

THE PHILIPPINE COMPETITION ACT AND THE SMALL BUSINESS SECTOR FRAMEWORK FOR DEVELOPMENT*

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I. INTRODUCTION

Over the past decades, the Philippine Government has institutionalized policies and programs that seek to establish an environment conducive to the growth of the small business sector, which makes up 99.57% of business establishments in the country.¹ Figures have consistently shown the increasing contributions of the sector in employment creation and export, including through subcontracting arrangements with large firms, or as suppliers to exporting companies. Yet development of the sector remains modest, and under the 2017–2022 Philippine Development Plan (“PDP”), the policy focus on access to finance, financial literacy, and access to technology has been reiterated. While an explicit correlation between the growth of micro, small and medium sized enterprises (“MSMEs”) and (the presence of a) competition law has yet to be established,² there is basis for looking at competition policy, particularly as articulated in Republic Act No.

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¹ Department of Trade and Industry, *2016 MSME Statistics*, DEPARTMENT OF TRADE AND INDUSTRY WEBSITE, available at <https://www.dti.gov.ph/businesses/msmes/msme-resources/msme-statistics> (last accessed July 5, 2018). See also Cassey Lee & Bernardine Zhang Yuhua, *SMEs, Competition Law and Economic Growth*, in *COMPETITION LAW, REGULATION & SMEs IN THE ASIA PACIFIC: UNDERSTANDING THE SMALL BUSINESS PERSPECTIVE* 19 (2016).

² Lee & Yuhua, *id.* at 14. “How competition law affects SMEs role in economic growth is not entirely clear at this point. Part of this problem is due to the availability of measures and data on competition law and factors such as entrepreneurship and entry-exit dynamics. It is also related to how competition law is framed and enforced which depends on the guiding economic framework i.e. Schumpeterian (dynamic) competition or neoclassical (static) competition.”

10667 or the Philippine Competition Act (“PCA”), as an area of intervention in support of MSME development.

This Article conducts a survey of the current legal framework for MSMEs to provide an understanding of the underlying policy for enhancing the sector’s development and competitiveness. The role of competition law as a potential platform for policy intervention in the MSME sector is then considered, in terms of examining competition issues that have either been observed as affecting the sector in the country or have arisen in other comparable jurisdictions. It is hoped that this analysis will assist in shaping enforcement of the PCA in a way that is strategic from the perspective of both the MSME policy framework and competition policy. In Part II, the Article offers a discussion of the current legislative and regulatory framework for the MSME sector. Part III identifies the areas of intervention that are peculiar to competition policy and specifically provided for under the PCA. Part IV sets out an overview of the challenges that the Philippine MSME sector is likely to face given the full implementation of the PCA, while Part V complements this discussion with selected MSME case studies from various jurisdictions. The paper will conclude with some high-level recommendations.

II. MSME LEGISLATIVE AND REGULATORY FRAMEWORK

A. Magna Carta for MSMEs

In 1991, the Philippine Congress enacted the Republic Act No. 6977 or the “Magna Carta for Small Enterprises.” Considered as landmark legislation, it set the national policy favoring small and medium enterprises (“SMEs”) for their potential to generate employment and spur economic growth, including countryside industrialization.³ To ensure the development of SMEs in all productive sectors of the economy, particularly rural or agriculture-based enterprises, the law sought to reduce business costs by directing concerned government agencies to practice minimum regulation of SMEs in the acts of registration, provision of financing and other government services and assistance.⁴ The law also made it mandatory for all lending institutions, whether public or private, to set aside at least five percent (5%) of their total loan portfolio for SMEs.⁵

³ Rep. Act No. 6977 (1991), § 2.

⁴ § 5(a).

⁵ § 13.

Under the Magna Carta, to qualify as a SME, the value of the total assets of a business activity or an enterprise engaged in industry, agribusiness and services, whether single proprietorship, cooperative, partnership, or corporation, must be as follows:⁶

Micro	less than PHP 50,000.00
Cottage	PHP 50,001.00 to PHP 500,000.00
Small	PHP 500,001.00 to PHP 5,000,000.00
Medium	PHP 5,000,001.00 to PHP 20,000,000.00.

In addition, to be eligible as beneficiaries under the law, SMEs must be duly registered with the appropriate agencies.⁷ SMEs must also comply with the citizenship requirements for single proprietorship or partnerships (must be 100% owned and capitalized by Filipino citizens) and juridical entities (Filipino ownership of at least 60% of capital or outstanding stock).⁸ Such entities must also be primarily engaged in manufacturing, processing, or production, excluding farm level agricultural or crop production, in order to avail themselves of the law's incentives.⁹ Branches, subsidiaries, or divisions of large-scale enterprises are not eligible.¹⁰

To ensure its effective implementation, the law also created the Small and Medium Enterprise Development Council¹¹ ("SMED Council"). Attached to the Department of Trade and Industry (DTI), the SMED Council is headed by the DTI Secretary.¹² Among the SMED Council's powers is the review and adjustment of the SME qualification thresholds as necessary, taking into account inflation and other economic factors.¹³ The SMED Council is also in charge of crafting a comprehensive SME development plan for integration into the national development plan.¹⁴

In order to promote the productivity and viability of SMEs, the SMED Council is tasked to direct and assist relevant government agencies and institutions at the national, regional, and provincial levels for:¹⁵

⁶ § 3.

⁷ § 4(a).

⁸ § 4(b).

⁹ § 4(c).

¹⁰ § 4(d).

¹¹ § 6.

¹² § 7.

¹³ § 3.

¹⁴ § 8(c).

¹⁵ § 8(i).

1. The provision of business training courses, technical training for technicians and skilled laborers, and continuing skills upgrading programs;
2. The provision of labor-management guidance, assistance, and improvement of the working conditions of employees in small and medium-sized firms;
3. The provision of guidance and assistance regarding product quality/product development and product diversification;
4. The provision of guidance and assistance for the adoption of improved production techniques and commercialization of appropriate technologies for product development and for increased utilization of indigenous raw materials;
5. The provision of assistance in marketing and distribution of products of SMEs through local supply-demand information, industry and provincial profiles, overseas marketing promotion, domestic market linkaging, and the establishment of common service facilities such as common and/or cooperative bonded warehouse, grains storage, agro-processing and drying facilities, ice plants, refrigerated storage, and cooperative trucking facilities;
6. The intensification of assistance and guidance to: enable greater access to credit through a simplified multi-agency financing program; encourage development of other models of financing such as leasing and venture capital activities; provide effective credit guarantee systems; encourage formation of credit guarantee associations, including setting up of credit records and information systems; and decentralize loan approval mechanisms;
7. The provision of concessional interest rates, lower financing fees, including incentives for prompt credit payments, arrangements tying amortizations to business cash flows, and effective substitution of government guarantee cover on loans for the borrower's lack of collateral;
8. The provision of bankruptcy preventive measures through the setting up of a mutual relief system for distressed

enterprises and the establishment of measures such as insurance against extraordinary disasters;

9. The intensification of information dissemination campaigns and entrepreneurship education activities;
10. Easier access to tax credits and other tax and duty incentives as provided by the Omnibus Investment Code¹⁶ and other laws;
11. The provision of support for product experimentation and research and development activities as well as access to information on commercialized technologies; and
12. The provision of more infrastructure facilities and public utilities to support operations of SMEs.

The landmark law also established the Small Business Guarantee and Finance Corporation (“SBGFC”) whose primary duty is to provide SMEs alternative modes of financing, including direct and indirect project lending, venture capital, financial leasing, secondary mortgage, and rediscounting of loan papers to small businesses secondary or regional stock markets, with the exception of crop production financing.¹⁷ SBGFC may also guarantee SME loans up to one hundred percent (100%).¹⁸ It may further provide second level guarantee (re-insurance) on the credit and investment guarantees made by credit guarantee associations and other institutions in support of SMEs.¹⁹ SBGFC, which is attached to the DTI and is under the administrative supervision of the SMED Council, possesses all the general powers conferred by law upon corporations under the Corporation Code.²⁰

The law was amended five years later, reducing to three the categories of SMEs while increasing the thresholds for their qualification, as follows:²¹

Micro	less than PHP 1,500,001.00
Small	PHP 1,500,001.00 to PHP 15,000,000.00

¹⁶ Exec. Order No. 226 (1987).

¹⁷ § 11.

¹⁸ § 11.

¹⁹ § 11.

²⁰ § 11. *See* Batas Blg. 68 (1980).

