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PHILIPPINE COMPETITION BULLETIN

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**PHILIPPINE
COMPETITION
COMMISSION**

Ensuring businesses compete and consumers benefit

REGULATORY OBSTACLES TO COMPETITION IN PHILIPPINE MARKETS

by Ciara R. Daquis



Graciela Miralles Murcigo, one of the lead authors, discusses the highlights of the World Bank report.

Last March 4, the World Bank Group launched *Fostering Competition in the Philippines: The Challenge of Restrictive Regulations*, a report identifying existing regulatory restraints to competition in the country.

Restrictive regulations, such as complex regulatory procedures and state involvement in business operations, can limit market competition. Discretionary application of the regulatory framework may make it difficult for new firms to enter and operate in the market.

In the recently launched report on the competition landscape in the Philippines, the World Bank notes that the Philippine Competition Commission's (PCC) advocacy role is critical in addressing regulatory conditions that may be facilitating anti-competitive behavior.

Concentrated markets

While the Philippines' economic outlook remains strong,

the report said that limited competition in crucial sectors of the economy still remains a constraint to inclusive growth. For instance, in the agriculture sector, only one firm is operating in 15 national markets. The case is the same in the transport/storage sector. It is worth noting that competition is usually viable in these markets, except in a few transport markets (e.g., railway) where a monopoly is common.

Similarly, the manufacturing sector has 16 national markets, but with only one firm operating. Compared with other countries in the region, the Philippines has a high proportion of monopoly, duopoly or oligopoly in manufacturing markets. Typically, these concentrated markets are prone to abuse of market power and collusion.

Restrictive policies

Philippine markets are also more restrictive than those of

comparator countries¹ such as Chile and Romania. Citing Product Market Regulation (PMR) indicators, which measure how policies impact competition in product market areas, the report said that the most significant restrictions to competition in the Philippines are the extent of public ownership, administrative burden to start ups, and non-explicit barriers to trade and investment.

In terms of the state control sub-indicator, the Philippines scored close to average. However, components such as extent of public ownership indicate critical restrictions to competition. Usually, governments justify state-owned enterprises' (SOEs) participation in economic activities in line with improving wealth distribution and control of resources. In the Philippines, SOEs are commonly known as government-owned and controlled corporations (GOCCs) There were almost 200 GOCCs in existence as of 2016. Of the 27 Philippine sectors reviewed, SOEs exist in 18, which is higher than the average of 14 in countries included in the review. The Philippine government controls at least one firm in majority of the non-infrastructure sectors reviewed, including financial services, insurance, and health activities. Many of these non-infrastructure sectors are usually privately served. The report notes that while there are government efforts to lessen direct participation in markets, significant state participation in business operations (e.g., through entry and quality regulations) remain, possibly stifling the ability of private firms to compete.

¹ Based on two criteria: current gross domestic product (GDP) and labor market participation

Administrative burden

Data also show that private sector development is burdened by excessive start-up requirements. High levels of administrative burden make it costly for new entrants to the market. For instance, a corporation must deal with 10 bodies for registration. It takes at least 35 days to complete the registration, compared with the East Asia Pacific's average of 23.9 days for seven procedures. The World Bank's Doing Business indicator confirms this difficulty faced by start-ups: the Philippines ranked 171 out of 190 countries in ease of starting a business in 2017.

Relevant steps are now being taken to improve business registration in the country through process integration efforts of government agencies.

Limited foreign participation

While barriers to trade and investment account for the smallest weight in the overall restrictiveness in Philippine markets, data show that there are significant barriers to foreign direct investment (FDI) and differential treatment of foreign suppliers in the country. This is mainly attributed to constitutional and legislative limitations (e.g., Foreign

Investment Act) on foreign engagement in key economic activities. Such restrictions bar key sectors of the economy from attracting resources for capital-intensive projects (e.g., large infrastructure), prompting SOE intervention in those sectors. As such, the development of these sectors depends on the government's financial capabilities.

For instance, FDI restrictions in the construction market have stifled the sector's growth. In 2014, the country's construction market attracted only USD 1.4 million, the lowest among ASEAN members (e.g., Vietnam drew USD 457.3 million). The report notes that foregone FDI in the sector due to regulatory restrictions amounts to at least USD 108 million. In the absence of these regulatory barriers, foreign contractor services in residential, industrial, and commercial segments could have generated an estimated PhP210 billion.

Towards an effective framework

Fostering pro-competition regulations and interventions is a key element of an effective competition policy framework in the Philippines. The World Bank report shows how existing regulations restrict the country's markets. Without

these restrictive regulations, at least 0.2 percentage points could have been added to the economic growth rate every year, the report estimates.

