

ADMINISTRATIVE WILL TO POWER: ARTICULATING THE GOALS OF ANTITRUST AND PROPOSING THEREFOR A REGULATORY FRAMEWORK*

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“Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.”

—Judge Robert Bork¹

I. BEYOND ECONOMIC EFFICIENCY & CONSUMER WELFARE

The complexities of modern government have often led Congress—whether by actual or perceived necessity—to legislate broad policy goals and general statutory standards, leaving the specific policy options to the discretion of an administrative body.² In this regard, the Philippine Competition Commission (“PCC”)—the administrative body mandated to implement the Philippine Competition Act³—has taken great strides in advancing the policy objectives of economic efficiency and consumer welfare. That the two policy objectives figure greatly in the exercise of the PCC’s mandate is evident from its regulatory issuances and participation in relevant proceedings.

* Cite as Jose Maria L. Marella, *Administrative Will to Power: Articulating the Goals of Antitrust and Proposing Therefor a Regulatory Framework*, 91 PHIL. L.J. 603, (page cited) (2018).

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Much gratitude is extended to Paolo Romeo J. Yusi, whose invaluable editorial assistance greatly polished this work, as well as to Atty. Darwin P. Angeles, whose insightful comments refined the ideas distilled herein.

¹ ROBERT BORK, THE ANTITRUST PARADOX 50 (1978).

² *Macalintal v. Comm’n on Elections*, G.R. No. 157013, 405 SCRA 614, 721, July 10, 2003 (Puno, J., *concurring and dissenting*), citing Jacob Javits & Gary Klein, *Congressional Oversight and The Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 460 (1977). See also *Abakada Guro Partylist v. Purisima*, G.R. No. 166715, 562 SCRA 251, Aug. 14, 2008.

³ Rep. Act No. 10667 (2015) [hereinafter, “PCA”], § 5. The Philippine Competition Act.

A. Regulatory Issuances

In its Implementing Rules and Regulations (“IRR”), the PCC adopts the “substantial lessening of competition” (“SLC”) test,⁴ a jurisprudential standard crafted and developed by foreign jurisdictions to weigh the anticompetitive effects of certain transactions. By assessing market indicators such as firm rivalry, prices, quality, and availability of goods and services, the SLC test filters out agreements that reduce competitive pressure among firms and disincentivize them from becoming more efficient and innovative.⁵ The IRR also allows the PCC to forbear—or desist from applying the provisions of the PCA—when, among other considerations, forbearance is consistent with the benefit and welfare of the consumers.⁶

Economic efficiency and consumer welfare also take center stage in the PCC’s Rules on Enforcement Procedure (“Enforcement Rules”), the rules and regulations governing hearings, investigation, and other proceedings on anti-competitive agreements, abuse of dominant market position, and other violations of the PCA.⁷ Preliminary inquiries—the PCC proceedings that parallel the prosecutor’s preliminary investigation in criminal cases—are to be conducted with due regard to consumer welfare.⁸ Interim measures may be issued against entities when their acts would result in a material and adverse effect on consumers or competition in the market.⁹ Upon termination of enforcement proceedings, the PCC will determine the propriety of imposing conclusive remedies with the aim of maintaining, enhancing, or restoring competition in the market.¹⁰

Similar to the IRR, the PCC’s Rules on Merger Procedure (“Merger Rules”) employs the SLC test in determining whether a proposed merger or acquisition will, post-transaction, reduce economic efficiency or impair

⁴ Implementing Rules and Regulations of Republic Act No. 10667 [hereinafter “PCC IRR”], Rule 7, § 1(d). In the United States, the substantial lessening of competition test is more commonly referred to as the “rule of reason” analysis. *See, generally*, THOMAS MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS (1994).

⁵ RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 982 (2015 ed.), *citing* 2010 Merger Assessment Guidelines (OFT 1254), at ¶ 4.1.3.

⁶ PCC IRR, Rule 9, § 1(c).

⁷ 2017 Rules of Procedure of the Phil. Competition Comm’n [hereinafter “Enforcement Rules”], Rule I, § 1.2.

⁸ Enforcement Rules, Rule II, art. I, § 2.1.

⁹ Rule XII, § 12.1

¹⁰ Rule VI, art. II, § 6.22.

consumer welfare;¹¹ in determining the appropriateness of imposing interim measures;¹² or in considering whether, before clearing a merger or acquisition, the parties must abide by certain conditions to remedy, prevent, or mitigate competitive harm.¹³ In addition, pursuant to its market surveillance function, the PCC is empowered to *motu proprio* conduct a review of mergers that are reasonably foreseen to breach the SLC test.¹⁴

B. Relevant Proceedings

Intervening by way of an *amicus curiae* brief, the PCC apprised the Supreme Court of the competition issue intertwined with the legal question in a pending case that assailed, as an *ultra vires* expansion of statutory language, the regulation issued by the Philippine Contractors Accreditation Board that created a nationality restriction that was unsupported by the governing statutory text.¹⁵ The PCC supported striking down the regulation, arguing that, on the basis of economic literature and empirical data, the nationality restriction constituted a regulatory barrier to entry that unduly favored domestic contractors to the detriment of foreign contractors. In its argument that the regulation inordinately restricts market competition, the PCC enunciated the following principles:

Consumer welfare, which in this case refers to the welfare of both households and other businesses, is maximized when competition allows consumers to access and choose the most efficient producers, regardless of the service provider's nationality. Indeed, it is a settled principle in economics that if there are many players in the market, healthy competition will ensue. The competitors will try to outdo each other in terms of quality and price in order to survive and profit. Competition therefore results in better quality products and competitive prices, which redound to the benefit of the public.¹⁶

¹¹ PCC Rules on Merger Procedure [hereinafter "Merger Rules"], Rule 2(A), § 2.2. See also Rule 11, § 11.5.2.

¹² Rule 10, § 10.1.

¹³ Rule 11, § 11.5.2.

¹⁴ Rule 13, § 13.1.

¹⁵ Manila Water Co., Inc. v. Phil. Contractors Accreditation Board, Civil Case R-QZN-13-01205 (RTC-QC, Feb. 24, 2014).

¹⁶ *Amicus curiae* brief filed by the PCC in connection with Phil. Contractors Accreditation Board v. Manila Water Co., Inc., G.R. No. 217590 (pending before the Supreme Court), at 30.

In its recent bid to take its legal scuffle with Globe and PLDT¹⁷ to the Supreme Court,¹⁸ the PCC donned its mantle “to level the playing field across all markets; to review the competitive implications of large transactions; and to actively investigate, prosecute, and sanction cases of cartelistic behaviors that prevent, restrict, or lessen market competition.”¹⁹ These mandates would be carried out to “[encourage] innovation among market players, [reward] their efficient and productive use of resources, and ultimately [redound] to the benefit of consumers by lowering prices and enhancing their right of choice over goods and services offered in the market.”²⁰

Significantly, the general public has acquiesced to the perception that the PCC champions economic efficiency and consumer welfare. News reports have consistently adverted to the PCA as a landmark piece of legislation that will enhance and promote these two policy objectives. Even lawmakers have acknowledged the PCC’s critical role in improving market competition. Senator Juan Miguel Zubiri, addressing PCC’s representative, Commissioner Johannes Bernabe, in a legislative hearing concerning the telecommunications sector, stated: “I’m really one with you [...] So you guys have to help us out [...] We are fighting giants. But as I said, the least that can happen is [that they] shape up and give us better service[,] or the best is that more players can come in and give us the best service[.]”²¹

But are such policy objectives all there is to the PCA? Or does the statutory text, alone or in conjunction with related legal materials, admit of other governing principles? Addressing such questions is crucial as the PCA may also cover other goals that have not been explicitly recognized. The law, after all, admits of different interpretations.²² This then requires stakeholders and other government bodies to defer to the “sound discretion of the government agency entrusted with the regulation of activities coming under

¹⁷ Jomar Canlas, *Court of Appeals halts commission’s review of telco deal*, MANILA TIMES, Aug. 30, 2016, available at <http://www.manilatimes.net/court-of-appeals-halts-commissions-review-of-telco-deal/282905/>.

¹⁸ Roy Stephen Canivel, *PCC seeks review of court ruling on SMC’s telco assets*, PHIL. DAILY INQ., Dec. 12, 2017, available at <http://business.inquirer.net/242401/pcc-seeks-review-buyout-deal-smcs-telco-assets-pcc-sc-telco-pldt-san-miguel-corp-globe>.

¹⁹ Phil. Competition Comm’n v. CA, G.R. No. 230798 (pending before the Supreme Court), at 2. Petition for review on *certiorari* filed by the PCC.

²⁰ *Id.*

²¹ Transcript of Stenographic Notes, 17th Cong. (Dec. 8, 2016), at 100-02. Senate Committees on Econ. Affairs, and Trade, Commerce and Entrepreneurship.

²² See *Drugstores Ass’n of the Philippines v. Nat’l Council on Disability Affairs*, G.R. No. 194561, 803 SCRA 25, Sept. 14, 2016.

[its] special and technical training and knowledge[.]”²³ In such case, the PCC might be undercutting its own potential to make even greater strides in other aspects of national development. Recognizing these other objectives will greatly influence the PCC’s exercise of its mandate and, more importantly, could translate to better gains in national development.

By no means does this Note claim that the PCC is severely limiting the exercise of its functions—whether consciously or subconsciously. Rather, it simply articulates other equally important antitrust considerations which can be construed from the statutory text—considerations which the PCC must also devote attention to, and which the public, considering the incipient but technical field of competition law,²⁴ must appreciate.

In veering away from the traditional efficiency and welfare analysis in order to accommodate the other goals of antitrust, the PCC will face issues of policy prioritization or goal sequencing. To marshal these diverse and sometimes conflicting values, this Note proposes a framework of regulation—a grand unification theory of sorts—to aid the PCC in the discharge of its mandate.

The rest of this Note is divided into four parts. Part II plots economic efficiency and consumer welfare as aspects of the perfect competition paradigm. Market inefficiency and reduction of consumer welfare are social costs inflicted by deviations from perfect competition, which antitrust has largely been developed to address. However, although the focused promotion of efficiency and welfare engenders certain regulatory advantages, it is not without its shortcomings.

Inefficiency and reduced welfare are not the only social costs borne by imperfect competition. Part III articulates other non-traditional antitrust goals that are supported specifically by the PCA and generally by the broader legal framework. The articulation of other goals will subject the PCC to a more complex regulatory calculus. Hence, Part IV organizes all other goals into a framework of regulation. Part V summarizes the Note’s salient points and proffers some precepts for administrative regulation.

²³ Dep’t of Agrarian Reform v. Samson, G.R. No. 161910, 554 SCRA 500, 510-11, June 17, 2008.

²⁴ Their conceptual nuances notwithstanding, this Note will use the terms “antitrust” and “competition law” interchangeably.

II. THE OLD GODS: ECONOMIC EFFICIENCY AND CONSUMER WELFARE

A. Economic Analysis

1. *Theory of perfect competition*

Any attempt to define economic efficiency and consumer welfare would be wanting without discussing the perfect competition paradigm. Such policy objectives are, for the most part, derived in principle from such theoretical construct.

Economist and philosopher Adam Smith was among the earliest to articulate a theory of perfect competition. In *THE WEALTH OF NATIONS*, Smith laid down the following observations on the interaction between foreign and domestic trade:

As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value, every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.²⁵

In an earlier work, *THE THEORY OF MORAL SENTIMENTS*, Smith laid down the following principles:

The rich [...] consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same

²⁵ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 35 n.18 (R.H. Skinner & A.S. Skinner eds., 1976) (1776), available at http://files.libertyfund.org/files/220/0141-02_Bk.pdf. (Emphasis supplied.)

distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus *without intending it, without knowing it, advance the interest of the society*, and afford means to the multiplication of the species.²⁶

Adam Smith's treatment of perfect competition is properly situated in the niche of classical economics. In this school of thought, competition was cast in a behavioral sense, placing emphasis on the process of rivalry between participants in the market who would compete by changing prices in response to market conditions, thereby eliminating excessive profits and unsatisfied demand. Graduating from this approach, the neoclassical conception of perfect competition placed more emphasis on the market structure. Laying down the "structure-incentives-conduct" framework, neoclassical economists posited that industry performance—largely measured by profitability—varies with market structure, which sets the incentive scheme of the market, in turn guiding the behavior of economic agents.²⁷ Further in the development of such tenets is the evolutionary school of thought. Taking their cue from Joseph Schumpeter's idea of "creative destruction,"²⁸ the thinkers of the evolutionary school of thought viewed competition as

a succession of events, a dynamic process, a voyage of exploration into the unknown in which successively superior products and production methods are introduced, and consumers discover who meets their particular needs and how. Neither producers nor consumers know in advance the outcome of the competitive process, for that is established only by trial and error; the market process is necessarily an experimental process.²⁹

Notwithstanding their nuances, the foregoing strands of perfect competition underpin the *laissez faire* approach to market competition. *Rational and self-interested economic agents, when placed beyond the reach of government*

²⁶ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 184 (Glasgow ed. 1976) (1759). (Emphasis supplied.)

²⁷ See Paul Cook et al., *Competition, regulation and regulatory governance: an overview*, in *LEADING ISSUES IN COMPETITION, REGULATION AND DEVELOPMENT* 5 (2005).

²⁸ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 83 (2003 ed.) (1942), available at <https://eet.pixel-online.org/files/etranslation/original/Schumpeter,%20Capitalism,%20Socialism%20and%20Democracy.pdf>.

²⁹ John Metcalfe et al., *Competition, innovation and economic development: the instituted connection*, in *LEADING ISSUES IN COMPETITION, REGULATION AND DEVELOPMENT* 64-65 (2005).

regulation, unwittingly promote the social good. The allocation of inputs and the production and distribution of output in a perfectly competitive economic system will be efficient—that is, no resources are wasted, and the mix of goods and services produced, as well as their allocation, will be in accord with individual preferences. Competitive forces will thus generate efficiency in two ways: *first*, through productive efficiency, in which low cost producers will replace the less efficient; *second*, through allocative efficiency, in which exchanges in the marketplace direct production away from goods and services that consumers value less and towards those that they value more.³⁰

From a welfare economics approach, perfect competition is viewed as the best choice among alternative conflict resolution mechanisms because markets allocate and distribute resources efficiently, achieving society's goals while using as few resources as possible.³¹ To put it simply, efficiency is attained in a perfectly competitive market. In this regard, promoting consumer welfare can be understood as a necessary incident³² in realizing economic efficiency. Consumer welfare—measured as the collective gains of buyers who were fortunate enough to pay less than what they were actually willing to pay for a certain good—is maximized at the price where supply intersects with demand. At any price higher than this competitive price, certain consumers would be discouraged from purchasing; any lower would lead to the demise of firms whose production costs could not yield to such price.

2. *Imperfect markets*

The perfectly competitive paradigm is workable only to the extent that its stringent assumptions can hold, and considering that such assumptions are rather unrealistic, perfect competition remains only an ideal model. The conditions that satisfy the functioning of perfectly competitive markets are: (i) sellers and buyers are numerous such that no one's actions can perceptibly influence market conditions; (ii) consumers are able to register their subjective preferences among various goods and services through market transactions at fully disclosed prices; (iii) information is

³⁰ See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 8* (4th ed. 1988) (1967).

³¹ M. Neil Browne et al., *Potential Tension Between a 'Free Marketplace of Ideas' and the Fundamental Purpose of Free Speech*, 3 AKRON J. CONST. K. & POL'Y 55, 61 (2012).