²¹ Rep. Act No. 8289 (1997), § 1.

Medium PHP 15,000,001.00 to PHP 60,000,000.00.

In reviewing the above thresholds, the SMED Council has also been directed to consider, in addition to inflation and other economic indicators, the number of employees, equity capital, and asset size.²²

The scope of business activity, in classifying SMEs, has also been expanded to include the practice of one's profession and the operation of tourism-related establishments.²³

A new benefit was also added for SMEs under the amended law: a share of at least ten percent (10%) of total procurement value of goods and services supplied to the government, its bureaus, offices, and agencies annually, provided that the prices and quality of goods offered by SMEs are competitive.²⁴

On the mandatory allocation of credit resources to SMEs imposed on lending institutions, the requirement was amended as follows: for small and medium enterprises, at least six percent (6%) and at least two percent (2%), respectively, of the lending institution's total loan portfolio shall be reserved.²⁵ Further, lending institutions are now required to submit to the *Bangko Sentral ng Pilipinas* (BSP) quarterly compliance reports.²⁶

In 2008, the law was further amended to classify micro enterprises as separate and distinct from small enterprises,²⁷ thus renaming the group collectively as "MSMEs," or micro, small, and medium enterprises.²⁸ The threshold for each category was also increased, as follows:²⁹

Micro	Not more than PHP 3,000,000.00
Small	PHP 3,000,001.00 to PHP 15,000,000.00
Medium	PHP 15,000,001.00 to PHP 100,000,000.00. ³⁰

²² § 1.

²³ § 2(c).

²⁴ § 2.

²⁵ § 9.

²⁶ § 9.

²⁷ Rules Implementing Rep. Act No. 6977, Rule 2, § 4.

²⁸ Rep. Act No. 9501 (2008), § 1.

²⁹ § 1.

³⁰ Currently, there are two ways of defining MSMEs: based on (i) asset size or (ii) total number of employees. Under the law, MSMEs are defined based on asset size, as provided for above. However, the Philippine Statistics Authority, classifies MSMEs based on the total number of employees, as follows:

Similarly amended was the mandatory credit allocation imposed on lending institutions: for micro and small enterprises, at least eight percent (8%), and for medium enterprises, at least two percent (2%) of the lending institution's total loan portfolio shall be reserved.³¹ The manner of compliance was also specified as any of the following:³²

1. Actual extension of loans to eligible MSMEs;
2. Actual subscription of preferred shares of stock of the Small Business Corporation ("SB Corp." formerly SBGFC);
3. Wholesale lending to participating financial institutions for on-lending to MSMEs;
4. Purchase or discount of MSMEs receivables;
5. Loans granted to export, import, and domestic traders subject to compliance with the law; or
6. Subscription or purchase of liability instruments as may be offered by the SB Corp.

The BSP was also tasked to establish an incentive program to encourage lending to MSMEs beyond the mandatory credit allocation, such as possible reduction in a bank's reserve requirement.³³

The amended law also provided for the creation of the Venture Capital and Micro Finance Trust Fund, to be set up by the SB Corp., now subject to the supervision and examination of the BSP.³⁴ The Venture Capital Fund shall primarily serves as a source of venture capital financing, especially in technology-oriented industries, while the Micro Finance Trust Fund provides collateral-free, fixed, and working capital loans to micro and small enterprises run by those emerging out of poverty.³⁵

MSME	Number of Employees
Micro	1 to 9
Small	10 to 99
Medium	100 to 199
Large	More than 200

See Phil. Stat. Authority, *Number of Establishments and Total Employment by Region, Industry and Employment Grouping*, PHIL. STAT. AUTHORITY WEBSITE, available at <https://drive.google.com/file/d/1JLSI49zX6DIIwoqQHpkS4Yetfnq8zEIU/view> (last accessed Feb. 28, 2018).

³¹ Rep. Act No. 9501 (2008), § 18.

³² § 18.

³³ Rules Implementing Rep. Act No. 6977, Rule 13, § 4.

³⁴ Rep. Act No. 9501 (2008), § 17.

³⁵ § 17.

The SMED Council was accordingly renamed as MSMED Council,³⁶ with a revised membership, with, among others, the inclusion of the Interior and Local Government Secretary, and removal of the Environment and Natural Resources Secretary. In lieu of the Labor and Employment Secretary, a representative from the labor sector is to be nominated by accredited labor groups.³⁷

The MSMED Council was further empowered, in coordination with the appropriate government agencies, to:³⁸

1. Provide more infrastructure facilities and public utilities to support operations of MSMEs;
2. Establish, operate, and administer a small business incubation program in coordination with academic institutions, the Department of Science and Technology (DOST), and other appropriate government entities that will provide space for start-up and expanding firms, shared use of equipment and work areas, daily management support services essential to high-quality commercial operations, technical assistance, and other services to develop innovative and deserving MSMEs;
3. Conduct a nationwide information campaign with the Philippine Information Agency that shall inform the public of all programs and services, government and non-government, available to MSMEs;
4. Provide local and international network and linkages for MSME development;
5. Compile and integrate statistical databank on Philippine MSMEs; and
6. Set up new MSME centers and revitalize already established MSME centers to provide MSMEs in the regions easier access to services such as, but not limited to, the following:
 - i. Accept and act on all registration applications of MSMEs;
 - ii. Streamline registration process and facilitate speedy registration for the establishment of business enterprises in the country;

³⁶ § 7.

³⁷ § 8.

³⁸ § 9.

- iii. Provide all information and referral services necessary or essential to the development and promotion of MSMEs;
- iv. Conduct other programs or projects for entrepreneurial development in their respective areas; and
- v. Provide courses and development programs, training, advice, consultation on business conceptualization and feasibility, financing, management, capacity building, human resources, marketing, and such other services to support the needs of MSMEs.

In addition, the MSMED Council shall ensure the implementation of other plans and programs specific to the needs of each sector, encouraging MSMEs to graduate from one category to the next.³⁹

The Department of Budget and Management, for its part, has been tasked to monitor the compliance of government agencies on the required procurement for MSMEs, and to submit its report to the MSMED Council every semester and to Congress every year.⁴⁰

The formulation of a six-year MSME development plan, to be prepared by the DTI and approved by the President, was also mandated under the amended law to form part of the Medium-Term Philippine Development Plan. The MSME development plan, to be validated and updated every semester, shall include a component on a micro credit financing scheme.

B. Barangay Micro Business Enterprises Act

Even with the Magna Carta for Small Enterprises already in effect, Congress found it necessary to extend further assistance to small businesses within *barangays*, the smallest local government unit in the Philippines, each with at least 2,000 and 5,000 inhabitants for the provinces and Metro Manila, respectively.⁴¹ As the basic political unit, the barangay serves as the primary planning and implementing unit of government policies, plans,

³⁹ § 3.

⁴⁰ Rep. Act No. 9501 (2008), § 4.

⁴¹ LOCAL GOV'T CODE, § 386.

programs, projects, and activities within a community.⁴² There are a total of 42,036 barangays throughout the archipelago as of December 31, 2017.

The enactment of the Barangay Micro Business Enterprises (“BMBE”) Act in 2002 sought to integrate those in the informal sector into the mainstream economy⁴³ by providing certain incentives to BMBEs, or businesses engaged in the production, processing or manufacturing of products, including agro-processing, as well as trading and services, with total assets of not more than PHP 3,000,000.00.⁴⁴ Among the benefits available to BMBEs are: (i) income tax exemption;⁴⁵ (ii) exemption from the coverage of the Minimum Wage Law;⁴⁶ (iii) priority in special credit windows, set up specifically for the financing requirements of BMBEs;⁴⁷ and (iv) technology transfer, production, and management training, and marketing assistance programs provided by the DTI, DOST, the University of the Philippines-Institute for Small Scale Industries, and the Technical Education and Skills Development Authority, among others.⁴⁸

Under the BMBE Act, local government units are also encouraged to exempt BMBEs from local taxes, fees and charges or to reduce such fees.⁴⁹ To take advantage of these benefits, businesses must secure from their respective local treasurer’s offices a Certificate of Registration, effective for two years, subject to renewal.⁵⁰

Notwithstanding the passage of the Magna Carta and its amendments, the Senate Economic Planning Office, in a study in 2012, summarized the barriers to MSME growth and development under the following general categories: (i) non-financial barriers (cost of getting electricity, heavy regulation, high tax rates, and corruption); and (ii) financial barriers (access to finance). According to the study, “these non-financial barriers to MSME development translate to high cost of doing business or poor business environment, and discourages the formation of new MSMEs or the entry of existing MSMEs into larger markets, among others,” pointing

⁴² § 384.

