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DAWN RAIDS:

INVESTIGATING VIOLATIONS OF THE PHILIPPINE COMPETITION ACT

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I. COMPETITION: A FUNDAMENTAL PRINCIPLE UNDERLINED IN SCARLET

In 1997, the Supreme Court promulgated the ruling in *Tatad v. Secretary of Energy*,[1] described by the pen of Chief Justice Puno as one of the small number of cases that "carry a surpassing importance on the life of every Filipino." The Court struck down the Downstream Oil Deregulation Act of 1996[2] for being in violation of Section 19, Article XII of the 1987 Constitution, which states that:[3]

> SECTION 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

Amidst the backdrop of oil deregulation, a pressing issue at that time, the Court identified, emphasized, and in the words of Chief Justice Puno, "underlined in scarlet" the fundamental principle behind Section 19, Article XII of the 1987 Constitution: competition. According to the Court, "the desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies."[4]

A testament to the virtues of competition is the extensive dissolution of monopolies and the liberalization and privatization of industries at the dawn of the 20th century brought about by the developments and innovations in transportation, communication, and manufacturing industries, among others.[5] At the background of this shift is a movement in economic thought hinged on the growing

1 Tatad v. Secretary of Energy, 346 Phil. 321 (1997) [hereinafter Tatad].

2 Rep. Act No. 8180 (1996).

3 CONST. art. XII, sec. 19.

4 Tatad, *supra* note 1.

5 MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 1-2 (2005) [hereinafter MOTTA].

consensus that the public is better off with open markets, rather than with an economy concentrated in the hands of a few, or even state-planned economies.[6] It is believed that through competition, consumers' needs and wants will be met at the lowest price while sacrificing the fewest possible resources.[7]

"Competition" translates to "contention" or "struggle for dominance."[8] In the context of commerce, competition means vying for the business and patronage of consumers in the marketplace over time.[9] Firms compete for a slice of the pie in a number of ways, such as by lowering prices, introducing better products or services, or a combination of these. A competitive market environment necessitates investment in newer methodologies and technologies, making it a primary driver of efficiency and innovation.[10] It also encourages entrants, providing consumers with a wider array of choices. Thus, a highly competitive market benefits consumers as it results in lower prices, better products and services, and more options.

This economic principle is embodied not only in Article XII, Section 19 of the 1987 Constitution but in fact even in Article XIV, Section 2 of the 1973 Constitution. It states:

> The State shall regulate or prohibit private monopolies when the public interest so requires. No combination in restraint of trade or unfair competition shall be allowed. [11]

Finally, this policy which has long been constitutionally recognized has been crystallized into a landmark piece of legislation.

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6 RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 4 (8th ed. 2015).; See also Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 4 (1973).

7 Tatad, *supra* note 1.

8 RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 4 (8th ed. 2015) [hereinafter WHISH].

9 *Id.*

10 *Id.*

11 CONST. (1973), art. XIV, sec. 2.

II. THE PHILIPPINE COMPETITION ACT

At the heart of competition policy is competition law and in 2015, the legislature passed Republic Act No. 10667, otherwise known as the Philippine Competition Act ("PCA").

Prior to the enactment of the PCA, the country's competition policy was embodied in various laws and Supreme Court decisions. Article 186 of the Revised Penal Code[12] was the primary statutory provision penalizing monopolies and combinations in restraint of trade. Apart from this, competition policy was sector-based in approach, with the country having more than 30 competition laws for various industries. In a move to centralize and ensure effective implementation, the Department of Justice ("DOJ") was designated as the country's competition authority in 2011. Pursuant to this, the DOJ created the Office for Competition ("OFC")[13] which was tasked to enforce competition laws, investigate and prosecute criminal cases

12 REV. PEN. CODE, art. 186. Monopolies and combinations in restraint of trade. — The penalty of *prision correccional* 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 part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or 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 and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market;

3. Any person who, being a manufacturer, producer, or processor of any merchandise or object of 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, of 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, or imported merchandise or object of commerce is used.

If the offense mentioned in this article affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of prision mayor in its maximum and medium periods it being sufficient for the imposition thereof that the initial steps have been taken toward carrying out the purposes of the combination.

Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippines.

Whenever any of the offenses described above is committed by a corporation or association, the president and each one of its agents or representatives in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offense, shall be held liable as principals thereof.

13 Exec. Order No. 45 (2011), 107 O.G. 29, 3334 (July 18, 2011).

involving violations of competition laws, and supervise market competition. Still, the need for a comprehensive competition law persisted.

After two long decades since the first bill was filed in Congress, the Philippine Competition Act was passed. Welcomed as a game-changer, it transformed a general policy declaration into a concrete national competition policy framework with enabling tools for implementation. Furthermore, it created a separate central body mandated to implement the law.

The PCA aims to foster a culture of competition across all types of businesses in all industries – big or small, old or startups, multinational or homegrown. The goal is two-pronged: on one hand, it creates a level playing field for entry and growth of businesses; on the other hand, it promotes consumer welfare.[14]

Inasmuch as competition is primarily an economic concept, the PCA is a unique piece of legislation in that it is a merger of two disciplines: law and economics. As a legal instrument, the PCA provides for the legal standards, i.e. what are the prohibitions, the tests for determining violations, and the penalties. However, economics provides the tools for determining or proving whether such legal standards have been met.[15] In other words, it is economic analysis within a legal framework.

