector-specific regulator?

The PCC and sector-specific regulators differ in two ways.

First, their mandates differ. Sector regulators are primarily tasked to address "market failures" in a sector. For example, sector regulators regulate natural monopolies. These use technologies that require huge amounts of capital and in order to minimize fixed costs, have to operate at a very large scale relative to total market size. This is the reason it makes sense for only one firm to operate. Water and power distribution companies are examples of natural monopolies. These companies operate under the guidance of sector regulators, which would typically have a say on the most important business decision: pricing.

Another important reason for why markets fail, and thus require regulation, is "information asymmetry." When consumers do not have perfect information on the quality or safety of a product or service while suppliers do, regulators step in to ensure that quality or safety is assured.

> “TWEENING IS PRECISELY WHAT PCC AND SECTOR REGULATORS NEED TO DO. THAT IS TO WORK TOGETHER SO THAT DECISIONS ARE COORDINATED, AND SECTORS REMAIN DYNAMIC.”

On the other hand, the PCC's mandate is not sector specific. Its mandate is economy-wide. The PCC can enforce Section 3 of the Philippine Competition Act (PCA) against "any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines." Section 4 of the PCA defines an entity 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."

The purpose of a possible PCC intervention, however, is specific to competition. The PCC is mandated to prohibit anti-competitive agreements and conduct, abuse of dominant position, and anti-competitive mergers or acquisitions. The PCC's task is to identify situations where a firm's market power is increased or is already excessive in a way that consumers are adversely affected by way of high prices, poor quality, or limited choices. According to Section 32 of the PCA, the PCC has "primary and original jurisdiction in the enforcement and regulation of competition-related issues."

Hence, when firms in a highly regulated sector merge, such merger clearly falls under the jurisdiction of the PCC. It has the power to review the merger, and if the review points to possible harms to consumers because of the merger, the PCC is vested with the power to prohibit the said merger.

Second, competition authorities and sector regulators have varying "comparative advantages": each one can do something better than the other. The technical knowledge and expertise of competition authorities differ from that of sector regulators. Sector regulators will develop a deep knowledge of the kind of technology used by the regulated firms. Sector regulators typically know the amount and type of capital expenditures. As such, they can regulate prices based on average costs, if such is allowed by their mandate. On the other hand, a competition authority such as the PCC has expertise in identifying market power and situations where such market power is exercised by firms in a way that is detrimental to consumers.

Hence, it is futile to have disagreements over jurisdiction. Rather, the best approach for the competition authority and sector regulators is to coordinate. A conversation between the PCC and sector regulators on how to share each other's expertise and information would be for the benefit of the public. In fact, Section 32 of the PCA urges the PCC and sector regulators to "work together to issue rules and regulations to promote competition, protect consumers and prevent abuse of market power by dominant players within their respective sectors." The framers of the law must have foreseen that best sector outcomes are achieved through a genuine cooperation.

So, are competition authorities and regulators twinning or, rather, tweening? In the field of animation, tweening is the process of generating intermediate frames between images so that one image evolves smoothly into the next image, thus creating the illusion of motion.

Tweening is precisely what PCC and sector regulators need to do. That is to work together so that decisions are coordinated, and sectors remain dynamic. ∎

COMPETITION: A WHOLE-OF-GOVERNMENT EFFORT

SEPTEMBER 12, 2018

ARSENIO M. BALISACAN, PHD

Millenials and succeeding generations will not be able to recall a time when Philippine businesses and consumers had no choice but to engage in a highly concentrated market characterized by the absence of any significant competitive pressure. The State held inefficiently run monopolies of vital sectors and virtually controlled the entry and expansion of new players through regulations that protected and entrenched dominant players.

These misguided policies inevitably led to the weakening of our global competitiveness, curtailed market dynamism, starved the country of foreign direct investments, limited the growth of productive employment, and deepened inequality in the distribution of incomes and opportunities. Fortunately, economic reforms through trade liberalization, deregulation, and privatization gained some momentum in the 1980s and in the decades that followed. This led to an influx of market players and the much-needed adoption of more efficient technologies and business processes, which, in turn, lowered prices, expanded consumer choices, and enhanced product quality.

Today, the upward growth trajectory of our economy suggests that we are reaping the benefits of these reforms. However, we remain hampered by the legacy and unintended consequences of state-instituted and state-enabled controls, including those governing state-owned enterprises (SOEs). Indeed, various anti-competitive acts and practices in key sectors of the economy have their roots in these state-enabled controls and regulations.

To sustain the growth of our economy in the long term, we need to deepen policy and institutional reforms, including the reform of SOEs.

In 2015, Congress enacted the Philippine Competition Act (PCA), which gives the Philippine Competition Commission (PCC) a very broad mandate covering all businesses and sectors, including SOEs. Cognizant of the pressing need to deepen industry reforms, legislators designed the PCA to empower the PCC with a gamut of advocacy and advisory functions. Indeed, the Philippine Development Plan (PDP) 2017-2022 reinforced this notion by recognizing competition policy as part and parcel of the government's strategy toward sustained economic development.

Early on, the PCC recognized that its unilateral pursuit of pro-competitive reforms will yield very little by way of achieving desired results. Being a new competition authority in a largely oligopolistic economy, it recognized that effective coordination and advocacy is key to mainstreaming a culture of competition. This means enlisting competition champions within the government policy-making architecture and obtaining the support of established line-agencies and sector regulators.

Since its inception, the PCC has been active in reviewing economic and administrative regulations. It has advised the Executive branch on the competitive implications of its policies and programs. PCC lawyers and economists regularly attend legislative hearings to provide comments on bills that may influence the competitive behavior of firms in a market. These efforts guarantee that the competition lens will be considered in the crafting of policies and laws.

To avoid jurisdictional conflicts and to harness administrative synergies, the PCC has been coordinating with sector regulators and has executed memoranda of agreement with regulatory bodies, such as the Securities and Exchange Commission, the Bangko Sentral ng Pilipinas, and the Insurance Commission. These agreements include provisions for policy coherence, the streamlining of procedures, and the sharing of information and technical expertise.

“TO SUSTAIN THE GROWTH OF OUR ECONOMY IN THE LONG TERM, WE NEED TO DEEPEN POLICY AND INSTITUTIONAL REFORMS, INCLUDING THE REFORM OF STATE-OWNED ENTERPRISES (SOES).”

Of course, the PCC is aware that many government policies and programs were institutionalized to achieve a desired objective beyond the promotion of market efficiency. These may include the equitable distribution of incomes, attaining development objectives through industrial policy, or protecting the environment. This is why competition advocacy can work by having policymakers utilize the least anti-competitive instrument that meets the policy objective—a potentially win-win situation.

Perhaps, most important, the PCC has been assisting the National Economic and Development Authority in the formulation of the National Competition Policy. The NCP, targeted to be adopted within the year through an executive order, will be a comprehensive framework that steers regulations and administrative procedures to promote effective competition. When adopted, this will be a leap forward in ensuring that businesses and consumers will reap the benefits of market competition.

Sustaining our growth through critical economic reforms will be the country's key policy challenge in the coming years. Correcting the many inefficiencies caused by highly distortive policies is crucial to leveling the playing field, strengthening the private sector, attracting more investments and encouraging greater innovation.

Indeed, we have come a long way toward unwinding the intricate web created by the misinformed policymaking of decades past.

This herculean task requires nothing less than a whole-of-government effort. ∎

CONSUMERS AT THE HEART OF COMPETITION POLICY

JANUARY 2, 2019

ARSENIO M. BALISACAN, PHD

For nearly three years now since its establishment in 2016, the Philippine Competition Commission (PCC) has sustained its momentum in promoting consumer welfare and competitive processes under the game-changing Philippine Competition Act (PCA).

The transitory period provided by the PCA ended on August 8, 2017, two years after the law's enactment. Affected parties were given this two-year grace period so that they could adjust their business practices to fully comply with the law. Considering the lag between policy issuance and firm uptake, we can reasonably say that the year 2018 was truly the first full year of the new regime of Philippine competition policy.

The past year also proved to be challenging for the Philippine economy. Prices of basic goods rose at a faster clip and major players in the global market enacted disruptive protectionist measures stemming from populist sentiments within their domestic spheres.

Thus, the country's transition to a new competition regime came at a time when Filipino consumers and businesses were experiencing pressing challenges. Nonetheless, the PCC forged ahead steadily to fulfill its mandate. As we welcome the new year, let me share with you the key accomplishments of the Commission in 2018 in our core functions of competition enforcement, merger review, and competition advocacy.

First, cognizant of how spikes in prices of necessities disproportionately harm the poor, the Commission opened and continues its investigation of the rice, energy and fuel markets. It is unfair and unacceptable that a few unscrupulous businesses and groups should benefit at the expense of millions who are left with increasingly meager budgets for their basic needs. In 2018, we opened four new investigations, so that there are now seven ongoing full administrative investigations.

> “OUR COMMITMENT TO FILIPINO CONSUMERS IS THIS: WE WILL STAUNCHLY CARRY OUT PCC'S MANDATE OF PROTECTING AND PROMOTING A FREE AND FAIR COMPETITION LANDSCAPE.”

To aid enforcement efforts, the Commission executed memoranda of agreement with the Department of Justice-Office for Competition and the Office of the Ombudsman. These agreements aim to strengthen enforcement action through complementation of resources and sharing of institutional capacities.

Second, the Commission continued to review mergers and acquisitions that have a potentially high impact on consumers. In 2018, we received 39 mergers and acquisitions (M&A) transactions with a total value of P438 billion, of which 33 were approved.

The Commission has exercised its power to subject M&As to commitments that seek to remedy anti-competitive effects expected to arise from such transactions. For example, we subjected Grab's acquisition of Uber to stringent pricing and quality standards to address competition issues arising from the merger of the country's two biggest ride-hailing apps.

Moreover, we have been studying the voluntary commitments proposed by concerned parties in two other M&A transactions: one in the sugarcane industry and the other in the passenger and cargo shipping services. When a transaction is expected to harm market competition, the Commission is ready to act and implement measures to correct for outcomes that are disadvantageous to both consumers and the competitive process.

Third, we directed the Commission's competition advocacy efforts in 2018 at sectors, such as telecommunications, that need significant reform through the injection of a healthy market competition. To ensure that the principles of competition are considered in the selection process for a third player in the telecommunications market, the Commission provided inputs to the Department of Information and Communications Technology and the National Telecommunications Commission. We, likewise, provided comments on complementary legislative measures such as mobile number portability, open access in data transmission, spectrum management reform, and the common tower policy. These pro-competition reforms are expected to benefit Filipino consumers who may soon enjoy improved service at lower costs.

The Commission has undertaken several issue papers on priority sectors, such as rice, pharmaceuticals, poultry and livestock, manufacturing, and transportation and logistics. These studies assist the PCC to identify risks to consumers and the competitive process that may require our enforcement or advocacy intervention. The Commission also successfully organized numerous advocacy and capacity-building activities to educate consumers, businesses and public institutions, keeping in mind that fostering a culture of competition is a building block of a strong competition regime.

In summary, consistent with the Philippine Development Plan (PDP) 2017-2022, the PCC has allocated its resources toward enforcement, merger review, and advocacy activities in sectors with the highest impact on consumers. Having set up our institutional architecture within a short time, I am proud to say that the Commission has transitioned quickly by accumulating experience and enhancing competencies in its core functions.

As the country's economy is expected to continue on a high-growth trajectory, the Commission firmly believes that the benefits of economic growth must be felt by all through a fairer distribution of incomes and opportunities. Our commitment to Filipino consumers is this: We will staunchly carry out PCC's mandate of protecting and promoting a free and fair competition landscape. This is because consumers are at the heart of the Philippine competition policy. Our track record in 2018 attests to this.

I look forward to what will surely be an exciting year ahead for competition! ∎

THE YEAR AHEAD FOR MARKET COMPETITION

JANUARY 9, 2019

ARSENIO M. BALISACAN, PHD

In last week's column, I shared the key accomplishments of the Philippine Competition Commission (PCC) in 2018, which we consider as the first full year of the country's new competition policy regime. Throughout last year, the Commission placed the consumers, along with promoting competitive processes, at the heart of its endeavors.

But, while we have accomplished much within a short amount of time, many new and continuing challenges remain to be hurdled by the Commission under its three broad functions of competition enforcement, merger review, and competition advocacy. These challenges shape the Commission's priorities in 2019.

First, we recognize that in an archipelagic economy where oligopolies and highly concentrated markets abound, expectations are mounting for the Commission to deliver more and better competition enforcement. Our goal this year and onward is to effectively investigate anti-competitive agreements and conduct, such as price fixing and bid-rigging. Deterrence requires that the threat of penalties is truly felt and that the detection and prosecution of infringements are effective.

In carrying this out, our enforcement action would be informed not only by the complaints or queries we receive, but also by the prioritization framework that the Commission has developed. In this regard, based on the findings of our issue paper on the manufacturing sector, in tandem with other considerations (e.g., the relative importance of the good or service on consumer welfare), we have identified the following priority sectors for competition analysis and enforcement in 2019: logistics supply chain, corn milling and trading, refined petroleum manufacturing and trading, sugar, and pesticides. These are in addition to the ongoing work on priority sectors launched in 2018.

Having identified these priorities, we are keen on implementing three key components this year to bolster and complete our enforcement framework. This January 2019, we will be rolling out the Commission's Leniency Program. We expect this whistle-blower-type program to significantly improve our ability to detect cartels and increase the number of cartel investigations in the coming years.

In addition, we will soon implement our Rules on Forbearance and on Inspection Orders, which will enable us to work more efficiently. The former will allow an entity or group of entities to be exempted from certain provisions of the Philippine Competition Act under very specific circumstances and stringent conditions. The latter will govern our conduct of dawn raids (an addition to our arsenal of investigative tools).

Fortunately, the Commission is not alone in its mission to enforce the law. With the Office of the Ombudsman and the Commission on Audit as key partners, the Commission has laid the groundwork for the adoption of a tripartite action plan and the formal constitution of a joint task force to investigate bid-rigging in public procurement. As the economy weathers domestic and global headwinds and the government ramps up its "Build, Build, Build" program, ensuring a clean selection process in public procurement is key to extracting the best value for our taxpayers' money.

Upholding fairness in the market is one of the principles enshrined in the PCA. In this regard, the credibility of PCC rests on its ability to swiftly and thoroughly detect, investigate, and prosecute anti-competitive agreements and conduct.

Second, for mergers and acquisitions, we shall adopt a more simplified notification process to further expedite the review of non-problematic merger cases and facilitate the ease of doing business. We will continue our efforts to proactively monitor non-notified transactions and evaluate merging parties' compliance with their voluntary undertakings. This means we

"THE CREDIBILITY OF PCC RESTS ON ITS ABILITY TO SWIFTLY AND THOROUGHLY DETECT, INVESTIGATE, AND PROSECUTE ANTI-COMPETITIVE AGREEMENTS AND CONDUCT."

can constantly check the market power of growing and dominant firms and, at the same time, focus on transactions that pose greater competition concerns.

Last, one persistent challenge has been the general population's low level of awareness and understanding of the Commission and the PCA, as well as the principles of healthy market competition. When consumers, businesses, and even government entities, including government-owned and -controlled corporations, are uninformed, anti-competitive conduct and misinformed public policies may proliferate.

This 2019, the Commission shall become more proactive in its engagement with Congress and sector regulators by reviewing bills, existing laws, and regulations that restrict competition in various markets. We hope to organize a multiyear workplan utilizing a quick-response mechanism, tapping competition and sectoral experts in the provision of targeted, timely, and informed comments on legislative proposals and executive issuances. We recognize that competition advocacy is a cost-efficient way of preempting anti-competitive conduct.

As the PCC expands its portfolio of cases and advocacy efforts in 2019, we reaffirm our commitment to our vision of becoming a world-class competition authority. Indeed, we have set a lofty goal, yet it is attainable. This goal provides us the impetus to work at the frontier, aiming to attain the standards set by model competition authorities in other jurisdictions.

The PCC's 2019 marching order is set. We step into this year with hope and renewed vigor to foster competitive processes in the markets of goods and services. ∎

COMPETITION DOS AND DON'TS IN THE YEAR OF THE PIG

FEBRUARY 8, 2019

ATTY. AMABELLE C. ASUNCION

Gong Hei Fat Choy! While there are various ways of saying "Happy New Year" in Chinese, this seems to be the most common greeting. It translates to "wishing you great happiness and prosperity," which is the best anyone could wish for another.

Celebrating its third anniversary a few days ahead of the Chinese New Year, the Philippine Competition Commission (PCC) makes the same wish for everyone—prosperity for businesses and consumers alike. The essence of competition law and policy is captured in this simple Chinese greeting. As no Chinese New Year celebration is complete without rituals and predictions intended to attract good fortune or counter bad luck, here is a PCC list of dos and don'ts that are worth noting in the Year of the Pig.

First, come forward and come clean. The PCC recently launched its Leniency Program wherein entities or individuals engaged in anti-competitive agreements can apply for immunity or fine reduction in exchange for providing information to the PCC. Any firm involved in cartel activity—fixing prices, artificially limiting production or supply, or dividing the market—is advised to avail itself of this program. A successful applicant will be granted immunity from criminal and administrative liability and from any civil suit that the PCC would otherwise file. If the applicant is a corporation, the immunity can extend to its responsible directors, officers, and employees.

Since the program allows for only one immunity and one fine reduction, applications for leniency are considered on a "first-come, first-served" basis. It is a race to obtain the first marker and there is no consolation for arriving late, like the pig at the party of the Jade Emperor. The benefits available under the Leniency Program also diminish as the investigation progresses. While immunity is always available before the preliminary inquiry begins, it may not

> “COMPLIANCE IS KEY TO DISPERSING ANY NEGATIVE CONSEQUENCE. THE PCC TAKES ITS MANDATE SERIOUSLY AND WILL NOT HESITATE TO INVOKE ITS FULL POWERS TO ENFORCE ITS ORDERS AND DECISIONS.”

necessarily be so after the inquiry starts. The amount of fine reduction, likewise, dwindles.

The Leniency Program is an opportunity for infringers to confess and start anew. More important, it is a chance to help arrest practices that have been injurious to consumers.

Second, comply and cooperate. Whether it is a request for information or a subpoena, comply. Compliance is key to dispersing any negative consequence. The PCC takes its mandate seriously and will not hesitate to invoke its full powers to enforce its orders and decisions. A question that has been asked a few times is whether the PCC has teeth. The answer is yes, and a good set of teeth at that. The Commission can, and will, if warranted, mete out penalties, issue compulsory processes, and deputize other agencies to assist it.

While confidentiality and privacy of information are valued, withholding information is more detrimental than beneficial. The investigative and analytical processes—whether in the mergers or enforcement context—depend on accurate and complete information. Where information is not provided, the rules of procedure allow the PCC to make assumptions against entities based on worst-case scenarios. Thus, the more information withheld from PCC, the more likely the findings will be adverse. It is like waiting for karma to visit.

Third, take commitments seriously. With pig symbolizing wealth, 2019 is supposed to be an auspicious time for business opportunities. Last year alone, PCC reviewed 41 mergers and acquisitions. More mergers are likely to emerge this year. As mentioned in an earlier column, a merger is like a marriage where, in some cases, commitments are required as conditions to consummate the bond. These commitments are not to be taken lightly but treated as sacrosanct as the unbreakable “word of honor.” Earnest and strict adherence to such commitments is expected no less.

Voluntary commitments are offered by merging parties to address the negative impact of the proposed merger on competition and consumers. The purpose of such commitments is specific and concrete. These commitments are not meant to be motherhood statements or a form of “window dressing” just to muster regulatory approval. Although formally proffered to the PCC, these are actually the merging parties’ commitments to consumers and to competition in general. To renege on these commitments is to turn their backs on the consumers they are supposed to serve. Unless this is the intent, merging parties should have no reason or excuse to violate their own commitments.

To date, the PCC has rendered four commitment decisions based on undertakings submitted by merger parties. The undertakings range from extending fair, reasonable, and nondiscriminatory terms to competitors, maintaining pricing behavior pre- and post-merger, data firewalls and avoiding practices that could foreclose entry or expansion of competitors. These are all subject of monitoring to ensure that merger parties abide by their commitments.

The “commitment track” is an option available to merger parties if the merger raises competition concerns. Parties are allowed to offer remedies to address the concerns. If found to be sufficient, the commitment package is approved. This track is a non-adversarial alternative to a straightforward review where the Commission can unilaterally impose remedies or even prohibit the transaction. While this option will continue to be encouraged, merger parties are cautioned that this is not a perfunctory exercise. Commitments offered must remedy the concerns and if violated, the transaction could be unraveled. So, take these commitments seriously both at the time they are offered and during the time they are to be complied with.

With these nuggets of advice and a reminder to always play fair, may the Year of the Pig bring prosperity to all. ∎

PCC @ 3: A DISRUPTOR AMONG DISRUPTORS

FEBRUARY 20, 2019

ATTY. MACARIO R. DE CLARO, JR.

"Disruption" and "disruptive innovation" are buzzwords making their rounds in business and tech circles lately. They describe the phenomenon of rapid change in the environment, practices, and culture shaping business, government and many other fields. In the Philippines, alongside technologically driven disruption, another kind of disruption is taking place. A disruption of anti-competitive attitudes and practices has been spearheaded by the Philippine Competition Commission (PCC), which for the past three years has worked toward ensuring fair competition in all markets for the benefit of all Filipinos.

On the occasion of its third anniversary, the PCC held the 2019 Forum on Competition in Developing Countries, themed "Technological Disruption: Market Competition Issues and Challenges." Having laid the groundwork for sound competition policy and enforcement in the Philippines, the PCC is bent on staying at the forefront of competition developments in Southeast Asia and among developing countries. The forum gathered key stakeholders from business, government, the academe, and the international community for a timely discussion of how competition authorities must respond to the technological disruptions that are transforming the business landscape.

The keynote speaker, Dr. Ndiamé Diop, head of the World Bank Group's Macroeconomics, Trade and Investment Global Practice, appropriately framed the day's discussion. Everyone was gathered there to discuss the latest technology, cyberthreats, and cyber opportunities, but Dr. Diop reminded the body that, at the end of the day, effective competition policy and enforcement, especially in developing countries, must necessarily lead to poverty reduction via competition in labor markets among firms and real wage growth. After all, poverty reduction is the best proof of consumer benefit and economic development.

The panel discussions focused on the opportunities and challenges posed by technological disruption. For example, technological disruptions alter cost structures and allow easier market entry due to lower fixed and average costs, affecting traditional business models, like that of exclusive franchises for "natural monopolies." Presently, these effects should be considered in responding to clamors from certain business sectors seeking relief from disruptors entering their markets.

Meanwhile, it has become ever more crucial for regulators to weigh their regulatory mandate against consumer welfare considerations. A commendable example cited in the forum was the response of the Bangko Sentral ng Pilipinas to recent developments in financial technology. The BSP's liberal but prudent approach to the regulation of new financial technology services has allowed the industry to flourish and serve the country's large unbanked population.

Generally, the adoption of outcomes-based regulation has allowed the rapid testing and development of new products and business models and innovation to prosper. Competition cooperation does not end with sector regulators. All agencies across national and local government, however, should be equipped with a mindset that fosters innovation.

Businesses, big and small, stand to benefit from the productivity gains generated by disruptive innovation. Small market players can gain access to smart operations solutions, which could cover accessible business services and manufacturing facilities. But as with all other emerging technologies, there are risks to be faced. Artificial intelligence can reinforce anti-competitive behavior even without human instruction. Data itself can become a barrier to entry or may be leveraged for anti-competitive agenda. Potential efficiency gains and convergence of technologies may be limited by the extent of interoperability of physical and digital infrastructure.

"COMPETITION COOPERATION DOES NOT END WITH SECTOR REGULATORS. ALL AGENCIES ACROSS NATIONAL AND LOCAL GOVERNMENT, HOWEVER, SHOULD BE EQUIPPED WITH A MINDSET THAT FOSTERS INNOVATION."

Two recurring themes on disruptive technologies were discussed during the forum. First is the call for closer collaboration among the government, industry, and the academe, to facilitate adaptive regulation design, align development objective with existing and available talents and resources, and build and promote mutual capacity. Second is the inclusivity of access to disruptive technology, which will open up potential markets and increase the size of the economic pie.

The same can be applied to PCC as a disruptor promoting market competition. Multisectoral cooperation is vital; all markets and market players must have access to competitive conditions and outcomes, when applicable. These past three years have not been easy. Every concluded case and signed memorandum of agreement are but small steps for the PCC not only in upholding competition within the local and international business environment, but also in promoting consumer welfare and benefit. Surely, there will be more uphill battles in the coming months and years. Rest assured, the PCC will remain steadfast in disrupting unfair competition. ∎

ENHANCING CONSUMER WELFARE THROUGH THE NATIONAL COMPETITION POLICY

MARCH 20, 2019

ARSENIO M. BALISACAN, PHD

In the past several decades, serious observers of the Philippine economy have noted how state policies have acted as barriers to the country's achievement of its desired development outcomes. Time and again, the country has shot itself in the foot just as economic growth was about to take off.

Our experience in leveling the playing field across different industries or sectors most clearly demonstrates this. Many times, misguided state interventions have wreaked havoc on the dynamic forces of competition. For instance, costly subsidies, tax breaks, and regulations impede or discourage the entry of investors. These have prevented more efficient and innovative players from coming in and dislodging the inefficient incumbents. The consequences for the consuming public are high-priced and low-quality goods and services.

