



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

PHILIPPINES

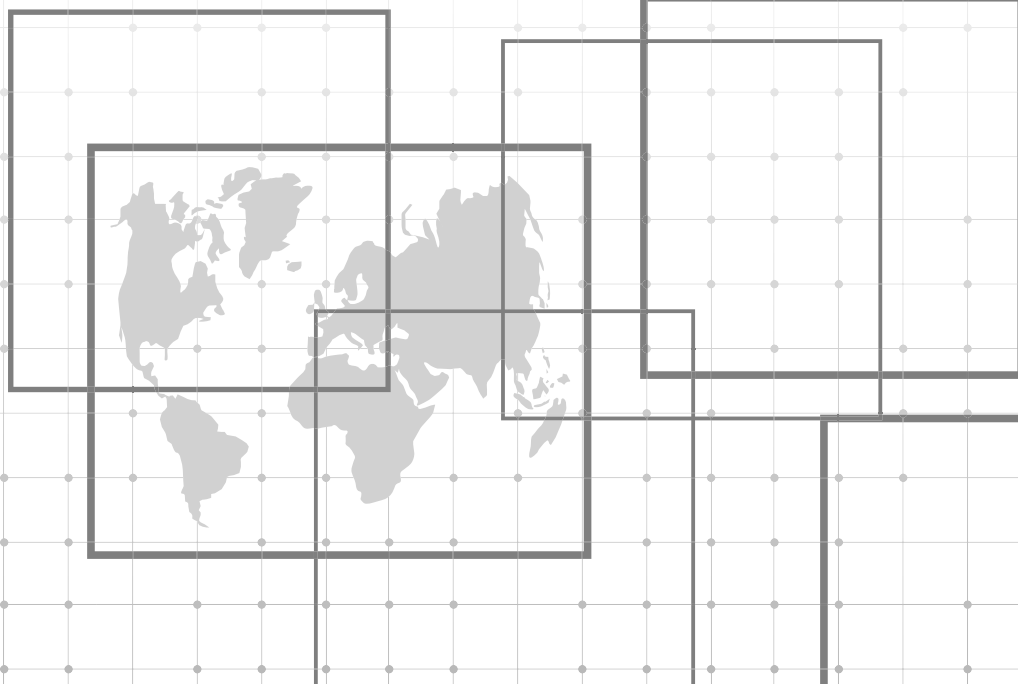




VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

PHILIPPINES

Full Report



NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to competition policy. UNCTAD seeks to further the understanding of the nature of competition law and policy and its contribution to development and to create an enabling environment for an efficient functioning of markets. The work of UNCTAD is carried out through intergovernmental deliberations, capacity-building activities, policy advice and research and analysis on the interface between competition policy and development.

Voluntary peer reviews of competition law and policy carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

The designations employed and the presentation of the material do not imply the expression of any opinion on the part of the United Nations Secretariat concerning the legal status of any country, territory, city or area, or of its authorities or concerning the delimitation of its frontiers or boundaries, or regarding its economic systems or degree of development.

Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a copy of the publication containing the quotation or reprint to be sent to the UNCTAD secretariat.

This publication has not been formally edited.

UNCTAD/DITC/CLP/2014/1

©Copyright United Nations 2014
All rights reserved

ACKNOWLEDGEMENTS

UNCTAD voluntary peer reviews of competition law and policy are conducted at annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy or at five-yearly United Nations conferences to review the United Nations Set. The substantive preparation is carried out by UNCTAD's Competition and Consumer Policies Branch under the direction of the Branch Head, Hassan Qaqaya.

This report was prepared for UNCTAD by Deunden Nikomborirak and Bob Weymouth. The substantive backstopping and review of the report was the responsibility of Hassan Qaqaya and Dongryeul Shin.

UNCTAD would like to acknowledge the enriching assistance of the officers of the Department of Justice Office For Competition of the Philippines, who contributed to this report, as well as all the persons, representatives of different public and private sector institutions, who were interviewed.

TABLE DES MATIÈRES

1.	Foundations and history of competition policy.....	3
	The history.....	3
	The political system.....	3
	The legislative system	3
	The economy.....	3
	The economic policy.....	4
2.	The legal framework.....	6
	Introduction	6
	The current laws	7
	1987 Constitution, article XII, section 19	7
	The Revised Penal Code	
	(Act No. 3815) of 01 January 1932, article 186	8
	Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247)	
	of 01 December 1925	9
	Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office	
	of the Secretary of Justice (RA No. 4152) of 20 June 1964.....	9
	The Price Act (RA No. 7581) of 27 May 1992	10
	The Downstream Oil Industry Deregulation Act (R.A. No. 8479) of 10 February 1998	12
	The Revised Penal Code (R.A. 3185), article 185.....	12
	The Corporation Code of the Philippines (B.P. No. 68) of 01 May 1980	13
	Summary of the current laws	13
	Association of Southeast Asian Nations guidelines	13
	Potential for new competition laws	14
	Background on the bicameral Congress of the Philippines.....	14
	Competition bills before the fifteenth and sixteenth Congresses	15
3.	Institutional framework	18
	Institutional aspects of the proposals in the Senate and House competition bills	
	(fifteenth Congress)	22
	The institutions involved in the enforcement process.....	23
4.	The Office for Competition – key initiatives for the first 33 months.....	24
5.	Enforcement action	26
6.	Competition advocacy	27
7.	International cooperation and technical assistance	29
	Summary of Technical Assistance as of March 2014.....	30
8.	Observations and recommendations	31
	The current law and potential new law.....	31
	The criminal standard of proof	32
	Administrative penalties.....	33
	Concept of joint and several liability	34
	Dealing with leniency policy, whistle-blowers and “attempted unlawful conduct”.....	34
	The capacity of DOJ prosecution regime	35
	The judiciary – capacity	36
	The enforcement task	36
	Public awareness – a complaint handling regime.....	37
9.	Summary of Recommendations	37

INTRODUCTION

This report is based on material current at March 2014 and on information gathered during a fact-finding mission to the Philippines in June 2012. Legislative updates since the time of that visit have been taken up in the report.

1. Foundations and history of competition policy

The Philippines is a sovereign State in Southeast Asia in the Western Pacific Ocean. It is an archipelago comprising 7,107 islands, with a population of more than 103 million people.

The history

The Philippines is a country of mixed cultures that has passed through Spanish occupation, which lasted from 1565 for more than three centuries, followed by that of the United States of America in 1898. Prior to the Spanish rule, the Philippines was an archipelago of independent kingdoms. Spain united these kingdoms, introduced Christianity, universal education and the code of law. The Philippine revolution against Spain began in August 1896, resulting in the establishment of the First Philippine Republic. However, at the end of the Spanish–American War, control of the Philippines was transferred to the United States. This agreement was not recognized by the Government of the First Philippine Republic, which declared war against the United States. The Philippine–American War ended in 1902 when Philippine President Emilio Aguinaldo was captured.

The occupation by the United States began with the establishment of a United States military Government in 1898 following the capture of Manila. In 1901, civil government was installed and in 1907 the Philippine Assembly was convened as the lower house of a bicameral legislature. After the end of the Second World War, the Treaty of Manila established the Republic of the Philippines as an independent nation.

The political system

The Philippines has a democratic Government. It is a constitutional republic with a presidential sys-

tem much like the United States. It is governed as a unitary State with the exception of the autonomous region in Muslim Mindanao. The President assumes the role of both head of State and head of Government and is the commander-in-chief of the armed forces. The President is elected by popular vote for a single six-year term. The bicameral Congress is composed of the Senate, the upper house, where the 24 members are elected to a six-year term, and the House of Representatives, serving as the lower house, with its current 292 members elected to a three-year term. The senators are elected on a national basis while the representatives are elected from both legislative districts and (not more than 20 per cent) through the “party list” or the electoral representative system.

The legislative system

The Philippines has a bicameral legislature called the Congress of the Philippines. Each bill needs the consent of both houses to be submitted to the President for his signature. If the President vetoes the bill, Congress can override the veto with a two-thirds supermajority. If either house voted down on a bill or fails to act on it after a designated time period, the bill is dropped from the legislative procedure and can only be resubmitted during the following Congress, with the process starting all over again. Decisions by Congress are mostly via majority vote, except for voting on constitutional amendments. Each house has its own inherent power, with the Senate given the power to vote on treaties, while the House of Representatives can only introduce money bills. The Constitution provides Congress with impeachment powers, with the House of Representatives having the power to impeach, and the Senate having the power to try the impeached official.

The economy

The country is classified as a lower-middle income country by the World Bank with a gross domestic product (GDP) per capita of \$2,701 in 2012 (current price). Currently, the country is enjoying an unusual period of political stability that helps boost economic growth. In 2012, the country’s GDP grew at

an impressive rate of 6.8 per cent and further up to 7.2 per cent¹ in 2013 – well above the Association of Southeast Asian Nations (ASEAN) region's 5.3 per cent – despite the economic difficulties in the United States and the European Union.

However, the country's income inequality is among the highest in Asia as wealth is concentrated in the hands of few families. According to the United Nations Development Programme *Human Development Report 2009*, following Brunei Darussalam and Myanmar, the Philippines recorded the next highest income inequality in the South-East Asian region. The measured poverty incidence or the proportion of people below the poverty line to the total population was 22.3 per cent according to the National Statistical Coordination Board. The current Government is implementing large-scale projects, such as the distribution of cash transfers, to alleviate the problem. However, a major restructuring of the economy will be required to ensure that the prospective economic growth and prosperity will trickle down to the poor rather than be concentrated among the few rich.

"In its *Global Competitiveness Report 2012–2013*, the World Economic Forum elevated the Philippines by 10 places last year to 65th of 144 economies, with marked improvement in terms of the macroeconomic environment. However, the country remained behind Malaysia at 25th, Thailand at 38th, and Indonesia at 50th, held back by low rankings notably on infrastructure, among other measures. Corruption and government bureaucracy remain concerns for investors, though there is a perception these issues are being addressed."²

The country continues to make improvement as it advances six places to fiftyninth in 2013–2014.³

The economic policy

Like most developing countries, the Philippines adopted an import substitution strategy from the 1950s up to the late 1970s. The manufacturing sector was well protected behind high tariffs. To promote manufacturing growth and develop-

ment, the Government provided subsidies and created regulatory institutions to control prices, domestic supply, and market entry in sectors such as cement, passenger cars, trucks, motorcycles, iron and steel, electrical appliances, sugar milling and refining, flour milling, textiles, and paper.

Along with other countries in the region, the Philippines abandoned the import substitution policy in favour of an export-oriented one. In 1981, the Government switched to liberal trade and investment policies. Two decades later, import duties on most goods have been reduced significantly through successive rounds of tariffs reform. Under the ASEAN Free Trade Agreement most tariff lines have been reduced to zero for imports from member countries. Furthermore, the Government eased entry of foreign investment into the Philippines. Under the Foreign Investment Act amended in 1996, 100 per cent foreign equity may be allowed in all areas of investment except those reserved for Filipinos by mandate of the Philippine Constitution⁴ and existing laws.

According to Aldaba (2012),⁵ the trade reform that took place from the early 1980s to mid-1990s brought about a less concentrated manufacturing sector. Data shows that the four-firms concentration ratio fell to roughly 35–45 per cent for most industries with the exception of cement, refined petroleum products, flat glass, tobacco and beverages, whose concentration ration remained high at 60–82 per cent. The study found that greater competition was associated with lower price–cost margin and innovation.

While trade liberalization may help promote competition from imported products, from the early 2000s the Government maintained in-quota and out-quota tariffs for selected agricultural products such as rice and sugar. The Government also resorted to contingent protection measures such as anti-dumping and safeguard measures subject to conditions set in Philippine laws.

¹ National Statistical Coordination Board.

² Asian Development Bank Outlook 2013, Philippines chapter by Norio Usui and Teresa Mendoza.

³ *Global Competitiveness Report 2013–2014*.

⁴ Article XII National Economy and Patrimony, section 11: "No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens".

⁵ R Aldaba, 2012, "Trade reform, competition and innovation in the Philippines", ERIA discussion paper series, available at <http://ideas.repec.org/p/era/wpaper/dp-2012-05.html>.

Aldaba (2005)⁶ found that these protective measures led to high market concentration in many manufacturing industries including cement, iron, steel, float glass, plastics and resin. Another study by Aldaba (2010)⁷ found that prices of cement remained high even when tariffs have been removed. This is because cement is a high-weight-to-value product with high transport and handling costs. As an island State, moving products or services from one island to another is costly, rendering the domestic market highly fragmented, and hence particularly vulnerable to capture by regional monopolies or oligopolies. It should be noted that although high domestic prices (from alleged collusion) may be attractive to importers, dominant local manufacturers can easily cut prices to fend off competition from imported products because of clear cost advantage.

High market concentration can be found not only in the manufacturing sector, but also in the non-traded service sector and the agricultural sector. It is noteworthy that the country's foreign investment restriction in public utility services mandated by the constitution also contributes to market concentration in key service sectors such as telecommunications, energy and transport. In the telecommunications sector, the mobile phone market recently witnessed a merger that resulted in a duopoly. The energy sector, on the other hand, faces alleged price manipulation in the wholesale electricity spot market resulting from an insufficient number of players in the electric power generation market.⁸ Cabotage and frequent mergers in the domestic cargo and passenger shipping contributes to a concentrated inter-island and coastal shipping industry.

Limited market competition leads to widespread rigging of bids in government procurement as the number of participants in most bids does not exceed three. According to the World Bank's 2008 *Philippines – Country Procurement Assessment Report* "there is a perception that collusion or rigging of bids is common, particularly for big ticket con-

tracts". In 2009, the World Bank blacklisted three Filipino and four foreign contractors because of alleged collusion in the bidding of a World Bank-funded road project. These companies were suspended for 15 days by the Department of Public Works and Highways but were qualified to bid for other projects and allowed to continue on projects they had already procured.⁹

According to the Philippine Institute for Development Studies (PIDS), "weak competition is one of the fundamental factors that explain limited growth, productivity, employment in the economy".¹⁰ While antitrust law has long been a part of the Philippines legal system, starting with the Old Penal Code administered by the Spanish Regime in the early 1900s, there is no doubt that the country is in need of a comprehensive competition law and policy.