³² Some literature goes so far as to treat efficiency and consumer welfare synonymously. See, e.g. Lina Kahn, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236 n.7 (2017). Viewed in this manner, the PCC, in proclaiming either economic efficiency and/or consumer welfare, is really advancing only one policy objective.

perfect, in the sense that all relevant prices are known to each producer who knows of all input combinations technically capable of producing any specific combination of outputs; (iv) access to input markets is equal among every producer; (v) homogeneity of goods and services; and finally, (vi) there are no artificial entry barriers to the production of any product.³³

Such assumptions must perforce yield to reality. Markets are never one-dimensional as the economy is broken down into different sectors—like agriculture, manufacturing, services, international trade, banking and finance—each with their own finite roster of producers and limited set of consumers, the latter often being sub-classified according to age, profession, buying power, or geographical situation, among others.

Barriers to entry, defined as a cost that must be borne by firms seeking to enter an industry but not borne by firms already in the industry,³⁴ are prevalent in the Philippine economy. For instance, the agriculture sector is fenced off by regulatory barriers, such as import licensing and tariff quotas, that ward off foreign competition. On the other hand, incumbent players in food and appliance manufacturing enjoy the protection of structural barriers, such as large capital requirements and sunk costs, as well as regulatory barriers like tariff quotas. In pharmaceutical drugs, intellectual property rights insulate the holder from competition, and require challengers to incur substantial research and development costs to develop similar products.³⁵ Ultimately, these barriers contribute to the Philippines' dismal ranking, 113th out of 190 countries, in the World Bank's latest Ease of Doing Business report.³⁶

By means of product differentiation, firms are able to create "ostensible monopolies" in the perception of the consuming public. Businesses—by varying the product design, serviceability, terms of sale, advertisement, packaging or outlet of production—appeal to the distinctive tastes of consumers, thus inducing and maintaining brand loyalty. Product differentiation, therefore, engenders a certain degree of monopoly power, at times forcing firms to produce at inefficiently small scales to satisfy the

³³ See AREEDA & KAPLOW, *supra* note 30, at 7-8.

³⁴ GEORGE STIGLER, *THE ORGANIZATION OF INDUSTRY* 67 (1968).

³⁵ See Table 13, in Rafaelita Aldaba, *Assessing Competition in Philippine Markets*, Phil. Inst. for Dev. Stud. Discussion Paper Series No. 2008-23 (2008), available at <https://dirp4.pids.gov.ph/ris/dps/pidsdps0823.pdf>.

³⁶ Ben de Vera, *PH Ranking in ease of doing business slips from 99th to 113th*, PHIL. DAILY INQ., Nov. 1, 2017, available at <http://business.inquirer.net/239704/philippines-ranking-world-bank-doing-business-2018>.

limited but loyal clientele.³⁷ But such monopolies remain ostensible precisely because underneath these various marketing strategies, competing firms produce essentially substitutable products. The practice of product differentiation is evident in the Philippine tobacco industry. The single “Marlboro” brand is stamped on reds, menthols, lights, or other variations which, save for some slight tweaking, are basically the same pack of cigarettes.

The confluence of the foregoing market imperfections facilitates the rise of the oligopolies. One news article notes that

huge sectors of Filipino industry (such as banking, telecommunications, and property development) are almost entirely monopolized by a few elite political families, most of whom have been in power since the Spanish colonial era. And despite wide-reaching government reforms from the 1980s, those industries remain effective oligarchies or cartels that vastly outperform small businesses.³⁸

Deviations from the perfectly competitive paradigm lead to social costs, the first being *productive inefficiency*. With a limited number of players, ranging from a monopolist to oligopolists, any business decision will have a perceptible effect on market conditions. In other words, the business entity now possesses economic clout and can raise prices in pursuit of higher profits but in the process reduce the production of goods and services. The foregone production of goods and services thus represents output which the entity could have made available to consumers but, because producing that much would mean depressing prices and reaping lower profits, opted not to do so: an inefficiency in the use of resources.³⁹

Because buyers are now faced with higher prices than when perfect competition prevailed, there is a transfer of surplus from consumers to producers. This is the social cost of wealth transfer, made more pernicious when consumers are generally poorer than producers (more accurately the shareholders thereof). In such analysis, consumers attach higher utility to the enjoyment of lower prices than what producers ascribe to reaping higher prices.⁴⁰

³⁷ See AREEDA & KAPLOW, *supra* note 30, at 27.

³⁸ Jillian Keenan, *The Grim Reality Behind the Philippines' Economic Growth*, THE ATLANTIC, May 7, 2013, available at <https://www.theatlantic.com/international/archive/2013/05/the-grim-reality-behind-the-philippines-economic-growth/275597/>.

³⁹ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 357 (2010 ed.) (1973).

⁴⁰ *Id.* at 358.

Another social cost is that of rent-seeking. Firms, thinking they can obtain monopoly profits by setting up entry barriers, are induced to spend resources for the formation and maintenance of artificial monopoly power and, once formed, engross a large portion of the market.⁴¹ Thus, firms would spend resources on lobbying and regulatory capture which is considered a waste because such expenditures do not translate to higher production.⁴²

Finally, another pernicious social cost is that of dynamic inefficiency. The few big players, unalarmed by the absence of other competitors who might outdo their business, remain complacent and face fewer incentives to innovate and minimize their costs.⁴³

The Philippine economy abounds with such social costs. In one of the cases pending before the PCC, the complainant alleged that the Cement Manufacturers Association of the Philippines (“CeMAP”)—along with dominant cement manufacturers Lafarge Holcim, Republic Cement, and Building Materials, Inc.—engaged in mob-style business by excluding and even harassing non-CeMAP members in order to maintain their stature in the industry. Allegedly, CeMAP used the trade association and pseudo consumer groups to justify the violation of the PCA when it filed unsubstantiated and frivolous cases solely against non-CeMAP imported brands alleging substandard cement.⁴⁴ In the agricultural sector, a perennial problem concerns the rice cartelization by middlemen. A 2015 study by the Philippine Institute of Development Studies observes that “rice marketing in the Philippines involves a network of middlemen working closely with rice cartels which control 90% of the country's rice supply.”⁴⁵ This practice prompted Agriculture Secretary Emmanuel Piñol to enlist the help of supermarket chains to purchase directly from local growers and do away

⁴¹ *Id.* at 360.

⁴² See Richard Wong, *Why is rent seeking so bad for competition, growth and freedom?*, SOUTH CHINA MORNING POST, June 14, 2016, available at <http://www.scmp.com/business/global-economy/article/1975033/why-rent-seeking-so-bad-competition-growth-and-freedom>.

⁴³ See POSNER, *supra* note 39, at 361.

⁴⁴ Othel Campos, *PCC to investigate alleged cement price manipulation*, MANILA STANDARD, Mar. 6, 2017, available at <http://manilastandard.net/business/biz-plus/231057/pcc-to-investigate-alleged-cement-price-manipulation.html>.

⁴⁵ See Roehlano M. Briones & Beulah dela Pena, *Competition Reform in the Philippine Rice Sector*, Phil. Inst. for Dev. Stud. Discussion Paper Series No. 2015-04 (2015).

with the participation of middlemen.⁴⁶ The existence of these problems necessitates a call for a strong legal and policy response.

B. Antitrust & Competition Policy

Sic utere tuo ut alienum non laedas—so use your property as not to injure the property of others.⁴⁷ If in Adam Smith’s theory of perfect competition, rational self-interested decision-making will secure the public good, *modern economic theory, taking into account the various market imperfections previously discussed, posits that such individualistic behavior actually harms society.* The invisible hand can no longer sustain the proper functioning of the *laissez faire* economy and must now give way to government intervention. *Antitrust and competition policy thus assume the mantle of remedial tools to correct the various market imperfections to the greatest extent possible and reduce their concomitant social costs.* Such policy instruments serve as the legal response to “internalize” the social costs⁴⁸ of one’s private action.

These principles also find affirmation in the 1987 Constitution:

The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.⁴⁹

Within the framework of classical economics, antitrust and competition must focus on rules and procedures that prevent enterprises from engaging in anti-competitive behavior. For neoclassical economics, the pertinent question to ask is whether antitrust should be aimed primarily at attaining optimal market structures.⁵⁰ For evolutionary theorists, competition should be directed at eliminating frictions that slacken the otherwise dynamic processes of firm entry and product innovation.

⁴⁶ Philstar, *Piñol: 5 big supermarket chains to buy direct from onion farmers*, PHIL. STAR, Nov. 28, 2016, available at <http://www.philstar.com/business/2016/11/28/1648277/pinol-5-big-supermarket-chains-buy-direct-onion-farmers>.

⁴⁷ *Gerochi v. Dep’t of Energy*, G.R. No. 159796, 527 SCRA 692, 714, July 17, 2007.

⁴⁸ See, generally, Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

⁴⁹ CONST. art. XII, § 6.

⁵⁰ See Cook, *supra* note 27, at 7.

The PCA is replete with textual anchors that refer back to the foregoing concerns. Under the law, “the State shall regulate or prohibit monopolies when the public interest so requires and that no combinations in restraint of trade or unfair competition shall be allowed”;⁵¹ the State is also required to “[p]revent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets”⁵² as well as to “[p]enalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions[.]”⁵³ Such language emphasizes anti-competitive conduct, the concern of classical economics. In pursuit of the structural approach of neoclassical theory, the law also concedes that “past measures undertaken to liberalize key sectors in the economy need to be reinforced by measures that safeguard competitive conditions[.]”⁵⁴ And in the evolutionary sense, “the provision of equal opportunities to all promotes entrepreneurial spirit, encourages private investments, facilitates technology development and transfer and enhances resource productivity[.]”⁵⁵ All these are pursuant to the objective of protecting consumer welfare by allowing consumers to exercise their right of choice over goods and services offered in the market.⁵⁶ After all, “[t]he efficiency of market competition as a mechanism for allocating goods and services is a generally accepted precept.”⁵⁷

To give effect to the foregoing, the law is fortified by three pillars: merger review, enforcement, and advocacy.

1. Merger Review

Under the PCA, the PCC is empowered to “[r]eview proposed mergers and acquisitions, determine thresholds for notification, determine the requirements and procedures for notification, and upon exercise of its powers to review, prohibit mergers and acquisitions that will substantially prevent, restrict, or lessen competition in the relevant market[.]”⁵⁸ When the proposed transaction breaches a certain threshold, parties are compelled to notify the PCC of the same,⁵⁹ providing the necessary details that will allow

⁵¹ PCA, § 2.

⁵² § 2.

⁵³ § 2.

⁵⁴ § 2.

⁵⁵ § 2.

⁵⁶ § 2.

⁵⁷ § 2.

⁵⁸ § 12(b).

⁵⁹ *See* PCA, § 17.

the agency to assess the effects on competition. An agreement consummated in the absence of notification is considered void and the parties shall be subject to an administrative fine.⁶⁰

Economic efficiency is impaired when competition is eliminated,⁶¹ thus allowing the merged entity to flex its market power.⁶² Consumers are effectively deprived of the whole array of choices which the absorbed or eliminated entity was previously providing. The level of demand being fixed, any restriction in supply will bring about higher prices that buyers are constrained to take. Anti-competitive mergers can also bring about coordinated effects because “[t]he fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of [antitrust laws][.]”⁶³ Similarly, “where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”⁶⁴

Admittedly, mergers and acquisitions can also lead to efficiency gains. The linkage between a manufacturer and a supplier, for instance, can bring about ease of logistical coordination, thus reducing costs of production that can eventually translate to cheaper goods. In this regard, the PCC will consider such benefits and weigh them against the foreseeable harm.⁶⁵

Ultimately, the PCC can choose to prohibit the contentious merger; approve it conditionally—that is, subject the parties to certain commitments such as divestiture of assets or the desistance of certain practices; or outright approve the same when economic efficiency and consumer welfare are unlikely to be harmed.⁶⁶

2. *Enforcement*

⁶⁰ PCA, § 17.

⁶¹ *See* United States v. United States Steel Corp., 251 U.S. 417 (1920).

⁶² *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

⁶³ Hospital Corporation of America v. Fed. Trade Comm’n, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.). *See also* Fed. Trade Comm’n v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.).

⁶⁴ Fed. Trade Comm’n v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986) (Bork, J.).

⁶⁵ *See* PCA, § 21(a).

⁶⁶ §§ 12(h), 20, 21.

Sections 14⁶⁷ and 15⁶⁸ embody the enforcement aspects of the law. Essentially, these provisions curtail behavior that reduces efficient market behavior and inflicts economic harm in the marketplace as a whole and on consumers in particular. They are, in a sense, the reactive tools of antitrust, seeking to address the symptoms of imperfect market conditions.

Under Section 14(a), price-fixing and bid-rigging are considered *per se* violations. The law dispenses with the requirement to prove economic injury since Congress, taking cue from established economic theory, has deemed such violations as harmful in and of themselves. Thus,

[h]orizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an illegal *per se* approach, because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.⁶⁹

The rest of Section 14, as well as Section 15, requires the application of the SLC test. Among the earliest formulations of SLC is enunciated in the seminal decision in *Chicago Board of Trade v. United States*, penned by Justice Louis Brandeis, a prominent figure in antitrust law. The formulation of the SLC test was Justice Brandeis' rebuke of the government's attempt to penalize the defendants outright without looking into the totality of the circumstances, based on the "bald proposition"⁷⁰ that they simply agreed on prices. Justice Brandeis wrote:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts particular to the business to which the restraint is applied; the nature of the restraint and its effect, actual or probably. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.⁷¹

⁶⁷ § 14. Anti-Competitive Agreements.

⁶⁸ § 15. Abuse of Dominant Position.

⁶⁹ Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100 (1984).

⁷⁰ *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

⁷¹ *Id.*

Further, in *Continental TV, Inc. v. GTE Sylvania, Inc.*,⁷² it was held that an SLC analysis must consider the specifics of the challenged practices and their impact upon the marketplace.⁷³ The fact-finder should weigh all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.⁷⁴ The idea is to gain an understanding of the competitive situation in the product market.⁷⁵

3. *Competition Advocacy*

The PCC is empowered to “[c]onduct, publish, and disseminate studies and reports on anti-competitive conduct and agreements to inform and guide the industry and consumers,”⁷⁶ and to advocate pro-competitive policies of the government by (i) reviewing economic and administrative regulations, *motu proprio* or upon request, as to whether or not they adversely affect relevant market competition, and advising the concerned agencies against such regulations; and (ii) advising the Executive Branch on the competitive implications of government actions, policies and programs.⁷⁷

While the enforcement functions are a reactive type of power, the PCC’s advocacy powers are more preventive in nature. Wielding its advocacy powers will allow the PCC to create a culture of competition, instilling in industry players the tenets of fair dealing, and nipping anti-competitive conduct in the bud. It can also apprise other government bodies of the anti-competitive aspects of some rules which, while bona fide aimed at advancing a certain policy objective, unduly create structural restraints on market entry and participation.

It was on the basis of the latter thrust that the PCC filed its first *amicus curiae* brief. The assailed licensing regime bestowed disparate benefits on domestic and foreign contractors even if both classes expended the same resources in securing the license, and even if the latter might have possessed better capacity than the former⁷⁸—a vestige of the well-meaning but ill-

⁷² Hereinafter “*Continental TV*”, 433 U.S. 36 (1977).

⁷³ *Citing United States v. Schwinn*, 388 U.S. 365 (1967).

⁷⁴ *Continental TV*, 433 U.S. at 49.

⁷⁵ *Id.* at 45.

⁷⁶ PCA, § 12(m).

⁷⁷ § 12(r).

