

Medalla, Erlinda M.

**Working Paper**

## Understanding the new Philippine competition act

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Philippine Institute for Development Studies  
*Surian sa mga Pag-aaral Pangkaunlaran ng Pilipinas*

## Understanding the New Philippine Competition Act

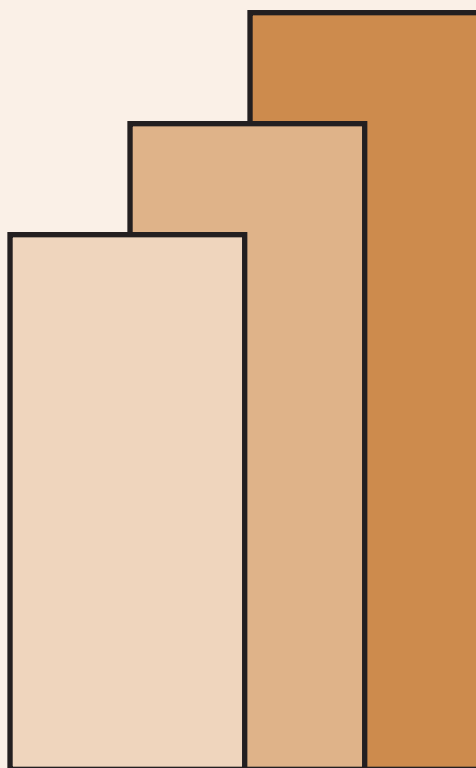
*Erlinda M. Medalla*

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For comments, suggestions or further inquiries please contact:

**The Research Information Staff**, Philippine Institute for Development Studies

18th Floor, Three Cyberpod Centris – North Tower, EDSA corner Quezon Avenue, 1100 Quezon City, Philippines

Tel Nos: (63-2) 3721291 and 3721292; E-mail: [publications@mail.pids.gov.ph](mailto:publications@mail.pids.gov.ph)

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## **Abstract**

After numerous attempts over more than a decade, the Philippine government finally enacted a comprehensive competition law, the Philippine Competition Act (Republic Act 10667) in July 2015. Before this breakthrough legislation, competition policy and law was scattered in about 30 different laws (for instance, the Philippine Constitution, Revised Penal Code, Consumer and Price Acts, and sector-specific regulations), with outdated provisions and hardly any jurisprudence. The passing of the law is only the first step. Much needs to be done to establish a truly working competition policy, including capacity building, and dissemination, information and education for the law. This paper attempts to contribute in this regard, by examining the provisions of the new law, and providing an overview of what it covers, what it can do, and what could be the possible implications for related policies. As such, this paper has three major sections. The first provides an overview of the rationale and objectives of competition law. The second discusses the major provisions of the new law, including some comments to highlight important provisions. The third provides an overall assessment of the Act and additional comments and observations. The section also looks briefly at the case of PLDT/Globe acquisition of the San Miguel Corporation's telecommunications assets.

Keywords: competition policy and law, Philippine Competition Act, anti-competitive behavior

## **Understanding the New Philippine Competition Act**

### **1. Introduction**

The passing of an anti-trust law was identified early on by the Aquino administration as one of its flagship bills. After numerous attempts to pass a competition bill in congress during the past two decades, the Philippine government finally enacted a law that will promote free and fair competition in economic activities and penalize anti-competitive conduct. Indeed, the enactment into law of the Philippine Competition Act (Republic Act 10667 signed into law on July 21, 2015) is a breakthrough legislation, especially in view of the developments in technology, and in global business and trade that have created new business models and intensified international production sharing and interlinked supply chains. The removal of cross-border trade barriers worldwide has facilitated these developments in global trade and production. With the significant reduction in cross-border trade barriers, the importance of the behind the border measures, particularly the domestic competition law, has become more prominent in the global agenda as the nature of the competition regulatory environment would eventually impact on the flow of trade and investment.

Indeed, most countries in the region have enacted new and comprehensive competition laws. On a regional level, ASEAN and APEC have identified a consistent competition regulatory and policy environment as a major pillar for reforms.

Before this milestone legislation, competition policy and law was scattered in about 30 different laws (for instance, the Philippine Constitution, Revised Penal Code, Consumer and Price Acts, and sector-specific regulations) mostly with outdated provisions and penalties on anti-competitive business practices that were hardly enforced/implemented. In the interim, the Aquino Administration passed Executive Order No. 45 in 2011, which designated the Department of Justice (DOJ) as the Competition Authority and created the Office for Competition (OFC) under the DOJ to carry out the duties and responsibilities such as to investigate cases involving violations of competition laws. The OFC has been tasked to prosecute violators, to enforce competition policies and related laws, among others, in order to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade. This EO, however, would refer to existing legislations with competition policy and law components. This is a major setback as prohibited acts and violations are not clearly defined, and fines and appropriate recourse are very much outdated.

While the new, long-awaited competition act is a much needed reform, the passing of the law is only the first step toward creating a truly working competition policy regime and a fairly competitive environment. The next immediate step is drafting and adopting a good set of implementing rules and regulations (IRR) and interim procedures. So much more needs to be done to establish a working competition policy, including capacity building, and dissemination, information and education for the law to create the intended efficient regulatory regime. This paper attempts to contribute in this regard, by examining the provisions of the new law, and providing an overview of what it covers, what it can do, and what could be the possible implications for related policies.

The need for a good understanding of the new competition law is highlighted by the controversy that followed soon after its signing into law, involving the PLDT and Globe acquisition of San Miguel Corporation's telecommunications assets. The paper will also attempt to provide a few insights into the controversy.

As such, this paper will have three major sections. The first will present an overview of the rationale and objectives of competition law. The second will discuss the major provisions of the new law, highlighting important provisions and possible implications. The third provides an overall assessment of the Act, with some additional comments and observations. The section will also look briefly at the PLDT/Globe acquisition of the San Miguel Corporation's telecommunications assets as a case in point. The fourth section will provide the summary and conclusions and possible recommendations.

## 2. Objectives and Rationale of Competition Policy and Law

The objective of competition law is universal and self-explanatory: to ‘*safeguard, protect and promote competition and the competitive process.*’ The rationale is also universal: to optimize overall welfare by promoting efficiency arising from good resource allocation, yielding the ‘right’ prices<sup>1</sup> of goods and services, with highest feasible quality and variety of available products. The benefits from competition are also well-understood. Under a competitive market, the rivalry among firms (actual or potential rivals) would ensure that firms try to outdo each other in terms of price and/or the quality of their product. Firms would need to produce the best quality of products at the least cost, and sell at the price dictated by the market. Otherwise, they would lose their market share to their competitors.