The data bear this out. Comparative indices show that the Philippines has higher levels of competition and investment restrictiveness than most other countries, as shown in a recent World Bank report (2019) and an Organisation for Economic Co-operation and Development report (2017). The World Bank report also points out administrative burdens to start-ups, state ownership, and barriers to trade and investment as factors that significantly hinder competitive forces in the market.

The 2018 Global Competitiveness Report of the World Economic Forum shows that out of 140 economies, the Philippines ranks 65th in terms of not distorting competition through subsidies or tax breaks. We are ahead of Vietnam (94th), but well behind Singapore (1st), Malaysia (18th), Indonesia (34th) and Thailand (57th).

To address these issues, the Philippine Competition Commission (PCC) has been working with the National Economic and Development Authority (NEDA) to formulate the National Competition Policy (NCP). The Governance Commission for GOCCs, the

> "THE NCP IS A CREDIBLE SIGNAL THAT THE GOVERNMENT IS SERIOUS AND COMMITTED TO ADDRESSING THE NUMEROUS BOTTLENECKS THAT HARM THE COUNTRY'S COMPETITIVE LANDSCAPE."

Department of Justice-Office for Competition, and the Department of Trade and Industry, as well as private-sector representatives, have helped to come up with a draft NCP that is hoped to truly reflect what lawmakers envisioned when they enacted the Philippine Competition Act (PCA).

Guided by the Competition Chapter of the Philippine Development Plan (PDP) 2017-2022, the NCP, proposed to be issued as an executive order, will serve as a framework that would steer state policies and administrative regulations toward the promotion of robust and fair market competition. It rests on three fundamental pillars: (1) the effective implementation of the PCA, (2) the enactment of pro-competitive government regulations and (3) the internalization of the principle of competitive neutrality.

At its core, the NCP ensures that the entire government policy architecture will enact reforms that complement the PCC's efforts so that there is a greater likelihood of achieving the development objectives set forth in the PCA and in the PDP.

With the NCP in place, healthy market outcomes such as the promotion of market efficiency and enhancement of consumer welfare will now have to be considered in the design of public policies and interventions. This means the government can restrict competition only when it is the only available means to satisfy public policy objectives or when the benefits to consumer welfare are shown to be greater than the costs.

Competitive neutrality, the principle obliging state-owned enterprises (SOE) to compete on a level playing field with firms in the private sector, is enshrined in the NCP. Toward this end, oversight agencies must examine possible conflicts of interest in an SOE's proprietary and regulatory roles, and determine whether state subsidies or interventions affect the investment environment. Upon detection of possible competition issues, agencies must adopt measures to address these.

The covered agencies are directed to coordinate with the PCC regarding efforts to promote effective competition in their own jurisdictions and in fulfilling their own mandates. This is in line with the PCC's holistic strategy for mainstreaming a culture of competition.

The forthcoming adoption and implementation of the NCP is a credible signal that the government is serious and committed to addressing the numerous bottlenecks that harm the country's competitive landscape. Already a momentum for change and sustaining our economic growth trajectory has been created with the recent passage of the laws on rice tariffication and mobile-number portability—two significant and pro-competitive reforms.

Furthermore, deepening regulatory reforms is critical to sustaining the investor confidence that we have gained in the past few years. In addition to our ambitious infrastructure program, creating a level playing field can only make the country more attractive as an investment destination.

As we put in place all this transformation, our fervent hope is that the phrase "government policies with unintended consequences" will become a thing of the past. The time is ripe for an effective national competition policy. ∎

BALANCING COMPETITIVE MARKETS AND PUBLIC INTEREST

APRIL 10, 2019

ATTY. JOHANNES BENJAMIN R. BERNABE

A debate which remains unsettled within, not only the Philippine Competition Commission (PCC), but in other competition authorities around the world as well, is the extent to which "public interest" should influence the decisions and policies made by these agencies. While the answer may seem obvious, there are nuances that make a straightforward resolution more elusive than what meets the eye.

To be clear, public interest in this context refers to considerations broader than market competition and consumer welfare as explicitly espoused in the Philippine Competition Act (PCA). The public interest discussed in this article partakes of the nature of certain policy objectives such as, among others, health, employment, national security, and sustainable development through the adoption of environmentally sensitive measures. These policy objectives may not be synonymous with, but could generally pass as forming part of that notion called public interest. They are not expressly provided or mentioned in the PCA, but are widely accepted enough to be arguably implicitly embedded in any government agency's framework for implementation of its legal mandate. Or should they?

A competition authority from a developing country similarly situated as the Philippines, in this case the South African Competition Commission (SACC), invoked public interest when it imposed conditions on its clearance of the merger between two agrochemical giants, Monsanto and Bayer, last year. In its decision, SACC required the prospective buyer of assets (to be divested as a result of the merger clearance) to license the use of such assets to a South African entity with Black Economic Empowerment (BEE) credentials. *(N.B. BEE is a program of the South African government that gives its black citizens privileges and preference in economic opportunities over white citizens.)* This condition was required as part of the public interest in ensuring that South Africa will directly benefit from the divestiture of the global businesses of Bayer.

The PCC itself had the possibility to take into account public interest when it reviewed the acquisition by Japan Tobacco International Philippines Inc. of Mighty (Tobacco) Corp. in 2018. Merger review typically focuses on the ability of the merging firms to increase the price of the relevant products after their transaction. In this case, an issue that was raised was whether the merged entities' ability to raise prices should matter, given that the products concerned were cigarettes and tobacco products, which are recognized health risks. In other words, even if the merger would result in higher prices for cigarettes, given the public interest of ensuring the health of the nation's citizenry, should the PCC prohibit the merger? The Commission decided—rightly so—not to take this public interest issue into account when deciding the case, on the reasoning that its analysis should be limited to the generally accepted competition assessment tool kit. Moreover, the Commission firmly believed that in this case, there are other more appropriate policy instruments available to the government in addressing its public health objectives.

There will certainly arise other situations in the future when the Commission will be compelled to carefully balance competition law enforcement against the broader public interest. Much advice has been given about the need for young competition agencies like the PCC to stick to evidence-based competition analysis when evaluating the likely effects of mergers, and to dispense with public interest considerations when ruling on cases. Supposedly, a more robust analysis that relies on the application of competition disciplines will better withstand legal challenge and lend more credibility to the Commission's decisions. Further, this school of thought suggests that reliance on amorphous public interest reasons as basis for its decisions gives rise to too much subjectivity and lack of predictability in what

> "THERE WILL CERTAINLY ARISE OTHER SITUATIONS IN THE FUTURE WHEN THE COMMISSION WILL BE COMPELLED TO CAREFULLY BALANCE COMPETITION LAW ENFORCEMENT AGAINST THE BROADER PUBLIC INTEREST."

is already conceded to be a field of law that depends heavily on economic context.

On the other hand, turning a blind eye to public interest could lead the PCC to being trapped in an ivory tower, where it limits its perspective solely to competition issues, while the rest of the world turns. Clearly, the Commission has to be able to balance its primordial duty to uphold competition and consumer welfare, while at the same time having the requisite sensitivity to issues that afflict the world outside the markets it examines.

Toward this end, the Commission should continue to hone this dual awareness in its less contentious policy advisory role where it provides inputs to proposed laws and regulations of the legislature and other government agencies. For instance, bills that suggest incentives to facilitate the development of certain economic activities are often referred to the PCC. Incentives or subsidies are traditionally seen as capable of distorting the playing field and thus liable to raise competition concerns, and yet, these must be assessed vis-à-vis other policy objectives such as the need to promote clean energy to address climate change.

In time, the PCC should get the balance of interests right. ∎

CREATING A FAIRER SOCIETY FOR FILIPINOS

MAY 22, 2019

ARSENIO M. BALISACAN, PHD

The "Asian Century." That's how experts and pundits dub this period of history due to the dynamism of the region's economies. The rise of Asia is expected to bring millions of people out of poverty and into the economic mainstream as per capita incomes rise across the region.

From 2010 to 2018, the annual growth of the Philippines's gross domestic product averaged 6.3 percent. This nine-year performance has catapulted the country to the enviable list of fastest-growing economies around the world. However, unlike the experience of developing Asia (most significantly, China and Vietnam), our high GDP growth has not yet translated into as much poverty reduction as we hoped. This may be traced to our country's troubles with persistently high levels of inequality in the distribution of incomes or, in general, opportunities.

Within the Asian region, the initial levels of economic inequality during the early stages of economic transformation varied greatly across countries. In countries with initially low inequality prior to rapid growth (e.g., China, Vietnam, Indonesia), poverty has responded strongly to growth. The opposite is true in countries with high inequality at the start of the growth process (e.g., Philippines, Pakistan, India): Poverty has been persistent and has responded weakly to growth.

Rapidly rising inequality poses a serious threat to poverty reduction. For one, it may lead to political polarization and unrest, dampening investor confidence and job growth. A skewed income distribution can also prevent the poor from accessing opportunities to invest in human capital, such as health and education. Further, economic inequality aggravates and entrenches political inequality, providing the environment for political and economic elites to shape institutions and laws that favor their interests.

Competition policy, as envisioned and enabled by the Philippine Competition Act (PCA), the

> “...THE PCC SERVES AS A TRUSTEE FOR PUBLIC INTEREST, IMPLEMENTING EFFECTIVE COMPETITION POLICY ON BEHALF OF CONSUMERS.”

country’s comprehensive competition law, is a key tool for addressing economic inequality.

While competition enforcement and analysis has generally put forward the objective of improving economic efficiency, competition policy is historically connected to the decoupling of market power and political clout. This is especially true in the case of the United States when it passed the Sherman Act of 1890 at a time when industrial elites controlled vast areas of commercial activities.

In the case of the Philippines, the PCA was conceived as a key economic reform to promote economic development and a fairer distribution of opportunities, income, and wealth. Indeed, the PCA cites one of the constitutional goals: The attainment of “a more equitable distribution of opportunities, income, and wealth.”

With consumer welfare at the heart of the country’s competition policy, it can be argued that prohibition of cartels and abuses of dominance, merger control, and advocacy for competitive markets—the core activities of the Philippine Competition Commission (PCC)—promote fairer social outcomes while improving economic efficiency.

In the Philippines, as elsewhere, where economic and political elites often intersect, rent-seeking or rent-preserving activities by dominant incumbents can result in policies or regulations that protect their interests by restricting entry of competitors into the marketplace and dampening competitive pressure. As a consequence, the market becomes inefficient, which hurts consumers, most especially the poor, who then have to deal with higher prices, fewer choices, or lower quality of goods and services.

On the demand side, the PCC serves as a trustee for public interest, implementing effective competition policy on behalf of consumers.

The Commission employs filters to prioritize its actions, focusing on sectors with potentially large impact on consumer welfare and those having serious competition challenges that act as roots of market inefficiencies.

By prohibiting anti-competitive agreements, such as price fixing, and abuses of dominance and by preventing the consummation of anti-competitive mergers and acquisitions, the PCC provides counterweights to the economic power of dominant players in the market, disproportionately benefiting the poor. Thus, pursuing a consumer welfare standard can be both efficient and equitable.

On the supply side, improving the competition landscape across industries can help spur productivity and lead to the efficient shift of the country’s labor force from low-productivity to high-productivity jobs that offer higher wages. We can reasonably expect this dynamic and transformative process within and across industries to bring the economy closer to its full potential—allowing it to reach the frontier, so to speak. Such a transformation has been critical to the development success stories of our Asian neighbors.

We have been experiencing rapid economic growth for nearly a decade now. We still have some 20 years to go before we measure our performance against the standards set forth in Ambisyon Natin 2040, the country’s long-term vision for development.

But this we know: Sustaining this growth and reaching an even higher trajectory—in the order of 7 percent to 8 percent—in the next two decades require that we prohibit anti-competitive business practices, and dismantle structures and policies that cause an uneven playing field and hinder the flourishing of economic opportunities.

The PCC is committed to doing these—not only because it is mandated to promote consumer welfare, but for the loftier aspirations of reducing economic inequality and creating a fairer society for all Filipinos. ∎

A CONFLICT OF LAWS?

SEPTEMBER 25, 2019

ATTY. JOHANNES BENJAMIN R. BERNABE

Intellectual property law and competition law have traditionally been seen as at odds with one another. The conflict owes to the premise that intellectual property law is intended to protect the rights of inventors, artists, writers and businesses through the grant of patents, copyright and trademarks in their favor to the exclusion of others. In a very real sense, these intellectual property rights are in the nature of monopoly rights. If the right holder does not want and refuses to allow or license the use of his patent, copyright or trademark to another person, then the community is deprived of the benefits of the right holder's creation.

Competition law, on the other hand, frowns upon monopolies. While modern competition disciplines no longer prohibit monopolies *per se*, authorities are wary of and enforce the law against abuse of monopoly or dominant position. Competition law is concerned with the effective and efficient functioning of markets. As such, one of its inherent aims is to ensure that whatever inputs and technologies are needed for the production of goods and services are not foreclosed, that is, made available to the extent possible to all market participants. The question is, how does a competition authority pursue this goal in the face of intellectual property law that permits right holders to restrict access to their creations?

There are no easy, straightforward answers, and much depends on the context and particular circumstances of each case. The protection of intellectual-property rights is justified in that it promotes dynamic efficiencies by incentivizing innovation. Technological and business innovations allow for the more efficient use of labor and capital, and over time, disrupt the old ways to pave for superior quality and consumer choice. Conventional wisdom has it that inventors and creators are more likely to undertake research and pursue inventive products and processes if they know that their innovation will be credited to them, and that the benefits arising from their ingenuity will be reserved for them.

The Philippine Competition Act (PCA) is not blind to the benefits of innovation, and provides that where an entity is in a dominant position, the entity is not prohibited from entering into agreements that protect its intellectual property rights. The PCA further recognizes that conduct which improves the production or distribution of goods or services, or promotes technical and economic progress, while allowing consumers a fair share of the resulting benefit may not necessarily be an abuse of one's dominant position. These are, of course, without prejudice to the Philippine Competition Commission's (PCC) ability to pursue measures that would promote fair or more competition.

The PCC has not yet had occasion to directly rule on a controversy where the conduct of an entity in a dominant position is sought to be justified on the basis of intellectual property law. Some experts note that case law in the European Union, from which the relevant provisions of the PCA on abuse of dominant position were adapted, may provide guidance. For instance, it has been ruled in the EU in the *Magill* case that a refusal to provide basic information, even if protected by copyright, which results in preventing the appearance of a new product, which the copyright owners did not offer and for which there is a potential demand among consumers, constitutes abuse. Similarly, in another case (*IMS Health v NDC Health*), it was ruled that in balancing the need to protect the economic rights of an intellectual property rights holder and the need to protect competition, the latter can prevail where the refusal to grant a license prevents the development of a secondary or a neighboring market to the detriment of consumers. The same competition principles were upheld in cases involving Microsoft in cases more recently decided in the EU.

> "THE PHILIPPINE COMPETITION ACT IS NOT BLIND TO THE BENEFITS OF INNOVATION... THE [DOMINANT] ENTITY IS NOT PROHIBITED FROM ENTERING INTO AGREEMENTS THAT PROTECT ITS INTELLECTUAL PROPERTY RIGHTS."

Apart from these decided cases, the Intellectual Property Code of the Philippines explicitly provides that the Intellectual Property Office of the Philippines (IPOPHL) may grant a compulsory license, i.e., a license to exploit a patented invention, even without the agreement of the patent owner, in favor of any person who has shown his capability to exploit the invention where, among others, an administrative body has determined that the manner of exploitation by the owner of the patent or his licensee is anti-competitive. The PCC, being the agency mandated with the original and primary jurisdiction in the enforcement and regulation of all competition-related issues, clearly has the authority to determine such anti-competitive conduct. Its findings would then provide the basis for IPOPHL to issue a compulsory license that would rectify the restriction of competition in the market.

While much more can be written and analyzed to explore the interface between competition and intellectual property law, what is certain and urgent is the need for the PCC and IPOPHL to come together and work on their *modus* for cooperation. ∎

IN OR OUT?

OCTOBER 9, 2019

ATTY. MACARIO R. DE CLARO, JR.

You may have heard in the news that the Philippine Competition Commission (PCC) is looking into big mergers and the behavior of dominant market players. The PCC investigates alleged abuses of dominant position and reviews proposed mergers, acquisitions, and joint ventures that exceed set thresholds to determine their effects on competition in the relevant markets. What, then, is a relevant market?

Based on the implementing rules and regulations (IRR) of the Philippine Competition Act (PCA) under Rule 2 (l), relevant market refers to the market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market, defined, as follows: (a) a relevant product market comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices, and their intended use; and (b) the relevant geographic market comprises the areas in which the entity concerned is involved in the supply and demand of goods and services, in which conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are different in those areas.

Market definition is often the starting point of competition assessment. It primarily depends on consumer response to the exercise of market power by firms. Imagine there is a monopolist in the market for a certain product—say soda. If this monopolist will increase prices (by just 5 percent to 10 percent but permanently), decrease quality, or limit product availability, do customers have alternative products to which they can and are willing to switch? Are there suppliers in other places from whom they can buy?

> SOUND MARKET DEFINITION LENDS CREDENCE TO THE CALCULATION OF MARKET SHARES AND CONCENTRATION IN LATER STAGES OF THE ASSESSMENT.

Consumer insight on purchase and usage patterns is crucial for market definition. What usually determines the relevant product market is demand-side substitution as a response to price or non-price changes. But sometimes, supply-side substitution also factors into market definition when competing suppliers can switch production to the relevant product without incurring significant additional costs or risks. This can happen when the companies segment their product line into several grades or variants, like in the case of baby formula, cement, or paper. In these markets, customers with different needs may be unwilling to substitute between variants, but suppliers are usually able to shift supply and offer a competitive constraint on any undue exercise of market power by a firm just as quickly and effectively.

Talking about the relevant geographic market, does this include a barangay, city, province, or the whole country? It depends on transportation costs. Other factors may be also considered such as regulations, culture, and other trade barriers that limit the willingness or ability of customers to substitute products or prevent suppliers from serving customers. Seller locations may also shape the geographic market when customers go to these locations to obtain goods and services. Alternatively, if suppliers bring their products to their customers, then the relevant geographic market will be based on the locations of suppliers' target market.

So, why is market definition important? It is important because it allows competition authorities to limit the scope of products and services, geographic areas, and market participants that are relevant to their assessment or investigation. Sound market definition lends credence to the calculation of market shares and concentration in later stages of the assessment. For example, evidence on the extent of market share and the ability and incentive of a single player to exercise market power within a certain relevant market would allow competition authorities to determine a dominant position of a certain entity and potentially the entity's abusive conduct.

For more information on market definition and its applications in competition policy enforcement, you may check the PCC's web site https://www.phcc.gov.ph. ∎

2019: A BANNER YEAR FOR COMPETITION ENFORCEMENT

JANUARY 8, 2020

ARSENIO M. BALISACAN, PHD

Despite the many headwinds it continued to face, the Philippine economy received some welcome news at the end of 2019: Poverty estimates recently released show that the country's full-year poverty incidence dropped from 23.3 percent in 2015 to 16.6 percent in 2018. Additionally, economic growth for 2019 is expected to hover at 6 percent despite the slowdown in the first half of the year. We are on track to achieve AmBisyon Natin 2040, our long-term vision for the Philippines.

To ensure that our growth is sustainable and results in the inclusion of the poor in the economic mainstream, the effective enforcement of competition law and policy must remain part and parcel of the country's long-term development agenda.

I am quite pleased to say that the year 2019 was a banner year for the Philippine Competition Commission (PCC), as it flexed its enforcement muscle to protect and promote market competition. The past year saw the Commission issuing landmark decisions, instilling discipline in the competitive landscapes across different industries, and imposing sizable penalties on erring firms.

Quite significantly, the Commission decided on its first abuse of dominance case—a milestone in Philippine competition enforcement. It involved Urban Deca Homes, a property developer that imposed a sole Internet service provider on its residents. This prevented them from availing themselves of alternative and cheaper Internet service.

Among its corrective measures, the PCC ordered the property developer to pay a fine of P27 million, and invited other Internet service providers to offer their services to residents. Such was the impact of this decision that other property developers with similar conduct initiated remedial actions on their own practices—a clear example of deterrence and voluntary compliance as a result of effective enforcement.

Another important "first" for the country's antitrust regime was the merger prohibition in January 2019. The PCC blocked Universal Robina Corp.'s proposed acquisition of Central Azucarera Don Pedro, as it would substantially lessen competition in the market for sugarcane milling services in Southern Luzon. The prohibition of the transaction prevented the creation of a monopoly that could significantly harm the welfare of sugarcane farmers. This demonstrates how the Commission's work has significant impact on stakeholders who belong to our priority sectors.

The Commission has vigorously enforced the Philippine Competition Act, its rules, decisions and issuances. The PCC stood guard in monitoring Grab's compliance with the Commission's Commitment Decision, which subjected Grab's acquisition of Uber in 2018 to pricing and quality standards. Since opening a motu proprio review of this transaction, and for numerous violations of orders and commitments, the PCC has exacted fines on Grab totaling P39.60 million, of which P19.2 million shall be refunded to affected Grab riders.

The PCC remains committed to the robust enforcement of its rules to penalize violators, encourage compliance, and deter the conduct of unfair market practices. Indeed, the total amount of fines it imposed in 2019 reached P114.6 million—four times greater than in 2018.

Efforts from previous years produced two significant enforcement tools that augment our current processes. First, the Commission's Leniency Program, a whistle-blower-type program that is a staple in most jurisdictions, was launched in January 2019. More recently, the Commission got a boost from the Supreme Court through its issuance of the Rule on Administrative Search and Inspection, which strengthens PCC's ability to conduct dawn raids. These two frameworks are expected to significantly advance our case-building and

> "...THE EFFECTIVE ENFORCEMENT OF COMPETITION LAW AND POLICY MUST REMAIN PART AND PARCEL OF THE COUNTRY'S LONG-TERM DEVELOPMENT AGENDA."

increase the number of cartel prosecutions in the coming years.

To fast-track investigations and to facilitate better policy coordination, the Commission in 2019 established agreements with regulators in sectors it has prioritized. These include the Departments of Trade and Industry; Energy; Agriculture; and the Energy Regulatory Commission. These partnerships are being utilized as the Commission continues to bear down on complaints of anti-competitive conduct across a broad range of industries.

In summary, our experiences in the course of our work the past three years have strengthened the Commission's confidence in engaging with participants from various industries and in steadfastly enforcing its rules and decisions. Our strong stance in favor of consumers, as reflected in the stiff fines we have imposed on noncomplying entities, shows the Commission's seriousness in its commitment to making markets efficient and advancing consumer welfare.

This new year, the Filipino people can only expect the PCC to sustain its momentum in delivering more and better competition enforcement. ∎

2020: TOWARD A MORE ROBUST COMPETITION REGIME

JANUARY 15, 2020

ARSENIO M. BALISACAN, PHD

In last week's column, I discussed how 2019 proved to be a banner year for the Philippine Competition Commission (PCC). Having gained significant experience in the past three years, the PCC confidently flexed its enforcement muscle by deciding on several landmark cases and imposing stiff fines on competition law violators. Our strong position reflects the Commission's commitment to fostering efficient markets and advancing consumer welfare.

Yet, many challenges still need to be overcome. Many sectors that have significant impact on consumer welfare and economic development are still characterized by high levels of market concentration and barriers to entry. Consequently, the full benefits of competition—lower prices, better quality, and wider variety of goods and services—are yet to be felt by most Filipinos.

Therefore, for the year 2020, the Commission will prioritize the sectors of telecommunications, retail, energy and electricity, transportation, construction, health and pharmaceuticals, and food and agriculture. In carrying out competition analysis and enforcement activities, we intend to unleash the full economic potential of these sectors that have long been held back by highly restrictive regulation.

This year, the Commission's topmost priority is to effectively investigate anti-competitive agreements and conduct, bearing in mind that effective deterrence requires not only the threat of penalties but also effective detection and prosecution of infringements. With the fully launched Leniency Program and the strengthened ability to conduct dawn raids added to our armory of enforcement tools, we are now more equipped to exercise the full range of our investigative powers.

On the mergers and acquisitions front, we will further streamline our review process by issuing several important circulars and

> “...PCC RECOMMITS ITSELF TO FULFILLING ITS MANDATE OF PROTECTING COMPETITIVE PROCESSES TO ADVANCE CONSUMER WELFARE AND ACHIEVE SUSTAINED AND INCLUSIVE DEVELOPMENT.”

guidelines. In the first half of this year, we intend to issue circulars on the process for exemption from compulsory notification of joint ventures under the NEDA JV guidelines, as well as unsolicited public-private partnership projects. Guidelines on merger remedies, which parties may use to inform their proposals for voluntary commitments to the Commission, will also be issued within the year.

We will undertake in-depth research to support merger reviews and competition enforcement and to provide inputs for advocacy initiatives. These include competition assessments of sector regulations and market conditions, and an impact evaluation of PCC's decisions. The Commission also intends to conduct research on the impact of government subsidies on the competition landscape, as well as on industry practices, such as vertical restraints between upstream and downstream segments of various industries.

On the matter of strengthening our enforcement networks, we look forward to solidifying and formalizing interagency ties with other sector regulators, particularly with the Land Transportation Franchising and Regulatory Board, the Intellectual Property Office, and the Department of Information and Communications Technology. These partnerships will effectively speed up investigation of cases and facilitate better policy coordination.

Along with this, the Commission plans to formally propose to Congress amendments to the Philippine Competition Act (PCA) to address salient issues that have emerged during its first three years of operations. The proposed amendments will include raising the amount of pecuniary penalties, giving PCC the power to conduct dawn raids without court order, and reinforcing its primary, original, and exclusive jurisdiction over all competition cases. Following global trends, we will also explore expanding our mandate to include consumer protection, recognizing the complementarity between competition and consumer protection work.

