The Case for the Philippine Competition Law

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Abstract

The Philippine Competition Act of 2015 is a product of decades of legislative labors to establish a competition regime apropos to prevailing social and economic conditions. This paper examines the narrow construct of the law that it superseded and the US and EU jurisprudence that informed its provisions. While it embodies the best practices in detecting and punishing anti-competitive practices, it is still confronted with numerous implementation challenges, among which is applying *per se* and rule of reason standards in adjudicating cases.[1]

Keywords: competition law, per se rule, rule of reason

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Following the promulgation of the Philippine Competition Act (PCA) on 21 July 2015, the Philippines joins the ranks of more than 120 market economies that have established a system of competition law. A spate of national competition laws emerged in the 1990s, as trade meshed with competition policy. It became evident that trade liberalization could not thrive if anti-competitive practices in domestic markets are sanctioned because of the absence or weak enforcement of competition law. In 1996, members of the World Trade Organization (WTO) attempted to address this gap by developing a multilateral framework on competition, but the initiative was shelved after seven years because of strong opposition from developing economies. Had the work to forge such an agreement started more recently, the outcome might have been different. For now, economies at both ends of the spectrum – advanced and developing, large and small, continental and island – have come to view competition law as an instrument to promote market efficiency and consumer welfare.[2] And most bilateral and regional trade agreements include competition-related provisions.[3]

The PCA was a product of nearly three decades of legislative tussle. From the 8th Congress and every congress thereafter, various proposals to give substance to the constitutional prohibition on monopolies and combinations in restraint of trade were submitted, although initially there was little legislative appetite.[4] The advocacy for competition law gained traction when committee hearings were convened during the 11th Congress; yet none of the bills went past the committee level. It took a turn in the 15th Congress when the Senate version was approved on second reading and the House bill came close to passing a second reading.

What clinched the passage of the competition law in the 16th Congress was a combination of actions by the executive branch and fortuitous events. Then President Benigno S. Aquino III gave a ringing endorsement on the measure and rallied members of the ruling party behind it. It was designated a priority measure by both chambers at the onset. Public hearings on the bills in the two chambers commenced almost at the same time. Still, the measure was nearly stalled in the House. The Senate passed its version on second reading on 9 December 2014, but the House bill languished at the committee level for months, prompting a change in committee sponsorship in early December 2014.[5] Advocates of competition law were concerned then that the measure could suffer the same fate it had in the 15th Congress if the House failed to pass its version before the end of the first regular session.[6]

By the time the House version was ready for a second reading, the plenary schedule was nearly full with other pending legislations and priority bills. Sessions were frequently called off for lack of a quorum; hence it was a challenge to have any bill deliberated upon, much less approved. As the first regular session was winding down, the chances of enacting a competition law within the 16th Congress were thinning. Then barely three weeks before the end of the first regular session, in the early morning of 12 May 2015, the House competition bill reached yet another juncture when its principal proponent, Representative Enrique "Henry" M. Cojuangco, Sr., succumbed to an aneurysm. That could have set back the timetable for the bill's passage. Instead, on the same day that the bill lost its champion, House lawmakers gathered to pass it on second reading in a show of solidarity and homage to its fallen sponsor. Thenceforth, the measure sailed unobstructed and swiftly in the legislative mill. On 10 June 2015, the day before Congress adjourned *sine die*, the two chambers sealed their final approval on the consolidated and reconciled version, which is now referred to as the PCA.

Like other major reforms, the PCA had its share of opponents and skeptics. Most dissenters have reservations about the readiness of the institutions to deal with a complicated law that not only introduces new legal standards, but more importantly, departs from bright-line rules.[7] Competition law is deeply rooted in economic theories of market behavior, which continue to evolve with changing market environment. Hence, the rules are not as rigidly defined as in other laws. Its application is also foreseeably less straightforward and predictable. If institutions are unprepared for the new task, they are prone to commit too many false positives or false negatives that could inflict long-term harm on the market. That happens when efficient conduct is discouraged by mistakes of prosecution (false positive), whereas anti-competitive conduct is bolstered if mistakenly found not to violate the law (false negative). Since neither situation is desirable, nor is one less grievous than the other, it is argued that the market may be better off without a competition law that could induce those mistakes.

Opponents also anticipate that a new competition law would spawn too much litigation and thus create enormous social waste. As it stands, the administration of justice has been hampered by a severe problem of load congestion in courts nationwide. Competition cases could only add to this menace. The resources that the government would spend on wrongful enforcement and by the private sector in pursuing and defending itself against legal actions could be directed instead toward more productive pursuits. Besides, if markets were opened up to competition (or made contestable), there might be no urgency for a new competition law.

There are, however, more who are leery of the view that removing restrictions on market entry is sufficient to curb anti-competitive conduct than those who are agnostics on the value of a competition law. Experience shows in fact that liberalizing entry into a market increases the demand for regulation, aligned with the view that a liberal economic policy is not total abstention from market intervention. Market liberalization and enforcement of competition law are indeed complementary rather than substitute measures.

In retrospect, the passage of the PCA in the 16th Congress was threatened less by questions of whether or not a new competition law is desirable than by debates on the legal and technical substance of the law. The latter include, among others: the legal standard of analysis to apply to hard-core cartel agreements, i.e., *per se* versus rule of reason; the deterrence value of criminal penalties versus administrative sanctions; the relationship between sector regulator and competition authority; exemptions and limitations to the application of the law; and interplay between private and public enforcement and between adversarial and non-adversarial remedies. A critical examination of these issues and how the drafters resolved the deadlocks are necessary for an understanding of the PCA but are beyond the scope of the current work.