⁷⁸ Ted Cordero, *PCC weighs competition issue in PCAB-Manila Water construction case*, GMA NEWS ONLINE, Jan. 6, 2017, available at <http://www.gmanetwork.com/news/money/companies/594892/pcc-weighs-competition-issue-in-pcab-manila-water-construction-case/story/>.

advised Filipino First policy. National Scientist for Economics Gerardo P. Sicat views this policy as the “original sin” of Philippine development policy, first grafted onto the 1935 Constitution and carried over into the present charter.⁷⁹ From a competition perspective, the PCC viewed the nationality distinction as an entry barrier that unduly restricted market competition. In its own strategic way, the PCC sought to atone for the original sin by asking the Court to strike down the questioned regulation.

Coming full circle, Part II presents a framework that synthesizes the concepts of perfect competition, imperfect markets, and competition policy. The theoretical construct of perfect competition, while existing merely as an ideal concept, provides a useful benchmark, a counterfactual of sorts, against which to appraise contemporary market conditions. Deviations from such an ideal, therefore, pose social distortions that ought to be corrected. Antitrust and competition policy—by means of merger review, competition enforcement, and advocacy—serve as the legal response to such imperfections. As this legal instrument is increasingly wielded to correct various market aberrations, economic efficiency and consumer welfare may be expected to improve.

C. Comments and Criticisms

That competition agencies gravitate towards the economic efficiency and consumer welfare standards is unsurprising; employing such standards provides considerable advantages.

In promoting policy objectives that are rooted in time-honored economic principles, competition agencies can easily claim the mantle of objectivity. According to scholars of law and economics, “[e]conomics provide[s] a scientific theory to predict the effects of legal sanctions on behavior.”⁸⁰ And as a tool of analysis, economics possesses significant methodical allure owing to “mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics)[.]”⁸¹ Further in legal analysis, the use of economics can be distinguished from other tools in the following respects:

First, economic analysis emphasizes the use of stylized models and of statistical, empirical tests of theory, whereas other

⁷⁹ Gerardo P. Sicat, *Legal and Constitutional Disputes and the Philippine Economy*, 82 PHIL. L.J. 2, 29 (2007).

⁸⁰ ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 3 (2016 ed.) (1988).

⁸¹ *Id.*

approaches usually do neither. Second, in describing behavior, economic analysis gives much greater weight than other approaches to the view that actors are rational, acting with a view toward the possible consequences of their choices. And third, in normative evaluation, economic analysis makes explicit the measure of social welfare considered.⁸²

With data and information being processed through a tested theoretical framework, economic efficiency and consumer welfare are easily quantified.

From objectivity necessarily flows the advantages of transparency and accountability. “Welfare-based standards have led to greater predictability in judicial and [executive] agency decision making.”⁸³ By tying their mandate to a single economic policy objective, regulators can act more predictably and consistently, thereby promoting compliance and effective regulatory operations.⁸⁴ Such agency action can, from the standpoint of due process, be likened to the publication of penal laws.⁸⁵ Explicitly adopting an economic efficiency standard serves to apprise the general public⁸⁶ of the substance and formalities of agency action, thereby promoting fairness in public administration.

Finally, the adoption of an objective and transparent standard allows an agency to exercise its mandate in a non-confrontational manner. In this manner, the government and private sector will no longer be depicted as two opposite and conflicting forces—with government often being criticized as encroaching on private interests; and businesses often painted as headstrong self-seeking entities. By crusading for the cause of consumers, instead of openly declaring war against big businesses, the competition authority can claim the neutral exercise of its mandate. In this regard, the PCC would be in the same strategic position that the Supreme Court, in *Tatad v. Secretary of Energy*, maneuvered itself into:

With this Decision, some circles will chide the Court for interfering with an economic decision of Congress. Such

⁸² STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 4 (2004).

⁸³ Joshua Wright & Douglas Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2407 (2013).

⁸⁴ See Organisation for Economic Co-operation and Development, *Principles for the Governance of Regulators*, in OECD BEST PRACTICE PRINCIPLES FOR REGULATORY POLICY (2013), available at <http://www.oecd.org/gov/regulatory-policy/the-governance-of-regulators-9789264209015-en.htm>.

⁸⁵ See *Tañada v. Tuvera*, G.R. No. L-63915, 136 SCRA 27, Apr. 24, 1985.

⁸⁶ *Pesigan v. Angeles*, G.R. No. L-64279, 129 SCRA 174, 177, Apr. 30, 1984.

criticism is charmless for the Court is annulling R.A. No. 8180 not because it disagrees with deregulation as an economic policy but because as cobbled by Congress in its present form, the law violates the Constitution. [...] Indeed when confronted by a law violating the Constitution, the Court has no option but to strike it down dead. Lest it is missed, the Constitution is a covenant that grants and guarantees *both* the political and *economic rights of the people*. The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well. The protection of the economic rights of the poor and the powerless is of greater importance to them for they are concerned more with the exoterics of living and less with the esoterics of liberty. Hence, for as long as the Constitution reigns supreme so long will this Court be vigilant in upholding the economic rights of our people especially from the onslaught of the powerful. Our defense of the people's economic rights may appear heartless because it cannot be half-hearted.⁸⁷

The allure of such advantages has prompted legislators, in the enactment of the PCA, and the PCC, in its administrative issuances, to adopt criteria that are collapsible into the economic efficiency and consumer welfare standards. In determining the existence of anti-competitive conduct, the totality of evidence must be assessed in order to account for efficiency gains; consider the availability of goods and services to consumers; and to safeguard efficiency, productivity, innovation, and development.⁸⁸ With respect to mergers and acquisitions, the IRR requires a balancing of competitive restrictions and efficiency gains, as well as a comparison between the competitive conditions that would likely result from the merger or acquisition and the conditions that would likely have prevailed without the merger or acquisition.⁸⁹

Enjoyment of the foregoing advantages should not, however, serve as vices that hinder the PCC from pursuing other policy objectives beyond economic efficiency and consumer welfare. The two virtues are, after all, not without their shortcomings—a strong admonition against the PCC from exclusively limiting its mandate to said virtues. Moreover, “with the growing complexity of modern life, the multiplication of the subjects of governmental regulations, and the increased difficulty of administering the laws,” Congress has vested “a larger amount of discretion in administrative and executive officials, not only in the execution of the laws, but also in the

⁸⁷ G.R. No. 124360, 281 SCRA 330, 370, Nov. 5, 1997.

⁸⁸ See PCA, § 26.

⁸⁹ PCC IRR, Rule 4, § 1.

promulgation of certain rules and regulations calculated to promote public interest.”⁹⁰

To begin with, economics may not be as impartial a science as one might paint it to be, while economic efficiency and consumer welfare may not be as dispassionate. Economics, after all, is a tool that can be harnessed to suit any end. As incisively expressed in one article:

Despite the laborious techniques and scientific pretention, most brands of economics are covertly ideological. Marxian economics, with its labor theory of value, assumes the inevitability of class conflict, and hence, the necessity of class struggle. Keynesianism, with its conviction that industrial capitalism is systematically unstable, offers an equally “scientific” rationale for government intervention. Neoclassical economics, with its reliance on the efficiency of markets, is a lavishly embroidered brief for laissez faire.⁹¹

Although legal analysis can now be expressed in terms of graphs, functions, equations and charts, this does not mean that competition agencies automatically possess the “cold neutrality of an impartial judge[.]”⁹² Antitrust and competition policy, no different from the application of any other law, is not an autarchic field but is instead responsive to the warp and woof of other civil, political, and social dimensions.

More alarmingly, employing the standards of economic efficiency and consumer welfare—more so when done to the exclusion of other goals—have, in some instances, perversely led to economic injury. Efficiency or welfare analysis has been criticized as ascribing to distinct goods and services the same social utility. Such a one-dimensional take fails to account for the harm certain goods—for instance, tobacco and guns—inflict on society. Since efficiency and welfare are primarily concerned with delivering the most competitive prices to consumers, regulators end up making harmful goods more accessible to the consuming public.⁹³ Furthermore, in a regime that adopts efficiency and/or welfare to the exclusion of other standards, “conduct that did not impair efficiency would

⁹⁰ Calalang v. Williams, G.R. No. 47800, 70 Phil. 726, 733, Dec. 2, 1940.

⁹¹ Robert Kuttner, *The Poverty of Economics*, ATLANTIC MONTHLY 74 (1985).

⁹² Sardinia-Linco v. Pineda, G.R. No. 55939, 104 SCRA 757, 761, May 29, 1981.

⁹³ Barack Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 133, 152-53 (2010).

be permitted, regardless of the effects on consumers, producers, competitors, or the political economy at large.”⁹⁴

From a broader perspective, efficiency and consumer welfare are but two aspirations in the entire universe of objectives that antitrust may pursue. The United States case of *Brown Shoe v. United States*⁹⁵ is instructive on this matter:

*Congress provided no definite quantitative or qualitative tests by which enforcement agencies were to gauge the effects of a given merger, but rather that Congress intended that a variety of economic and other factors be considered in determining whether the merger was consistent with maintaining competition in the industry in which the merging companies operated.*⁹⁶

The PCC shall inevitably encounter cases that will entail the application of other considerations since going by the economic efficiency or consumer welfare approach alone would be a dereliction of the duties to address various issues and promote other equally important values. As more complex variables factor into the agency’s calculus, the PCC would risk undercutting its mandate if it were to limit its goals. In such case, the ultimate loser would be society.

In the drive towards the frontiers of its mandate, the new agency should overcome the frictions of established practices and the inertia of rigid principles. To paraphrase the Supreme Court in *Antamok Goldfields Mining Co. v. Court of Industrial Relations*:⁹⁷ alive to the social, political and economic forces at work, the legislators—in enacting the PCA—boldly met the problems and difficulties which faced them and endeavored to crystallize, with more or less fidelity, the political, social, and economic proposition of their age; and this they did, with the consciousness that the economic, political and philosophical aphorism of their generation will be doubted by the next and perhaps be entirely discarded by the third.

III. THE OLD GODS ARE DEAD: ARTICULATING THE OTHER GOALS OF ANTITRUST

⁹⁴ Kahn, *supra* note 32, at 270.

⁹⁵ 370 U.S. 294 (1962).

⁹⁶ *Id.* at 315. (Emphasis supplied.)

⁹⁷ G.R. No. 46892, 108 SCRA 43, June 28, 1940.

Friedrich Nietzsche once declared, “the old god is dead,”⁹⁸ and with these words ushered in an epoch of metaphysical manumission. No longer fettered by traditional Christian values, individuals were now driven with a will to power, a drive to take moral responsibility for their existence.

So too must the PCC, in going beyond the confines of traditional antitrust analysis, create something beyond what other competition agencies have realized. This Part, therefore, articulates other goals of antitrust. The goals laid out herein are by no means exhaustive. Nonetheless, these virtues are strongly supported by the existing legal and competition framework, and are of primary concern in Philippine society. The basic premise, it must be noted, is that these other antitrust goals seek to address other social costs which traditional antitrust analysis would otherwise omit.

The discussion in the succeeding subsections assumes the following form: a pronouncement of the antitrust principle, a discussion of Philippine social issues that urge the adoption of the said principle, and a synthesis of the legal bases that support and demonstrate the use of antitrust and competition policy.

A. Empowerment of Smaller Businesses

1. Pro-producer Rationale

In *United States v. Von's Grocery Co.*,⁹⁹ the US Supreme Court observed that the antitrust laws, in seeking to arrest the rising tide toward the concentration of industry into too few hands, aim to halt the demise of the small businessman. By keeping a large number of small competitors in business, antitrust can steer the economy clear from the point where markets are left in the control of a few big companies.¹⁰⁰

Antitrust and competition policy reflect the “concern for preserving business opportunities for small firms,” which is especially important considering that “[t]he opportunity to compete has been viewed as particularly important for small entrepreneurs, perhaps because of their vulnerability to predatory activities.”¹⁰¹ Adam Golodner, a former staffer of the Antitrust Division of the US Department of Justice noted that

⁹⁸ FRIEDRICH NIETZSCHE, *THE GAY SCIENCE: WITH A PRELUDE IN GERMAN RHYMES AND AN APPENDIX OF SONGS* 199 (Cambridge U. Press, 2001 ed.) (1882).

⁹⁹ 384 U.S. 270 (1966).

¹⁰⁰ *Id.* at 275-77.

¹⁰¹ Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L. J.* 67, 101-04 (1982).

“[a]ntitrust laws work as an economic ‘charter of freedom’ by protecting [the] economy from the misuse of market power by dominant firms, or from anticompetitive collusion by groups of firms, or from anticompetitive mergers[.]” noting that “[s]mall businesses are often the first and most directly affected by the harm caused by price-fixers and market allocators. These cartels can, and have, controlled the price, availability, and other terms of the essential inputs that small businesses need in order to transact business and make products.”¹⁰²

Furthermore, “the same can be said of antitrust's role in preserving the freedom to innovate. It is well known that many important technological breakthroughs have been made by small businesses [...] [such as] the self-winding watch, the oxygen process in steel making, and the stainless steel razor blade. Today, small businesses are in the forefront of developing new advances in telecommunications—for example, the next generation of lasers, routers and optical switches that will allow fibre optic networks to move ever-increasing amounts of data at the speed of light.” The problem, however, is that “[i]nnovation, like entrepreneurship, is risky. It costs money. It takes time. It often fails. Therefore, common sense tells us that there will be a lot less innovation if markets are not open to competition from businesses that have a better idea.”¹⁰³

Competition must, therefore, increase the competitive space where micro, small, and medium enterprises (“MSMEs”) may enter, compete, innovate, and thrive.

2. *The Philippine Concern for Smaller Businesses*

For decades, MSMEs have remained in the saddle point between constrained potential and unfettered growth.

MSMEs are heralded as the “missing link to inclusive and sustainable economic development.”¹⁰⁴ Department of Trade and Industry (“DTI”) statistics indicate that, as of 2015, MSMEs comprised 99.5% of 900,914 establishments in the Philippines.¹⁰⁵ They serve as industrial linkages to global value chain systems, functioning as intermediate input or raw

¹⁰² Adam Golodner, *Antitrust, Innovation, Entrepreneurship and Small Business*, speech delivered at the SBA Conference on Industrial Organization (Jan. 21, 2000).

¹⁰³ *Id.*

¹⁰⁴ Int'l Trade Centre, *SME Competitiveness Outlook* (2015).

¹⁰⁵ Dep't of Trade and Indus., *2015 MSME Statistics* (2015), available at <http://www.dti.gov.ph/businesses/msmes/msme-resources/msme-statistics>, citing data from the Philippine Statistical Authority.

materials suppliers and subcontractors to larger businesses and exporters. As linkages, they provide a mechanism for technology transfer and local capacity building.¹⁰⁶ As support systems, they enable larger enterprises to become more productive and cost efficient, bringing about an increase in value added. They also supply outsourced parts or services that have increasingly grown in sectors such as automotive, machineries, electronics, garments, and food.¹⁰⁷ Additionally, they are more dynamic, more likely to innovate, and more likely to create employment than large firms.¹⁰⁸ In March 2017, the DTI, confident that homegrown products can compete globally, showcased to the ASEAN community the modern and indigenous quality products crafted, designed, and created by MSMEs.¹⁰⁹

However, MSME potential is still severely undercut. While comprising nearly all establishments in the Philippines, their contribution to GDP still remains at 35% as of 2015.¹¹⁰ This means that the bulk of productive apparatus still remains within the command of the big firms. Between 2000 and 2015, the rate of entry of MSMEs has generally remained stagnant considering that, while 2015 registered a total of 896,000 MSMEs,¹¹¹ such establishments already numbered at around 800,000 between 2000 and 2010.¹¹² These figures suggest that there were critical factors at the time that impeded MSME entry and growth but were not addressed during such period.