The PCA draws heavily from the Treaty on the Functioning of the European Union ("TFEU"),[16] and the Sherman Act,[17] Clayton Antitrust Act,[18] Federal Trade Commission Act[19] and the Hart-Scott-Rodino Act[20] of the United States. Thus, similar to these laws, there are also three types of prohibited acts under the PCA, referred to as the three pillars: **anti-competitive agreements** (Section 14), **abuse of**

14 Rep. Act No. 10667 (2015), sec. 2.

15 GUNNAR NIELS ET AL, ECONOMICS FOR COMPETITION LAWYERS 2-4 (2nd ed. 2016) [hereinafter NEILS].

16 Consolidated Version of the Treaty on the Functioning of the European Union arts. 101-102, June 7, 2016, 2016 O.J. (C 202).

17 Sherman Antitrust Act of 1890 15 U.S.C. §§ 1-38 (2018).

18 Clayton Antitrust Act of 1914 15 U.S.C. § 12-27 (2018).

19 Federal Trade Commission Act of 1914 15 U.S. Code § 41-77 (2018).

20 Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 U.S.C. § 18a (2018).

dominant position (Section 15), and **anti-competitive mergers and acquisitions** (Section 16). Engaging in any of these prohibited acts may result in criminal, administrative and civil liabilities.

The PCA also created the Philippine Competition Commission ("PCC"), an independent quasi-judicial body mandated to implement the provisions of the PCA. As a quasi-judicial body, PCC has the "power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law."[21] It also has the power to gather and investigate facts related to a subject matter under its jurisdiction.

In order to delineate its investigative, prosecutorial, and adjudicatory functions, the PCC adopted the administrative model followed by competition authorities around the world with similar powers. This model observes an internal firewall between the body performing the adjudicatory functions from the offices performing the investigative and prosecutorial functions. This is to safeguard due process and preserve the impartiality of the adjudicating body.

PCC performs its adjudicatory functions through its Commissioners, composed of a Chairman and four (4) Commissioners ("Commission").[22] The Commission conducts hearings and render decisions and orders on violations of the PCA. It also determines whether a merger or acquisition should be prohibited due to a finding of substantial lessening of competition.[23]

On the other hand, PCC performs its fact-finding and investigative functions through the Competition Enforcement Office ("CEO"), Mergers and Acquisitions Office ("MAO"), and the Economics Office, which are all under the Office of the Executive Director. In accordance with the administrative model adopted by PCC, the powers of inspection granted under Section 12(g) of the PCA will be exercised by CEO and MAO in the performance of their investigative functions.

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21 Smart Communications Inc. v. National Telecommunications Commission, 456 Phil. 145 (2003).

22 Rep Act No. 10667 (2015), sec. 6.

23 Rep Act No. 10667 (2015), sec. 12(a).; PCC Rules of Procedure (2017), Rule IV, sec. 4.55.

III. "DAWN RAIDS" AS AN INVESTIGATIVE TOOL IN COMPETITION CASES

Investigating competition cases is challenging and different from criminal investigations. For one, a common crime leaves physical evidence of the *corpus delicti*, *e.g.* a dead body in a murder case. The corpus delicti also tends to bear traces of direct evidence that link the culprit to the crime, *e.g.* fingerprints, DNA. In contrast, the "corpus delicti" in a competition case is more abstract—the competition that (previously existed) was lost. Physical and direct evidence is thus elusive. Several layers of proof are necessary: proof of the conduct; proof of the entity responsible for the conduct; and proof that the conduct adversely affected competition, which in turn requires first proof of the competition that was lost, lessened, restricted, or prevented by such conduct.

In practice, therefore, most cases are built by piecing together various circumstantial evidence which tend to point to the conclusion that if not for the agreement or conduct in question, the market would have been competitive or more competitive. Thus, the task of the investigator is to obtain such quantity and quality of evidence – whether direct, indirect or circumstantial, which are usually in the hands of the erring entities themselves and could easily be concealed or destroyed.

To address this challenge, competition authorities all over the world have utilized an investigation tool known in competition parlance as "dawn raids." Contrary to its name, dawn raids are not necessarily raids conducted at dawn. A dawn raid, rather, is an unannounced search of business premises of entities subject of an investigation. Dawn raids provide direct access to documentary evidence that can establish conspiracy, or to other pieces of evidence that may support overt acts of anti-competitive agreements or conduct. These pieces of information would otherwise be concealed or destroyed by the involved entities.

Dawn raids have seen a rise in recent years in international competition enforcement. In 2004, Japan raided a number of Intel offices based on a suspicion that Intel puts unfair pressure on Japanese companies to use its chips exclusively. Significant information was uncovered by reason of the dawn raid, and in 2005, the Japan Fair Trade Commission ("JFTC") imposed conditions on Intel upon finding that the corporation engaged in anti-competitive conduct.[24] Meanwhile, in 2017, based on evidence gathered during a dawn raid, the Italian Competition Authority found that BMW, Daimler, FCA Italy, Ford, General Motors, Renault, Toyota, and Volkswagen had schemed together with their respective captive banks to fix the terms and conditions of the financing and leasing of new cars.[25] With the success of international enforcement, cooperation between jurisdictions produced fruitful results. In 2009, the European Commission conducted a successful joint dawn raid with Brazilian and United States competition authorities in the premises of an international refrigerator compressor cartel. It was found during the coordinated dawn raid that the cartel members exchanged confidential market information and fixed prices during numerous meetings between the parties. The inspections were carried out simultaneously in Brazil, the United States, and some countries in the EU.[26]

In the ASEAN region, cartels have widened their operations on an intra-regional level.[27] This intensified the use of dawn raids as an investigation tool. In 2014, the Competition and Consumer Commission of Singapore ("CCCS") considered the results of the dawn raid conducted by the JFTC on four Japanese bearings manufacturers in formulating its own decision against the said entities. In 2018, the CCCS placed a record-breaking penalty of SGD27 Million against 13 fresh chicken distributors based on

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24 *Intel Accepts Japan Fair-Trade Order*, Los Angeles Times (Apr. 1, 2005). https://www.latimes.com/archives/la-xpm-2005-apr-01-fi-intel1-story.html.