Notwithstanding that the 1987 and still current Philippine Constitution prohibits monopolies,¹¹ the country still does not have a comprehensive competition law to this day. Various competition-related clauses can be found in the penal code, the civil code, price control law and several sector-specific laws.¹² The substantive provisions found in these laws are by no means comprehensive. For example, there are no provisions governing the abuse of dominance, although the word "monopolization" appears in various provisions under several laws. There is also no merger regulation for antitrust purposes.

There has not been a single case brought to court under any of the existing competition provisions, although a few cases have been investigated. For example, in 2007 the Energy Regulatory Commission investigated the alleged fixing of spot electricity prices in the wholesale power pool, and in 2009, the Department of Justice and Department of Energy Task Force launched a probe into oil

⁶ R Aldaba, 2005, "Policy reversals, lobby groups and economic distortions", PIDS discussion paper No. 2005-04, Philippine Institute for Development Studies.

⁷ R Aldaba, 2010, "Why cement prices remain high despite zero tariffs", PIDS policy notes.

⁸ E I Uy, 2010, "Genuine and sustainable reform in the Philippines electric power industry", slides can be downloaded from www.slideshare.net/elvinuy (accessed 27 May 2014).

⁹ World Bank, 2009, "World Bank debars seven firms and one individual for collusive practices under Philippines roads project", World Bank News Releases No. 2009/200/INT, 14 January 2009.

¹⁰ PIDS, 2008, "Assessing competition in Philippines markets", Discussion paper series No. 2008-23.

¹¹ Article XII, sections 13 and 19: "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity and shall regulate or prohibit monopolies when the public interest so requires".

¹² See comprehensive list in chapter 2 of this review.

companies for unreasonable oil price increases but found insufficient evidence of collusion. The main obstacles to effective enforcement of the competition provisions are the criminal sanctions which require the standard of proof “beyond reasonable doubt”, the sheer lack of awareness of the nature of trade practices that constitute restrictive practices, and the absence of an authority designated to oversee the enforcement of the scattered competition provisions.¹³

The recognition of a need for a comprehensive competition law is long standing. The first competition bill was submitted to the Congress in the early 1990s, more than two decades ago. The exact reason why each bill may have failed to progress to law is open to conjecture. However, resistance from big businesses and the lack of political commitment will undoubtedly be critical. The past fifteenth Congress¹⁴ had been noteworthy – the first bill filed in the Senate was a competition bill. The consolidated bills in both Senate and House of Representatives managed passage to the third reading stage. Senate later passed a committee report endorsing the consolidated bill. In the view of some, the fifteenth Congress was just a breath away from passing a comprehensive competition law – but this is academic, as the bills lapsed with the adjourned fifteenth Congress. However, for the current sixteenth Congress, similar bills as well as new versions have been filed and committee hearings and deliberations have been conducted for the purpose.

The time for the promulgation of a competition law may be ripe due to several reasons. First, there is clear political commitment at the highest level: President Aquino called for an antitrust law to fulfil the constitutional guarantee of fair competition in his first state of the nation address in July 2010. The creation of the country’s first competition authority, the Office for Competition (OFC), under the Department of Justice (DOJ) under executive order No. 45 issued in the following year is a clear testimony of the commitment. Second, the

competition bill has gained wide support from the business and academic community as well as key members of the legislature. The Philippines Chamber of Commerce, the largest business association, has voiced support for the law, while the Makati Business Club, the only other main business association consisting of the country’s big businesses, has not expressed a formal support but does not voice any opposition. Extensive consultation over the past few years has come to fruition. Third, the ASEAN Economic Community Blueprint (AEC Blueprint), a roadmap for the regional integration of the ASEAN, in which the Philippines is a member, endeavours to introduce competition policy in all member countries by 2015 and to adopt a regional guideline on competition policy in the region.

The *ASEAN Regional Guidelines on Competition Policy*, published in 2010, represents a pioneering attempt to achieve the stated goal of ensuring ASEAN as a highly competitive economic region as prescribed in the AEC Blueprint. The guidelines serve as a general framework for member countries as they endeavour to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each member country. The guidelines address main elements of a competition regime, that is, the scope of competition policy and law, the roles and responsibilities of competition regulatory body, its institutional structure and its relationship to sector regulators, due process, technical assistance and capacity-building, and advocacy and outreach. The Philippines competition regime and the proposed competition bills pending in the Congress shall be assessed against the regional guideline.

2. The legal framework

Introduction

The Philippines has a history stretching back to the Spanish regime of laws dealing with competition issues. Current laws dealing with monopolies go back to 1925 and restraint of trade provisions date back to 1932 in the Revised Penal Code. The current Constitution with reference to control of monopolies was established in 1987, although the same provisions are similarly found in the 1973 Constitution.

¹³ The Tariff Commission, an agency mandated to assist the Cabinet Committee on Tariff and Related Matters, has acted as a focal point for the enforcement of the competition provisions, drawing on its expertise in implementing cross-border competition safeguard measures such as anti-dumping and countervailing duties.

¹⁴ The fifteenth Congress adjourned sine die in the first week of June 2013.

In addition to a review of the current law, this chapter considers the potential for new laws, given the history of bills before the recently adjourned 15th Congress and the strong support of this objective by President Aquino.

The current laws

The main legislation dealing with competition issues has been summarized as:¹⁵

For a more comprehensive schedule of competition-related laws in the Philippines, a brochure entitled *Advancing Economic Justice for All*, an official publication of the OFC, lists the competition laws as follows:

1. 1987 Constitution (February 1987)
2. Act to Prohibit Monopolies and Combinations in Restraint of Trade (1 December 1925)
3. Revised Penal Code, as amended (1 January 1932)
4. Public Service Act, as amended (7 November 1936)
5. New Civil Code (18 June 1949)
6. Civil Aeronautics Act, as amended (20 June 1952)
7. Amending the Law Prescribing Duties and Qualifications of legal Staff in the Office of the Secretary of Justice (20 June 1964)
8. Insurance Code (18 December 1974)
9. Corporation Code (1 May 1980)
10. National Food Authority Act (19 January 1981)
11. Revised Securities Act (23 February 1982)
12. Consumer Act (13 April 1992)
13. Price Act, as amended (27 May 1992)
14. New Central Bank Act (14 June 1993)
15. Public Telecommunications Policy Act (1 March 1995)
16. Intellectual Property Code (6 June 1997)
17. Downstream Oil Industry Deregulation Act (10 February 1998)
18. Anti-Dumping Act (12 August 1999)
19. Retail Trade Liberalizations Act (7 March 2000)
20. Deposit Insurance law (29 April 2000)
21. Securities Regulation Code (19 July 2000)
22. Electric Power Industry Reform Act (8 June 2001)
23. Government Procurement Reform Act (10 January 2003)
24. Domestic Shipping Development Act (3 May 2004)
25. Universally Accessible Cheaper and Quality Medicines Act (6 June 2008)
26. Philippine Cooperative Code (17 February 2009)
27. Real Estate Service Act (29 June 2009)
28. Rent Control Act (14 July 2009)
29. Food and Drug Administration Act (18 August 2009)
30. Pre-Need Code (3 December 2009)

While this description may be accurate and comprehensive, it does nothing to explain the nature, scope and coverage of the competition laws in the Philippines. There is no comprehensive or unified law or enforcement regime that deals with all of the anticompetitive behaviours that may impact on consumers in the Philippines. As a result it is necessary to examine the major laws in some detail.

1987 Constitution, article XII, section 19

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

The Constitution does not make any reference to the term "abuse of dominance".

Having established the constitutional authority, the most prominent law and the only law that could be truly described as covering the whole economy is the Revised Penal Code.

¹⁵ *Handbook on Competition Policy and Law in ASEAN for Business*, p. 43.

The Revised Penal Code (Act No. 3815) of 01 January 1932, article 186

"The penalty of prison correctional in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed 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 on order to alter the price thereof by spreading false rumours 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."

While the term monopoly is not defined in either the Constitution or the Revised Penal Code, the Supreme Court has defined it as "a privilege or particular advantage vested in one or more persons or companies, consisting of the exclusive right (or power) to carry on a particular business, trade, manufacture a particular article or control

the sale of a particular commodity". This definition by the Supreme Court was part of a case in which the constitutionality of a law that regulated the Philippine Oil industry put in question.¹⁶ That case found the law to be unconstitutional because its provisions on tariff differential, inventory reserves and predatory prices were found to inhibit the formation of a competitive market. A new law was enacted to deal with the deficiencies identified by this first Supreme Court case.

A reference to the Philippines Case Digest offers a useful explanation of this Supreme Court case:

"The Downstream Oil Deregulation Act of 1996 or Republic Act No. 8180 allows any person or entity to import or purchase any quantity of crude oil and petroleum products from a foreign or domestic source, lease or own and operate refineries and other downstream oil facilities and market such crude oil or use the same for his own requirement subject only to monitoring by the Department of Energy.

Tatad assails the constitutionality of the law claiming, among others, that the imposition of different tariff rates on imported crude oil and imported refined petroleum products violates the equal protection clause. Tatad contends that the 3 per cent-7 per cent tariff differential unduly favours the three existing oil refineries and discriminates against prospective investors in the downstream oil industry who do not have their own refineries and will have to source refined petroleum products from abroad. Notably, 3 per cent is to be taxed on unrefined crude products and 7 per cent on refined crude products.

ISSUE: Whether or not RA 8180 is constitutional.

HELD: The Supreme Court declared RA 8180 unconstitutional because it violated Section 19 of article XII of the Constitution. It cannot be denied that the downstream oil industry is operated and controlled by an oligopoly, a foreign oligopoly at that. Petron, Shell, and Caltex stand as the only major league players in the oil market.

As the dominant players, they boast of existing refineries of various capacities. The tariff differential of 4 per cent therefore works to their immense benefit. Yet, this is only one edge of the tariff differential. It sets up a high

¹⁶ Tatad vs Lagmann (secretary of Energy), GR No. 124360 and G.R. No. 127687, November 5, 1997.

barrier to the entry of new players. New players that intend to equalize the market power of Petron, Shell, and Caltex by building refineries of their own will have to spend billions of pesos. Those who will not build refineries but compete with them will suffer the huge disadvantage of increasing their product cost by 4 per cent. They will be competing on an uneven field. The first need is to attract new players and they cannot be attracted by burdening them with heavy disincentives. Without new players belonging to the league of Petron, Shell, and Caltex, competition in the downstream oil industry is an idle dream.

RA 8180 is likewise unconstitutional because it discriminated against the “new players,” placing them at a competitive disadvantage vis-à-vis the established oil companies by requiring them to meet certain conditions already being observed by the latter.”

This case clearly demonstrates the court has a clear understanding of the potential for anti-competitive effects from what may have been thought to be a relatively benign albeit protectionist policy.

The Supreme Court has helpfully defined combination in restraint of trade as provided for in article 186 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”¹⁷

Importantly, article 186 does not provide direct liability for corporations. The provision is criminal in nature and in the Philippines legal regime penalties are restricted to natural persons. While there is scope for the corporation to be held liable civilly, article 186 will “hold liable as principals” those representatives and agents who “knowingly permitted or failed to prevent the commission of the offense”.

At the heart of the competition regime is the article 186 provision as described above. It is a provision that provides for criminal penalty at the lower end of the scale (ranging from six months and one day to two years and four months imprisonment)

and a fine that can only be described as ineffective. The penalty range of 200 to 6,000 pesos was set in 1932 and has never been upgraded to reflect inflation. The financial penalty could never be considered a likely deterrent given that the range expressed in United States dollars is approximately \$15 to \$150.

Unlike some of the other provisions about to be addressed there is no administrative penalty regime contained within article 186.

As a criminal provision, an allegation will be brought before a judge in the Regional Trial Court and is tested against a burden of proof of “beyond reasonable doubt”.

Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247) of 01 December 1925

Act No. 3247 is the oldest competition law that penalizes monopolies and combinations in restraint of trade and provides for treble damages in civil actions. Most of its provisions have been incorporated in the Revised Penal Code, except for section 6 below:

“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.”

Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (RA No. 4152) of 20 June 1964

This is a law that vests the Secretary of Justice with legal and enforcement duties in competition. Section 2: The Secretary of Justice shall:

“study all laws relating to trusts, monopolies and combinations; to draft such legislation as may be necessary to up-date or revise existing laws to enable the Government to deal more effectively with monopolistic practices and all forms of trusts and combination in

¹⁷ See case at note 11.

restraint of trade or free competition and/or tending to bring about non-competitive prices of articles of prime necessity; to investigate all cases involving violations of such laws; and to initiate and take such preventive or remedial measures, including appropriate judicial proceedings, to prevent or restrain monopolization and allied practices or activities of trusts, monopolies and combinations”.

The Price Act (RA No. 7581) of 27 May 1992

Arguably the next most powerful statute in relation to anticompetitive conduct is The Price Act, as amended by R.A. No. 10623.¹⁸

In considering the provisions within the Price Act, it is vital to remember the purpose of this law: “An act providing protection to consumers by stabilizing the prices of basic necessities and Prime commodities and by prescribing measures against undue price increases during emergency situations and like occasions”. So while some provisions have wider application, the agency tasked with administration of the law is an agency with a major objective to deal with prices during emergency or calamitous situations.

“Section 5. Illegal Acts of Price Manipulation – Without prejudice to the provisions of existing laws on goods not covered by this Act, it shall be unlawful for any person habitually engaged in the production, manufacture, importation, storage, transport, distribution, sale or other methods of disposition of goods to engage in the following acts of price manipulation of the price of any basic necessity or prime commodity:

- (1) Hoarding ...
- (2) Profiteering ...
- (3) Cartel, which is any combination of or agreement between two (2) or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of

any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price. There shall be prima facie evidence of engaging in a cartel whenever two (2) or more persons or business enterprises competing for the same market and dealing with the same basic necessity or prime commodity, perform uniform or complementary acts amongst themselves which tend to bring about artificial and unreasonable increase in price of any basic necessity or prime commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition amongst themselves”.