Recently, the Commission and the Asian Development Bank launched the $23.3-million Capacity Building to Foster Competition Project, the first capacity building loan in recent years. This six-year project, currently ongoing, will help strengthen PCC's institutional capacity while furthering the culture of competition in other government agencies and in the academe.

Further, to cater to the growing appetite for expansion across our country's major economic centers, PCC will ramp up preparations for the establishment of regional offices in Cebu and Davao, by 2021.

By issuing several rules and guidelines that streamline PCC's processes and clarify the scope of its powers, as well as introducing programs that bolster its operations, the Commission looks to further improving the quality of its operations and reducing the risks and costs to doing business in 2020.

Now, having laid down the future actions on the country's competition policy regime, the PCC recommits itself to fulfilling its mandate of protecting competitive processes to advance consumer welfare and achieve sustained and inclusive development. ∎

ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANCE

The Philippine Competition Act (PCA) defines and prohibits anti-competitive agreements and abuse of dominant position in the market. When businesses engage in anti-competitive agreements such as price fixing and bid-rigging, consumers are deprived of enjoying a variety of choices, affordable prices, and quality goods and services. Similarly when big companies abuse their dominant position in the market through business practices such as predatory pricing and price discrimination, competition is likewise restricted, to the detriment of smaller businesses and the consumers. The Philippine Competition Commission (PCC), as the chief enforcer of the PCA, is mandated to investigate and adjudicate enterprises that engage in anti-competitive conduct. Articles in this section explain such prohibited acts and illustrate how they affect consumers through examples in everyday life. Readers will get to know how the PCC carries out its mandate of enforcing the competition law to protect consumer welfare.

CHASING CARTELS FOR THE BENEFIT OF CONSUMERS

JUNE 12, 2018

ATTY. JOHANNES BENJAMIN R. BERNABE

Putting a halt to cartels and other collusive acts lies at the heart of the Philippine Competition Commission's (PCC) effort to improve consumer welfare.

The review of mergers and acquisitions, often involving large corporations, while gaining the lion's share of attention, is perceived by many as mainly affecting competitors in the market who may be eased out because of the monopolization or dominance by the merged entity.

On the other hand, the PCC's mandate to curtail abuse by an entity of its market power is seen as more directly impacting suppliers, distributors and other entities involved in the production or marketing chain of a good or service.

However, all consumers, bar none, look at price fixing, bid-rigging, output limitation, and market allocation—the last two in the sense that they result in increased prices—as a bane of their existence. Hence, agreements to fix prices are regarded as acts characteristic of "hard-core cartels." These types of agreement are by their nature inherently bad, such that no analysis is needed of their effect on competition.

Under the Philippine Competition Act (PCA), price fixing and bid-rigging are *per se* prohibited, which means that there is no defense or circumstance that could ever justify their commission. Market competitors found by the PCC to have committed these acts are not only subject to administrative fines of up to P100 million for a first offense and between P100 million and P250 million for a second offense; moreover, if found guilty by the regular courts, these competitors are liable for criminal penalties in the form of imprisonment of two to seven years, and a fine ranging from P50 million to P250 million. If committed by corporations, the penalty of imprisonment shall be imposed upon their corporate officers and directors.

Cartel agreements between or among competitors, which have the object or effect of substantially preventing, restricting or lessening competition by restricting output, technical development, or investment, are subject to the same administrative and criminal penalties. The same goes for agreements that divide or allocate markets among competitors. These kinds of agreements are similarly seen as egregious and, as such, penalized heavily.

The difference, however, with the first type of agreements that seek to fix prices or rig bids is that unlike the latter, the PCC must prove that an agreement, for instance restricting output, has the "object" or "effect" of substantially lessening competition. As such, the PCC must not only prove that an agreement, formal or informal, tacit or explicit, exists; in addition, it must necessarily conduct an analysis of the agreement to determine whether it substantially lessens competition in the market.

Does it, for example, have the purpose of dividing the geographic market such that an entity is only allowed to supply its services in Metro Manila, while its competitor supplies the rest of Luzon? Even if the agreement does not expressly provide for this purpose, if examined in its overall legal or commercial context, can there be no other inference but that the agreement has the object of restricting competition in the market?

Alternatively, if this object is not apparent, the PCC can look at the likely or actual effect of the agreement on the market. In this case, the Commission will use economic analysis to prove the pernicious effects a market allocation or an output limitation agreement has on competition and on consumers. Since economic analysis will be availed of to establish liability, it behooves the Commission to ensure that its conclusions on the effect of the agreement are robust and evidence-based.

"...ALL CONSUMERS, BAR NONE, LOOK AT PRICE FIXING, BID-RIGGING, OUTPUT LIMITATION, AND MARKET ALLOCATION—THE LAST TWO IN THE SENSE THAT THEY RESULT IN INCREASED PRICES—AS A BANE OF THEIR EXISTENCE."

The third category of anti-competitive agreements prohibited under the PCA is meant to catch all other kinds of collusive acts and need not even be among competitors.

For instance, an agreement between a government-owned or -controlled medical insurance corporation and an association of health professionals that limits payments to the latter to services that are provided under certain discriminatory conditions, may be caught by this prohibition. Its criterion is that entities collude or otherwise agree to engage in acts that have the object or effect of substantially preventing, restricting or lessening competition.

Due to its very broad coverage, this type of agreement is balanced by the so-called "rule of reason," such that the PCC must consider any economic efficiency gains, which allow consumers a fair share of the resulting benefits that may be raised by the parties complained against. While this efficiency argument does not afford the parties an automatic exemption from prohibition, it does provide them a potential defense or justification against liability.

The PCC's ability to navigate and hurdle the conditions for successfully prosecuting cartels and various types of anti-competitive agreements described above will make a marked difference in the Commission's goal of directly improving the lives of Filipino consumers. ∎

(KING) CRAB MENTALITY

JUNE 26, 2018

ATTY. AMABELLE C. ASUNCION

I first learned about "crab mentality" back in elementary while studying history. It is a bad trait unfairly ascribed to Filipinos and considered a formidable obstacle to their success.

Crab mentality involves pulling down anyone who achieves or is about to achieve success greater than yours. This behavior takes its name from how crabs scramble to get out of a boiling pot by clambering on top of the others. This has the effect of crabs pulling each other down so that no one escapes, and everyone ends up on the dinner table.

I remember how laughable the concept was and did not believe it to be real. Fast-forward to this day, and I realize that crab mentality partly explains the state of market competition in the Philippines. The boiling pot represents the market, while the crabs are the players competing to get to the top. Crab mentality creeps in and destroys competition, to the detriment of the market. In this situation, the players are of similar size and might, with those who are behind engaging in unfair conduct to pull down the others who are ahead.

There is another version of crab mentality, which I dub "king crab mentality." In this second situation, a king crab that has reached the top flicks the smaller crabs back to the bottom of the pot to prevent them from getting to the top. This exemplifies what the Philippine Competition Act (PCA) considers abuse of dominant market power.

Abuse of dominance involves a firm holding a dominant position in the market and behaving in a way that substantially lessens competition. It is not wrong to be a dominant player; in the same way that it's not a sin to be a king crab. However, flicking smaller crabs back to the bottom of the pot is another matter—this is abusive conduct.

> "THE LAW PRESUMES A 'SPECIAL RESPONSIBILITY' ON THE PART OF DOMINANT FIRMS TO ACT IN ACCORDANCE WITH THE BASIC TENETS OF COMPETITION."

Such king crab mentality may come in the form of unfair pricing and exclusionary behavior against competitors. An example of unfair pricing is selling below cost or at artificially low prices to drive a competitor into bankruptcy.

Exclusionary conduct includes imposing barriers to entry or preventing competitors from growing. Offering special discounts to a customer who buys all or most of their supplies from you can be abusive conduct.

Some businesses engage in these practices, probably without realizing that they are potentially anti-competitive. The PCA recognizes that some of these practices can be legitimate business strategies beneficial to consumers. For instance, tying and bundling products may prove to be a good deal for customers. Likewise, offering discounts would not be anti-competitive *per se*.

The law doesn't prohibit legitimate business strategies in acquiring, maintaining or increasing market share; nor does it penalize success. What the law forbids is a dominant player behaving in a way that lessens competition. The law presumes a "special responsibility" on the part of dominant firms to act in accordance with the basic tenets of competition.

A firm with a market share of at least 50 percent is presumed to be dominant. Other factors that determine dominance are the number and strength of competitors, barriers to entry, customers' ability to switch to other goods or services, and competitors' access to inputs. These factors are relevant because a dominant firm is likely to exercise a multipronged power over its competitors, over customers, and on the relevant market. Considering these factors, it is easy to understand why and when the various behaviors mentioned above may be abusive.

To be sure, the king crab is not expected to pull up the smaller ones to the mouth of the pot but instead is presumed to maintain its position. Again, there is nothing wrong with this. What the law guards against is the king crab pushing the smaller crabs back to the bottom of the pot, putting up barriers or preying on their lesser brethren. Allowing these could lead to the demise of the entire market, to the prejudice of consumers.

Many find it difficult to understand competition law, much less abuse of dominance. It would be instructive to read Robert Fulghum's book, *All I Really Need to Know I Learned in Kindergarten*. If my elementary years taught the vice of crab mentality, Fulghum's book taught the virtue of fair play in kindergarten. Take these lessons and apply them to your harried business lives. I am sure these will hold true, clear and firm. ∎

BIG AND SPECIAL

JULY 31, 2018

STELLA A. QUIMBO, PHD

At the recent Competition Law Asia conference held in Singapore, the conference chairman reminded participants what Spider-Man once said: With great power comes great responsibility. By "power", the conference chairman was, of course, referring to market power, rather than the abilities of a superhero.

Market power is what competition law seeks to address. It is what gives businesses the ability to profitably increase prices above the competitive level. Big businesses, because they have a large share of the market, are thought to have market power and can dictate prices.

Nothing in the Philippine Competition Act (PCA) suggests that monopolies are prohibited. Bigness, *per se*, is not unlawful. Bigness can lead to good outcomes, especially when the business exhibits economies of scale, such that operating at a larger scale can reduce production costs. What is unlawful is if such bigness is used in a way that harms market competition in a significant way. If bigness is used by firms to "foreclose markets"—e.g., preventing smaller firms from accessing essential inputs or preventing customers from purchasing from small rival firms—then such bigness can be unlawful.

According to jurisprudence, a big or dominant firm has a special responsibility "not to allow its conduct to impair genuine undistorted competition on the common market" (*Michelin NV v. European Commission*). This has been interpreted as a negative responsibility: There are certain behaviors that dominant firms must abstain from, including those that will cause prices to substantially increase or quality to significantly deteriorate.

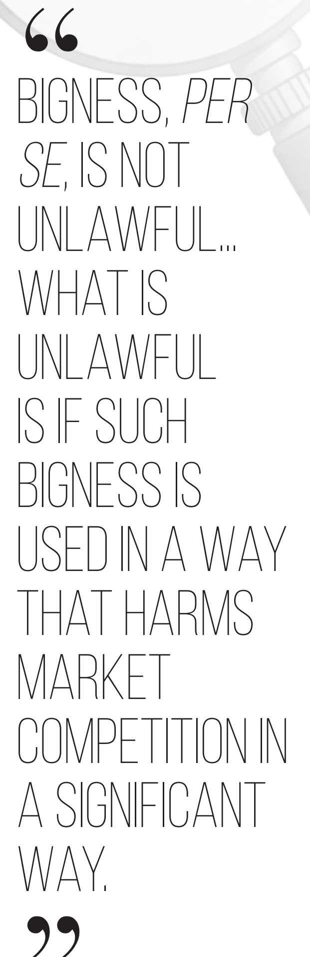
Under the PCA, a firm that has a market share of at least 50 percent is considered "dominant," although this presumption is rebuttable. The firm can argue and show proof to the contrary despite having this market share. Similarly, the Philippine Competition Commission (PCC) can deem a firm "dominant" despite a market share lower than 50 percent.

The PCA deals with competition concerns arising from dominance in two general ways.

One way is through Section 15, which prohibits abuse by dominant firms. This includes predatory pricing, i.e., temporarily lowering prices to a level that brings losses to the firm, with the intent of driving away competitors, whether actual or potential.

The other way is an *ex ante* approach by way of merger control, which is the subject of Sections 16 to 23 of the law. When firms come together to merge, and (i) when the size of the transaction is sufficiently large (i.e., P2 billion in assets or revenues) and (ii) when the size of either party is sufficiently large (i.e., P5 billion in assets or revenues), these firms are subject to a compulsory notification requirement. This means that they are not allowed to consummate the transaction until after the PCC has reviewed and cleared it. Clearance is granted when the PCC assesses that the transaction—which results in the creation of a larger firm—would not strengthen the market power of the merged firm in a way that substantially increases prices, reduces quality or limits consumer choices.

In a recent decision, the PCC found that the proposed acquisition by Chelsea Logistics of 2GO could result in a significant increase in market power and, hence, a substantial lessening of competition. The merging parties are both involved in the business of supplying roll-on/roll-off passenger and cargo-shipping services, and directly competing in several legs, for example, Cebu-Cagayan de Oro, Cebu-Ozamis, etc. Each of these legs is considered a relevant geographic market, and PCC found that, in some of these legs, the merger will result in the creation of a dominant supplier, with market shares exceeding 50 percent.



> "BIGNESS, *PER SE*, IS NOT UNLAWFUL... WHAT IS UNLAWFUL IS IF SUCH BIGNESS IS USED IN A WAY THAT HARMS MARKET COMPETITION IN A SIGNIFICANT WAY."

Last April the PCC initiated a *motu proprio* review of Grab's acquisition of Uber, largely because the transaction puts Grab in a position of dominance in the market for on-demand private transportation online booking services. With the acquisition by Grab, Uber exited the market, causing Grab's market share to increase to over 90 percent. The PCC suspended its review after Grab offered voluntary commitments to address the competition concerns raised by the government agency. The PCC and Grab are in talks, which, if fruitful, will result in PCC accepting the commitments.

Dominance is a nice thing. It can be a badge of honor, if dominance was arrived at by eliminating rivals through innovation and efficient operations. It can be a virtue, if dominance is used to facilitate activities that improve overall market efficiency. However, it can also be a dangerous weapon to exploit or exclude, making the playing field less even. Bigness can be special, but it comes with special responsibility and, hence, invokes special attention from regulators. ∎

CHRISTMAS BARGAINS, BUNDLING, AND COMPETITION

DECEMBER 5, 2018

ATTY. AMABELLE C. ASUNCION

The cold early-morning breeze, dancing streetlights and nostalgic Jose Mari Chan tunes cannot but signify that the Yuletide season is here. It is the time of year when godparents suffer temporarily from selective amnesia. The only antidote to this holiday disease is finding gifts that are millennially hip but cheap. Thankfully, this is within reach.

Godparents no longer must choose between breaking the bank in the mall and penny-pinching in Divisoria. *Ninongs* and *ninangs* can scour a wide selection of products to discover the best deals. Creative promotions abound—buy one-take one, buy one-get a selected second item at a discount, bundled items at a discount, package deals, etc. To the frugal, these bargains are heaven-sent. But a word of caution is in order.

Some of these deals are forms of tying and bundling, which the Philippine Competition Act considers as abusive conduct if practiced by a dominant player without efficiency justifications that benefit consumers.

Tying occurs when the sale of goods (the tying product) is conditional upon the purchase of a different (tied) product, or upon the buyer agreeing not to purchase the tied product from another seller. Tying, which can involve products, services, franchises, intellectual property or combinations of these, may be contractual or technical.

Contractual tying is more common and imposes the tie as a condition on the buyer. If a generous *ninong* wants to gift his favorite godchild with a car and is told by the dealer that the purchase is contingent on taking out a specific car insurance, then there is contractual tying between two distinct products. Maybe the *ninong* is only willing to spend on the car, leaving the purchase of insurance coverage to his *inaanak*. But with tying, he cannot buy the car without also taking out the recommended insurance.

> "TYING AND BUNDLING ARE COMMON COMMERCIAL PRACTICES THAT MAY REDOUND TO THE BENEFIT OF CONSUMERS... BUT THESE CAN RAISE COMPETITION CONCERNS BECAUSE OF POTENTIAL FORECLOSURE OF COMPETITORS AND EXTRACTION OF CONSUMER SURPLUS."

Technical or technological tying occurs when the tied product is physically integrated into the tying product such that it is impossible to purchase the latter without the former. For example, selling a printer that uses only cartridges produced by the same manufacturer. The buyer is forced to purchase cartridges of the same brand even if there are cheaper alternatives. Before buying your *inaanak* a popular battery-operated toy for half the price of other brands, check first if the toy requires expensive batteries that can only be purchased from the same manufacturer.

Closely related to tying is bundling, wherein a package of two or more products is offered at a discount. Consumers are fond of bundles because of the convenience and the apparent savings they offer. The *noche buena* basket is the classic example during the Christmas season.

For the most part, consumers benefit from bundles, of which there are two types: pure and mixed. Pure bundling is when two products can only be bought together and are unavailable for purchase separately. An example is the OTT (over the top) delivery of film and TV content via the Internet, where a subscription comes with preselected content that cannot be unbundled and bought individually.

Mixed bundling is when two products are available for sale separately but are sold at a discount when bought together. Value meals and gift sets are examples. Another example is the "buy one, get a second item at a discount" deal. Mixed bundling is often favored because it offers options while still allowing buyers to purchase the products separately.

Tying and bundling are common commercial practices that may redound to the benefit of consumers. The economic logic is that tying and bundling reduce costs and allow economies of scale and scope for producers, which lead to higher sales, and lower prices. But these can raise competition concerns because of potential foreclosure of competitors and extraction of consumer surplus.

A tie has the effect of foreclosure if it restricts the opportunities available to competitors, frequently in the tied product. The tie is used as leverage by an entity dominant in one product market to foreclose sales in a second product market. In the battery-operated toy example above, the manufacturer tries to leverage its market power in the production of the popular toy against competitors in the market for batteries. Due to the tie, competition in the second market could be foreclosed, to the detriment of consumers.

A tie is also harmful if it amounts to extraction; that is, consumers are forced to purchase both products and therefore pay more. The consumer could have saved money were it not for the tying because they are interested in buying only the tying product.

When the tying and bundling have such foreclosure and extraction effects, the practice will be considered anti-competitive unless the dominant entity engaged in it presents objective and efficiency justifications. These justifications include improvement of production and distribution, technical and economic progress, and consumer benefit.

To a consumer, the disadvantages of tying and bundling may be unclear. The thrifty godparents may be too happy to find any promo that looks like a good bargain. Consider, however, this scenario: After years of living together, you propose to marry your significant other, and then are told that the proposal will be accepted only if you agree to have your future mother-in-law move in with you; or your proposal is accepted and, on your wedding day, you find out that your mother-in-law will live with you

thereafter. Since you really want to marry your significant other, you end up accepting the arrangement. This is a case of tying between your significant other and your mother-in-law, or more specifically, your marriage and the living arrangements of your mother-in-law.

Compare this with another scenario: You ask for your beloved's hand in marriage, and your future in-laws agree for as long as you live in the new condominium unit that they bought. In this case, your marriage is tied to living in the new condominium unit. Which of the two ties would you consider a good deal?

Surely, promos that involve tying and bundling can be *aguinaldo* for your conscientiousness and generosity. But while some of these deals may feel like winning a grand raffle, others sound like a prenuptial agreement. It is quite a treat if it feels like the first; but if it feels like the second, it is no Christmas bargain. ∎

ENSURING THAT BUSINESSES PLAY HARD

MAY 8, 2019

ATTY. MACARIO R. DE CLARO JR.

Everyone loves a good fight. Be it the exciting series between the Warriors and the Rockets in the NBA playoffs or the ultimate battle between the forces of good and evil in Avengers: Endgame, competition demands that both sides bring out their best performance, and most often, regardless of the outcome, the viewing public emerges as the winner. No one wants to spend hard-earned money and valuable time on a rigged match.

In the business arena, competition is equally important. It incentivizes companies to offer consumers the best quality products and services at the best prices in all instances, and to prioritize innovation to secure long-term operational sustainability. Competition among companies can be best illustrated in a bidding process where companies enter into the competing business arena set up by the prospective client as they try to outbid each other in terms of product quality and prices. In both government and private business procurement, biddings increase the likelihood that clients receive the best value in exchange for their scarce resources.

But what if the contending firms, instead of competing, coordinated their actions and manipulated the outcome of the bidding process for their own benefit? These actions refer to an anti-competitive conduct, which is called bid-rigging. This is now a *per se* violation under Section 14(a)(2) of Republic Act 10667 or the Philippine Competition Act (PCA). Companies and individuals who commit this type of violation may be held administratively and criminally liable, regardless of intent.

Common forms of bid-rigging include cover bidding, bid suppression, bid rotation, and market allocation. How do you know if bid riggers are ripping you off? There are red flags to watch out for.

If some bidders, save for one or a few "designated winners," suddenly increase their

> “...[T]he PCA grants the Philippine Competition Commission (PCC) primary jurisdiction in the enforcement and regulation of all competition-related issues, including bid-rigging...”

prices or submit bids that obviously do not meet your budget or quality specifications, cover bidding may be at work. Did some of your usual suppliers suddenly fail to bid or withdraw a previously submitted bid? This is a sign of bid suppression. Alternatively, there may be a constant set of bidders that seems to just take turns in submitting winning bids. Or there could be suppliers that unreasonably refuse to serve you or your whole geographic area. They might have bid rotation or market allocation agreements with their competitors. Bid riggers can be sophisticated, and there is no exhaustive list of bid-rigging schemes. The examples above and all “other analogous practices of bid manipulation” are prohibited under Section 14(a)(2) of the PCA.

Since the PCA grants the Philippine Competition Commission (PCC) primary jurisdiction in the enforcement and regulation of all competition-related issues, including bid-rigging, the PCC can initiate investigations based on reasonable grounds. These investigations may be *motu proprio*—on the PCC’s own initiative—or upon the filing of a verified complaint by an interested party, or upon referral by a regulatory agency.

The PCC may impose fines and penalties up to P100 million for the first offense, between P100 million and P250 million for the second offense, and between P150 million and P250 million for succeeding offenses. The PCC can stop bid-rigging by applying remedies, such as the issuance of injunctions and disgorgement of excess profits. Based on evidences, the PCC may file a criminal complaint against erring entities before the Department of Justice. If there would be probable cause found by the prosecutor, the corresponding information will be filed before the proper court, which may impose criminal sanctions for bid-rigging, such as imprisonment of from two to seven years, and fines of between P50 million and P250 million. The fine will be tripled if the bid-rigging involves basic necessities and prime commodities as defined by Republic Act 7581 or the Price Act.

Notwithstanding, however, the administrative and criminal penalties that may be imposed on erring entities for bid-rigging, a participant may still be immune from prosecution or have the administrative fines reduced if said participant will avail himself of the PCC’s Leniency Program.

Thus, if anyone suspects that any of the above anti-competitive conducts may have been committed, you may report this to the PCC immediately. Help the PCC keep an even playing field for business to ensure that the consuming public will always get their money’s worth. ∎

DON'T BE EVIL

JUNE 5, 2019

ATTY. AMABELLE C. ASUNCION

Abuse in any context is bad.

There are laws against different forms of abuse: Child abuse, abuse of women, abuse of authority, to name a few. The essence of these laws is to protect those in a position of weakness or disadvantage against those occupying a position of strength or power. Likewise, those enjoying such a position are not supposed to take advantage and cause harm to those in an inferior position.

The same can be said about abusive conduct in the context of competing businesses. The Philippine Competition Act's prohibitions against abuse of dominant position guard against abusive exercise of market power over other, often smaller, players. Business practices that prevent entry or growth of other players are detrimental not only to the competitors but also to the consumers because they can be left with a dominant player turned monopolist. Some practices that offer some form of "benefit" may appear altruistic, such as bundling another product for free or giving an incentive in exchange for exclusivity. Other practices may be as brazen as threatening to refuse supply, or advocating regulatory barriers under the guise of public interest. Regardless of the form, however, these practices are considered abusive conduct.

Abuse was bad even then.

In the late 1990s, Microsoft used its dominant position in the desktop computer operating systems (OS) market to exclude the Internet browser Netscape Navigator, which was competing with Microsoft's own Internet Explorer. At the time, Microsoft's Windows enjoyed at least a 90-percent market share. Most applications were written to be compatible with Windows so users purchased it over other OS. With the advent of the worldwide web, a then up-and-coming company developed Netscape Navigator, which enabled users to access applications located in another server.

In response, Microsoft came up with Internet Explorer (IE). Using its dominant position in OS, Microsoft then bundled IE with Windows for free and gave incentives to other firms in exchange for their commitment to distribute and promote IE. Microsoft also engaged in practices to exclude Navigator from important distribution channels. Some of these practices were considered abusive conduct in the United States.

Abuse remains bad today.

From desktop browsers in the 1990s, the battle for online supremacy is now being waged on the mobile front with the Google Chrome case decided only last year. In order to cement Chrome's dominant position in the market for general Internet search engines, Google imposed certain restrictions on Android device manufacturers. These included requiring them to preinstall Google Chrome as a condition for licensing Google Play Store; making payments in exchange for exclusively preinstalling Google Chrome; and preventing those wishing to preinstall Google Chrome from selling smart mobile devices running on alternative versions of Android (i.e., Android forks) without Google's approval. These restrictions were considered by the European Commission (EC) as abusive conduct because these foreclosed Google's rivals' opportunity to compete, and obstructed the development of Android forks, which could have provided alternative platforms for rival search engines to gain traffic. The EC slapped Google with an unprecedented fine of €4.34 billion.