While numerous measures have been enacted and oriented towards building MSME capacity, solidifying them as a major driver of economic growth, such measures have tilted heavily towards addressing internal attributes and capabilities of MSMEs, overlooking external impediments relating to business conditions.

¹⁰⁶ Rafaelita Aldaba & Fernando Aldaba, *Toward Competitive and Innovative ASEAN SMEs: Philippine SME Policy Index 2012*, Phil. Inst. for Dev. Stud. Discussion Paper Series No. 2014-30 (2014).

¹⁰⁷ Richmond Mercurio, *SMEs eyed to hike GDP contribution*, PHIL. STAR, Nov. 24, 2015, available at <http://www.philstar.com/business/2015/11/24/1525141/smes-eyed-hike-gdp-contribution&arubalp=a31e8eea-897d-4cc0-ac64-78ebace420>.

¹⁰⁸ Rene Hapitan, *Competition Policy and Access of Small and Medium Enterprises (SMEs) to Financial Services: A Review of Selected SMEs*, WORLD BANK WEBSITE, available at <http://siteresources.worldbank.org/INTPHILIPPINES/Resources/Hapitan.pdf>.

¹⁰⁹ Dep't of Trade and Indus., *PH Boasts of MSME Products at ASEAN Economic Ministers' Meet*, available at <http://dti.gov.ph/media/latest-news/10297-ph-boasts-best-of-msme-products-at-asean-economic-ministers-meet>.

¹¹⁰ Mercurio, *supra* note 107.

¹¹¹ *Supra* note 104.

¹¹² Asia-Pacific Economic Cooperation, *Capacity Building for SMEs and Competition Policy: Baseline Study and Regulatory Impact Assessment* (2016).

3. MSME Protection Under the PCA

In providing full protection to MSMEs, the PCA places emphasis on “measures that safeguard competitive conditions.”¹¹³ In doing so, “[t]he State also recognizes that the provision of equal opportunities to all promotes entrepreneurial spirit, encourages private investments, facilitates technology development and transfer, and enhances resource productivity[.]”¹¹⁴ All this is done with the view towards attaining “a more equitable distribution of opportunities, income, and wealth[.]”¹¹⁵

One provision that gives effect to the foregoing principles is the prohibition on predatory pricing. Section 15(a) of the PCA penalizes the act of “selling goods or services below cost with the object of driving competition out of the relevant market[.]”¹¹⁶ Market entrants who possess and utilize more innovative and competitive business practices will threaten to displace incumbent players and reduce their industry profits. Faced with such threat, incumbent players will attempt to reduce their prices to a certain point where new players can no longer compete, incurring short-term losses deliberately.¹¹⁷ This is carried out with the intent to drive out weaker competitors to maintain the incumbent’s privileged status.¹¹⁸ Consequently, successful predatory pricing requires that the predator recoup the lost profits and maintain monopoly power over the long-term.¹¹⁹

Complementing the provision on predatory pricing is Section 15(b), which prohibits the imposition of barriers to entry, as well as the commission of acts that prevent competitors from growing within the market in an anti-competitive manner.¹²⁰ In contrast to Section 15(a), this other provision appears to be a catch-all provision against the harm caused by any conduct which structurally impairs market conditions or oppresses weaker firms. One example of this harm is found in the practice of preemptive patenting or the procurement of sleeping patents. A dominant

¹¹³ PCA, § 2.

¹¹⁴ § 2.

¹¹⁵ § 2.

¹¹⁶ § 15(a).

¹¹⁷ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

¹¹⁸ See *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891 (3d Cir.), *cert denied*, 474 U.S. 863 (1985); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert denied* 459 U.S. 825 (1982); and *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1504 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

¹¹⁹ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹²⁰ PCA, § 15(b).

firm may, in certain instances, find it unprofitable to commercially exploit a technical invention, yet deem it strategic to obtain the same in order to preclude potential competitors from utilizing such patent.¹²¹ Such practice imposes an artificial barrier to entry that undermines the potential of smaller firms.

Recognizing that small producers have as much a stake in industry profits as any other market player, Section 15(g) penalizes the direct or indirect imposition of unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, MSMEs, and other marginalized service providers and producers.¹²² This is the practice of short-changing small producers, prevalent in instances where it is now the consumers that possess significant buying power—that is, since sellers have few options with regard to demand, the limited number of buyers can dictate prices. The US Supreme Court, in *United States v. Trans-Missouri Freight Association*,¹²³ declared that “[t]rade or commerce under [circumstances of artificially reduced prices] may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.”¹²⁴ As earlier adverted to, the agriculture industry thrives with cartelized middlemen who force small farmers to sell at absurdly low prices.¹²⁵

Significantly, the PCA contains a specific provision on trade associations:

Nothing contained in this Act shall be construed to prohibit the existence and operation of trade associations organized to promote quality standards and safety issues: *Provided*, That, these associations shall not in any way be used to justify any violation of this Act: *Provided, however*, That it shall not be illegal to use the association as a forum to discuss or promote quality standards, efficiency, safety, security, productivity, competitiveness and other matters of common interest involving the industry:

¹²¹ Fed. Trade Comm’n, *Strategy, Predation, and Antitrust Analysis* 223-30 (1981), available at <https://www.ftc.gov/sites/default/files/documents/reports/strategy-predation-and-antitrust-analysis/198109strategy-predation.pdf>.

¹²² PCA, § 15(g).

¹²³ 166 U.S. 290 (1897).

¹²⁴ *Id.* at 323-24.

¹²⁵ See Briones & dela Peña, *supra* note 45. See also, Piñol: 5 big supermarket chains to buy direct from onion farmers, PHIL. STAR, Nov. 28, 2016, available at <http://www.philstar.com/business/2016/11/28/1648277/pinol-5-big-supermarket-chains-buy-direct-onion-farmers>.

Provided, further, That such is done without any anti-competitive intent or effect.¹²⁶

An association—also denoted as a trade association, trade group, sector association, chamber of commerce, board of trade, *inter alia*—is understood as a number of private entities or individuals, the members of which are involved in a particular profession, trade or business, that band together for some special purpose.¹²⁷ The members need not be engaged in the same or similar line of business. Its defining feature is that its individual members agree to be bound by certain rules that are internally agreed upon. In that sense, individual entities surrender some degree of business discretion in the hope that concerted action will yield some collective benefit. Such collective benefit is expected to trickle down and more than compensate the individual entity for its diminished independence.

Adam Smith once observed that “[p]eople of the same trade seldom meet together, even for merriment and diversion, *but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*”¹²⁸ Notwithstanding such competitive concerns, the PCA does not ban trade associations outright. More than being afforded constitutional protection,¹²⁹ trade associations are acknowledged by law as a necessary vehicle through which smaller businesses can gain mutual protection, obtain leverage, and accumulate significant bargaining power.

In another jurisdiction, the Australian Competition & Consumer Commission created a Small Business and Franchising Consultative Committee, a forum where small businesses and members of trade associations can voice out competition-related concerns and grievances.¹³⁰ The PCC just recently concluded its first industry consultation with members of the Philippine Chamber of Food Manufacturers, Inc.,¹³¹ although the participants therein primarily consisted of the bigger industry players.

¹²⁶ PCA, § 48.

¹²⁷ See “association” and “trade union” in BLACK’S LAW DICTIONARY 98, 1165 (2nd ed. 1910)

¹²⁸ SMITH, *supra* note 25, at 145. (Emphasis supplied.)

¹²⁹ CONST. art. III, § 8. “The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.”

¹³⁰ See Australian Competition and Consumer Comm’n, *Small Business and Franchising Consultative Committee*, available at <https://www.accc.gov.au/about-us/consultative-committees/small-business-franchising-consultative-committee> (last accessed Jan. 4, 2019).

¹³¹ See Gallery, PHIL. CHAMBER OF FOOD MANUFACTURERS, INC. WEBSITE, available at <http://www.foodchamber.ph/gallery-others.html> (last accessed Jan. 4, 2019).

Therefore, the weight of the PCA provisions suggests that even without harm to consumers, harm to other players—especially the smaller firms—constitutes an actionable antitrust violation. At any rate, the statute must be read in conjunction with the other constitutional provisions that safeguard the interests of private enterprise. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments;¹³² hence, it must recognize the right of enterprises to reasonable returns on investments, and to expansion and growth.¹³³ Moreover, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop.¹³⁴

Conservatives who refuse to subscribe to such view will try to limit the use of antitrust to cases where only consumers are harmed—such that any perceived harm to producers must be disregarded if not offset by expected gains to consumers. This argument, however, misses the evolutionary aspect of antitrust and competition policy: the fate of consumers is, in the long run, ultimately tied to the fate of market competitors.

Joseph Schumpeter observed that the “productive apparatus”¹³⁵ of different industries evolved through the entry of new firms seeking to compete with incumbent firms and make a profit. He described the manner by which entrants challenge the *status quo* as one of “creative destruction” or the process “that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one.”¹³⁶

Modern thinkers complement Schumpeter’s position with their own dynamic efficiency argument: “producers will be more likely to innovate and develop new products as part of the continual battle of striving for consumers’ business.” Thus, “competition may have the dynamic desirable effect of stimulating important technological research and development.”¹³⁷ Ultimately, robust competition among competing firms will redound to consumer welfare.

Emphasis on dynamic efficiency also serves to distinguish protection against competitive harm from the coddling of small businesses.

¹³² CONST. art. XII, § 20.

¹³³ Art. XIII, § 3.

¹³⁴ Art. XII, § 1.

¹³⁵ SCHUMPETER, *supra* note 28.

¹³⁶ *Id.*

¹³⁷ RICHARD WISCH & DAVID BAILEY, COMPETITION LAW 6 (2015).

Antitrust only protects producers to the extent that other competitors inflict economic injury through anti-competitive tactics. But if such firms fall out from the industry because of their own inefficiencies, antitrust will not go out of its way to resuscitate them. So that businesses do not remain complacent or static, dynamic evolution requires a healthy rate of turnover.

It becomes clear, therefore, how the PCA operates in the broader scheme of MSME-oriented policies. Existing measures already seek to address internal issues like insufficient financial capabilities, limited access to bank loans, low productivity due to weak technological capabilities, and lack of ability to form or retain a skilled workforce, but it is equally imperative to ensure that MSMEs operate in a healthy and fair business environment.

B. As Redress for Income Inequality

1. Market Concentration: Wealth Transfers and Profit Hoarding

Antitrust and competition policy can be used to address income inequality. Because big firms unduly extract consumer surplus and convert it into monopoly profits, existing literature argues for the use of antitrust laws to restrain market concentration.¹³⁸ Such strand of literature, however, fails to account for a second channel through which market concentration leads to income inequality—that is, when dominant firms keep smaller players and potential entrants out of the industry, thus depriving other producers of an opportunity to reap a fair share of industry profits.

As earlier discussed, market concentration leads to a “distributive inefficiency”¹³⁹ since market power could be used to restrict output, raise prices, extract the wealth of consumers, and turn them into monopoly profit.¹⁴⁰ Monopolistic overcharges are considered extortion that made the people poor; it promotes transactions, the direct purpose of which is to wrest from the community wealth that ought to have been equitably distributed.¹⁴¹ The overall effect is that “returns from market power go disproportionately to the wealthy: increases in producer surplus from the

¹³⁸ See Lande, *supra* note 101; Jonathan Baker & Steven Salop, Antitrust, Competition Policy, and Inequality, Working Paper No. 41 (2015), available at http://digitalcommons.wcl.american.edu/fac_works_papers/41; Daniel Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016); and Khan, *supra* note 32.

¹³⁹ Lande, *id.* at 68.

¹⁴⁰ *Id.* at 93.

¹⁴¹ *Id.* at 94-95.

exercise of market power accrue primarily to shareholders and the top executives, who are wealthier on average than the median consumer.”¹⁴²

Concerning the second channel of wealth inequality, market concentration allows big firms to hoard industry profits and crowd out their competitors from sharing therein. On this matter, Schumpeter wrote that

[p]ossibilities of gains to be reaped by producing new things or by producing old things more cheaply are constantly materializing and calling for new investments. These new products and new methods compete with the old products and old methods not on equal terms but at a decisive advantage that may mean death to the latter. This is how “progress” comes about in capitalist society. In order to escape being undersold, every firm is in the end compelled to follow suit, to invest in its turn and, in order to be able to do so, to plow back part of its profits, i.e., to accumulate.¹⁴³

The looming threat of market entry cuts away at captured industry profits;¹⁴⁴ hence, monopolists and oligopolists would naturally resist this process of creative destruction in order to maintain their grip on the industry. With “little constraints on market power and great incentives for expropriation and wealth extraction,” the ruling elite will entrench “extractive institutions [and] vicious cycles will generate negative feedback loops that will prevent progress.”¹⁴⁵ In the process, one can expect that wealth will be skewed in favor of bigger and dominant players while smaller enterprises, if not totally excluded from the industry, will reap only a measly share.

Of note is how the two channels—wealth extraction from consumers, and hoarding of industry profits—are not at all mutually exclusive. The entry of new firms is expected to drive down prices and dissipate extra-normal profits among both consumers and new market

¹⁴² Baker & Salop, *supra* note 138, at 238.

¹⁴³ SCHUMPETER, *supra* note 28.

¹⁴⁴ See Diana Heger & Kornelius Kraft, *Barriers to Entry and Profitability*, in CENTER FOR EUROPEAN ECONOMIC RESEARCH DISCUSSION PAPER NO. 08-071 (2008), available at <ftp://ftp.zew.de/pub/zew-docs/dp/dp08071.pdf>; and Michael Porter, *Understanding Industry Structure*, in HARVARD BUSINESS SCHOOL NOTE 9-707-493 (2007), available at <http://home.aubg.edu/students/MAN130/Understanding-Industry-Structure3.pdf>.

¹⁴⁵ See Vuk Vukovic, *Review: Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, in ADAM SMITH INSTITUTE THINKPIECES (2012).

entrants.¹⁴⁶ Hence, when big businesses resort to cutthroat tactics to eliminate smaller businesses, they reduce competitive pressures, facilitating the charging of higher prices in the market.

2. *Income Inequality in the Philippines*

Philippine economic literature establishes that market concentration, and conversely, weak market competition, lead to limited growth and productivity. The interplay of behavioral, regulatory, and structural constraints fosters within numerous industries the rise of an exclusive circle of dominant players.¹⁴⁷

Antitrust analysis relies on economic indicators such as the price-cost margin (“PCM”) and the Herfindahl-Hirschman Index (“HHI”), a ratio used to determine industrial concentration, to compare the monopolistic price markup and competitive prices. “In the presence of market power, the firms will be able to set prices above those prevailing under competitive conditions, leading to excessive economic profits or ‘rents’.”¹⁴⁸ These measures directly affect the distribution of wealth. A high HHI means that the industry is concentrated; only a few firms deliver the bulk of industry output and reap the profits therein. On the other hand, a high PCM means that firms are effectively denying to consumers what they could have enjoyed under competitive conditions.

Using such economic tools in conjunction with industry analysis, one study found that: (i) deliberate government coddling led to concentration in telecommunications, power, shipping, banking, manufacturing, textiles, and cement; (ii) cartel-like behavior persists in flour milling, cement, and inter-island shipping; (iii) entry barriers led to comparatively high domestic prices when compared to border prices; and (iv) entry barriers sustained the operation of inefficient firms and allowed them to generate monopoly rents.¹⁴⁹

The flipside of the issue is that more inclusive industries lead to lower figures of the HHI and PCM. One of the Philippines’ best chronicled

¹⁴⁶ Severin Borenstein, *Understanding Competitive Pricing and Market Power in Wholesale Electricity Markets*, 13 ELEC. J. 49, 51 (2000), available at <http://faculty.haas.berkeley.edu/borenste/mba212/ElecJo00MktPower.pdf>.