“Section 15. Penalty for Acts of Illegal Price Manipulation. – Any person who commits any act of illegal price manipulation of any basic necessity or prime commodity under Section 5 hereof shall suffer the penalty of imprisonment for a period of not less than (5) five years nor more than (15) years, and shall be imposed a fine of not less than Five Thousand Pesos (P5,000) nor more than Two million pesos (P2,000,000).”

“Section 17. Violation by Juridical Persons. – Whenever any violation of the provisions of this Act is committed by a juridical persons, its officials or employees, or in the case of a foreign corporation or association, its agent or representative in the Philippines who are responsible for the violation will be held liable therefor.”

“Section 20. Criminal Penalties Without Prejudice to Administrative Sanctions. – The foregoing criminal penalties shall be without prejudice to any administrative sanctions which the implementing agency may impose under this Act or any other law.”

R.A. No. 10623 expanded the definition of basic necessities and prime commodities and strengthened the powers of the Price Coordinating Council, viz:

“Section 3. Definition of Terms. For the purposes of this Act, the term

- (1) ‘Basic necessities’ are goods vital to the needs of consumers for their sustenance and existence in times of any of the cases provided under Section 6 or 7 of this Act such as, but not limited to, rice, corn, root crops, bread; fresh, dried or canned fish and other marine products; fresh pork, beef and poultry meat; fresh eggs; potable water in bottles and containers; fresh

¹⁸ An act amending certain provisions of R.A. No. 7581, entitled “An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions” and for other purposes signed by the President of the Philippines on 6 September 2013.

and processed milk; fresh vegetables and fruits; locally manufactured instant noodles; coffee; sugar; cooking oil; salt; laundry soap and detergents; firewood; charcoal; household liquefied petroleum gas (LPG) and kerosene; candles; drugs classified as essential by the Department of Health and such other goods as may be included under Section 4 of this Act”;

and at subsection (8):

“Prime commodities’ are goods not considered as basic necessities but are essential to consumers in times of any of the cases provided under Section 7 of this Act such as, but not limited to, flour; dried, processed or canned pork, beef and poultry meat; dairy products not falling under basic necessities; onions, garlic, vinegar, patis, soy sauce; toilet soap; fertilizer, pesticides and herbicides; poultry, livestock and fishery feeds and veterinary products; paper; school supplies; nipa shingles; sawali; cement; clinker; GI sheets; hollow blocks; plywood; plyboard; construction nails; batteries; electrical supplies; light bulbs; steel wire; all drugs not classified as essential drugs by the Department of Health and such other goods as may be included under Section 4 of this Act.”

“Section 10. Powers and Responsibilities of Implementing Agencies. – To carry out the intents and purposes of this Act, the head of the implementing agency shall have the following additional power and responsibilities:

Subparagraph (9) He may conduct investigations of any violation of this Act and, after due notice and hearing, impose administrative fines in such amount as he may deem reasonable which shall in no case be less than One thousand pesos (P1000) nor more than One million pesos (P1,000,000).”

The Act provides extensive price-monitoring and price-setting powers in the event of “disaster” or “calamity” with the objective of maintaining supply at reasonable prices for the basic commodities important to all consumers. Notwithstanding that focus, the existence of an offence defined as “cartel” with a significant criminal sanction and or the option of an administrative penalty that is not limited to the declaration of a disaster or calamity is an important element of the competition regime in the Philippines.

The Price Act offers a realistic option to address anticompetitive price collusion across a broad

range of commodities. It is a long way from dealing with the total economy and does not address the provision of services.

The Price Act does not directly address the conduct of corporations; however section 17 clearly establishes liability will be with the responsible officials and employees.

The Act refers to “Implementing Agencies” – while not repeating the definitions in the Act section 3(3) the Departments of Health, Agriculture, Environment, Natural Resources has this role in relation to specified commodities and the Department of Trade and Industry (DTI) for all other basic necessities and prime commodities. With R.A. No. 10623, the Department of Energy is now included as one of the agencies authorized to implement the Price Act. As implementing agencies, they may include in the definition of basic necessities and prime commodities the types and brands of goods, subject to the conditions provided for by law.

When considering the potential impact of the Price Act it is important to understand what is the result of section 10, subparagraph 9 which empowers the DTI to impose administrative fines. The Department has issued extensive rules¹⁹ dealing with powers, processes and procedures for the imposition of administrative sanctions under various Acts including the Price Act. Rule XIII, section 2 (a) provides for a range of sanctions including permanent closure of the establishment, confiscation/seizure and forfeiture of all products subject of the offense, cease and desist orders, censure, reprimand and administrative fines.

Importantly, the range of sanctions described above are only available after a clearly defined process has been undertaken which can include the laying of formal charges, formal response, hearings – the process is an attempt to offer the protections of a court-based process but is managed within the department by designated adjudication officers who are ultimately the decision makers. A decision of the adjudication officer may be appealed to the Office of the President or to

¹⁹ “DTI Department Administrative Order No 07 of 2006: Instituting the Simplified and Uniform Rules of Procedure for Administrative Cases Filed with the Department of Trade and Industry (DTI) for Violations of the Consumer Act of the Philippines and Other Trade and Industry laws.”

the Court of Appeals. However, in practice the law was never enforced.

The 30 competition laws identified by the Office for Competition have already been listed – some of these are very much on the periphery of a competition law regime while others deal with civil remedies for those parties impacted by unlawful conduct. However, some minor explanation is relevant of the provisions within the Downstream Oil Industry Deregulation Act, the Revised Penal Code (R.A. 3185), article 185 and the Philippines Corporation Code, Act No. 68 (1982).

The Downstream Oil Industry Deregulation Act (R.A. No. 8479) of 10 February 1998

This Act was passed in response to the country's power-supply crisis that began in 1992 and that resulted in major interruptions that weighed down the economic growth and the rising fiscal instability of the Oil Price Stabilization Fund. President Fidel Ramos at the time reckoned that the downstream oil industry – oil importation, refining and distribution – needed to be liberalized in order to attract new players and investment into the energy market. At the same time, the oil price subsidy had to be terminated as the fiscal burden proved unsustainable. The law abolished the power of the State to set prices of oil or to set any rules governing competition in the market. However, to ensure that subsequent competition in the market is not only “free” but also “fair”, the law contains provisions prohibiting collusion and predatory pricing as shown below:

The two most relevant sections within this law relate to cartelization and predatory pricing.

Section 11 (a) prohibits “cartelization” which is defined as “any agreement, combination or concerted action by refiners, importers and/or dealers or their representatives, to fix prices restrict outputs or divide market, either by products or by areas, or allocate markets, either by products or by areas, in restraint of trade or free competition, including contractual stipulation which prescribes pricing level and profit margins”.

Section 11 (b) prohibits predatory pricing which is defined as “selling or offering to sell any oil prod-

uct at a price below the seller's or offerer's average variable cost for purposes of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market”.

Penalties within this statute for violation of section 11 include three to seven years imprisonment, and fines ranging from 1 million to 2 million pesos. As with other criminal sanctions, the sanctions apply to natural persons.

Unfortunately, the deregulation did not lead to a more competitive market environment as intended. The refinery industry continued to be dominated by Petron, a joint venture between the Philippines National Oil Company, Saudi Aramco and Pilipinas Shell. According to a study by Mumar (2010),²⁰ the failure of the price and market deregulation to attract new players can be attributed to the country's political instability, high oil tax that lead to massive uncontrolled smuggling of substandard oil and the imposition of tax on new players. The study concluded that, in the absence of the development of alternative energy sources, the Philippines remains fully dependent on imported oil, the price of which has sky-rocketed and became increasingly volatile. The Government needs measures to promote new players and encourage exploitation of alternative energy sources at the upstream industry level.

The Revised Penal Code (R.A. 3185), article 185

“Machinations in public auctions – 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 auctioned, shall suffer the penalty of *prision correccional* in its minimum period (a range from 6 months and 1 day to 2 years and 4 months) and a fine ranging from 10 to 50 per centum of the value of the thing auctioned.”

It is noteworthy this is the first reference to an “attempt” at anticompetitive conduct being treated in the same way as actual conduct.

²⁰ M B Mumar, 2010, “Philippines oil deregulation and the oil crisis: A policy issue paper”, University of Philippines.

The Corporation Code of the Philippines (B.P. No. 68) of 01 May 1980

Mergers and acquisitions are covered by sections 76 to 80 of the Corporation Code. Parties are required to file articles of the merger or consolidation with the Securities and Exchange Commission (SEC). SEC approval of a merger is required prior to issuing a certificate of merger or consolidation.

There is no competition assessment or competition law based guidelines that would be used by the SEC when considering a merger prior to approval.

Despite the code being cited as part of the competition law regime, SEC representatives interviewed acknowledged no merger or acquisition would be rejected on the basis of competition issues. It is clear, however, that if the merger or acquisition is within a regulated sector such as energy or telecommunication, the sectoral regulator may have a basis to prevent the merger proceeding. As an example, in the regulated electricity market, which breaks the market into four distinct markets (generation, transmission, distribution and retail) there is a rule preventing vertical integration, ring fencing the transmission assets from parties in any of the other three sectors.

Summary of the current laws

The most comprehensive law dealing with anti-competitive conduct in the Philippines is within the Revised Penal Code, as amended – the statute provides no administrative penalty options and does not penalize corporations other than via the employees and officials of those companies. The provision does offer a custodial penalty and a paltry fiscal penalty being at its maximum 6,000 pesos. The conduct most easily recognized that can be dealt with in this statute is a combination in restraint of trade, which would include a cartel by the normal definition of the term.

The Price Act offers regulators an alternative to criminal sanctions when pursuing cartel conduct. Administrative penalties are available and may be levied without impact on the scope for pursuit of criminal sanctions. The reach of the Price Act

is limited, however – only conduct concerning goods defined in section 3 as “basic necessities” or “prime commodities” is captured.

Merger control does not allow the prohibition of a merger on the basis of competition analysis.

There exists, therefore, what appears to be a robust law dealing with attempts to manipulate public auctions and also with attempts to manipulate price/participation.

With the exception of the Price Act, and in addition to treble damages under civil penalties, the laws are of a criminal nature requiring proceedings to be launched and dealt with in compliance with Supreme Court Rules. Offences need to be proven to a criminal standard, beyond doubt, before the prosecutor can succeed.

Association of Southeast Asian Nations guidelines

The Philippines as a member State of the ASEAN Economic Community has adopted a goal of introduction of nation-wide competition policy and law by 2015.

In contemplating the introduction of laws, the *ASEAN Regional Guidelines on Competition Policy*, August 2010, invites member States to consider:

- Prohibiting horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the member State’s territory unless otherwise exempted.²¹ This would include so-called hard-core examples such as price fixing, bid rigging, market sharing and limiting or controlling production or investment.
- Prohibiting the abuse of dominant position.²²
- Prohibiting mergers that lead to a substantial lessening of competition or would significantly impede effective competition in the relevant market or in a substantial part of it, unless otherwise exempted.²³
- Provide a whole range of sanctions, punitive and non-punitive coercive measures, whether

²¹ *ASEAN Regional Guidelines on Competition Policy* chapter 3.2.

²² *Ibid.*, chapter 3.3.

²³ *Ibid.*, chapter 3.4.

criminal, civil or administrative to ensure compliance with the law.²⁴

- Introduce a leniency programme targeted at undertakings who have participated in cartel activities²⁵
- Entitle any applicant to bring a specific law suit before the appropriate judicial authorities for breaches of competition law, in order to recover the damages suffered.²⁶

In summary form, the current laws of the Philippines when assessed against the framework suggested by the ASEAN guidelines are (table 1):

Table 1. Current laws of the Philippines assessed against the framework suggested by the ASEAN guidelines

ASEAN Regional Guidelines	Philippines Competition Law
Prohibition against anticompetitive mergers	No
Merger regime – with power to suspend	No
Prohibition against collusive agreements	Yes
Leniency policy	No
Prohibition applying to vertical conduct	No
Prohibition against unilateral conduct	No
Criminal Sanctions	Yes for individuals, no for corporations
Private rights	Yes

By any standard the current law cannot be described as a comprehensive competition regime, notwithstanding the existence of some sector specific laws, (such as in the electricity market) with the very best intentions and in some cases good result.

The ultimate test of laws is their effective enforcement. Good laws that fail to be enforced are no better than bad laws. The recent history of the Philippines in terms of enforcement is not encouraging. The evidence indicates a complete lack of prosecutions in the courts for anticompetitive behaviour.

There may be argument about the causes for this failure, with many people pointing to the much wider cultural issues linked to corruption. However, it is hard to ignore the law itself. Whatever the reason, the facts speak for themselves – corporations and individuals currently face little or no deterrent if considering acting in an anticompetitive manner.

Potential for new competition laws

Background on the bicameral Congress of the Philippines

To understand the potential for new competition laws in the Philippines it is first helpful to understand the system of government. A brief explanation of the system is provided below.

The 1987 Constitution restored a Presidential system of government together with a bicameral Congress of the Philippines.

The President with executive power is elected for a six-year term, with the current President Benigno S. Aquino III having completed his first three years as the fifteenth Congress ended. The next presidential election will be held in 2016.

Congress of the Philippines has two chambers or houses – the Senate and the House of Representatives.

The Senate members (known as senators) are elected for six-year terms on a nation-wide voting system with a total of 24 senators represented in the Senate. As a result of this system, 12 of the elected senators fall due for replacement at each three-year election.

