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PHILIPPINE COMPETITION BULLETIN

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**PHILIPPINE
COMPETITION
COMMISSION**

Ensuring businesses compete and consumers benefit

COMPETITION REGULATION FOR BIG DATA-DRIVEN INDUSTRIES DISCUSSED

by Paul Jeffrey Ballentos

In the digital age, traditional business practices are continuously being challenged by new business models such as online merchants and other platforms. Since competition rules and regulations are anchored on traditional business models, competition tools need fine-tuning to cope with the dynamic business landscape.

In this regard, Indonesia's Commission for the Supervision of Business Competition (KPPU), the Competition and Consumer Commission of Singapore (CCCS), and the Japan Fair Trade Commission (JFTC) organized a workshop on Big Data and Competition Law, which was held last August 6-7 in Singapore.

A key issue involving big data is data sharing, which refers to making data available to internal or external stakeholders. Its objective is to derive new insights beyond one's own data sets or solve business problems in a targeted way.

Sharing data problematic

Data sharing between competitors might be a problem, particularly if these are data on confidential business information. "In general, data exchange should not affect competition if data shared are historical, sufficiently aggregated, and not commercially sensitive, strategic or confidential information; or where data are shared with consumers or government agencies," explained Rachel Lee, Assistant Director of CCCS Enforcement Division. She noted, however, that exchange of commercially sensitive data between competitors may lead to coordination, thus diminishing competition.

Sharing data may also be problematic in the following cases: only a few companies are operating in the market; data exchange is frequently conducted; the data are sensitive, strategic, and confidential; and data exchanged are limited to certain participating companies in the market to the exclusion of their competitors and buyers.

While data sharing among competitors may infringe competition laws, Lee said there are instances when these are pro-competition. One example in Singapore is the National Electronic Healthcare Records system. This system facilitates verification of patients' past medical records, resulting in overall efficiencies (e.g., through reduction in the time spent in verifying records and lowering possibilities of duplication of treatments or medical tests).

Algorithm technology also poses potential competition issues. While the use of algorithms generally brings about efficiency, it may foster collusion by enhancing market transparency and increasing frequent interactions between firms. Lee said there are ongoing discussions on future developments of algorithm technology and the adequacy of the existing competition enforcement framework.

Source of market power

Data accumulation as source of market power may serve as an indicator of dominance in data-driven industries. Generally, however, mere accumulation of big data does not immediately prove the dominant position of a firm. Lee shared two key questions to assess market power of data-driven industries: Can data be replicated under reasonable conditions by competitors? Will the use of data likely result in a significant competitive advantage? Assessment of dominance must consider features of data-driven industries, such as network effects, multi-homing, and dynamism of markets.

On the other hand, even if a firm is found to be in a dominant position, there will be no breach in competition laws, unless the firm uses its dominance to engage in conduct that substantially lessens competition.

Competition issues may also arise from data privacy and intellectual property (IP) rights. Lee pointed out that the objectives of competition law and policy and of data privacy are not mutually exclusive. For instance, data portability could potentially reduce barriers to entry for new entrants or smaller companies, due to reduced

WHAT IS BIG DATA?

According to Assistant Director Rachel Lee of CCCS Enforcement Division, **big data** refers to a set of large data of various forms generated and collected from different sources and analyzed to derive valuable insights.

Dimensions of Big Data:



Volume - quantity of data generated or collected

This determines the potential value and insight that can be derived from it, in contrast to few data points.



Variety - different data types or sources for analysis

More valuable insights may be derived from it, which might not be possible with data from traditional types or from limited data sources.



Velocity - speed at which data are generated and processed

High-speed processing allows for swift and accurate actions and decisions based on valuable insights and conclusions.



Value - quality of insights derived from data sets

This involves examining data sets to draw conclusion about the information they contain.

NBI CONDUCTS TRAINING ON INVESTIGATION, INTELLIGENCE GATHERING FOR PCC

by Leanne Gorosin

The Philippine Competition Commission (PCC) has the sole and exclusive authority to initiate and conduct fact-finding investigations or preliminary inquiries for the enforcement of the Philippine Competition Act (PCA), either *motu proprio*, upon the filing of a verified complaint or upon referral by another regulatory agency. To boost its capacity in conducting investigations and intelligence gathering operations, the PCC recently partnered with the National Bureau of Investigation (NBI) Training Academy.