It is still important nonetheless to secure the place of the PCA in the legal firmament. The central concern of the PCA is to prevent firms with market power from harming consumers by using such power to raise price, reduce supply, degrade the quality of product, suppress innovation, or restrict choices. Since the object of intervention —market power—is an economic concept that

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does not lend itself to strict legal definition, the PCA cannot be a set of codified rules that may be applied with precision like other laws. Its application must draw inputs from both law and economic disciplines so that market behaviors such as collusion, discrimination and predatory pricing can be properly assessed and appropriately dealt with. The PCA is therefore a departure from formalistic rules and calls for a more analytical and beyond-the-black-letter application of the law. As the implementation proceeds apace, it is natural for the PCA to draw more adversaries than adherents because of its unconventionality.

This paper aims to build public support for the rigorous but judicious implementation of the new competition law. It begins by revisiting the competition regime before the passage of the PCA, highlighting the narrow construct of the old law, which led to only limited prosecutions for many decades. It then examines the influence of foreign jurisprudence in the PCA and how such influence closes the loopholes of the old regime and strengthens the potentials of the new law in detecting, curbing and punishing anti-competitive behavior. The paper concludes with some implementation challenges that not even a robust law such as the PCA can evade.

The Competition Regime Before the PCA

A system of competition law covers all laws that control practices deemed harmful to market competition. These laws are particularly concerned with anti-competitive agreements, abusive behavior of a monopolist or dominant firms and mergers.

Before the passage of the PCA, the canon of laws defining the competition regime consisted of about 30 disparate laws that were enacted over a span of eight decades.[8] Of these, the most notable because of their scope and general applicability are the 1987 Constitution, the Revised Penal Code (RPC) and the Price Act.[9]

Article XII, Section 9 of the 1987 Constitution enshrines the authority of the State to protect market competition,[10] to wit:

> The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

Without an enabling law, this broad constitutional mandate was nonetheless understood to proscribe the same agreements or combinations and unilateral conduct referenced in Sections 1 and 2 respectively of the US Sherman Act, and unfair methods of competition stipulated in Section 5 of the Federal Trade Commission Act.[11] It is deemed to reflect the principles expressed in the commercial laws that preceded it, including the Act to Prohibit Monopolies and Combinations in Restraint of Trade of 1925 and the Revised Penal Code (RPC) of 1932.

The RPC was considered the primary competition law since it was the only one that applied to all sectors and had stipulated sanctions. Article 186 of the Code, in particular, imposed a penalty of imprisonment (from six months and one day to two years and four months) and a fine of PhP 200 to PhP 6,000 upon:

1. Any person who shall enter into any contract or agreement or shall take any part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce to prevent by artificial means free competition in the market.
2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market.
3. Any person who, being a manufacturer, producer, or processor of any merchandise or object of any commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, or any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, or imported merchandise or object of commerce is used.

Heavier fines were imposed for bid-rigging, and any attempt thereof, in public auctions. Article 185 of the RPC stated that in addition to a prison term, a fine equivalent to 10 to 50 percent of the value of the item auctioned, shall be imposed upon "any person who shall solicit any gift or a promise as a consideration for refraining from taking part in any public auction, and any person who shall attempt to cause bidders to stay away from an auction by threats, gifts, promises, or any other artifice, with intent to cause the reduction of the price of the thing…"[12]

Individuals and firms were also allowed to bring civil action against those found to have committed antitrust infringement. This right of private action was stipulated in the oldest Philippine competition law, the Act to Prohibit Monopolies and Combinations in Restraint of Trade of 1925, whose provisions were superseded by the RPC except for one providing for treble damages:

> Section 6. Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act, shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee.

Apart from the RPC, the Price Act was another statute that defined the regime before the PCA. Its application was however restricted to "basic necessities" and "prime commodities," triggered only by "undue price increases" during emergency situations and calamities. But since its was enacted only in 1992, six decades after the RPC, the provisions are easier to enforce.[13] First, unlike the RPC, a juridical person may be held directly liable in the Price Act.[14] The offenses in Article 186 are criminal, hence the penalties are restricted to natural persons. Juridical persons (corporations) may be held civilly liable but the principal liability is imposed only upon their representatives and agents who "knowingly permitted or failed to prevent the commission of an offense."[15] Second, violations in the Price Act may be prosecuted administratively without prejudice to criminal sanctions. Since there are fewer

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evidentiary requirements in an administrative than in a criminal case, more prosecutions may be expected, at least administratively. Third, the Price Act empowers certain executive agencies to impose administrative penalties. These agencies are also given authority to monitor and set prices during emergency and disasters. Fourth, the Act stipulates the specific conduct that constitutes "illegal price manipulation," namely hoarding, profiteering and cartelization. In contrast, the RPC's provisions are framed too broadly to pin down specific acts that may be considered violations of the Code.

The weatherglass of the effectiveness of a competition law regime is the number of prosecutions of anti-competitive conduct. The regime before the PCA had very few. Casual observers ascribe this debacle to weaknesses in institutions. At one level, the importance of establishing a competition regime was generally unappreciated by policymakers. Until recently, it was common among developing economies to put the promotion of competition below other economic priorities. Industrial policies such as tariffs, subsidies, public ownership and concessionary financing were often justified by development or social goals, even if they restrict or distort competition.

On another level, the culture of competition had not taken root in the business sector. Moreover, there were few incentives to fix the flaws in sector regulation and judicial processes so that anti-competitive practices could not be allowed to thrive and those harmed by such conduct could find redress.