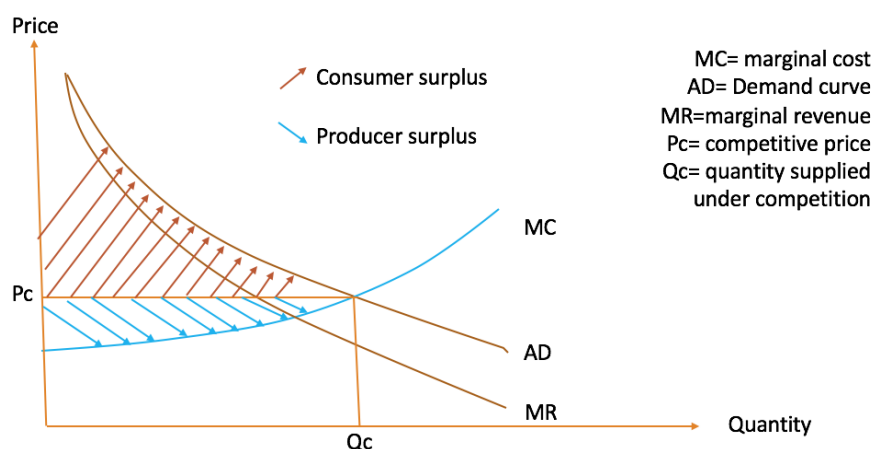
Thus, in a competitive setting, individual firms have no market power. They cannot dictate the selling price of their product simply by withholding or controlling supply. Instead, all the incumbent firms would face the same prevailing market price (given same product quality), who then decide how much to produce given that price. There need not be a large number of rival firms. What is crucial is open entry and exit of firms which make the market contestable.<sup>2</sup> That is, the rivals could be actual or potential, which would limit the firm’s market power and push it to produce at optimum quality, quantity and price. (Box 1 presents a classic graphical illustration of the impact and benefits from competition.)

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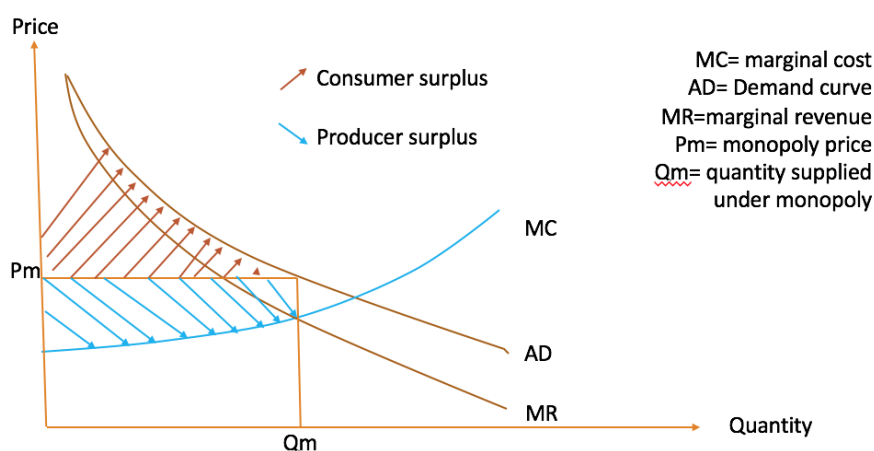
<sup>1</sup> Competitive prices which are free of excess profits.

<sup>2</sup> If the selling price of the incumbent firm/s is too high (yielding excess profits), rival firms would be free (and encouraged) to enter the market and offer better prices. This brings prices down to ‘competitive’ levels.

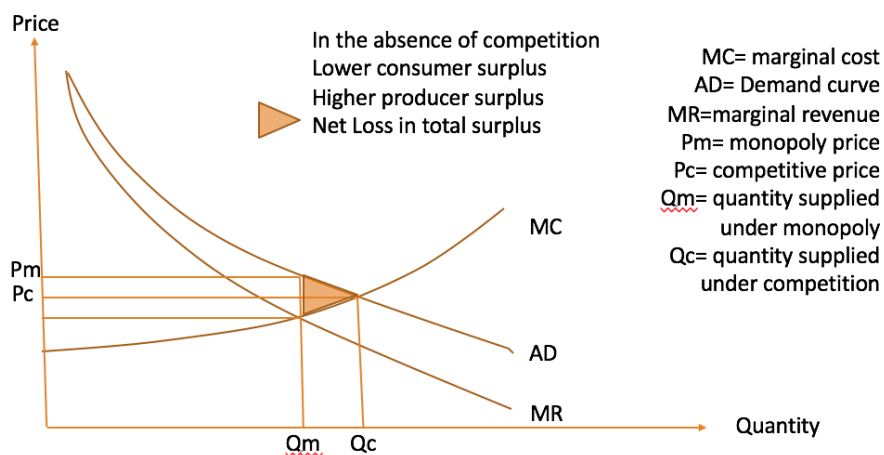
## Box 1. Graphical illustration of the impact of competition on consumer and producer surplus



Under perfect competition, there is free entry and exit of firms. As such, there will be supply as long as marginal cost is not more than the price the firm receives. The equilibrium price,  $P_c$  is where demand and supply meet.  $P_c$  is the competitive price faced by all firms.



Under a monopoly, where there is no rival firm able to enter the market, the producer can dictate the price it offers by limiting its output. It will supply output as long as its marginal cost does not exceed its marginal revenue ( $MR=MC$ ).  $P_m$  is the monopoly price, higher than  $P_c$ .



The monopoly power would depend on the elasticity of demand. The more inelastic the demand, the higher the monopoly power.

Without competition, the monopoly is able to increase its surplus at the expense of the consumer.

Overall welfare is reduced.

By eliminating or reducing the market power of a few dominant firms, competition policy is thus inherently a ‘pre-distribution’<sup>3</sup> policy that advances equity objectives.

On top of the immediate benefits of competition on equity, efficiency and consumer welfare, there are also dynamic gains from innovation that competition fosters. In addition, the culture of competition cultivates flexibility and adaptability that enables the economy to cope better with a constantly changing environment.

Given such benefits from competition, why is there such a need, in the first place, to have an explicit competition policy and law? The brief answer is: the market can and does fail and, left to itself, a competitive market process is not guaranteed. Then, if market fails, the economy foregoes these benefits from competition, and instead, there would be monopoly rents and costs in terms of losses in efficiency and consumer surplus.