NBI Director/Superintendent and Atty. Orlando Navallo, and Special Investigator Chester Viñalon Gans II facilitated the conduct of a seminar on surveillance and other intelligence gathering techniques for lawyers, investigation agents, economists, and other staff of the PCC and the Department of Justice last July 18-20 in Antipolo City.

Navallo stressed that investigations must be in-depth and comprehensive so that investigators could render complete, accurate, and reliable conclusions.

In facilitating inquiries, agents must maintain the highest standards of integrity and ethical conduct, understand the levels of confidentiality and security of gathered evidence, demonstrate professionalism and objectivity, act with circumspection, and have utmost respect for human rights.

It is likewise essential that investigators are knowledgeable of their agency's mandate, jurisdiction, policies, and procedures, and must be able to properly exercise their skills in intelligence gathering, interrogation, statement taking, and evidence collection.

In interviewing witnesses, protocol must be followed to ensure the integrity of the entire operation. This includes rapport building, proper introduction, witness' narration of events,

questioning, and recap/closing. In cases where an interviewee may give an incomplete account, the agent must ask questions systematically to gather pertinent information from the witness.

Navallo said investigators resort to surveillance when there are no open sources of information and/or the case objectives call for it. "In police work, keen observation is necessary to perceive investigative leads, to evaluate the validity of statements by witnesses, and to make accurate and objective reports," he explained. In documenting observations, agents usually use both quantitative and qualitative descriptions in their reports. These accounts serve as bases for investigators to draw inferences relevant to the case.

Navallo said investigations "should always remain objective and impartial in establishing facts." Investigation agents should be perceptive of different angles and possibilities when conducting inquiries. Otherwise, the entire investigation could become fixated on a single theory, which might exclude other important facts that may potentially affect the case.

"Investigations must be in-depth and comprehensive so that investigators could render complete, accurate, and reliable conclusions."

How to conduct an investigation

1. Determine the investigative problem. Agents must identify the main issues of the case that must be resolved.
2. Determine the basic information, such as the 5Ws (what, who, when, where, why) and 1H (how).
3. Develop an investigative strategy, from goal setting to identification of interviewees for other possible sources of information.
4. Aside from determining facts, collect information that is relevant and material in proving or disproving a fact in the case.
5. Conduct interviews and take sworn statements. Witnesses include those with firsthand knowledge of the event, those named by the complainant, those whom other witnesses ask you to interview, and those who worked with the complainant, with another witness, or with the subject.
6. Document the entire process using photographs, affidavits, audio and video recordings, or any material admissible in court.
7. Examine the gathered information. Classify information as to whether testimonial, documentary, or physical. Assess its credibility.
8. Establish the finding of facts. Analyze each allegation in the light of all information gathered and applicable laws.
9. Conclude based on established facts and recommend appropriate action. In writing recommendations, agents must state whether or not the case objectives are met and the law that was violated, if any.

ON THE ROAD PCC PUSHES FOR GREATER COMPETITION AWARENESS AT THE LOCAL LEVEL

To be fully effective, competition policy must be reflected by a culture of competition that is shared by everyone - from the government to the private sector, civil society and the general public. In its continuing effort to mainstream competition policy, the Philippine Competition Commission (PCC) conducted a series of regional roadshows in August, aimed at raising awareness of competition at the local level.

Each roadshow featured a public exhibit on the Philippine Competition Act (PCA), a series of discussions on the salient points of the PCA, and a public forum that provided a platform for discourse with the local stakeholders.



PCC kicked off its 2018 regional roadshow in Cagayan de Oro City on August 9. In the photo are (from left) Xavier University President Roberto C Yap SJ, NEDA Assistant Regional Director Mae Ester Guiamadel, PCC Executive Director Kenneth Tanate, and NEDA Region X Director Leon M. Dacanay, Jr.



Local government representatives at the opening of the roadshow in Tacloban City held on August 16.



Representatives from local businesses, academe, government sector, and NGOs during the Cagayan De Oro City roadshow.



Students from the Eastern Visayas State University actively participated at the roadshow in Tacloban City held last August 16.