⁴³ Rep. Act No. 9178 (2002), § 2.

⁴⁴ § 3.

⁴⁵ § 7.

⁴⁶ § 8.

⁴⁷ § 9.

⁴⁸ § 10.

⁴⁹ § 7.

⁵⁰ § 4.

to the need to improve the overall business environment to ensure sound MSME development.⁵¹

C. Go Negosyo Act

To complement the Magna Carta for MSMEs and the BMBE Law, Republic Act No. 10644, or the “Go Negosyo Act,” was passed in 2013, strengthening the MSMED Council⁵² and mandating the establishment of “Negosyo Centers” in all provinces, cities, and municipalities.⁵³

Within its jurisdiction, each Negosyo Center is tasked to: (i) promote ease of doing business and access to services for MSMEs, including accepting and facilitating all MSME registration applications and coordinating with the respective local government units (“LGUs”) and concerned government agencies to process the duly accomplished forms submitted by the MSMEs; (ii) co-organize with the local chambers of commerce and other business organizations a mentoring program for prospective and current entrepreneurs and investors; (iii) coordinate with schools and organizations on the development of youth entrepreneurship program; (iv) encourage women entrepreneurship by giving women access to information, support, training, and credit facilities; (v) ensure management guidance, assistance, and improvement of the working conditions of MSMEs; (vi) create a databank which shall be a source of all information necessary for project monitoring, research, and policy studies and informal dissemination campaigns; (vii) map out all information and services essential to prospective entrepreneurs and prospective investors especially in key value chains and economic subsectors; and (viii) establish a feedback mechanism among MSMEs.⁵⁴

⁵¹ Senate Economic and Planning Office, *The MSME Sector at a Glance* (Mar. 2012) (policy paper prepared for the Senate). In this study, AIM-RSN Survey respondents were asked to identify barriers to entry in their respective markets. Large start-up costs (71.7%), large economies of scale (67.7%), and aggressive or predatory behavior of a major player (67.7%) were all mentioned by most SMEs as barriers for prospective entrants, while half of the respondents (49.8%) considered access to competent personnel a barrier. Small enterprises were more likely than medium players to mention large start-up costs as a barrier to entry.

⁵² Rep. Act No. 10644, § 2.

⁵³ § 3.

⁵⁴ § 4.

Business Registration Assistance	Business Advisory Services	Business Information and Advocacy
<ul style="list-style-type: none"> • Accept and facilitate new registration and renewal application of MSMEs, including BMBEs • Coordinate with LGUs and liaise with government agencies to process applications • Implement a unified business registration process preferably through automated systems such as the Philippine Business Registry 	<ul style="list-style-type: none"> • Assist MSMEs in meeting regulatory requirements to start and maintain the business • Build local support networks and establish market linkages for MSME development through the MSMED Council and DTI • Facilitate access to grants and other forms of financial assistance, shared service facilities and equipment, and other support for MSMEs through national government agencies • Ensure management guidance, assistance, and improvement of MSMEs' working conditions • Co-organize with the local chambers of commerce, other business organizations, and government agencies, a mentoring program for prospective and current entrepreneurs and investors 	<ul style="list-style-type: none"> • Provide information and services in training, financing, marketing, and other areas • Establish and maintain a databank of business information requirements of MSMEs • Promote ease of doing business and access to services • Support private sector activities relating to MSMEs development • Encourage government institutions related to the business application process to help promulgate information on the Negosyo Center • Coordinate with schools and related organizations on the development of youth entrepreneurship program • Encourage women entrepreneurship through access to information, training, credit facilities, and other forms of assistance

	<ul style="list-style-type: none"> • Conduct other programs or projects for entrepreneurial development in the country aligned with the MSMEs development plan 	
Monitoring and Evaluation		
<ul style="list-style-type: none"> • Monitor and recommend business-process improvement for MSMEs • Establish a feedback mechanism among MSMEs 		

TABLE 1. Functions of Negosyo Centers.

The law also mandated the DTI to develop a unified and simplified business registration form to be made available in all Negosyo Centers.⁵⁵ Should the concerned business permits and licensing offices fail to process the application within 15 days, the MSME shall be deemed registered for a period of one year. However, such business permit or licensing office shall have the authority to revoke the permit or license if a MSME has not met the relevant requirements and qualifications within 30 days from the date of application.⁵⁶ The creation of a business registry databank, as a repository of information of all business enterprises in the country, shall also help facilitate business registration.⁵⁷

In addition, the MSMED Council, through the DTI, the Department of Finance (DOF), and authorized financing institutions shall establish a start-up fund to provide financing for the development and promotion of MSMEs in priority sectors, as identified in the MSME Development Plan.⁵⁸ The start-up fund shall be sourced from the MSME Development Fund and BMBE Fund.⁵⁹

An Advisory Unit was also created within the MSMED Council. While its members have no voting power, it may be consulted by the MSMED Council in the latter's regular meetings.⁶⁰ The Advisory Unit is made up of the heads of the DOST, NEDA, BSP, Land Bank of the Philippines, Development Bank of the Philippines, and the Credit Information Corporation, together with one representative each from the

⁵⁵ § 5(a)(1).

⁵⁶ § 5(a)(3).

⁵⁷ § 5(d).

⁵⁸ § 7.

⁵⁹ § 7.

⁶⁰ § 9.

labor sector, the private banking sector, microfinance non-government organizations, and the University of the Philippines-Institute for Small Scale Industries.⁶¹ The composition of the MSMED Council was effectively changed, leaving the following as members: Secretaries of Trade and Industry, Agriculture, and Interior and Local Government, together with the President of the SB Corp., three MSME sector representatives from Luzon, Visayas, and Mindanao, and one representative each from the women and youth sectors.⁶²

The law also transferred the authority to issue Certificates of Authority for BMBEs, from the local treasurer's office to the corresponding Negosyo Center.⁶³

D. MSME Development Plan

1. SME Development Plan 2004–2010

The first Development Plan specifically formulated for the then SME sector was crafted in 2004 (“SMED Plan 2004–2010”). Designed as a framework for making SMEs a key factor in the Philippine economy's growth by 2010, the Plan identified three key strategies:

1. Enhancing operations of the individual SME by providing focused support;
2. Assisting identified growth or priority industries; and
3. Evolving an operational and regulatory environment more conducive for SMEs to set up, operate, and succeed.⁶⁴

These are further broken down into corresponding specific programs, with the targets and timelines delineated in the Plan.

By the end of 2010, the MSMED Council noted the following major accomplishments from the implementation of the SMED Plan 2004–2010, divided into four outcome areas:⁶⁵

⁶¹ § 9.

⁶² *Compare* Rep. Act No. 10644 (2014), § 9, on the composition of the MSMED Council, *with* Rep. Act No. 10679, § 9(d), or the Youth Entrepreneurship Act.

⁶³ Rep. Act No. 10644 (2014), § 5(b).

⁶⁴ SMED Council, SME Development Plan 2004–2010, at 27 (May 2006), *available at* <https://drive.google.com/file/d/0B0iIL7KAK3i5UWJ4aldfWXhmelU/edit>.

⁶⁵ MSMED Council, MSME Development Plan 2011–2016, at 15-17, *available at* <https://drive.google.com/file/d/0B0iIL7KAK3i5MEozZWpHcHg2TIU/edit>.

Business Environment	Access to Finance
<ul style="list-style-type: none"> • Streamlined the issuance of mayor's permit in 100 cities and municipalities • Developed the DTI Business Profile Management System for business matching and prioritizing business development services • Publication of business registration handbooks 	<ul style="list-style-type: none"> • Granted loans to MSMEs from PHP 234.4 billion in 2003 to PHP 288 billion in 2010 • Generated 3 million jobs under the Microfinance Program and 2.9 million jobs under the SULONG Program • Released PHP 169.24 billion in loans to 6.1 million microfinance clients
Access to Markets	Productivity and Efficiency
<ul style="list-style-type: none"> • Provided buyer-supplier matching assistance to 6,383 SMEs generating domestic sales of PHP 814.4 million and exports of USD 82 million • Organized local and international trade fairs that assisted 6,673 companies generating domestic sales of PHP 4.3 billion and export sales of USD 1.1 billion • Provided product research and development assistance to 3,674 SMEs 	<ul style="list-style-type: none"> • Assisted 4,393 firms in technology transfer and commercialization • Assisted 2,143 firms in packaging and labelling • Provided 4,158 technology trainings to 12,380 firms

TABLE 2. SME Development Plan (2004–2010) Accomplishments.