Reforms to reduce restrictiveness, the report suggests, should be aimed at: (1) creating more competitive conditions in the infrastructure sector and professional services; (2) reducing state intervention through SOEs and ensuring competitive neutrality; (3) streamlining administrative processes for businesses; and (4) eliminating restrictions on foreign contractors vis-à-vis domestic investors, among others.

The report notes that the PCC is critical to ensuring a stable regulatory environment. Cooperation between the Commission and sector regulators is crucial to achieving an effective competition policy. By working with sector regulators, the PCC can play a significant role in integrating principles of competition in policy making. Building on its advocacy mandate, PCC's contribution in crafting pro-competition regulation can impact regulated sectors, state participation in commercial operations, and price controls. ■



The *Fostering Competition in the Philippines: The Challenge of Restrictive Regulations* is a project of the World Bank Group, with the support of the Australian Government through the Australia-World Bank Philippines Development Trust Fund, and the Canadian Government.

The full report can be accessed and downloaded from the World Bank website (<http://documents.worldbank.org>)

The report is authored by Graciella Miralles Murciego, Roberto Martin Nolan Galang, Sara Nyman, Tilsa Guillermina Ore Monago, and Leandro Deambrosio Zipitria – all from the World Bank Group.

LENIENCY PROGRAM ROADSHOW KICKS OFF IN BAGUIO CITY

by: Paul Jeffrey M. Ballentos



(Seated, from left) Atty. Genevieve Jusi, Atty. Niña Mejia, and Atty. Jasmine Maquiling of the PCC Enforcement Office serve as the public forum's speakers.

To increase public awareness of its newly launched Leniency Program, the Philippine Competition Commission (PCC) conducted a “Public Forum on Market Competition and the PCC Leniency Program” last April 11 in Baguio City.

The PCC Leniency Program, launched last January, aims to deter the creation of cartels and to aid in the detection and prosecution of existing ones. It rewards current or former cartel participants who cooperate by providing information necessary for a successful investigation and prosecution of cartels.

It is a legal remedy afforded by the Philippine Competition Act (PCA), where violators may avail themselves of immunity from suit or reduction of fines in exchange for voluntary disclosure of information.

Benefits and violations covered

“Leniency is similar to the Witness Protection Program of the Department of Justice,” explained Atty. Niña Remedios R. Mejia, PCC senior lawyer. She added that the program grants

certain benefits to qualified applicants.

Under the Leniency Program rules, immunity from suit exempts qualified applicants from both administrative and criminal liability, as well as civil actions initiated by the PCC on behalf of cartel-affected parties. On the other hand, reduction of fines (i.e., exemption, waiver, or gradation in fines) applies only to administrative penalties imposed by the PCC.

Benefits depend on the applicant’s role in the cartel and the time of application (*see table*). Leniency is like a race, in that the first applicant reaps the highest benefit. The time of application is reckoned at the start of the preliminary inquiry (PI). The highest benefits may be availed of when application is done before the PI starts.

The Leniency Program does not cover all competition-related prohibitions in the PCA, however. According to the rules, only anti-competitive agreements under Section 14(a) and 14(b) of the PCA

such as price fixing, bid rigging, output restriction, and market allocation fall under the program.

Qualified beneficiaries

Unlike the DOJ’s witness protection program, only cartel participants — not just any informant — may qualify for the PCC Leniency Program. Under the rules, any participant who is liable for anti-competitive agreements may apply for leniency.

Also, current or former directors, officers, trustees, partners, employees, or agents of a juridical entity who have participated in a cartel may apply for leniency. Their application will be considered separate from that of their employer, corporation, or the partnership they are associated with.

As a general rule, members of a cartel may not jointly apply for the benefits of the program. This is meant to spur cartel members to be the first to disclose to the PCC the existence of anti-competitive agreements.

Benefits available to successful leniency applicants, by role in cartel and time of application

Place in the queue	Role in the cartel	Available Benefits	
		Before start of PI	After start of PI
First applicant	Participant	Immunity from suit	Immunity from suit* No fine
	Leader, Originator, Coercer	80% reduction of fines	45% reduction of fines
Second applicant	Participant	65% reduction of fines	35% reduction of fines
	Leader, Originator, Coercer	50% reduction of fines	25% reduction of fines
Third applicant	Participant or Leader	None	None

*At the discretion of the PCC

However, joint applications between two or more officers of the same entity are allowed.

Marker system

The program uses a marker system to protect an applicant's place in the queue. That is, applicants are placed in a queue according to the order of their Marker Request Form (MRF) submission. The applications are then assessed sequentially, starting from the earliest applicant. When the application is withdrawn or abandoned by the applicant, or rejected by the PCC, the next applicant is given the opportunity to qualify for the program.

The PCC requires that the relevant conduct be sufficiently described in the MRF so that the PCC Leniency Committee could determine if there are other applicants for the same cartel activity.