Members of the House of Representatives (known as congressmen/congresswomen) are elected for three-year terms and may not serve more than three consecutive terms. There are 212 legislative districts with each district electing a representative. In addition, there are a number of representatives elected through a party list system, with this latter group limited to not more than 20 per cent of the total representation in the House. In the fifteenth Congress, which concluded in June 2013, the House of Representatives included a total of 287 members of congress. In the current sixteenth Congress, there are 289 members.

²⁴ Ibid., chapter 6.7.

²⁵ Ibid., chapter 6.9.

²⁶ Ibid., chapter 6.11.

The Constitution provides for Congress to convene for its regular session on the fourth Monday of July. The sixteenth Congress, which has been elected as a result of elections in May 2013, commenced its first regular session on the fourth Monday of July 2013 and will have a three-year term.

How a bill becomes law:²⁷

1. A bill may be introduced either in the House of Representatives or the Senate.
2. On first reading, the title and number of the bill is read and then it is referred to an appropriate committee.
3. A committee studies the bill and conducts hearings on it. Thereafter, a committee report is prepared on the bill (only if the committee is recommending approval). The committee report is read in open session and, together with the bill, it is referred to the Rules Committee. The Rules Committee can place the bill on the second reading calendar or in the calendar of unassigned business.
4. On the second reading a bill is subject to debate and amendment before being placed in the third reading calendar for final passage.
5. After passage by one house, the bill goes through the same process in the other house.
6. If amendments are made in one house, the other house must concur. If a house has a counterpart bill to a bill passed by the other house, and these bills have conflicting provisions, a conference committee of representatives of each house is formed to harmonize the conflicting provisions. Thereafter, if the conflicting provisions are harmonized, a conference committee report is prepared for ratification or approval of both houses. It is open to the houses to consider/approve, but no further amendment is possible at this stage. This joint house committee process is called a bicameral committee.
7. Copies of the bill signed by both the Senate President and the Speaker of the House of Representatives and certified by both the secretary of the Senate and the Secretary General of the House are transmitted to the President.

8. The President may sign the bill into law, or veto all or part of it. The bill becomes law if within 30 days after receiving it, the President fails to sign or veto the bill. The bill, even if vetoed by the President, can also become law when the Congress overrides the veto by a 2/3 vote of all of its members.

Competition bills before the fifteenth and sixteenth Congresses

While not detailing the history of bills before each of the houses, it is understood there has been at least one bill before the house in each Congress since the eighth Congress in the early 1990s.

As is clearly evident by the review of the legislative process as outlined above, there are any number of issues that may impede the progress of a bill. As may have been critical in the fifteenth Congress, just the competing business of each of the houses may result in a bill not progressing during the life of congress.

By way of background, during the fourteenth Congress, the Office for Competition shepherded the preparation of the first consolidated bill when DOJ Assistant Secretary Geronimo L. Sy was designated Chair of the Senate Sub-committee on Antitrust.

The fifteenth Congress, which has just concluded, was noteworthy for bills being before both the Senate and the House of Representatives. Senate Bill No. 3098 that was prepared jointly by the Committees on Trade and Commerce, Economic Affairs, and Finance, is in substitution of a number of bills including the very first bill filed in the Senate of the fifteenth Congress. The Committees passed a joint report endorsing the approval of the same.

On the other hand, House Bill No. 4835 in substitution of several bills filed in the House of Representatives was pending interpellation in the Committee on Trade and Industry. Notwithstanding the well advanced bills before each of the houses, no bill has progressed to a final bicameral committee stage for consideration/approval.

It is widely reported that the President included a call for the passage of antitrust laws as part of his first address to the nation in 2010 at the com-

²⁷ Philippines House of Representatives Website.

mencement of the fifteenth Congress. Following the 2013 elections, it was again reported²⁸ that the President urged the newly elected Congress to progress legislation to push his reform agenda. The same article reports “the Philippine Chamber of Commerce and Industry sought the passage of economic measures, particularly the antitrust bill, to level the playing field, attract job-generating investment and sustain economic growth”.

The progress made in the fifteenth Congress is likely to have some impact on the legislative programme for the sixteenth Congress. Secretariat staffs indicate there is already a plan for a new bill to be filed and for work to be done outside of the parliamentary process to try and advance the harmonization of the final bills in the Senate and House of Representatives of the fifteenth Congress. An examination of the final bills indicates that either of them would deliver a legislative framework that could justifiably be called a comprehensive competition law. While the bills have differences – the most obvious being related to the institutional arrangements for the competition regulator – they do suggest the approach to competition law in the Philippines is consistent with the ASEAN guidelines.

It is noteworthy that when the sixteenth Congress commenced, bills similar to the consolidated versions pending in the previous Congress as well as new versions were filed before Senate and the House. Committee hearings in both chambers are underway and, for its part, the Office for Competition has submitted an updated version of the consolidated bill after a series of consultations with private and government entities.

While it may be too early to predict, there does seem to be a level of optimism that a consolidated version of these earlier bills will be filed and progressed into law during the life of the 16th Congress. A factor in this optimism is the ASEAN goal of a nationwide Competition Policy and Law by 2015.

A useful summary of the propose law is provided in the fact sheet tendered with House Bill No 4835.²⁹

²⁸ *The Philippine Star*, 4 June 2013.

²⁹ House Bill 4835 has subsequently been refiled in the sixteenth Congress as House Bill No 00388, together with another slightly modified version House Bill No 1133, and

OBJECTIVES:

To promote and enhance economic efficiency and full competition in trade, industry and all commercial economic activities.

To prevent the concentration of economic power in a few persons who threaten to control the production, trade, or industry in order to stifle competition, distort, manipulate or constrict the discipline of free markets, increase market prices.

To penalize all forms of unfair trade, anticompetitive conduct and combinations in restraint of trade, with the objective of protecting and advancing consumer welfare.

KEY PROVISIONS:

Mandates that this Act shall be enforceable within the territory of the Republic of the Philippines and shall apply to all areas of trade, industry and commercial economic activity. It shall likewise be applicable to international trade having direct, substantial and reasonably foreseeable effects in trade, industry or commerce in the Republic of the Philippines including those that result from acts done outside the Republic of the Philippines;

Provides that the Act shall apply to: (a) all firms as defined and all their commercial agreements, actions or transactions involving goods, services or intellectual property; and (b) all agents, officers, employees, partners, owners, directors, consultants, stockholders, representatives, managers, supervisors, and all other natural persons who, acting on behalf of judicial persons shall authorize, engage or aid in the commission of restrictive practices prohibited under this Act;

Identifies and defines prohibited acts such as anti-competitive agreements, and abuse of dominant position (such as, but not limited to predatory behaviour towards competitors, price fixing, bid rigging, limitation and control of markets, market allocation, arrangements to share markets or sources of supply, price discrimination [except those that are considered permissible], exclusivity arrangement, tie-in arrangement, and boycott);

House Bill No 453.

Prohibits mergers, consolidations or asset acquisition where the effect of such may be to substantially lessen competition, or tend to create a monopoly. Nevertheless, it also identifies instances where stock or asset acquisition or ownership shall be permissible and the bill sets down requirements thereon. As such, it requires notification prior to stock or asset acquisition if as a result of the acquisition, the acquiring firm would own twenty per cent (20 per cent) or more of the shares of stock or assets of the acquired firm;

Imposes a fine of not less than Ten million Pesos and not exceeding Fifty million Pesos if a natural person; by a fine of not less than Two Hundred Fifty million Pesos but not exceeding Seven Hundred Fifty million Pesos if a firm, at the discretion of the Commission, for violations;

Establishes the Philippine Fair Competition Commission (PFCC) an independent body which shall have the original and exclusive jurisdiction to enforce and implement the administrative provisions of this Act. The Commission shall be composed of a Chairperson and four Associate Commissioners. The Chairperson and the Associate Commissioners shall be appointed by the President of the Philippines. The term of office of the Chairperson and the Associate Commissioners shall be six years without reappointment;

Mandates that upon prior notice and hearing, the Commission shall have the power to, among others, issue binding rulings, show cause orders, and thereafter, render decision thereon, approve, or disapprove, proposals for consent judgment, conduct the required preliminary inquiry of cases involving violations of this Act and other competition laws; and thereafter, if appropriate, sign and file the proper criminal complaint before the Department of Justice, and impose the appropriate administrative fines and penalties;

Provides that the Commission, without hearing, shall have the power to commence investigation, on its own initiative or upon complaint of any person, any and all violations of this Act, cause the issuance of a cease and desist order prior to the commencement of a preliminary inquiry, and/or the institution of a civil or administrative action, require any government agency to lend assistance and information necessary in the discharge of its responsibilities under this Act and examine if necessary, pertinent re-

cords and documents in the possession of such government agency, and to issue subpoena, subpoena duces tecum and subpoena ad testificandum in the exercise of its functions, powers and duties;

Mandates that the exercise of regulatory powers by different government agencies, including local government units, over an industry or a sub-sector of an industry shall be cumulative and shall not be construed in any way as derogating from the power and authority of the concerned agency. The government agencies shall cooperate and coordinate with one another in the exercise of their powers in order to prevent overlap, to share confidential information, or for other effective measures. The Commission can seek technical assistance from sectoral regulators;

Provides that the Commission shall have a primary and sole jurisdiction over competition issues, whilst the regulatory body shall continue to exercise jurisdiction over all matters with regard to a firms' operation and existence;

Provides for a whistle-blower mechanism whereby any person or firm which cooperates or furnishes any information, document or data to the Commission before or during the conduct of the preliminary inquiry that constitutes material evidence shall be immune from any suit or charge including from affected parties and third parties; Provided, That the person or firm is not the most guilty;

Provides for leniency via Nolo Contendere Resolution whereby any firm under inquiry may submit to a nolo contendere resolution at any time before the termination of the preliminary inquiry by; a) the payment of an amount within the range of penalties; b) by entering into an undertaking to effectively stop and rectify the acts complained against, make restitution to the affected parties, whether or not the parties are plaintiffs or witnesses; and, c) by submitting regular compliance reports as may be directed;

Provides for an initial fund of one Hundred million Pesos for its implementation. Thereafter, such amounts as may be necessary shall be for the continuous implementation of the Act shall be included in the Annual General Appropriations Act. All moneys recovered or charges or compositions sums collected under this Act, other than financial

penalties, shall be paid into and form part of the moneys of the Commission.

Assessing this proposed law against the ASEAN guidelines demonstrates that the passage of a law as proposed in the fifteenth Congress would provide a huge leap towards comprehensive regulation of anticompetitive conduct across the economy (table 2).

Table 2. A comparison of the proposed Philippines competition law with the ASEAN regional guidelines

ASEAN Regional Guidelines	Proposed Philippines Competition Law
Prohibition against anticompetitive mergers	Yes
Merger regime – with power to suspend	Yes
Prohibition against collusive agreements	Yes
Leniency policy	Yes
Prohibition applying to vertical conduct	Yes
Prohibition against unilateral conduct	Yes
Criminal Sanctions	Yes
Private rights	Yes

3. Institutional framework

In the absence of a unified competition law, the Philippines does not have a central authority responsible for competition. The Tariff Commission, an agency attached to the National Economic and Development Authority, whose mandate is to assist the Cabinet Committee on tariff and related matters in the formulation of national tariff policy, was the designated interim competition oversight body. This is because tariffs used to be the main barrier to competition for foreign products. Hence, the applicable tariff rate is often closely linked with the competition landscape of a particular product market. At the same time, the Commission has conducted formal investigation into cross-border competition cases such as dumping and subsidization and safeguards cases.

In 1999, studies undertaken by the Tariff Commission proposed that a new institution be set up under a specific act of Congress – the Philip-

pine Competition Commission. It would have two main functions. First, it would coordinate reforms and act as an intermediary among the relevant agencies to ensure the formation and effective implementation of competition policy. Second, it would advise and supervise a review of existing regulations that restrict competition.³⁰

The institutional framework within the Philippines changed dramatically on 9 June 2011 when President Aquino issued executive order No 45. Significantly, this order designated the DOJ as the Competition Authority while at the same time creating the OFC under the Office of Secretary of Justice to perform the following duties and responsibilities:

- a. Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade;
- b. Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;
- c. Supervise competition in markets by ensuring that prohibitions and requirement of competition laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;
- d. Monitor and implement measures to promote transparency and accountability in markets;
- e. Prepare, publish and disseminate studies and reports on competition to inform and guide industry and consumers; and
- f. Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements.

The practical result of the executive order is that the Philippines now has an overarching government body established with the purpose of investigating and enforcing existing competition laws, monitoring and supervising markets to improve accountability and transparency and in general terms promoting information to enhance competition and protect consumers.

³⁰ "A national competition policy for the Philippines", available at r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/en9.doc (accessed 20 May 2014).

The creation of the OFC does not limit the role of the 63 sectoral regulators³¹ but does introduce expectation of a collegiate approach. Likewise, the Consumer Protection and Advocacy Bureau (formerly Bureau of Trade Regulation and Consumer Protection) under the DTI, remains the consumer protection agency within the Philippines. To coordinate competition work with other agencies, the OFC created various “working groups” that are co-chaired by other agencies such as the Tariff Commission for the work on advocacy and partnerships which includes sectoral regulators, the Securities and Exchange Commission for the work on business and economics including monitoring mergers and acquisitions, the DTI for the work on consumer protection and welfare, the Philippine Institute for Development Studies for policy and planning and the Bureau of Internal Revenue for enforcement and legal work as will be elaborated in details later.

As an office under the DOJ, the OFC was able to draw on two full-time staff with assistance from roughly 20 personnel with legal, investigative and enforcement experience and expertise from various offices and divisions within the Department, such as the National Bureau of Investigation, the Office of Chief and State Counsel, the Office of the Government Corporate Counsel and the Office of the Solicitor General (details about these organizations are described in the section “The institutions involved in the enforcement process”, below). During the initial stage, the 20 personnel only performed their duty at the OFC on a part-time basis as they continued to carry out pre-existing responsibilities within the offices to which they were attached. However, beginning in 2012, full-time lawyers, economists and a Director were appointed, and now the office has 15 full-time positions.