There are many cases of market failures arising from various reasons and factors. The major reason is barriers to entry (and exit)<sup>4</sup> of firms, in one form or another: structural, firm behavior, government policy-induced.<sup>5</sup> Hence, competition is not necessarily a given even in a market economy. Even what can be considered only as an ‘effective’ competition<sup>6</sup> is not automatic. Thus, the need for competition law (and policy). As such, competition policy is not a ‘*laissez faire*’ or ‘free for all’ policy. The market, left to itself, can fail to produce desired competitive outcomes.

As earlier indicated, a major factor is the existence of barriers to entry (and exit) of firms. Barriers to entry bestow market power to the incumbent firm/s who would be able to dictate what level of output and at what price it would produce. As such, firms would no longer be price takers who would need to compete and do their best to produce and supply outputs with best quality at least costs.

Given that the market does fail, we go to the central question. How would a competition policy and law “safeguard, protect and promote competition and the competitive process?” The basic answer is by being able to correct the problem at the source: that is, by being able to prevent and curb market power. In other words, “safeguarding, protecting and promoting competition and the competitive process” essentially means, in simplified terms, making sure that firms play ‘fair.’

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<sup>3</sup> This is in contrast with income distribution or re-distribution policies-- policies to redistribute incomes from rich to poor sectors. Competition policy, at the outset, equalizes opportunities across firm sizes and incomes.

<sup>4</sup> A barrier to exit is effectively also a barrier to entry. If there are huge costs to exit, this is taken into account by the firm in entering the market in the first place, thus also constituting a barrier to entry.

<sup>5</sup> This will be expounded on in the succeeding discussion.

<sup>6</sup> As opposed to pure or perfect competition where there are no barriers at all to entry of rival firms. See relevant discussion that follows.

Hence competition policy and law creates a market environment and rules of the game where firms compete fairly.

The theoretical discussion about what constitutes ‘fair’ competition, and when markets become uncompetitive can be complicated. What does “lessen competition” even mean? A lot depends on the nature and structure of the industry, the industrial organization, the intricacies of the supply chain, relevant markets, other government policies/objectives, *etc*, which produce a lot of gray areas, and unclear implications on the state of competition in particular markets. However, if anything, there is one underlying theme that summarizes the gist of what competition policy and law should be about. Competition policy and law, in the end, is essentially about making sure that firms play ‘fair.’

#### Making sure that firms play ‘fair’

In general, making sure that firms play ‘fair’ means that in the first place, competition law should prevent firms from ‘unfairly’ obtaining market power. That is, prevent firms from ‘unfairly’ excluding other firms from playing (and thus it would not need to compete),<sup>7</sup> which would then have the effect of ‘lessening competition.’ Understanding why such behavior should not be allowed is intuitive. The question is, what is ‘unfair?’ How can we judge that the firm’s conduct is unfair?

At first glance, defining what is ‘unfair’ would appear subjective, which could make determination of what is a violation of a competition law difficult. Indeed, this is the case in practice, and in the drafting of competition law, it is always a challenge to find the right legal language to succinctly capture the concept and objectives of competition. However, defining what is ‘unfair’ is not as subjective as it seems when we look instead at what it is not. That is, ‘unfairly’ obtaining market power can be summed up as any firm behavior of obtaining dominant market position by means other than being or becoming more efficient than the other players (actual or potential).

In other words, the only ‘fair’ way (that is, the only acceptable manner within competition law) for a firm to achieve a dominant position is by being more efficient than its competitors. Even if the firm becomes one of only a few surviving firms, these survivors are more efficient.<sup>8</sup> Hence there is still the positive competitive impact on efficiency.

The theoretical economic literature provides ample discussion on the means, the manner and what constitutes such anti-competitive behavior of ‘unfairly’ erecting barriers to entry. A well-known example is predatory pricing. A firm deliberately (temporarily) underprices its product to prevent a potential firm trying to enter the market to compete at such an artificially low price (below cost).

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<sup>7</sup> This uncompetitive market behavior is also referred to as exclusionary abuse.

<sup>8</sup> The presumption here is that there are no barriers to entry. The market is contestable.



However, predatory behavior probably rarely happens, since this requires a firm to maintain excess capacity over an extended period of time which could prove very costly.

Perhaps a more evident example of exclusionary behavior is ‘refusal to deal.’ In general, firms have the right to choose who to conduct business with- whether another company, business or individual. However, competition law, in safeguarding the competition process, would prohibit ‘refusal to deal’ by firms that would exclude some parties and choose to do business only with certain parties in a *conspiracy and collusion for the purpose of controlling or leveraging the market*. In the process, the ‘boycotted’ (rival) firms could be cut off from supply of intermediate inputs, raw materials, facility, or markets. As a result this (vertical) refusal to deal by the firm/business would ‘unfairly’ increase the costs of the boycotted rival firm and likely push them out of the market eventually. Hence, the effect is limiting competition and preventing competitive outcomes of greater efficiency and welfare.

A more illustrative example of a ‘vertical refusal to deal’ is when a firm refuses to do business with another firm, customer or supplier<sup>9</sup> unless they comply with certain conditions, e. g. stop doing business with another (usually another competitor). This is an exercise in market power that would allow it to extract excess profits and at the same time enable it to maintain and/or reinforce its market dominance. Clearly, this is a weakening of the competitive process. Of course, there could be legitimate reasons for ‘refusal to deal’ with another business, e. g. because of known unethical, unsound practices of the shunned party, or as a result of the competitive process itself. Hence, again, it is a matter of ‘fairness,’ which might need to be ‘tested’ and shown. The guiding principle is that the ‘refusal to deal’ is not born out of a conspiracy or collusion.

A conspiracy or collusion of ‘refusal to deal’ could also be ‘horizontal,’ that is an agreement among ‘rival’ firms/businesses not to compete. This is what is often understood as cartel agreement. The agreement not to compete could be in the form of price setting (an agreement/collusion to fix prices that the cartel parties would sell their output. This would be higher than what would have been if they competed against each other, or dividing the market among themselves into their own exclusive market segment (again enabling the firm to sell at higher prices and possibly at lower quality).

Note also that the firm/s who would be able to exercise such exclusionary abuses would likely already be an incumbent monopoly, or at least a firm (or firms) with dominant market position, trying to maintain or enhance market dominance. In the earlier examples of predatory pricing and vertical ‘refusal to deal,’ there is a dominant firm involved. In the horizontal ‘refusal to deal,’ the anti-competitive behavior is a cartel agreement among firms, that bond together to secure and ensure their dominant position.

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<sup>9</sup> E.g., sell its output or buy certain inputs from them.