It is almost inexplicable why Google did not learn from Microsoft. Then again, businesses do continue to engage in similar practices to this day. The drive to maintain and cement market dominance intensifies the inclination to resort to strategies that would exclude competitors, big or small, old or new. When this tendency arises, taking the perspective of the small/ new player or that of a consumer may temper

"THE DRIVE TO MAINTAIN AND CEMENT MARKET DOMINANCE INTENSIFIES THE INCLINATION TO RESORT TO STRATEGIES THAT WOULD EXCLUDE COMPETITORS, BIG OR SMALL, OLD OR NEW."

the temptation—take the child's position, or the woman's, or that of the abusive officer's victim.

Recall the challenges you had to hurdle as a new business. Were there artificial barriers that made it difficult to set up the business and enter the market? Did you attempt to penetrate a distribution channel only to be told that an exclusivity arrangement with a long-time dominant player prevents a distributor from carrying your product? Did your competitor crowd you out by offering incentives to a big customer, which purchased most of its supply requirements from them?

Remember your frustrations as a consumer. How often did you have to suffer from a bad service or product because the dominant provider or manufacturer managed to prevent its competitors from making their service or product equally available to you? How many times did you have to purchase something you did not want/need, or felt compelled to agree to a condition because you were told it was required for the purchase you actually wanted to make? Do you find goods to be priced higher than they should?

If these concerns resonate, it is because these are the very ills that a misbehaving dominant player can cause, whether intentionally or unintentionally. Thus, as one loathes being at the receiving end of such conduct, one must also learn to behave. As Google's own motto (ironically) puts it, "Don't be evil." ∎

ABUSING DOMINANCE

JUNE 19, 2019

ATTY. JOHANNES BENJAMIN R. BERNABE

Cartels are more easily understood by lawyers and economists familiarizing themselves with competition law concepts. Even laypersons have a general understanding of price fixing and bid-rigging as acts among competitors that ought to be prohibited and penalized.

However, the practices that the Philippine Competition Act (PCA) considers as constituting "abuse of dominance" are more difficult to grasp for the business community, or even among legal practitioners. This difficulty owes to abuse of dominance being such a fluid concept, with no fixed standard apart from the principle that such conduct should substantially lessen, prevent or restrict competition. Unlike price fixing where one has a fair idea when it is, in fact, happening, abuse of dominance depends on so many variables, which have to be established before the fact of abuse is acknowledged.

First, the competition authority has to determine what the "relevant market" is. What is the product involved? In which area of the country is the product being sold or traded? Once these tricky issues of the market involved are resolved, the competition authority has to establish that the entity alleged to be involved in abusive conduct is indeed dominant in that market. But just how do you establish this? The PCA creates a rebuttable presumption of dominance if the market share of the entity in the relevant market is at least 50 percent. This presumption may, however, be set aside by the Philippine Competition Commission (PCC) if the latter finds that even with a lower market share, there exist barriers to the entry of prospective competitors, or that buyers have ease and ability to switch to other goods or services, or that other entities can have easy access to the dominant entity's source of inputs.

Only after the PCC has established that an entity is dominant in the relevant market can it then determine that an act, such as those enumerated in Section 15 of the PCA, constitutes an "abuse" from a competition perspective.

> “…BUSINESSES SHOULD VIEW THESE AS AN OPPORTUNE OCCASION TO ENHANCE THEIR UNDERSTANDING OF COMPETITION LAW, REFORM THEIR PRACTICES… AND CONTRIBUTE TO BUILDING A CULTURE OF COMPETITION IN OUR COUNTRY.”

While the enumeration in Section 15 is quite comprehensive, covering everything from predatory pricing to tying the sale of a product to the purchase of a totally unrelated product or some other condition, or imposing anything from unfair selling price to undefined barriers to entry, there is a prevalent view that the enumeration in the law is not exhaustive. Indeed, lawmakers could not possibly imagine all the possible conduct, which could constitute abusive behavior resulting in a substantial lessening, prevention or restriction of competition.

This series of subjective analyses the PCC has to undertake is what lends difficulty to fixing an objective standard in ascertaining whether or not an offense has been committed under Section 15. Not only are the analyses based mostly on economic evidence, but also further compounding the difficulty is that findings based on these analyses change over time, such that they may have minimal precedential value. Thus, even in the United States, judges with limited economic training have on several occasions based their rulings in antitrust cases involving abuse of dominance on legal procedural issues, rather than substantive analysis. It is no wonder that many resource experts from more advanced competition jurisdictions, when advising the PCC, often suggested deferring going after abuse of dominance cases, and to focus instead on cartel investigations.

Notwithstanding all these, the PCC Enforcement Office's very first charge sheet against an entity for violation of the PCA, known in competition circles as a Statement of Objection, was filed against a real-estate developer for abuse of dominance in excluding other Internet service providers in the provision of fixed broadband services to homeowners and tenants in its various property developments. When news of this enforcement action was published in PCC's web site as required under the rules, we in the Commission were informed that companies involved in similar lines of business started scurrying around, trying to find out if their contracts contained similar exclusivity clauses. Without awaiting the outcome of the Commission's decision on the matter, it seems that the PCC's Enforcement Office filing of its Statement of Objection has already had a concrete deterrent effect on possible anti-competitive behavior of businesses!

Another consequence of this filing has been its instructional value on other end-users and consumers. The PCC has recently received a spate of inquiries and informal complaints about practices of certain businesses, ranging from mall cinemas barring moviegoers from bringing food bought elsewhere to transport providers charging unfairly high prices, all of which are alleged to be abusive and anti-competitive. The PCC Enforcement Office is bound to be called upon to investigate some of these, and the Commission will in due course hear and decide these cases. Rather than ruing these developments, businesses should view these as an opportune occasion to enhance their understanding of competition law, reform their practices, if necessary, and contribute to building a culture of competition in our country. ∎

IS MY 'SUKI' A PRICE FIXER?

JULY 3, 2019

ATTY. MACARIO R. DE CLARO, JR.

You have recently learned about the Philippine Competition Act (PCA) and have become more wary of possible violations in everyday life. A case that comes to mind is the price of your favorite snack and its competitors. All these products appear similarly priced and their producers raise prices at the same time, especially when the price of sugar or flour goes up. Another example would be the sellers of electronics at the local *tiangge*, promising to match lower prices from their competitors. Are these violations of the PCA?

In a previous article, I discussed bid-rigging, a *per se* violation under Section 14(a)(2) of Republic Act (RA) 10667 or the PCA. You worry that the scenarios above may pertain to another *per se* prohibition under Section 14(a)(1) of the PCA: Price fixing. Let's break it down.

Price fixing is an agreement among competing businesses to directly or indirectly raise, lower, or maintain purchase or selling prices. Under fair market competition, the dynamics of supply and demand determine the prices of goods and services. Companies are expected to establish prices and other terms of trade on their own. When businesses subvert the market and agree to fix prices and restrict competition, they are engaging in anti-competitive behavior that often leads to higher prices for end-consumers or less incentive for businesses to innovate. As such, price fixing is a major concern of the Philippine Competition Commission (PCC).

Competitors need not meet formally in a boardroom and decide to fix prices for them to be culpable. The agreement may be written, verbal, or inferred from observed conduct. Do some of your company's suppliers or clients routinely exhibit a pattern of identical contract terms or price behavior that appear lacking a legitimate business explanation? They may have entered into a price fixing agreement.

Of course, not all price similarities result from price fixing. They can often just be the effect of normal market conditions. Products that are practically identical, like similar varieties of rice, will usually be similarly priced, because the prices farmers charge rise and fall with the seasons or as a result of natural and man-made calamities, even without any agreement. Rising consumer demand due to higher incomes or changing consumer attitudes can also cause uniform price increases when the supply of a product is limited.

Price fixing agreements do not only pertain to up-front prices. They can also be about other terms of trade that affect prices to consumers, such as delivery fees, discount programs, or installment interest rates. Competing businesses and their representatives should be wary about discussing, in any context, present or future prices, pricing policies, promotions, bids, costs, capacity, terms or conditions of sale, among other confidential business information, that competitors must protect and use in making independent pricing and other strategic decisions.

Given this information, are your snack manufacturers and electronics vendors violating the PCA? Perhaps not. Unless agreements were made to fix snack prices, price changes that result from rising input prices are expected from the ordinary conduct of business. As for the electronics vendors, matching competitor prices, so long as it results from independent price setting and not coordination agreements, is the very mechanism that allows consumers to benefit from highly competitive markets.

But actual price fixers must be forewarned. Since price fixing is a *per se* violation under the PCA, there can be no justification of such conduct. Similar to bid riggers, price fixers, regardless of claimed intent or effects, will be prosecuted and may be fined and penalized according to the fine and penalty schedule

"WHEN BUSINESSES SUBVERT THE MARKET AND AGREE TO FIX PRICES AND RESTRICT COMPETITION, THEY ARE ENGAGING IN ANTI-COMPETITIVE BEHAVIOR..."

in the PCA and its implementing rules and regulations. The fine will be tripled if the price fixing involves basic necessities and prime commodities as defined by RA 7581 or the Price Act.

To encourage cooperation by possible informants, the PCC provides incentives, such as a price fixing participant may still be immune from prosecution or have the administrative fines reduced if said participant will avail himself of the PCC's Leniency Program.

Thus, if anyone suspects that any of the above anti-competitive conducts may have been committed, you may report this to the PCC immediately. Help the PCC keep an even playing field for business to ensure that the consuming public will always get their money's worth. ∎

BIG TECH IN A SMALL ECONOMY

JULY 31, 2019

ARSENIO M. BALISACAN, PHD

Much has been said about the dominance of the so-called tech titans: Google, Facebook, Amazon, Apple, and the like. Not a day goes by that the decisions and policies of these companies do not touch the lives of millions of citizens, a testament to the success of their business models, which include heavy investments in R&D and the introduction of new products. These innovations have generally made life more convenient, efficient, and pleasant. Tasks that previously took hours and money to accomplish can now be done in much less time and sometimes "for free".

Not all is well, however. In recent years, tech companies have gone on the defensive, as government regulators (including competition authorities), politicians, academics, and consumer groups decry and scrutinize perceived abusive conduct.

In 2017, the European Commission imposed a hefty $2.7-billion penalty on Google for favoring its own service over those of its competitors that also use its popular search engine. Similarly, the US Federal Trade Commission recently approved a $5-billion fine against Facebook for its much-publicized misconduct concerning users' personal data. The European Commission is now investigating Amazon for possible anti-competitive conduct involving the exploitation of information provided by third-party merchants. Indeed, it appears that the assault on big tech companies is far from over.

The cases against Google, Facebook, and Amazon demonstrate the dangers posed by market power and dominance. While these technological marvels have greatly enhanced our way of life, they have given rise to a host of new issues, especially those involving competition, data privacy, and the (re)shaping of political and social values.

These cases are taking place in large economies where the stakeholders, including the big tech companies and their citizens, have

“Unduly high market power that remains unchallenged and protected by public policy can also lead to lower levels of innovation and productivity growth.”

substantial stakes on the issues. Should a small economy such as the Philippines be also concerned with these issues? If so, how would the country's leaders proceed with tackling them? In particular, what approach, mechanism, or remedies would the Philippine Competition Commission (PCC) employ in addressing these issues?

The PCC has prioritization frameworks for addressing potential competition concerns involving any industry. Under merger review, it has thresholds on the size of the party and the size of the transaction. It can open an investigation in response to a verified complaint, a referral from a government agency, or on its own initiative. If any transaction or conduct involving big tech companies merits scrutiny under the frameworks, then the Commission is duty bound to investigate it.

Note that dominance or having significant market power is not prohibited *per se*. What the competition law prohibits are the abuses of dominance such as foreclosure or exclusionary conduct, which result in substantially lessening competition in the market. For instance, foreclosure can occur when a company's search engine favors its own price comparison website over other price comparison websites that attempt to reach users through the same search engine.

The issues surrounding big tech companies become very thorny because of the very nature of their products. Three of these come to mind.

One, advances in computing techniques have allowed the use of algorithms that do a nearly perfect job of matching consumer preferences with products offered in the market. Operating as platforms, tech giants have been able to collect massive amounts of buyer and seller data that have allowed them to peek at individual-level behavior and tweak their services accordingly. One outcome would be that, even as overall efficiency improves, consumers may be disproportionately benefited from having to pay for perfectly calculated or “personalized” prices. Efficiency is promoted but the distribution of the gains is not deemed fair. Should a competition authority be concerned?

Two, prohibiting conduct in the rapidly evolving tech sector carries the risk of creating a “chilling effect” where innovation is discouraged. This effect is damaging to the long-run prospects of an economy because it can dampen productivity growth and desirable technological upgrading. As economic history of nations shows, it is productivity growth over the long haul that brings about prosperity and human development.

However, as observers have noted, significant market power may lead dominant firms to acquire political power or cause them to capture political institutions and processes for the enhancement or preservation of their market power. The evidence is clear: Unduly high market power that remains unchallenged and protected by public policy can also lead to lower levels of innovation and productivity growth.

The competition authority and other government agencies must therefore carefully weigh the long-run effects of their policies and regulations in consideration of these circumstances.

And three, technology has evolved and seeped into the very fabric of human interaction. We are seeing how it influences the way politics and businesses are organized and the way personal information is valued. From an analytical standpoint, such issues are separate from—but not necessarily unconnected with—the efficiency standard that competition authorities usually employ. In some instances, sector regulators and civil society—not the competition authority—are perhaps in a better position to pass judgment on these matters.

In other instances, there may be a need for effective coordination between the competition

authority and the sector regulators to address overlaps in the effects or outcomes of their enforcement actions. After all, regardless of their respective objectives, the goal of public action or intervention—by the competition authority or any other agency—has to be the promotion of the common good, the general welfare.

Given the above considerations and the alarm being sounded across the globe over potential risks that can affect the choices and welfare of millions of citizens, clearly we must be concerned and be prepared to act. ∎

EXCLUSIVE ONLY

AUGUST 17, 2019

ATTY. AMABELLE C. ASUNCION

If there is one word in the lexicon that evokes special or expensive, or both, that would be the word “exclusive.” Attach exclusive to anything and it magically turns into something rare and highly coveted. A club, an event, a film screening, or an interview that is labeled exclusive straightaway sets itself apart and beyond reach. Making anything exclusive builds imaginary walls around it, multiplying its value because of the limited access. People are attracted to exclusives because this makes them feel special and marks them as insiders, assuring them of a place that they would otherwise have to fight for and best others if it were open to everyone. “Exclusivity” signifies a perk that grants access to something from which others are restricted, in exchange for some premium payment. While it can be commercially rewarding, it is rather elitist as it is selective and deliberately exclusionary.

In competition law, exclusionary practices are considered anti-competitive. Exclusionary practices are those that have the object or effect of driving out competition; that is, foreclosing competitors from entering or growing in the market. If a company enjoying a dominant market position engages in such conduct, then it is considered abuse of dominance that is violative of Section 15 of the Philippine Competition Act.

The most palpable example of exclusionary conduct is exclusive dealing arrangements. This can come in different forms, the most common of which are exclusive purchase agreements where a customer is bound to buy only from one supplier to the exclusion of the supplier’s competitors. It is like “exclusive dating,” as the youth of today calls it, where neither party is allowed to entertain other suitors, regardless if they could potentially find better partners. Just like in exclusive dating, an exclusive arrangement is usually explicitly agreed upon whereby the customer agrees not to deal with any other supplier. Where the supplier involved in an exclusive purchase agreement is a

> “...EXCLUSIVITY ARRANGEMENTS CAN DRIVE OUT COMPETITION AND HARM CONSUMERS BECAUSE, IN A WAY, THE SUPPLIER ENJOYS MONOPOLY POWER OVER THE CAPTIVE CUSTOMER.”

dominant player, limiting the customer's ability to source its requirements from the supplier's competitors could result in their exclusion or exit from the market. This would be especially true if the exclusivity arrangement is to be effective for a long period. At the same time, the customer is left with no options even when the supplier's goods or services deteriorate in quality or increase in price.

A less apparent way of effecting exclusivity is by offering preferential discounts or rebates conditioned on purchasing exclusively from the supplier. To be sure, awarding rebates is in itself not anti-competitive. However, where the rebate is based on purchasing all or most of a customer's requirements from the same supplier, it can be akin to an exclusivity arrangement. In such a case, the rebate will be considered as having the object or effect of restricting competition as it limits the customer's ability or freedom to source its requirements from another supplier. The exclusionary effect becomes more patent when the supplier in question is a dominant player, which, in some situations, would even be an unavoidable trading partner as when it must stock products. In such a case, the rebate will most likely induce the customer to procure all its requirements from that supplier.

The nagging question from the business perspective, however, is when it impairs parties' freedom to contract and ignores business considerations for wanting an exclusive arrangement. The plain response to this is that competition law is indeed a check on business judgment and freedom to contract. Companies are free to make business decisions and choose with whom to contract and under what terms, provided these are not anti-competitive.

The deeper rationale, however, is that exclusivity arrangements can drive out competition and harm consumers because, in a way, the supplier enjoys monopoly power over the captive customer. This could then translate to higher price levels, lower quality of goods or services, and limited consumer choice. This happens when the prestigious underpinnings commonly associated with the general concept of exclusivity are replaced with the oppressive consequences of a lock-in arrangement.

Exclusivity arrangements are actually barriers to entry because the customer base is already reserved to the current market players. This prevents other market players from coming in and competing, even if they could potentially provide better goods or services at affordable prices. It perpetuates inertia as it encourages the current market players to relax because they are protected from the normal threat of their customers being lured away.

At a time when most anything is a dime a dozen, the challenge is to distinguish oneself and rise above the others. There are many legitimate and creative ways to respond to this dare. Competition law emphasizes that the challenge is in fact to be a cut above the rest, not to cut off the rest. ∎

ANTI-COMPETITIVE MERGERS AND ACQUISITIONS

Mergers and acquisitions (M&As) can benefit consumers as they may lead to businesses that operate more efficiently, enable transfer of technology, broaden access to capital, and increase productivity. However, some M&As may also harm competition and consumers. Chapter IV of the Philippine Competition Act (PCA) provides the Philippine Competition Commission (PCC) with the power to review M&As, and prohibit those that substantially prevent, restrict or lessen competition in the relevant market. Since its inception in 2016, the PCC has decided on several M&A cases; blocking outright an M&A transaction when it has the potential to harm the market, or imposing conditions on merging entities to address competition concerns arising from the merger. The articles in this section shed light on how the Commission has navigated the delicate line between efficiency considerations and anti-competitive effects in the exercise of its mandate to review such transactions.

PCC MERGER REVIEW AS TOOL FOR COMPETITIVE MARKETS, CONSUMER WELFARE

APRIL 17, 2018

ATTY. JOHANNES BENJAMIN R. BERNABE

Of all the powers vested in the Philippine Competition Commission (PCC), none has attracted as much attention as its power to review mergers and acquisitions (M&As). Large businesses have had to not only conform with new regulations but contend as well with novel standards of scrutiny and approval. Small- and medium-sized enterprises have looked to the PCC's exercise of this power for assurance that competition in or for the market will be maintained. Consumers expect this review would ensure choice, reasonable price and quality of the products they use.

The Philippine Competition Act (PCA) provides for compulsory review of M&As. Transacting parties whose transaction is valued above the PCC's threshold must be notified before consummation of their deal. Some countries, notably Singapore and Australia, do not require compulsory notification before consummation and choose to review transactions on an "as needed" basis. Many other economies, such as the US, Japan, South Africa, and Brazil, follow a compulsory system like ours. These countries, like the Philippines, put a premium on legal predictability and certainty as indispensable elements to doing business, and are averse to the risk of subjecting a transaction to review and possible prohibition and unwinding months or even years after they have been consummated.

The PCA initially set the threshold for compulsory notification at a "transaction value" of P1 billion. So it can hone in on transactions more likely to pose harm on the market, the PCC subsequently adopted a two-fold test: "Size of Party", which pertains to the total revenues or asset size of one of the transacting parties, is now pegged at P5 billion; and the "Size of Transaction", representing the assets or revenues of the acquired entity, has been fixed at P2 billion.

These rules, however, only tell us whether a transaction should be notified. They don't begin to tell us whether the transaction is likely to substantially lessen competition.

Even if the thresholds for notification are not met or an otherwise notifiable transaction is not submitted for review, the Commission can still exercise its power to review M&As on a *motu proprio* (on its own initiative) basis. On at least two occasions, the Commission has had to undertake such a review where the transactions are likely to result in a substantial lessening of competition. In June 2016, the PCC sought to review PLDT and Globe Telecom's acquisition of San Miguel Corp.'s telecom assets because of the parties' insufficient notification. More recently, PCC has initiated a review of Grab's acquisition of Uber's Southeast Asian business.

In its review, the Commission determines whether a transaction is likely to result in a substantial lessening of competition. In the case of an M&A between firms that compete against each other, such as Uber and Grab, we ask, among others: Will their transaction likely give rise to a situation where the absence of competitive pressure leads to increased prices, deterioration in quality or lower incentive to innovate? Is the merger likely to adversely affect consumers?

In transactions between non-competitors, such as in the SM Group's proposed acquisition of Goldilocks last year, the Commission examined, among others, whether the merger would deprive competitors access to prime mall space under reasonable terms – an input these competitors need to compete with Goldilocks. In competition jargon, whether input foreclosure resulting in a substantial lessening of competition would occur.

The PCC employs various economic analytical tools to establish the likelihood that post-transaction, there will be increased ability and incentive for the transacting parties to exercise market power–unilaterally or in coordination

"THE PCC EMPLOYS VARIOUS ECONOMIC ANALYTICAL TOOLS TO ESTABLISH THE LIKELIHOOD THAT POST-TRANSACTION, THERE WILL BE INCREASED ABILITY AND INCENTIVE FOR THE TRANSACTING PARTIES TO EXERCISE MARKET POWER..."

with other firms–to the detriment of competition and consumers. At the same time, sound analysis also allows for clearing transactions that enable the merged firm to reduce costs and become more efficient, leading to lower prices, higher quality, higher quantity and diversity of products, or increased investment in innovation. When performing merger analysis, the Commission predicts a merger's competitive impact to prevent problems *before* these materialize.

Herein lies the challenge for business and legal practitioners who face the Commission during merger review–at its core, competition law is economic analysis within a legal framework. The legal standard of "substantial lessening of competition" is not a concept framed with precision that lawyers can hang their arguments on. Rather, it varies from transaction to transaction, depending on the product or service, as well as geographic area involved, even the timing of the deal. Legal precedent has less of a place in competition law than in other fields of law.

If Filipinos are to pursue the constitutional goal of attaining a more equitable distribution of opportunities, income, and wealth, as well as an expanding productivity to raise the quality of life for all, it is imperative that we begin to appreciate the language and benefits of competition law. ∎

MERGER AS MARRIAGE AND ITS COMMITMENTS

MAY 1, 2018

ATTY. AMABELLE C. ASUNCION

In many ways, a merger is like marriage: Two independent entities agree to, for better or for worse, become one, pool their resources and begin a profitable life of operating the business together. Just like a marriage, mergers are usually intended to last forever.

A merger is also meant to be a free and voluntary act of each party and is the result of the mutual consent of the parties. Before the passage of the Philippine Competition Act (PCA), parties are, for the most part, left alone to enter into such an agreement, save for regulatory requirements that could be likened to a marriage license. Following the PCA, however, merger parties undergo scrutiny, either before or after the fact, and risk disavowal of their transaction. The "fear of commitment" that hounds entities contemplating a merger is replaced by a newfound fear of merger review and of prohibition. The question lingers, what if they really want to "get married"?

This fear, however, tends to be overstated. While it is true that mergers are subject of review, this is not aimed at prohibiting a merger. The purpose of the review is to evaluate whether the merger could substantially lessen, restrict, or prevent competition (SLC); the ultimate objective is to preserve competition in that market even after the merger. If the merger does not result in SLC, then it will be allowed. Still, even where it could potentially do so, the merger will not be prohibited altogether. It may still be allowed under certain situations: First, it may be allowed provided the merger parties comply with specific conditions or remedies; second, it may be allowed if the merger parties agree to make changes to the transaction or offer undertakings that would address the potential SLC.

