PHILIPPINE COMPETITION COMMISSION
Ensuring businesses compete and consumers benefit

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Closure of Investigation on the Alleged Violation by Entities of the Philippine Competition Act in the Provision of Ophthalmological Services

Industry:	Ophthalmological Services
Case Reference:	CEO-201703-FAI003
Case Closed:	07 December 2017
Issue(s):	Anti-competitive agreements and abuse of dominance in the provision of ophthalmological services
Relevant Provision(s):	Sections 14 (b), (c), 15 (b), and (i), Philippine Competition Act

I. Background

On 13 December 2016, the Philippine Competition Commission (PCC), through the Enforcement Office, commenced a preliminary inquiry on the verified complaint filed by Mr. David Harold Gosiengfiao, M.D. against the Philippine Academy of Ophthalmology, Inc. (PAO) and Philippine Health Insurance Corporation (PhilHealth), for alleged violations of the Philippine Competition Act (PCA) in its policies and practices for rendering ophthalmological services.

In March 2017, after the conduct of preliminary inquiry, the Enforcement Office opened a full administrative investigation for possible violations of Sections 14 (b), (c), 15 (b), and (i) of the PCA, which prohibit anti-competitive agreements, and abuse of dominant position by imposing barriers to entry or by limiting production, markets or technical development to the prejudice of consumers, respectively.

PAO is a professional organization of ophthalmologists. It was founded in 1945 for the purpose of elevating the practice of ophthalmology and improving ophthalmological services in the Philippines through education, scientific research, and exchange among ophthalmologists in the country and abroad.

PhilHealth is a government-owned and controlled corporation and a covered entity under the PCA. It administers the National Health Insurance Program, with the

mandate of providing universal coverage to ensure that essential goods, health, and other social services are available to all the people at affordable cost.

II. Alleged Violations

A. Anti-Competitive Agreements

The alleged anti-competitive agreements are as follows:

1. *Between PAO and its members*. In the PAO Code of Ethics ("PAO Code of Ethics"), there is an agreement banning: (a) the solicitation of patients; (b) the use of free eye screening to solicit patients; and (c) networking with non-governmental organizations (NGOs) and local government units (LGUs) to solicit patients.

2. *Between PAO and its members*. In its Mission Guidelines, there is agreement that implicitly divides the territory of practice or establishes barriers to entry, as an ophthalmologist is required to first seek permission from the local ophthalmologist of an area to conduct a medical mission therein.

3. *Between PhilHealth and PAO.* Through a Memorandum of Agreement (MOA), PhilHealth also bans the activities listed in item (1) above for all its accredited ophthalmologists.

4. *Between PhilHealth and PAO.* Through the MOA, PhilHealth payments for ophthalmological services that are provided through medical missions are conditioned on item (2) above. This allegedly results in discriminatory treatment of PhilHealth-accredited PAO and non-PAO ophthalmologists.

B. Abuse of Dominant Position

PhilHealth and PAO were also alleged to have abused their dominant position, as follows:

1. *PhilHealth*. In its accreditation policy, a certificate of good standing from the Philippine Medical Association (PMA) is required, which allegedly imposes a barrier to entry.

2. *PhilHealth.* Through its benefit payment policies, PhilHealth imposes a limitation on eye surgeries of up to 10 patients per day and 50 patients per month, effectively restricting the output of ophthalmologists.

3. *PAO and PhilHealth.* PAO and PhilHealth harassed the Philippine Eye Institute (PEI) by railroading the investigation and prosecution of

alleged fraudulent claims, resulting in damage and injury to PEI's reputation.

III. Summary of Findings

A. Alleged violations under (A)(1) and (A)(3) are not competition concerns

The market for ophthalmological services, like most health care markets, is characterized by information asymmetry, especially with respect to the quality of care. This means that health care providers and patients have asymmetric knowledge of the quality of care, with the former at an advantage. Medical information is provided by health care providers to patients, who are typically unable to measure the quality of care at the point of service provision. The quality measure observable by patients, which comes with a lag, is the outcome of health care, for example, whether or not eyesight improved or was restored.

One accepted approach to quality assurance among health care providers is self-regulation through professional societies. The promulgation of a code of ethics or guidelines on the standard of care are forms of self-regulation. Medical professionals have an interest to self-regulate to maintain the public's trust in the medical profession.

While the PAO Code of Ethics qualifies as an agreement under the PCA, the agreement does not appear to have the object or effect of substantially reducing competition in the market. The PAO Code of Ethics was promulgated to ensure that quality deterioration that may arise through the solicitation of patients, especially in large volumes, is prevented. Risks associated with this kind of activity include unnecessary surgeries that could result in irreversible damage. The PAO Code of Ethics is a means to safeguard the well-being of patients.

Among medical practitioners, there is general consensus to prohibit the solicitation of patients. In the context of cataract operations, there were information received that free eye screening and linkages with NGOs and LGUs have been used as means or forms of patient solicitation. Banning both supports PAO's objective of ensuring quality and upholding ethical behavior among its members, thereby improving outcomes for patients.