3.1 The sector regulators

The Philippines has many sector regulatory bodies established by sector-specific laws with the most prominent being the Energy Regulatory Commission (ERC), the Department of Energy, the National Telecommunications Commission (NTC), the

Philippine Port Authority (PPA), and the DTI, among others. Each of these regulatory agencies is of unique institutional design, but none is truly independent of the executive power.

The PPA is a government-owned corporation attached to the Department of Transportation and Communications that operates and regulates ports. The NTC, on the other hand, is a state agency attached to the Department of Transportation and Communications, although with respect to its quasi-judicial functions, NTC’s decisions are appealable only and directly to the Supreme Court of the Philippines. Unlike the NTC, the ERC is not attached to any particular department. It reports to the Joint Congressional Power Commission. However, the chairman of both the NTC and the ERC are appointed by the President and their annual budgets are allocated through regular appropriation.

It should be noted that in the Philippines, many regulatory functions are under the purview of the executive or the legislative power. For example, the NTC and the ERC do not have the authority to give out “licences” as is the case in most countries. The operation of telecommunication services and electricity distribution requires a “national franchise” granted by the Congress. Port charges – such as wharfage and wet charges – that are of national application require approval from the Office of the President.³² When it comes to competition regulation, however, these regulatory authorities are given broad residual power to regulate.

Presidential Decree No. 505 in 1974 stipulates that the PPA “shall have general jurisdiction and control over all persons, corporations, firms, or entities, existing, proposed or otherwise to be established within the different port districts in the Philippines and shall supervise, regulate and exercise its powers in accordance with the provisions of this Decree”. Currently, regulatory functions of the PPA include the issuance of a permit to construct private ports, approval of cargo-handling rates and port charges and awarding contracts to private operators of public ports. As

³¹ The OFC developed draft “Guidelines to govern the relationship between the Office for Competition (OFC) and sector regulators” – annex A of the guidelines contains the list of sectoral regulators identified by the OFC.

³² PDP Australia Pty Ltd and Meyrick and Associates, 2005, Promoting effective and competitive intra-ASEAN shipping services: The Philippines country report. Paper can be downloaded at <http://www.asan.org/archive/AADCP-REPSF-Project/Philippines.pdf> (accessed 27 May 2014).

both regulator and service provider, the PPA faces a conflict of roles in trying to safeguard free and fair competition in port services. For example, the PPA issues permits to construct and operate ports. As a grantor of these permits, it may insulate its own ports from competition by restricting permits. The PPA also sets port charges for handling non-own cargo and collects 50 per cent of these dues in taxes. The very low port charges in the Philippines have been cited as one of the main factors discouraging private investment in ports.³³ In 2013, the Department of Justice and the PPA agreed to conduct a study of the port sector which would assess the level of competition and the rules and regulations involved to improve efficiency, transparency and competition in this sector.

Fortunately, unlike the port sector, regulation has been promptly separated from operation in the telecommunications and electricity sectors. Section 5 of the Republic Act No. 7925, known as the "Public Telecommunication Policy Act of the Philippines", promulgated in 1995 prescribes that the NTC shall "foster fair and efficient market conduct through, but not limited to, the protection of telecommunications entities from unfair trade practices of other carriers" and "protect consumers against misuse of telecommunications entity's monopoly or quasi-monopolistic powers". Since conventional competition rules were not yet well developed back in 1995, there is very little elaboration on the nature of restrictive practices and possible prevention or remedies.

As a latecomer, competition provisions in the energy law are much more developed. Section 45 of the Electric Power Industry Reform Act of 2001 provides that "no participant in the electricity industry or any other person may engage in any anticompetitive behaviour including, but not limited to, cross-subsidization, price or market manipulation, or other unfair trade practices detrimental to the encouragement and protection of the contestable markets". Section 8 of the Rules and Regulations to Implement the Act stipulates that the ERC shall promulgate competition rules

prohibiting and specify appropriate remedies and penalties for restrictive practices. Consequently, the ERC issues "Competition Rules and Complaint Procedures" addressing anticompetitive agreements, misuse of market power and mergers and acquisitions and consolidation.

Among the three regulatory agencies, the most active in competition oversight is the ERC. In 2006, the ERC launched an investigation into the alleged price manipulation in the wholesale electricity market but found no *prima facie* case against the alleged violator. However, in its order to terminate the investigation, the Commission noted that the electricity market was not truly competitive and hence prone to market power abuse.³⁴ From then until recently, there has been no major investigation into any alleged restrictive practices in the energy sector. In December 2013, complaints for alleged collusion among generation companies to fix prices were filed and are currently being investigated by the ERC, as sector regulator, as well as the OFC, as competition authority of the country.

In the telecommunications sector, the NTC's anti-trust mandate prescribed by the "Public Telecommunications Policy Act" is rather broad but, unlike the ERC, the NTC has not yet established equivalent competition rules and guidelines required for effective implementation.

In 2012, the NTC gave approval to the controversial merger between the former State monopoly Telco, the PLDT, and Sun Cellular, the ailing smallest and most recent entrant in the three players' cellular market. The merger resulted in an entity that controlled 70 per cent of the cellular market. The duopolistic market raised widespread public concerns. According to Aldaba (2011), in the absence of an effective competition law, the deal is likely to stifle competition in the market given the formidable market barriers such as foreign equity restrictions, the need for Congressional franchise to provide telecom services and the access to radio spectrum.

To conclude, the enforcement of competition rules in regulated sectors until today is very limited. No competition cases have yet been brought to court by any of the bodies despite the fact that

³³ Discussion draft: Reforms in ports and shipping. The paper can be downloaded from <http://siteresources.worldbank.org/INTPHILIPPINES/Resources/DB12-Portsandshippingpolicybrief-June29.pdf> (accessed 21 May 2014).

³⁴ ERC case No. 2007-421 MC.

a number of these regulated markets appear to be highly concentrated and hence susceptible to restrictive practices.

3.2 Relationship between Office for Competition and sector regulators

The executive order 45 which created the OFC did not diminish the legal authority of these sector regulators. As a result, the Office has established an "Advocacy and Partnerships" working group one of whose major tasks is to develop and maintain relationships with the sector regulators. The Office also developed draft "Guidelines to govern the relationship between the Office of Competition (OFC) and sector regulators" that provide a framework for concurrent application of the competition law. The guidelines address key issues such as the operational relationship, notification and referral process, complaint handling and the exchange of information. With respect to the operational relationship, the guidelines stipulate that the sector regulator shall be responsible for technical and economic regulation, while the OFC will be responsible for competition enforcement to ensure consistent application of competition rules across sector. The guidelines also mention that the OFC may be involved in both technical and economic regulation in cases where regulatory capture is apparent, national interest or national emergencies are implicated, or as instructed by the President or the Secretary of Justice.

Although the guidelines appear to prescribe clear jurisdiction between itself and the regulatory agencies, compliance to the guideline is voluntary as the OFC has no legislative power over sector regulators. Nevertheless, the fact that the OFC reaches out to sector regulators is a move in the right direction in the quest to build an effective and consistent competition regime in the country.

It should be noted also that neither of the competition bills currently proposed by both the Senate and House³⁵ envisions the centralization of the competition authority. Pending bills stipulate that the power of the competition authority-to-

be shall be "cumulative" to the power and authority of the different government agencies over an industry or a sector of an industry and shall not in any way derogate the power and authority of the concerned agency. At the same time, these bills do not exempt regulated sectors with own regulatory body from the competition law. Both prescribe that "all government agencies shall cooperate and coordinate with one another in the exercise of their powers and to duties to prevent overlap, share information, or such other effective measures".

Section 4.4 of the *ASEAN Guidelines on Regional Competition Policy* entitled "Balancing sectoral regulation with national competition policy" provides that:

- (1) Member countries may exempt sectors with own regulator from the competition law.
- (2) Member countries could introduce concurrent regulation, with the national competition policy providing overarching template for pro-competition regulation.
- (3) In case where sectoral regulator handles competition, member countries could impose or recommend consultation or coordination between sector-specific regulators and the competition regulatory body for purposed of consistent application of competition functions across all sectors.
- (4) Member countries may establish a regular inter-agency forum or platform to enable competition regulatory body and sector specific regulators to work together to help reduce the conflict between regulators as well as "forum shopping" by regulated parties.

Although the bills advocate concurrent regulation, concrete details about the scope and method of cooperation and coordination are not prescribed. One House bill, for instance, touches upon the specific issue. It stipulates that the Competition Regulatory Body shall consult with the sectoral regulatory body when issuing guidelines of rules and regulations that are applicable to regulated industries.

However, the OFC version submitted to the sixteenth Congress proposes that jurisdiction in the

³⁵ Senate: version submitted during the first regular session of the fifteenth Congress. House: draft as of February 2011.

enforcement and regulation of all competition-related issues be vested in the competition authority.

Institutional aspects of the proposals in the Senate and House competition bills (fifteenth Congress)

The Senate and House competition bills share many common features in terms of the nature of prohibited acts, the scope of authority of the competition authority, enforcement and penalties, provisional clauses, and the like, although the House version contains more details. However, one marked difference between the two bills lies in the institutional design of the competition authority.

The Senate version proposes an office for competition in the Department of Justice, much like the current institutional structure of the OFC, but with legal power. The office would report to the Congressional Oversight on Competition to be composed of chairpersons of designated Senate and House Committees and two senators and two representatives nominated by the Senate President and the Speaker of the House Representatives. The office will be funded through annual General Appropriations Act with 10 million pesos for initial budget requirement.

The House version proposes an independent competition authority, the "Philippines fair competition commission" (PFCC). The commission shall be composed of a chairman and four associate commissioners. The chairman and two associate members shall be members of the Philippines Bar while the other two members shall be of recognized competence in the field of economics, commerce, accounting or financial management. All members are to be appointed by the President. Commissioners' compensation is benchmarked against that of Department Secretary for the Chairperson and Department Undersecretary for Associate commissioners. For budgetary purposes, the Commission will be funded through annual General Appropriations Act (through the Office of the President) with 100 million pesos for initial budget requirement. The Commission is allowed to keep all charges bar financial penalties.

Finally, the PFCC is to report to the Congressional Oversight on Competition as in the Senate's version. At a glance, it would appear that the House version envisions a competition office with a higher profile than that of its Senate counterpart with qualified commissioners and larger initial financial endowment as well as own revenue.

Section 4.3 of the *ASEAN Guidelines on Regional Competition Policy* entitled "Institutional Structure of Competition Regulatory Body (sic)" provides that:

- (1) Member countries may choose the appropriate institutional design of their respective competition authority be it a single independent authority, multiple sectoral authorities or a body within the government department of Ministry. It also stipulates that:
- (2) Member countries may grant a competition regulatory body as much administrative independence as necessary and as possible, to avoid political influence.
- (3) Member countries may determine that the competition authority's budget should be free from political considerations – i.e., separate the authority's budget from that of other governmental functions or make part of the budget dependent on income generated by the competition regulatory body.
- (4) Member countries should also determine whether they would establish an administrative appeal body which is independent of the competition regulatory body and executive Government or leave appeals to the judicial authority.

The institutional design of the competition authority proposed by both Senate and House competition bills is that of an agency under a government organization, namely, the Department of Justice in case of the Senate's version and the Office of the President in case of the House's version. Hence, the administrative and financial independence of the proposed competition agencies are potentially limited. However, the House's version does allow the competition authority to keep all income generated from performing its duties, bar financial penalties. Finally, both versions provide for an appeal to the judicial authority.

The UNCTAD Model Law on Competition³⁶ commentary makes it clear it is not possible to lay down how the authority should be integrated into the administrative or judicial machinery of the given country:

The present Model Law has been formulated on the assumption that probably the most efficient type of administrative authority is one which is a quasi-autonomous or independent body of the Government, with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., whilst at the same time providing for the possibility of recourse to a higher judicial body.

Of the two models proposed in the fifteenth Congress, the House version is the “most independent” structurally, and arguably less prone to political interference. In practice however, the Department of Justice currently has key criminal investigation and prosecution teams within it (the National Bureau of Investigation and the National Prosecution Service) which appear to be respected as professional enforcement/prosecution agencies.

Ultimately the decision on agency design has to be left to the Philippines – the balance of costs, efficiency, effectiveness and speed of implementation all need to be part of the decision while respecting the fact that the ultimate effectiveness of a competition authority is heavily reliant on the perception of independence from political interference.

The institutions involved in the enforcement process

The practical considerations of the enforcement framework within the DOJ need to be understood to fully appreciate the issues of institutional design within the Philippines.

Executive order 45 which created the OFC also recognizes the DOJ as the principal legal counsel and prosecution arm of the Government. It is important to understand how the enforcement

elements within the DOJ play a role as an enforcement matter progresses. Firstly, just what are the various elements that play a role in the DOJ?

Office of the Government Corporate Council: Supplies legal advice and representation to some regulators and government-owned corporations.

Office of the Solicitor General: Represents a number of regulators before appellate and supreme courts.

National Bureau of Investigation (NBI): is the prime agency responsible for criminal investigations. Completes criminal investigations it believes “display probable cause to warrant prosecution” which are then sent to the National Prosecution Service (NPS).

National Prosecution Service: is charged with independently determining if there is probable cause to lodge criminal charges. In the first instance, on the basis of sworn affidavits, complaint and supporting evidence, if the NPS is satisfied there is probable cause, the respondent will be notified. The “preliminary investigation” (conducted by the NPS) is an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof, and should be held for trial. If the NPS establishes the prima facie case, the matter is immediately filed in court.

Due to the lack of a comprehensive law against monopoly, there has been very little jurisprudence on the matter. Until now, the most important case is that of the Philippine Supreme Court’s denial of a petition to declare null and void the amended by-laws of a large manufacturing company that sought to disqualify any stockholder from being nominated to its board of directors when he/she is engaged in a competing business. The Supreme Court held that a monopoly can be attained by various means, including a joint management. It further said that competition can be frustrated if a competitor has access to the pricing policy and cost conditions of the company.

