

Enforcer's roundtable: What's under the radar?

The evolution of competition law and policy in the Philippines

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I. Introduction

1. The past quarter-century has seen rapid adoption of comprehensive competition law and policy regimes across jurisdictions in the world, particularly in developing countries. In East Asia, the Philippines is one of the recent adopters, joining other member states of the Association of Southeast Asian Nations (ASEAN) in enabling a comprehensive framework for the deployment of competition policy in support of the region's vision for economic integration.

2. This article traces the origins and evolution of competition law and policy in the Philippines and how these impact the enforcement of the Philippine Competition Act (PCA) and the operations of the Philippine Competition Commission (PCC). As in many developing countries, the development of the country's enforcement regime and competition culture has many challenges though these are not insurmountable. The young competition agency has taken a pragmatic approach, building on experiences and best practices of other jurisdictions in its enforcement rules and practices, prioritizing enforcement actions to focus on the core principle of competition policy, mainstreaming competition policy in the government's national development agenda, and building institutional capacity for sustained effectiveness.

II. Historical context

3. Competition-related provisions have existed in the Philippine legal system for longer than a century, albeit scattered and not successfully enforced. The first legal text dealing with monopolies came out while the Philippines was under Spanish rule. The Spanish Penal Code, which was made applicable to the Philippines in 1887,¹ prohibited combinations in restraint of trade and other restrictive business practices. These provisions curiously existed amidst the monopolies that were officially established to raise funds for the Spanish king, to be used in operating the colonial government.²

4. When the Americans took over, US antitrust laws became the inspiration of new competition-related laws that were issued by the Philippine legislature. Both Act No. 3247, enacted in 1923,³ and the Revised Penal Code,⁴

1 The Spanish Royal Decree of 4 September 1884 directed that the Spanish Penal Code be applied in the Philippines. The Spanish Penal Code is also referred to as the Philippines' "Old Penal Code." See also J. Javier, A Short Study of the Philippine Revised Penal Code, *Philippine Law Journal*, Vol. XIV (1934), for an account of the evolution of the Philippine penal laws.

2 O. D. Corpuz, *An Economic History of the Philippines* (University of the Philippines Press, 1997), pp. 119–120. See also T. Catindig, ASEAN Competition Law Project: The Philippines Report, 2001.

3 Act No. 3247, entitled "An Act to Prohibit Monopolies and Restraint of Trade," enacted on 1 December 1923. This law gave the attorney general (now solicitor general), the Fiscal of the City of Manila and the provincial fiscal, or whoever may act in their stead, to institute proceedings to prevent and restrain such violations.

4 Act No. 3815, 8 December 1930. Article 186 mirrored Sections 1 and 2 of the Sherman Act.

*The views and interpretations herein are solely those of the authors and do not necessarily reflect those of the institutions they are affiliated with.

enacted in 1930,⁵ mirrored the Sherman Act's prohibition against monopolizing or attempting to monopolize trade and commerce, alone or in combination with any person.

5. In the postwar period, the country's legal framework for competition was further fragmented across the 1987 Constitution, Revised Penal Code, and 30 different statutes with outdated provisions and hardly any jurisprudence.⁶ These statutes prohibited certain anticompetitive practices in specific sectors and were enforced by various government agencies, but failed to address the wide range of anticompetitive practices across all industries.⁷ Moreover, bringing criminal and civil actions under court proceedings had been difficult.⁸ Expectedly, the country's competition environment remained weak.

6. To ensure legal certainty in competition enforcement, reform proponents pushed repeatedly for the congressional enactment of a comprehensive competition law that would enable a level playing business environment among firms of all sizes and origins. All attempts failed to pass the legislative mill beyond "first reading" till 2015, or nearly twenty-five years later since the first bill, when then President Benigno Aquino III used his political capital to achieve this key-missing element of his development agenda to promote a fairer society.⁹

7. Another important driver for the enactment of the competition law was the external pressure coming from the ASEAN, in which the Philippines was a founding member. The Philippines committed under Clause 41(i) of the AEC Blueprint¹⁰ to introduce competition policy in all ASEAN member countries by 2015. By the end of 2014, the Philippines was the only founding member of the ASEAN that had not passed a competition law.¹¹

5 Article 186 repealed the provisions of Act No. 3247, except for Section 6, which provided the courts' authority to award damages in favor of the aggrieved party in a private action.