The accomplished MRF may be submitted through registered mail, private courier, or email (leniency@phcc.gov.ph). Once the MRF is received, the PCC issues a marker in the form of a letter indicating the date and time the accomplished MRF was received and the description of the anti-competitive agreement reported. The applicant is given 30 days initially, to gather the necessary information and evidence to qualify for the program. The Leniency Committee may extend the deadline.

The applicant must submit information and evidence in a sealed envelope or folder. Evidence such as emails, letters, minutes of meetings, or any other piece of evidence that can prove the existence of the anti-competitive agreement shall be given significant value by the Leniency Committee.

The PCC then evaluates information and evidence submitted to it, as to whether these would enable the Commission to carry out a targeted investigation on the alleged anti-competitive agreement, or provide sufficient basis for initiating adjudication. If there is an ongoing investigation on the said conduct, the PCC shall assess whether or not the information and evidence provided add significant value to the investigation.

Mitigating liability

Leniency may only be granted to two beneficiaries: one for immunity of suit and another for reduction of fines. Further, when the conditional grant of immunity of suit is revoked, the next in line will not be entitled to this benefit.

In addition to leniency, the PCC has other options available to mitigate liability. The violator may, for instance, consider entering into a settlement (see Sec 2.17, Article VIII, Rule IV of the 2017 Rules of Procedure of the PCC) or avail of non-adversarial remedies (Section

34, PCA; Rule III, 2017 Rules of Procedure of the PCC).

For more information, visit the PCC website (phcc.gov.ph/leniency-application/) or contact the Leniency Committee (leniency@phcc.gov.ph or +632 771-9777). ■

Minimum requirements for submission to PCC

The information and evidence provided by the applicant must include the following:

- Entities involved in the alleged anti-competitive agreement;
- Affected product(s) or service(s);
- Affected geographic area(s) or territory(-ies);
- Duration of the alleged anti-competitive agreement;
- Reasons why the entity is eligible under the Leniency Program;
- Nature of the alleged anti-competitive agreement; and
- Information on previous leniency applications with the PCC and other competition authorities outside the Philippines in relation to the alleged anti-competitive agreement



ADVOCACY ROUNDUP

MYANMAR COMPETITION COMMISSION LEARNS THE ROPES FROM PCC



Officials and representatives of the Myanmar Competition Commission with PCC Chairman Arsenio Balisacan (middle, seated) and Commissioner Johannes Bernabe (leftmost, seated).

Officials and representatives of the Myanmar Competition Commission (MmCC) went on a study tour at the Philippine Competition Commission (PCC) on May 7-10. Their goal was to learn from the PCC's birthing pains and early challenges.

Established on October 31, 2018, MmCC is the youngest competition authority in Southeast Asia. The delegation was led by MmCC Chairman

Than Myint, who also serves as the head of Myanmar's Ministry of Commerce. The participants included MmCC commissioners and staff representing the Union Attorney General's Office, Ministry of Commerce, Ministry of Home Affairs, Ministry of Transport and Communications, Ministry of Industry, and Union of Myanmar Federation of Chambers of Commerce and Industry.

The study tour was organized by the PCC, in partnership with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) in the Philippines and the Friedrich Naumann Foundation.

It is part of PCC's long-term regional cooperation with different competition authorities, especially in Asia and the Pacific – *R. Advincola* ■

PCC, PHILJA BRING COMPETITION LAW SEMINAR SERIES TO HIGH COURT

The Philippine Competition Commission (PCC) conducted a seminar on competition law and policy at the Supreme Court (SC) on April 26. This was part of the Commission's ongoing seminar series designed for court lawyers, officials, and justices.

The seminar discussed the salient points of the Philippine Competition Act, the PCC as its implementing body, the landscape of market competition in the country, and the role of economics in competition cases.

PCC Commissioner Amabelle C. Asuncion and Atty. William E. Kovacic, former Chair of the US Federal Trade Commission, served as resource persons. SC Chief Justice Lucas P. Bersamin the closing remarks.

Earlier, the PCC, in cooperation with Philippine Judicial Academy (PhilJA), conducted a similar training for Court of Appeals (CA) lawyers in Cebu City on April 23-24. Participants mostly hailed from CA Cebu and Cagayan De Oro.

The two-day event was facilitated by competition experts Dr. Derek Ritzman and Atty. Kovacic, alongside PCC Chairman Arsenio Balisacan and Commissioners Asuncion, Johannes Bernabe, and Macario De Claro, Jr.

PhilJA, which was created by the SC in 1996, aims to develop judicial competence by providing globally relevant, responsive and effective training for the judiciary. – *R. Advincola* ■



from left) PCC Commissioner Amabelle C. Asuncion; Atty. William E. Kovacic, former Chair, US Federal Trade Commission; and Supreme Court Chief Justice Lucas P. Bersamin.