In either situation, the merger may proceed, subject to conditions or remedies. The difference, however, is that in the first situation, these conditions or remedies are a result of a full merger review that finds the transaction

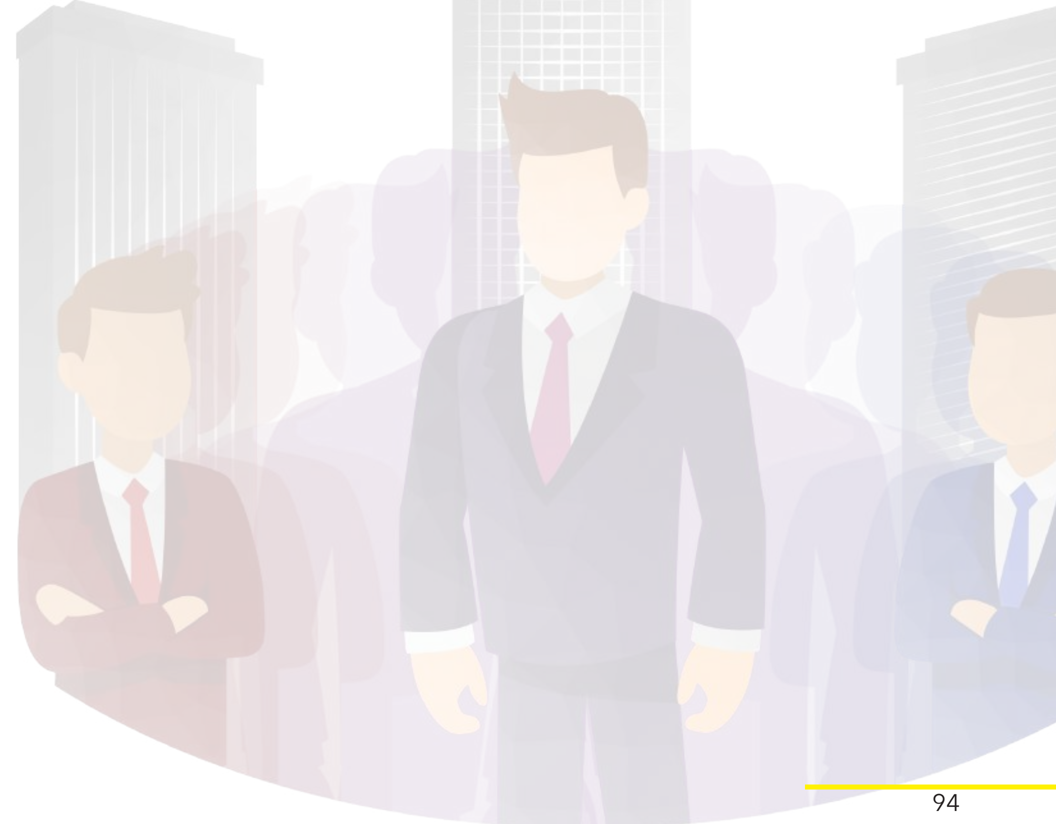
> "THE INTRODUCTION OF COMMITMENT DECISIONS...IS AN ATTEMPT AT A WIN-WIN SOLUTION WHEREIN THE MERGER PARTIES CAN PROCEED WITH THE TRANSACTION BUT AT THE SAME TIME ADDRESS THE POTENTIAL HARM/S TO THE MARKET..."

would result in SLC and so the PCC imposes conditions. In the second situation, the conditions are a result of the merger parties' own undertaking and commitments to address potential harms to the market, even before the review is completed and a definitive finding of SLC is made. In the marriage analogy, this is where the groom, upon sensing any concern, already addresses these early on so that the wedding can push through on the chosen date and he can secure a happy ending.

Offering commitments is usually optimal for the merging parties and the competition authority. Where a transaction raises concerns of potential SLC, offering commitments bears advantages for the parties as it makes the review faster and cheaper, avoids a determination of SLC or worse, a prohibition, and affords parties the opportunity to propose tailored solutions proportionate to the harm being addressed. On the part of the competition authority, commitments save on resources, solve the harm to the market faster and timelier, and presumably ensure compliance since the commitments are made by the merger parties themselves rather than imposed upon them.

Parties to a merger may offer commitments at any time during the review. This is true for both notified mergers as well as mergers subject of a *motu proprio* review. Commitments can come in the form of behavioral or structural remedies. Parties can offer either or a mixture; there is no fixed formula. For instance, in the Asahi Flat Glass merger, the acquiring party committed to set prices and provide services to customers on fair, reasonable and nondiscriminatory terms (FRAND), as well as sell products and services to glass distributors on terms no less favorable than those extended to similarly situated customers. The Philippine Competition Commission assessed the entire commitment package and found it to be an effective solution to the identified competition concerns. This resulted in a commitment decision, which is akin to a compromise judgment. It is based on the commitments offered by merger parties and makes such commitments legally binding without issuing a definitive finding of SLC.

The introduction of commitment decisions in competition practice is an attempt at a win-win solution wherein the merger parties can proceed with the transaction but at the same time address the potential harm/s to the market through the parties' own undertakings. It is a solution accepted by competition authorities around the world and a track willingly taken by entities that only wish to merge but not to diminish or eliminate competition. Although commitments are, narrowly viewed, made by parties to enable them to proceed with the merger, commitments are actually, in a broader context, a commitment to a culture of competition. It is thus the kind of commitment that should not be feared but rather welcomed. ∎



HOLDING GRAB BY THE HORNS

AUGUST 14, 2018

ATTY. JOHANNES BENJAMIN R. BERNABE

Grab's acquisition of Uber is a landmark case for the Philippine Competition Commission (PCC). It is the first transaction that the PCC reviewed *motu proprio* (i.e., on the PCC's own initiative) and, with the August 10 decision, resulted in a conditional clearance.

The conditions form part of a Commitment Decision and are based on a set of voluntary commitments that Grab submitted to address competition concerns raised by the PCC's Mergers and Acquisitions Office. From where I sit, if not for the voluntary commitments, it is unlikely that the PCC would have cleared Grab's acquisition.

The PCC's underlying premise for accepting Grab's offer of commitments is two-pronged: first, to ensure that existing and prospective competitors of Grab in the ride-hailing market are afforded a fair and reasonable opportunity to compete and expand their business; and second, to resolve complaints of increased prices, cancellation rates and unaccepted booking requests from the riding public. The first reason pertains to the core mandate of the PCC (i.e., promoting competition), while the second involves the agency's corollary function of enhancing consumer welfare, particularly in the face of a virtual monopoly in the ride-haling market.

To ensure competition, the PCC, in its Commitment Decision, prohibits Grab from introducing any exclusivity provision in the company's agreements with drivers and operators that would prevent multi-homing or otherwise result in exclusive affiliation with Grab. This includes the grant of incentives, which will likely have the effect of exclusive membership in or use of the Grab app by drivers or operators.

Consumer welfare is addressed by requiring Grab to achieve specific price-related targets and service quality standards. To ensure its pricing behavior is not unreasonably different pre- and post-acquisition, Grab is constrained under the Commitment Decision to keep fares within a price level that does not deviate by more than 22 percentage points from where it was prior to the exit of Uber, using a statistical measure prescribed by the PCC.

Riders are, likewise, entitled to a receipt showing the breakdown of the fare they paid—what pertains to the minimum charge, the distance covered, the surge pricing, and the running time (if applicable).

Improvements in the quality of service are mandated under the PCC decision by compelling Grab to increase the acceptance rate for bookings requested by riders to 65 percent within the next 12 months. This represents a substantial increase from present acceptance rate levels, which have led to a great deal of frustration among the online ride-hailing public since the Grab-Uber transaction.

An additional condition designed to augment acceptance rates is the removal of the "See Destination" feature among Grab drivers. Previously, this feature allowed drivers to discriminate and reject riders who they did not want to service. With the decision, the PCC now prohibits drivers, whose acceptance rates fall below the mandated rates, from seeing the destination of requested bookings.

A complementary commitment made by Grab is the reduction of cancellation rates for rides booked and already accepted by its drivers. At the end of 12 months, this rate should be brought down to 5 percent. Further, response time to rider complaints is set at three hours for serious complaints, and six hours for all other complaints. Other commitments made by Grab relating to assistance to and the quality of its drivers, as well as addressing rider concerns, were also adopted by the PCC in its decision.

All these commitments are valid for 12 months and will be subject to strict quarterly monitoring

> "THE PCC'S UNDERLYING PREMISE FOR ACCEPTING GRAB'S OFFER OF COMMITMENTS IS TWO-PRONGED... PROMOTING COMPETITION... [AND] ENHANCING CONSUMER WELFARE..."

by the PCC and a designated third-party monitor. If it fails to comply with the foregoing targets or commitments, Grab shall be imposed a fine of up to P2 million. If after 12 months, the conditions for entry and expansion remain unchanged and unfavorable to competitors, the PCC will have to consider whether the commitment period should be extended or to evaluate measures consistent with Grab's dominant market position.

The commitments made by Grab were subject to intense negotiations with the PCC. The conditions may be tough, even difficult to comply with. For instance, fares for a significant portion of routes serviced by Grab drivers breach the deviation thresholds set under the decision. Moreover, the ability of Grab to service booking requests—reflected through acceptance rates—depends on having a sufficient number of drivers and operators, and yet the latter is influenced by Grab's incentives, which are now subject to monitoring and evaluation by the PCC. No mistake about it, Grab definitely has its work cut out for it. ∎

HAILING GRAB ACROSS ASIA

NOVEMBER 20, 2019

ATTY. AMABELLE C. ASUNCION

The "non-millennials" might still remember those hilarious movie scenes where a long queue of passengers competing for a cab on the street would inevitably be beaten by an attractive woman flashing her shapely legs. Within minutes, a cab would dash to pick up the lady, leaving the others to wait and compete again for the next cab. Today, hailing a ride has taken a form beyond imagination. It does not even require one to stand on the street in fear of being defeated by that svelte figure. All it takes is a downloadable app that can track the rider, quote the fare in advance, and pick up the rider, wherever he is. Some of these apps even operate in various countries. One can almost literally book a ride anywhere in the world. At a time where mobility is in itself a commodity, these ride-hailing apps are a gift of this millennium.

In the ASEAN region, there are several ride-hailing apps: Grab, Uber, Go-Jek, Bluebird, MyCar, JomRides, MULA, Riding Pink, Dacsee, Oway Ride, Hello Cabs, PassApp, ExNet, to name a few. Among these, Grab and Uber operated across Asia, including the Philippines, Singapore, Malaysia, Indonesia, Thailand, Vietnam, Myanmar, and Cambodia. In any of these countries, a passenger has the option of hailing a ride using either the Grab or the Uber app, considering factors like price and service quality.

However, the two merged in March 2018, combining the two strongest competitors into one. This sent ripples across the ASEAN competition authorities, which faced the problem of having a market with less competition, to the detriment of the riding public. Investigations were opened to the extent allowed by the respective laws of the jurisdictions. The Philippines, Singapore, and Vietnam reviewed the transaction under their merger control regime and assessed whether the merger resulted in substantial lessening of competition. Indonesia did not consider the transaction a merger under their law,

> “THIS MERGER CONCRETELY ILLUSTRATED HOW A CROSS-BORDER TRANSACTION COULD REALLY AFFECT COMPETITION IN VARIOUS MARKETS TO THE DISADVANTAGE OF CONSUMERS.”

characterizing it only as an asset transfer with no change in control. However, they monitored the price and the competition in the online transportation market. Thailand's merger control rules only became effective in December 2018. Malaysia does not have a merger control regime so it investigated instead Grab's abuse of market dominance. Myanmar's competition law took effect in 2017, but the competition authority was only formed in October 2018. Cambodia has yet to pass a competition law.

Singapore found that Grab and Uber competed in the market for chauffeured point-to-point transport booking/matching platform services. This market covered all point-to-point transport services that could be hailed through a platform, which included taxis that could be hailed in this manner. Given this, the Singapore competition authority assessed that the merged entity likely gained the ability to increase price. In addition, it could tie and enforce exclusive arrangements on the drivers of their chauffeured private hire car rental services. Thus, Singapore found Grab and Uber to have infringed the prohibition against anti-competitive mergers and imposed a total of SGD 13 million in fines against both entities. It also enjoined Grab to maintain the premerger pricing, pricing policies and product options and remove all exclusivity arrangements.

In Vietnam, the competition authority found that the transaction resulted in an economic concentration having at least 50 percent market share post-transaction, in violation of their law. However, Grab contested the determination of the relevant market and the competition council rejected the findings of the competition authority.

In Malaysia, the competition authority provisionally found that Grab abused its dominant position in the e-hailing market by preventing its drivers from promoting and advertising the services of competitors. These had the effect of distorting competition in the relevant market by creating barriers to entry. A fine of MYR86 million is proposed by the competition authority and a daily fine of MYR15,000 if Grab fails to take remedial actions.

In the Philippines, a Statement of Concerns was issued finding that the transaction resulted in the merged entity being a virtual monopoly and having the ability and incentive to increase prices post-merger. Barriers to entry were also identified. To address these concerns, Grab offered commitments not to deviate from their pricing behavior pre-merger, not to impose exclusivity on its drivers, and to maintain service quality. These commitments were to be effective for a year, ending in August 2019. Prior to the expiration of the term, however, the commitments were extended and amended due to the continuing concerns on the lack of effective competition in the market for on-demand car-based private transportation online booking service through a mobile ride-hailing application. Under the extension, Grab commits to observe a monthly average fare cap so that its fares for the monitoring year starting November 1, 2019, are not unreasonably higher compared to pre-merger fares. If Grab breaches this commitment, it will refund to the riders their corresponding commission on the excess fare. Furthermore, Grab will not impose exclusivity on its drivers or structure incentives that tend to make drivers exclusive to Grab. Grab has to abide by this commitment for the next four years so as not to foreclose possible entrants.

From the actions taken by the various ASEAN jurisdictions, it cannot be gainsaid that the Grab-Uber merger raised significant concerns on competition in the market—however, the relevant market was defined by each jurisdiction. This merger concretely illustrated how a cross-border transaction could really affect competition in various markets to the disadvantage of consumers. As it also revealed the constraints faced by competition authorities, it further highlighted the necessity of a whole-of-government kind of effort for the effective implementation of competition law and policy. Surely, it is a convenience to be able to hail a Grab ride almost anywhere in Asia. However, the old movies of passengers competing for a cab have ceased to be funny. It is the undeniable responsibility of the government to ensure that the 21st-century digital market is one where it is the cabs/apps that compete for the patronage of consumers. ∎

MERGERS AND THE PCC DURING COVID

NOVEMBER 24, 2020

ATTY. JOHANNES BENJAMIN R. BERNABE

Mergers and acquisitions have slowed down in the last eight months since the country went on lockdown to reduce the risk of spreading Covid-19. With the uncertainty of the extent of decrease in demand for goods and services looming large, most businesses not only have had to shelve any planned expansions but also more likely, struggled to find ways to survive. Bayanihan to Recover as One Act or Bayanihan 2 is meant, among others, to offer a reprieve to businesses through various incentives and accommodations, which ease their cost of doing business amid the public health crisis and beyond. Subsidies are coupled with streamlined regulatory processes to help affected businesses, particularly micro, small and medium-sized enterprises (MSMEs), get through the lockdown and participate in a post-pandemic economic recovery.

Curiously, the Philippine Competition Commission's mandate to review mergers and acquisitions was included among the governmental measures that were curtailed by Bayanihan 2. For a period of two years from its passage, mergers and acquisitions, including joint ventures, whose value do not exceed P50 billion are exempted from the PCC's erstwhile mandatory review. This means that only really large transactions north of approximately $1 billion will be subject to review.

On the surface, this provision in Bayanihan 2 seems to make sense. Given the problems encountered by companies, especially MSMEs, in dealing with the effects of the pandemic, many face the prospect of closing shop. For some, the only hope for continued operations is to be acquired or merged with a larger firm. Other affected businesses may wish to consolidate their operations with others to thrive in the harsh business environment. Dealing with the regulatory hurdle of notifying the PCC and obtaining approval for such consolidations can be daunting, particularly if the lawyers advising the companies are not experienced in complying with the requirements.

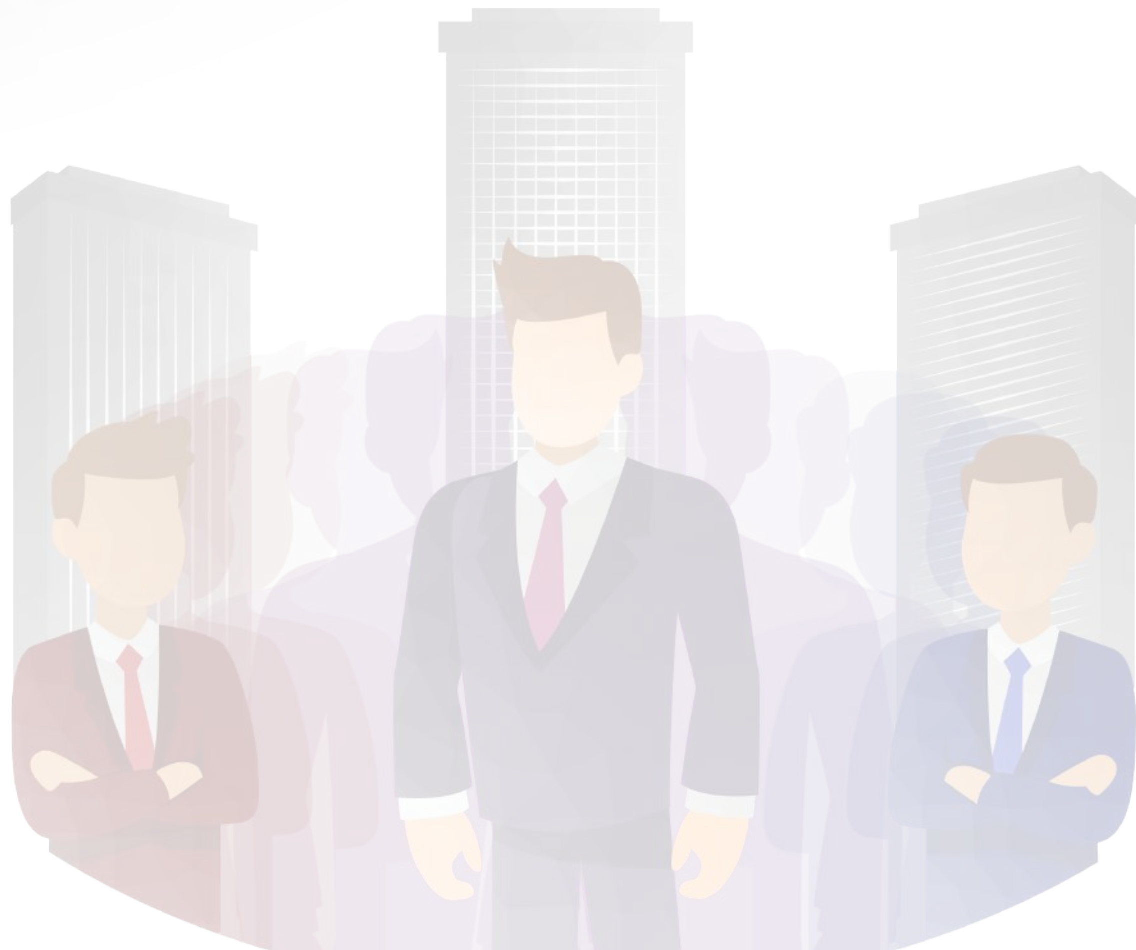
Upon deeper analysis, however, the proffered rationale does not hold much water. First, the thresholds for notifying mergers under the Philippine Competition Act (PCA) and its existing rules are such that MSMEs are practically exempted from mandatory review. The largest MSMEs have assets worth less than P100 million; whereas, the PCA only requires notification and reviews transaction if the entity to be acquired has assets or revenues in excess of P2.4 billion. Since 99.5 percent of the roughly one million recorded business enterprises in the country are MSMEs, this leaves only a miniscule fraction of the 5,000 largest business entities susceptible to merger review. Moreover, a survey of the 200-plus transactions notified to the PCC since 2016 shows that only 17 transactions have exceeded the value of P50 billion provided under Bayanihan 2. Most of these were mergers among multinational companies, which did not have significant impact on competition in the Philippines because their operations here comprised but a small portion of their global revenues. In fact, PCC data shows that the transactions that are likely to substantially lessen competition (i.e., were the subject of a Statement of Concerns issued by the PCC's Mergers and Acquisitions Office or were only cleared conditionally by the Commission) are generally those with a value from P2.5 billion to P10 billion. Hence, the peg of P50 billion set by Bayanihan 2 does not appear to have a basis, whether in terms of ostensibly shielding MSMEs from the costs of regulatory compliance or genuinely protecting consumers from anti-competitive mergers.

Furthermore, the temporary diminution of PCC's mandate to review mergers will arguably lead to legal uncertainty at a time when certainty is precisely what is needed by the business community. Insofar as Bayanihan 2 states that the PCC can resume the exercise of its authority to unilaterally review transactions one year after the effectivity of said law, mergers that were provisionally exempted from notification and thus not notified can thereafter be reviewed.

> "...[T]HE TEMPORARY DIMINUTION OF PCC'S MANDATE TO REVIEW MERGERS WILL ARGUABLY LEAD TO LEGAL UNCERTAINTY AT A TIME WHEN CERTAINTY IS PRECISELY WHAT IS NEEDED BY THE BUSINESS COMMUNITY."

If found to be anti-competitive, the transaction can be subjected to conditions or, worse, unwound by the PCC. Rather than encouraging businesses to consolidate to better withstand the lockdown, Bayanihan 2 may instead have a chilling effect on mergers as there will be the uncertainty of not knowing whether a consummated transaction will be subsequently prohibited by the Commission. Of course, a straightforward fix for businesses intent to consolidate is to voluntarily notify the PCC of their proposed merger or acquisition; this way, their deal may be reviewed and cleared by the Commission prior to consummation and hence dispense with any cloud of doubt on possible anti-competitive effects the transaction may have.

What is clear from the foregoing is that five years from the passage of the PCA, many stakeholders, even colleagues in government, still see competition disciplines as mere regulatory red tape. This is unfortunate, as economic history is replete with lessons on why long-term vision, as espoused by our competition law, should not be sacrificed at the altar of short-term exigencies. ∎



EMERGING TOPICS ON COMPETITION

Rapid technological innovation in recent years enabled the emergence of new business models, as well as changed the market landscape and the ways firms compete. These developments underscore the importance of competition law and policy as well as the Philippine Competition Commission's (PCC) role in monitoring markets to ensure a level playing field. The articles in this final section chronicle the PCC's approaches in tackling new challenges—whether brought about by climate change, a global pandemic or pole-vaulting technology—through the lens of competition.

PLAYING FAIR TO COURT INVESTORS

JULY 10, 2018

ARSENIO M. BALISACAN, PHD

Foreign direct investment (FDI) is key to sustaining the rapid growth of the Philippine economy and, more important, to the generation of higher-paying, better-quality jobs for Filipinos. As rapid growth of employment opportunities is fundamental to poverty reduction, making the country attractive to FDI, especially in manufacturing and tourism, is part and parcel of the country's strategy to winning the war against poverty.

The country has made impressive strides in attracting FDI during the current decade. While the Philippines was Southeast Asia's laggard at the start of the decade, with only $1.07 billion in 2010, the country's net FDI has grown to $10.05 billion by 2017, surpassing those of Malaysia ($9.51 billion) and Thailand ($9.10 billion). The country's FDI, though, is still far lower than those of Vietnam ($14.10 billion), Indonesia ($22.08 billion) and Singapore ($63.63 billion).

Much remains to be done to sustain the inflow of FDI, especially as the government embarks on a massive infrastructure buildup. The challenge is to promote the Philippines as an attractive investment destination where foreign capital can expect to receive reasonable returns. To be sure, a country's appeal to investors hinges on a host of factors, most notably the quality of its infrastructure, the skills and competitiveness of its labor force, the effectiveness of its enforcement agencies (or the transparency and consistency of rules, regulations, and policies), and local peace and order.

In short, for long-term investors, what counts is the ease of doing business in the country and the prospect for durable, competitive returns to capital.

Anti-competitive conducts, agreements or practices by monopolies, cartels, or dominant market players exercising market power contribute to high cost of doing business, stifle economic growth, and reduce consumer and overall welfare. In some cases, a captive regulatory agency perpetuates the burden faced by investors and consumers alike.

As the enforcer of the Philippine Competition Act (PCA), the Philippine Competition Commission (PCC) polices market conduct by prohibiting anti-competitive practices, such as price fixing, bid-rigging, dividing markets between suppliers, or foreclosing of inputs or customers by a dominant market player. By ensuring that anti-competitive conduct is caught or deterred, the PCC is, in effect, upholding the principle of fairness (through the rule of law) for anyone who chooses to set up shop in the country, foreign investors included.

The PCC assures current and prospective investors that the Philippines offers a level playing field, one where companies are expected to increase their market shares or attain dominance through merit and innovation alone—not through underhanded deals or unscrupulous business practices. Because of vigorous competition enforcement and advocacy, investors can also expect lower costs, as the improvement of market efficiency entails having both consumers and businesses pay competitive prices for the goods and services they need.

Investors do consider the rule of law in their decision to locate in a particular country. Perceptions matter, because the expected returns are weighted by risks and uncertainties. If a foreign entrant intends to pour in millions or billions of dollars to the local economy, it would want to know whether the company will receive the same treatment under the law as market incumbents. Similarly, start-ups in the fast-growing and data-driven "disruptive sectors" would only consider locating themselves in the Philippines if they knew that incumbents are prevented from abusing their dominance by engaging in input or customer foreclosure.

"FOR LONG-TERM INVESTORS, WHAT COUNTS IS THE EASE OF DOING BUSINESS IN THE COUNTRY AND THE PROSPECT FOR DURABLE, COMPETITIVE RETURNS TO CAPITAL."

The point is especially important, considering that many large companies who are potential investors may already be familiar with, and comply to, competition or antitrust regulation in their home countries. Indeed, the Philippines is a latecomer to the group of countries with a working competition regime—some countries like the US have had an antitrust law for more than a century already.

Yet, even after investments have been locked in and foreign competitors have entered, the PCC still has its work cut out for it. It must ensure that the entrants also abide by the rules of free and fair market competition. Reinforcing the rule of law will allow all incumbent market players to benefit from the entry of a foreign competitor, especially if it brings in new technology that results in more efficient production processes, as well as cheaper and higher-quality products. These, in turn, can make the entire market more attractive to future investors. A virtuous cycle is born.

Of course, it is one thing to talk about the role of competition policy in helping to drive economic growth by improving the country's attractiveness to potential investors. It is another thing altogether to achieve this through vigorous competition enforcement and advocacy.

In this regard, we are making significant progress. The PCC takes pride in ensuring that its rules are transparent and accessible to all stakeholders. In holding various discussions with our stakeholders in the private sector, we are constantly reinforcing our message that all businesses must observe strict compliance with the PCA. This is complemented by conducting trainings with our partners in government and providing critical inputs to legislation, both of which ensure that competition policy becomes part and parcel of our country's development framework.