¹⁴⁷ See Aldaba, *supra* note 35.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ Rafaelita Aldaba, *The State of Competition in the Philippine Manufacturing Industry*, Phil. APEC Study Center Network Discussion Paper No. 2000-13, 12 (2000), available at <https://pascn.pids.gov.ph/files/Discussions%20Papers/2000/pascndp0013.pdf>.

“success stories” on the matter relates to the airline industry. Owing to the various trade liberalization measures implemented during the 1990s—among them the deregulation of aviation—PCMs declined from 67% to 48%. The entry of new firms served to depress monopolistic prices and disperse the profits enjoyed by a previous monopoly.¹⁵⁰

The income inequality concern becomes even more alarming when one considers the interests of those within the poorest income strata in the Philippines. Latest statistics indicate that poverty incidence¹⁵¹ is at 21.6%. This figure expresses that, as a fraction of the total number of individuals in the Philippines, around one-fifth live below the poverty threshold. The hardest-hit sectors are the farmers, fisher folk, and children, with poverty incidences at 34.3%, 34.0%, and 31.4%, respectively.¹⁵² Moreover, total family expenditure is broken down into food at 42.8%; housing, water, electricity, and other fuels at 19.1%; and education at 4.5%. Such figures spell destitution, especially considering that basic commodities are prone to cartelization while electricity and fuels industries are lorded over by oligopolies.¹⁵³

Thus, the stage is set for antitrust and competition policy to step in. In order to include redistributive justice as among its “final causes,”¹⁵⁴ the law’s advocates must identify the specific mechanisms through which economic wealth can be equitably distributed.

3. *Wealth Redistribution Under the PCA*

¹⁵⁰ Rafaelita Aldaba, *The Impact of Market Reforms on Competition, Structure and Performance of the Philippine Economy*, paper presented at the “Workshop on Policies to Strengthen Productivity in the Philippines” sponsored by the Asia-Europe Meeting (ASEM) Trust Fund, Asian Institute of Management Policy Center, Foreign Investment Advisory Service, Philippine Institute for Development Studies and the World Bank, held in AIM Policy Center, Makati City (July 27, 2005), *available at* <http://siteresources.worldbank.org/INTPHILIPPINES/Resources/Aldaba.pdf>.

¹⁵¹ Measured as the proportion of individuals with per capita income/expenditure less than the per capita poverty threshold to the total number of individuals. *See* Phil. Stat. Authority, *Poverty Incidence*, PHIL. STAT. AUTHORITY WEBSITE, *available at* <https://psa.gov.ph/content/poverty-incidence-pi-0>.

¹⁵² Phil. Stat. Authority, *Farmers, Fishermen and Children consistently posted the highest poverty incidence among basic sectors –PSA*, *available at* <https://psa.gov.ph/poverty-press-releases> (last modified June 30, 2017).

¹⁵³ Aldaba, *supra* note 150.

¹⁵⁴ ARISTOTLE, PHYSICS II (350 B.C.E.), *available at* <http://classics.mit.edu/Aristotle/physics.2.ii.html>.

In arguing for the use of antitrust as a wealth redistributive tool, an initial inquiry must be made on whether or not consumers are entitled to competitive prices such that any markup therefrom will be considered an undue extraction of wealth. As earlier established, monopoly pricing creates a distributive effect. Traditional economic efficiency analysis will treat this transfer neutrally if it does not impair overall welfare; in other words, economic efficiency is unmindful of who gets a bigger slice of the pie so long as the overall size is not reduced. However,

this transfer of wealth raises a very controversial question: is the transfer a “good,” “bad,” or neutral result of monopoly pricing? The value-laden answer in large part is determined by whether anyone is thought to be entitled to the economic benefit of the “consumers’ surplus.” Under monopoly pricing, some consumers’ surplus is acquired by the monopolist. Depending on one’s perspective, one can be entirely indifferent to the result, or one can conclude either that the monopoly is “unfairly taking” property from consumers, or that the monopoly is only reaping its just reward.¹⁵⁵

Fortunately, the PCA is replete with provisions that bolster consumers’ entitlement to competitive prices. Section 14 on Anti-Competitive Agreements penalizes as *per se* antitrust violations the restriction of competition as to price¹⁵⁶ and the fixing of prices at any auction or bidding.¹⁵⁷ Section 15(d) penalizes as an abuse of dominance the act of “[s]etting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially[.]”¹⁵⁸ Similarly, Section 15(h) prohibits “[d]irectly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers,” but permits “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[.]” Thus, the statute recognizes consumers’ entitlement to competitive prices and, supposing an entity is prosecuted under these provisions, aims to return to buyers what was initially extorted from them.

¹⁵⁵ Lande, *supra* note 101, at 75-76.

¹⁵⁶ PCA, § 14(a)(1).

¹⁵⁷ § 14(a)(2).

¹⁵⁸ § 15(d).

One jurisdiction has, in fact, attempted to infuse merger analysis with an income redistribution consideration.¹⁵⁹ In one transaction, Superior Propane sought to acquire ICG Propane, an acquisition which would result in Superior Propane owning about 70% of the propane industry.¹⁶⁰ In balancing the merger's anti-competitive effects with the purported efficiency gains, the Canadian Competition Tribunal was of the impression that increases in welfare should be given different weights depending on whether such accrued to consumers or to producers and shareholders; in other words, it is possible for consumers to derive a higher utility than producers for a given increase in welfare. The Tribunal thus proceeded to employ a "Balancing Weights Approach" in order to assess the distributional concerns involved in the case.¹⁶¹

Antitrust can be utilized towards more equitable distribution of wealth by exercising prosecutorial discretion in order to target sectors which are critical to the middle and lower income class.¹⁶² The whole array of remedies spans from opening up investigations on food and retail markets to coordinating with other government agencies on how to eradicate structural barriers in industries such as telecommunications, transportation, water, and other utilities. Ultimately, antitrust proceedings can conclude with the imposition of behavioral remedies¹⁶³ designed to benefit less advantaged consumers. For instance, US authorities approved a proposed merger between two broadcast companies subject to the commitment that the merged entity would subsidize broadband to low income buyers.¹⁶⁴

Relative to the equitable redistribution of wealth among other producers, a strategic use of merger review powers can secure a more equitable distribution of wealth. A "perceived potential entrant" could

¹⁵⁹ Comm'r of Competition v. Superior Propane, Inc., 2002 Comp. Trib. 16, CT1998002, Apr. 4, 2002 (Canadian Competition Tribunal), available at [http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0238a_45QDJ-5222007-3468.pdf#search="superior propane"](http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0238a_45QDJ-5222007-3468.pdf#search=).

¹⁶⁰ CBC News, *Tribunal approves propane merger despite concerns*, CBC NEWS, Nov. 10, 2000, available at <http://www.cbc.ca/news/business/tribunal-approves-propane-merger-despite-concerns-1.249168>.

¹⁶¹ Comm'r of Competition v. Superior Propane, Inc., *supra* note 164, at ¶ 109.

¹⁶² Baker & Salop, *supra* note 138, at 15.

¹⁶³ See PCA, § 12(h).

¹⁶⁴ Baker & Salop, *supra* note 138, *citing* In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, FCC 11-4, Jan. 20, 2011, ¶ 233 (Fed. Comm. Comm'n), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

threaten dominant incumbents into behaving competitively;¹⁶⁵ in response to such threat, the incumbent will want to eliminate the potential entrant in order to maintain its level of profit. Merger analysis can step in to block a possible merger and encourage the potential entrant to do business. That way, wealth in the industry can be equitably dispersed among various players. On another note, industries that tend toward monopolistic structures, such as public utilities, are characterized by scarcity of an indispensable input. The telecommunications industry, for instance, is heavily reliant on a finite spectrum of radio frequencies; therefore, the market can only accommodate so many players. But with proper use of merger review, a competition authority can properly manage the allocation of the spectrum so that it can be used by the most deserving enterprises. Otherwise, an inefficient allocation of such resources could deprive well-equipped entities of the opportunity to do business and reap profit in the industry.¹⁶⁶

On the matter of predation, “it is often feared that a powerful firm may have the will and the power to destroy its rivals.”¹⁶⁷ Successful predation can greatly impair income distribution as only incumbents will amass immense profit. Hence, the PCA penalizes predatory activities so that industry rivals can have a fair opportunity to share in the industry profits.

Finally, the PCC counts among its arsenal the imposition of structural remedies. Such remedies—divestiture of assets being the most quintessential—involve the discontinuation of a part of the infringing entity’s business or its sale to a third party.¹⁶⁸ When imposed properly, structural remedies can facilitate the entry of new players or strengthen existing ones.¹⁶⁹ In this way, vital industry assets can be preserved for other competitors who now have the potential to utilize the same and viably operate a business out of it.

C. Multivalued Approach

1. Competition Fused with Other Social and Political Considerations

¹⁶⁵ See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

¹⁶⁶ Mary Grace Mirandilla-Santos, *Philippine Broadband: A Policy Brief (A Policy Brief on Philippine Broadband Service)* 11, available at <http://www.investphilippines.info/arangkada/wp-content/uploads/2016/02/BROADBAND-POLICY-BRIEF-as-printed.pdf>.

¹⁶⁷ AREEDA & KAPLOW, *supra* note 30, at 885.

¹⁶⁸ See David Bosco et al., *Structural remedies: A unique antitrust tool*, CONCURRENTS: COMPETITION L.J. (2013).

¹⁶⁹ *Id.*

Competition is not an isolated concern; it is an issue that traverses a multitude of sectors and cuts across numerous facets of daily life. As expressed in *Brown Shoe Co., Inc. v. United States*,¹⁷⁰ the antitrust law embodies the “fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.”¹⁷¹ To illustrate, concentration in the mass media industry undermines the democratic value of free speech;¹⁷² market power begets political clout as big firms direct more resources towards campaign financing and lobbying;¹⁷³ in the realm of intellectual property, competition law limits a dominant player’s—which possesses an essential facility—discretion in refusing to deal;¹⁷⁴ government procurement is often tainted with corrupt and cartel-like tactics;¹⁷⁵ and to a certain extent, a proposed merger between ammunitions manufacturers may raise concerns over national security.¹⁷⁶

It is in such instances that a competition agency is behooved to apply special standards or a “multivalued approach” in its analysis. A multivalued approach recognizes the desire to preserve a variety of social and political values and to encourage an economic way of life that is compatible with those values. Beyond mere prices, costs, and product innovations, such approach aims to include a strong socio-political connotation. A multivalued approach is justified by the social losses that result from anticompetitive conduct. By applying a “substantially broader meaning to the term ‘competition’,”¹⁷⁷ the multivalued approach requires that other “social and political values need to be more implicitly

¹⁷⁰ 370 U.S. 294 (1962).

¹⁷¹ *Id.*

¹⁷² See Graciela Base & Jose Maria Marella, *Tempering Dominance in the Marketplace of Ideas: The Application of the Philippine Competition Act in the Mass Media Industry*, 62 ATENEO L.J. 442 (2017).

¹⁷³ Kahn, *supra* note 32, at 267.

¹⁷⁴ See Robert Pitofsky et al., *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 ANTITRUST L.J. 443 (2002).

¹⁷⁵ Richmond Mercurio, *PCC, Ombudsman join forces vs cartels*, PHIL. STAR, June 19, 2017, available at <https://www.philstar.com/business/2017/06/18/1711292/pcc-ombudsman-join-forces-vs-cartels>. See also Pabillo v. Comm’n on Elections, G.R. No. 216098, 756 SCRA 606, Apr. 21, 2015.

¹⁷⁶ See Fed. Trade Comm’n v. Alliant Techsystems, Inc., 808 F.Supp. 9 (D.D.C.1992).

¹⁷⁷ Wesley Cann, *Section 7 of the Clayton Act and the Pursuit of Economic Objectivity: Is There Any Role for Social and Political Values in Merger Policy*, 60 NOTRE DAME L. REV. 273, 275 (1985).

accommodated in measuring antitrust[.]”¹⁷⁸ Many proponents of the multivalued approach argue that antitrust analysis that fails to reflect social and political considerations would contravene the agency’s mandate.

More concretely, the assumption of a multivalued approach means that the competition authority will now apply lenses other than traditional economics; thus, it will recalibrate its antitrust analysis to fit the peculiar circumstances. If confined to the conventional economic approach, such as efficiency and consumer welfare, the competition agency will miss out on other equally important considerations. A more nuanced calculus will, on the other hand, attempt to capture and address the various dimensions of the case.

From the foregoing and succeeding discussions, it will be seen that the adoption of a multivalued approach requires the presence of an actionable competition issue, the involvement of other social or political values that are fundamentally intertwined with the competition issue, and the competence of the competition authority—alone or in collaboration with other specialized bodies—to resolve such amalgamated issues.

2. The Philippine Clamor for a Multivalued Approach

A survey of the Philippines’ competitive landscape reveals numerous competition issues that are inextricably linked to other social and political concerns. This portion provides a non-exhaustive selection of such issues, bolstering the need for the adoption of a multivalued approach.

i. Blend of Economic and Political Influence

The agglomeration of power does not cease with the economic aspect because the latter tends to beget political power—through political campaign contributions, access to politicians,¹⁷⁹ and grease money, to name a few channels.

In conducting their business, firms can avail themselves of informal institutions that are often characterized by relational contracting. Bribery or corruption by firms can be understood as one form of relational contracting, which substitutes for and undermines the impersonal application of formal

¹⁷⁸ BENJAMIN COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 554 (2000 ed.) (1979).

¹⁷⁹ Daron Acemoglu, *Economic Power Begets Political Power*, THE ECONOMIST, Jan. 23, 2011, available at <http://www.economist.com/node/21015029>.

institutions. Informal payments are typically offered to overcome inordinate delays in government processes or to gain an advantage in business; informal payments can therefore be interpreted as means to circumvent higher transaction or contracting costs presented by weak formal institutions.¹⁸⁰ Ultimately, the implication is that businesses with deeper pockets are the ones best able to exploit such informal channels.

When payoffs increase in frequency and become institutionalized, firms are able to capture their sector regulators. “Regulatory capture” involves the regulatory process becoming biased in favor of particular interest groups, namely the regulated companies themselves.¹⁸¹ Joseph Stiglitz, a Nobel Prize awardee for Economics, further notes that those in government will also use their positions to influence other public officials. Where political capture occurs, the regulatory goals are distorted to pursue political ends—regulation becomes a tool of self-interest within government or the ruling elite.¹⁸²

Payoffs from investing in the political system may come in the form of regulatory policies that are skewed in favor of a narrow section in the industry. Such policies are referred to as “governmental barriers” or “public restraints” to trade. Of course, some of these public restraints are borne simply from ill-advised policies but, as pointed out by former US Federal Trade Commission (“FTC”) Chairperson Timothy Muris, “rational firms are likely to *prefer* public, governmental restraints, assuming that they are confident of their ability to secure such restraints.”¹⁸³ Muris proceeds to explain how public restraints should cause more alarm than private anti-competitive conduct:

Unlike private restraints, there is no need to maintain backroom secrecy or to incur the costs of conducting a covert cartel. Public restraints can be open and notorious. Public restraints are also a more efficient means of solving the entry problem. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides for only a limited number of licenses. Perhaps the clearest advantage

¹⁸⁰ Josemaria Agregado, Jose Maria Marella & Toby Monsod, *Does judicial quality matter for firm performance?*, 52 PHIL. REV. OF ECON. 77, 79 (2015).