Yet there were also deficiencies in the competition laws that explained much of the weaknesses in the regime before the PCA. Foremost was the opacity of scope. The RPC did not define crucial terms such as "restraints in trade" and "monopolization" to clarify the scope of prohibitions. The Supreme Court provided guidance but only in recent cases. Moreover, the definitions are narrower compared to those adapted in other antitrust statutes and the PCA.

To be sure, the RPC reflects most of the key provisions in the US antitrust statutes, except for those on merger and acquisition in the Clayton Act. It embraces the prohibitions on anti-competitive agreements, abuse of dominance and anti-competitive mergers that are key elements of a modern competition law, albeit with a confined focus.

Thus, in ruling on the constitutionality of a law that deregulated the downstream oil industry,[16] the Supreme Court defined the "combination in restraint of trade" of Article 186(1) of RPC as:

> ...an agreement or understanding between two or more persons, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority.

That the foregoing represents a narrow definition of an agreement, hence a limited scope of RPC, becomes clear when it is compared with the definition currently applied in other jurisdictions and adopted in the PCA. Section 4(b) of the new competition law includes "concerted action" and "tacit" arrangement, which are more in keeping with the complex reality of business behavior.

> *Agreement* refers to any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral;

It follows that the combination contemplated in the RPC is "formal" in the sense that it could only be established (or deduced) from the existence of a "contract, trust, pool, holding company, or other form of association." The expansive definition of an agreement in the PCA, in contrast, permits inference of its existence from observed actions. Since the "smoking-gun" evidence rarely exists, and the facts of a case are oftentimes *sui generis*, the formalism in the RPC restricted its application

On the other hand, in *Gokongwei vs Securities and Exchange Commission et al.*,[17] the Supreme Court clarified the meaning of "monopoly" and by implication, the concept of "monopolization."[18]

> A "monopoly" embraces any combination, the tendency of which is to prevent competition in the broad and general sense, or to control prices to the detriment of the public. In short, it is the concentration of business in the hands of a few. The material consideration in determining its existence is not that prices are raised and competition actually excluded, but that power exists to raise prices or exclude competition when desired. Further, it must be considered that the idea of monopoly is now understood to include a condition produced by the mere act of individuals. Its dominant thought is the notion of exclusiveness or unity, or the suppression of competition by the qualification of interest or management, or it may be thru agreement and concert of action. It is, in brief, unified tactics with regard to prices.

From this perspective, the concept of "monopoly" dovetails with the notion of "dominant position" in the PCA.[19] Thus, the prohibition against "any person who shall monopolize..." in Article 186(2) has the same purpose as the prohibition against abuse of dominant position in Section 15 of the PCA. But the scopes are different. In the former, the proscribed acts are limited to those that "...alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market." The list of abuses in the PCA is sufficiently comprehensive to admit any behavior by an entity in possession of monopoly power that deviates from "normal," "fair" or "undistorted" competition or from "competition on the merits."[20]

The scope for merger regulation in RPC is likewise too narrow. Article 186(3) of the RPC alludes to a merger that will cause prices to increase as the merged entity achieves monopoly power. The Code specifically holds liable "any person who... shall combine, conspire or agree in any manner with any person... for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price..." Since the concept of "prejudicial to

lawful commerce" is too abstract to guide enforcement, the provision is understood instead to bar mergers that have the intent or likely effect of "increasing the market price."

But not all anti-competitive mergers result in higher prices. A more comprehensive competition law should be so broad as to cover transactions where the merged entity is empowered not only to raise prices, but also to produce a smaller volume or lower quality of output, or more generally, to act less intensely competitive than before the transaction. It should also ban mergers that may not necessarily increase the monopoly power of the merged entity but could reduce the incentives of non-merged entities to compete, thereby making collusion more feasible.[21] More recent case laws in other jurisdictions have gone as far as voiding mergers between entities producing goods unrelated in demand, therefore belonging to different antitrust markets, because of concern that the transaction might result in weakening of competition across markets.[22] In sum, modern competition laws do not only weigh the impact of a merger on prices, but also on the long-term, direct and indirect consequences of such transaction in one or several markets. Section 20 of the PCA anticipates this wide range of possible anti-competitive effects by prohibiting a broad class of mergers "that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services as may be determined by the Commission."

Having noted the limitations on the scope of the RPC's provisions, it is also useful to point out that the competition provisions in the RPC and of the Sherman Act are not materially different in substance. Yet the US did not have to effect any change in its antitrust statutes in order to broaden its scope and application. Rather, its common law tradition allows it to adapt its guidelines and analysis progressively to changing markets and business behavior. In contrast, the civil law tradition and absence of a competition authority – analogous to the Federal Trade Commission – prevented the Philippines from emulating the evolution in the competition law regime of the US. A new competition statute was necessary to enable the Philippines to adapt its competition regime to the changing times.

An additional argument for a new competition law was the structure of remedies before the PCA. As in the US, the RPC provisions were enforceable by criminal penalties and civil suits brought by injured parties for treble damages. Both were difficult to pursue. Enforcement of criminal penalties, on the one hand, was dependent on the actions of the Department of Justice (DOJ), which lacked the technical capacity to discern anti-competitive acts. The bar in proving any criminal liability is high; the hurdle is even more difficult to overcome for competition cases where it is seldom that a market outcome could be unequivocally attributed to the action of an entity.