If we want to make the Philippines more attractive to investors, we need to make sure that the market is fair. If we build a level playing field—they will come. No sensible player would want to join a high-stakes game that is rigged against them. ∎

THE 'DATING APP PHENOMENON' OF DIGITAL PLATFORMS

AUGUST 28, 2018

ATTY. AMABELLE C. ASUNCION

The proposed traffic scheme banning single-rider vehicles along EDSA during rush hour has generated mixed, mostly satirical, if not downright sarcastic reactions from single drivers and commuters alike. Social network posts range from complaints about discrimination to a mad rush for a "partner" just so they can pass EDSA.

Amid the controversy, a thought crossed my mind: Could this be a golden opportunity to invent an app to top all dating apps? Talk about a dating/ride-sharing app!

The idea sounds flippant but is a half-serious attempt at offering a solution to the thousands of singles passing EDSA to and from work every day. As I toyed with the idea, two things came to mind.

First, the app should have many registered users. The app is a digital platform—that is, a place where participants virtually meet and match. As a platform, its value rests on having many participants. In this dating/ride-sharing app, the participants are single drivers who need a "date," as well as single commuters who need a ride along EDSA during rush hours.

For the dating/ride-sharing app to be successful, it should entice as many of these single drivers and commuters to register with the app, within the shortest possible time. This is important because people are more likely to join if there are many registered users, which increases the chances of getting a match.

This is like speed dating, where the number of participants is key to the success of the service. In a sense, all digital platforms are a version of a dating app where the goal is to meet and match as many people as possible.

In competition parlance, this is known as "network effects," where the value of the platform increases with the number of users or participants. The classic example is the

> WHILE RAPID INNOVATION IS ENCOURAGED, THE MARKET MUST BE KEPT OPEN FOR COMPETITION, AND WINNER-TAKE-ALL SITUATIONS MUST BE AVOIDED.

telephone line, where the value of the service increases with every additional subscriber since more people can call each other. When there are competing telephone service providers, a potential user is likely to choose the provider with more subscribers.

As the first of its kind, the dating/ride-sharing app also has the unique opportunity of getting the lion's share of potential users, until a new app comes along. If most of the EDSA-passing single drivers and commuters have registered with this app, and the chances of getting a match are higher, then the registered users would see little benefit in switching to a competing app. The advantages of network effects are often available to the first mover, which can take on a "winner-take-all" position. Even if a new app comes along, users will not immediately bail out, if only because the new kid in town has fewer users, if any.

The second thing that came to mind about this dating/ride-sharing app is that it should consider the relevant dating preferences to ensure there are sufficient options for any registered user. However, this is tricky.

Assume for a moment that the registered users are heterosexual males and females. Apart from the natural imbalance in the population, males and females may also have different appetites for dating apps. If males are less likely to join such apps, it may be necessary to incentivize them to register. With too few males, females may no longer find it worth their while to register with the app.

To keep the females, the app must keep the males. At certain points, the numbers may shift, in which case the app may have to tweak incentives to maintain an appropriate ratio. So, it is not enough to have many registered users. There must also be enough participants from both sides of the platform. This is true for other platforms. Ride-hailing apps like Grab and Uber require sufficient riders and drivers, while AirBnB must have an ample number of hosts and guests.

As I pondered on these issues, it is very tempting to be selfish and aim for capturing all the EDSA-passing singles in the dating/ride-sharing app and database. The appeal of cordoning them off against competitor apps is simply irresistible. The impulse to drive away any competition is so strong that it almost feels justified given the cost of innovation. The desire to be the only dating/ride-sharing app for EDSA-passing singles cannot be easily ignored.

These explain why digital platforms must be guarded closely. While they represent innovation that brings benefits once thought inconceivable, these can also create monopolies that harm consumers, especially involving products that are imbued with public interest. While rapid innovation is encouraged, the market must be kept open for competition, and winner-take-all situations must be avoided. As the dating app thrives on network effects, the digital economy must live by a brand of network effects where competition is present to inspire more innovation, which, in turn, spurs competition. ∎

OF RICE AND ART

SEPTEMBER 26, 2018

STELLA A. QUIMBO, PHD

At the moment, inflation dictates our state of mind. Policymakers are debating what might have caused rising prices. Is inflation a result of external factors or domestic policies, particularly, the Tax Reform for Acceleration and Inclusion (TRAIN) law? More important, what steps can be taken to arrest further price increases?

Meanwhile, consumers are helpless. They must simply absorb the price increases. Their budgets don't increase unless their take-home pay increases. While TRAIN reduced the income-tax rates for salaried workers, it did not increase the take-home pay of minimum-wage earners, simply because they were already tax-exempt. The vast majority of workers in the Philippines—about 72 percent—are minimum-wage earners.

Without proportional increases in take-home pay, the effect of inflation on a typical household is less "nominal," rather, more "real." Total expenditure (nominal) will perhaps not change much, and the larger impact will be on quantities consumed (real).

Economists use a measure called "price elasticity of demand" to assess the responsiveness of demand to changes in price. It is the percentage reduction in quantities consumed divided by the percentage increase in the price of a good. My own back-of-the-envelope estimates of the price elasticity of rice using data from the 2015 Family Income and Expenditure Survey suggest that for the poor, a 20-percent increase in the price of rice also means a 20-percent reduction in quantities of rice consumed. So, *ceteris paribus*, if one were consuming one cup of rice prior to the price increase, then consumption goes down by one-fifth cup after a price increase of, say, P40 to P48 per kilo.

These are the real effects of inflation: belts are tightened, plates are less than full. Hunger, in turn, can have profound long-term effects on poverty, creating a vicious cycle. Studies have shown that schooling outcomes are not optimized when children go to school with an empty stomach. Hence, breakfast programs in school are popular poverty reduction interventions in developing countries.

A 2008 paper written by Hyun Son of the Asian Development Bank described Philippine inflation as largely a food inflation problem: 62 percent of total inflation can be explained by the rise of food prices. This figure is higher at 75 percent for the poor, who allocate almost 60 percent of their expenditure on food. Based on her estimates, it appears a 20-percent increase in food prices will result in an additional 4.6 million poor Filipinos. If there are 26 million poor Filipinos, an additional 4.6 million is substantial. This impact on distribution is another "real" effect of inflation. If real incomes are compared against the poverty line, there are more poor Filipino people than we think.

In contrast, the wealthy are not bothered by the increase in the price of rice. After all, rice constitutes a small share of their total spending. Perhaps a greater concern is the rising price of art. A recent article published in the *Philippine Daily Inquirer*, "Are astronomical auction prices for real?" (E. Caruncho, August 19, 2018) discusses rising prices in the art market. The article quotes Richie Lerma, director of Salcedo Auctions: "There's no mistake that because... affluence is growing in the Philippines, there is growth in the prices and interest in art." Lerma's concern is not whether the price of art is high, but rather, whether it is real or not. The article describes a phenomenon called "shill" bidding, where a fake bidder who, in coordination with a prospective buyer, puts up fake competition, thereby inflating the price of an artwork. Presumably, both "shiller" and buyer have the collective interest of inflating the value of the art piece because both have an extensive collection of the artist. Worse, the buyer and seller might be one and the same entity.

"ULTIMATELY, THE PCC IS COMMITTED TO PROTECTING CONSUMER WELFARE. WHAT IS CLEAR IS THAT ITS EFFECTIVENESS IN TRACKING DOWN CARTELS WILL HAVE AN IMMEDIATE AND LASTING IMPACT ON FILIPINO CONSUMERS."

What is the role of the Philippine Competition Commission (PCC) in all these concerns? To the extent that prices in any market are inflated due to anti-competitive conduct, PCC is mandated to intervene. Under the Philippine Competition Act, cartelistic behavior—competitors agreeing to fix prices or rig bids—is prohibited, meaning there is no possible justification for such conduct. The PCC has the power to investigate potential cartels and penalize offenders with a fine of up to P100 million. The criminal liability ranges from two to seven years of imprisonment.

Whether in the market for rice or art, PCC has jurisdiction over cartels. You may ask whether PCC has taken concrete steps to address these concerns. Unfortunately, it is PCC's policy to neither confirm nor deny investigations, so as not to hinder the ability to gather evidence.

Ultimately, the PCC is committed to protecting consumer welfare. What is clear is that its effectiveness in tracking down cartels will have an immediate and lasting impact on Filipino consumers. ∎

CHANCES AND CHOICES: LOTTO AND 'SILING LABUYO'

OCTOBER 10, 2018

ATTY. AMABELLE C. ASUNCION

A testament to the unique Filipino trait of having fun even in adversity, the recent headlines on rising prices of rice and fuel are interspersed with updates on the billion-peso lotto jackpot. The record jackpot has attracted habitual gamers and first-time bettors alike, including celebrities and politicians. With fingers crossed, bettors divine the six lucky numbers based on birthdates, anniversaries, age and other numbers that bear some meaning in the bettor's life. Bets range from P24 to P22,000+. Some pin their hopes on winning while others simply try their luck. Regardless of the motivation, bettors await the results with optimistic enthusiasm.

As a game of chance, lottery makes no guarantee of winning; the only assurance is that the numbers will be drawn fair and square. Thus, while it cannot guarantee winning, it does promise a fair chance of winning, of course depending on the amounts and number of bets placed. Win or lose, such assurance allows bettors to hope, thus keeping the game alive through the years.

Establishing a business is like betting on lotto. The chance of earning entices businesses—old and new, big and small—to try their luck and compete with other businesses. Business owners employ different strategies and invest varying amounts, depending on capacity and appetite. The prospect of winning motivates the neighborhood *sari-sari* store owner as much as the business tycoon.

Like lotto, competition cannot guarantee success; however, it does ensure fair chances for all those competing. If this promise is kept, businesses will continue to crack the winning combination. Even where a jackpot is won, there is always a new draw and another jackpot to be won. Amid economic uncertainties, people turn to games of chance because these offer a chance of improving their lot, even if the gamble is risky. Similarly, people venture into business for an opportunity to earn. This opportunity can only be real if everyone will play by the rules.

> ...THE INTEGRITY OF THE GAME ALSO RESTS ON THE GAMERS. A BETTOR WHO EXPECTS THE SYSTEM TO BE FAIR IS ALSO EXPECTED TO PLAY FAIR. FOR COMPETITION TO BE FAIR, BUSINESSES MUST PLAY FAIR.

In the same way that lotto cannot afford to be smeared by allegations of rigging, competition must be free from manipulation. However, the integrity of the game also rests on the gamers. A bettor who expects the system to be fair is also expected to play fair. For competition to be fair, businesses must play fair. Otherwise, there will be no point in playing and the market will fail.

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Aside from rice and fuel, the price of *siling labuyo* skyrocketed to an unprecedented P1,000 a kilo. *Siling labuyo* or bird's eye chili is used for spicy Filipino dishes like Bicol Express, *laing, kinilaw, caldereta*, etc. *Siling labuyo* used to be affordable that it could be given for free to diners to spice up their soy sauce dip. With the price increase, consumers scrambled for ways to cope.

Carinderia owners resorted to using less quantities while bigger restaurants looked for cheaper sources abroad. Still, others looked for alternative spices that could give the same heat to their dishes for a lesser price. Some of the substitutes were sweet and chili pepper, bell pepper, jalapeño, paprika and black pepper. The quality of heat, price and availability vary compared to the *siling labuyo*, making some of them more likely substitutes than others.

For example, black pepper provides less heat than *siling labuyo* and may not be a good substitute for Bicol Express. Jalapeño or sweet and chili pepper may be good substitutes in terms of quality of heat. If the prices are comparable to *siling labuyo* (prior to the increase) and the produce easily available, consumers may switch to these alternatives. Consumers can cook their spicy *sisig* using these cheaper substitutes. This means *siling labuyo*, jalapeño, and sweet and chili pepper are substitutable.

In competition parlance, substitutable goods are considered part of what is called the same "relevant market." Defining the relevant market is the first step in competition analysis. However, more than an academic analytical tool, "relevant market" represents the plethora of choices available to consumers to answer a need. In the example, the consumer willing to spend a certain amount can choose from *siling labuyo*, jalapeño, and sweet and chili pepper for spice needs. If one spice is unavailable or increases in price, the consumer can switch to substitutes to fulfill her need. The more substitutes, the more options for consumers; the more substitutes, the more suppliers vying for the patronage of consumers. This would translate to more vigorous competition, to the benefit of consumers. But if none of the alternatives can substitute for *siling labuyo*, then they do not belong to the same relevant market. In such a case, *siling labuyo* may be a relevant market on its own. So, if *siling labuyo* prices increase, consumers would have to absorb the increase. Limited or absence of substitutes could lead to greater market power of *siling labuyo* suppliers and possibly abuse of such power, to the detriment of consumers.

Therefore, relevant market indicates the options available to consumers and sets the stage for competition among suppliers. What competition policy seeks to do is ensure that consumers will benefit from multiple choices at affordable prices, and suppliers will compete fairly.

Where the relevant market is less competitive, competition policy guards against monopolistic or abusive behavior of suppliers enjoying market power. In short, competition law lets the consumer savor spicy Filipino food at reasonable prices, with or without *siling labuyo*. ∎

THE PCC AND THE THIRD TELCO

OCTOBER 31, 2018

ATTY. JOHANNES BENJAMIN R. BERNABE

Filipinos will have a taste of more competition in the telecoms market once the third major player begins operations in 2019. This will come on the heels of the Department of Information and Communications Technology (DICT) and the National Telecommunications Commission's (NTC) widely anticipated selection of the new major telecoms player next month. With the new competitor in play, Filipinos are eagerly expecting faster and more widespread access to Internet service, less dropped calls and perhaps even lower telephone bills.

Simply getting to this point where the country can hope for better service brought about by the entry of a third player seemed like a pipe dream even just a couple of years ago, when the planned foray of San Miguel Corp. into the business was suddenly aborted by its sale of its subsidiaries holding valuable frequencies and telco assets to the two dominant incumbents in the sector—Philippine Long Distance Telephone (PLDT) and Globe Telecoms. SMC was almost ready to roll out its telephone and Internet services then, and many believed if any entity can go toe-to-toe with the duopoly, it was San Miguel. If even SMC opted out of this venture, who would dare take on the challenge?

It is a credit to President Rodrigo Duterte and DICT Secretary Eliseo M. Rio Jr. that they have summoned the necessary political will to lay the groundwork for the entry of a viable third player. This includes allocating whatever bandwidth is available, ensuring access to the "dark fiber" or unused optical fiber embedded in the government-owned power transmission grid, and promulgating clear-cut and transparent rules for the selection of the new major player. Sec. Rio, together with NTC Commissioner Gamaliel Cordoba, have likewise tirelessly engaged in various consultative processes with other government agencies and stakeholders to make sure that the terms of reference for selection (TORS) are rational and inclusive of the different perspectives put forth.

For its part, the Philippine Competition Commission (PCC) sought to fine-tune and tighten the disciplines affecting competition under the TORS. For instance, the Commission expanded the scope of what would be covered as "related party" to a dominant player, so that it would include those who are under the common control of the ultimate parent entity of a dominant player, or those who are not able to act or decide independently of other entities related to the ultimate parent entity. This revision made the TORS more consistent with the Philippine Competition Act (PCA). This modification is key because the third player to be selected is barred from merging, combining with or becoming a related party to a dominant player for period of five years from selection. Notwithstanding this prohibition, however, a further tweak adopted in the TORS on suggestion of the Commission is that the third player is allowed to enter, for its own benefit, into co-use, interconnection, infrastructure, and tower-sharing agreements with either PLDT or Globe, albeit subject to the PCC's review and approval. From the PCC's perspective, exempting these kinds of agreements from the prohibition could allow the third telco to unlock potential efficiencies in the assets held by the dominant telcos.

The scale of investment and technology needed to ensure that the third telco can compete effectively necessarily requires a domestic firm holding a congressional franchise—a legal requirement to operate a telecommunications facility—to combine or partner with a foreign telecoms company. Under the PCA, this business combination or partnership is generally required to be notified to the Commission as part of the latter's mandate to review mergers of a certain size. However, it would seem akin to putting the cart before the horse if, after complying with all the stringent requirements of the TORS and running the course of the selection process, a selected third telco would then have to submit its merger agreement involving its domestic and foreign

> "...[T]HE PHILIPPINE COMPETITION COMMISSION (PCC) SOUGHT TO FINE-TUNE AND TIGHTEN THE DISCIPLINES AFFECTING COMPETITION UNDER THE [TERMS OF REFERENCE FOR SELECTION]."

partners for review by the PCC. What if the Commission then finds something, which will cause it to prohibit the merger agreement? Will the DICT and NTC have to go through the selection process again or at least provide for a mechanism to enable it to award to another telco applicant?

To rationalize the exercise of its mandate, the PCC has opted instead to ensure the TORS incorporate the requisite competition disciplines and for these to be reflected in a separate undertaking to be submitted by third telco applicants to the PCC. This undertaking is analogous to voluntary commitments to address competition concerns that parties to a merger offer the PCC, where needed, in the course of a merger review. In this way, PCC acts consistent with the law and its mandate while contributing to a streamlined selection process as part of one government forging a unified agenda.

(Next up: Regulatory reforms needed to ensure the third telco can compete effectively.) ∎

MEETING THE CHALLENGE OF A NEW TELCO PLAYER

MARCH 6, 2019

ATTY. JOHANNES BENJAMIN R. BERNABE

The search for a third telecommunications company (telco) may have presumptively concluded with the selection of Mindanao Islamic Telephone Co. (Mislatel), and the approval given by the Senate to the transfer of controlling interest therein to a consortium led by Udenna Corp. and China Telecom. However, the challenge to ensure that the third telco lives up to the expectations of consumers for fast and reliable Internet and better overall quality of telecommunication services remains to be hurdled.

Indeed, while Mislatel will benefit from the assignment of relatively large swathes of 5G frequency—which is supposed to be the next big thing in terms of delivering hyper-speed Internet—it is not as if the technological hardware needed to provide this service is immediately available. Some experts say it will take another two years before smartphones that can use this frequency will become widely available. In the meantime, Mislatel practically has no 2G frequencies to work with. These frequencies are needed for the delivery of basic call and text functions to consumers, especially those who do not use smartphones. Though some insist that this situation is not a big deal, given that mobile phone users are ditching their old phones for the increasingly affordable smartphones, the latest figures show that at least one out of every three Filipinos are still not smartphone users. This means that while it awaits deployment of the much-hyped 5G technology, Mislatel is foreclosed from a third of the market.

These circumstances highlight the importance of two issues many pundits have been pushing for: first, the implementation of a credible spectrum-management plan that will allocate frequencies rationally and in a pro-competitive manner among telco providers. Currently, Smart has approximately a total of at least 400 megahertz (Mhz) of bandwidth, while Globe has about 325 Mhz. Mislatel has been assigned around 210 Mhz, 120 of which

> "A SOUND SPECTRUM-MANAGEMENT PLAN SHOULD PRECLUDE HOARDING AND SITTING ON BANDWIDTH BY TELCOS THAT HAVE NO REASONABLE USE FOR THESE, BUT RATHER INCENTIVISE OPTIMAL USE OF THESE FREQUENCIES BY OTHER TELCO PLAYERS."

pertain to the 5G, thus leaving it with only 90 Mhz to work with, at least in the first couple of years of its operation. Many have questioned the inequity of these allocations, and the Philippine Competition Commission itself had initiated a review of whether the assumption by Smart and Globe of frequencies previously held by San Miguel Corp. subsidiaries was likely to substantially lessen competition. (*Note: The conduct of this review was challenged by Smart and Globe before the Court of Appeals, and the case is now pending before the Supreme Court.*) A sound spectrum-management plan should preclude hoarding and sitting on bandwidth by telcos that have no reasonable use for these, but rather incentivise optimal use of these frequencies by other telco players. The legal definition and parameters of what constitutes "use" should be reviewed such that mere procurement of equipment without otherwise implementing a preapproved rollout program will not justify retention of assigned frequencies.

Second, the lack of available or sufficient frequencies in certain bandwidths, such as in the 850-900 Mhz range, which is used for the delivery of 2G calls and texts, suggests for many that "national roaming" whereby other telco players can co-use the frequencies held by incumbents, should be allowed by the government, at least during the period that the spectrum-management plan is not yet fully implemented. Indeed, in other jurisdictions such as the European Union, competition authorities have recognized the validity of agreements that provide for the ability to roam on other telco providers' network. This ties in with the doctrine of "essential facilities," where the control over a product by a dominant incumbent(s) leads to certain obligations, including allowing access to the facilities or product held by the incumbent(s), which has been applied in the telecom sector in numerous countries.

The memorandum of agreement between the Department of Information and Communications Technology (DICT) and the National Grid Corporation of the Philippines (NGCP), which enabled Mislatel to have access to the nationwide physical infrastructure of NGCP, including the "dark fiber" or unused fiber optics built into it, is certainly a tremendous assist in lowering the start-up cost for Mislatel, as it dispenses with the need for constructing its own backbone and helps it attain competitive viability in short order. So does the Common Tower Policy being pursued by the DICT, bogged as it is by issues on whether Smart and Globe can continue to build their own towers and whether a limit on the number of tower companies should be imposed. The Mobile Number Portability Act recently signed into law by President Rodrigo Duterte, which ensures that the "switching cost" from one telco to another is minimized insofar as it enables consumers to retain their phone numbers, is another boon to Mislatel. This is particularly relevant as, given the oversaturation of mobile-phone subscriptions in the Philippines, Mislatel expects to garner customers from existing Smart and Globe subscribers rather than new users.

The Duterte administration has notably pushed aggressively for the introduction of a third telco to challenge the duopoly of the dominant incumbents, Smart and Globe. How much further is it willing to go? ∎

INNOVATIVE REGULATION: KEEPING THE SPEED BUMPS JUST RIGHT

FEBRUARY 5, 2020

ATTY. AMABELLE C. ASUNCION

There was a time when the roads of northern Fairview were conducive to “The Fast and The Furious” type of car racing. Displaying their newfound ability to drive, teenagers would proudly drive their flashy cars late evenings to race a few meters to be declared king of the road. Soon enough, this activity was brought to the attention of the authorities. The prohibition against road car racing was enforced, speed limits were imposed, stoplights were installed, and policemen were deployed in the area. The car-racers were directed to take their skills to the proper race tracks.

It was also around this time when residential developments were under way north of Metro Manila. To attract buyers, developers offered gated properties that provided security, privacy and safety. Part of the safety features were speed bumps around the subdivision to prevent vehicular speeding that could endanger residents. Funnily though, this meant halting almost every two meters for a speed bump high enough to damage your car’s under chassis. As homeowners started to use the village streets, the speed bumps were lowered and lessened, but still enough to prevent speeding and to ensure safety of residents.

These happened in the early 1990s but they actually depict what continues to be the dilemma in competition policy and regulation: Under-regulation versus over-regulation.

In the first case, there was traffic regulation that generally prohibited road car-racing but it was not sufficient to deter drivers from doing so. For sure, talent and skills like car-racing should be encouraged. However, there is a need to regulate where car-racing could be done in order to keep the roads safe for other people. In this instance, further regulation and enforcement was required.

In the second case, while the high and numerous speed bumps ensured safety, these also had unintended and unnecessary outcomes like damaging vehicles or causing undue delay in navigating subdivision roads. Although the streets must certainly be kept safe, the question is whether the speed bumps have to be so high and numerous to achieve this objective.

At the recently concluded 2020 Manila Forum on Competition in Developing Countries, one of the underlying themes was precisely this—how do you keep the speed bumps just right?

Competition policy is a form of regulation which practically mandates firms to really and “fairly” compete with each other. From a firm’s perspective, this could be difficult and ruinous compared to a market that accommodates a monopoly and allows the firm to recoup its investments more quickly and earn maximum profits. It could also be seen as preventing growth and innovation because becoming a market leader tends to be eyed with suspicion of potential misuse of market power. Thus, competition seems to be either a threat to a firm’s existence or a warning against being too successful. Either way, it is a speed bump to an otherwise strongly motivated firm driving toward its desired destination.

Similarly, sector regulation is another speed bump that is probably just a meter apart from the speed bump of competition. Its development in the Philippine context, however, is viewed a little more positively in that sector regulation is by definition supposed to help the sector even as it regulates it. Thus, the policy objectives of sector regulation tend to focus on enforcing qualifications, standards, safety measures, and the like. Still, sometimes this speed bump can be too high that the firm might just end up backing off rather than trying to get over it and destroying the car. (In an ideal setup, competition policy should be able to give the firm a push to get it to slide over the unjustly high speed bump of regulation.)

“...IN AN IDEAL SETUP, COMPETITION POLICY SHOULD BE ABLE TO GIVE THE FIRM A PUSH TO GET IT TO SLIDE OVER THE UNJUSTLY HIGH SPEED BUMP OF REGULATION...”

These speed bumps with different heights sitting closely to each other could be so daunting as to discourage and drive away business. This, ironically, is the last thing that competition and regulation would like to happen. The challenge, therefore, is how to create business-friendly policy spaces.

As brought out in the forum, the common and surprisingly simple answer is cooperation and collaboration among regulators and business. Quite right.

Before this can be done, however, there must be mutual respect for each other's objectives. There must be an appreciation of each other's goals, an acceptance that such goals are legitimate, and an acknowledgment that each party has to achieve its objectives. This means that business must understand what the regulators are trying to do, why they are doing it, and that they have to do what it takes to accomplish their policy objectives. In the same way, regulators must accept that business is there for profit and that it has to protect this proprietary objective. Between regulators, they must understand each other's policy objectives and acknowledge that these are of equal importance. Having this common understanding and acceptance is crucial in bringing all parties to a state of openness and readiness for cooperation and collaboration.