Mayor Hermenegildo Gualberto (first row, left), PCC Economics Office Director Benjamin Radoc (first row, middle), and NEDA Region I Director Nestor Rillon lead the opening of the exhibit on competition policy and law at San Fernando City Hall on August 30.



PCC Executive Director Kenneth Tanate joins DTI Provincial Director Desiderio P. Belas, Jr. and NEDA Region VII Director Bonifacio G. Uy.

YOUNG COMPETITION AGENCIES BENEFIT FROM TECHNICAL ASSISTANCE

by Ryan Israel Advincula

Official development assistance (ODA)—which includes grants, loans, and technical assistance—is a vital funding source for many developing countries in terms of implementing programs and building institutional capacities.

A study published by the Organisation for Economic Co-operation and Development (OECD) earlier this year shows that the European Union and its member states continue to be the world’s leading provider of ODA, with a combined 75.7 billion euros (Php 4.56 trillion) worth of commitments in 2017.

As a young agency, the Philippine Competition Commission (PCC) has also taken advantage of ODA in the form of technical assistance from more experienced antitrust and competition jurisdictions.

Coordinating technical assistance

In his presentation at the 14th East Asia Top Level Officials Meeting held in Sydney, Australia last August 29, PCC Chairman Arsenio M. Balisacan said the Philippines, being new to having a centralized body ensuring fair competition, has limited domestic knowledge and resource constraints as regards competition enforcement. Hence, there is a pressing need to tap the wealth of experience and expertise from more mature jurisdictions through technical assistance.

The PCC coordinates technical assistance for competition in the country. This arrangement enables the Commission to evaluate and identify needs and constraints, ensure coherence with the overall national development strategy, determine the absorptive capacity of the agency and its staff, and minimize overlaps and duplication of technical assistance.

The PCC experience

Balisacan shared that the PCC has come up with a Strategic and Operational Business Plan 2017-2019. This plan guides the PCC in addressing its immediate needs after its two-year transitory period ended on August 8, 2017 and in achieving its key targets by end of 2019. The plan was developed through numerous needs assessment, prioritization, and planning exercises.



The plan considers donor agencies, intergovernmental organizations, and academic institutions - in addition to counterpart competition agencies - that can help the PCC in its internal capacity-building and external advocacy efforts.

Earlier, the PCC launched a Partnership for Competition Development Forum, which serves as a venue or platform for:

- consultations and dialogues with development partners;
- investment programming to optimize and harmonize the flow of existing and potential technical assistance; and
- the creation of the Institutional Development Assistance Framework 2017-2019, which contains the technical assistance and support pledged by development partners in the Forum.

The Institutional Development Assistance Framework 2017-2019 facilitates the identification of priority areas for capacity building and ensures that overlaps are avoided; adopts a programmatic approach to facilitate planning and delivery of technical assistance; and assists development partners in better targeting their resources.

Balisacan shared that the PCC has established a Technical Service Support Unit, which is responsible for ensuring the consistency of technical assistance with PCC’s plans and framework. Specifically, the unit:

- Facilitates requests for technical assistance from PCC units and links them with potential development partners;
- Shares inventory of completed, ongoing, and proposed technical assistance to avoid overlaps and duplication;
- Enables complementarity among development partners by advocating “division of labor” based on their mandate and core competencies or niche; and
- Ensures flexible and active collaboration between PCC and development partners from planning to implementation and monitoring of technical assistance.

ADVOCACY ROUNDUP

BERNABE UNDERScores NEED TO HARMONIZE COMPETITION LAWS

Commissioner Johannes R. Bernabe of the Philippine Competition Commission (PCC) served as one of the panelists at the 2018 Association of Southeast Asian Nations (ASEAN) Law Conference held on July 25-28 at the Raffles City Convention Centre in Singapore.

The conference coincided with the 13th general assembly of the ASEAN Law Association (ALA), a nongovernment organization for all branches of the law profession – judges, law teachers, law practitioners, and government lawyers. Established in 1979, ALA promotes convergence in laws and the rule of law in the ASEAN.

During the session on “Competition Law in the ASEAN Economic Community,” Bernabe underscored the need to harmonize competition laws of various ASEAN competition regimes to facilitate the growth and development of the ASEAN economic community.

He noted that information sharing among ASEAN members depends on how different member-states treat confidentiality. “If member states could provide waivers of confidentiality, that would go a long way toward promoting cross-jurisdictional cooperation. Without such waivers, competition authorities would not be able to use the information provided by their counterparts,” Bernabe said.