25 Jan Schwartz & Andreas Cremer, *EU Raids Daimler and VW in Widening Cartel Inquiry*, Reuters (2017), https://www.reuters.com/article/us-eu-antitrust-volkswagen/eu-raids-daimler-and-vw-in-widening-cartel-inquiry-idUSKBN1CS1OK (last visited Apr 10, 2019).

26 Case COMP/39406, Marine Hoses, 2009 EUR-Lex CELEX LEXIS 52009XC0721(01) (Jan. 28, 2009).

27 Association of Southeast Asian Nations [ASEAN], *ASEAN Regional Guidelines on Competition Policy* (2010), https://asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy.

evidence gathered during the dawn raids they conducted. CCCS' investigations started in 2014 and concluded in 2018.[28]

Inspection Powers of Competition Authorities

Remarkably, most competition authorities have the power to conduct dawn raids or inspections. In some jurisdictions, the competition agency can conduct an inspection on its own authority. In others, a court order is required before the agency can conduct an inspection. These include the United States, United Kingdom, Australia, Germany, Sweden, Austria, Belgium, Germany, Denmark, Estonia, France, Hungary, Ireland, Lithuania, Latvia, and Poland. Some jurisdictions would only require a court order if exceptional circumstances exist, such as Estonia, Poland, France, Spain, Italy, Luxembourg, Malta, Cyprus and Finland. For example, in Italy, a court-issued search warrant is only necessary when inspectors are met with opposition from the entities being inspected.[29] Otherwise, these jurisdictions allow the competition agency to conduct an inspection based on its own order.

28 Singapore, Competition and Consumer Comm'n of Singapore, CCCS Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel, (2014), http://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/ccs-imposes-penalties-on-ball-bearings-manufacturers-involved-in-international-cartel.; Singapore, Competition and Consumer Comm'n of Singapore, CCCS Penalises Fresh Chicken Distributors for Price-fixing and Non-compete Agreements (2018), https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/fresh-chicken-distributors-penalised-by-cccs-12-sept-18.

29 European Competition Network [ECN], *ECN Working Group Cooperation Issues and Due Process: Investigative Process Report* at 2-15 (Oct. 21, 2012) [hereinafter Report].

The table below summarizes the inspection powers of different jurisdictions:

	Power to Conduct Inspections	Authority derived from		Standard Used	Who Conducts Inspection	Must there be an on-going investigation
		Inspection Decision of CA	Court Order			
Philippines	✓		✓	RS	CA	Yes
USA	✓		✓	PC	DOJ	Yes
Mexico	✓	✓		RS	CA	Yes
Singapore	✓	✓(1)	✓(2)	RS	CA	Yes
Malaysia	✓	✓(1)	✓(2)	RS	CA	Yes
Japan	✓	✓(1)	✓(2)		CA	Yes
Korea	✓	✓		RS	CA	Yes
Australia	✓		✓	RS	CA	Yes
Austria	✓		✓	RS	CA	No
Belgium	✓	✓		RS	CA	No
Bulgaria	✓		✓	RS	CA	Yes
Cyprus	✓	✓		N/A	CA	Yes
Czech Rep	✓	✓		RS	CA	Yes
Germany	✓		✓	RS	CA	No
Denmark	✓		✓	RS	CA	No
Estonia	✓	✓(1)	✓(2)	RS	CA	No
Greece	✓	✓		RS	CA	No
Spain	✓	✓	when opposed	RS	CA	No
Finland	✓	✓		N/A	CA	No
France	✓	✓(1)	✓(2)	RS	CA	Yes
Hungary	✓		✓	RS	CA	Yes
Ireland	✓		✓	RS	CA	No
Italy	✓	✓	when opposed	RS	CA	Yes
Latvia	✓	✓		RS	CA	No
Lithuania	✓		✓	RS	CA	Yes
Luxembourg	✓	✓	when opposed	RS	CA	Yes
Malta	✓	✓	when opposed	RS	CA	Yes
Netherlands	✓	✓		RS	CA	No
Poland	✓	✓(1)	✓(2)	RS	CA	No
Portugal	✓		✓	RS	CA	Yes
Romania	✓	✓		RS	CA	Yes
Slovenia	✓	✓		RS	CA	No
Slovakia	✓	✓		N/A	CA	No
Sweden	✓		✓	RS	CA	No
UK	✓		✓	RS	CA	No

Table 1. Comparison of Inspection Powers of Competition Agencies in the Philippines, United States, and the European Union. [30]
Legend: RS = reasonable suspicion; PC = probable cause; DOJ = Department of Justice; CA = Competition Authority

30 *Id.*

Whether an inspection order can be issued by the competition agency itself or by a court, jurisdictions establish a legal standard for the issuance of an inspection order. In the European Union, for example, all jurisdictions have the power to conduct inspections[31] but subject to standards that prevent the violation of fundamental rights of persons.[32] The most common standard is "reasonable suspicion," that is, the existence of reasonable grounds to suspect that an entity has violated provisions of the competition laws. A study prepared by the European Competition Network[33] compares the standards used by various jurisdictions. Belgium, Cyprus, Hungary, Lithuania, Portugal, and Romania require that inspections conducted by the antitrust agency be related to an investigation already commenced. The Czech Republic, France, and Luxembourg adopted the same requisite in practice.[34]

Subject to the standard adopted by the jurisdiction, investigators are generally empowered to perform the following during a dawn raid: (i) enter premises, including land and vehicles, of entities subject of the investigation; (ii) examine their books and other records related to their business; (iii) take or obtain, in any form, copies of extracts from such books or records; (iv) seal any business premises, books or records for the period necessary for the inspection; and (v) ask any representative of the entities for explanations on facts or documents relating to the subject matter of the inspection and to record their answers.[35]

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31 Council Regulation 1/2003, art. 20(2) O.J. L 1, 4.1.2003 [hereinafter Regulation].