For the above reasons, items (A)(1) and (A)(3) are not considered competition concerns.

B. Alleged violations under (B)(1) and (B)(2) are suitable responses to cost escalation concerns

The health insurance market is also beset with information asymmetries. The health insurance carrier faces moral hazard—the inability to monitor the actions of the insured and the health care provider—thus resulting in adverse systemic behavior such as overprovision of health care services. Another information problem is adverse

selection, which arises from the inability to observe the true health status of potential purchasers of health insurance. Both could result in the escalation of costs and thus, benefit payments.

The optimal responses to these information problems are well-known. These include (i) the imposition of benefit payment ceilings and (ii) an accreditation program for health care providers, which uses membership in a professional society (such as the PMA and PAO) as structural indicators of quality and ability. Both sets of responses serve to curb adverse behavior by both health care providers and consumers. These policies help ensure the financial viability of the health insurance program.

In view of the above, items (B)(1) and (B)(2) are found to be suitable responses to cost escalation concerns, and were not considered as competition issues.

C. Alleged violation under (B)(3) is not a competition concern

The PCA primarily seeks to regulate markets, not individual entities. The objective of the PCA is to ensure that competition in markets is safeguarded, and that harm to the process of competition—rather than harm to any competitor—is prevented.

On the other hand, PhilHealth is authorized to investigate and prosecute health care providers for violations of the National Health Insurance Act and its implementing rules and regulations. In the discharge of such function, any action of PhilHealth which can be the basis of an administrative or criminal complaint or charge shall be under the jurisdiction of the Office of the Ombudsman, Sandiganbayan, Civil Service Commission, or the regular courts of justice.

The alleged harassment was described to have been carried out by the PAO leadership in conspiracy with PhilHealth. In this context, it appears to be a ground for possible administrative or criminal charge rather than a competition concern. Consequently, the alleged harassment may be more properly investigated and determined in another forum.

Based on the foregoing, item (B)(3) cannot be considered a competition concern. Other remedies may be available to PEI for the alleged conduct.

D. Alleged violations under (A)(2) and (A)(4) are competition concerns but may no longer be subject of an investigation

In the market for ophthalmological services, PAO may have a dominant position as majority of ophthalmologists are members of PAO. Based on interviews of key informants, medical missions can adversely affect local ophthalmologists as these take away their potential patients. By imposing through the Mission Guidelines that visiting mission groups must seek permission from PAO itself or from the local ophthalmologists in the area, PAO may have imposed a barrier to entry and effectively limited competition. In effect, the Mission Guidelines facilitate the division of practice territory.

Hence, item (A)(2) is a competition concern.

Moreover, by virtue of the MOA between PhilHealth and PAO and PhilHealth Circular No. 13, series of 2013, all claims for ophthalmological services provided in medical missions shall be compensated only if there is an endorsement by PAO. Accordingly, it is expected that such endorsement is forthcoming only when there is compliance with the PAO Mission Guidelines.

It follows then that item (A)(4) is also a competition concern.

While items (A)(2) and (A)(4) are competition concerns, the same may no longer be subject of an investigation pursuant to the transitory clause under Section 53 of the PCA and the respective corrective actions by PAO and PhilHealth.

Section 53 provides for a transitory period in the implementation of the PCA. The effect of Section 53 is that for conduct that started before the effectivity of the PCA on 08 August 2015, only acts and agreements that continue after the transitory period can be pursued by the PCC. Any conduct which existed prior to 08 August 2015 but ceased prior to or on 08 August 2017 cannot be the subject of a proceeding before the PCC.

On 13 July 2017, PhilHealth requested the termination of its 2007 MOA with PAO. On 07 August 2017, PAO transmitted a letter to PhilHealth indicating their agreement to terminate the MOA. Accordingly, the 2007 MOA between PAO and PhilHealth has been terminated. Considering further that the termination of the 2007 MOA was done within the transitory period of the PCA, PAO and PhilHealth can no longer be subject to administrative penalties in accordance with Section 53 thereof.

PAO's voluntary act of suspending its Mission Guidelines, particularly the provision on obtaining permission and coordinating with the local ophthalmologist, effectively rectified what appeared to be an anti-competitive agreement. Considering further that the suspension of the relevant section of the Mission Guidelines was done within the transitory period of the PCA, PAO can no longer be subject to administrative penalties in accordance with Section 53 thereof. Notably, the relevant section of the Mission Guidelines has been permanently deleted.

IV. Conclusion

In view of the findings above and the subsequent action of the parties, the Enforcement Office formally closed its investigation on 07 December 2017. Nonetheless, in accordance with Section 2.13 of the 2017 Rules of Procedure of the PCC, closure of the full administrative investigation shall be without prejudice to the conduct of another inquiry or investigation if the circumstances so warrant.

It shall be understood that the foregoing findings are based solely on the facts and circumstances of this investigation and relevant only to the particular issues examined herein. This shall not be construed as a standing rule binding upon the courts or the Commission in other cases.