¹⁸¹ See Israel Kirzner, *How Markets Work: Disequilibrium, Entrepreneurship and Discovery*, Hobart Paper No. 133, London: Institute of Economic Affairs (1997).

¹⁸² See Joseph Stiglitz, *Private uses of public interests: incentives and institutions*, 12 J. ECON. PERSPECTIVES 3 (1998).

¹⁸³ See Timothy Muris, *State Intervention/State Action—A U.S. Perspective*, speech delivered before the Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003).

of public restraints is that they frequently include a built-in cartel enforcement mechanism. While cheating often besets private cartels, public cartels suffer from no such defect. Cheaters, once identified, can be sanctioned through government processes.¹⁸⁴

There is a need, therefore, to utilize antitrust and competition policy in such a manner that addresses economic and political aggrandizement.

ii. Corruption

A further illustration of competition blending with other concerns—one that seriously plagues Philippine government—is bid-rigging. In *Pabillo v. Commission on Elections*,¹⁸⁵ among the most recent controversial cases of corruption in public procurement, the Court explained the importance of competitive bidding: “competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking, but also that *it be legitimate, fair and honest and not designed to injure or defraud the government*. The essence of competition in public bidding is that the bidders are placed on equal footing which means that all qualified bidders have an equal chance of winning the auction through their bids[.]” More importantly, “[a]nother self-evident purpose of competitive bidding is to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts.”¹⁸⁶

The OECD expounds on the social cost in corrupt public procurement:

In the case of social sectors and public goods, the government often acts as a consumer of goods and services, making purchases on behalf of its citizens. When competition is suppressed in procurement markets through collusive tendering or bid rigging, the purchasing power of public funds is eroded due to higher costs.¹⁸⁷

The harm in bid-rigging manifests in a lower ability for governments to deliver public goods and services. This is particularly detrimental to government delivery of social goods and services such as goods health and

¹⁸⁴ *Id.*

¹⁸⁵ G.R. No. 216098, 756 SCRA 606, Apr. 21, 2015.

¹⁸⁶ *Id.* at 638-39. (Emphasis supplied.)

¹⁸⁷ WORLD BANK GROUP & ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, A STEP AHEAD: COMPETITION POLICY FOR SHARED PROSPERITY AND INCLUSIVE GROWTH 26 (2017).

education, as well other government schemes such as agricultural input subsidy programs.¹⁸⁸

In recent memory, the World Bank-funded National Road Improvement and Management Project-1 was once characterized as “corrupted to the core[.]” Of the USD 150 million grant, around USD 30 to 45 million was supposedly lost to a cartel—one that has been institutionalized and has operated with impunity for at least a decade, possibly longer on account of the systemic corruption and bid-rigging in the Philippine public works sector. To highlight the gravity of such scam, World Bank evidence suggested that the cartel may enjoy support at the highest levels of the Government of the Philippines, including several officials of the Department of Public Works and Highways (DPWH) and even the husband of then-President Gloria Macapagal Arroyo herself. The cartel’s *modus operandi* consisted of: (i) aid by officials within the Project Implementation Unit of the DPWH which disqualified uncooperative bidders without basis before formal bids could be placed; (ii) the anointing by cartel members of contract winners in advance of bid submission and the designation of losing bidders, who were compensated to cover their costs in bidding; (iii) cartel managers’ telling bribers what to bid, days before the bid submission date; (iv) redrafting by cartel backers of their unit bid prices to comport with cartel-mandated total bid amounts, frequently 20 to 30% in excess of estimates.¹⁸⁹

In addressing the aforementioned concerns, the OECD suggested that competition authorities play a central role in curbing the corruption of bidding and procurement. In particular, competition authorities must assume a prospective role by engaging in advocacy efforts to increase awareness of the risks of bid-rigging in procurement tenders; and “where bid-rigging has already occurred, vigorous enforcement of the competition rules (either the general rules prohibiting cartels, or specific prohibitions prohibiting bid rigging) is needed, in order to punish the immediate violation and to deter future competition law violations.”¹⁹⁰

¹⁸⁸ *Id.*

¹⁸⁹ See Malou Mangahas, *ENTIRE ROAD PROJECT CORRUPTED: \$45m lost to bribes for ‘cartel’ backed by DPWH, pols*, PHIL. CENTER FOR INVESTIGATIVE JOURNALISM WEBSITE, Feb. 13, 2009, available at <http://pcij.org/stories/45m-lost-to-bribes-for-cartel-backed-by-dpwh-pols/>.

¹⁹⁰ Organisation for Economic Co-operation and Development, Competition and Procurement, Roundtable on “Competition Policy and Public Procurement”, Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 9-11 2012, at 22 (2011), available at http://unctad.org/meetings/en/Contribution/ciclp2012_RT_PP_OECD_en.pdf.

Notably, the PCA penalizes the acts of “[f]ixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation[.]”¹⁹¹ By classifying such acts as *per se* violations, the law adopts a strict and exacting posture against the compounded malaise of cartelization, collusion, and corruption.

iii. Constitutional Values

Unbridled concentration of economic power can also tear at the Philippines’ democratic and constitutional fabric; in fact, recent domestic studies have identified such threats to free speech and health.

Doctrinally, the constitutional “marketplace of ideas” doctrine mirrors the economic “free competition” paradigm. Reliance on such framework leads to the policy stance that government intervention is unnecessary, as the best ideas will eventually emerge after being subjected to the rigors of the marketplace. However, the rise of mass media has warped the freely competitive ideal and produced a marketplace where the dominant ideas are those manufactured by the narrow interests that control the media. Such a systemic market distortion inhibits the genuine flow of ideas, requiring a recalibration of the marketplace doctrine and, more importantly, affirmative government action to make the marketplace more inclusive and more democratic.¹⁹²

Data collected by the Vera Files and Reporters Without Borders (“RSF”) indicated that the mass media industry—broken down into the television, radio, and print media—is characterized as a duopoly, with the lion’s share of viewership being shared by ABS-CBN and GMA. Moreover, media companies are owned by the same big names who own vast holdings in other commercial enterprises.¹⁹³ Such an industry structure engenders perverse incentives leading to self-censorship, filtering of facts, and erosion of reporting integrity, among other democratic ills.¹⁹⁴

¹⁹¹ PCA, § 14(a)(2).

¹⁹² Base & Marella, *supra* note 172.

¹⁹³ See The Vera Files, *A Tale of Two Conglomerates*, available at <https://philippines.mom-rsf.org/en/owners/companies/abs-cbn-and-gma7/>; and The Vera Files, *Media Ownership Matters*, available at <http://philippines.mom-rsf.org/en> (last accessed Jan. 4, 2019).

¹⁹⁴ Base & Marella, *supra* note 172.

Further, in another paper, it was argued that the imposition of a two-tiered cigarette tax system constituted a restraint of trade. In characterizing the tax system as such, resort was made to the Supreme Court's pronouncements in *British American Tobacco v. Camacho*:¹⁹⁵ "the cumulative effect of the operation of the classification freeze provision is to perpetuate the oligopoly of intervenors Philip Morris and Fortune Tobacco in contravention of the constitutional edict for the State to regulate or prohibit monopolies, and to disallow combinations in restraint of trade and unfair competition."

After articulating the Constitution's competition clauses as reflective of a public welfare dimension, the study concluded that the two-tiered tax scheme contravenes the "goal of decreased tobacco consumption and smoking cessation[.]"¹⁹⁶ The structure furthermore "favors certain tobacco manufacturers over the welfare of the Filipino people" and "neglects the implications on the lives of millions of Filipinos who will be affected directly by smoking-related diseases and indirectly through second-hand smoke[.]"¹⁹⁷

iv. License to Adopt a Multivalued Approach

Given the critical issues that are fundamentally intertwined with antitrust questions—politics, corruption, and democratic values, to name a few—it would be "bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."¹⁹⁸

The US jurisdiction has remained divided on the issue of adopting a multivalued approach. Ever since the seminal treatise of Judge Robert Bork, *THE ANTITRUST PARADOX*,¹⁹⁹ antitrust methodology has been exclusively confined to the attainment of economic efficiency goals. Among the paramount apprehensions of adopting a multivalued approach is that it "improperly would require courts to make political decisions, a perversion of their role."²⁰⁰

¹⁹⁵ *British American Tobacco v. Camacho*, G.R. No. 163583, 585 SCRA 36, Apr. 15, 2009.

¹⁹⁶ Allan Chester Nadate et al., *The Public Welfare Dimension of the Competition Clauses: An Exposition and Application of the Proper Constitutional Treatment for Industries with Adverse Public Health Impacts*, 90 PHIL. L.J. 797, 849 (2017).

¹⁹⁷ *Id.*

¹⁹⁸ Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

¹⁹⁹ BORK, *supra* note 1.

²⁰⁰ ROBERT PITOFSKY, *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 49 (2008).

The Philippines need not pick up from such debate and don the shackles of the US jurisdiction. That the PCC can and should imbue its antitrust analysis with the foregoing concerns is owed to its nature as an administrative body—one that is alive to the “felt necessities of the time, the prevalent moral and political theories, [and the] institutions of public policy, avowed or unconscious[.]” After all, “[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”²⁰¹ There is, above all, a fundamental institutional disparity between the two jurisdictions’ antitrust regimes: in the US, the FTC is required to litigate antitrust cases before the regular courts; in the Philippines, the resolution of such issues lies with the PCC as a quasi-judicial and quasi-legislative body.

While courts of general jurisdiction are expected to remain non-partisan, administrative bodies have the license to advance their congressionally delegated policy objectives. The former are limited to adjudicating private rights and obligations brought before them, while the latter can and are expected to actively safeguard public rights. Regular courts are limited to the evidence presented before them while agencies are capacitated to continuously monitor and gather information on their subject of regulation. Further, administrative bodies possess a wide scope of discretion in giving effect to policies respecting their specialized subject matter.

In carrying out its regulatory functions, *Philippine Communications Satellite Corp. v. Alcazar*²⁰² pinpoints two powers in an agency’s arsenal: quasi-judicial and quasi-legislative. Under the former power, a regulatory body is able to incrementally shape a sector when it lays down particular and immediate rulings, subject to the requirement of administrative due process. Pursuant to the quasi-legislative or rule-making power, the agency lays down rules of general and prospective application, uninhibited by the constraints of administrative notice and hearing. The PCC is possessed of the same general powers; it is now only a matter of laying down a framework that can support the adoption of a multivalued approach.

3. PCC’s Adoption of a Multivalued Approach: Legal Underpinnings

²⁰¹ OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

²⁰² G.R. No. 84818, 180 SCRA 218, Dec. 18, 1989.

In arguing for the PCC's adoption of a multivalued approach, the legal framework provides a two-tiered foundation. The first tier consists of a public welfare dimension, broadly construed as a "discrete element"²⁰³ of antitrust and competition law. Sequentially, this public welfare dimension provides the general base, or substructure, upon which the PCC can lay down the component legal principles that bear upon the particular value involved.

That antitrust and competition policy comprehend a public welfare dimension is evident from the 1987 Constitution's competition clause and its underlying intent, as well as accompanying jurisprudence.

The Constitution prescribes that "[t]he State shall regulate or prohibit monopolies when the *public interest* so requires. No combinations in restraint of trade or unfair competition shall be allowed."²⁰⁴ Furthermore, examining the foregoing provision alongside the "adjunct"²⁰⁵ competition clauses—particularly the last sentence of Article XII, Section 1, paragraph 2;²⁰⁶ and Article XVI, Section 11(1)²⁰⁷—reveals that the framers had intended to underscore antitrust as a tool to promote the common good. Then-Constitutional Commissioner Christian Monsod expressed that "[t]he purpose of the amendment is precisely [...] *to protect the public* from such monopolies or combinations in restraint of trade or unfair competition."²⁰⁸

²⁰³ Nadate et al., *supra* note 196.

²⁰⁴ CONST. art. XII, § 19. (Emphasis supplied.) See also Garcia v. Executive Secretary, G.R. No. 157584, 583 SCRA 119, Apr. 2, 2009.

²⁰⁵ Nadate et al., *supra* note 196.

²⁰⁶ "The goals of the national economy are 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, especially the underprivileged.

"The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. *However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.*

"In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership." (Emphasis supplied.)

²⁰⁷ "(1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

"The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed."

²⁰⁸ V RECORD CONST. COMM'N 193 (Sept. 29, 1986). (Emphasis supplied.)

In response to the query of whether only a single person could set up a mass media enterprise, Commissioner Rosario Braid answered: “I think this will be denied under the concept of *public interest*.”²⁰⁹

Jurisprudence distills the same principles. In *Tatad v. Secretary of Energy*,²¹⁰ the Supreme Court instructed that “[t]he overriding consideration, which is *the public interest and public benefit*, calls for the leveling of the playing fields for the existing oil companies and the prospective new entrants.”²¹¹ The Court thus viewed competition as a means of which the final cause is the welfare of the public.

Underscoring the need for a competitive bidding procedure, the Supreme Court in *Pabillo v. Commission on Elections*²¹² pronounced that “public bidding *aims to protect public interest* by giving the public the best possible advantages through open competition.”²¹³ After articulating this broad policy of public interest, the Court then proceeded to identify specific components subsumed therein—namely, promotion of procedures that are legitimate, fair and honest and not designed to injure or defraud the government; providing qualified bidders with an equal chance of winning the auction; and to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts.

Further still, in *Agan v. Philippine International Air Terminals Co.*,²¹⁴ the Court had occasion to scrutinize contracts that gave Philippine International Air Terminals Co., Inc. (“PIATCO”) a monopoly over the operation of an international commercial passenger terminal. The Court forewarned, however, that “[t]he grant to respondent PIATCO of the exclusive right to operate NAIA IPT III should not exempt it from regulation by the government. *The government has the right, indeed the duty, to protect the interest of the public.*”²¹⁵ *Agan* laid down a strict standard, making it a duty for the government to regulate monopolies for the protection of the public.

Finally, the Supreme Court decision in *Avon Cosmetics, Inc. v. Luna*²¹⁶ provided some guidelines in scrutinizing contracts that tended to restrain trade:

²⁰⁹ *Id.* (Emphasis supplied.)

²¹⁰ G.R. No. 124360, 281 SCRA 330, Nov. 5, 1997.

²¹¹ *Id.* at 375. (Emphasis supplied.)

²¹² G.R. No. 216098, 756 SCRA 606, Apr. 21, 2015.

²¹³ *Id.* at 638. (Emphasis supplied.)

²¹⁴ G.R. No. 155001, 420 SCRA 575, Jan. 21, 2004.

²¹⁵ *Id.* (Emphasis supplied.)

²¹⁶ G.R. No. 153674, 511 SCRA 376, Dec. 20, 2006.

First off, restraint of trade or occupation embraces acts, contracts, agreements or combinations which restrict competition or obstruct due course of trade.

Now to the basics. From the wordings of the Constitution, truly then, what is brought about to lay the test on whether a given agreement constitutes an unlawful machination or combination in restraint of trade is whether under the particular circumstances of the case and the nature of the particular contract involved, such contract is, or is not, against public interest.²¹⁷

While the foregoing cases were decided prior to the enactment of the PCA, such judicial pronouncements are interpretations of the Constitution's competition clause; these constructions, therefore, attach to the constitutional provision and are deemed written into subsequently passed legislation.²¹⁸ The PCA, after all, directly refers to the constitutional provision and explicitly adopts it in the Declaration of Policy.²¹⁹ At any rate, the law is a "past-dependent" discipline²²⁰ and no less than Dean Pacifico Agabin notes how the legal system moves with the leaden feet of *stare decisis* behind the times.²²¹

The weight of legal authority, therefore, incorporates public welfare into antitrust and competition policy, such that these legal instruments unavoidably tend towards such ends. As discussed in the early parts of this paper, antitrust and competition policy was largely developed as a response to the social costs borne by economic inefficiency and impairment of consumer welfare. It becomes apparent that these matters are but specific derivatives of the broader public welfare dimension of antitrust. *The recognition of such a broadly construed standard implies that there are other equally important, but heretofore unarticulated, derivatives.* Expressed in another way, economic efficiency and reduced consumer welfare are not the only social costs inflicted by economic concentration; agglomeration of economic clout actually bleeds into other aspects of society, thereby adding to the enumeration of social costs that antitrust can address. But to allay any

²¹⁷ *Id.* at 391-392.