Without a successful record of prosecution under Article 186 of the RPC, one could surmise that Philippine courts followed the legal standard of its US counterparts. The US Supreme Court prescribes that in violations of the Sherman Act, the criminal intent must be demonstrated through evidence that the conduct: (1) had "anti-competitive effects" and was "undertaken with knowledge of its probable consequences", or (2) had "the purpose of producing anti-competitive effects…even if such effects did not come to pass."[23] It is difficult to prove that the infringer has prior knowledge of the anti-competitive effects of its conduct or pursued the conduct with the intention of producing anti-competitive effects. But the US Supreme Court asserted that the evidentiary requirements for criminal liability were purposively made stringent to avoid false positives.[24]

A civil action for treble damages would have gone through the same wringer, not the least because the compensation sought is severe. Thus, in US case laws, treble damages are awarded only if the following are proven: (1) the violation was the material cause of the injury; (2) the injury flowed from the anti-competitive aspects of the challenged conduct;[25] (3) a direct or proximate link between the violation and injury; and (4) the amount of damages from the injury.[26] Deficiency in any of these elements is a ground for dismissing a damage claim. Hence, it is possible that a criminal penalty is imposed on an antitrust violation but a damage claim, arising from the same act, is denied.[27]

The foregoing difficulties of bringing criminal and civil actions under the RPC had clearly contributed to the ineffectiveness of the pre-PCA regime.[28] The deficiencies could only be addressed by a change in law that establishes an administrative body with power to impose sanctions and remedies for antitrust infringements and to block or remedy anti-competitive mergers. Administrative procedures are shorter and less costly compared to court proceedings; hence, measures to stop or reverse anti-competitive conduct may be applied sooner. This increases the effectiveness of the competition regime in deterring anti-competitive conduct.

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Scope and Strength of PCA

No competition law enacted since the 1980s can claim not to have been influenced by either the US or European jurisprudence. In rule making, transplanting established jurisprudence of other countries into domestic laws is an accepted practice, since it is prudent, efficacious and pragmatic to draw from the collective wisdom and cumulative experiences of others. This tradition is perhaps more commonly observed in the drafting of competition laws. A case for harmonization of national competition laws can in fact be made in view of the global integration of markets. The argument for harmonization is that it would facilitate the coordinated application of these laws against international cartels. Moreover, without binding global competition rules, harmonization would help avoid these laws from being used as *de facto* trade or investment barriers.

The combined influences of the US and EU competition laws in the PCA are unmistakable. They are particularly evident in Section 14, prohibition against anti-competitive agreements, where both *per se* and "object-and-effect" standards are applied in determining the legality of horizontal agreements. The former is identified with the Sherman Act; the latter with the Treaty for the Functioning of the European Union (TFEU).[29] Similarly, the prohibition on abuse of dominant position in Section 15 applies the same "object-and-effect" standard – i.e., substantial lessening of competition (SLC),[30] that is derived from Article 102 of TFEU. But Section 15 exempts acts that lead to the acquisition or maintenance of market power

as a consequence of "superior product or process, business acumen or legal rights or laws," following the "monopolization" standard applied in US case laws.[31]

On the other hand, the principles and procedures in Section 7 of the Clayton Act and Merger Guidelines of the US Department of Justice are the basis of the merger provisions in Chapter IV of the PCA.

Common law tradition is strong in the US and EU; hence court decisions are an integral part of their competition laws. Some of the provisions in the PCA bear imprints of US and EU case laws. For one, the extraterritorial application of competition law, stipulated in Section 3, is based on the US "effects doctrine"[32] that justifies extending the reach of a domestic law to the acts of foreign-based entities when these have direct and tangible effects on domestic commerce.[33] The leniency program to facilitate the conviction of cartels, Section 35 of the PCA, emulates a similar program in the US that led to growth in the criminal prosecution of antitrust cases.[34] The right of private individuals to bring an antitrust civil case, based on Sections 4 and 16 of the Clayton Act, is stipulated in Section 45 of the PCA. The expectation is that this would enhance enforcement[35] as it did in the US,[36] although recent trends are showing a notable decline in private antitrust litigation.[37] The provision in Section 48 of the PCA allowing the operation of trade association when it is not used as a forum to achieve collusion is informed by several landmark cases, notably the 1921 decision of the US Supreme Court against manufacturers of hardwood lumber[38] and the European Commission's case against the Dutch association of electro-technical equipment wholesalers.[39] Moreover, the single economic entity doctrine, articulated in the 1984 US Supreme Court opinion in the Copperweld case,[40] provided an anchor for Section 14 in determining which entities are competitors for purposes of applying criminal penalties for anti-competitive agreements.

Despite the strong influences of the EU and US competition regimes, domestic concerns were not lost in the PCA. Section 41 imposes treble penalty on anti-competitive conduct affecting trade of politically sensitive commodities, referred to as "basic necessities" and "prime commodities." This provision retains the structure of penalties for those goods under the Price Act. Unfair trading practices (UTPs), which are covered by a separate legislation on consumer protection, were decided to be outside the scope of PCA. But Section 15(g) was nonetheless accommodated, even as it awkwardly treats as abuse of dominant position all acts that amount to setting "unfairly low purchase prices for the goods or services of marginalized agricultural producers, fisherfolk, micro-, small- and medium-scale enterprises and other marginalized service providers and producers."

The confluence of different persuasions, nonetheless, resulted in a law that embodies most of the best practices in competition law. Judged by the OECD (2013) standards of an effective competition law, the Philippine competition regime appears robust, based on *de jure* information. The annex shows the correspondence between these indicators and provisions in the PCA. Evidently, the new law meets the high OECD standards, particularly in terms of: (1) wide application of the law, with very few exclusions; (2) broad powers of the competition authority to allow it to discover violations and impose appropriate sanctions and remedies; (3) allowance for private action to increase enforcement; (4) availability of non-adversarial remedies to encourage voluntary compliance; (5) adequate consideration given to technical efficiencies that may be generated by the challenged conduct; (6) independence of the competition authority from private sector stakeholders and other government agencies; (7)

fairness of procedures in investigation and prosecution; (8) transparency and accountability of the competition authority; and (9) mandate of the competition authority to nurture and spread the culture of competition.