6 See: Art XII, Section 19 of the 1987 Constitution; Corporation Code of the Philippines (1980); Foreign Investments Act (1991), as amended by R.A. No. 8179 (1996); Consumer Act of the Philippines (1992); Price Act (1992); New Central Bank Act (1993); An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines (1994); Public Telecommunications Policy Act of the Philippines (1995); Intellectual Property Code of the Philippines (1997); Downstream Oil Industry Deregulation Act (1998); Retail Trade Liberalization Act (2000); General Banking Law (2000); Securities Regulation Code (2000); Electric Power Industry Reform Act (2001); Domestic Shipping Development Act (2004); Universally Accessible Cheaper and Quality Medicines Act (2008); Tariff and Customs Code of the Philippines (1957).

7 UNCTAD also found that these laws did not address abuse of dominance and did not provide for the prohibition of mergers based on competition analysis. See United Nations Conference on Trade and Development, Voluntary Peer Review of Competition Law and Policy, 2014, pp. 5–13.

8 UNCTAD reported that "[t]here has not been a single case brought to court under any of the existing competition provisions, although a few cases have been investigated." *Ibid.*, p. 5.

9 During his 2014 State of the Nation Address, President Aquino noted that his administration was "forging a system of fairness; where, as long as you follow the rules, you can get to where you want to go; where true competition leads to opportunity and widespread progress; where each and every person can take control of their own destinies." See State of the Nation Address of His Excellency Benigno S. Aquino III, President of the Philippines to the Congress of the Philippines, July 28, 2014 (English Translation). President Aquino thereafter certified the competition bill as urgent.

10 Declaration on the ASEAN Economic Community Blueprint adopted by the ASEAN Member States in 2008.

11 The other four original members were Indonesia, Malaysia, Thailand, and Singapore. Thailand and Indonesia passed their respective laws as early as 1999, while Singapore and Malaysia did the same in 2006 and 2010, respectively. Vietnam passed its competition law in 2004.

Manila's hosting of the 2015 ASEAN Meetings of Heads of States added urgency to passing the law. As the host country and principal co-founder of ASEAN, it would have been a "loss of face" for Manila if it did not demonstrate political commitment to this key element of the vision for ASEAN economic integration.¹²

8. The Republic Act No. 10667 or the PCA was finally signed into law on 21 July 2015 and came into effect on 8 August 2015.

III. Roots and influences of the Philippine Competition Act from a legal perspective

1. 1987 Constitution

9. Competition policy in the Philippines has historical roots in its struggle for economic and social reforms aimed at achieving inclusive development. To fully understand the underpinnings of the PCA, one must look into the 1987 Constitution's emphasis on equality and improving the lives of the underprivileged.¹³ This constitutional thrust stems from the country's long history of inequality under centuries of colonial oppression and martial law.¹⁴ Reflecting these principles, the PCA¹⁵ states that the enhancement of economic efficiency and promotion of competition should be done "pursuant to" the following threefold goals: First, a more equitable distribution of opportunities, income, and wealth. Second, a sustained increase in the amount of goods and services produced by the nation for the benefit of the people. And third, an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.¹⁶ Thus, the object of antitrust enforcement in the Philippines is not merely confined to economic efficiency or the preservation of competitive processes to protect

12 The sponsors of the bill in both houses of Congress pointed out that the Philippines is the only remaining founding member of the ASEAN which has not enacted its own comprehensive competition law, despite the looming 2015 deadline set by the ASEAN.

13 Article XII, Section 1, 1987 Constitution.

14 See also *Francisco Tatad v. Secretaries of DOE and DOF* (G.R. No. 124360, 5 November 1997) where the Supreme Court explained that the Philippines' "distinct free enterprise system is dictated by the need to achieve the goals of [its] national economy as defined by Section 1, Article XII of the Constitution."