The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

c) to take or obtain in any form copies of or extracts from such books or records;

d) to seal any business premises, books or records for the period and to the extent necessary for the inspection;

e) to ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject matter of the inspection and to record the answers.

32 *Id.* preamble 37. This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

33 Report, *supra* note 29 at 8.

34 *Id.*

35 Regulation, *supra* note 31.

Dawn raids under the PCA

Following international best practice, Section 12(g) of the PCA grants PCC the power to, "upon order of the court, undertake inspections of business premises and other offices, land and vehicles, as used by the entity, where it reasonably suspects that relevant books, tax records, or other documents which relate to any matter relevant to the investigation are kept, in order to prevent the removal, concealment, tampering with, or destruction of the books, records, or other documents[.]"[36] Section 12(g) gives PCC the power to conduct inspections but requires PCC to secure a court order in order to exercise such power.

Similar to other jurisdictions, Section 12(g) also establishes a legal standard: reasonable suspicion that relevant books, tax records, or other documents which relate to any matter relevant to the investigation are kept in the business premises and other offices, land and vehicles. This standard requires that: (i) there is an ongoing investigation; (ii) there is reasonable suspicion that books, tax records, or other documents are kept in the place or vehicle to be inspected; (iii) the books, tax records, and documents subject of inspection are relevant to the investigation; and (iv) the purpose of the inspection is to prevent the removal, concealment, tampering with, or destruction of the books, records, or other documents.

Notably, the standard under Section 12(g) is only reasonable suspicion, and such reasonable suspicion does not pertain to the violation but to the fact that the information sought to be searched is found in the premises. This lower standard is consistent with the standard applied to administrative searches by competition authorities in other jurisdictions as well as administrative searches by other government agencies in the Philippines.

In the United States, the Supreme Court held that the use of a standard less than probable cause in administrative searches does not violate the constitutional right to due process.

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36 Rep. Act 10667 (2015), sec. 12(g).

In the Philippines, other administrative agencies with investigative functions are empowered to conduct surprise inspections, a power which they have exercised throughout the years in pursuit of their own legislative mandates. For example, the Bureau of Customs[37] and the Department of Labor and Employment[38] are armed with investigative powers that include the power to inspect business premises.

The Rule on Administrative Search and Inspection under the PCA

Pursuant to the requirement of a court order under Section 12(g), the Supreme Court promulgated The Rule on Administrative Search and Inspection under the Philippine Competition Act ("Rule"). In accordance with the legal standard and framework set forth in Section 12(g), the Rule lays down the procedure for applying for and issuance of an inspection order. It adapts applicable provisions from the special rules for searches and seizure in civil actions for infringement of intellectual property rights ("IPO Rules")[39] and the rule on cybercrime warrants.[40] The Rule also draws from pertinent provisions of the EU Council Regulation on the implementation of the rules on competition ("Council Regulation"), as well as the inspection rules of France and the United States.[41]

Under the Rule, Special Commercial Courts in Quezon City, City of Manila, Makati City, Pasig City, Cebu City, Iloilo City, Davao City and Cagayan de Oro City shall have authority to act on applications for the issuance of inspection orders, enforceable nationwide. The Special Commercial Courts in the judicial regions where the place to be inspected is located shall have concurrent jurisdiction. Where inspection of multiple locations is sought for the same investigation, any of the Special Commercial Courts in Quezon City, Manila, Makati, Pasig, Cebu City, Iloilo City, Davao City and Cagayan de Oro City and Special Commercial Courts in the judicial regions of the places to be inspected may issue an inspection order.[42]

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37 Rep. Act. No. 9135 (2001), sec. 2356.

38 Labor Code, art. 128(a).

39 Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights.

40 Rule on Cybercrime Warrants.

41 Regulation, *supra* note 31.; Code de Commerce [C.com.] [Commercial Code], art. L-450-4 (Fr.).; Hong Kong, Hong Kong Competition Commission, Guidelines on Investigations (2015).; Fed. R. Crim. P. 41.

42 Rule on Administrative Search and Inspection under the Philippine Competition Act, sec. 3 [hereinafter Rule].

Incidentally, the Supreme Court has designated Special Commercial Courts as competition courts to hear, try, and decide cases involving violations of the PCA and other competition laws. The resolution came into effect on January 1, 2020.[43]

An inspection order shall be issued upon application by a duly authorized officer of CEO or MAO. The inspection order authorizes the duly authorized officers of CEO/MAO and other duly deputized law enforcement agencies to search and inspect the particular business premises and other offices, land and vehicles, for information.[44]

An application for inspection order shall be verified and contain a particular description of the subject of the administrative investigation, the premises, other offices, land or vehicles, as used by the entity, sought to be searched or inspected, and the information sought to be examined, copied, photographed, recorded, or printed, and their relevance and necessity to the investigation.[45] Similar to the IPO Rules,[46] the hearing on the application shall be conducted *ex parte*, and the application shall be acted upon within twenty-four hours from its filing. Due to the nature of the inspection to be conducted, the proceedings on the application for an inspection order shall be kept confidential.[47]

In evaluating the application, the judge shall personally examine in the form of searching questions and answers, in writing and under oath or affirmation, the applicant and the witnesses on facts personally known to them;[48] or on facts based on: (i) the applicant's or witnesses' training and/or experience; (ii) authentic records; (iii) verifiable data; or (iv) economic analysis. In the Rule, the judge shall determine whether the applicant has reasonable ground to suspect that the information is kept, found, stored, or accessible at the premises indicated in the application. Thus, PCC as applicant must demonstrate: (i) reasonable ground to suspect that the information is

43 A.M. No. 19-08-06-SC.

44 Rule, *supra* note 42, sec. 2.

45 Rule, *supra* note 42, sec. 4.

46 Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights, sec. 2.