Challenges Ahead

The preceding sections built a case for the PCA by showing that the new law addresses many of the loopholes that undermine the effectiveness of the previous competition regime. Yet a number of challenges confront the new competition authority tasked to implement the new law. Foremost is managing public expectations and demand for the PCA to be pivotal in addressing many social and economic ills. A healthy market environment will certainly spur economic growth, but it could not be a development panacea. The new competition authority would have to build up its credibility and presence through enforcement within the limits of its mandate and resources. It needs to hone its capacity to gather and process information, detect anti-competitive conduct, carry out its administrative processes, and impose fair sanctions. The judiciary has to keep in step by assimilating the legal standards and analytical framework advanced by the new law. Other institutions ought to respect the competition authority's autonomy and to shield it from political processes.

An equally difficult challenge and one that relates directly to the provisions of the PCA is sorting out the roles and criteria of the *per se* tenet and rule of reason in adjudicating cases involving agreements between competing entities. As noted, Section 14 on anti-competitive agreements stipulates a *per se* approach for price-fixing, in and out of an auction, and other forms of bid-rigging, while rule of reason applies to all other forms of agreement. It is worth noting that the discourse on legal standard of analysis was one of the most contentious issues tackled during the drafting of the law – for good reason. It represents a conundrum that continues to hound competition authorities worldwide. For while there is a consensus on the need for tough action against hard-core cartels, there is also recognition that not all horizontal agreements that fix prices, restrict outputs and share or divide markets are hard-core in the sense of being too pernicious and devoid of any social benefits.

One source of difficulty is the perception that a *per se* prohibition is akin to an automatic rule of illegality; the determination is immediate and does not require a thorough analysis of the conduct and its market context. Such approach is deemed justified when the conduct is patently anti-competitive, in the sense of having no redeeming value, whether in improving market efficiency or contributing to consumer welfare. Once the conduct is proven to have occurred, the presumption of illegality is held conclusive and no pro-competitive justification may be offered by any party to overturn such finding. Price-fixing and bid-rigging are often distinguished from other conduct for meriting *per se* illegality.

Rule of reason, in contrast, requires a consideration of the totality of circumstances in deciding on whether a challenged conduct promotes or suppresses market competition. It demands an extensive analysis of the impact and future consequences on the market, counter-factual simulation of market outcomes, and

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balancing of commercial justification and harm wrought on the market. If pro-competitive justifications outweigh the anti-competitive consequences, then a conduct may be allowed to continue unless a less restrictive alternative is available. Necessarily, the determination on whether conducts "substantially prevent, restrict or lessen competition" is done on case-by-case basis.

Considering the analytical work and administrative costs that might be saved if certain behaviors are considered illegal at the onset, it is understandable why many would be partial to a *per se* rule. A competition authority that is still learning the ropes seems to be better served by a *per se* prohibition. The market could benefit as well in avoiding the "uncertainty" of having different conclusions on seemingly the same conduct when the rule of reason is applied. In addition, the *per se* rule cuts down the time and cost of enforcement by shunning long and complicated investigations into transactions that are almost certain to harm the market.

But complexities are bound to arise when the case involves a novel set of facts such that an immediate labeling of a conduct as "price-fixing" (or any act considered *per se* illegal) may be inappropriate. For example, Whinston (2008, p. 20) inquires if these two separate declarations by a firm to his rival should be treated differently: (1) "I am morally opposed to price fixing but tomorrow I will set my price equal to 100"; and (2) "I'll set my price equal to 100 if you do." The legal implications of the two statements might be different, but they would be considered equivalent if economic theory was applied. The main considerations from an economics perspective are whether it would be profitable for some entity in the challenged transaction to renege on its declaration, i.e., to cheat, and whether some form of coordination among the entities exists to ensure that the agreement is sustained. These considerations could only be properly assessed under a rule of reason approach.[41]

Some jurisdictions have opted for the flexibility of rule of reason so it could use the competitive process in pushing their domestic firms to raise their efficiency. For example, agreements among small-sized firms may be permitted if competition is not restricted, prevented, or lessened in the process. Indeed, the European Commission holds the view that if the combined market share of competing entities participating in an agreement does not exceed 10 percent, then an agreement to coordinate cannot significantly affect market competition. Agreements involving noncompeting entities with a combined market share of 15 percent or less are likewise covered by the *de minimis* exception.[42] Moreover, the EU has held that industries with a chronic problem of overcapacity (the so-called crisis cartels) could be given temporary relief from the coverage of the law to allow time for industry rationalization.

Legal scholars have observed that the US Supreme Court has limited the application of the *per se* prohibition to exceptional cases. Most US courts prefer to run the course of evaluating the business justification and anti-competitive consequences of the conduct in a rule of reason analysis. Thus, despite the statutes that declare certain conduct *per se* illegal, most US courts would not condemn the behavior outright, but instead hear the facts of the case, i.e., the nature and history of the restraint and why it was imposed. This practice has prompted the US Supreme Court to devise a third approach called a "quick look" or truncated rule of reason. The "quick look" is seen as an analytical compromise between the dismissive *per se* and litigious rule of reason approaches. Where it is possible for someone

with rudimentary knowledge of economics to discern the anti-competitive effects of a behavior, the burden to prove otherwise is shifted to the defendant. An assessment of conduct from quick look analysis does not create a non-rebuttable presumption, but since it is based on factual analysis, albeit limited or truncated, it constitutes a presumption that the defendant is obliged to contest. Hence the approach eschews the need for long and exhaustive investigation required in a full-blown rule of reason analysis, but allows a consideration of pro-competitive effects of the conduct that may not be readily apparent from cursory investigation.