15 Section 2, PCA.

16 Article XII, Section 1 of the 1987 Constitution. Equality and inclusive growth became a prominent topic during the congressional deliberations on the draft competition bill. See the *Journal of the Senate of the Philippines*, 30 July 2014, p. 47, where Senator Aquino explained that: "[w]e have said repeatedly that our key challenge in this second half of the Aquino administration is achieving inclusive growth and making true progress felt by each and every Filipino." See also, *Journal of the House of Representatives*, 27 January 2015, p. 70, where Representative Cojuangco pointed out that the "goal has always been about inclusive growth so that as the economy grows, nobody gets left behind, especially the poor."

consumer welfare, but is permeated by the foregoing “public interest” considerations.¹⁷

2. US, EU, and ASEAN models

10. Records show that the PCA was mainly influenced by the US, EU and ASEAN models of competition law.¹⁸

11. Consistent with the recommendations of the ASEAN Regional Guidelines on Competition Policy, the Philippine Competition Commission was created as an independent quasi-judicial agency attached to the Office of the President.¹⁹ The president may not overturn decisions of the PCC since the “attachment” is only for purposes of policy and program coordination.²⁰ The chairman and commissioners have a fixed term and may not be removed except for just cause provided by law.²¹

12. PCC was given broad powers and functions to enforce the PCA and its Implementing Rules and Regulations, such as: conducting inquiries, investigating, hearing and deciding cases; reviewing proposed mergers and acquisitions and prohibiting those that will substantially prevent, restrict, or lessen competition in the relevant market; issue injunctions, require divestment and disgorgement of profits; and develop a leniency program,²² employ non-adversarial remedies such as consent orders, and undertake advocacy initiatives and market studies.

13. The provision in the PCA which governs anticompetitive agreements is a hybrid of the US “per se versus rule of reason” and the EU’s “object or effect” schemes.²³ Hard-core cartels are considered criminal offenses in the Philippines.

14. Similar to the US and EU, under the PCA, being a monopoly is not by itself illegal. With respect to evidence of dominance, the rebuttable presumption of a market-dominant position when there is at least 50%

market share was inspired by EU case law.²⁴ The list of possible abuses of dominant position was derived from Article 102 of the TFEU.²⁵

15. The PCA instituted a compulsory merger review regime, which is suspensory in nature.²⁶ Parties must notify PCC of transactions that breach the thresholds provided in the PCA and wait for PCC’s clearance before consummating the transaction. Mergers and acquisitions “that substantially prevent, restrict, or lessen competition in the relevant market” as may be determined by PCC are prohibited.

IV. Birth pains

16. While the PCA provided a two-year period during which administrative, criminal, or civil penalties could not be imposed on existing business structures, conduct, practices, or any act that violated the PCA,²⁷ it required the PCC to review mergers and acquisitions right after the PCA became effective.²⁸ The PCA gave PCC a strict 90-day period to review merger notifications, otherwise, the merger or acquisition would be “deemed approved” and the parties may implement or consummate it. This stringent requirement meant that PCC had to hit the ground running. PCC had no choice but to prioritize the quick development of its merger review rules and procedures and to process merger notifications lest it be labeled a lame duck.

17. PCC also faced the challenge of implementing competition law in a legal environment that had scant foundations on competition law. There were no existing rules or jurisprudence to draw from or which could provide guidance on how the specific provisions of the PCA will be implemented. No one in the PCC had a prior firsthand experience in working in a competition authority. Neither was there a deep pool of local competition experts who could assist the PCC. Further, the business community was skeptical that PCC’s processes would just be another dilatory bureaucratic step that would impede the efficient conduct of business.

18. It was therefore no surprise that barely four months from the start of PCC’s operations, two industry leaders in the Philippines challenged the exercise of PCC’s mandate before the courts. PCC issued a preliminary statement of concerns on a multi-billion-peso acquisition and the companies filed separate cases against the PCC to prevent it from conducting any further review of

17 It can be argued that, in the Philippine context, adhering to consumer welfare standard in competition policy promotes a fairer social outcome (i.e., reduction of income inequality and poverty) while improving economic efficiency. See A. Balisacan, *Toward a Fairer Society: Inequality and Competition Policy in Developing Asia*, *Philippine Review of Economics* (2020), forthcoming.