47 Rule, *supra* note 42, sec. 5.

48 Rule on Cybercrime Warrants, sec. 2. 4.

application; (ii) the information relates to any matter relevant to the investigation; and (iii) the issuance of the order is necessary to prevent the removal, concealment, tampering with, or destruction of the books, records, or other documents to be inspected.[49]

To reiterate, the judge must only be satisfied that there is *reasonable suspicion* that the relevant information is kept, found, stored, or accessible at the premises indicated in the application. This is different from the probable cause standard for searches under Article III, Section 2 of the 1987 Constitution and in Section 4, Rule 126 of the Rules of Court in connection with the specific offense or infringement.

The Commission's power of inspection under Section 12(g) of the PCA is first and foremost an **administrative search**. Administrative searches, as distinguished from the searches under Article III of the 1987 Constitution and Rule 126 of the Rules of Court, are conducted by administrative agencies based on a standard lower than probable cause. For example, under the visitorial powers of the Secretary of Labor, it is not necessary to establish probable cause that violations of the provisions of the Labor Code occurred in order to conduct inspections of employer premises.[50]

A long line of jurisprudence in the United States shows that administrative searches on the basis of a standard less than probable cause are allowed. In *United States v. Morton Salt*,[51] the Supreme Court stated that:

> *[o]f course, a government inspection into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant*

49 RULE, *supra* note 42, sec. 6.

50 LABOR CODE, art. 128(a). The Secretary of Labor and Employment or his duly authorized representatives, including labor regulation officers, shall have access to employer's records and premises at any time of the day or night whenever work is being undertaken therein, and the right to copy therefrom, to question any employee and investigate any fact, condition or matter which may be necessary to determine violations or which may aid in the enforcement of this Code and of any labor law, wage order or rules and regulations issued pursuant thereto.

51 United States v. Morton Salt 338 U.S. 632 (1950) (Emphasis supplied).

In *See v. City of Seattle*,[52] the Supreme Court held that administrative inspectors are not exempted from the requirement of obtaining a warrant before performing inspections of business premises. However, the only requisite to obtaining a warrant is to show the courts that the need for the search warrant passes the criterion of reasonableness – that is, that the existence of an "*administrative probable cause*" supports the issuance of the warrant and not unjustifiably burdens the inspection programs. Meanwhile, in the EU, European Courts apply the *proportionality principle* in cases involving inspections by competition authorities. The *proportionality principle* is a general principle of EU law codified under Article 5(4) of the Treaty on the European Union, which states that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." As long as the test of proportionality is met, the EU Courts uphold the validity of inspections in competition cases.[53]

The criterion of reasonableness was made to apply in *Marshall v. Barlow's, Inc*.[54] In this case, the Supreme Court held that in order to satisfy the requirements of the Fourth Amendment,[55] the Occupational Safety and Health Administration (OSHA) must obtain a search warrant from a competent court prior to exercising its power to conduct non-consensual inspections pursuant to its enabling act. However, an administrative agency is not required to establish the same level of probable cause as conventional searches and seizures. The Supreme Court further held that for the purpose of obtaining a search warrant, the OSHA only needs to establish that **"the reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment."**[56] One of the reasons cited by the Supreme Court for requiring a less stringent quantum of evidence to establish probable

52 See v. City of Seattle 387 U.S. 541 (1967); See also Camara v. Municipal Court 387 U.S. 523 (1967).

53 Case 136/79, National Panasonic v. Commission, 109 E.C.R.2033.; Joined Cases 46/87 and 227/88, Hoechst AG v Comm'n, 1989 EUR-Lex CELEX LEXIS 61987CJ0046 (Sept. 21, 1989).

54 Marshall v. Barlow's 436 U.S. 307 (1978).

55 U.S. Const. amend. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seiz0ed.

56 Marshall v. Barlow's 436 U.S. 307 (1978).

cause for administrative searches is that administrative searches are conducted in furtherance of a strong public interest.[57]

Using the criterion of reasonableness, the United States Supreme Court has allowed administrative bodies to obtain search warrants on the basis of some standard of reasonableness lower than probable cause. More specifically, *Barlow's*,[58] which is the controlling rule in the application of search warrants for administrative inspections, states that only "reasonable legislative or administrative standards for conducting an inspection" need to be satisfied.

Consistent with *Barlow's*, Section 12(g) of the PCA provides for the standard of **reasonable suspicion** and that an investigation[59] must have been commenced. Both serve as a preliminary check on the exercise of inspection powers. It must also be emphasized that as adapted from EU Council Regulation,[60] the information collected pursuant to the inspection order shall be used only in administrative proceedings for violations under the PCA and other competition laws.[61] If an inspection order is improperly issued or implemented, the person or entity whose premises were inspected may move for the quashal of the inspection order.[62]

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57 Marshall v. Barlow's 436 U.S. 307 (1978).

58 Marshall v. Barlow's 436 U.S. 307 (1978).

59 Rep. Act No. 10667 (2015), sec. 12(g), sec. 31. Fact Finding; Preliminary Inquiry. – The Commission, motu proprio, or upon the filing of a verified complaint by an interested party or upon referral by a regulatory agency, shall have the sole and exclusive authority to initiate and conduct a fact-finding or preliminary inquiry for the enforcement of this Act based on reasonable grounds.