Next, regulation must keep up with the times. A frequent criticism is that regulation always lags behind business and technological developments. Yet, it is also not realistic to demand that regulators be able to predict such developments before they occur lest this results in over-regulation. What, therefore, does keeping up with the times mean? It is for regulation to be innovative. It is futile to insist on a traditional framework if it no longer addresses present-day concerns. This means genuine mutual efforts by regulators and business to bridge the information asymmetry. Only in being well-informed can regulators respond appropriately.

Finally, regulation must be suitable to the governed sector and consciously infused with overarching principles and policies aimed at serving the public good. This is where competition policy becomes relevant. Regulation must be innovative and inclusive. While it protects sectoral interests, it should keep the playing field open for anyone who wants to come in, and level it for them to have a fair chance to succeed. Sometimes, this means rechecking the height and width of the regulatory speed bump, recounting if there are too many, and recalibrating if any is misplaced, as often as necessary. ∎

SMALL BUT SIGNIFICANT

MARCH 4, 2020

ATTY. MACARIO R. DE CLARO JR.

A country's development is often depicted as an improvement in the quality and diversity of products and services, from consumer goods to health care and infrastructure, that are available to average citizens. In a market economy, it's easy to imagine these innovations being carried out by large firms, perhaps conglomerates, that have the capital resources and expertise to bring the good life to the masses. But what happens when large businesses enter a new market? How do they change the competitive landscape in that market, particularly in relation to small- and medium-sized incumbents? Will the relationship be symbiotic, predatory or parasitic?

Considering that a vast majority of Philippine businesses are micro, small- and medium-sized enterprises (MSME), and that they employ two-thirds of the country's labor force, the MSME sector is crucial in enhancing and protecting market competition. MSMEs play an important role in the economy. Many producers of raw materials, like agricultural products, are small-scale farmers or entrepreneurs. Some serve as agents and facilitate trade that opens up far-flung and isolated markets. In manufacturing and services, MSMEs fill in crucial gaps in the supply chain by being agile, active, and responsive to small- and medium-scale, or niche and specialized, client needs.

The Philippine Entrepreneurship Report shows that Filipinos are very entrepreneurial, either out of necessity or because they can spot good business opportunities. However, MSMEs in the Philippines tend to falter when faced with roadblocks related to financing, access to human talent, use of modern technology and access to markets. These barriers stifle the sustainability and growth potential of MSMEs, with only a few making it past the 3.5-year mark to become stable and established businesses. Those that survive often remain very small, as they find difficulty in expanding

> "A COMPETITIVE ENVIRONMENT THAT PROVIDES REALISTIC PROSPECTS FOR GROWTH AND SUSTAINABLE SUCCESS DOES NOT ONLY ALLOW BUT ALSO ENCOURAGES MSMES TO CONSTANTLY IMPROVE THEIR PRODUCTS, SERVICES AND INTERNAL PROCESSES."

in terms of sales and employment. Meaning, these significant barriers still prevail.

While MSMEs play crucial roles in the economy, they often find themselves vulnerable and subject to entry and access barriers, external shocks, and the will of large and dominant players. The Philippine Competition Commission (PCC) endeavors to level the playing field such that market interactions are competitive and fair. Removing anti-competitive barriers in the markets for financing, labor, technology, and product distribution allows MSMEs to easily transact with suppliers when sourcing raw materials, and with clients or distributors when trying to attain a broad consumer base.

A competitive environment that provides realistic prospects for growth and sustainable success does not only allow but also encourages MSMEs to constantly improve their products, services and internal processes. When clients become accustomed to the best the market has to offer, they further fuel demand for quality products and services, creating a virtuous cycle of innovation and value creation.

Under the Philippine Competition Act (PCA), MSMEs are explicitly protected against abusive conduct. Section 15(g) of the PCA prohibits a dominant player from abusing its dominant position by "directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, MSMEs and other marginalized service providers and producers." Establishing dominance before prosecuting potentially anti-competitive behavior ensures that MSMEs and other marginalized producers are protected while being given the freedom to conduct their business pro-competitively.

The expansion and frequent disruption of some traditional markets due to rapid emergence of digital technology can also bring new business opportunities and challenges for MSMEs. MSMEs benefit from broader market access but are also threatened by the tipping of some markets in favor of dominant players. Issues related to intellectual property rights, privacy, and data management are becoming important and concerning not just for big businesses but also for MSMEs. These developments pose challenges for competition authorities the world over, and the PCC, along with other government agencies, is exploring modes of cooperation and innovative regulation that are in keeping with the times, to be effective and relevant.

With the protection of MSMEs from abuse by dominant players and promotion of competitive market conditions enshrined in the PCA as part of the national competition policy, the PCC considers MSMEs as allies not only in fostering a culture of competition but also in ensuring the promised benefits of competition law and policy, resulting in a good life for all in terms of low prices and improved quality of products and services. ∎

COMPETITION LAW IN THE TIME OF COVID AND BEYOND

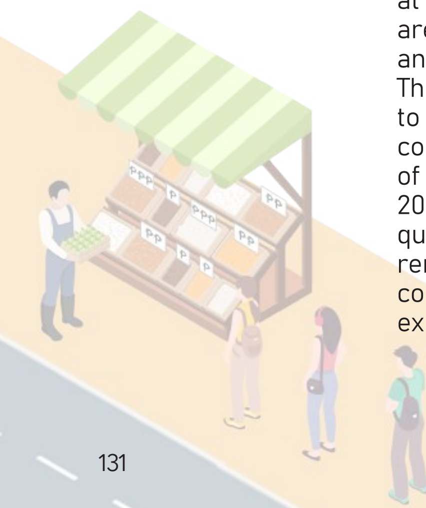
JUNE 24, 2020

ATTY. JOHANNES BENJAMIN R. BERNABE

Much is being said about the need to adjust laws and regulations to facilitate business operations and economic recovery during the community quarantine and the "new normal" that comes after. Initiatives abound in both houses of Congress seeking to grant loans, subsidies and other financial packages in favor of affected businesses.

There are calls as well on government agencies and local governments to implement strictly the timelines and procedural guidelines under the Ease of Doing Business Act. Certain quarters likewise ask that the Philippine Competition Commission (PCC) authority to review mergers and acquisitions be clipped for the time being. There is even a proposal to suspend the power of the PCC to charge and prosecute cartels and entities that abuse their market power during this pandemic and for at least a couple of years thereafter. If these restrictions on PCC's mandate are adopted, consumers and ordinary Filipinos may very well end up bearing the burden.

Mergers and acquisitions are indeed generally harmless to competition. Many times the increase in scale brought about by these transactions results in enhanced ability to efficiently deliver more goods and services to a wider band of consumers. From the PCC's experience, however, there is bound to be at least one or two mergers every year that are likely to substantially lessen competition and consequently inflict harm on consumers. These are the transactions that the PCC has to have the power to prohibit or subject to conditions prior to being cleared. An example of these is Grab's acquisition of Uber in April 2018, which resulted in price and service quality commitments being imposed by PCC to remedy or mitigate the harm to competition and consumers brought about by Uber's subsequent exit from the market.



The call for suspending PCC's authority to review mergers and acquisitions is made in the belief that given the difficulties businesses have had to endure during this pandemic, many are unlikely to continue operating unless they consolidate or are acquired by larger companies. This is meant to complement the loans and subsidies that these failing firms are intended to receive as "bailout" from the government. It should be noted however that the Philippine Competition Act (PCA) anticipated these kinds of difficulties that firms may encounter and provided for a 'failing firm defense' when troubled firms merge. Section 21 of the PCA states that mergers or acquisitions which would otherwise be prohibited may be exempted from such prohibition by the Commission when a merging or acquired party is "faced with actual or imminent financial failure" and the transaction "represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets."

Mention has also been made that apart from these failing firms, businesses should be allowed to consolidate so that they can achieve efficiencies necessary to tide them over the crisis we are facing. On this point, it is perhaps worth recalling that not all mergers are subject to review by the PCC; only the largest among these, i.e., those where either of the merging parties has assets or revenues in the Philippines in excess of P6 billion, and where generally, the value of the assets being acquired or the revenue generated by these assets in the Philippines exceed P2.4 billion, may be reviewed by the PCC.

> "...[T]HE PHILIPPINE COMPETITION ACT (PCA)... PROVIDED FOR A 'FAILING FIRM DEFENSE' WHEN TROUBLED FIRMS MERGE."

The most vulnerable and predominant business entities in the country, the micro, small and medium-sized enterprises (MSMEs) can consolidate all they want, and they will not likely qualify for review by the Commission. For large firms, the argument that they are 'too big to fail' and should thus be exempt from any review appears to be premised on a short-term

perspective. While the mergers or acquisitions made by large firms may ensure production and continued employment for their workers now, if the transaction results in the unintended foreclosure or raising of barriers to entry or expansion of competitors in the industry, the avowed objectives of productivity and employment will be sacrificed for the industry as a whole.

With the loss of competition, consumers will suffer from less choice. Not only that, but the merged and enlarged entity—facilitated through a relaxation of competition law and policy—will likely be entrenched in a position of market power that will almost certainly outlive the current crisis. Such market power, given the experience of other competition authorities around the world and the context of Philippine business realities, may lead to high prices, deterioration of quality of goods and services and lack of innovation in the medium to long term. Hence, while we may have solved some problems in the short run, we may be creating problems of a more permanent nature.

Beware, the ones who will bear the brunt of these pitfalls will be you and I, the ordinary consumers. ∎

ANATOMY OF A COMPETITIVE ONLINE MARKETPLACE

JULY 15, 2020

ATTY. AMABELLE C. ASUNCION

Are you looking for a hard-to-find product? Or perhaps a pantry supply that ran out? Or maybe personal hygiene products that you cannot go out to buy because of fear of Covid-19? Look no further, the marketplace is right in your home.

The past four months that glued everyone home has fueled the growth of the digital marketplace to unanticipated levels. Whereas there were only a number of online stores viewed as a distant alternative to brick-and-mortar stores, the so-called new normal has propelled digital platforms to the top-of-mind option for consumers. New forms emerged to respond quickly to the pressing demand for access to basic necessities amid the lockdown and to the counterpart need for an avenue to dispose of available inventory or simply earn a living. One such form that has become immensely popular is the online marketplace.

This marketplace makes use of the group chat feature of instant messaging and social media platforms where an administrator creates an online community for sellers and buyers to join. Sellers can post their products and buyers can place their orders directly with the sellers. Buyers can likewise post "looking for" inquiries to which sellers can respond. Some marketplaces accommodate all types of products, while others cater only to particular types of products; for instance, only food products, or even more specialized, such as baked products. Some are geo-specific while others are general. Some marketplaces could be as small as the number of residents in a village; others could have more than 50,000 members from all over the metro.

Clearly, the online marketplace is more than a novelty; it has become a service that addresses multifarious needs all at once. Like any market, however, the rules of fair competition are relevant. Quite interestingly, online marketplaces instinctively developed their own rules. While most of their rules are for the convenience of both sellers and buyers, some

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AT A TIME WHERE CONSUMER OPTIONS HAVE ALREADY BEEN SEVERELY LIMITED BY HEALTH AND ECONOMIC CONSTRAINTS, COMPETITION IN THE MARKETS THAT CONSUMERS ARE INCREASINGLY RELYING ON MUST BE SAFEGUARDED.

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have implications on competition which impact competitors and consumers. How then do you keep the online marketplace competitive? Here we dissect the anatomy of an online marketplace.

The administrator. S/he created the marketplace and is the one who sets out and implements the rules. S/he can delete posts and ads, reject registration of sellers, ban sellers, and remove buyers. The administrator may or may not be a seller himself/herself. An administrator who is also a seller, however, has a responsibility to act fairly. S/he should not use the authority to accept, reject, and ban sellers to prevent entry of competitors into the marketplace. This is especially significant in community marketplaces that cater to a specific geographic location where considerations such as delivery/transportation costs, logistics, perishability of goods, and time are important to consumers. There are also marketplaces where the primary consideration is trustworthiness of sellers. An example would be marketplaces for second-hand products. Second-hand buyers joining a marketplace that conducts a vetting process of sellers before admitting them are likely to limit themselves to that marketplace when looking for second-hand products. In these types of markets, unreasonable denial of entry of competitors would create monopolies and leave consumers with no choice. At a time where consumer options have already been severely limited by health and economic constraints, competition in the markets that consumers are increasingly relying on must be safeguarded.

Pricing information. In some marketplaces, sellers are required to provide pricing information upon registration. An administrator who is also a seller must not use this advance information to deny registration to a competitor that is offering its products at a lower price or to undercut it before allowing its entry into the marketplace. Neither should this information be used to agree on a price range for the product that they are both selling. In all of these scenarios, consumers are at the losing end.

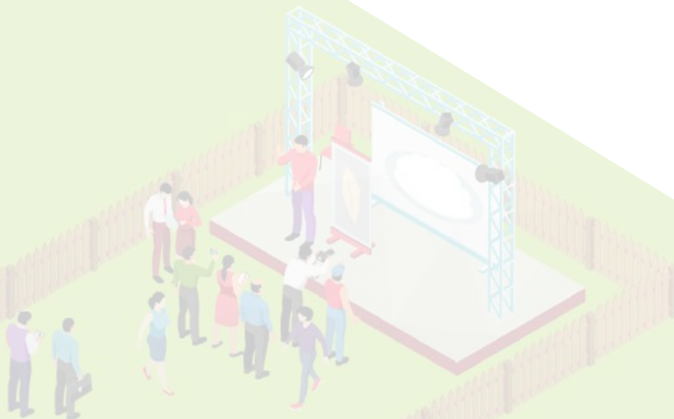
Limitations on products. Some marketplaces have rules disallowing sales of identical products or products of the same brand. Others limit the number of suppliers per product type. In a desire to help sellers, there could be a tendency to allocate the market among products or brands rather than have several sellers offering the same products. If various alternative marketplaces exist for both sellers and buyers, this would be less of a concern. However, if a specific marketplace is viewed by buyers and suppliers as a class on its own, such that they are not likely to see other marketplaces as equivalent alternatives to sell or buy products from, then limiting the number of suppliers per product or brand in that market would be anti-competitive.

Overpricing; lowballing. Two popular rules adopted by many marketplaces relate to price: No overpricing and no lowballing. The prohibition on overpricing aims to protect buyers, while the prohibition on lowballing is for the benefit of sellers. Violation of either rule gives the administrator the right to ban the concerned seller or buyer. However, most marketplaces do not have standards for what is considered as overpricing or lowballing. Thus, although these rules may have merit, they are vulnerable to subjectivity on the part of the administrator who has the power to remove sellers and buyers from the marketplace. To be sure, the pricing behavior of big sellers and big buyers are subject to scrutiny when these have the effect of exploiting customers or squeezing out competitors. However, it is a judgment that should not be used to substitute for the price that may be determined by the market. What an administrator should therefore ensure is the existence of competition in the marketplace by not unduly restricting entry of sellers.

Regulated posting. A common rule is the limitation on posts and advertisements to one per day. In some marketplaces, the privilege of promoting through photos or streams is reserved to the administrator. The stated reason for this rule is to avoid spamming. However, it can also stifle competition. In a regular market, advertising and promotion is part of the competition. Companies invest huge capital in brand marketing in order to attract and maintain customers. The more aggressive the promotions are, the more likely the company can

boost its sales. This also benefits consumers as they are able to learn more about the product and compare across competing brands. The regulations on posting should not dampen such competitive spirit in the online space.

Closing friendly reminder. The list of rules ends with an affirmation of the purpose for which the marketplace was created—for buyers to find what they want and for sellers to do business. This is accompanied with a friendly reminder for all members to show respect and practice proper business etiquette, under pain of banishment from the marketplace. This is as good a reminder that business etiquette includes fair play and that the virtual marketplace can only truly fulfill its purpose if it is kept competitive. ∎



IS COMPETITION CRUCIAL FOR ECONOMIC RECOVERY IN THE COVID-19 CRISIS?

AUGUST 12, 2020

ATTY. MACARIO R. DE CLARO JR.

This year, we have witnessed hard times dawning upon us due to the Covid-19 pandemic. Because of this virus, our economy has suffered a setback, affecting every sector of society, men and women, rich and poor, and young and old alike.

More than a quarter of micro, small, and medium-sized enterprises have permanently closed, as others try to survive on limited operations. More than 100,000 workers have lost their jobs, which they rely on to feed their families.

The Philippine economy has slipped into recession for the first time in three decades. In second-quarter estimates released last week, household consumption, gross capital formation, and exports took a turn for the worse due to the continued imposition of community quarantine. While the government has exerted efforts to revive the economy and help the masses, focusing assistance on the hardest-hit by providing limited financial assistance to low-income groups and investing in labor, services, and agriculture, such efforts may not be enough to address the emergency health situation due to limited resources.

Does competition have a role in all of this? Yes, and it is crucial.

The overarching mandate of the Philippine Competition Commission (PCC), in both good times and bad, is to protect the competitive process that keeps markets efficient and able to deliver the best outcomes to all—low prices, high quality goods and services, and dynamic innovation. To this end, the PCC wields a few tools, including investigative powers and quasi-judicial functions that it uses to uncover and prosecute anti-competitive behavior and to implement merger control.

We have entered this era of uncertainty on a strong footing, with a stable macroeconomic environment validated by investment grade

“

BEING THE ANTITRUST REGULATOR, THE PCC COMPLEMENTS WHOLE-OF-GOVERNMENT EFFORTS IN IMPROVING THE EASE OF DOING BUSINESS...

”

credit ratings. But given our current circumstances, consumers need access to adequate and affordable food and basic services like water and electricity, at the very least, as well as telecommunications, health care, and other services, if they are to survive this pandemic in good shape. Thus, it is important that we play on our strengths, which entail maintaining a business-friendly environment and ensuring consumer protection against possible abuses of large businesses that could take advantage of the current situation.

Notwithstanding the restrictions on some of the functions of government agencies on account of the quarantine regulations, the PCC was quick to adopt digital processes that streamline the delivery of its services and, at the same time, safeguard the health and well-being of its clients and staff. Being the antitrust regulator, the PCC complements whole-of-government efforts in improving the ease of doing business by ensuring that no dominant player in any market can arbitrarily erect barriers against new or small entrants. Neither can a dominant business, under PCC's watch, "corner a market" by taking advantage of fearful and confused customers and competitors. The PCC seeks to ensure regularity in bidding and independent price setting in all industries. These processes are sacred, since they ensure that infrastructure projects, government procurement, and even the responsible extraction of our rich natural resources are carried out to the advantage of every Filipino.

As our country heals and the economy recovers, albeit slowly, the competitive process is crucial in sectors that support industry, such as telecommunications, electricity, transportation, and construction. Competition also matters in retail, food production, and agriculture. Overall, robust competition can invigorate rural development and the distribution of economic activities and opportunities nationwide.

As competition improves every sector of the economy, as we believe it does and will, each one of us has a role to play. President Rodrigo R. Duterte, during his penultimate State of the Nation Address on July 27, 2020, echoed the words of former President Ramon Magsaysay and said that in these troubled times we need men to be like our great heroes, to act courageously in facing the uncertain future, to be dedicated to our great nation's development, to be capable and industrious in our work, and to be compassionate in serving the needy.

Heeding our President's call to action, we, the men and women of PCC, strive to foster a level playing field that is key to rekindling the vibrancy of business and the economy, ensuring every Filipino is rewarded for all his sacrifices by reaping the fruits of competition in our markets. ∎

BALANCING COMPETITION LAW AND THE PREFERENCE FOR FILIPINO BUSINESSES

AUGUST 26, 2020

ATTY. EMERSON B. AQUENDE

Starting as a spark in Wuhan, China in December 2019, the Covid-19 has spread across the world like a wildfire. By March 11, 2020, the World Health Organization declared the viral outbreak as a pandemic. Infection has creeped into every corner of the globe and to date afflicts peoples in 215 countries and territories, with the total worldwide death count reaching 810,885 as of August 23, 2020.

Eight months from the initial outbreak, science continues to play catch-up with Covid-19. As experts and researchers make new discoveries, prevention and treatment protocols are likewise evolving. The furious race to invent safe and effective vaccines is still months away from the finish line. With science yet unable to offer reliable solutions, governments are left with no choice but to supplement the gap in information with intuition resulting in either too draconian or overly lenient measures. Even the few governments that seemed to get the right mix of containment strategies have suffered setbacks from second or third waves of infections.

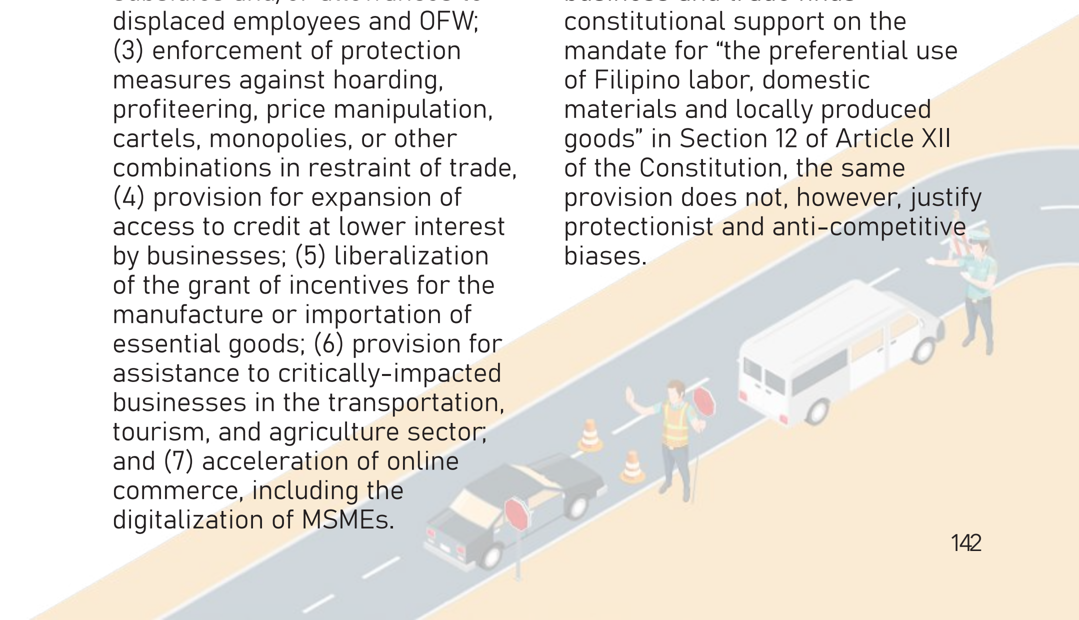
As people drastically reduce social interactions, the pandemic is also fast developing into a global economic crisis. With many economies screeching to a halt, the economic damage is fast becoming obvious. In its June *Global Economic Prospects*, the World Bank has forecasted a 5.2 percent contraction in the 2020 global gross domestic product (GDP).

The case of the Philippines is no different. As the country emerges from lockdown, the economic data confirms the devastating effects of the pandemic. The economy is projected to have lost as much as P1.1 trillion during the first 45 days of the lockdown. Tax collections slid by 61.56 percent year-on-year to P90.5 billion in April 2020 instead of the expected surge from the income tax filing deadline. Remittance from overseas Filipinos in 2020 is predicted by the Asian Development Bank to decline by 20.2 percent. The Philippine Statistics Authority (PSA) recently reported an all-time high unemployment rate of 17.7 percent, with 7.3 million unemployed adults in April of this year. The economic recession was confirmed by the PSA when it announced a 16.5 percent decline in the 2nd Quarter GDP growth rate.

To reverse the recession, restart the economy, promote business continuity, and save jobs and livelihood, the government is deploying a new set of tools that will hasten economic recovery even as the country continues to battle the Covid-19 menace. Congress is enacting into law "Bayanihan II." The measure will authorize the President to deploy a wide range of measures to stimulate the economy and promote business continuity, the most significant of which include the following: (1) flexibility in realigning government funds; (2) provisions for assistance, subsidies and/or allowances to displaced employees and OFW; (3) enforcement of protection measures against hoarding, profiteering, price manipulation, cartels, monopolies, or other combinations in restraint of trade, (4) provision for expansion of access to credit at lower interest by businesses; (5) liberalization of the grant of incentives for the manufacture or importation of essential goods; (6) provision for assistance to critically-impacted businesses in the transportation, tourism, and agriculture sector; and (7) acceleration of online commerce, including the digitalization of MSMEs.

Economic revival started after quarantine restrictions were eased across the country. In adopting a strategy of localized or micro lockdowns to contain infection outbreaks, the government has facilitated the calibrated reopening of businesses. However, as businesses struggle to cope with the negative shock of the initial quarantine measures, there are growing calls from various industries for government, businesses and consumers to adopt a policy of Filipino preference to speed up the economic recovery and job creation. Criticisms have been aired by some business quarters about the importation of personal protective equipment (PPE) instead of sourcing from local manufacturers. In the agriculture sector, hog and poultry growers have likewise called for a ban on pork and chicken meat imports to avoid a local supply glut.

While a Filipino preference in business and trade finds constitutional support on the mandate for "the preferential use of Filipino labor, domestic materials and locally produced goods" in Section 12 of Article XII of the Constitution, the same provision does not, however, justify protectionist and anti-competitive biases.



“...A PROTECTIONIST AND ANTI-COMPETITIVE STRATEGY TO PROMOTE FILIPINO BUSINESSES WILL ONLY YIELD SHORT-TERM RESULTS AND WILL EVENTUALLY BE COUNTER-PRODUCTIVE TO ECONOMIC DEVELOPMENT.”