18 During the deliberations held in the House of Representatives on 3 March 2015, Representative Anthony Del Rosario explained that House Bill No. 5286 is a combination of the US, EU and ASEAN models.

19 Section 5, PCA.

20 “Attachment” is defined under the Book IV, Chapter 7, Section 38 of the Administrative Code as the “lateral relationship between the department or its equivalent and the attached agency or corporation for purposes of policy and program coordination.” See also *Senate Journal* dated 21 October 2014, p. 415, wherein Senator Drilon, responding to the proposal to delete the phrase on “attachment,” explained that under the country’s system of government, an agency must be under the jurisdiction of either the executive, legislative, or judiciary branches, or under a constitutional body, and “not just floating around the bureaucracy.”

21 Section 7, PCA.

22 Section 35, PCA. On 27 December 2018, PCC issued the Rules of the Leniency Program.

23 Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill 2282 and House Bill 5286, 5 June 2015, pp. 5–8.

24 Statement from Representative Del Rosario during the deliberations in the House of Representatives on 24 February 2015 House of Representatives. The case referred to is *AKZO Chemie BV v. Commission of the European Communities*, Case C-62/86 (1991).

25 *Supra*, Bicameral Conference Committee note 23, pp. 24–25.

26 Section 17, PCA.

27 Section 53, PCA. The transitory period, during which concerned entities could make corresponding adjustments in their businesses, expired on 8 August 2017.

28 Section 16, PCA. The merger control regime was already effective as early as 8 August 2015.

the transaction. Due perhaps to the novelty of competition law and unfamiliarity with the implications of PCC's mandate, the court ended up issuing an injunction order against the PCC, restraining it from proceeding with its mandatory assessment of said acquisition. A gag order was likewise issued against the PCC, preventing the Commission from speaking about the case publicly. The PCC, through the Office of the Solicitor General, has asked the Supreme Court to set aside the injunction.²⁹

V. Strategies to address the birth pains

1. Institutional development

19. PCC's initial experiences as well as abundant insight from other (once young) competition authorities led to the realization that PCC needed to focus on building institutional capacities and capabilities in its early years. Thus, PCC developed a Strategic and Operational Business Plan (2017–2019), which provided direction in addressing its immediate needs by the end of the transitory period of August 2017 and achieving its key targets by the end of 2019.

20. Under the 2017–2019 Plan, PCC carried out intensive advocacy campaigns and produced knowledge products to increase the stakeholders' awareness of PCA and the PCC and its functions; built systems and enhance capacity of the PCC for increased efficiency, particularly on its core functional areas; and engaged development partners, counterpart competition agencies, intergovernmental organizations, and international academic institutions to assist PCC in its initial years of existence.

21. To train its staff quickly and effectively, with PCC's limited budget and technical expertise in competition enforcement, PCC maximized training opportunities that used resources outside the agency. These included workshops hosted by intergovernmental organizations such as the OECD, UNCTAD, and ASEAN, twinning partnerships with competition agencies of other countries (which included secondments and study tours), and scholarships.

22. PCC's 2017–2019 Strategic and Operational Business Plan also established a coordination and investment programming platform which optimized and harmonized the flow of existing and potential staff training assistance from various development partners, such as the Asian Development Bank, ASEAN, Australia Department of Foreign Affairs and Trade, European Union, GIZ, JFTC and JICA, OECD, USAID/US-FTC/US-DOJ,

²⁹ PCC Press Release, PCC asks SC to lift CA injunction blocking review of P69.1B telco deal, 19 April 2017.

UK Foreign Commonwealth Office, UNCTAD and the World Bank Group.