However, the following are also noted as areas requiring further attention:⁶⁶

1. Smaller MSMEs are benefitting less from improved access to finance, signalling a need to enhance bankability of smaller MSMEs.
2. The quality of training and technology transfer offered are more suitable for bigger MSMEs.
3. There was low awareness of the SMED Plan.
4. There is a lack of documented success stories. Greater monitoring of impact of programs is needed.
5. There is a lack of growth among medium-sized enterprises.

⁶⁶ *Id.* at 18-20.

6. There is a lack of strong coordination among national agencies and local government units.

2. MSME Development Plan 2011–2016

Building on the gains under the SMED Plan 2004–2010, and taking into consideration the areas for improvement, the succeeding MSME Development Plan for 2011–2016 (“MSMED Plan 2011–2016”) sought to put greater emphasis on the role of local and regional stakeholders to achieve the Plan’s targets, adopting a three-pronged approach:

1. Local and regional economic development approach;
2. Sector development approach; and
3. Market system development approach.⁶⁷

While the Plan also adopted the same results framework in the previous Development Plan, specifically the four outcome areas, its implementation also sought to incorporate four emerging global themes: climate change/green growth; gender mainstreaming; migration; and corporate social responsibility and linkages with large companies.⁶⁸

The implementation of the MSMED Plan 2011–2016 posted the following results:

1. Generation of three million new jobs, exceeding the two million target;
2. Creation of one million new MSMEs;
3. Assistance to 710,908 existing MSMEs in their operations and expansion;
4. PHP 82.14 billion in domestic sales, PHP 110.12 billion in export sales, and PHP 226.24 billion in investments; and
5. Direct lending to MSMEs reaching the amount of PHP 2,215.75 billion, 44% of which went to micro and small enterprises.⁶⁹

⁶⁷ *Id.* at 32–34.

⁶⁸ *Id.* at 35–36.

⁶⁹ MSMED Council, MSME Development Plan 2017–2022, at 30–31 (Apr. 2018), available at https://drive.google.com/file/d/1PhDj6-41QsA2YmXdk1K86HsqOSz_Sooa/view.

In addition, by December 2016, a total of 448 Negosyo Centers, which bring government services closer to small businesses, have been set up: 52% in Luzon, 23% in Visayas, and 25% in Mindanao.⁷⁰

3. *Medium Term Development Plan 2017–2022*

For 2017 to 2022, the Philippine Development Plan seeks to provide more opportunities for growth of output and income to sub-sectors and marginalized economic groups, including MSMEs.⁷¹ This is further articulated in the MSME Development Plan for 2017–2022 drafted by the MSMED Council and approved by the President where the medium-term vision for MSMEs is to be more globally competitive, regionally integrated, resilient, sustainable, and innovative, performing as key drivers of inclusive Philippine economic growth. The MSMED Plan 2017–2022 also identifies five strategic goals:

1. Improved business climate;
2. Improved access to finance;
3. Enhanced management and labor capacities;
4. Improved access to technology and innovation; and
5. Improved access to market.⁷²

The MSMED Plan 2017–2022 is also aligned with the ASEAN Strategic Action Plan for SME Development 2016–2025; the ASEAN 2017 MSME Development Summit Manila Call to Action; and the APEC Strategy for SME Development 2017–2020.⁷³

E. Ongoing Challenges for the MSME Sector in Current Legislative and Regulatory Environment

Lee and Yuhua pointed out that in economies associated with the Asia Pacific Economic Cooperation (“APEC”), SMEs dominate in terms of number of establishments, but less proportionally in terms of GDP. While this finding should not be taken as an indication of the extent to which SMEs contribute to economic development, it does indicate the continuing need to support the sector and enhance its contribution to growth.

⁷⁰ *Id.*

⁷¹ Nat’l Econ. & Dev’t Authority, Philippine Development Plan 2017–2022, at 50, (2017), available at http://www.neda.gov.ph/wp-content/uploads/2018/01/Abridged-PDP-2017-2022_Updated-as-of-01052018.pdf.

⁷² *Supra* note 69, at 34–36.

⁷³ *Id.* at 9.

Economic growth is considered to be a dynamic process and “at the micro-level, this can take place through existing firms expanding their production (including introducing new products), and new firms entering the market and commencing production.”⁷⁴

In the Philippines, “[t]he SME sector [...] remains underdeveloped by APEC region standards,” in terms of both the number of enterprises and level of employment as compared to other APEC member economies.⁷⁵ This condition prevailed notwithstanding the passage of the Magna Carta, later amendments, and new laws extending to the sector. These policy instruments have tended to focus on strengthening the institutional framework for the small business sector by creating, and later revamping the membership of, the MSMED Council, and expanding its mandate; creating of supporting institutions such as Negosyo Centers; establishing mechanisms for access to credit; and streamlining interface with government at both the national and local levels. Prior to the introduction of the PCA, the policies had not significantly improved the market conditions in which MSMEs compete.

Pursuant to the Go Negosyo Act, Negosyo Centers have been set up all over the Philippines, where qualified businesses may register as MSMEs. Currently, there are over 500 Negosyo Centers.⁷⁶ Some of these are existing MSME centers originally established by the DTI, which have since been converted to Negosyo Centers. In addition to serving as venue for the registration of MSMEs and BMBEs, Negosyo Centers also offer business registration services such as business name registration and business permit registration. The goal is for Negosyo Centers to function as a one-stop shop for all government registration requirements for businesses. Negosyo Centers are also mandated to process business permits and licensing applications within 15 days, otherwise an MSME is automatically registered for a period of one year, subject to revocation within 30 days from the date of application should it be found that the MSME has not met the relevant requirements and qualifications.⁷⁷

⁷⁴ Lee & Yuhua, *supra* note 1, at 11.

⁷⁵ Bryanne Michael, Tom Sloan, & Lai-lynn Barcenas, Capacity Building for SMEs and Competition Policy: Baseline Study and Regulatory Impact Assessment, Asia-Pacific Economic Cooperation Secretariat, at 6 (2017), available at https://apecmsmemarketplace.com/sites/default/files/doc/1_cc_07_2014a_baseline_and_ria_report.pdf.

⁷⁶ *Negosyo Centers*, SEN. BAM AQUINO WEBSITE, available at <http://www.bamaquino.com/gonegosyoact/negosyocenters/> (last accessed Mar. 9, 2018).

⁷⁷ Rep. Act No. 10644 (2014), § 5(a)(3).

The MSMED Council notes, however, that despite these programs which have substantially improved the process of business registration, there remain government procedures and requirements for businesses that are deemed as numerous, repetitive, time-consuming and thus costly, especially for small businesses.⁷⁸ The problem is particularly common in local governments with poor coordination with the national government and with the private sector.⁷⁹

With the benefit of mandatory credit allocation in favor of MSMEs, small businesses now have more opportunities to avail themselves of loans from both public and private lending institutions.⁸⁰ However, the MSMED Council has noted that banks continue to prefer larger corporate borrowers who are perceived to pose lower credit risk and promise higher repayment rates. MSMEs, meanwhile tend not to be prioritized for lack of available collateral.⁸¹ It also does not help that most small businesses have limited credit information. Not all MSMEs are financially literate or aware that these financial options are available to them.⁸² Clearly there is a need to, on one hand, improve the environment in order to encourage banks to perceive MSMEs as a viable market, and, on the other hand, enhance the financial literacy of MSMEs.

MSMEs generated a total of 4,879,179 jobs in 2016, as compared to 2,831,729 for the large enterprises. This indicates that MSMEs contributed almost 63.3% of the total jobs generated by all types of business establishments that year. Of these, 30.4% or 2,345,992 jobs were generated by micro enterprises, 25.7% or 1,981,316 by small enterprises, and 7.2% or 551,871 by medium enterprises. MSMEs account for 25% of the country's total exports revenue. It is also estimated that 60% of all exporters in the country belong to the MSME category. MSMEs are able to contribute in exports through subcontracting arrangement with large firms, or as suppliers to exporting companies.

However, lack of growth, particularly for the medium enterprises, and lack of coordination among national government agencies and local government continue to require attention, such that under the current development plan, the five strategic goals have been developed to include improving access to technology and innovation and access to market.