In another case, the Supreme Court determined that an exclusivity clause which prohibited the sales personnel of a direct selling enterprise from carrying or selling its competitor’s products was not per se void. The probability that such act serves

³⁶ Paragraph 160 of the 2010 Model Law on Competition, published at the direction of Intergovernmental Group of Experts on Competition Law and Policy, tenth session, 7–9 July 2009 (available at http://unctad.org/es/Docs/tdrbpconf7d8_en.pdf, accessed 21 May 2014).

to foreclose competition, which would affect public interest, would have to be established.³⁷

While the lack of competition law cases has meant there is almost no jurisprudence on the current laws, that same lack of enforcement results in a somewhat untested process. The OFC currently has NBI staff seconded to it, in addition to the current Enforcement Division, in a bid to build an investigation capacity.

The effectiveness of this institutional arrangement is yet to be tested – the workload of the NBI and the NPS must be an issue as is the overall staffing levels of the OFC. Other than a reference³⁸ indicating that a two- to five-year delay is created by the process of preliminary investigation, it is not clear what time frame should be expected if a criminal competition case is brought to the NPS and ultimately the court. Based on conversations with staff of the OFC and NBI it is not unreasonable to think in terms of years to bring a competition case to conclusion. Just as the time frame for a prosecution to be successfully managed is unknown, the capacity of the NBI and the NPS to handle a new workload is equally unknown.

4. The Office for Competition – key initiatives for the first 33 months

As previously reported, the establishment of the OFC by executive order 45 was a significant step towards the development of an economy-wide competition regime. Notwithstanding that the OFC was established by executive order in June 2011 without any new legislative tools, the significance of this competition authority cannot be ignored. For this reason it is useful to document the major activities and achievements of this relatively new organization.

A great deal of work was needed to deliver an organization in a manner consistent with the executive order. In an impressive display, by October 2011, the Secretary of the DOJ issued department order No. 844 formally organizing the OFC

and designated Assistant Secretary Geronimo L. Sy as the Assistant Secretary in charge. Thus the first competition authority of the Philippines was born.

By January 2012, the OFC had adopted a dictum, vision, mission and a set of principles or values:³⁹

DICTUM – Advancing Economic Justice for All.

VISION – A just and peaceful society anchored on the principles of transparency, accountability, fairness and truth.

MISSION – Toward the effective, efficient and equitable administration of justice, specifically economic justice, that promotes a culture of competition and levels the playing field by providing guidance and enforcing competition policy and law.

PRINCIPLES – Fairness, Accountability, and Transparency Rules –based, Respect for Market Dynamics Consultative and Participative.

The Office has also established a structure, as described in figure 1.

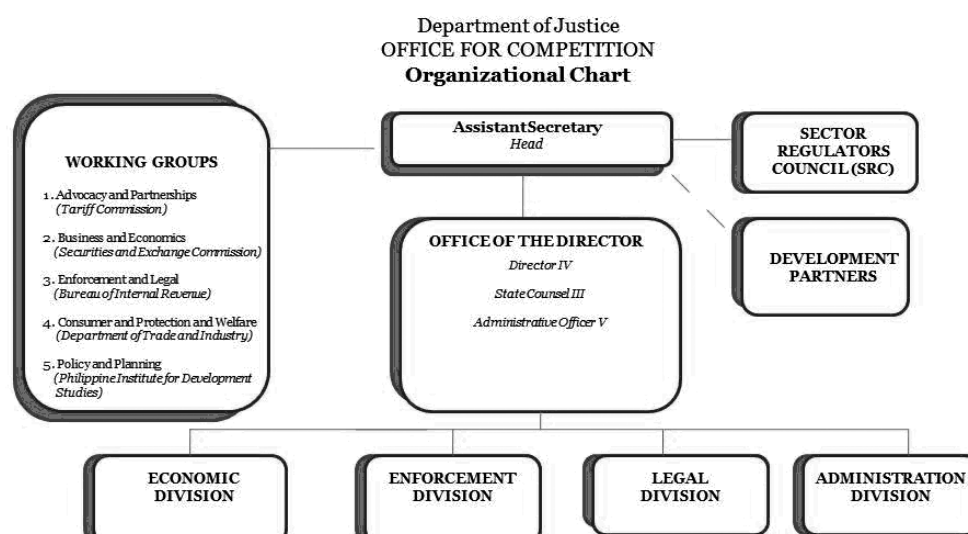
The immediate focus of this new competition authority on enunciating clear fundamental values is important. In the Philippines, given the levels of perceived corruption and inequalities, the OFC is to be commended for being very open and transparent about some core values – concepts such as transparency, accountability, fairness and truth may not seem as critical in a well-established administration, but in the Philippines it is a crucial element.

To operationalize these core values through the implementation of priority programmes and initiatives, the President through the Department of Budget and Management approved budgetary allocation for OFC as a separate regular item in the General Appropriations Act. The OFC was initially granted 4.975 million pesos (\$110,556) for capital outlay. For support to operations, 7.525 million pesos (\$167,222) each was allotted for fiscal years 2012 and 2013. This was increased to 10.144 million pesos (\$225,422), inclusive of personal services, for fiscal year 2014.

³⁷ antitrustasia.com: Competition in the Philippines: A market overview (available at <http://antitrustasia.com/competition-law?region=south+east+asia&country=philippines>, accessed 21 May 2014).

³⁸ Proceedings of the first National Criminal Justice Summit. Presentation ASS Sec Sy – Page 39–41.

³⁹ OFC, 2012, “Year 1 report and Strategic Plan of Action”, available at http://www.aseancompetition.org/resources/articles_publications/2012-07/ofc-year-1-report-and-strategic-plan-action (accessed 1 May 2014).

Figure 1. The structure of the Philippines OFC

In the early stages of operations, the OFC had only two full-time staff. Currently, there are 15 full-time lawyers and economists comprising mainly the Legal Division and the Economics Division. Based on the organizational table developed by the OFC, the creation of additional legal and economics divisions is expected within the year.

This strategic direction addresses the need for the OFC “to be staffed with permanent, full-time personnel” as mentioned in the Assessment of Needs and Strategic Planning Report prepared by the United States Agency for International Development (USAID) and the American Bar Association – Rule of Law Initiative (ABA–ROLI) on 12 February 2012.

The OFC has recognized the need to work in a manner that is both complementary and cooperative with sector regulators. To deliver against the functions defined in executive order 45, working groups have been established, with each being co-chaired by a representative of the sector regulators. The working groups and functions can be summarized as follows:

Advocacy and Partnerships: co-chaired by the Tariff Commission

Develop and maintain relationships with Philippine sector regulators as well as with

foreign competition authorities and international organizations;

Prepare an annual update/accomplishment report of the Advocacy and Partnerships Working Group, for submission to the OFC;

Develop public information materials for dissemination to stakeholders.

Business and Economics: co-chaired by Securities and Exchange Commission

Monitor transactions reported involving mergers of corporations, acquisitions, consolidations, and other anticompetitive conduct in the market or concerned industries;

Call on government enforcement agencies to provide assistance in determining whether certain corporate behaviour monitored in the market is potentially anticompetitive;

Develop a system of exchange of information or, in certain instances, a procedure where the Business and Economics Working Group will be provided with ease of access and information, free of charge, from relevant government agencies.

Enforcement and Legal: co-chaired by the Bureau of Internal Revenue

Provide OFC advisory opinion;

Develop guidelines for investigation and referral to the NBI and the NPS;

Propose methods or tools to ensure that persons or entities adhere to the prohibitions and requirements of competition law.

Consumer Protection and Welfare: co-chaired by the DTI

Develop a cooperative arrangement and formal understanding about the distinctions between overlapping areas of competition policy and consumer protection;

Conduct regular consultations or dialogues with consumers and/or consumer groups to discuss relevant issues on a particular market;

Issue advisories on relevant laws, issuances or cases affecting consumers which will ultimately empower them to make rational choices.

Policy and Planning: co-chaired by the Philippine Institute for Development Studies

Develop templates for studies and reports a competition;

Conduct annual strategic planning and prepare a comprehensive plan for the OFC;

Study and recommend amendments to pending legislation related to competition.

In this initial phase of establishing a workable competition authority, this working-party approach with high level engagement by other key regulators is sensible and likely to assist the overall ideal of cross-sector cooperation. The working groups themselves are not expected to deliver results but rather contribute to an environment in which the economic and enforcement divisions of the OFC can excel.

The Secretary of the DOJ has issued draft guidelines designed to better explain how the OFC and sector regulators would work together as required to comply with executive order 45. The guidelines look to add helpful explanations for referral processes, complaint handling, and the relationship between technical regulation, economic regulation and competition enforcement. The scope of this challenge is highlighted by the number of regulators listed in this guide-

line: a total of 63 sectoral agencies have been identified.

The OFC likewise issued its first policy paper entitled "Cooperation for competition: The role and functions of a competition authority and sector regulatory agencies", designed to develop a framework for the interface between the OFC and sector regulators.

In another document⁴⁰ a detailed set of guidelines have been promulgated to govern the OFC's exercise of its mandate and functions. This document reflects a desire to be transparent and accountable with timeframes for initial investigations and for subsequent legal action if approved by the Secretary of Justice.

While in some jurisdictions the competition and consumer laws are administered by the one authority, the Philippines approach, along the lines of the United States model, has the consumer protection laws administered by the DTI, Consumer Protection and Advocacy Bureau (formerly Bureau of Trade Regulation and Consumer Protection). In recognition of the important linkage between competition and consumer protection laws, the fourth working group, co-chaired by the DTI, has a clear objective to develop clear linkages and communication channels between the two important regulatory bodies.

5. Enforcement action

The OFC has put in place mechanisms to ensure transparency and predictability in enforcement. These include issuances such as the executive order No. 45; implementing guidelines that provide, among others, the procedures for case investigation; legal representation guidelines that enable the OFC and sector regulators to effectively perform their mandates and fulfil statutory duties by providing them with adequate legal assistance; DTI-DOJ memorandum of agreement for a complaint-handling system for violations of competition and consumer welfare laws; and advisory opinions on legal and consumer protection matters.

Policy papers and case studies on competition issues were developed and sector studies in tele-

⁴⁰ DOJ Circular No. 011 – effective 1 March 2013.

Table 3. Enforcement action matrix as of June 30, 2013⁴²

	No. of cases received	Pending assessment	With initial assessment	Written Decision			Advisory Opinion Issued
				Terminated/ no further OFC action required	Endorsed/ referred to appropriate agency/body	Endorsed to NPS for Preliminary Investigation	
A. Competition Cases							
1. Anti-competitive agreements							
1.1. Horizontal agreements	4	3			1		
1.2. Vertical agreements	2		2				
1.3. Bid rigging	1		1				
2. Abuse of dominance	3	2	1				
3. Mergers and acquisitions	1			1			
B. General Query	2				1		1
C. Others	8	4	2	2			
TOTAL	21	9	6	3	2	0	1

communications, energy and transport are ongoing preparation.⁴¹ The OFC established the Sector Regulators Council (SRC) for clustering of sectors and case investigation. Similarly, a set of enforcement guidelines as well as an updated complaint-handling system are currently being developed and programmed to be issued by the second quarter of 2014.

Despite a deficient set of laws, the OFC has commenced investigation of a number of alleged breaches. According to the OFC's "Year 2 report", a cumulative total of 21 cases are recorded in the OFC files; 15 cases reported in year one and 6 in year two. Out of that number, 7 had been resolved and/or their investigations closed, while the remaining 14 are under ongoing assessment as can be seen in table 3. The OFC reported that the first cartel case involving liquefied petroleum gas dealers was filed in 2012. The case is now under a motion for reconsideration.

The OFC as currently structured is clearly a transition structure toward an organization backed with comprehensive legislation. In so many ways the current OFC is hamstrung by the inadequate law.

⁴¹ The OFC published its first case study on customs, immigration and quarantine in 2013.

That said, the work being undertaken by the OFC will allow rapid impact when legislation is passed and a new competition body is established, be it internal to the DOJ or an independent statutory body. No matter what implementation model is adopted the fundamentals of cooperation amongst sector regulators will be crucial, and has been a major focus of the current OFC.

6. Competition advocacy

Competition advocacy can be an extremely important function for a competition authority in developing economies where the promulgation of laws and regulations are not properly assessed of their impact on market competition. Many monopolies or oligopolies can be traced back to state policies or regulations that serve to restrict market entry or favour a dominant incumbent over smaller competitors or potential new entrants.

Executive order No. 45, which establishes the OFC, does not spell out the agency's advocacy role. It appears to focus on its adjudicative responsibilities of enforcing fragmented competition provisions under different laws and the monitoring of trade practices in the market. The competition

⁴² Source: The OFC's "Year 2 report".

bills of both the Senate and the House put similar emphasis on adjudication although both prescribes that the competition authority “proposes legislation for the regulation of commerce, trade or industry”.

As a nascent competition authority, the OFC is still in the early stages of developing a comprehensive competition advocacy plan. The plan aims to broaden the scope of advocacy and not just to establishing partnerships with other government agencies responsible for enforcing competition rules such as the sector regulators including the Tariff Commission, the Securities and Exchange Commissions, the DTI, and the Philippine Institute for Development Studies for research work on competition. The method by which the partnership is fostered is to invite these organizations to co-chair the various working groups it has established.

Chapter 9 of the *ASEAN Regional Guidelines on Competition Policy* entitled “Advocacy and outreach” stipulates that member countries may consider educating businesses, judges, public prosecutors and other government agencies, civil society, academia and consumers about competition law and policy in order to build a competition culture. The guidelines also stipulate that member countries may entrust the competition authority with the role of advising the Government and other public authorities on policies related to competition. In particular, regulatory barriers to competition resulting from economic or administrative regulations may be assessed by the competition authority from a competition perspective.