The Commission, after considering the statements made, or documents or articles produced in the course of the fact-finding or preliminary inquiry, shall terminate the same by:

(a) Issuing a resolution ordering its closure if no violation or infringement of this Act is found; or

(b) Issuing a resolution to proceed, on the basis of reasonable grounds, to the conduct of a full administrative investigation.

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60 Regulation, *supra* note 31.

61 RULE, supra note 42, sec. 20.

62 RULE, supra note 42, sec. 13.

Information that may be the subject of inspection includes, but is not limited to, books, tax records, documents, papers, accounts, letters, photographs, objects, or tangible things.[63] Following the Hong Kong Competition Commission's guidelines on investigations,[64] authorized officers may also inspect databases and means of accessing information contained in such databases, and electronically stored information (as defined in the applicable rules of procedure of the PCC) which relate to any matter relevant to the administrative investigation.[65] As adapted from Rule 27 of the Rules of Court,[66] the inspection order also gives permission to the duly authorized officers of CEO/MAO, deputies, or agents, to examine, copy, photograph, copy, record, and print such information in order to prevent the removal, concealment, tampering with, or destruction of such information.[67]

IV. INVESTIGATING COMPETITION CASES: SECTIONS 14, 15, 16 OF THE PCA

PCC's inspection powers will be used, *when necessary*, in investigating violations of the PCA. It is therefore appropriate at this point to discuss the nature and elements of these violations as well as the investigation and evidence required to determine if indeed there was an infringement of the law.

There are three main types of violations under the PCA that could be subject of a competition investigation: **anti-competitive agreements** (Section 14), **abuse of dominant position** (Section 15), and **anti-competitive mergers and acquisitions** (Section 16).

63 RULE, *supra* note 42, sec. 2.

64 HONG KONG, HONG KONG COMPETITION COMMISSION, GUIDELINES ON INVESTIGATIONS (2015).

65 RULE, *supra* note 42, sec. 2.

66 RULES OF COURT, Rule 27, sec. 1.

67 RULE, *supra* note 42, sec. 2.

Test: Substantial Lessening of Competition

In determining whether there is a violation of the PCA, the overall test is whether the agreement or act has the object or effect of substantially preventing, restricting, or lessening competition ("SLC").

This test has three components: (i) object or effect; (ii) prevention, restriction, or lessening of competition; and (iii) substantial. This means that: (i) the agreement or conduct must have the object, evinced through an analysis of the overall legal and commercial context in which the act is pursued, or otherwise has an effect, determined through an economic analysis of the result on competition and consumer welfare; (ii) the agreement or conduct prevents, restricts, or lessens competition among competitors; and (iii) such effect is substantial. An agreement, conduct, or merger or acquisition results in SLC when it substantially reduces the competitive incentive of entities to lower prices, improve products or services, or innovate and become more efficient over time.[68]

Although SLC is a legal standard, it is established through economic analysis. It is necessary to consider many factors, including: actual or potential state of competition in the market, barriers to entry, level of market concentration, the characteristics of the market including dynamism, growth, and innovation, and product or service differentiation.[69] These criteria are determined using economic tools, such as market surveys, statistical analysis, regression analysis, and economic modelling.

As the determination of PCA violations is an administrative proceeding, the quantum of proof necessary to establish SLC is substantial evidence – that is, "the amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[70]

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68 Richard Whish & David Bailey, Competition Law 932 (7th ed. 2012).

69 *Id*. at 932-940.

70 Miro v. Mendoza, 721 Phil. 772 (2013).

Relevant Market

In order to assess whether or not an agreement, conduct, or merger or acquisition results in SLC, it is necessary to look at the market which is affected by such agreement, conduct, or merger or acquisition. This market is known as the "relevant market." The definition of the relevant market is fundamental in competition cases as it separates the goods and services that compete with one another from those that do not.[71] It aids in the assessment of market power which would enable a firm to dictate price and outputs.[72]

The relevant market has two components: relevant product market and the relevant geographic market.

A relevant product market is composed of all goods/services which are regarded as interchangeable or substitutable by the consumer or customer by reason of the characteristics, prices, and intended use.[73] To illustrate: a customer might walk into a store to buy coffee. Finding that his favorite brand of coffee has increased in price by more than 10%, he might buy tea instead as a substitute. If he does, then coffee and tea may be considered as belonging to the same relevant product market.

Aside from the characteristics, prices, and intended use of a product or service, geographical considerations also determine whether or not a product/service is substitutable with another. A relevant geographic market is composed of the territory in which the subject goods/services are supplied, and in which competition conditions are sufficiently the same, so that the said territory could be distinguished from another.[74] For example: laundromat A and B offer the same kind and quality of services. Thus, it could be said that the services of laundromat A are substitutable for the services of laundromat B and therefore they belong to the same product market. However, if laundromat A exclusively operates in Quezon City, while laundromat B exclusively operates in Makati City, customers

71 Motta, *supra* note 5 at 102.

72 *Id*.

73 *Id*. at 102-103.

74 *Id*. at 113-114.

from Quezon City may be unwilling to go to laundromat B for laundry services, and vice versa. In this situation, although laundromat A and laundromat B belong to the same product market, they do not belong to the same geographic market.

The examples above illustrate that determining the relevant market is evidence-based. In order to know whether certain products/ services are substitutable or interchangeable, competition authorities have to look at consumer behavior, sales data, prices, consumer profile, company business plans, marketing strategies, and the views of consumers and competitors, among others. Defining the relevant market is an investigation in itself that entails both fact-gathering and economic analysis.