⁷⁸ *Supra* note 69, at 21.

⁷⁹ *Id.*

⁸⁰ Rep. Act No. 6977 (1991), § 13.

⁸¹ *Supra* note 69, at 20.

⁸² *Id.* at 21.

III. COMPETITION POLICY AND LAW IN THE PHILIPPINES

A. Overview of the PCA

Although the PCA was passed in 2015, there is no articulation as yet on how the law may affect the sector, particularly its role in supporting innovation and access to markets. It is important, in this regard, to emphasize that effective enforcement of the PCA (in relation to the sector) can significantly enhance the State's pro-MSMEs policy, by levelling the playing field with a responsive regulation of anti-competitive business practices, including the prohibition of abusive conduct by dominant firms. With the PCA in full force since August 2017 (the end of the two-year transitory period), it is hoped that greater awareness and understanding of the new competition law regime will empower MSMEs and improve their capacity, productivity, and competitiveness. The creation of competitive markets of itself should benefit MSMEs.

The PCA is the primary competition legislation in the Philippines. A unique feature of this law is the mandate to establish a National Competition Policy to be implemented by the Government and all of its political agencies as a whole. Indeed, the PCA was passed upon the premise that the provision of equal opportunities to all promotes entrepreneurial spirit, encourages private investments, facilitates technology development and transfers and enhances resource productivity.⁸³

Conduct proscribed under the PCA comes under three categories: (i) anti-competitive agreement or conduct as set out in Section 14 of the law; (ii) abuse of dominant position under Section 15; and (iii) anti-competitive mergers and acquisition or those that result, or are likely to result, in the prevention, restriction or substantial lessening of competition, dealt with under Sections 16 to 23.

Under the law, anti-competitive acts generally refer to concerted conduct or agreements between competitors. Section 14(a) of the PCA states that the following agreements, between or among competitors, are *per se* prohibited: (i) restricting competition as to price, or components thereof, or other terms of trade; and (ii) fixing 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. However,

⁸³ Rep. Act No. 10667 (2015), § 2.

under Section 14(b) of the PCA: (i) setting, limiting, or controlling production, markets, technical development, or investment; and (ii) dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means, are prohibited only upon a determination that they have the object or effect of substantially preventing, restricting or lessening competition. A catch-all provision prohibits other types of agreements, such as those that do not involve competitors, which have the object or effect of substantially preventing, restricting or lessening competition, so long as those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of the law.⁸⁴

Abuse of dominance is proscribed under Section 15 of the PCA, which provides a comprehensive but non-exhaustive list of acts considered to constitute abuse of dominance:

1. Selling goods or service below cost with the object of driving competition out of the relevant market;⁸⁵
2. Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner;⁸⁶
3. Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;⁸⁷
4. Setting 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;⁸⁸

⁸⁴ § 14(c).

⁸⁵ § 15(a).

⁸⁶ § 15(b).

⁸⁷ § 15(c).

⁸⁸ § 15(d). The provision also states that the following are considered permissible price differentials: (i) socialized pricing for the less fortunate; (ii) price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers; (iii) those offered in response to the competitive price of payment, services or changes in the facilities furnished by a competitor;

5. Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially;
6. Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or service to be supplied;⁸⁹
7. Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisher folk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers⁹⁰
8. Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers;⁹¹ and
9. Limiting production, markets or technical developments to the prejudice of consumers.⁹²

It should be emphasized that mere possession of dominance in a relevant market is not prohibited, nor is acquiring, maintaining and increasing market share through legitimate means that do not substantially prevent, restrict or lessen competition proscribed. Indeed, the law recognizes having a superior product or process, business acumen, or legal rights as exemptions from abuse of dominance in three instances under Section 15 involving imposition of: (i) barriers to entry; (ii) unfair purchase or selling price on competitors, customers, suppliers or consumers; and (iii) limiting production, markets or technical developments to the prejudice of consumers. Moreover, conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered abuse of dominant position.

and (iv) price changes in response to changing market conditions, marketability of goods or services, or volume.

⁸⁹ § 15(f).

⁹⁰ § 15(g).

⁹¹ § 15(h).

⁹² § 15(i).

The PCA prohibits merger and acquisition agreements that substantially prevent, restrict, or lessen competition in the relevant market,⁹³ and grants the competition authority the power to review merger and acquisition agreements.⁹⁴ The PCA established a compulsory notification regime for mergers and acquisitions that breach the threshold as currently set under the law.⁹⁵ In the Implementing Rules and Regulations, specific criteria based on size of party and size of transaction for determining the thresholds were set by the Philippine Competition Commission (“PCC”), and remain effective today. A merger or acquisition agreement that is consummated in violation of the requirement to notify shall be considered void and subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction.⁹⁶ Mergers and acquisitions that do not come under mandatory notification may still be reviewed by the PCC upon its own initiative.

The PCA established the PCC as the country’s primary competition authority. The PCC is a quasi-judicial body with a broad mandate to implement the PCA, other competition-related laws and regulations, as well as the National Competition Policy. It has original and primary jurisdiction in the enforcement and regulation of all competition-related issues, even in cases involving both competition and non-competition issues. In the latter case, the sector regulator concerned shall be consulted and afforded reasonable opportunity to submit its own opinion and recommendation before the Commission renders a decision.

B. Constraints on Competition for MSMEs

The focus group discussions (“FGDs”) conducted by Sustineo for the Asia Pacific Economic Cooperation in 2016 and 2017 surfaced challenges that have confronted the sector and explored possible areas for intervention in levelling the playing field for SMEs. Among these areas are easing government restrictions, enhancing access to finance, developing necessary infrastructure (roads, transport, shipping and telecommunications, among others), enforcement against anti-competitive conduct from big

⁹³ § 20.

⁹⁴ § 16.

⁹⁵ *See* Phil. Competition Comm’n Memo. Circ. No. 18-001 (2018). The PCC raised the thresholds to PHP 5 billion for the size of person and PHP 2 billion for the size of transaction as defined in the Implementing Rules and Regulations.

⁹⁶ Rep. Act No. 10667 (2015), § 17. *See also* Phil. Competition Comm’n Rules on Merger Procedures, §§ 15-16.

businesses, and calibrated enforcement against SMEs themselves,⁹⁷ particularly as the initiative for MSMEs to transition to the digital economy is pursued.

The Baseline Study and Regulatory Impact Assessment found:

A broad assessment of the Philippines' SME market points to constraints to market competition. The largest concentration of SME centers on trade, hospitality, manufacturing and other services. Many of the companies in these sectors represent lower tech, lower skilled firms without competitive advantage. These sectors tend to suffer the most in an environment with vigorous competition. Policies which promote competition without simultaneously encouraging innovation could result in large scale disruptions in wholesale and retail markets, hospitality, and manufacturing.

The way that SMEs in the Philippines tap possible resources from formal financial institutions provides clues on the extent of how competition law and policy could improve SME competitiveness. Despite penalties levied against financial institutions for not giving 8% of their capital as loans to SMEs, between 2001 to 2012, of the 19 universal banks, 14 failed to lend the minimum amounts to micro and small enterprises, and 13 failed to lend to medium-sized enterprises. High taxes and administrative burdens also inhibit Filipino SMEs' incentives to compete and expand.⁹⁸

Unlike large and established business entities, small businesses have had to hurdle registration and licensing requirements that continue to impose a barrier to entry, as complex and burdensome registration and licensing systems directly influence the "ease of doing business." This creates a disproportionately high entry barrier for SMEs compared to better-resourced and larger rivals. Sustineo also notes that deficiencies in the public or judicial mode of resolving disputes present an indirect competition issue.

FGD participants confirmed that while contract enforcement was a challenge within the Philippines, problems existed within the broader judicial process. Specifically, FGD participants from across government and SME

⁹⁷ Mark Williams, Lai-Lynn Barcenas & Tom Sloan, Sustineo Policy Note 6: Competition Enforcement Priorities for Small and Medium Enterprises (2017) (Policy Note based on work completed under the Capacity Building for Small and Medium Enterprises on Competition Policy and Law project sponsored by the Asia-Pacific Economic Cooperation).

⁹⁸ Michael et al., *supra* note 75, at 7.

associations noted that contract dispute resolution is an important SME issue as judicial processes are slow, expensive and, in some cases, problematic due to institutional corruption. This issue persists even after recent reforms, with these burdens falling disproportionately on SMEs given their limited resources.