Elhauge and Gerardin (2011) summed up the discourse as follows:

> This way of framing the distinction between *per se* and rule of reason scrutiny has, however, been eroded by two doctrinal developments. First, the Supreme Court has stated that, even if a horizontal agreement "literally" constitutes price-fixing, an output restriction or a boycott, it will not be deemed to fall within such *per se* illegal categories when a pro-competitive justification in fact exist for the agreement in question. Second, the Court has held that, even if a restraint falls within the rule of reason, it will be condemned summarily as a "naked" restraint if no pro-competitive justification is offered for it. This has led some to conclude that the distinction is incoherent. On this view, the rule of reason is really being applied in all cases; it is just that the rule can be applied quite quickly in cases where no plausible pro-competitive justification has been offered. (p. 75)

A consensus among competition scholars on the appropriate use of *per se* rule and rule of reason is unlikely to be forthcoming, given that other jurisdictions (outside the US and EU) have their own variants of these standards. Some economies – Australia, South Korea and Thailand, among others – have understood *per se* rule to mean that inquiries on justification and market effects are precluded. Argentina, Chile and Japan, however, have adopted a rule of *per se* legality for horizontal agreements involving entities with small combined market share, even if no pro-competitive justification can be offered. In contrast, China's approach, described as "partial *per se* rule", would allow an agreement to continue if a pro-competitive justification could be offered, whether or not the entities involved have market power.[43]

The issues are clearly complex but all competition authorities are eventually compelled to define their own parameters, often by the cases presented before them. Their choices are ultimately determined by the social goals that they deem should be served by the law, as well as their appreciation of the intricate nature of economic behavior.

Notes

1. This paper is dedicated to the memory of former Tarlac Representative Enrique "Henry" M. Cojuangco, Sr., whose leadership and dogged perseverance ensured the early passage of the Philippine Competition Act. "Cong. Henry" (as he was fondly called by colleagues and friends) was the Chair of the Committee on Economic Affairs and principal sponsor of House Bill 5286, the lower chamber's version of the competition bill in the 16th Congress.
2. The International Competition Network has 334 member competition authorities and enforcement agencies (some countries have several), spanning six continents, including 56 members from Africa and 12 from Oceania.

3. Laprevote et al (2015) reported that 190 of the 219 preferential trading agreements that were in force in 2015 contain competition-related provisions.
4. The 8th Congress was the first to be convened under the 1987 Constitution. Three bills (HB nos. 26204 (Monfort), 26308 (Verano-Yap) and 26560 (Dragon)) were filed in the House of House of Representatives. None of these bills and those that were filed in subsequent Congress before the 15th passed beyond the first reading.
5. A third reading of the bill is required but it is almost ministerial. The Senate version was approved on 15 December 2014.
6. A bicameral conference is convened after the respective bills in the Senate and House are approved on third reading.
7. Antitrust scholars refer to this as "formalism", that is, a concern with "form" over "substance". There is consensus among scholars that the use of "formalistic" approaches in antitrust cases leads too often to "perverse results" (Schmitten, 2012, p. 95).
8. This is based on laws compiled by the Office for Competition (OFC) of the Department of Justice, as cited in UNCTAD (2014). See also Abad (2002).
9. The other laws in the OFC's list are sector-specific, e.g., the Public Telecommunications Policy Act, Electric Power Industry Reform Act, Domestic Shipping Development Act, Civil Aeronautics Act and Universally Accessible, and Cheaper and Quality Medicines Act. Some deal with remedies for parties affected by unlawful conduct, e.g., the New Civil Code and Anti-Dumping Act. Still others are only tangentially related but have no direct or explicit competition provision, such as the Corporation Code, Revised Securities Act, New Central Bank Act and Insurance Code.
10. Article XIV, Section 2, of the 1973 Constitution has the same provision.
11. The pertinent provisions in the Sherman Act read:

    1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

    2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...

    Section 5 of the FTC Act stipulates:

    Unfair methods of competition in or affecting commerce… are hereby declared unlawful.
12. The Government Procurement Reform Act (2003) penalizes a private bidder for rigging an auction with a longer jail term ranging from six years and one day to 15 years, but does not stipulate a fine (Section 65.3). Article 185 of the RPC was not explicitly repealed.
13. The Price Act (RA 7581) was amended by RA 10623, which was signed in December 2013. The amendment broadened the definition of "basic necessities" and "prime commodities" and added price monitoring and setting powers to the implementing agencies.
14. Section 17 of the Price Act, as amended.
15. UNCTAD, 2015, p. 9.
16. *Tatad v. the Secretary of the Department Energy et al., G.R. No. 124360* and *Lagman et al., v. Torres et al., G.R. No. 127687*, 5 November 1997. The Supreme Court ruled in favor of the petitioners,

prompting the enactment of a second deregulation law two years later. The Downstream Oil Deregulation Act of 1998 is among the 30 competition laws in the OFC's list.

17. *G.R. No. L-45911, 11 April 1979.*

18. This definition is consistent with the opinion of the Supreme Court in *Tatad v. the Secretary of the Department of Energy* where it declared:

    > A monopoly is a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right or power to carry on a particular business or trade, manufacture a particular article, or control the sale or the whole supply of a particular commodity. It is a form of market structure in which one or only a few firms dominate the total sales of a product or service.