The relevant market then delineates the contours of the competitive assessment of the effects of an agreement or conduct.

Section 14: Anti-Competitive Agreements

Section 14 prohibits anti-competitive agreements. Section 14(a) and 14(b) of the PCA pertain to agreements more commonly known as cartels. These are agreements between competitors or entities on the same level of the supply chain (e.g. manufacturer to manufacturer, distributor to distributor). Section 14(a) agreements are considered *per se* anti-competitive while Section 14(b) agreements would be considered anti-competitive based on object or effect.

Per se anti-competitive

Under Section 14(a) of the PCA, price-fixing agreements and bid rigging agreements are *per se* anti-competitive. A *per se* anti-competitive act is akin to that of a *malum prohibitum* offense. They are viewed as inherently damaging to the market that no scrutiny of their object or effect on market competition is required. The agreement is the essence of a Section 14(a) violation. As defined in the PCA, an agreement is not only limited to contracts but also includes any type or form of arrangement, understanding, collective recommendation, independent or concerted action or practice, whether formal or informal, tacit, written or oral.[75] Under Section 14 (a), it is only necessary to prove that an agreement exists without the need to further inquire into the effects of such agreement on the market.[76] The actual implementation, success, or failure of the agreement is irrelevant to culpability.

Examples of **price restriction or price-fixing agreements** include agreements to raise, maintain, or stabilize prices; the designation of a price floor or ceiling; establishing a pricing formula; and agreements to eliminate or reduce discounts or rebates. Price-fixing agreements also cover agreements concerning price components.[77]

Meanwhile, in **bid rigging agreements**, parties participating in a tender process coordinate their bids, rather than submit independent bid prices. This includes cover bidding, bid suppression, bid rotation, and other analogous practices of bid manipulation.

Object or effect rule

Agreements under Section 14(b) of the PCA are unlawful if the object or effect of the agreement is the substantial lessening of competition. Object refers to the content and purpose of the agreement, not the subjective intent of the parties. This requires an assessment of the legal and commercial context in which the agreement is pursued. On the other hand, effect is proven through economic analysis of the consequence of the agreement on market competition.[78]

There are two types of agreements under Section 14 (b) of the PCA: (i) setting, limiting, or controlling production, markets, technical development, or investment; and (ii) dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means.

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75 Rep. Act No. 10667 (2015), sec. 4(c).

76 WHISH, *supra* note 8 at 128-129 (8th ed. 2015).

77 Rep. Act No. 10667 (2015), sec. 14(a).

78 WHISH, *supra* note 8 at 124-135 (8th ed. 2015).

Output restriction agreements, among others, limit output or control production by fixing production levels or setting quotas, or agreements which deal with structural overcapacity or coordination of future investment plans. Such agreements create artificial shortage by withholding output.

Meanwhile, a typical example of **allocation or market-sharing agreement** is when entities restrict their sales of goods and services to certain geographic areas, thereby developing local monopolies.

Section 14(c) pertains to anti-competitive agreements other than those covered by Sections 14(a) and 14(b) which also have the object or effect of SLC. These would include not only agreements between competitors but also vertical agreements, such as, for example, agreements between manufacturer and distributor.

Investigating Anti-Competitive Agreements

Anti-competitive agreements are usually enforced by a cartel, which is typically an association of businesses in the same industry colluding with one another explicitly or tacitly to take steps that will enable them to control the market in terms of price, output, or territory. Cartels are considered damaging to the economy primarily because they overcharge consumers for the price of their products or services. Cartel overcharge is defined as the difference between the observed market price and a benchmark competitive price.[79] In a report by the United Nations Convention on Trade and Development Research Platform, it was observed that cartels in developing countries overcharge their customers by an average rate of 20% above the competitive price. This is close to the overcharge experienced by the European Union (20%) and the United States (19%).[80]

Cartels are by nature clandestine and are thus able to evade detection by competition authorities. They are creative, sophisticated, and technologically advanced in their ways, especially with the global and digital nature of present-day transactions. All these factors make investigating and proving competition infringements a tough challenge for competition authorities.

79 Niels, *supra* note 15 at 501.

80 Mark Ivaldi et al, Measuring the Economic Effects of Cartels in Developing Countries 6 (2014).

Cartel investigations thus usually begin with unearthing leads or circumstantial evidence that tend to show a pattern that might indicate collusion. Examples of indicators are bidding behavior, pricing trends, and other business practices that may not appear normal if the entities were really competing with each other. These circumstantial evidence, coupled with economic analysis, are used for case build up until direct evidence is obtained. Direct evidence include testimonies of officers or employees of a corporation, documents, such as emails, text messages, calendar entries, meeting notes, price lists, and the use of code words to conceal conspiracy, price quotations, telephone records, appointment books, and expense account records.[81]

Dawn raids in anti-competitive agreements investigations

The first dawn raid in Brazil related to cartel activity was conducted in 2003. The competition authority held an unannounced inspection in the premises of the Sao Paulo State Crushed Rock Mining Industry Association. Evidence of cartel activity gathered during the dawn raid included software programs that gathered data relating to clients, pricing data, quotations and daily sales figures in the possession of the association. During the course of the inspection, the competition authority also discovered notes evidencing meetings held by the member corporations to dictate the cartel's policy. The competition authority imposed a fine on the association and its member-corporations, ranging from 15% to 20% of each corporation's gross revenues for the year preceding the investigations.[82]

Meanwhile, beginning 2005, investigators from the European Commission ("EC") conducted dawn raids at the premises of Lundbeck in different member-states of the European Union. Lundbeck is a pharmaceutical manufacturing corporation based in Denmark, and the investigations were made pursuant to alleged antitrust activities in the pharmaceutical sector. The surprise inspections were also conducted in 2006, and again in 2009 until