Among APEC economies, competition law enforcement at the competition authority level react to macroeconomic indicators, and as a result, can harm SMEs' ability to rely on stable competition policy and law. As previously noted, policy instability is one of the clearest impediments to promoting competition in the APEC region. Competition lags due to the lack of competition authorities' focus and policy prioritization, especially in instilling a culture of competition-focused commerce.

IV. COMPETITION ISSUES FOR THE PHILIPPINE MSME SECTOR

A. Application of the PCA to MSMEs

The PCA is enforceable against “any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines.”⁹⁹ In the early drafts of the PCA, MSMEs were proposed to be exempted. In the Bicameral Conference Committee deliberations, however, the exemption for MSMEs was removed on the basis that to do otherwise would send an undesirable message that a class of firms was already exempt from the laws. Those concerned with the position of MSMEs appeared (ultimately) to be satisfied that MSMEs would be unlikely to infringe the law as their agreement and conduct would have a limited effect on any market.

While there is no statutory exemption in favor of MSMEs, Section 15(g) of the PCA extends some protection as it considers it an abuse of dominance to directly or indirectly impose unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisher folk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers.

At the national level, the SME agenda and interests are articulated by the Philippine Exporters Confederation (“PHILEXPORT”) and the Philippine Chamber of Commerce and Industry (“PCCI”). PHILEXPORT is the country’s umbrella organization of exporters and is composed of 3,000 member exporters from fifteen economic sectors accredited under the

⁹⁹ Rep. Act No. 10667 (2015), § 3.

Export Development Act of 1994.¹⁰⁰ PCCI is a non-stock, non-profit, and non-government organization of SMEs as well as local chambers and industry associations. It has currently over 35,000 direct and indirect members from over a hundred local chamber affiliates throughout the country. Its programs and services are implemented by its various Committees composed of: (i) SME Development; (ii) Intellectual Property; (iii) Industry; (iv) ICT, Transportation, and Logistics; (v) Banking and Taxation; (vi) Environment; (vii) Agriculture and Food Security; (viii) Energy and Water Sector; and (ix) Housing, Construction, and Infrastructure.¹⁰¹ While the PCA recognizes the legitimacy and role of trade associations, it is useful to note that they may nevertheless be the source or cause of anti-competitive behavior. The law expressly provides that it is not illegal to use trade associations for the discussion or promotion of quality standards, efficiency, safety, productivity, competitiveness, and other similar matters of common interest involving the industry, provided that they shall not in any way be used to justify a violation of the PCA.¹⁰²

B. Awareness of the PCA

The results of the SME survey recently conducted by the Asian Institute of Management Rizalino S. Navarro Policy Center for Competitiveness (“AIM-RSNPCC”) indicate that awareness of the PCA and the PCC remains low and further studies to explore the correlation between MSME growth and the presence (or absence) of competition in the market are an imperative to better devise competition policy interventions for MSMEs. The findings of the AIM-RSNPCC study that have so far been made publicly available support the view that the application of competition law to MSMEs needs particular consideration, given the size of the enterprises in question and their (in)ability to impact any relevant markets.

From May to June 2017, the AIM-RSNPCC conducted a survey of 530 small and medium-sized enterprises to find out the attitudes of SMEs in Metro Manila in terms of competition. Respondents were chosen using multi-level random sampling, with the sample size for each of the 17 LGUs comprising Metro Manila proportional to their respective shares of

¹⁰⁰ Rep. Act No. 7844 (1994).

¹⁰¹ 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).

¹⁰² Rep. Act No. 10667 (2015), § 48.

registered businesses in the total number of registered businesses in Metro Manila.¹⁰³

Respondents of the AIM-RSNPCC Survey were asked “are you aware of the Philippine Competition Act and the Philippines Competition Commission?” After the PCA and the role of the PCC were explained, respondents were asked about their attitude towards the implementation of the law. They chose a rating from a 7-point scale with signposts: “Bad” on one end, and “Good” on the other end. Most SMEs had a neutral (22.5%) to positive (73%) view of the PCA. Medium enterprises viewed the PCA slightly more positively than small businesses.¹⁰⁴

The AIM-RSNPCC Survey respondents were asked if firms in their respective markets made business or strategic decisions according to inter-firm or business group agreements. Around a third of SMEs reported agreements in terms of pricing and product variety. A quarter of SMEs mentioned agreements in advertising and marketing strategies. Less than a tenth of SMEs mentioned that agreements among firms or within business groups influenced the quantity of products they may sell, the buyers to whom they may sell, and the geographic areas they may sell in.¹⁰⁵ A third of SME respondents thought that there was one firm or small group of firms that controlled the market for important inputs to their businesses. The remaining respondents did not think (53.4%) or did not know (11.5%) if one or a group of a few firms controlled the market for their inputs. 60% of respondents said there was not just a single competitor or a small group of competitors in their respective markets. But a quarter of SMEs did think there was concentration in their market, while around a fifth were unsure. Two-thirds of respondents did not think there was a single buyer or a small group of buyers in their respective markets, while the remaining third of SMEs did think there was concentration among their clients.¹⁰⁶

These results are consistent with the view that MSMEs, having been present across diverse businesses, have employed practices or engaged in transactions that have gained acceptance under the legal and regulatory framework for commercial undertakings prior to the PCA. MSMEs, therefore, remain unaware of what conduct to avoid and what pro-competitive practices they may retain or adopt to ensure compliance with

¹⁰³ Emmanuel Garcia, Christopher Ed Caboverde, Rose Ann Camille Caliso & Jamil Paolo Francisco, *Leveraging Competition Policy for SME Development and Shared Prosperity*, RSN-PCC Working Paper No. 17-006 (2017).

¹⁰⁴ *Id.* at 36.

¹⁰⁵ *Id.* at 12.

¹⁰⁶ *Id.*

the law. A two-year transitory period was included in the PCA for the competition authority to undertake awareness-building and advocacy activities. This period ended on August 8, 2017, without any indication that the advocacy and public briefings held by the PCC have effectively introduced the competition regime under the PCA to MSMEs.

C. Risk Areas for MSMEs

1. *Per Se Breaches of the PCA*

Williams et al. have identified the prohibition against anti-competitive agreements as the main threat to SMEs, noting that abuse of dominance and merger issues are unlikely to be a concern for SMEs.¹⁰⁷ Under section 14(a) of the PCA, price-fixing and bid-rigging come under *per se* analysis,¹⁰⁸ and are regarded as automatically prohibited. This means that establishing the existence of an agreement would be sufficient to impose administrative and even criminal liability. Particular concerns may arise where trade associations coordinate such practices for member-MSMEs.¹⁰⁹ The requirement to establish dominance as basis for determining abusive conduct, whether in its exclusionary or exploitative forms, appears to insulate MSMEs by reason of their size and market share from liability under Section 15 violations. With the significant increase in the size of party and size of transactions thresholds for compulsory notification, MSMEs are also unlikely to come under merger review. Nevertheless, the intention to treat these forms of conduct as *per se* violation, even if they involve the MSME sector, is apparent from the discussion of the Congressional Bicameral Conference Committee that tackled the PCA.

¹⁰⁷ Williams et al., *supra* note 97. See also Rachel Burgess, *Trade Associations Competition Law Advocates or Offenders?*, in COMPETITION LAW, REGULATION & SMEs IN THE ASIA PACIFIC: UNDERSTANDING THE SMALL BUSINESS PERSPECTIVE 192-208 (2016).

¹⁰⁸ The adoption of the *per se* standard was a controversial one, particularly because it is understood to preclude an analysis of market context, justification and effects. See Ma. Joy Abrenica & Johannes Bernabe, *The Case for the Philippine Competition Law*, XVI & XVII PUB. POLICY J. 165 (2017). See also Alexandra Merret, Rhonda Smith & Rachel Trindade, *The Application of PER SEs to SMEs The Type 1 Error No One Notices*, in COMPETITION LAW, REGULATION & SMEs IN THE ASIA PACIFIC: UNDERSTANDING THE SMALL BUSINESS PERSPECTIVE 11 (2016).

¹⁰⁹ Knut Fournier, *A New Competition Agency Learns to Deal with SMEs: The Case of the Hong Kong Competition Commission*, in COMPETITION LAW, REGULATION & SMEs IN THE ASIA PACIFIC: UNDERSTANDING THE SMALL BUSINESS PERSPECTIVE 351 (2016). “SMEs and their trade associations have proven to be low-hanging fruits for competition authorities in Singapore and Malaysia: they have weak compliance mechanisms and a very low understanding and knowledge of rules and regulations[.]”