In the real world, in many cases, there would be sectors with market concentration and firms already enjoying dominant market position, whether as a result of efficient market allocation process, structural barriers (inherent characteristic of the industry), behavioral barriers described

### **Box 2. Examples of Structural and Behavioral Barriers to Entry**

#### **A. Major Sources of Structural Barriers to Entry**

1. Sunk costs. These are investments into the market that would not have any use or value if withdrawn from it. Thus new firms would think twice before entering the market if such costs are high relative to the expected returns. Sunk costs could come from large fixed costs, startup losses, physical and human investments that are specific to the market, “soft” assets such as huge advertising costs to establish brand names and others.
2. Absolute cost advantage. Incumbent firms could have absolute cost advantage, e.g., arising from steep learning curve, prior access to a natural resource, some government policy like direct subsidies, etc.
3. Large capital requirements. This could also be due to sunk costs or imperfection in the capital market that limit the ability of new entrants to come up with the required capital at similar costs to the incumbent.
4. Network industries. These are where competing firms share the same critical facilities. Incumbent firms may be able to deny new entrants access to the common facility.

#### **B. Behavioral Barriers to Entry**

1. Predatory pricing. This is where the incumbent firm temporarily sells at a price below cost to drive out new entrants. There is some debate about how effective this is in discouraging new entrants since it may be unsustainable and not a very rational behavior (McGee 1958).
2. Excess capacity. This is an attempt to demonstrate that the incumbent can maintain the pre-entry level of output.
3. Product differentiation and advertising. This is when “first-mover” advantage is perceived. This is possible with established brand loyalty and some “inertia” in consumer tastes. (The result, however, could be procompetitive when demand actually expands. The incumbent might itself try to fill in the differentiated products and maintain it even if it is unprofitable to hold on to some market power, but as in predatory and limit pricing, this could be unsustainable).
4. Horizontal restraints. Horizontal relationships, whether through mergers and acquisitions or some horizontal agreements, would increase the market share and market power of the firm/s involved. Some horizontal restraints or agreements could benefit the firms because of efficiency gains from the arrangement and would therefore have procompetitive effects. However, there could be horizontal agreements with anticompetitive effects. Examples include
  - a. Cartel agreements to fix prices above competitive levels and/or to limit levels of outputs
  - b. Bid-rigging or collusion-setting prices at auctions
  - c. Arrangements to divide the market (by territory, size, customer, etc.).
5. Vertical restraints. Vertical relationship between firms may be able to discourage entry into one or some stage of production. This could take the following forms:
  - a. Foreclosure and exclusion
  - b. Raising rival’s costs
  - c. Contracts such as exclusive dealing, tie-ins (sale of one product on condition of purchase of another), etc.

Source: Medalla 2003, following World Bank/UNCTAD classification

above, or government policy-induced. (See Box 2 for more examples of barriers to entry.) In such cases, the task of competition law is to prevent such firms with dominant market position from actually abusing that market power (that is, by actually controlling prices and manipulating outputs).<sup>10</sup>

When a firm has market power (which arises because of its dominant position), it is able to affect the selling price of its output by controlling how much it supplies the market.<sup>11</sup> It could thus reduce output/supply (and consumer surplus) up to the point where it is able to raise prices enough for it to maximize profits. The result is higher prices, possibly also lower quality and lower output available to consumers, and consequently, what is termed as excess profits or monopoly rent. (Refer back to Box 1.) Competition law should prevent firms with dominant position to extract rents.<sup>12</sup>

The competition law should then define what are considered anti-competitive acts accordingly—whether exclusionary or exploitative abuse. (See Box 2 for an overview) This task is, of course, by no means simple, especially when one considers the implementation difficulties at the nascent stage of competition law.

Making sure that firms play ‘fair’ is the underlying principle of the rules laid down as provisions in the law of what are defined as anti-competitive acts. Having clear and transparent provisions on prohibited acts would set the level playing field, and hopefully already act as deterrent to firms from committing such errant behavior.

Once a firm has obtained dominant position, it is more difficult for competition policy and law to police such firms against anti-competitive behavior. A pre-emptive measure is to have rules on Mergers and Acquisitions (M&A), to vet the firms against possible anti-competitive impact and make sure that the dominant position created by the M&A produces efficiency or welfare gains. This is akin to preventing exclusionary abuse by rejecting M&As that could unjustifiably limit competition, and at the same time a pre-emptive measure to prevent likely exploitative abuse of resulting market dominance. Hence, in addition to provisions on prohibited anti-competitive acts, another major provision of competition law is the set of rules on approving Mergers and Acquisition.

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<sup>10</sup> This can be referred to as exploitative abuse.

<sup>11</sup> How much the firm is able to affect prices is indicative of how much market power it has.

<sup>12</sup> There are various ways it could do this (prevent abuse of market power), depending on the market and the immensity of the losses. These include imposing fines and penalties, ordering divestment, cease and desist order, etc. The competition law would have prescriptions or remedies and penalties.

In sum, these are the core functions of competition law:

- Preventing firms from ‘unfairly’ obtaining market power
- Preventing firms from actually abusing market power, and
- Setting Rules for Mergers and Acquisition

The first 2 would prohibit anti-competitive acts and discipline errant (anti-competitive) firms. The third is more of a pre-emptive measure. Competition law would thence serve to “safeguard, protect and promote competition and the competitive process.”

In many cases, promoting competition would not need imposing the sanctions but would rather be better addressed by implementing measures to make markets more contestable. This could be done by examining what are the barriers to entry, and if possible removing these barriers and allowing more players to enter the market. This is especially relevant in the case of unnecessary government regulations that erect barriers to entry. In some cases, promoting competition would only require addressing information asymmetries, where relevant information about the sellers and their products, who they are and what they sell, are hidden from the consuming public, and thus bestowing unjustified market power to the incumbent firms because of lack of information.

In general, however, promoting competition would require a good competition law that would lay down the rules and legal basis to discipline errant (anti-competitive) firm behavior. Even if, in the end, few firms are prosecuted, the law would act as a deterrent, as firms would then know what would be illegal, anti-competitive behavior and hopefully refrain from such acts.

#### When more needs to be done to assist the market

In still some other cases, more needs to be done to assist the market in obtaining ‘competitive outcomes’<sup>13</sup> because of the inherent structure of the industry/sector (economies of scale, network externalities). This is the case of the so-called ‘natural monopolies.’ There is need for competition policy and law to do more, other than prohibiting anti-competitive acts, to assist the market to mimic competition and obtain similar desired outcomes. There is need for ‘regulation’ to assist the market achieve “competitive” outcomes.