²¹⁸ See *Perfecto v. Meer*, G.R. No. 2348, 85 Phil. 552, Feb. 27, 1950; and *Endencia v. David*, G.R. No. 6355-56, 93 Phil 696, Aug. 31, 1953.

²¹⁹ PCA, § 2.

²²⁰ Richard Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 CHICAGO L. REV. 573 (2000).

²²¹ Pacifico Agabin, *Laissez Faire and the Due Process Clause: How Economic Ideology Affects Constitutional Development*, 44 PHIL. L.J. 709 (1969).

misgivings that a public welfare standard would be too broad and amorphous, resort is made to the second tier of the framework.

The second tier will necessarily vary from case to case, depending on the submitted facts, issues, socio-political milieu, and intersection with other fields of law. It behooves the PCC to identify the specific virtue being advanced and explicitly make the adoption of such virtue amongst its considerations. Indeed, “administrative officers or bodies are required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them as basis for their official action and exercise of discretion[.]”²²² An agency like the PCC must exercise “sound administrative discretion requiring the special knowledge, experience and services [...] to determine technical and intricate matters of fact[.]”²²³ The PCC necessarily acts with discretion which, “when applied to public functionaries, means a power or right conferred upon them by law of acting officially, under certain circumstances, according to the dictates of their own judgments and consciences, uncontrolled by the judgments or consciences of others.”²²⁴

In identifying and promoting a specific value, the PCC can take either of two paths:

First, it can, on its own, conduct a review of the pertinent laws and regulations and proceed to develop a framework that synthesizes traditional antitrust analysis with the added value involved. Other competition authorities have done the same: a former Chairperson of the US FTC once declared, in reviewing the merger between broadcasting giants Turner Broadcasting and Time Warner, that the FTC would apply “special scrutiny” that went beyond traditional economic analysis and factored in considerations of free speech;²²⁵ European competition authorities consider data privacy as an antitrust issue, so much so that transactions which reduce consumer privacy protections could lead to market abuse;²²⁶ and in balancing the concerns of antitrust and intellectual property protection, the

²²² *Smart Comm., Inc. v. Nat’l Telecomm. Comm’n*, G.R. No. 151908, 408 SCRA 678, 687, Aug. 12, 2003.

²²³ *Fabia v. Ct. of Appeals*, G.R. No. 132684, 388 SCRA 574, 585, Sept. 11, 2002.

²²⁴ *Sanson v. Barrios*, G.R. No. 45086, 63 Phil. 198, 203, July 20, 1936.

²²⁵ *Misgivings Over a Media Merger*, THE NEW YORK TIMES, Sept. 19, 1996, available at <http://www.nytimes.com/1996/09/19/opinion/misgivings-over-a-media-merger.html>.

²²⁶ Nitashi Tiku, *Digital Privacy is Making Antitrust Exciting Again*, WIRED, June 4, 2017, available at <https://www.wired.com/2017/06/ntitrust-watchdogs-eye-big-techs-monopoly-data/>.

FTC was forward-looking enough to promulgate its *Antitrust Guidelines for the Licensing of Intellectual Property*.²²⁷

Second, the PCC can—if the particular value involved strays too far from its competence—collaborate with other highly specialized bodies. In taking this path, the PCA provides three salient provisions:

SEC. 12. Powers and Functions. — The Commission shall have original and primary jurisdiction over the enforcement and implementation of the provisions of this Act, and its implementing rules and regulations. The Commission shall exercise the following powers and functions:

* * *

(n) Intervene or participate in administrative and regulatory proceedings requiring consideration of the provisions of this Act that are initiated by government agencies such as the Securities and Exchange Commission, the Energy Regulatory Commission and the National Telecommunications Commission;

* * *

(r) Advocate pro-competitive policies of the government by:

(1) Reviewing economic and administrative regulations, *motu proprio* or upon request, as to whether or not they adversely affect relevant market competition, and advising the concerned agencies against such regulations; and

(2) Advising the Executive Branch on the competitive implications of government actions, policies and programs;

* * *

SEC. 32. Relationship with Sector Regulators. — The Commission shall have original and primary jurisdiction in the enforcement and regulation of all competition-related issues.

²²⁷ Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property*, available at https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

The Commission shall still have jurisdiction if the issue involves both competition and noncompetition issues, but the concerned sector regulator shall be consulted and afforded reasonable opportunity to submit its own opinion and recommendation on the matter before the Commission makes a decision on any case.

Where appropriate, the Commission and the sector regulators shall work together to issue rules and regulations to promote competition, protect consumers, and prevent abuse of market power by dominant players within their respective sectors.

Section 12(n) pertains to situations where a question is initially lodged with another specialized agency but there is a competition issue involved. The participation of the PCC is therefore required in order to resolve such issue. Complementing Section 12(n) is Section 32; the latter provision pertains to instances where the case is primarily lodged with the PCC but, because of the entanglement of some matters that require the competence of other bodies, the advice of such bodies is solicited. Section 12(r) is a legislative recognition that other bodies—in adopting rules or official action that promote their specific policy objectives—can sometimes run afoul of competitive ideals. A balancing of interest is, therefore, required to adjudicate such conflicting values.

These provisions are very cogent. They indicate the instances when antitrust questions will inevitably intersect with other novel considerations, requiring the recalibration of antitrust analysis and the adoption of a multivalued approach. Resort to such powers has been demonstrated, for instance, when the PCC partnered up with the Office of the Ombudsman. Former PCC Commissioner El Cid Butuyan commented that “[t]he PCC is like an ‘Ombudsman of the market.’ We go after cartels, bid manipulators, price fixers, etc.—cases that may also potentially involve criminal offenses such as bribery, graft and corruption, over which the [Ombudsman] has jurisdiction[.]” More importantly, “[t]here are significant synergies and complementarity of the two (2) agencies in pursuing a shared mandate to detect and penalize misconduct. We expect this partnership between the [Ombudsman] and the PCC to provide a big boost in promoting integrity both in the public and corporate sectors,” he added.²²⁸

The analysis thus far reveals that, in laying the legal foundation for a multivalued approach, the second tier serves as a sort of “limiting factor” to

²²⁸ Phil. Competition Comm’n, *Ombudsman set united front against bid-riggers, auction-fixers*, PHIL. COMPETITION COMM’N WEBSITE, June 16, 2017, available at <http://phcc.gov.ph/pcc-ombudsman-set-united-front-against-bid-riggers-auction-fixers/>.

the first tier, chiseling away at the non-essential matters that are subsumed in the broad public welfare dimension and directing the agency's focus on the specific consideration involved.

The Constitution recognizes the debilitating effects of “social, economic, and political inequalities” as well as “cultural inequities.” It is highly likely that, in drafting this provision, the framers of the Charter were well aware that “social”, “economic”, and “political” were not distinct and independent qualifiers of “inequalities.” As the Philippine experience has so painfully demonstrated, all three are often interwoven, forming an intricate complication that paralyzes the nation's progress. The same provision indicates a broad panacea to these ills—that is, “the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.”²²⁹ Among the specific treatments through which the State must regulate the “acquisition, ownership, use and disposition of property,” the framers of the Charter have fortuitously prescribed Article XII, Section 19: “The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.”

The PCC, therefore, has the bounden duty to realize this constitutional blueprint. To shirk therefrom would be a dereliction of such commitment.

IV. OVERCOMING: A FRAMEWORK FOR REGULATION

A. “Indispensable” and “Auxiliary” Considerations

In the discharge of its mandate, an administrative agency is expected to act with predictability, consistency, transparency, flexibility, efficacy, and competence, among other virtues.

As held in one case decided by the Supreme Court, “stability and predictability are [...] key pillars on which our legal system must be founded and run to guarantee a business environment conducive to the country's sustainable economic growth.”²³⁰ However, the PCC's case-by-case infusion

²²⁹ CONST. art. XIII, § 1.

²³⁰ *Heirs of Gamboa v. Teves*, G.R. No. 176579, 682 SCRA 397, 593, Oct. 9, 2012 (Velasco, Jr., J., *dissenting*).

of various principles could undermine these values, especially considering the nascent field of competition law.

However, an exclusive adherence to stability and predictability can clash with efficacy. For instance, departing from previous standards may seem warranted for an industry with special public interest considerations, such as mass media. In contrast to regular courts, agencies are not strictly bound by *stare decisis*. After all, “the peculiarity, uniqueness and unusual character of the factual and circumstantial settings of a case may allow the flexible application of these established legal principles to achieve fair [...] dispensation of justice.”²³¹ Competence is also put at stake. While competition issues abound in various industries, each sector is unique, often governed by various regulatory systems, different target markets, varying financial requirements, and sometimes imbued with various facets of public interest.

Regulatory values sometimes clash and, at first glance, the articulation of other antitrust goals may seem to complicate the PCC’s regulatory calculus, thereby heightening the tension among the agency’s concerns. The controversy would really be rooted in the PCC’s adoption of a multivalued approach, as the PCA, taken in isolation from other legal principles, provides little to no guidance on how to approach such matters. By infusing antitrust analysis with other novel dimensions, the agency’s expertise will be tested, and the public could risk being disadvantaged by the resulting regulatory move. In contrast to the multivalued approach, goals like protection of small businesses and income redistribution—while non-traditional in the sense that they go beyond mere considerations of economic efficiency and consumer welfare—can be addressed through a framework that can be built solely from the text of the PCA.

In the interest, therefore, of working out such “inevitable tradeoffs”²³² in regulation, presented herein is a framework for regulation, a grand unification theory of sorts, which marshals the articulated goals of antitrust.

A reframing of the discussion and the use of new parlance is warranted.

Transactions that affect economic efficiency, consumer welfare, empowerment of smaller business, and income redistribution will now be

²³¹ Chua v. Ang, G.R. No. 156164, 598 SCRA 229, 237, Sept. 4, 2009.

²³² THOMAS MCCRAW, PROPHETS OF REGULATION 302 (1984).

clustered under the term “indispensable considerations.” These are considerations directly gleaned from the PCA’s statutory text. They are, in a sense, threshold or jurisdictional issues, the presence of which is indispensable for the PCC in taking cognizance of a case. On the other hand, the multivalued approach will be subsumed under the term “auxiliary considerations” since this involves supplemental matters that require further articulation. These are considerations which are not jurisdictional but nevertheless deserve attention upon the PCC’s exhaustive study of the pleadings, documents, and issues before it, and as examined against the contemporary socio-political context. For an auxiliary consideration to be actionable by the PCC, it must be inextricably linked to an indispensable consideration.

When confronted with a controversy, the PCC must endeavor to ask the following questions: *First*, is an indispensable consideration present? *Second*, is there an auxiliary consideration involved? *Third*, if an auxiliary consideration is present, is this inextricably linked to an indispensable consideration? Depending on the responses, five different scenarios can result.

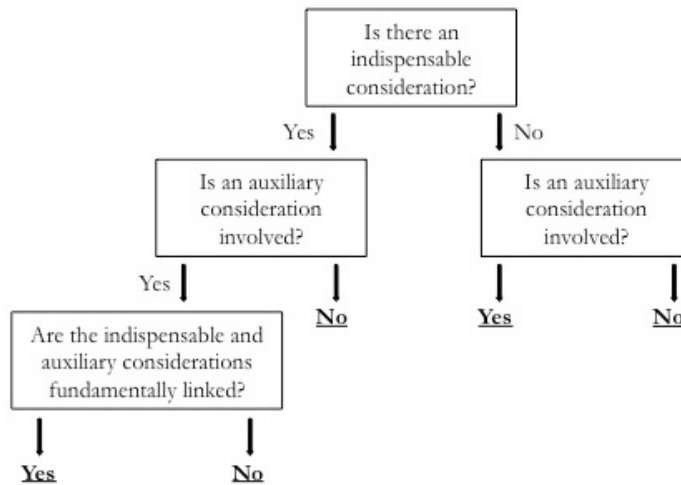


FIGURE 1. Expansion of Different Scenarios.

First, without both indispensable and auxiliary considerations, the PCC may not assume jurisdiction over a controversy. Such matters will find no place in the PCC’s docket; the agency should dismiss the matter lest it unduly expand its statutorily defined functions.

Second, supposing the absence of an indispensable consideration but the presence of an auxiliary consideration, the PCC could dismiss the

controversy or at best refer the same to the pertinent authority. Again, for an auxiliary consideration to be actionable it must demonstrate an unavoidable nexus with the indispensable consideration; therefore, absent an indispensable consideration, there is no foundation to which an auxiliary consideration will be appended.

Auxiliary considerations pertain to the multivalued approach which, as will be recalled, derives from public welfare as broadly defined. Hence, there is a wide range of policy objectives that lie beyond the PCC's mandate but well within another body's competence. For instance, while editorial self-censorship impairs the competitive exchange in the marketplace of ideas, such conduct cannot prompt the PCC's mandate if it is remote from considerations of economic efficiency, consumer welfare, protection of small business, or income redistribution. The matter would perhaps lie with journalists' self-regulating organizations, especially those espousing ethical standards and norms of conduct.²³³

A *third* scenario concludes in the same regulatory action recommended under the *second* scenario—that is, in instances where, even if there were both indispensable and auxiliary considerations, there lies no connection between the two elements.

In the *fourth* scenario, when faced exclusively with an indispensable consideration, the PCC will then proceed to apply a more straightforward antitrust analysis—the factors necessary for which are sufficiently laid out in the statutory text, IRR, Enforcement Rules, and Merger Rules. The PCA, for instance, requires the PCC to consider product substitutability, technology, costs of distribution, and distribution constraints to define relevant markets.²³⁴ Further, in determining market dominance, the IRR points to variables such as market shares, number of industry players, entry barriers, possibility of access to inputs, and future expansion, among others.²³⁵

Finally, under the *fifth* permutation—the presence of both an indispensable consideration and an auxiliary consideration *fundamentally intertwined therewith*²³⁶—the PCC will proceed to either apply special standards by itself or collaborate with other specialized bodies.

²³³ Base & Marella, *supra* note 172.

²³⁴ See PCA, § 24.

²³⁵ See PCC IRR, Rule 8, § 2.

²³⁶ Contrast this to the third scenario where, even where both indispensable and auxiliary considerations are present, there lies no nexus between the two elements.