Although competition law prohibits certain forms of conduct, such as price fixing and bid manipulation, it is generally understood to be for the purpose of ensuring efficient and competitive markets thrive to ensure reasonable prices and adequate supply of quality goods produced. It protects the presence and process of competition in markets, rather than competitors. For this reason, it seems intuitive for the analytical approach to require that intent to engage in anti-competitive conduct or that the conduct's anti-competitive effect be established. However, as the discussion of the Bicameral Conference Committee discloses, the Philippine Legislature adopted the *per se* approach for agreements contemplated under Section 14(a). Over time, since the *per se* approach was articulated, two rationales have been drawn from its continued application: (i) an understanding that certain practices are conclusively presumed to be harmful (to competition);¹¹⁰ and (ii) *per se* analysis, in dispensing with context, makes for efficient enforcement. The Bicameral Conference Committee transcripts show adherence to the first rationale: agreements to price fix and rig bids are presumed to always affect competition in the market (the *per se* threshold) and, put simply, the only defense available to the defendant is that the agreement did not take place or does not exist.

Viewed in this manner, MSMEs *can* readily fall foul of these provisions if they enter into agreements as to price or any component thereof or manipulate bids with competitors, even though they are small, particularly because an agreement is defined broadly under the PCA as “any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral.”¹¹¹

2. *Object or Effect of “Substantial Lessening of Competition” under the PCA*

Other types of agreements between competitors only breach the PCA if they have the *object or effect* of substantially preventing, restricting or lessening competition. Where MSMEs have small market shares, agreements

¹¹⁰ Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958). “Agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore will be illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”

¹¹¹ Rep. Act No. 10667 (2015), § 4(b). Indeed, a survey of competition enforcement among jurisdictions in the region shows that not a few authorities tended to focus on SMEs and built their skill set and knowledge in that direction. *See* Fournier, *supra* note 109.

between them are unlikely to have the effect of “substantially preventing, restricting or lessening competition.” However, it is still possible that an agreement could have the *object* of substantially preventing, restricting or lessening competition, which would result in infringement by a MSME.

It is not yet clear what the word “object” will mean in the context of the PCA. In Europe, where the term is used in its competition law, it is necessary to consider the terms of the agreement and the objectives it seeks to attain in the economic and legal context of the agreement.¹¹² Alternatively, the word “object” could mean intent, thus having a more subjective component: *Is it the intention of the parties that the agreement substantially prevents, restricts or lessens competition?* The answer to these questions is currently unknown. Given the leaning towards the European model in the PCA, the favorable view may be that the European interpretation of “object” is to be preferred.¹¹³

3. Abuse of Dominant Position and Anti-Competitive Mergers

The PCA also contains a prohibition against abuse of a dominant position. Although an assumption may be reasonably held that a MSME will not hold a dominant position, this is not always the case. In a Singaporean case involving ticketing services, the company in question, SISTIC.com Pte. Ltd., was found to have abused its dominant position. The company was an MSME but had acquired a dominant position by virtue of its strong position in a niche market.¹¹⁴

As noted above, mergers and acquisitions that do not have to be notified may still be reviewed by the PCC. For the MSME sector, this means that transactions between or affecting the sector may nevertheless come under review even if the size of party and size of transaction tests for mandatory notification are not met.

D. MSMEs Harmed by Anti-Competitive Conduct

Although MSMEs are at risk of breaking the law, it is important also to educate MSMEs on their *rights* under the law. MSMEs are at risk of anti-competitive harm arising from established business practices that persist

¹¹² GlaxoSmithKline Services Unlimited v. Commission, Case C-501/06 P, ECR I-9291, Oct. 6, 2009.

¹¹³ See Abrenica & Bernabe, *supra* note 108.

¹¹⁴ Abuse of Dominant Position by SISTIC.com Pte Ltd, CCS 600/008/07, June 4, 2010 (Infringement Decision); SISTIC.com Pte. Ltd. v. Competition Comm’n of Singapore, May 28, 2012 (Competitive Appeal Board Decision).

notwithstanding the prohibition under the PCA. They may fall victim to anti-competitive conduct by larger players. It is interesting to note, however, that in the AIM-RSNPCC Survey, respondents were also asked about their attitude towards competition among SMEs and with large businesses, using the 7-point scale. Most SMEs had neutral (28.5%) or positive (57.6%) views about competition with fellow SMEs. Medium enterprises were slightly more optimistic than small firms about competition among SMEs.¹¹⁵ Survey respondents were asked to gauge the intensity of competition in their respective markets. They chose a rating from a 5-point scale with labels Very low, Medium, High, and Very High. Most SMEs gauged competition in their markets to be medium (37.6%) or high (30.0%).¹¹⁶

V. LESSONS FROM THE REGION

How can pitfalls be avoided, and competition law be directed towards enhancing MSME development in the Philippines? It is useful to consider the application of competition laws and policies to MSMEs in other parts of ASEAN.

A. Competition Laws and Policies in the Region

As is the case in the Philippines, the competition laws of the Association of Southeast Asian Nations (“ASEAN”) member states, in all jurisdictions other than Indonesia, apply to MSMEs.¹¹⁷ The treatment of MSMEs in the other jurisdictions falls into a number of categories: (i) those where the law applies but exemption is permitted; (ii) those where the law applies but safe harbor provides legal certainty; and (iii) those where there is no exclusion, exemption, or safe harbor.

1. Exclusion

Indonesian law¹¹⁸ contains an exclusion in its Section 50(h) for “business actors of small scale.” Small scale is determined according to Law No. 20 of 2008 on micro, small and medium sized enterprises. Given the complete exclusion of the Indonesian competition law vis-à-vis MSMEs, the

¹¹⁵ Garcia et al., *supra* note 103, at 37.

¹¹⁶ *Id.* at 9.

¹¹⁷ Although the definitions of MSMEs differ across ASEAN, the distinctions are not relevant for the purposes of this Article.

¹¹⁸ Act No.5/1999. Regarding Prohibition of Monopolistic Practices and Unfair Business Competition.

position taken by the Indonesia competition regulator will not be considered any further.

2. *Exemption*

Despite including MSMEs in the application of the law, a number of the ASEAN competition laws include provisions that may permit an *exemption* from the application of the law for SMEs:

Laos' 2015 Law on Business Competition provides that an agreement can be considered for an exemption if the agreement provides benefits such as the strengthening of the competitiveness of SMEs (Article 45). It also provides that a merger of SMEs is exempted from the requirement to lodge documentation, but the Commission must be notified of the combination (Article 39).

Article 14(e) of Myanmar's 2015 Pyidaungsu Hluttaw Law No. 9 provides that the Commission can exempt a prohibited agreement if it lessens the expense of consumers by raising the competitiveness of SMEs.

Vietnam's Law on Competition, No. 27/2004/QH11, contains a complex set of arrangements for SMEs. Some agreements are prohibited—those that prevent entry to a market, exclude a competitor from the market or involve bid rigging.¹¹⁹ Other breaches are only prohibited if the *combined* market shares of the parties to the agreement is 30% or more.¹²⁰ In the latter case, where the parties have a market share in excess of 30%, an exemption may still be available if the agreement “increases the competitiveness of medium and small sized enterprises.”¹²¹

The provisions in Laos and Myanmar have not yet been tested in practice due to the early stages of implementation of competition laws in these jurisdictions. According to Le and Harvey,¹²² the exemptions have not been widely used by SMEs in Vietnam.

3. *Safe Harbors*

¹¹⁹ See arts. 8(5)-(7), 9(1).

¹²⁰ Arts. 8(1)-(5), 9(2).

¹²¹ Art. 10(dd).

¹²² Viet Le & Charles Harvey, *Competition Policy and SME Development in Vietnam, in* COMPETITION LAW, REGULATION & SMEs IN THE ASIA PACIFIC: UNDERSTANDING THE SMALL BUSINESS PERSPECTIVE 320 (2016).

The third approach to the treatment of MSMEs under ASEAN competition laws is to set “safe harbors.” A safe harbor operates to exclude application of the law to a MSME if the conditions of the safe harbor are met.