At the conclusion of its 13th general assembly, ALA had a leadership change: Chief Justice Sundaresh Menon and Mr. Paul Quan, both of Singapore, were elected as president and secretary-general, respectively. The next general assembly will be in Malaysia in 2021. – *R. Advincula* ■

PCC, TFTC CONDUCT INTERACTION PROGRAM

In its continuing efforts to strengthen staff capacity, the Philippine Competition Commission (PCC)

partnered with the Taiwan Fair Trade Commission (TFTC) for an interaction program held in Taipei last July. The three-day program provided an opportunity for knowledge sharing between the two competition agencies to enhance and strengthen cross-border cooperation and coordination. It centered on familiarizing the participants with each agency’s policies and procedures, so that they can assess how they can build on their strengths and improve on their processes.

The representatives of the two agencies discussed the challenges and issues confronting emerging markets, such as digital economies and e-commerce. The TFTC representatives also shared their experience in rules and regulations on merger control and enforcement of anticompetitive agreements and abuse of dominance.

The PCC delegates observed how Taiwan’s antitrust law was put to action through actual cases dealt with and investigations conducted by TFTC. TFTC’s Information and Economics Analysis Office also provided lectures on the economic tools and concepts used by their agency in performing competition analysis.

Atty. Joemyl J. Baloro of the Mergers and Acquisitions Office said the sessions provided a fresh perspective on how economic formulas may be used for merger analysis. He observed that while generally the tools and concepts are the same, their applications vary. TFTC’s simplified procedure and notification exemptions are useful references for the PCC as it crafts guidelines on expediting its merger review process.

The sessions on enforcement against anticompetitive agreements, abuse of dominance, and case studies gave Atty. Nina Remedios R. Mejia of the Competition Enforcement Office

insights on how litigation in antitrust cases proceeds. The sessions on economic analysis in support of enforcement cases afforded her a better understanding of the interface between economics and competition law and how to appreciate economic evidence.

The other PCC delegates were Renz Myron M. Manahan, Lea C. Gomez, and Justine Kaye O. Solano. – *L. Gomez* ■

ASEAN ANTITRUST STAFF TRAIN IN COMPETITION ECONOMICS

A lawyer and an economist of the Philippine Competition Commission (PCC), along with other representatives from different ASEAN competition authorities, participated in the Japan-ASEAN Integration Fund (JAIF) Training Course on the Economics of Competition Law Enforcement held last July 3-6 in Bali, Indonesia.

The course enhanced the participants’ understanding of the increasingly important role of economic analysis in competition law enforcement. It discussed various economic methods and techniques used in competition law enforcement and the appropriate types of economic analyses relevant to a particular competition law case.

It was hosted by Indonesia’s Commission for the Supervision of Business Competition (KPPU), in cooperation with the Japan Fair Trade Commission (JFTC). Speakers included Hideyuki Shimozu of JFTC Strategic Economic Analysis Team, Dr. Eugenia Mardanugraha of the University of Indonesia, Assistant Director Atsuko Izumi of the JFTC Economic Affairs Division, and Taufik Ariyanto, KPPU senior economist.

The PCC representatives were Atty. Katherine Baldos and Jestoni Olivo. – *L. Gorosin* ■

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switching costs for consumers. Lee added that adherence to personal data protection rules is used as a defense against the observance of competition law.

The ruling in an IP case¹ in Singapore revealed that there is no inherent IP protection over raw data. As competition and IP law issues are not mutually exclusive, even if data were found to be protected by IP rights, questions remain over: (1) whether or not the firm occupies a dominant position; and (2) whether or not a refusal to supply the protected data constitutes an abuse of dominance.

Fresh perspective on e-markets analysis

Data analysis traditionally refers to the use of business intelligence tools in business operations and performance management, and is usually focused on identifying trends and historical patterns. However, the advent of more sophisticated computing tools has paved the way for more advanced tools in analytics, such as predictive analysis and machine learning.

Since digital markets and data-driven industries differ from traditional business structures, competition tools must be modified to cope with the dynamism. Dr. Hiroaki Ishigaki, managing director of NERA Economic Consulting, emphasized the need to understand the nature of competition in platform markets, noting that competition agencies must gather information by means of interview, survey, or data analysis.