19. Section 4(g) of the PCA stipulates:

    > Dominant Position refers to a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following competitors, consumers, suppliers or consumers.

20. Those qualifiers, i.e., "fair," "normal" etc., are themselves difficult to define (Whish and Bailey, 2012, p. 192). It is not surprising therefore that an all-encompassing definition of "abuse" does not exist in the US or in the EU jurisprudence. In the former, Section 2 of the Sherman Act (which corresponds to Article 186(2) of the RPC) is understood to distinguish between "willful acquisition or maintenance of that (monopoly) power" and "growth or development as a consequence of a superior product, business acumen, or historic accident" (Elhauge and Geradin, 2010, p. 265).

21. This refers to the "coordinated effects" of mergers. See Kuhn (2008) for extensive discussion.

22. See Neven (2008) for an analysis of "conglomerate effects" of mergers.

23. Elhauge and Gerardin (2011, p. 15), citing US Supreme Court ruling on the U*nited States v. United States Gypsum* (1978).

24. Ibid.

25. This relates to the principle that competition laws are meant to protect competition (process), rather than competitors. Hence, the injury should be of the type that the competition law intends to prevent.

26. Elhauge and Gerardin (2011), p. 17.

27. Ibid, p. 18. Reference was made to *Brunswick Corp v. Puelbo Bowl-O-Mat* (1977) and *Cargill, Inc. v. Monfort of Colorado, Inc.* (1986).

28. Interestingly, the number of antitrust criminal cases has increased in recent years. Many of these cases involve foreign-based entities. It is believed that the leniency program has helped in the successful prosecution of these cases (Elhauge and Gerardin, 2011, pp. 15-16).

29. Articles 101 and 102 of the TFEU have the same provisions as Articles 85 and 86 of the 1957 Treaty of Rome and Articles 71 and 72 of the 1993 Treaty establishing the European Community.

30. The SLC test is also applied in evaluating mergers. See for example, EU Merger Regulation of 1990 and UK Enterprise Act of 2002. Some EU Member States, like France and Greece, combine SLC with dominance test. The Australian Trade Practice Act uses SLC standard for anti-competitive agreements (Section 45), exclusive dealing (Section 47) and merger control (Section 50).

31. In the *United States v. Grinnell Corp*. (1966), the Supreme Court wrote:

    The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from **growth or development as a consequence of a superior product, business acumen, or historic accident.** (*emphasis mine*)

32. This doctrine was invoked in the U*nited States v. Alcoa 148 F.2d 416* (2d Cir. 1945) and *Hartford Fire Ins. Co. v. California 509 U.S. 764* (1993).
33. The Foreign Trade Antitrust Amendment Act 1982 affirms this doctrine by stipulating that the Sherman Act can be made to apply to the conduct of foreign firms that have a "direct, substantial and foreseeable effect" on US trade and commerce (Whish and Bailey, 2012, pp. 493-494).
34. The leniency program in the US dates back to the late 1970s but the policy was formally codified only in the 1990s, specifically in the 1993 Corporate Leniency Policy of the US DOJ. The EU version of this program is contained in the European Commission's Leniency Notice in 1996 and in successor notices in 2002 and 2006.
35. During deliberation, there were concerns that facilitating private action might encourage more suits than if the law authorizes only public enforcement or government-initiated cases. This view is based on the impression that the private sector does not exercise the same prosecutorial discretion as the government. But there was also the view that since detection of antitrust violations is often hard and costly, private action could only strengthen the enforcement of competition law. In the end, the latter view prevailed.
36. Nine out of 10 antitrust cases are privately initiated in the US (Ottanelli, 2012).
37. Keyte et al (2016) attributes this trend to a 2007 Supreme Court decision (*Bell Atlantic Corp v. Twombly*) that effectively raised the standard for making antitrust claims.
38. *American Column & Lumber Co. v. United States* 257 U.S. 377 (1921).
39. COMP/33884 FEG & TU.
40. *Copperweld v. Independence Tube 467 U.S. 752* (1984).
41. That Section 14 includes tacit collusion and concerted practice provides more reason to shun any rule that automatically categorizes a conduct as an infringement.
42. The EU codified these exemptions in a series of notices entitled "Notice on Agreements of Minor Importance." The precursor of these guidelines is a ruling of the European Court of Justice that:

    an agreement falls outside the prohibition in Article [101{1)] where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question… (*Volk v. Vervaecke,* Case 5/69[1969] ECR 295; cited in Whish and Bailey, p. 140)

43. See Elhauge and Gerardin (2011), pp. 84-85.

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Annex

Table 1. OECD Compensation Law Indicators and the PCA

OECD Indicators	Provision in PCA
I. Scope of Action	
1. The application of the competition law extends to firms located outside the country's jurisdiction whose behavior directly affects competition or consumers in the domestic market.	Sec. 3, 1st para.
2. State-controlled firms are not exempted from the application of competition law when conducting commercial activities in competition with private firms.	Yes; all are covered except those explicitly exempted in Sec 3, 2nd para.
3. The competition authority can compel firms being investigated for possible antitrust infringement to provide information.	Sec. 12(f)
4. The competition authority can compel third parties to provide information to help an investigation on an antitrust infringement.	Sec. 12(f)
5. The competition authority can perform unannounced inspections or searches in the premises of firms investigated for a possible antitrust infringement aimed at gathering evidence, with or without a warrant or court authorization.	No; Sec. 12(g) requires a warrant or court authorization is required
6. The competition authority can compel merging firms to provide information to help it assess the merger.	Sec. 12(f)