PCC CHIEF JOINS BOOK LAUNCH ON COMPETITION LAW

Philippine Competition Commission (PCC) Chairman Arsenio Balisacan joined fellow competition law advocates in launching the book, *Competition Law Analysis: A Comparative Approach*, last March 27. Authored by Judge Cyrus Goco and Patricia Jasmine Alcoba, the book seeks to raise awareness of and contribute to the discourse on competition policy in the Philippines.

In his speech, Balisacan noted that while the Commission has learned a lot from more mature jurisdictions, it remains constrained because antitrust law is relatively new in the Philippine legal system. “Our decisions on enforcement and

merger cases are made on a test-case approach, and these, in turn, are shaping the body of precedent decisions, which will help clarify the meaning of the law for enforcers and businesses alike,” he explained. While there is a dearth of local antitrust jurisprudence, Balisacan assured that utmost diligence is exercised in the adjudication of cases so that decisions are based on sound legal and economic analyses.

Given this context, Balisacan said competition authorities, students, and practitioners of competition law and policy should welcome the insights of Goco and Alcoba, as detailed in their book. He hailed the

book’s timely publication, noting that “it contributes to filling the gap in the existing literature on competition law analysis, and most certainly increases our appreciation of the considerations underlying the decision-making processes of different competition jurisdictions.”

During the launch, Goco and Alcoba delivered presentations on Philippine competition law history and their rationale for writing the book.

The book launch was part of the Fulbright Perspectives event series. – L. Gorosin ■

MULTINATIONAL FIRMS, LEGAL REPS BUCKLE DOWN IN M&A WORKSHOP



Atty. Anton Arcilla of the PCC Mergers and Acquisitions Office explains how stakeholders can submit written complaints to the PCC.

Representatives of multinational companies (MNCs), government agencies, and the academe participated in a seminar on competition law and policy conducted last May 3 in Quezon City by the Philippine Competition Commission (PCC).

The PCC saw the relevance of the seminar given the current high appetite of businesses for mergers and acquisitions. The seminar tackled the rules on buyouts and exemptions, merger notification and review

processes, special rules on joint ventures and land acquisitions, qualification for exemptions and non-coverage, and PCC’s *motu proprio* powers. It included a special session on the PCC’s Leniency Program for competition enforcement.

The participants were from the Filipino-Chinese Chamber of Commerce, Federation of Philippine Industries, German-Philippine Chamber of Commerce and Industry, Inc., Philippine Franchise Association,

Philippine Retailers Association, State Investment Trust Inc.,

Honda Cars Philippines, Nestle Philippines, Inc., PLDT Inc., Tosoh Polyvin Corporation, National Bureau of Investigation, Office of the Solicitor General, Puno Law, Ateneo Law, TMI Associates, University of the Philippines College of Law, and University of Santo Tomas Faculty of Civil Law. – L. Gorosin ■

IN THE NEWS

Watchdog drafts rules for faster M&A review

The Philippine Competition Commission (PCC) has drafted rules for faster review of mergers and acquisitions (M&A) deals that are relatively simple or have little local impact. (*Janina Lim, Business World, 4 April 2019*) ■

Consumers help watchdog crush monopolies, break social divide

Three years since it was formed, the country's antitrust body, the Philippine Competition Commission (PCC), has scrutinized billion-peso mergers spanning telecommunications and transport. Now, consumers are in on the fight with a steady stream of complaints to Balisacan's office. (*Joel Guinto, ABS-CBN News, 10 April 2019*) ■

Businesses reminded to allow healthy competition, not collusion

The Philippine Competition Commission (PCC) reminded all businessmen not to collude with each other and allow healthy competition among themselves for the good of the economy and the consumers. (*Ador Vincent Mayol, Inquirer, 25 April 2019*) ■

Developments in the Philippine Competition Commission's enforcement activities

The Philippine Competition Commission (PCC) Enforcement Office launched a leniency/whistleblower program offering immunity from suit and reduction of fines to cartel members who will provide information that will help the PCC investigate and prosecute cartels. This forms part of the PCC's increased efforts in cracking down on anti-competitive agreements and conduct. (*Korina Ana T. Manibog, Business World, 14 May 2019*) ■

DICT scraps cap on common tower pool

Information and Communications Technology Acting Secretary Eliseo Rio told the Philippine Star, "It was the Philippine Competition Commission that advised us not to have a cap on towercos but instead let market forces determine how many the telecommunication industry can accommodate". (*Richmond Mercurio, Philippine Star, 30 May 2019*) ■

OTHER PUBLICATIONS



Electronic publications are available at the PCC website.
www.phcc.gov.ph



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M&A

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12

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212