In Singapore, SMEs are defined as undertakings with an annual sales turnover of not more than SGD 100 million, or not more than 200 employees.¹²³ Their Competition Act of 2004 applies to MSMEs in Singapore in the same way it applies to larger enterprises as the law is applicable to an “undertaking” which is defined as “any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.”¹²⁴ There are no specific exemptions for MSMEs, however, the Competition and Consumer Commission of Singapore (“CCCS”) has published guidance on the prohibition against anti-competitive practices which provides legal certainty for MSMEs wishing to enter into agreements that could (in theory) infringe competition. It states that agreements are unlikely to have an appreciable effect on competition:

1. Where the parties to the agreement are actual or potential competitors, the combined market share of the parties does not exceed 20%;
2. Where the parties to the agreement are non- competitors, the combined market share of the parties does not exceed 25%;
3. *If the parties to the agreement are SMEs.*¹²⁵

As a result of this guidance, SMEs can feel confident that, even in circumstances where they have entered into potentially anti-competitive agreements, those agreements are unlikely to “prevent, restrict or distort competition” and will therefore not infringe the law.

Like Singapore, Malaysia’s 2010 Competition Act does not expressly exclude SMEs from its operation, but the Malaysia Competition Commission (“MyCC”) has also issued guidance which establishes safe harbors for SMEs. The 2012 Guidelines on Chapter 1 Prohibitions – Anti-

¹²³ Wee-Liang Tan & Lip-Hang Poh, *Competition Law Implementation and SMEs Singapore’s Experience*, in COMPETITION LAW, REGULATION & SMES IN THE ASIA PACIFIC: UNDERSTANDING THE SMALL BUSINESS PERSPECTIVE 259 (2016).

¹²⁴ Singapore Competition Act (2004), § 3.

¹²⁵ Competition and Consumer Comm’n of Singapore Guidelines on the Section 34 Prohibition 2016, ¶ 2.25, available at <https://www.ccs.gov.sg/legislation/cccs-guidelines>. (Emphasis supplied.)

competitive Agreements state that an agreement will not significantly prevent, restrict, or distort competition where the parties to the agreement:

1. are actual or potential competitors and the combined market share of the parties does not exceed 20%;
2. are non- competitors, the individual market share of each party does not exceed 25%¹²⁶

Although there is no express safe harbor for SMEs, the parties are likely to be able to obtain comfort provided their market shares fall below the threshold.

4. No Exemptions or Provisions in Favor of SMEs

There is no express provision exempting MSMEs under the Brunei Darussalam 2014 Competition Order. In Thailand, there was no specific exemption for SMEs under the 1999 Trade Competition Act BE 2542, nor is there one expressly provided for under the Trade Competition Act BE 2560. The May 4, 2017 version of Cambodia's Draft Law on Competition of Cambodia does not contain an exemption for MSMEs.

As in Malaysia and Singapore, guidance from the competition regulators in these jurisdictions may create safe harbors that would be of benefit to MSMEs.

B. Enforcement against MSMEs

In other ASEAN member states, MSMEs have fallen foul of competition laws, particularly in the early years. The breaches appear to have been the result of ignorance and/or a lack of understanding of how the law applies. In many cases, members of trade associations have been implicated in agreements made during association meetings or recommendations made by the association (which are then followed by its members).

The first seven infringement decisions of the CCCS involved SMEs.¹²⁷ Two of the cases¹²⁸ involved bid rigging, one of the “cartel”

¹²⁶ Malaysia Competition Comm'n Guidelines on Chapter 1 Anti-competitive Agreements, ¶ 3.4, available at http://www.mycc.gov.my/sites/default/files/handbook/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition.pdf.

¹²⁷ See C. Toh, *Watching the Competition*, THE SME MAGAZINE, May 2012.

offences and was therefore not subject to the “safe harbor” exemption.¹²⁹ Fines were imposed totalling more than S\$ 450,000.

In 2010, the Vietnam Competition Council imposed a fine of VND 1.9 billion (approximately USD 85,000.00) on 19 car insurance companies.¹³⁰ Most of the 19 companies were SMEs.

In Malaysia, almost all of the MyCC’s early cases involved SMEs. The pattern that emerged in Malaysia was the apparent “agreement” to a price increase that took place in the context of trade association meetings. The price increase was then implemented by the members, often preceded by a public announcement. Infringements were found in relation to cut flowers, haircuts, bread and transport charges.¹³¹ Problems were also identified outside of trade association forums. A group of ice manufacturers in Malaysia publicly announced that the price of ice would increase from January 1, 2014. MyCC imposed fines ranging from MYR 1,200.00 to MYR 106,000.00 on 25 manufacturers.¹³²

VI. CONCLUSION

It is clear that the PCA has potential application to MSMEs in the Philippines, whether by way of enforcement activities against MSMEs, or as a further policy intervention in enhancing MSME growth and development. The Philippine competition authority will need to take a policy direction with regard to the MSME sector which could take the form of a program for awareness and knowledge building deliberately designed for the sector.

¹²⁸ Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore, CCS 600/008/06, Jan. 9, 2008, and Collusive Tendering (Bid-rigging) in Electrical and Building Works, CCS 500/001/09, June 4, 2010.

¹²⁹ See Competition and Consumer Comm’n of Singapore Guidelines on the Section 34 Prohibition 2016, ¶ 2.24, available at <https://www.cccs.gov.sg/legislation/cccs-guidelines> (last accessed July 10, 2018).

¹³⁰ Tuan Nguyen, *Overview of Vietnam’s Competition Law Regime*, GLOBAL COMPETITION REVIEW, 2014, available at <https://www.linkedin.com/pulse/20140604032845-170865371-overview-of-vietnam-s-competition-law-regime-gcr-2014>.

¹³¹ See Tan Shi Wen & Karyn Khor, *Malaysia: From Floriculturists and Barbers to Airlines and Insurers*, MONDAQ, Nov. 6, 2018, available at <http://www.mondaq.com/x/751900/Antitrust+Competition/From+Floriculturists+And+Barbers+To+Airlines+And+Insurers>.

¹³² Malaysia Competition Comm’n, *MyCC finds 26 ice manufacturers had infringed Competition Act on price for ice*, MALAYSIA COMPETITION COMM’N WEBSITE, Feb. 21, 2014, available at <http://www.mycc.gov.my/news/mycc-finds-26-ice-manufacturers-had-infringed-competition-act-on-price-for-ice> (last accessed July 10, 2018).

Taking guidance from jurisdictions in ASEAN and the region, the PCC may also formulate a policy for MSMEs that includes extending forbearance, offering specific exemptions or safe harbors.

Although it is unlikely that agreements between MSMEs will result in a substantial effect on competition in relevant markets, lessons from other parts of ASEAN suggest that the risk of cartel conduct is real, particularly where MSMEs participate in trade association meetings. This experience illustrates the imperative of building MSME awareness of competition law and policy and understanding of the PCA to help avoid inadvertent breaches.

What the brief overview of the PCA and its application to MSMEs demonstrates is the highly technical nature of the economic concepts and legal standards embedded in the law. Not only is it likely that MSMEs will be unfamiliar with these concepts and standards, they may have long been engaged in business practices that are now inappropriate under the law. Given their size and resources, legal advice in this particular field may either be unavailable or inaccessible. For this reason, guidelines on the interpretation and enforcement of the PCA can perform the function of building not only awareness but also understanding of competition policy and the regulation of business practices and conduct it entails. It is thus advisable for PCC, as the primary competition authority, to develop these guidelines, particularly in relation to conduct proscribed under Sections 14 and 15 of the PCA. Guidelines will need to take into consideration the policy of the law to enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, and the implementing guidance offered under Sections 26 and 27 of the PCA.

In a similar vein, while the PCC has not yet focused its advocacy efforts on MSMEs, approaches taken by the competition regulators in Malaysia and Singapore may provide useful guidance. The PCC may also consider coordinating with the DTI and MSMED Council for awareness and capacity-building activities to be implemented under or with the support of Negosyo Centers. It will also be important for government to review existing policy, and implement instruments affecting the sector to ensure that these are not the source of anti-competitive practices. New initiatives, such as the transition to the digital economy, and linkages with large enterprises, should be examined for this purpose.

The possible use of competition law as a policy intervention for MSMEs underscores the need for alignment across trade, employment, financial policies that affect MSMEs. For this approach to effectively and

efficiently contribute to the growth of the MSME sector, coordination among the relevant government agencies, both national and local, is an imperative. As policy areas and instruments grow, there is a further need for government to review the legal and regulatory landscape to ensure that they do not give rise to anti-competitive practices or conditions.

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