The OFC and the Tariff Commission have done much advocacy work with the private sector. As an office under the Department of Justice, the OFC also has naturally strong ties with judges, public prosecutors and investigators. However, consumers and civil society, the other major key stakeholders, are not yet fully aware of the competition law or policy. The OFC, as well as the regulatory authorities proposed in both the Senate and the House bills, are also not given the mandate to provide the Government advice on competition matters.

To drum up its advocacy and as the key indicator of its work, the OFC published and disseminated its year 1 and year 2 annual reports to national and international partners. Regular consultations with business organizations and industry associations were likewise undertaken to promote voluntary compliance to competition laws.

It may be true that the absence of a workable competition law limits the capacity of the OFC to engage in meaningful advocacy and outreach. Despite this limitation, the OFC has been active with a number of formal sessions conducted since 2012 – often with assistance of international organizations. The following events were actively attended by a combined total of 300 participants from sector regulators, business groups, judges, legislators, media, investigators, prosecutors and the OFC:

1. Seminar: Competition policy and law: An introduction and the role of sector regulators;
2. Workshop: Tools and techniques for detection and investigation of anti-competitive practices with focus on cartels;
3. Seminar: Theory of competition law, case handling and investigative techniques;
4. Forum: Competition policy and law and the media;
5. Training on competition assessment, sector analysis and relevant markets
6. Round Table Discussion with Judges on Competition Policy and Law
7. Business and consumer forum on competition policy and law;
8. Training on sector analysis;
9. Advanced training on competition policy and law;
10. Promoting competition through policy and regulation: Application of remedies;
11. Identifying the challenges and competition issues in the expansion and growth of Manila's seaborne trade;
12. Grounding water: The human rights-based approach to water for all;
13. Principles on competition policy and law for judges;

14. Competition policy and law and investigative techniques for prosecutors and investigators.

In addition to these specific events a module has been developed on competition policy and law and has been accredited for mandatory continuing legal education. Furthermore, the OFC launched the first ever introductory course on competition policy and law for law and business degree students at a premier university in the country.

As a further part of the effort to gain focus on competition law the 5 December 2012 was the first day to be celebrated as National Competition Day having been proclaimed by the President based on recommendations of the OFC. Since 2012, the OFC has led annual observances of the National Competition Day nationwide with the support of sector regulators and the academic community.

The OFC has identified an ongoing commitment to advocacy as a key priority within the current Strategic Plan as follows: "Preparation of long term advocacy plan including regular updating of OFC website, publication of IEC materials, and advocacy programmes for business (with a focus on SME's), consumer, media, academic and related groups/sectors".

7. International cooperation and technical assistance

The OFC Year 1 Report states:

Members of OFC have been to workshops and seminars in Japan, Viet Nam, Singapore, Korea [the Republic of Korea], Thailand, Laos [the Lao People's Democratic Republic], Indonesia, Brunei and Australia. OFC has established relationships with organizations including Japan International Cooperation Agency (JICA), European Union (EU), German Cooperation Agency (GIZ), American Bar Association – Rule of Law Initiative (ABA-ROLI), United States Agency for International Development (USAID) and World Bank–International Finance Corporation (WB–IFC).

In addition to participation in the events mentioned, OFC has taken an active role in the ASEAN Experts Group on Competition (AEGC) – elected as chair for 2013–2014. Its key initiatives as such include the following:

1. Development of a memorandum of understanding on regional cooperation on CPL with

the aim of setting the groundwork for cooperation in enforcement, information sharing, and technical assistance;

2. Development and implementation of sector studies focused on sectors with significant consumer impact;
3. Categorization of AEGC documents for the effective management of knowledge assets of competition authorities;
4. Measuring the effectiveness of AMSs individually and collectively as ASEAN through major indicators.

The OFC is now recognized across the ASEAN and international community as the central agency implementing competition law and policy within the Philippines. Its dynamic relations with regional bodies and other competition agencies have paved the way for improved cooperation. One such body is the International Competition Network of which the OFC has been a member since 2012. The OFC also entered into a memorandum of cooperation with the Japan Fair Trade Commission in August 2013 for harmonized competition law enforcement and technical assistance. In addition, the OFC hosted key regional events including the East Asia Conference on Competition Policy, the East Asia Top Level Officials Meeting, and AEGC meetings and workshops, and will spearhead the organization of the fourth ASEAN Competition Conference in July 2014.

The OFC has gone beyond the technical assistance that is often available through these international agencies. The strategic planning that has been mentioned in an earlier chapter has been performed with support of ABA–ROLI and US-AID.⁴³ This strategic planning importantly recognizes the need for "a non-trivial number of highly skilled practitioners" when discussing the need for economists.

In some ways the Philippines OFC is in a wonderful position – so much work has been done on the strategic planning needed to effectively implement a new law as a result of the creation of the OFC by executive order.

The challenge facing the OFC should not be underestimated. It has seriously engaged with the

⁴³ Strategic Planning Session of 15 February 2012

international community including volunteering to participate in the UNCTAD Peer Review programme. It has also received technical assistance from overseas mainly the Japan International Cooperation Agency, German Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), the European Union, the Asia Pacific Economic Cooperation, the United States Department of Justice, the United States Federal Trade Commission and United States Agency for International Development. Interestingly, the technical assistance programmes received have been targeted not only at OFC officials, but also officials of the sectoral regulators, law students and businesses. This is a positive sign for building awareness across a broad range of stakeholders of competition law and policy.

Perhaps the greatest challenge facing the OFC is to devise methodologies to ensure learning from international visitation and or training workshops is institutionalized. In the early days in the existence of any organization there is a real risk that internal systems are not mature enough to adequately capture the arrival of new information and translate it into systems and procedures for the ongoing benefit of the organization. The OFC focus on documentation to date suggests there is an awareness of this risk. To address these concerns, the OFC developed a basic knowledge management system where all international meetings, trainings and conferences attended and those organized locally, including formal and informal consultations with global competition experts, are properly documented and disseminated internally and to relevant stakeholders as necessary.

Summary of Technical Assistance as of March 2014⁴⁴

1. European Union (EU) – Trade Related Technical Assistant (TRTA) Project 3
 - Conduct of workshops for the -
 - Mapping of laws, rules and regulations involving the energy sector
 - Market study in the energy sector

- Joint cooperation between concerned energy regulator and the OFC
2. Japan International Cooperation Agency (JICA) – National Comprehensive Competition Policy Phase 2
 - Conduct of workshops for justices, judges, prosecutors, investigators and sector regulators
 3. Asia Pacific Economic Cooperation (APEC) – Improving the Capacity of Competition Authorities of Developing Economies in Competition Policy Assessment and Advocacy
 - Development of competition checklist with assistance from experts and in consultation with sector regulators
 - Preparation of indicators of effectiveness of competition checklist
 - Conduct of training on competition assessment and regulatory impact assessment (RIA) for staff of OFC and relevant sector regulators using the competition checklist
 - Conduct of and preparation of report on competition assessment and RIA
 - Conduct of workshop to develop a framework for competition advocacy
 - Implementation of advocacy plan through a series of forums/seminars and distribution of information materials
 4. US Federal Trade Commission (FTC), US Department of Justice (DOJ) and US Agency for International Development (USAID)
 - Conduct of Legal Writing Workshop and related trainings
 5. German Cooperation Agency (GIZ)
 - Support for the conduct of national and international workshops

Overall, it can be said that the country has made meaningful strides in implementing competition policy and law through the OFC's programmes and initiatives thus far. These have translated into improved performance in global rankings for key indicators, as follows:

⁴⁴ Excerpt from the OFC Work and Financial Plan 2014

Corruption Perceptions Index	2010	2011	2012	2016 targets
	134	129	105	59
Ease of Doing Business	2012	2013	2014	
	136	138	108	62
Global Competitiveness Index	2011–2012	2012–2013	2013–2014	
	75	65	59	48

8. Observations and recommendations

It is impossible to progress to detailed observations about competition law without firstly acknowledging the ongoing challenge of removing corruption and perceptions of inequality from the community. Slogans such as “no corruption, no poverty” and “corruption steals from the poor” appear as part of the push to crack down on corruption. The extent to which corruption impacts on consideration of laws cannot be underestimated – as an example, a proposal for a law that would provide police with the power to stop a motor vehicle driver and test for excessive alcohol was met with widespread concern at the scope for this law to entrench corrupt practices. The argument about the effectiveness of the law is derailed into an argument about the likely conduct of police who may in a corrupt manner extort money from drivers, perhaps unrelated to the actual alcohol test result. This example demonstrates that any or in fact all laws need to be administered in a manner that is understood by the wider community to be fair, transparent and just. While this may not be an easy thing to deliver, it is clear the OFC has started life with this in mind. In fact, the OFC has prepared a second policy paper entitled “Governance in the enforcement of competition policy and law” that discusses the best mechanism for effective competition policy and law enforcement.

It is reported that the President of the Philippines has used his power of veto on as many as 200 laws during the fifteenth Congress – many of these being local laws. Discussion on this previously very rarely used authority suggests that the veto has been applied where the President sees practical challenges in applying the law as drafted, and the potential for unintended consequences. While the legislative process provides for the houses to jointly deal with such situations there is no record that any bill vetoed by the President has

subsequently been enacted by vote of the two houses. This trend would suggest the President is using his power to significantly contribute to the reform process to ensure that new laws do not bring any further inequalities/unfairness to the community even where it is unintended.

The current law and potential new law

The existing laws in the Philippines do not deliver a comprehensive competition framework. The need for a new set of laws is well documented, with the recent bills before the fifteenth Congress being a practical demonstration that a comprehensive competition law is close. Exactly how close is impossible to measure.

The current law offers very little in the way of economy-wide competition law. On the other hand there is a vast number of sector-specific regulators with legislative frameworks to enforce. Until the creation of the OFC by issue of executive order No. 45 in 2011, there was no cross-sector co-ordination mechanism designed to try and deliver any level of consistency.

While the OFC model is a very positive step, it is clear that there is a lack of a unified law to support the role that has been established through the executive order.

Recommendation: A comprehensive competition law applying to all parts of the economy should be drafted and passed into law through the parliamentary process at the earliest opportunity.

Two issues that are worthy of mention as a new law is being contemplated are the question of exemptions, and the level of independence of the regulator.

Many competition laws provide exemptions for international liner cargo services. At least one of the bills before the fifteenth Congress offers this exemption. Sensibly, there are also exemptions for what may be termed industrial bargaining for employees, but no other exemptions appear to be seriously under consideration.

There are examples across the world for an economy-wide law that provides exemptions in circumstances where the public benefit outweighs the competitive detriment. Should any exemptions be contemplated a test of this type should be part of such an exemption.

Recommendation: Any new law should be designed as an “economy-wide” law with very limited scope for exemptions unless a public benefit test is written into the law.

The discussion of competition bills before the fifteenth Congress has in part been side tracked to a discussion about the merits of an independent regulator versus an “in house” regulator. While there may be good arguments around this issue, including financial implications, it is important not to lose sight of the fact that criminal prosecutions initiated by either version of a regulator will be directed to the National Prosecution Service within the DOJ. Equally both the in house and independent regulator will require funding. It is not clear that funding direct from the Office of the President is any more independent than funding through the DOJ.

Having made the observations above, it was reported by several parties that very few “independent bodies” in the Philippines are truly independent – the Central Bank was cited by several as the institution that comes closest. These observations serve to emphasize the importance of a robust funding model that respects the independence of the regulator, especially in the eyes of the wider community.

Far more important than the question of so-called independence is the question of adequate and ongoing funding. In this context there is often a call for the regulator to have incentive for activity by adopting a financial model that allows the regulator to keep any fines and penalties collected.

The advocates of this model argue the regulator then has a powerful motivator to drive it to be an active and tough enforcer of the law.

While there is no evidence within the Philippines to support or oppose this proposal, extreme caution is needed if considering any so-called self-funded model as a vehicle in support of independence. The goal for a regulator of competition law ought to be a healthy and robust economy with vigorous competition delivering high-quality goods and services to meet consumer demand. A regulator should not be influenced by the potential to collect penalties as opposed to delivering effective competition. In a so-called self-funded model there is no incentive to educate, to encourage compliance, or to assist business to adopt best-practice compliance systems. Given the Philippines has a long history without effective laws, the first priority for a number of years has to be delivering education, advocacy and support as a vital part of an enforcement regime. A mix of traditional enforcement actions with the educative package is most likely to deliver widespread compliance. A self-funded model creates a perverse incentive to firstly allow business to breach the law, and then act. The delivery of outcomes to consumers is thus delayed and perhaps defeated.

Recommendation: Any new regulatory model should be adequately funded to deliver traditional enforcement together with education, advocacy and business support. The concept of the agency being self-funded by retaining monies levied as penalties or fines should be avoided due to the perverse incentives it creates.

Recommendation: Any new regulatory model should be established in a manner that has considered the call for independence from political interference within the UNCTAD Model Law on Competition, and is likely to be perceived by the wider community as effectively independent of the political system.

The criminal standard of proof

The existing laws in the Philippines offer criminal penalties when an offence can be proven before the court. As with all criminal offences in the Phil-

ippines, the burden of proof for such offences is the very high criminal burden – beyond reasonable doubt. If the consequences of an offence being proven includes the potential to jail the alleged offender, I fully appreciate the need for this high standard of proof is clear.

The proposals for new laws before the fifteenth Congress also include criminal offences.

Is it realistic to frame competition law in this criminal environment?

The American Bar Association – Rule of Law Initiative⁴⁵ notes: “The OFC will receive complaints involving alleged monopolies and non-cartel horizontal and vertical restraints. These types of allegations involve complex assessments of the operation of competition within a defined market, and typically do not lend themselves to proof beyond reasonable doubt that would be required for NPS prosecutions. Rather, such allegations are typically treated as non-criminal offenses by the vast majority of competition agencies”.

The pursuit of competition law offenders as criminals is not unique to the Philippines. The real issue is the extent to which a lesser offence with lesser burden of proof may be desirable.