For ‘natural’ monopolies, enforcing ‘competition’ rules (**regulation**) to produce competitive-like outcomes are necessary, e.g. access to essential facilities (transmission lines in the case of power and electricity); allocating frequencies/bandwidths in telecommunications; mandating interconnection among telecommunication companies, unbundling services, opening up segments that are no longer ‘natural’ monopolies.

Indeed, regulatory reforms that promote competition could have the most pervasive benefits- as they affect ‘public’ utilities.

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<sup>13</sup> Production and consumption outcomes that would have resulted in a competitive environment.

In sum, a comprehensive competition policy and law has two major aspects: promoting **competition**, and where necessary, having good **regulation** to assist the market to produce competitive outcomes by enforcing ‘competition’ rules. In addition, inasmuch as government policy could in itself impact adversely on competition, it should also be able to review existing and proposed government policies and regulations, whose repeal or revision could be the appropriate action and solution.

### 3. Major Provisions of the new Philippine Competition Act (PCA)

The discussion above suggests the major provisions that should be included in competition law: a clear declaration of policy; what are prohibited acts; mergers and acquisitions; enforcement; regulation of natural monopolies (or interface with regulatory bodies); and review of government policies that could negatively impact on competition. This section will go over the major provisions of the Philippine Competition Act (PCA) accordingly. In particular, it will focus on the following:

- Declaration of Policy
- Creation of the Philippine Competition Commission (PCC)
- Powers and Functions of the PCC
- Prohibited Acts
- Mergers and Acquisition
- Additional provisions to aid enforcement

#### 3.1 The Declaration of Policy

Given the difficulties in choosing the right legal language that could encapsulate the concepts and objectives of competition policy, it is important to have a clear declaration of policy that could further define possible questions that could arise in the legal process in future cases. This is found in Section 2 of the PCA.

The PCA aims to:

*“attain a more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all...”*

To reiterate, it is crucial to have a good declaration of policy to turn to when some provisions, when implemented, becomes unclear. In this regard, the PCA has succinctly provided for what is the policy objective of the law.

### 3.2 Creation of the Philippine Competition Commission (PCC)

Implementing Competition Policy and Law is a huge task. The PCA creates the Philippine Competition Commission (PCC) which is designed to be an independent, quasi-judicial body. It is an attached agency to the Office of the President. (Section 5 of the PCA)

Section 6 of the PCA stipulates the composition of the PCC to be composed of one Chairperson and four Commissioners, with rank equivalent to a Cabinet Secretary and Undersecretaries, respectively, with expertise in economics, law, finance, commerce or engineering.<sup>14</sup> They shall be appointed by the President.

The term of the Chairperson and Commissioners is seven years without re-appointment. However, for the first set of appointees, only two of the four Commissioners will have a term of seven years. The other two Commissioners will have a term of 5 years. This would allow the succeeding (current) administration to choose two new appointees for Commissioners. In effect, there will be overlapping appointments from previous and current administrations concurrently serving as Commissioners.

For more effective, unencumbered performance of duties and responsibilities, the officers and staff of the PCC enjoy immunity from suit (Section 42) and indemnity privileges (Section 43).

### 3.3 Powers and Functions of the PCC

The PCA has the ‘original and primary jurisdiction over the enforcement and implementation’ of the PCA (Section 12). It has quasi-judicial powers and functions which include the following:

- Conduct inquiry, investigate
- Hear and decide cases
- Review mergers and acquisition
- Monitor compliance
- Stop, redress, apply remedies based on findings
- Issue subpoenas
- Conduct administrative proceedings, impose sanctions, fines or penalties
- Issue adjustment or divestiture orders
- Undertake inspection of business premises, under order of court
- Deputize enforcement agencies
- Issue advisory opinions on competition matters

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<sup>14</sup> “Provided, That at least one (1) shall be a member of the Philippine Bar with at least ten (10) years of experience in the active practice of law, and at least one (1) shall be an economist.” Section 6 of PCA.

The PCC has the sole authority to initiate and conduct a fact-finding preliminary investigation in connection with this Act. (Section 31) In addition, a private party suffering from violations of the this Act cannot separately file or initiate a civil case in court, until after the PCC has completed a preliminary inquiry. (Section 45). This could prevent nuisance filing of cases and other possible abuse of the law, which is especially important during the nascent stages of competition law still undergoing major capacity and capability building.

The PCC is also tasked to monitor and analyze competition practices in markets; conduct, publish and disseminate studies, among others. It is also worth noting that the PCC has the mandate to intervene or participate in administrative and regulatory proceedings initiated by government agencies such as the SEC, ERC and NTC.

Finally, while its core function is to address and discipline anti-competitive behavior of firms, another function of the PCC which could prove equally (if not more) important, especially in terms of its impact on the state of competition and the overall economic welfare, is to formulate a national competition policy. The PCC is mandated to:

- Assist NEDA (in consultation with other agencies) in the preparation and formulation of a national competition policy
- Advocate pro-competitive policies of the government by:
  - Reviewing economic and administrative regulations, *motu proprio* or upon request
  - Advising the executive branch on the competitive implications of government policies and programs

### 3.4 Prohibited Acts

In the first place, the PCA does not prohibit market dominance in itself. Indeed, Section 15 states that:

“*[N]othing in this Act shall be construed or interpreted as a prohibition on having a dominant position in a relevant market or on acquiring, maintaining and increasing market share through legitimate means that do not substantially prevent, restrict or lessen competition.*”

“*Provided further, That any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered an abuse of dominant position.*”

This is what the previous section elaborated on. That there are legitimate means under a rational competition act for achieving market dominance. And that is basically by being more efficient than its competitors. Or borrowing some language of the PCA provision, being more efficient

“does not prevent, restrict or lessen competition,” and could entail “improving production or distribution of goods or services... or promoting technical and economic progress.”

This is further clarified and reiterated in Section 27, as follows.

“The Commission shall not consider the acquiring, maintaining and increasing of market share through legitimate means not substantially preventing, restricting, or lessening competition in the market such as but not limited to having superior skills, rendering superior service, producing or distributing quality products, having business acumen, the enjoyment and use of protected intellectual property rights as violative of this Act.”

In addition, the supremacy of efficiency and consumer welfare is further articulated in the forbearance clauses. (Section 28 of the PCA)

What then are the prohibited acts? These are specified in Chapter III, Sections 14-15. Prohibited acts are of two general types: Collusive action among firms (Anti-Competitive Agreements), and Abuse of Dominant Position.