Platform markets are usually multi-sided markets. A multi-sided market is defined as a "market in which a firm acts as a platform and sells different products to different groups of consumers, while recognizing that the demand from one group of customers depends on the demand from the other group(s)."² Ishigaki underscored the importance of recognizing network effects and feedback loops in the measurement of market power of multi-sided platforms. Direct network effects illustrate that "the more people connected to a network, the more valuable that network becomes to each person who is part of it." In the case of indirect network effects, "people use a search engine for free, and the

advertiser uses the platform for advertising." Positive feedback loops show that each side attracts more of the other.

Market share is one of the widely-used indicators in antitrust analysis. Ishigaki cautioned, however, that while supply shares and concentration may be valuable indicators of market power, there is a need for careful interpretation. He noted that short-run market shares may not be a reliable measure of market power for platform-based markets. Competition authorities should aim to identify longer-term measures of market power, such as sustained high levels of market share, rather than measures that take a snapshot of a market in the short run.

Measures such as margins, profitability, and prices can be used to assess market power, but their results must be carefully interpreted. A positive margin, for instance, does not necessarily imply monopoly power. Ishigaki explained that "positive margin on advertising service may cover the free service cost on the other side of service, which may not be related to monopoly power."

Free service also does not imply "no monopoly power." This is because users pay the fee by, for example, supplying private information such as keywords or search results.

Ishigaki observed that agencies tend to focus on online platforms' commercial service aspect, such as advertising. "Free service can be considered as the required input for commercial services," he said.

Similarly, as in the case of market share, short- or long-run margin, profitability, and price may be informative if their computed "changes over time" are considered. For example, to examine an indication of market power, authorities may consider if the firm's commission levels increase with market concentration.

The two-day workshop was supported by the Japan-ASEAN Integration Fund. The PCC was represented in the workshop by Assistant Director Lianne Ivy P. Medina of the Mergers and Acquisitions Office and economists Carlos L. Tolentino II and Cara T. Latinazo.

¹ Global Yellow Pages Ltd. vs. Promedia Directorites Ote Ltd.

² Pike, C. (2017). Rethinking the use of traditional antitrust enforcement tools in multi-sided markets

IN THE NEWS

Competition Commission hopes to improve cross-border enforcement

The Philippine Competition Commission (PCC) is forging ties with antitrust authorities in Southeast Asia to boost its enforcement activities against foreign firms operating in the Philippines. At the hearing of the Congressional Oversight Committee on Competition, PCC Chairman Arsenio M. Balisacan identified "cross-border competition concerns" as among the emerging challenges facing the agency three years into its operations. (*BusinessWorld*, July 26, 2018) ■

Healthy Competition

In its thrust to ensure a level playing field, the Philippine Competition Commission is set to probe various sectors, particularly the manufacturing industry, for potential anticompetitive business conducts. PCC Chair Arsenio Balisacan said the antitrust body would look into a study by Erlinda Medalla, a renowned research fellow at the Philippine Institute of Development Studies, that listed priority sectors most exposed to anticompetitive behavior. Curbing such anticompetitive behavior is critical in helping Filipinos alleviate the effects of inflation and cope with economic changes. (*The Visayan Daily Star*, July 4, 2018) ■

Do you know what corruption is?

Antitrust laws criminalize anticompetitive agreements such as price-fixing and other cartel-like activities. These business conducts are considered corrupt practices and are investigated by the Philippine Competition Commission. (*Business Mirror*, August 13, 2018) ■

PCC to improve merger reviews, enforcement

The Philippine Competition Commission aims to refine its guidelines on merger reviews, revisit notification thresholds, and strengthen its enforcement capability through a leniency program. The Commission is also looking to set up an IT Forensics Laboratory and start-up toolkit for cartel investigations to further strengthen its enforcement capability and employ bid-rigging screening tools with its partner agencies. (*BusinessWorld*, September 21, 2018) ■

M & A DASHBOARD

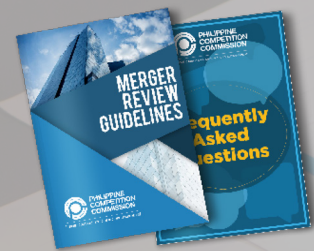
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38

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