2. Mainstreaming of competition policy

23. Another unique step that PCC undertook early on is to mainstream competition policy in the government's development agenda. Together with the National Economic and Development Authority (NEDA), PCC clearly identified the development or societal objectives that competition policy is best suited to address, the measurable development outcomes (targets) expected from its implementation, and the ways by which the competition policy complements the other policy tools of the government to achieve society's development goals.³⁰

24. PCC began the identification of priority sectors through the National Competition Policy Review, a comprehensive review of the Philippine competition landscape. This involved a review of government policies, regulations, and administrative issuances that inhibit competition. Through the National Competition Policy Review and the inputs of other government agencies, NEDA and PCC identified the economic sectors and services that are essential to poverty reduction and generation of new livelihood and employment opportunities, and those that have spillover effects on other sectors in the economy.

25. The National Competition Policy Review became a key document in the drafting³¹ of the National Competition Policy Chapter of the Philippine Development Plan (PDP) 2017–2022.³² PDP 2017–2022 now serves as the country's development blueprint, which determines priorities for resource allocation and the policy direction of government agencies for the medium term. PDP set agriculture, manufacturing, power generation, electricity, telecommunications, and transportation as the mid-term priority sectors.

VI. Recent guidelines and notable cases

26. PCC's capacity-building efforts greatly contributed to the completion of a number of guidelines and notable decisions. In September 2017, PCC issued the Rules of Procedure for its investigations, hearings, and proceedings.³³ The Rules of PCC's Leniency Program came out

³⁰ Philippine Development Plan 2017–2022 seeks to “enhance market competition by fostering an environment that penalizes anti-competitive practices, facilitates entry of players, and support its regulatory reforms to stimulate investments and innovation.”

³¹ By NEDA, with the assistance of PCC.

³² This is the first time in the country's socio-economic planning history that a dedicated chapter on competition policy appears in the PDP.

³³ Commission Resolution No. 20-2017.

in December 2018. PCC also issued further guidelines on the coverage and effects of its merger notification and review.³⁴

27. Within the past year, PCC issued its first ever merger prohibition, wherein it blocked Universal Robina Corporation's proposed acquisition of Central Azucarera Don Pedro as it would substantially lessen competition in the market for sugarcane milling services in Southern Luzon.³⁵ Further, the Commission issued a Commitment Decision, which subjected Grab's acquisition of Uber in 2018 to pricing and quality standards. These conditions were part of Grab's undertaking for a period of one year to address the competition concerns raised in view of the merger of the country's two biggest ride-hailing apps. Since opening a *motu proprio* review of the transaction, PCC has exacted fines on Grab totaling PHP55.78 million, of which PHP19.2 million was refunded directly to affected Grab riders.

28. PCC also decided on the country's first abuse of dominance case.³⁶ This involved Urban Deca Homes (UDH), a property developer that imposed a sole internet service provider on its residents, preventing them from availing of alternative and cheaper internet service. In March 2019, PCC's Enforcement Office filed a complaint against UDH. Instead of contesting the complaint, the developer proposed to correct its anticompetitive conduct through a settlement. PCC approved the settlement, ordering UDH to cease its admitted misconduct, pay a fine of PHP27 million, and comply with the terms of settlement, which included inviting other internet service providers to offer their services to its residents.

29. Notably, the parties in these cases challenged neither PCC's authority nor its processes or remedies. This indicates that, even at an early stage of development, PCC's rules and procedures are already regarded as robust. Further validation of PCC's enforcement efforts came via the Supreme Court's approval of the Rules on Administrative Search and Inspection to facilitate investigations and the prosecution of offenses under the PCA.³⁷

VII. Challenges moving forward

30. Barely four years old, PCC was already acknowledged as an "emerging enforcer" by competition practitioners³⁸ and praised by development partners for its quick progress.³⁹ PCC also received recognition from different organizations for the quality of its core processes and advocacy work.⁴⁰ These early successes, however, should not lead to complacency. Wary of following the fate of competition agencies that had an "*early ascent followed by decline*,"⁴¹ PCC adopts three strategies. First, it regularly assesses and revises its processes as to reflect the country's economic conditions. PCC has adjusted its merger thresholds twice⁴² to ensure that the thresholds maintain their real value over time and relative to the size and structure of the economy. PCC's Mergers and Acquisitions Office continuously seeks ways to simplify its merger review process, in response to feedback from stakeholders. Last year, PCC launched the Expedited Merger Review Rules, wherein qualified transactions are reviewed within a "fast-track" period of fifteen days, instead of the usual thirty days.