#### Section 14. Anti-Competitive Agreements

Section 14 of the PCA specifies prohibited acts which are basically conspiratorial and collusive action among firms: the Anti-Competitive Agreements. Under this, it categorizes three groups of prohibitions. The first, and most serious, under Section 14 a, are the *per se* prohibitions which are in themselves, violations that need not be proved to have ‘substantially prevented, restricted and lessened competition.’

- (a) The following agreements, between or among competitors, are *per se* prohibited
  - Restricting competition as to price (or other terms of trade)
  - Price fixing at an auction/bid-rigging, market allocation and other analogous practices of bid manipulation.
- (b) The following agreements, between or among competitors which have the object or effect of substantially preventing, restricting or lessening competition shall be prohibited:
  - Setting, limiting, or controlling production, markets, technical development, or investment;
  - Dividing or sharing the market whether by volume of sales or purchases, by territory, type of goods or services, buyers or sellers or any other means

Hence, *per se* violations are limited to price-fixing and bid rigging. Those dealing with controlling quantities should be subjected to a ‘rule of reason’ competition test of having the effect of lessening competition. In theory, though, the violations under (a) or (b) are similar as to its anti-competitive nature. It is unclear how fixing prices is more harmful to consumers than controlling supply. A possible explanation (rationale) for the difference in treatment in the provisions under the Act is that the negative impact of agreement (collusion) to fix prices is more obvious, while that of controlling production, dividing markets could have less obvious costs and benefits.



Under Section 30 on Criminal Penalties, only these violations under sub-sections 14a and 14b are punishable as criminal offenses.

Subsection 14c would cover other cases.

- (c) agreements other than those under (a) or (b) which have the “object or effect of substantially preventing, restricting or lessening competition.”

“*Provided*, Those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation ”

These additional provisions highlight the need for good “competition tests”, knowledge of the industry, supply chains, and the market in general.

### Section 15. Abuse of Dominant Position

Section 15 of the PCA specifies prohibited acts considered to be an abuse of a dominant position of an entity or entities “engaging in conduct that would substantially prevent, restrict or lessen competition.” These include

- a. Pricing below cost to drive out competition

This is what is known as predatory pricing. The law provides under this clause that the act should be proven to have been deliberate (with the object of driving out competition) and was not done in “good faith.”

- b. Creating barriers to market entry or growth, ... except those ... arising from superior product or prices...

Again, this is basically what the previous section elaborated on. An exemption on such exclusionary behavior is when preventing other firms from gaining market share is done by being more efficient.

The rest of the provisions under this Section specifies cases of vertical “refusal to deal” which are prohibited by law.

- c. Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction (tying arrangement)
- d. Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services (price discrimination) (with list of exceptions, e. g. socialized pricing, price differences due to differences in costs, etc.)

- e. Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially.
  - E.g., fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities,

Under (e), there are provided exceptions which allow these impositions: franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; protecting IPR, confidential information or trade secrets.

- f. Making supply of particular goods and services dependent upon the purchase of other goods and services from the supplier which has no direct connection with the main goods or services being supplied (competition remedy is unbundling)
- g. Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers;
- h. Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers as a result of or due to a superior product or process, business acumen as a result of or due to a superior product or process, business acumen or consumers, *Provided* that prices that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be considered unfair prices;
- i. Limiting production, markets or technical development to the prejudice of consumers, *provided that limitations that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be a violation of the Act.*

As earlier noted, the PCA provides that “any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered an abuse of dominant position.” Also, the clause, “as a result of or due to a superior product or process, business acumen,” is often repeated as qualifier. In sum, these illustrate and emphasize the primacy of efficiency and consumer welfare.

### 3.5 Mergers and Acquisition (M&A)

Another major provision of the PCA is the review of Mergers and Acquisitions (M&A). This is found in Chapter IV of the Act, Sections 16-23, giving the PCC (the Commission) the power to review Mergers and Acquisitions (M&A).

M&A is the general term for consolidation of companies or assets. Consolidation could be a merger of two or more independent companies forming a new entity, or a company acquiring the assets of another company, in full or in part. The M&A could be ‘horizontal’ involving similar products, or ‘vertical’ involving related activities within the supply chain.

A consolidation of companies or assets, which is created by M&A in one form or another, necessarily affects the relative market shares (and concentration) and thus the potential market power of the firm. While greater market concentration could result which would have a negative impact on competition *per se*, consolidation might also produce positive efficiency impacts generally arising from economies of scale or scope. There are products whose average production cost could be drastically reduced with greater production scale. There are also multiple products (e. g. because of similarity, or related processes) which are more efficiently produced jointly because of economies of scope or streamlined production. A company might also seek to become more competitive by acquiring or merging with an established business with the needed skills, resources or new technologies. Resources can thus be optimized and greater efficiency, achieved. Hence, M&As should not be prevented or rejected outright, but should rather be subject to review under a competition law to ensure that if indeed market dominance results, this would come with enhanced efficiency and ultimately increased consumer welfare.

The PCA Chapter on M&A contains following provisions for the conduct of the review:

Section 17. Compulsory Notification

Section 18. Effect of Notification

Section 19. Notification Threshold

Section 20. Prohibited Mergers and Acquisitions

Section 21. Exemptions from Prohibited Mergers and Acquisitions

Section 22. Burden of Proof

First of all, the Act stipulates mandatory notification of the M&As with transaction value over PhP1 Billion to the Commission prior to the merger or acquisition. The presumption is that anything below that would be unlikely to endow a firm with substantial market power. In theory, a market share threshold is preferred.<sup>15</sup> However, this requires a lot of data and technical knowledge and information that could make the task very difficult (and costly) to implement. The threshold of one billion pesos was a result of numerous consultations and was deemed to be an acceptable compromise.<sup>16</sup> In any case, as further refined in the implementing rules and regulations

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<sup>15</sup>The market power of a firm is proportional to its market share.

<sup>16</sup> The IRR further defines which ‘transactions’ are referred to. These include, for example, the aggregate value of the assets in the Philippines being acquired, and the annual gross revenues generated in the Philippines by the assets being acquired.

(IRR) of the PCA, the Commission could consider, on a case-to-case basis, other factors which may be more important including the structure of the relevant markets, market position, actual and potential competition both from within and outside of the relevant market, among others. In addition, it could make revisions in the future about the threshold if this is deemed necessary. This is a good provision (and additional compromise), since as much as possible, as rates and values should not be specified in a law, as they quickly become outdated with inflation.

Failure to comply with the compulsory notification requirement will void the M&A agreement and subject the parties to an administrative fine of 1% to 5% of transaction value.