Counter-balancing the *Filipino preference* are provisions found in the same Article XII that mandate trade policies that serve the general welfare, and anchored on equality and reciprocity, as well as that which prohibits combinations in restraint of trade and unfair competition.

Contrary to the misplaced beliefs of some market participants, competition is in fact essential in attaining economic recovery. As clearly laid out in the Philippine Competition Act (PCA), competition will propel economic development by promoting equal opportunity, improving productivity, and safeguarding consumer welfare.

It cannot be overemphasized that the national emergency brought about by the Covid-19 pandemic may spawn its own host of anti-competitive practices that can impact economic recovery efforts. There may be businesses incentivized to take advantage of the pandemic emergency to enter into anti-competitive agreements and/or to abuse their dominant market position in order to gain unfair advantage. It is not difficult to imagine that businesses may agree or collude to fix prices, or allocate markets, or control production, for basic and essential goods and services that are in high demand during the pandemic emergency, such as medical supplies and PPE, courier and transportation services, and Internet services. On the contrary, the absence of barriers to entry of market participants, has allowed the country to address

the initial supply shortages in face masks and other PPEs through importation sourced from foreign suppliers.

Emerging markets that have grown during the pandemic and their potential contribution to the economy may remain underdeveloped if anti-competitive practices of market participants are not effectively checked. A prime example are the digital and online markets that have found a niche during the lengthy community quarantines as substitutes for brick-and-mortar establishments. Early market participants who have attained dominance may abuse their market power by imposing barriers to entry of competitors, which will only slow down the development of this economic sector and negatively impact consumers.

Admittedly, the revival of Filipino businesses will greatly contribute to the economic recovery of the country. However, a protectionist and anti-competitive strategy to promote Filipino businesses will only yield short-term results and will eventually be counter-productive to economic development. The gains produced will be negated by the disadvantages and ills that are sought to be avoided by Section 19 of Article XII of the Constitution, and the PCA—that is, the detrimental effects to consumers and the concentration of market power in the hands of a few enterprises.

The interplay of these two factors require a careful balancing act on the part of our policy makers. While assistance and support should be extended by government to allow as many businesses as possible to restart their commercial activities, such support must be extended to all, or at least to those similarly situated on the basis of clear and sound criteria, without any market participant getting undue gain over its competitors.

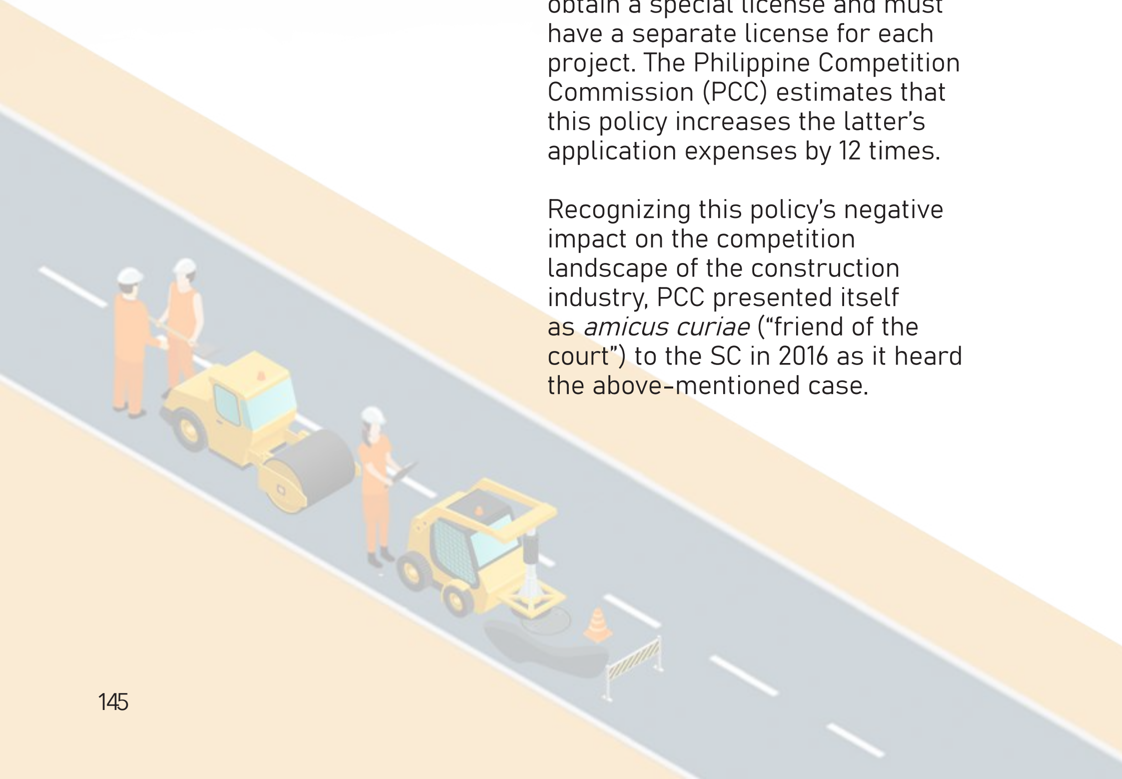
Apparently, Congress has weighed well these two factors in drafting the Bayanihan II by focusing on provisions that support Philippine businesses and workers, without unduly giving market participants unfair advantage over other competitors, such as the subsidies to displaced workers, the expansion to access to credit with favorable interest rates and terms by affected businesses, the liberalization of incentive grants for manufacturers of essential goods, and the increased efficiency in processing permits. These measures will lessen the burden on businesses to resume full commercial activity without giving any market participant an advantage over other competitors.

In the final conclusion, with the right balance of competition law and preference for Filipino businesses, both Filipino businesses and consumers stand to be mutually benefitted by a competitive business climate and vibrant Philippine economy. ∎

SC DECISION ON CONSTRUCTION REGULATION: A WIN FOR COMPETITION ADVOCACY

SEPTEMBER 16, 2020

ARSENIO M. BALISACAN, PHD



Recently, while most of us have been glued on the ubiquitous news of the pandemic, competition advocacy quietly chalked up a milestone in the country. This came via a game-changing ruling of the Supreme Court on the *Philippine Contractors Accreditation Board v. Manila Water*. The SC has deemed unconstitutional PCAB's nationality distinction in the classification of contractors applying for licenses.

To give context, prior to the SC decision, PCAB, the authorized licensing body, issues two types of licenses to contractors—regular and special licenses. Regular licenses are given to local firms, authorizing them to engage in several contracting activities for a year. On the other hand, foreign firms or companies with more than 40% foreign ownership may only obtain a special license and must have a separate license for each project. The Philippine Competition Commission (PCC) estimates that this policy increases the latter's application expenses by 12 times.

Recognizing this policy's negative impact on the competition landscape of the construction industry, PCC presented itself as *amicus curiae* ("friend of the court") to the SC in 2016 as it heard the above-mentioned case.

In its brief, PCC argued that the nationality-based restriction significantly hinders entry of players in the construction industry and that it violates the State's policy against unfair competition as enshrined in the Constitution. The high court concurred with PCC's arguments, thus, its ruling against PCAB.

Why is this ruling of importance to the country?

The construction sector occupies a significant part in the Philippine economy. It employed more than 2.71 million Filipinos in 2015, representing seven percent of total employment in the country. Its gross value increased by 40 percent between 2010 and 2015.

Public construction grew by eight percent, while private construction swelled by a whopping 58 percent!

Despite the industry's rapid growth, out of 1,600 special licenses issued in 2015, only 20 were to foreign firms and four to joint ventures or consortiums with foreign participation. PCC also noted that only a few new licenses were issued, and that three-fourths of the total licenses issued were merely renewals or amendments. These observations imply that the construction industry has remained structurally unchanged and insulated from the dynamics of global competition. When we examine the World Bank's Product Market Regulation indicators, we find that often, state-enabled restrictions or policies are misinformed and lead to unintended consequences that distort the incentives of players in the market. It is highly likely that the unequal treatment has been discouraging the entry of new players into the construction industry.

Comparative data show that restrictive policies translate to lower levels of foreign direct investment inflows. More restrictive countries such as the Philippines and Indonesia have lower FDI as a percentage of GDP compared with more liberal ones like Vietnam and Malaysia. Particularly in 2014, FDI in the Philippine construction industry was barely one percent of the GDP. This not only dampens capital accumulation but also hampers technology transfer, sharing of best practices, and access to international networks, which benefit the construction industry.

Already, the Philippines suffers from significantly higher construction costs relative to its comparable peers in the Asean. Arcadis Philippines Inc., a design and consultancy firm, reports that in 2020 the average construction costs in Manila are higher than in Bangkok, Ho Chi Minh, and Kuala Lumpur by 17 percent to 145 percent, depending on the type of structure. This is likely brought about by having fewer, less innovative players in the market than what is optimal, as well as the ineffective weeding out of inefficient firms.

The high prices hinder the construction sector from maximizing the potential economic

> HEALTHY MARKET COMPETITION ENTAILS FAIR PARTICIPATION OF FOREIGN PLAYERS, AS THESE FIRMS HAVE THE POTENTIAL TO INCREASE COMPETITIVE PRESSURE ON DOMESTIC INCUMBENTS AND THE CAPABILITY TO BRING IN NEW TECHNOLOGY AND IMPROVED BUSINESS PROCESSES.

activities it could generate both as provider of inputs to production and as consumer of services and products from other sectors, such as electricity, telecommunications, transport, and logistics. In this regard, the SC ruling is expected to yield significant positive spillover effects within and across sectors.

Moreover, the SC ruling acquires tremendous significance in view of the national government's 'Build, Build, Build' program. By further enabling foreign participation in the construction sector, more likely every peso that goes into infrastructure projects becomes more efficiently spent. In other words, Filipinos obtain more value from taxpayers' money.

Healthy market competition entails fair participation of foreign players, as these firms have the potential to increase competitive pressure on domestic incumbents and the capability to bring in new technology and improved business processes. It cannot be overemphasized—more competition provides consumers a wider access to cheaper and higher quality goods and services.

In policy design, it is paramount for the whole government architecture to be guided by competition principles. Having a culture of competition helps us achieve our shared goal of inclusive growth and sustainable development. ∎

MORE THAN A QUARANTINE GIG: LABORING IN THE DIGITAL MARKET

OCTOBER 13, 2020

ATTY. AMABELLE C. ASUNCION

In music and theater circles, "gig" is a hip term that refers to a show or performance by a musician, a band, or an actor. Nowadays, however, show business no longer has a monopoly of "gig work," which has evolved to perhaps less glamorous but increasingly popular services provided through online platforms. This global trend has given rise to a "gig economy" where workers provide services on-demand to clients via online platform apps. The most familiar are the drivers providing transportation services, food delivery, and courier services. Other emerging gig jobs include running errands, house cleaning, clerical work, etc. A gig worker gets a gig through the digital platform, which matches him/her to a customer but has no employment relationship with the platform or the customer.

Before the Covid-19 pandemic, the gig economy was populated with individuals deliberately making a choice to take on a gig for additional income or to shift fully from regular employment to gig-app work to have flexible work hours and potentially higher returns. With the pandemic forcing downsizing and lay-offs, however, these gig jobs are becoming the main means of livelihood for more and more people. The quarantine restrictions on movement have also multiplied gig-apps over the last six months. There are now more platforms providing similar services, some providing more than one type of service. If you want food delivered, you have several options: Use the delivery services of the restaurant you are ordering from; use a food delivery platform which caters to the restaurant you are ordering from; order from the restaurant and book your own delivery service that will pick up the food from the restaurant and deliver to your doorstep; or use a platform that purchases your order for you on reimbursement with mark-up basis and deliver to you.

In this sense, the existence of a gig economy at a time of crisis is a fortunate happenstance as it provides a means for earning a living

> “...IT MAY ALSO BE AN OPPORTUNE TIME FOR **COMPETITION POLICY** TO HEED THE NOW UNMUTED CALL OF THE **LABOR MARKET** FOR **RELEVANT**, EVEN LASTING, **INTERVENTION**...”

while fulfilling a demand heightened by the health situation. However, this also exposes gig workers, because of the nature of their engagement, to undue exercise of any market power that online platforms may possess. The curious question is, can competition law come to their rescue?

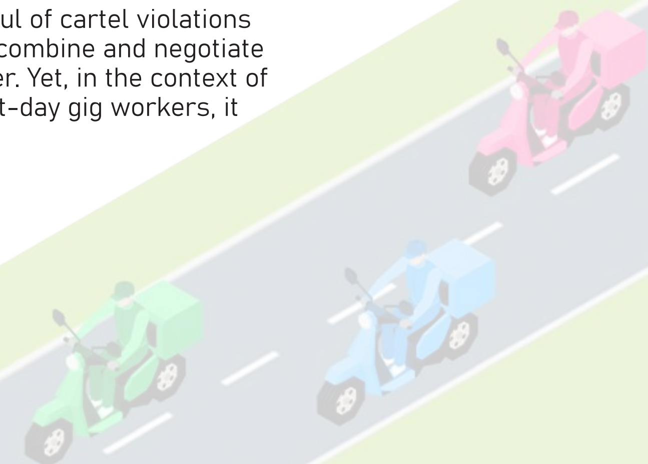
A quick travel back to pre-pandemic times reveals that the PCC was confronted with this kind of question when it investigated the Grab-Uber merger. The ride sharing services platform is two-sided: Drivers on one side and riders on the other side. Both sides stood to be harmed by the two to one merger, although their respective interests were not necessarily aligned. While the investigation focused more on the harm to the riders, it also recognized the harms to the drivers who were left with only one platform to subscribe to if they wished to continue providing ride sharing services. With Grab being the lone platform, drivers would have sufficiently diminished bargaining power in terms of commission rate, incentives, and other conditions of work. Grab was a monopsonist—it was the only intermediator of ride sharing services—and enjoyed such market power that gave it ability and incentive to lower commission rates, reduce incentives, and impose conditions favorable to it (e.g. exclusivity).

The same issues are likely to surface for gig workers today, especially with the oversupply of available labor and contraction of demand. Although there are several platforms that gig workers can choose from and switch between, human factors such as instability and desperation can negate any semblance of choice or bargaining leverage against the platforms. It should also not be forgotten that the essence of platforms is their network effects, that is, the benefit of using the platform lies in having more users. Thus, a gig worker would gravitate toward a platform that enjoys extensive network effects. Such a platform could then exercise monopsony power.

This could come in the form of lower commissions and incentives, imposition of non-compete clauses, unfair labor practices, and predatory hiring.

Unfortunately, the legal status of gig workers is more akin to an independent contractor under our labor laws. As such, they do not enjoy the same rights and protection given to employees. As independent contractors, they will also be considered “entities” under the Philippine Competition Act (PCA) and treated just like any other commercial enterprise. This means that they cannot try to strengthen their bargaining power by banding together with other gig workers to negotiate for better terms. Unlike labor unions that are exempt from the coverage of the PCA when they engage in collective bargaining agreement regarding conditions of employment, gig workers as independent contractors can run afoul of cartel violations if they combine and negotiate together. Yet, in the context of present-day gig workers, it is easy to see that they are as in need of protection as regular employees. In fact, it can even be argued that their need is greater during these uncertain times.

Commentators have suggested that competition law treat gig workers like employees where their relationship with the platform bears strong resemblance to the basic characteristics of an employer-employee relationship, i.e., the platform exercises such degree of control or decisive influence over the conditions under which the services are provided. This may well be a good starting point toward protecting this rising category of workers. To be sure, there may be quick regulatory solutions. Yet, it may also be an opportune time for competition policy to heed the now unmuted call of the labor market for relevant, even lasting, intervention, because definitely, labor in the digital market has become more than just a quarantine gig. ∎



STRIKING WHILE THE IRON IS HOT

OCTOBER 27, 2020

ATTY. MACARIO R. DE CLARO JR.

Months have passed since the national government enforced lockdown measures to curb the onslaught of the Covid-19 pandemic. In that time frame, the world was brought to its knees worse than ever—halting global mobility, accelerating economic slowdown, resulting in the biggest health crisis in the 21st century. Though few countries have been spared with close to zero cases, no country was exempt from the pandemic's echoing global repercussions.

Currently, the Philippines has a total of 360,000 active Covid-19 cases, with little signs of slowing down. Filipinos continue to cope with this pandemic as they strive hard to comply with health measures imposed by the government. Slowly, our economy is inching to recovery. How long this will take and how the government should approach this process of recovery remain to be seen.

According to the Philippine Statistics Authority (PSA), the economy is suffering a 16 percent GDP decline for the second quarter (the most since 1981), technically entering into a recession and has severely impacted the following sectors: Accommodation and Food Services, Transportation and Storage, Arts, Entertainment and Recreation, and Construction. If one compares these sectors with last year's second quarter, it is not surprising that only the sectors of Information and Communications, Financial and Insurance, Public Administration and Defense, and Agriculture, Forestry and Fishing, posted positive growth rates.

Repeatedly, studies show that a sustainable food and agriculture system is linked to more jobs and economic growth—and may even be robust throughout a pandemic. This, however, should not be construed as the food and agriculture sector is impervious to the pandemic. Considering that under the current situation, it is our food security which is primarily vital and essential for the country's economic survival, our government should focus on expediting the development and sustenance of our food and agriculture industry.

Under the present economic structure, three highly urbanized regions—National Capital Region (NCR), Calabarzon (Region 4-A) and Central Luzon (Region 3)—account for almost two-thirds of the country's total gross domestic product, while the remaining one-third is shared by the rest of the 14 regions. To address the decongestion of these areas, Congresswoman Sharon Garin, chairperson of the House Committee on Economic Affairs, called for the swift passage of House Bill 7111 or the "Balik-Probinsya Program Act of 2020," where it seeks to promote regional socioeconomic development, and establish mechanisms for sustainable reintegration. She added, "this condition reflects a highly unequal and inequitable socioeconomic development across regions in the country."

In partnership with local government units and the private sector, this bill aims to support jobs, employment, and other income-generating activities in those regions. Due to the pandemic which has resulted in the loss of jobs in the NCR, it may be worth shifting the lens of economic activity and stimulate growth to other regions. Decongestion may not only provide positive economic impact on these regions but may also help flatten the curve of Covid-19. Now is the opportune time to strike while the iron is hot.

Indeed, the implementation of this bill after its passage and approval, is a daunting task. One of the foreseeable issues arising from this would be the safeguarding of a robust economic development among the regions. It would be difficult to monitor and facilitate the behavior of businesses and firms in far-flung areas, more so ensure that these market players do not engage in anti-competitive behavior—which is detrimental

> "IT WOULD BE DIFFICULT TO MONITOR AND FACILITATE THE BEHAVIOR OF BUSINESSES AND FIRMS IN FAR-FLUNG AREAS, MORE SO ENSURE THAT THESE MARKET PLAYERS DO NOT ENGAGE IN ANTI-COMPETITIVE BEHAVIOR..."

to sustainable and progressive economic development. At the helm of this challenging task is the Philippine Competition Commission (PCC), which is legally mandated to ensure that businesses compete in a manner that is fair, sustainable, and beneficial not only to themselves but to consumers as well. Admittedly, the road to economic recovery will not be a simple one. Yet this is a challenge that the PCC is willing to face, along with other government agencies.

While it appears that our economy is headed to an uncharted territory, new opportunities will arise. Economic pathways have acquired another dimension, not just physical but digital. The ICT sector continues to take a pivotal role for development since digital connectivity has significantly paved its way through consumer markets, other sectors, and industries. With the administration's "Build, Build, Build" program, this will be a crucial tool for the country's overall economic connectivity, growth, and development in farther areas. ∎

COMPETITION LAW IN TIMES OF NATURAL DISASTERS

DECEMBER 9, 2020

ATTY. EMERSON B. AQUENDE

The successive typhoons that devastated large swathes of Luzon in November, and the massive flooding that recently inundated Metro Manila and Cagayan province have once again raised to the national consciousness the vulnerability of the Philippines to natural disasters. To a large part, geography is to be blamed for this curse. The entire east coast of the country faces the Pacific Ocean, which sends our way 20 typhoons every year on the average, at least five of which are destructive.

Accompanying flooding and landslides often aggravate the lethality and destructiveness of typhoons. Fluctuating ocean temperatures caused by climate change further compound the problem by either increasing the severity of typhoons, or causing droughts, depending on whether the ocean is warmer or colder than normal. It doesn't also help being in the Pacific Ring of Fire, where earthquakes from the occasional movement of the tectonic plates, and volcanic eruptions from the 24 known active volcanoes sprinkled across the archipelago, are frequently expected but cannot be predicted. Given all these adverse factors, it's not surprising that the Philippines is among the countries with the highest risk for natural disasters—9th out of 181 countries in the World Risk Index of 2020. The human and economic cost of natural disasters to the country is staggering. In the past 20 years, the 432 disaster events resulted in 39,946 deaths and estimated damages reaching $24.2 billion.

Coming from the Albay province, I am no stranger to frequent natural disasters. Super typhoons, landslides, flooding, earthquakes and volcanic eruptions are regular fare for us living at the foot of Mayon Volcano, whose majestic beauty is equaled only by her deadly reputation as the most active volcano in the Philippines with 52 eruptions to her credit since the year 1616. Albay, with the rest of the Bicol provinces, straddles also the typhoon alley where super typhoons birthed by the warm ocean in the months of October, November, and December

"[T]HE PCA OFFERS BETTER TOOLS TO ADDRESS PRICE GOUGING THAN PRICE FREEZE AND/OR PRICE CEILINGS BECAUSE THE FORMER IS GEARED TOWARDS ELIMINATING ANTI-COMPETITIVE CONDUCTS AND RESTORING MARKET EFFICIENCY."

cut across the archipelago on a diagonal northwest path.

For those of us who live with natural disasters, we know that every natural disaster leaves a lengthy trail of misery in the lives of those impacted. The survivors of natural disasters have to endure lengthy periods of recovery and rebuilding even as they are beset with a host of difficulties and deprivations. Water and electricity services may take weeks (or even months) to be restored in the disaster area, leaving everyone scrambling to buy electric generators and bottled drinking water. Roads may be impassable for days due to landslides, fallen trees and electric poles, or worse, destroyed bridges isolating local communities for a time. Business operations of banks, grocery shops, water refilling stations and other commercial establishments may be interrupted because of damages incurred and employees unable to work, resulting in shortages of basic necessities and prime commodities.

As is most often the case in post-disaster situations, prices of food, other basic necessities, and prime commodities, including building materials, may surge to unjustifiable levels because of price gouging. In many instances, the increase in post-disaster prices are justifiable due to higher input costs of traders and retailers, such as added expenses from cleanup, higher transportation charges, increased labor expenses, and similar legitimate factors. However, there is also no denying that many traders and businessmen will take advantage of the chaos in the market that follows natural disasters to generate more profit just because they can.

The adverse impact of price gouging can be magnified several times under a post-disaster situation. It is particularly injurious to those who belong to the lower income groups who may be denied access to basic necessities and prime commodities because prices have risen beyond their means. Unless the government is able to stabilize the markets immediately, price gouging may worsen the suffering of survivors due to hunger and other deprivations.

While the Price Act allows the government to use price freeze and price ceilings as immediate remedial tools to suppress price gouging, it should not be overlooked that these are not the only tools available in its arsenal. In fact, there are more potent measures that the government can deploy to suppress the more injurious types of price gouging—the kinds committed by cartels, and those practiced by dominant firms and businesses.

The Philippine Competition Act (PCA) offers alternatives, and perhaps even more appropriate remedies to suppress post-disaster price surges. Admittedly, anti-price gouging measures like price freeze and price ceilings are attractive to deploy because these are very visible tools. However, implementing price freezes and price ceilings can be administratively difficult, given the resources needed to enforce it effectively. Worse, it may actually be counter-productive in the long run because these interventions may in fact distort competition in the market. It is argued that allowing post-disaster price increases will result in increase in production (to meet demand), incentivize outside firms to bring in additional supply (because of attractive prices), promote efficient use of in-demand products, and even encourage businesses to stockpile supplies in anticipation of impending natural disasters. Capping prices may produce the reverse results, and even lead to rationing and long queuing.

I even hazard to argue that the PCA offers better tools to address price gouging than price freeze and/or price ceilings because the former is geared towards eliminating anti-competitive conducts and restoring market efficiency. Sections 14 and 15 of the PCA, which deals with anti-competitive agreements and abuse of dominance can be better employed as they do not adversely affect, but rather aid in, the proper functioning of the market. ∎

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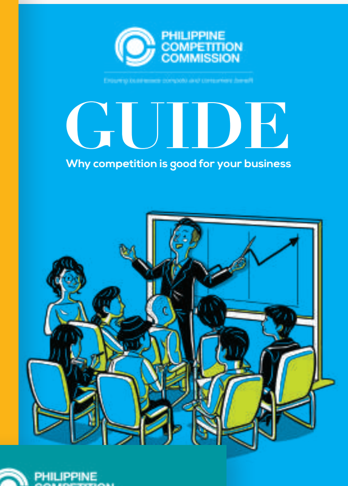

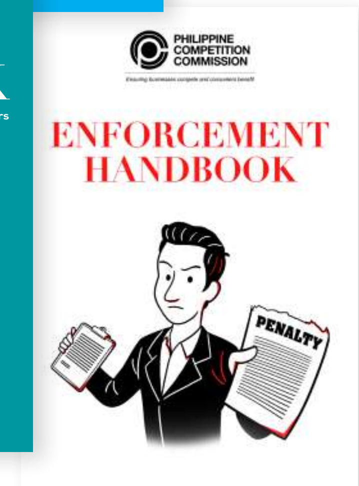

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