As earlier alluded to, US authorities have demonstrated the first route by adopting special standards in reviewing a merger between broadcast companies. The infusion of free speech considerations would greatly affect the antitrust analysis—for instance, how would one define the relevant market for the marketplace of ideas? As expressed in one notable US Department of Justice Opinion:

When faced with a proposed merger of two or more newspapers, the Division collects and examines the facts to determine whether local daily newspapers, national daily newspapers, community newspapers, radio stations, television stations, or [i]nternet sources belong in the same market on either side. In past investigations, the Division has concluded that nonnewspaper media do not sufficiently constrain the pricing of newspaper advertisements, the pricing of newspaper subscriptions, or newspapers' investments in news and editorial content, and thus are not in the same market. That conclusion is perfectly consistent with the observation that newspapers have been losing subscription and advertising revenues to other media, as some degree of competition across market boundaries is the norm. Whether changes in technology and consumer preferences may lead to the conclusion that a relevant market should include sales of advertisements (or content) by both newspapers and other media remains something that should be analyzed on a case-by-case basis.²³⁷

The PCC has taken efforts to pursue the second route by drafting memoranda of agreement with various government agencies, delineating the scope of their respective functions and apportioning their different roles. As earlier adverted to, the PCC tied up with the Office of the Ombudsman to crack down on bid-rigging, an offense interlaced with corruption and competition issues. Relevant to the second route of addressing auxiliary considerations are the following provisions, previously discussed:

SEC. 12. Powers and Functions. — The Commission shall have original and primary jurisdiction over the enforcement and implementation of the provisions of this Act, and its implementing rules and regulations. The Commission shall exercise the following powers and functions:

* * *

²³⁷ Christine Varney, *Dynamic Competition in the Newspaper Industry*, Remarks as Prepared for the Newspaper Association of America (2011), *available at* <https://www.justice.gov/atr/speech/dynamic-competition-newspaper-industry>.

(n) Intervene or participate in administrative and regulatory proceedings requiring consideration of the provisions of this Act that are initiated by government agencies such as the Securities and Exchange Commission, the Energy Regulatory Commission and the National Telecommunications Commission;

* * *

(r) Advocate pro-competitive policies of the government by:

(1) Reviewing economic and administrative regulations, *motu proprio* or upon request, as to whether or not they adversely affect relevant market competition, and advising the concerned agencies against such regulations; and

(2) Advising the Executive Branch on the competitive implications of government actions, policies and programs;

* * *

SEC. 32. Relationship with Sector Regulators. – The Commission shall have original and primary jurisdiction in the enforcement and regulation of all competition-related issues.

The Commission shall still have jurisdiction if the issue involves both competition and noncompetition issues, but the concerned sector regulator shall be consulted and afforded reasonable opportunity to submit its own opinion and recommendation on the matter before the Commission makes a decision on any case.

Where appropriate, the Commission and the sector regulators shall work together to issue rules and regulations to promote competition, protect consumers, and prevent abuse of market power by dominant players within their respective sectors.

These provisions set out the mechanisms through which the competition agency can rely on the special competence of other bodies. By way of clarification, the fifth scenario in the PCC's regulatory calculus does not exclusively pertain to instances where the case was initially lodged with the PCC and the latter will rope in other bodies; it can also cover situations where matters pending before other bodies will require the PCC's special competence, hence triggering the applications of Sections 12(n) or 12(r).

Taking the cue from European authorities’ antitrust crackdown on Google, PCC can, for instance, collaborate with the Department of Information and Communication Technology and its attached agencies such as the National Privacy Commission should the former tackle cases that deal with technology-driven commerce, often ripe with data privacy issues.

The decision to address the auxiliary consideration by itself or in collaboration with other bodies can be rather delicate. Faced with such options, the PCC must rely, as much as possible, on the competence of other bodies whenever applicable. But where such avenue is unavailing, the PCC should strive to obtain as much legal support in pursuing an unorthodox course of action, drawing extensively from various legal materials and synthesizing them into a coherent framework.

To summarize the different permutations, the following table serves as a useful guide:

		Is there an auxiliary consideration involved?	
		Yes	No
Is there an indispensable consideration?	Yes	<p>If with nexus: PCC must apply special considerations by (i) eliciting other bodies’ participation, (ii) intervening in other bodies’ proceedings, or (iii) tailoring a suitable framework by itself</p> <p>If without nexus: PCC will resolve the indispensable matter and may refer the auxiliary element to the proper body</p>	PCC will resolve the matter using more straightforward antitrust analysis (i.e. parameters sufficiently laid down in statute and administrative rules)
	No	PCC will dismiss the case and possibly refer the auxiliary element to the proper body	PCC will dismiss the matter

TABLE 1. Matrix of Regulatory Actions.

B. Giving Effect to Regulatory Values

The foregoing framework serves to harmonize the values of predictability, consistency, and transparency on one hand, with the values of flexibility and efficacy on the other.

Parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.²³⁸ With the paradigm shift from the traditional concerns such as economic efficiency and consumer welfare towards other policy considerations such as protection of small business, wealth redistribution, and incorporation of multiple values, the public could be at a loss on how to structure their behavior. For instance, a merger between tobacco companies could hurdle a pure efficiency standard but nevertheless fail to obtain clearance because of public health apprehensions.

Adopting the regulatory framework, however, prompts economic agents to broaden their perspective in appraising their transactions. They could, at the first instance, assess how their conduct will be measured against the PCC's indispensable considerations and thereafter consider how auxiliary considerations might be factored in. These are, after all, seasoned industry players who would be well-versed in the various public interest facets which intersect with their business transactions, for instance, public health for healthcare providers, free speech for mass media companies, and data privacy for technology companies.

At any rate, considering the rather belated entry of the PCA into the Philippine legal framework, both the PCC and regulated entities can look to other jurisdictions for regulatory best practices. A careful and judicious review of these available materials, modified to fit the domestic regime, should provide subject entities with enough guidance on how to conduct themselves.

This way, regulated entities would not feel blindsided should the PCC decide to rule on auxiliary concerns. Besides, the PCC would commit a disservice by evading such issues because administrative agencies are expected to adapt to changing conditions and discharge their mandate efficaciously—that is, with a due regard to achieving timely and desired

²³⁸ *Lambino v. Comm'n on Elections*, G.R. No. 174153, 505 SCRA 160, 196, Oct. 25, 2006 (Puno, J., *dissenting*).

results. As administrative history can attest, regulatory strategies framed in ignorance or disregard of real conditions and incentives usually lead to unfortunate results.²³⁹

The framework also serves to promote the regulatory value of competence. With respect to purely indispensable considerations, such matters lie expectedly within the expertise of the PCC and the latter shall employ the rigors of straightforward antitrust analysis. But the PCC's mandate is properly understood as an "all-purpose" typology of competition, one that traverses different activities of daily life. The agency is not, however, constrained to adopt a "one-size-fits-all" approach but rather a methodology specifically tailored to unique industries. Necessarily, the PCC would encounter issues that are too specific and too technical, requiring its deference to other specialized bodies. And where such bodies are absent, the PCC, if legally defensible, must adopt its own unique framework for the controversy at hand. In pursuing the value of competence, the PCC's approach can best be expressed as a spectrum: as the issue shifts from one that is purely indispensable towards one that integrates auxiliary considerations, the PCC would then have to (i) increasingly rely on other agencies' mastery of the additional matters, or (ii) develop its own nuanced and reasonable approach to resolve the conflict.

To better understand how the framework achieves regulatory competence, a cursory comparison with other regulatory regimes is helpful. Since competition is also addressed in these industries, a quick look into the regulatory frameworks of telecommunications, energy, and intellectual property can sharpen the focus of the discussion.

The Intellectual Property Office ("IPO"), mandated to take the lead in protecting intellectual property rights,²⁴⁰ possesses a competition mandate in a narrow area. As provided for in the Intellectual Property Code ("IPC"), patents and inventions may be subject to government use, even without the consent of the owner thereof, if the manner of exploitation is anti-competitive.²⁴¹ Similarly, the IPC also allows for compulsory licensing in instances where the owner's manner of exploitation is anti-competitive.²⁴² Finally, to balance the freedom to contract with the spirit of competition, the law deems certain voluntary licensing clauses as *prima facie* anti-

²³⁹ MCCRAW, *supra* note 232.

²⁴⁰ INTELL. PROP. CODE, § 5. The Intellectual Property Code or Rep. Act No. 8293 (1997).

²⁴¹ § 74(b).

²⁴² §§ 93, 95-96.

competitive,²⁴³ the enforcement of which will establish restraints to trade and commerce.

As can be gleaned from the provisions, the IPC factors in competition analysis only as a counterweight—to conduct a balancing of interests of sorts—to the patentee’s exclusive prerogative to commercially exploit his rights. Such balance is tilted in favor of the holder of the right, considering that patentees are largely left to subject their rights to any such use, unless the same offends against fair competition. Ultimately, the protection of such rights still remains paramount.

To utilize the language of the developed framework, competition does not even qualify as an indispensable consideration insofar as the IPO is concerned. At best, competition only serves as a special consideration that interrupts a patent holder’s exploitation of his right. As expressed in jurisprudence,

patent law has a three-fold purpose: first, patent law seeks to foster and reward invention; second, it promotes disclosures of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the free use of the public.²⁴⁴

Still, for two other administrative bodies, their organic statutes point to competition as a supporting policy handle in order to achieve more specific mandates. Competition is, to the Energy Regulatory Commission (“ERC”) and the National Telecommunications Commission (“NTC”), a mere means to an end.

The ERC is concerned primarily with delivering fair prices to the general public. The State ensures and accelerates the total electrification of the country²⁴⁵ and ensures the quality, reliability, security, and affordability of the supply of electric power.²⁴⁶ Towards these ends, a regime of free and fair competition,²⁴⁷ as well as the penalization of market power abuses,²⁴⁸ are

²⁴³ § 87.

²⁴⁴ *Pearl & Dean (Phil.), Inc. v. Shoemart, Inc.* G.R. No. 148222, 409 SCRA 231, 244-45, Aug. 15, 2003.

²⁴⁵ Rep. Act No. 9136 (2001) [hereinafter, “EPIRA”], § 2(a). The Electric Power Industry Reform Act of 2001.

²⁴⁶ EPIRA, § 2(b).

²⁴⁷ § 2(c).

²⁴⁸ §§ 6, 29, 43, 45.

simply specific modes of regulating the industry. Other means include rate-fixing,²⁴⁹ licensing,²⁵⁰ and industry restructuring.²⁵¹ Notably, no less than the Supreme Court has given its judicial imprimatur to the theory that competition is but a means to securing a robust energy sector:

The ERC retains the ERBs traditional rate and service regulation functions. However, the ERC now also has to promote competitive operations in the electricity market. RA 9136 expanded the ERCs concerns to encompass both the consumers and the utility investors.²⁵²

More importantly, the ERC has acquiesced to this understanding, citing the foregoing doctrine in a recent order where it interpreted its mandate vis-à-vis the supersession of the PCA.²⁵³

The same can be said of competition within the telecommunications regulatory framework. Section 17 of Republic Act No. 7925 reads:

The Commission shall establish rates and tariffs which are fair and reasonable and which provide for the economic viability of telecommunications entities and a fair return on their investments considering the prevailing cost of capital in the domestic and international markets.

The Commission shall exempt any specific telecommunications service from its rate or tariff regulations if the service has sufficient competition to ensure fair and reasonable rates or tariffs. The Commission shall, however, retain its residual powers to regulate rates or tariffs when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists and the rates or tariffs are distorted or unable to function freely and the public is adversely affected. In such cases, the Commission shall either establish a floor or ceiling on the rates or tariffs.²⁵⁴

²⁴⁹ § 23.

²⁵⁰ § 29.

²⁵¹ § 37.

²⁵² *Kapisanan ng mga Kawani ng Energy Regulatory Board v. Barin*, G.R. No. 150974, 526 SCRA 1, 24, June 29, 2007.

²⁵³ *Tomas v. Therma Mobile, Inc.*, ERC Case No. 2015-027MC (Energy Regulatory Comm'n Feb. 6, 2017).

²⁵⁴ Rep. Act No. 7925 (1995), § 17. The Public Telecommunications Policy Act of the Philippines.

As far as the statute is concerned, two important points may be gleaned relative to the role of competition. *First*, competition figures only in the narrow area of rate and tariff setting. Of course the NTC also relies on other means of regulation such as franchising, spectrum allocation,²⁵⁵ and issuance of interconnection orders²⁵⁶—all with the end view of developing and maintaining a viable, efficient, reliable, and universal telecommunication infrastructure using the best available and affordable technologies as a vital tool to nation-building and development.²⁵⁷ *Second*, competition serves simply as an exempting condition, allowing the NTC to exempt entities from rate regulation where the presence of sufficient competition is expected to elevate industry standards. And as a next level of consideration, the NTC will step in once more if market conditions foster the rise of cartels and engender anti-competitive practices.

Synthesizing the foregoing discussion, the NTC and the ERC possess competence with regard to competition issues if only to pursue the broader and more specific objectives they have been statutorily assigned. Competition is not an indispensable consideration as far as these bodies are concerned but is merely a regulatory tool to improve their respective sectors.

That there is a wide array of competition objectives—heretofore unpronounced in the Philippine legal setting—beyond economic efficiency and consumer welfare can be very daunting. Abandoning the old gods means pushing the boundaries of administrative regulation; only then, by overcoming its ruling paradigm, can the agency have the will to go over and beyond itself.²⁵⁸ The PCC must, to borrow the words of Nietzsche, organize the chaos of its passions, give style to its character, and become creative.²⁵⁹ Towards such endeavors, the regulatory framework expounded herein is but a modest proposition.

V. CONCLUSION: WILL TO POWER

Regulation entails a certain degree of “administrative artistry.”²⁶⁰ The path to effective regulation is paved by crafty and forward-looking personalities who adapt to changing times, respond to shifting ideologies,

²⁵⁵ § 4(c).

²⁵⁶ § 5(c).

²⁵⁷ § 4(a).

²⁵⁸ FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, Part III, Ch. 56 (1883).

²⁵⁹ RICHARD CHESSICK, *A BRIEF INTRODUCTION TO THE GENIUS OF NIETZSCHE* 49 (1983).

²⁶⁰ McCRAW, *supra* note 232.

and carefully weigh evolving public values, all with a due regard to the contours of the legal system.

As a disruptive force, the PCC is well-positioned to influence firms that, for the longest time, have conducted their business without concern for their rivals or their consumers. The PCC brings forth a paradigm shift where the excesses and inefficiencies brought about by anti-competitive conduct will be kept in check. And as the agency slowly learns to mitigate the economic concentration that has long ruled the Philippines, the economic landscape is hoped to gradually become more inclusive, participative, and equitable.

Before exerting mastery over its regulated subjects, however, the PCC must overcome the intricacies of its own mandate. To borrow from the principles of Nietzsche,

every specific body strives to become master over all space and to extend its force (its will to power) and to thrust back all that resists its extension. But it continually encounters similar efforts on the part of other bodies and ends by coming to an arrangement with those of them that are sufficiently related to it: thus they then conspire together for power. And the process goes on.²⁶¹

In résumé, this paper has explicated the role of antitrust vis-à-vis the convention of economic efficiency and consumer welfare. Such policy objectives are, however, but a narrow subset in the broader universe of antitrust goals, as derived from the text of the PCA and examined in light of the Philippines' social, economic, and political terrain. Since articulating such goals will complicate the agency's regulatory calculus, it is necessary to develop a regulatory framework in response to such articulation. In particular, the PCC must consider the presence and interaction between indispensable and auxiliary considerations so as to determine its possible courses of action.

By articulating the goals of antitrust and proposing therefor a regulatory framework, this paper serves as a work of anticipation, a simple contribution to the vast field of administrative artistry. Such matters may not even be within the perception of the PCC, much less that of the general public, but in organizing the work herein, it provides some advice on how the PCC may navigate its own mandate once it graduates from the economic

²⁶¹ FRIEDRICH NIETZSCHE, *THE WILL TO POWER* § 636 (1901).

efficiency and consumer welfare paradigm—subject, of course, to the interplay of various social, political, legal, and economic factors still to come. No single theory from any discipline can predict with certainty the evolutionary path of regulation, but if there were a single constant in the collective history of regulation, it would be controversy.²⁶²

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²⁶² MCCRAW, *supra* note 232.