OECD Indicators	Provision in PCA
7. The competition authority can issue a cease and desist order on firms that have committed an antitrust infringement.	Sec. 12(f)
8. The competition authority can impose sanctions on firms that have committed an antitrust infringement.	Sec. 12(e) and (h)
9. The competition authority can impose sanctions on firms that do not comply with remedies imposed on them with respect to an antitrust infringement they have committed.	Sec. 12(e); Sec. 29(h)
10. The competition authority can accept or impose remedies on firms in order to clear a merger.	Sec. 12(h); Sec. 18
11. The competition authority can impose sanctions on a firm that hinders an investigation on an alleged antitrust infringement.	Sec. 12(e); Sec. 29(d)
12. The competition authority can impose interim measures while performing an investigation of an alleged antitrust infringement when there is a concern that the challenged act may lead to irreversible damages.	Sec. 12(f)
13. The competition authority can settle voluntarily with the parties investigated for an alleged antitrust infringement and thus close the investigation.	Sec. 37(c)
14. The competition authority can clear a merger that raises anticompetitive concerns by negotiating or accepting remedies that address these concerns at an early stage and thus avoid performing a more in-depth investigation.	Sec. 37(c)
15. Individuals can bring legal action to seek damages from firms that have committed an antitrust infringement.	Sec. 45
16. Firms can bring a legal action to seek damages from firms that have committed an antitrust infringement.	Sec. 45
17. A group of consumers (either collectively or through a consumer association) can bring a legal action to seek damages from firms that have committed an antitrust infringement.	Sec. 45
II. Policy on Anti-competitive Behavior	
1. Anticompetitive horizontal agreements (including cartels) are prohibited.	Sec. 14
2. The decision-maker conducts an economic analysis of the competitive effects of horizontal agreements.	Sec. 14; Sec. 26
3. When investigating an allegedly anticompetitive horizontal agreement, the decision maker considers the efficiency it may generate.	Sec. 14; Sec. 26
4. A leniency or immunity programme for cartel participants exists.	Sec. 35
5. Anticompetitive vertical agreements are prohibited.	Sec. 14
6. When investigating an allegedly anticompetitive vertical agreement, the decision maker considers any efficiency this may generate.	Sec. 14; Sec. 26

OECD Indicators	Provision in PCA
7. The decision maker conducts an economic analysis of the competitive effects of mergers when investigating them.	Sec. 20
8. When assessing a merger, the decision maker considers whether the merger is likely to generate efficiencies.	Sec. 21 (a)
9. Exclusionary conducts by dominant firms or by firms with substantial market power are prohibited.	Sec. 15
10. The decision maker takes non-market-share factors (such as conditions of entry, ability of smaller firms to expand, and ability of customers to switch to smaller rivals) into account when determining dominance.	Sec. 27
11. The decision maker conducts an economic analysis of the competitive effects of exclusionary conducts when investigating them.	Sec. 26
12. When investigating an allegedly exclusionary conduct, the decision-maker considers any efficiency this may generate.	Sec. 26
III. Probity of Investigation	
1. The competition authority regularly publishes a report on its activities.	Mandated by Sec. 12(i)
2. The relevant decision maker publishes decisions that ascertain the existence of an antitrust infringement.	Mandated by Sec. 52
3. The relevant decision maker publishes decisions that block or clear mergers with remedies.	Mandated by Sec. 52
4. The decisions on antitrust infringements and mergers are subject to judicial review with respect to their substance.	Mandated by Sec. 39
5. The competition authority allows for consultation with the party under investigation for an antitrust infringement with regard to significant legal, factual or procedural issues during the course of the investigation.	No explicit prohibition
6. Parties have the right to be heard and present evidence before the imposition of any sanctions or remedies for having committed an antitrust infringement.	Implied by Sec. 12(a), (e)
7. The competition authority allows for consultation with the parties under investigation for a merger with regard to significant legal, factual or procedural issues during the course of the investigation.	No explicit prohibition
8. The parties have the right to be heard and present evidence before a decision on a merger is reached.	No explicit prohibition
9. The competition authority publishes procedural guidelines explaining its investigative procedures.	Mandated by Sec. 12(k)
10. The competition authority publishes guidelines explaining how abuses of dominance are assessed.	Mandated by Sec. 12(k)
11. The competition authority publishes guidelines explaining how agreements are assessed.	Mandated by Sec. 12(k)

OECD Indicators	Provision in PCA
12. The competition authority publishes guidelines explaining how vertical agreements are assessed.	Mandated by Sec. 12(k)
13. The competition authority publishes guidelines explaining how mergers are assessed.	Mandated by Sec. 12(k)
14. The competition authority publishes guidelines explaining how monetary sanctions for antitrust infringements are set.	Mandated by Sec. 12(k)
IV. Advocacy	
1. The competition authority advocates competition at the central government level.	Sec. 12(r)
2. The competition authority advocates competition at local or regional government levels.	Sec. 12(r)
3. The competition authority assesses new public policies that may have implications for competition.	Sec. 12(l)
4. The competition authority performs market or sector studies.	Sec. 12(m)
5. If a market or sector study conducted by the competition authority, identifies an obstacle or a restriction to competition caused by an existing public policy, it can include an opinion or recommendation to the government to remove or reduce such obstacle or restriction.	Sec. 12 (m), (r)
6. If a market or sector study conducted by the competition authority includes an opinion or recommendation to the government concerning an obstacle or restriction to competition caused by an existing public policy, the pertinent government agency is required to publicly respond to this opinion or recommendation.	No explicit requirement for public response

Note: Only those indicators that may be assessed using de jure information were included; excluded indicators require de facto information.