Within the 30-day period, the PCC can require “reasonably necessary and directly relevant information.” If such a request for more information is made by the PCC, it would have an additional 60 days to make the decision during which the M&A agreement cannot be consummated, and after which the transaction will be deemed approved if by then no decision is reached by the PCC. This implies a maximum of 90 days for the PCA to make the decision. A favorable recommendation by specialized regulatory agencies could provide disputable presumption that the M&A does not violate the PCA.

After the stipulated period, the PCC may approve the M&A (in effect, post no objection and the parties could proceed to consummate the agreement), may outright prohibit the M&A, or might specify conditions and/or changes that should be made to allow the M&A to proceed.

Prohibited M&As are those M&As that would “substantially prevent, restrict or lessen competition in the Philippines in the relevant market or in the market for goods or services”. (Section 9. Prohibited mergers and acquisitions). Exemptions from prohibited M&As are allowed on the grounds that there are efficiency (and welfare) gains offsetting impact of lessening competition. (Section 10) This follows the earlier discussion above that not all mergers and acquisitions should be prohibited because of such gains. However, the burden of proof to show that the M&A is such an exemption to the prohibition lies on the parties seeking the exemption (i. e. seeking approval of the merger and acquisition). This is an important provision which is common in competition laws.

Because of the gap between the effectivity of the law and the effectivity of its implementing rules of regulations, the PCC issued Memorandum Circulars 1 and 2 (MC1 and MC2) which provide interim guidelines about the required notification of covered M&As. MC2 covers M&As effected through the Philippine Securities and Exchange Commission (PSE) during the interim. Essentially, the MCs state that M&As covered under the PCA to be executed after the effectivity of the PCA but before the effectivity of the implementing rules and regulations (IRR) should notify the Commission (through the PSE if under MC2), and that these M&As complying with the MC “shall be deemed approved.”

The MCs also specifies the required information that the notification should contain, namely,

- the parties to the merger or acquisition;

- the name and contact details of the authorized representatives of each of the parties to the merger or acquisition to whom the Commission may address any correspondence;
- a brief description of the businesses of the parties to the transaction;
- the type of transaction (whether a merger or an acquisition);
- the consideration;
- the key terms of the transaction; and
- the timing for the execution or implementation of the transaction.

The MCs also further state that “Mergers and acquisitions that are deemed approved under this Memorandum Circular shall benefit from Section 23 of R.A. 10667 and may not be challenged under this law, except when the notification required [under paragraph 2 above] contains false material information.

This has created some initial controversy when Telcos (PLDT and Globe acquisition of the San Miguel telecommunications assets) appeared to use this clause to consummate their acquisition deals before its effectivity. This will be discussed further later to draw some lessons and implications for the implementation of the PCA.

### 3.6 Additional Provisions to Aid Enforcement

The PCA has additional provisions to aid in its enforcement. These include the Leniency program, the Nolo Contendere plea, and non-adversarial remedies.

The Leniency Program grants any entity immunity from suit or reduction of any fine which would otherwise be imposed on a participant in an anti-competitive agreement in exchange for reporting violation and the voluntary disclosure of relevant information regarding violations under the PCA prior to or during the fact finding or preliminary inquiry stage of the case. (Section 35 of the PCA)

Any entity charged under Section 14a or 14b can enter a Nolo Contendere Plea in which he does not accept nor deny responsibility for the charges but agrees to accept punishment as if he had pleaded guilty. Some parties may choose to enter this plea to avoid further costs in the case and possible liabilities a civil suit that could arise from the criminal action. Note this plea is available only in criminal cases for anti-competitive agreement ( Sections 14a and 14b), and only up to arraignment.

Similarly, non-adversarial administrative remedies may be resorted to before the institution of administrative, civil or criminal action. These non-adversarial administrative remedies include:

- *Request for binding ruling.* Some entities may find it advantageous to avail of request for binding ruling from the PCC when it is “in doubt” about whether an act or conduct is in compliance with, exempt from, or in violation of, the PCA or other competition laws. This

applies only to contemplated, not existing, acts and no prior complaint or investigation has been initiated.

- *Show cause order.* This requires the entity to “show cause” why there is no reason to (a) cease and desist from continuing identified business conduct; (b) pay administrative fine; or (c) re-adjust business conduct or practices.
- *Consent Order.* Prior to the conclusion of PCA inquiry, the entity may submit a written proposal for entry of consent order, specifying terms and conditions which include, (a) payment of fines; (b) payment of damages to injured party; (c) compliance report, and (d) other requirements as the PCC may prescribe.

Separate and independent civil action (Civil Damages) may be filed against the subject of investigation after the Commission has completed preliminary inquiry. On the other hand, the PCC decision may be appealable to the Court of Appeals, but appeal shall not stay the ruling or decision. Only the Supreme Court and the Court of Appeals can issue Temporary Restraining Orders (TROs) and preliminary injunctions against the Commission. Exceptions should only be cases of extreme urgency (e.g., constitutional issue, grave injustice...)

#### Transitional Clause

Firms have two years (from effectivity of the PCA) to “cure any existing business structure, conduct, practice or any act that may be in violation of the PCA.” This applies if administrative, civil and criminal proceedings have not already been initiated prior to the PCA effectivity.

#### **4. Overall Assessment: Some Comments and Observations**

In the Philippines, competition law has been embedded in the Philippine Constitution, the Penal and Civil Codes. Prior to this Act, it was scattered in about 30 different laws. However, there was lack of enforcement and hardly any jurisprudence related to competition law. The provisions and penalties in the then existing laws have become increasingly obsolete. In addition, prohibited acts and violations in these old laws and legislation are not clearly defined, and fines and appropriate recourse are outdated.

Indeed, the Philippines has been among the last in the Asian region (and the globe) to pass a comprehensive competition law. This has important implications on the country’s regional cooperation effort in competition policy, the reach of which is not confined within domestic borders. Without a clear competition policy and law, the country could not effectively engage, not just in sharing of information and best practice, but in coordination as well which is crucial in enforcement, as it affects multinationals and cross-border activities. The Philippine Competition Act is thus a landmark legislation and it is about time that the country has one.