31. Second, PCC ensures that its technical foundation is resilient to changes. Recognizing that long-term capacity building is key to sustaining PCC's progress, the Republic of the Philippines and the Asian Development Bank (ADB) entered into a USD23.3 Million Loan Agreement to fund the "Capacity Building to Foster Competition Project."⁴³ This six-year capacity building initiative aims to: (a) build systems and enhance the institutional capacity of PCC by providing international expertise and on-the-job training for the development of investigation techniques, formulation of enforcement guidelines, providing economic analysis, conducting market studies, coordinating with sector regulators, and formulating communication strategies and outreach programs; (b) improve the skills and capabilities, not only of PCC staff, but also of other government agencies with competition-related mandates, such as the Office of the Solicitor

38 Global Competition Review, *Emerging Enforcers* 2018.

39 Mr. Frank Tibitanzl expressed admiration for PCC because of its good development in the last three years, stating that "*this is one of the best progresses*" he has seen in his twenty years with GIZ. See <https://philippines.fnst.org/content/why-competition-matters-economic-growth-myanmar-delegation-learns-ph>.

40 In 2018, PCC's Guide for Business and Handbook for the General Public received the Awards of Excellence during the 16th Philippine Quill Awards, the country's premier awards program in the field of business communication. Later that year, PCC attained an ISO 9001:2015 certification for its review processes in mergers and acquisitions, competition enforcement, competition policy formulation and research, capacity building, and advocacy that follow international standards of service. In 2019, PCC received the Friedrich Naumann Foundation's Flame of Freedom Award for its work in crafting policies that promote a competitive market for business owners and consumers.

41 W. E. Kovacic and M. Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 *Law and Contemporary Problems* 85 (2016), p. 112.

42 See PCC Memorandum Circular 18-001 and PCC Advisory 2019-001 on the Adjustment of the Thresholds for Compulsory Notification of Mergers and Notifications.

43 Loan Agreement Number 3878 PHI between the Republic of the Philippines and the Asian Development Bank, 13 December 2019.

34 Memorandum Circular 19-001 on Process for Exemption from Compulsory Notification in Solicited PPP Projects and Guidance on Pre-Merger Exchanges of Information.

35 Commission Decision No. 03-M-021/2019.

36 Commission Decision No. 01-E-001/2019.

37 Supreme Court en banc A.M. No. 19-08-06-SC, promulgated on 10 September 2019.

General, Office for Competition of the Department of Justice and the National Economic and Development Authority; and (c) support the establishment of a university-based center of excellence to promote specialization and nurture local expertise in competition law, policy and economics. PCC has also secured additional technical positions from the Department of Budget and Management, in an effort to build up the capacity of its economics, legal, and adjudication offices.

32. Third, PCC periodically sets enforcement priorities to sharpen its goals, minimize arbitrariness in case selection, maximize the impact of enforcement actions, and achieve efficiency in the deployment of limited resources.⁴⁴ In considering whether or not a potential anticompetitive practice is of public interest, PCC examines whether

such practice involves any of its priority sectors, whether it may result in widespread harm to consumers, and whether it has precedential value or will have a significant deterrent effect. In addition, it may consider the likelihood of a successful outcome of an enforcement action, and whether there are other reasonable grounds to conduct an enforcement action.⁴⁵ Enforcement prioritization is particularly critical for a developing country in view of limited agency resources and the conflicting demands for investment in other critical areas of development, such as education, health, infrastructure, and rule of law. This exercise of prioritization must, however, be carefully weighed against PCC's need to upscale the build-up of its cases and to prove its ability to deter anti-competitive behavior. ■

⁴⁴ See, e.g., Kovacic and Lopez-Galdos, *supra* note 41, for a discussion on what competition agencies in varying stages of their lifecycles do to build an effective enforcement regime.

⁴⁵ Commission Resolution No. 20-2018, Approving and Adopting the Enforcement Strategy and Prioritization Guidelines.