It is worth extending this discussion a little by contemplating how a new competition law will be implemented. A traditional view of any new law would be to encourage early prosecution and very public demonstration of the consequences of unlawful conduct. In the competition law sphere, this would equate to an early detection of cartel conduct and the imprisonment of a senior official of a participating company. Here lies a problem with the criminal regime. Discussion with officials within the various arms of the DOJ indicate that the time frame to progress a criminal prosecution to judgement will be measured in years not months – and that is without an alleged offender making full use of the appeal provisions in the justice system. It is clear, as a result of this significant time lag, criminal prosecutions alone will not be the mechanism to drive an early compliance with the new law.

That said, the view that the only way to drive a change away from the culture of cartel behaviour is to send some company directors to jail was argued by the Australian regulator when specific criminal sanctions were under consideration by the legislators.

The competition regulator, be they “independent” or “internal”, armed with a comprehensive new law that meets all of the criteria recommended by ASEAN guidelines will still face a major challenge of how to implement the law in a manner that encourages the commercial sector to quickly become compliant. Perhaps not surprisingly, the toolbox of the regulator will need to include criminal, civil and administrative sanctions along with educational/advocacy efforts.

Recommendation: The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements and the lengthy time frame for such cases to progress drive a need to consider all options to quickly drive compliance.

Administrative penalties

The Price Act, which has been discussed at length in this report, provides for significant administrative penalties after due notice and hearing. Given the challenges of criminal prosecution it appears that the most realistic penalty for an offender under this law will be an administrative penalty to a maximum of 1 million pesos.

The bills before the fifteenth Congress provide for administrative penalties within the range 10 million pesos to 50 million pesos for a natural person. Penalties for a firm range from 250 million to 750 million pesos. These are very significant penalties and will need to be administered in a manner that is both consistent and transparent. While there is no competition law, it is not possible to test the administration of penalties under that law, but it is possible to review the processes used in the DTI to get a feel for the likely process.

The comprehensive procedures in place for the implementation of administrative sanctions under the Price Act serve as a fine example of a process

⁴⁵ United States Agency for International Development, American Bar Association Rule of Law Initiative “Assessment of Needs and Strategic Planning Report”, 21 February 2012, page 32.

that attempts to afford alleged offenders with all of the rights a party will have when taken before a court while at the same time removing some of the processes that may be viewed as delaying justice. Given the potential for penalties to a maximum of 1 million pesos, the existence of appeal mechanisms is also important. Importantly, the appeal mechanisms include scope to appeal via the court system – the Court of Appeals.

The administrative penalty as provided for in the Price Act and the proposed competition laws is a penalty without reference to an independent judicial body. Some parties may argue that the competition regulator must be independent if it has the power to impose penalties of up to 750 million pesos. In a community where there is a long standing suspicion about the fairness and equity of some government agency decisions, it seems inevitable there will be suspicion surrounding decisions to impose or not to impose penalties and the size of those penalties.

Recommendation: Clear guidelines should be produced explaining decision making, evidence-taking, hearings and appeal rights for the administration of any penalty regime included in any new competition laws.

Concept of joint and several liability

A feature of both bills before the 15th Congress is a provision dealing with the joint and several liability of company officers. The Senate bill⁴⁶ says in part “Whenever a corporation, partnership, association, firm or other entity, whether domestic or foreign, shall commit any violations under this Act, the chairman of the board of directors, executive officers of the firm, the general partners of a partnership and employees directly responsible, shall be jointly and severally liable with the firm for any sanction or fines imposed under this Act.”

This is an extremely important feature of a competition enforcement regime – the capacity to hold a number of natural persons liable, and prevent the corporate shield from removing any incentive to comply is vital.

To ensure the concept of joint and several liability has maximum impact it is important that any such provision in a new law extends to all and any financial sanctions that may be imposed for a contravention.

Recommendation: Any competition law should contain a provision to ensure, where the offender is a corporation, partnership, association, firm or other entity, that the financial liabilities are joint and several directed against directors, executive officers, general partners, and the like.

Dealing with leniency policy, whistle-blowers and “attempted unlawful conduct”

Competition Law needs to be framed to provide a basis to deal with both anticompetitive conduct and attempted anticompetitive conduct. Attempted conduct may be in the form of an approach to share a market (a cartel) or an attempt to prevent competition by threatening to refuse supply (vertical constraint) or an attempt to manipulate price in a tender process.

It is important that the attempt to contravene the law is dealt with as harshly as the actual conduct. This is significant when a leniency provision is contemplated, as it has been in both the bills before the fifteenth Congress. While the language of the leniency provisions as drafted is in terms of a candidate for leniency only being eligible if they are not the “most guilty”, a preferred model is to frame the provision in terms of “not the initiator”. If the law has an offense of “attempted conduct”, the party approached can effectively become a whistle-blower. In terms of the draft bills, they would not be an applicant for leniency as they did not participate in an unlawful agreement. There is merit in a model that offers some form of graduated leniency rather than just a 100 per cent protection from prosecution.

The point at issue is to ensure there is an adequate provision to create the offense of an attempt and at the same time an adequate protection for a whistle-blower. At the very minimum this protection must at least be as good as that offered a leniency applicant.

⁴⁶ Senate bill No. 3098, fifteenth Congress, section 23 – Violation by corporation, partnership, association, or other entity.

While discussing this topic it is worth considering the protections offered to potential witnesses be they whistle-blowers, leniency applicants or simply citizens who have somehow become a witness of some relevant fact.

The foregoing concern may be addressed by the Witness Protection Programme under DOJ as an established mechanism that encourages a person who has witnessed or has knowledge of the commission of a crime to testify before a court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation.

This report has not fully explored the extent and effectiveness of whistle-blower type protections in the Philippines but there is no doubt that criminal cases will struggle without effective and trusted (by the commercial sector) witness protection.

Recommendation: Any new regime must include a leniency regime, whistle-blower protection and an offence for attempted anticompetitive conduct to be truly effective. Consideration should be given to the concept of leniency, not just immunity.

The capacity of DOJ prosecution regime

As discussed in chapter 3, a number of agencies have a role in the pursuit of criminal offences as envisaged by the draft laws. To quickly recapitulate, the regime will have OFC staff investigating and collecting evidence, NBI staff assisting and also collecting evidence, NPS staff conducting the preliminary investigation and if a decision is taken to proceed to court, prosecuting the case before the Regional Trial Court.

Even in the event of a decision to proceed with an administrative penalty a number of these staff will be involved together with the potential for other DOJ staff to be involved in the event of an appeal – of either the decision to prosecute or to appeal the administrative penalty.

The collection of evidence in the complex area of competition law can be demanding – evidence

has to be collected to properly identify the conduct itself (the facts) and then in many cases economic evidence presented to define the market in both product and geographic dimensions.

It is understood the current NBI at the national level is made up of some 700 agents – roughly 300 special agents (may be any number of degree qualifications), 200 lawyers and 300 CPA's. The focus of this agency is to deal with any offences within the penal law with a clear mandate to deal with fraud and public corruption. The NBI does not get drawn into petty crime.

Even with a focus limited to criminal conduct and major issues the workload for NBI agents is significant, with an agent likely to have up to 100 cases a year to deal with. This sort of workload does not sit comfortably with the prospect of a raft of new laws and potential new investigations in the competition law space. For those cases demanding an understanding of economic evidence the burden will be even greater – put bluntly, the gathering of evidence in competition cases is a specialist area of the law. Clearly, NBI staff can be trained and developed to ensure competencies in this new law, but it will be at a cost – either other matters will have to be set aside or additional agents funded and recruited.

Just as importantly, OFC staff, or whatever a new regulator is called, may wish to use special powers, such as entering premises on warrant, and the like. These skills would currently be well established within the NBI – but not to any extent established within the OFC. This will again be a drain on the NBI.

The OFC is to be commended for already having NBI staff seconded to work within the ranks of the OFC. It is clear that the OFC leadership understands that there is a capacity-building challenge ahead. Notwithstanding this awareness, it is of concern that a failure to properly appreciate the resource demands from within the NBI will impact negatively on the implementation of any new competition law regime.

Recommendation: Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the NBI and NPS.

The judiciary – capacity

The OFC has already engaged in some advocacy and capacity building work including some early work in the education of legal professionals with an information/education event held with a number of judges early in 2013. As with much of the early education/advocacy work that has been undertaken, the OFC are to be commended for recognizing the judiciary as a target audience.

The challenge for the judiciary is common with judiciary in many jurisdictions – the competition law cases will be relatively small in number but potentially complex in evidentiary material with the potential for complex economic argument to be tabled in support of market definitions. There may well be an argument for a dedicated group of judges to be allocated to deal with this part of the law. For example, if the Supreme Court determined there was a demand for a Commercial Division, this type of specialty court would be ideal to deal with Competition cases.

Recommendation: The OFC maintain a relationship with the judiciary to ensure the court is well versed in any new law, and equally in the demands that will be placed on the court when cases are presented for adjudication. This relationship must respect the independence of the court officers of course but can be managed in a manner that is beneficial to both the regulator and the judiciary.

The enforcement task

The challenge of managing the evidence gathering and prosecution tasks associated with enforcing Competition Law has already been touched on. It is equally important to consider the range of skills needed to deliver the full range of an enforcement regime.

Effectively enforcing a new law demands a range of initiatives – ideally the approach of the regulator should be to employ an enforcement strategy that is sufficient to engender compliance. In some cases, a breach of the law may be effectively halted by educating an individual or a firm of the new law. In other cases there may be a need to put in place some form of undertaking to in ef-

fect put the firm into a type of probationary status. Administrative penalty is a more severe sanction but even that will have a tailored aspect to it to ensure the penalty being imposed is in some way appropriately linked to the nature of the offending conduct. At the extreme end of the enforcement options is the criminal sanctions, including jail terms for offenders.

The structure of the regulatory body and the staffing of that same body needs to recognize this is a complex task – especially in the early days of a new law. There will be pressure to prosecute cases before the court as this is the only way to develop the law – jurisprudence helps interpret the law and only results from contests before the court. The reality for a competition regulator is that this will take time – many years. The range of enforcement tools cannot all be put on hold waiting for the courts to interpret and develop the law. The administration (be it within DOJ or independent) will need to develop an enforcement policy to help the broader commercial sector understand what this regulator is about.

Linked to the enforcement task but not part of that task is the need to have capacity to undertake market analyses – clearly there is a need to understand various markets and the potential for anticompetitive conduct to be influencing the consumer experience in a negative way. The skills to perform this work is not necessarily based on the same skills needed for those officers at the sharp end of evidence gathering and prosecution activity. After a series of trainings on sector studies and market analysis, the OFC is now preparing studies and inquiries in the transport, energy and telecommunications sectors. The OFC has likewise developed training modules for judges, investigators and sector regulators that include basic economic concepts.

Recommendation: The OFC continue the work it has already commenced to ensure they build capacity in all facets of administration of an effective Competition law. Consideration be given to ongoing engagement both the ASEAN community and the wider international community to assist developing skills and policies in this critical area. Early consideration be given to approaches that take advantage of social media and the latest technology.

Public awareness – a complaint handling regime

The OFC has recognized in its Strategic Plan the need for a complaints handling process. This is far more important than just having a robust internal process so that matters are managed and not lost. This internal process needs to be a key pillar on which public confidence is built.

Given the history of the Philippines and the apparent lack of confidence that the government regulators can or will apply the law without fear or favour, the existence of a system that can be used to publicly report on the number and nature of complaints being received and the actions those complaints have triggered is vital.

The OFC has already delivered a first year report and indicated a plan to continue annual reporting.

This type of reporting contributes significantly to the building of public awareness and confidence. Again, this is even more so in the early days of a new law as the delays in prosecution processes will mean it takes time for the hard edged enforcement outcomes to be available to publicize – but there are stages of enforcement that can be reported.

Recommendation: The OFC proceed with development of a complaint handling regime and a reporting regime that will contribute toward the building of public confidence.

9. Summary of Recommendations

The recommendations are best considered when grouped into those directed towards legislators, Government and/or agency officials.

Directed to legislators

A comprehensive competition law applying to all parts of the economy should be drafted and passed into law through the parliamentary process at the earliest opportunity.

Any new law should be designed as an “economy wide” law with very limited scope for exemptions unless a public benefit test is written into the law.

Any new regulatory model should be established in a manner that has considered the call for independence from political interference within the UNCTAD Model Law on Competition, and is likely to be perceived by the wider community as effectively independent of the political system.

The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements, together with the lengthy time frame for such cases to be processed require that all options are considered to quickly drive compliance.

Any competition law should contain a provision to ensure that, where the offender is a corporation, partnership, association, firm or other entity, the financial liabilities are joint and several directed against directors, executive officers, general partners, and the like.

Any new regime must include a leniency regime, whistle-blower protection and an offence for attempted anticompetitive conduct to be truly effective. Consideration should be given to the concept of leniency and not just immunity.

Directed to Government

Any new regulatory model should be adequately funded to deliver traditional enforcement together with education, advocacy and business support. The concept of the agency being self-funded by retaining monies levied as penalties or fines should be avoided due to the perverse incentives this creates.

Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the NBI and NPS.

Directed to agency officials

The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements, together with the lengthy time frame for such cases to be processed require that all options are considered to quickly drive compliance. (Duplicated in legislator section.)

Clear guidelines need to be produced explaining decision-making, evidence-taking, hearings and appeal rights for the administration of any penalty regime included in any new competition laws.

The OFC should maintain a relationship with the judiciary to ensure the court is well versed in any new law, and equally in the demands that will be placed on the court when cases are presented for adjudication. This relationship must, of course, respect the independence of the court officers, but can be managed in a manner that is beneficial to both the regulator and the judiciary.

The OFC should continue the work it has already commenced to ensure capacity is built in all facets of the administration of an effective competition law. Consideration should be given to ongoing engagement within the ASEAN community and the wider international community to assist in the development of skills and policies in this critical area. Early consideration should be given to approaches that take advantage of social media and the latest technology.

The OFC should proceed with the development of a complaint-handling regime and a reporting regime that will contribute towards the building of public confidence.