On the whole, the PCA provides a good legislative framework for competition policy and law. As discussed in the previous section, it contains the crucial elements and necessary features that lay down the foundation for creating a working competition law. To reiterate and highlight some of the notable provisions:

- The Act has good declaration of policy. This is very important, especially in the early stages when certain provisions become unclear and subject to interpretation during deliberations.
- The Act replaces outdated definitions, penalties and mandates with more explicit provisions on what constitute anti-competitive behavior, provisions on more appropriate penalties and remedies, and other related provisions. This is the crux of having the new law.
- It creates a central body for carrying out the mandate for competition. The lack of a distinct body to champion this major policy which cuts across all sectors has been a major setback in the past. In addition, the nature of competition policy and law would evolve over time, especially with advances in technology and changes in business models. This requires a central body that could learn and adapt with the times.
- It includes provisions on mergers and acquisition. Mergers and Acquisitions could create harmful concentrations. It is important to have some preventive measures that would attempt to ensure that they serve efficiency/welfare objectives. It also helps that the burden of proof is on the firm.
- It includes provisions on review of government policy and regulation as they impact on competition. Government policies and regulations themselves could impose structural barriers to entry that could unduly and adversely impact on competition. While these policies and regulations would have worthwhile objectives of their own, it is important that anti-competitive, likely unintended, consequences be examined and possibly reformed if necessary (i. e. when the costs from anti-competitive effects outweigh the benefits from the stated objectives of the particular policy and regulation). Indeed, this could be an important function of the Commission that could potentially have a huge impact on the state of competition and the overall economic welfare.
- It includes mechanisms for effective enforcement. It gives the Commission the sole authority to initiate and conduct preliminary inquiry. In addition, it contains other provisions that could help in the process of investigation and efficient resolution of outcomes, e. g., the Leniency provision, Nolo contendere plea, and non-adversarial administrative remedies.
- It includes a transitional provision. Affected parties are given a period of two years to ‘cure’ its violation of the Act. In addition, the transition period would also provide firms in general the necessary time to familiarize themselves with the new law. It will also provide

the needed time for the new PCC for information and education campaign and public advocacy, and most especially, to build capacity and capability for enforcement.

In the case of Mergers and Acquisition, its review process starts upon the effectivity of the IRR of the PCA. In the interim, Memorandum Circulars 16-001 and 16-002 (MC1 and MC2) were issued by the Commission that require only authentic and proper notification of covered M&As executed after the effectivity of the Act but before the effectivity of the IRR to be deemed approved. As earlier stated this has prompted a controversial start of the PCC.

The timing (and haste) of the PLDT and Globe acquisitions of the San Miguel telecommunications assets is arguably suspect. This has brought a cloud about the motives and doubts about the net benefits that the acquisitions could bring given that these transactions clearly reduce competition to just two players. There is added concern that the transactions have not been fully transparent about the terms in the co-sharing agreement and the conditions set by the National Telecommunications Commission (NTC). Nonetheless, the MC provided a technical loophole for the transactions to proceed.

The Telecommunications industry, particularly given new and constantly changing ICT technologies, is a very complex sector. The industry involves the use of bandwidths (radio frequency spectrum), a public resource, which the government needs to regulate judiciously to benefit the consumers in the most efficient and equitable manner. Establishing platforms and essential facilities that would make use of this resource is very capital intensive. Technology and development of new products have created a wide range of ICT services, along the various segments of the network. However, there are network externalities involved that naturally endows the dominant firm strong leverage and advantage. At the same time, there are different possible platforms, based on technology and particular bandwidth/spectrum utilized, where perhaps inter-platform competition could be encouraged. Given such intricacies, how can the government impose competition discipline and make sure that efficiencies and consumer benefits can be derived?

To be sure, having at least three major players (rather than two) would help promote competition (better than a regulator). But arising from structural barriers, e.g., the cost of obtaining various permits and licenses, both local and national, the cost of obtaining rights of way, the available spectrum or bandwidth, the foreign equity limitation, might make this extremely difficult in the near future. Difficult reforms are needed to open up the market to potential rival, to make the market at least more contestable. What can be the way forward?

On the whole, what is needed is a combination of liberalization, competition and regulatory reforms. This is a major task for the newly formed Philippine Competition Commission, together with the National Telecommunications Commission, and other relevant branches of government, such as the National Economic and Development Authority (NEDA) and the Department of Information and Communications Technology (DICT).



To make the ITC market more contestable, reducing barriers to entry is the key policy reform area. This is the task of the NTC in allocating bandwidths and spectrum, and Congress in its granting of telecommunications franchises. Is there anything that the NTC can do to improve its allocation function? How can it recall unused (unpaid) radio spectrum that has already been assigned? Can it make bandwidths (viably) available to potential players?<sup>17</sup> Another task of the NTC should be to impose stringent conditions on consumer protection and quality of service standards to service suppliers. Does it have enough mandate to do this? Perhaps there is need to update the Telecommunications Act that would make it more forward looking, and allow the NTC to address these questions and other issues that could emerge given the pace of technological change in ITC.

Given that most bandwidths are already allocated and that the Globe and PLDT acquisitions are a done deal, what can be done to ensure that consumers gain? First of all, NTC (and PCC) must ensure that indeed, PLDT and Globe increase and widen their services. This, right away, would demonstrate increased overall welfare. In particular, they should make sure that the acquired assets are not be left practically idle. Otherwise, it is a clear indication that the motivation is to hog the bandwidth and limit competition.

Finally, it is not too late for PLDT and Globe to work with the PCC (and NTC) to ensure that there is (and will be) no violation of the Act and that the M&As would indeed produce benefits. This can be done during the transition period, where the firms can ‘cure’ any violation if any, or may request for binding ruling from the PCC. This could entail agreeing on conditions that would yield benefits for consumers, like platform sharing and interconnectivity, and increased services and greater utilization of their assets (including those newly acquired).

## **5. Summary and Concluding Remarks**

The Philippine Competition Act lays down the foundation for creating a working competition policy and law. The potential benefits are huge, not just because of the prevention of anti-competitive acts, but the potential for regulatory reforms in key sectors and in various government regulations. When done judiciously, the PCA would promote good governance and stability in the investment climate. However, the task is huge. It would need to build needed capacity and capabilities, work on public advocacy, and evolve into a credible, respected independent Institution.

There could be a steep learning curve. Advanced countries like the UK, Germany, Japan and Australia took decades to develop an effective competition law, and still continue to seek further improvements and learning. Our ASEAN neighbors, like Vietnam, Thailand and Indonesia, are more than a decade ahead of us in enacting a comprehensive competition law, but they are still

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<sup>17</sup> Spectrums and bandwidths are theoretically infinite. However, huge capital investments are required to make small bandwidths clear and clean to use.

grappling for ways and means to create a working competition law. Nonetheless, the PCC could already start to establish itself by making its presence known as an advocate for fair rules of competition. During the transition period, it would need to make a headway in information and education campaign, thresh out its relationships with regulatory agencies, and establish an effective mechanism to prioritize.

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