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81 *Id.*

82 IGNACIO DE LEON, AN INSTITUTIONAL ASSESSMENT OF ANTITRUST POLICY: THE LATIN AMERICAN EXPERIENCE 29 (2009)

formal proceedings were opened against Lundbeck in 2010. The EC found that Lundbeck entered into agreements with the object of substantially lessening the competition in the market for the drug citalopram by paying off four manufacturers of the generic version of the drug to keep them from entering the market. The EC relied on the actual agreements between the parties as main evidence, taken together with the documents found during the inspections. In particular, these documents pertain to the negotiations, conclusion, and implementation of the agreements. The EC imposed a fine of EUR 93,766,000 on Lundbeck and a fine of EUR 52,239,000 on the four entities that entered into agreements with Lundbeck.[83]

Section 15: Abuse of Dominant Position

Dominance is the position of economic strength in a market enjoyed by an entity or two or more entities.[84] It is the acquisition of significant power in the market, such that a dominant entity is able to increase prices or limit its output independently of other competing entities and its consumers.[85] In itself, dominance is not illegal. It is not punishable to enjoy a dominant position, or to acquire, maintain, and increase market share through legitimate means that do not substantially prevent, restrict, or lessen competition.[86] What the PCA punishes, however, is the abuse of such dominant position. Markets that are dominated by a few large companies are vulnerable to anti-competitive acts. Certain acts or business conduct of dominant companies, considering their size, scope, and position of economic strength, may have a disproportionately severe effect on the market and competition.

Section 15 of the PCA prohibits dominant entities from engaging in predatory pricing, imposing barriers to entry, tying and bundling, refusal to deal, price discrimination, imposing restrictions on lease, or contract of sale, or trade of goods, unfair purchase or selling price, or limiting production, markets, or technical development to the detriment of consumers. When any of these is committed by a

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83 Case T-472/13, Lundbeck v. Comm'n, 2016 EUR-Lex CELEX LEXIS 62013TJ0472 (Sept. 8, 2016).

84 Rep. Act No. 10667 (2015), sec. 4(g).

85 MOTTA, *supra* note 5 at 34.

86 Rep. Act No. 10667 (2015), sec. 15.

dominant player with the object or effect of SLC, it constitutes abusive conduct under Section 15.

Predatory pricing is selling goods or services below cost with the object of driving competition out of the relevant market.[87]

Imposing barriers to entry is the commission of acts by an entity that prevents competitors from growing within the market in an anti-competitive manner, except those that develop in the market as a result of, or arising from a superior product or process, business acumen, or legal rights or laws.[88]

Tying/bundling is making a transaction subject to acceptance by the other parties of other obligations which have no connection with the transaction, or making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services being supplied.[89]

Discriminatory behavior is setting prices or other terms and conditions that discriminate unreasonably between customers or sellers of the same goods or services.[90]

Meanwhile, **imposing restrictions** on the lease or contract of sale or trade of goods or services concerning where, to whom, or in what form goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities can constitute abusive conduct if committed by a dominant entity. However, franchising, licensing, or exclusive distributorship agreements are permissible if each party can unilaterally terminate the agreement. Agreements protecting intellectual property rights, confidential information, or trade secrets are likewise not prohibited.[91]

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87 Rep. Act No. 10667 (2015), sec. 15, par (a).

88 Rep. Act No. 10667 (2015), sec. 15, par (b).

89 Rep. Act No. 10667 (2015), sec. 15, par (c).

90 Rep. Act No. 10667 (2015), sec. 15, par (d).

91 Rep. Act No. 10667 (2015), sec. 15, par (e) – (f)

Investigating Abuse of Dominance Cases

In investigating cases of abuse of dominant position, the relevant market must first be defined, and the dominant position of the entity alleged to engage in abusive conduct must be established. The PCA provides for a rebuttable presumption of market dominance when the market share in the relevant market is at least fifty percent (50%).[92] In determining whether an entity has a dominant position, the following are considered: (i) share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market; (ii) existence of barriers to entry and the elements which could foreseeably alter both said barriers and the supply from competitors; (iii) existence and power of its competitors; (iv) possibility of access by its competitors or other entities to its sources of inputs; (v) power of its customers to switch to other goods or services; and (vi) its recent conduct.[93] The PCC may also establish other criteria for determining dominance.[94]

In assessing whether an entity is engaged in abusive conduct, competition authorities look into evidence of anti-competitive strategy, such as internal documents, minutes, and board presentations.[95] In determining the effect of the conduct on the competition in the market, competition authorities consider qualitative evidence, such as business documents, consumer surveys, and the views of industry participants. Competition authorities also look into quantitative evidence from econometric studies.[96] Since Section 15 violations are largely subject to the effects test, both factual and economic evidence are imperative.

92 Rep. Act No. 10667 (2015), sec. 27.

93 Rep. Act No. 10667 (2015), sec. 27.

94 Rep. Act No. 10667 (2015), sec. 27.

95 European Union, Directorate-General for Competition, DG Competition Discussion Paper on the Application of Article 82 to Abuse of Dominance Cases 33-36 (2005).

96 Canada, Competition Bureau, Abuse of Dominance Enforcement Guidelines 30 (2019).

Dawn raids in abuse of dominance investigations

In 2008, investigators from the EC conducted an inspection in the premises of Orange Polska ("Orange"), a dominant telecommunications company in Poland. The EC found that Orange abused its dominant position by implementing a strategy of limiting its competitors from access to its network and subscriber lines. This strategy was discovered from various internal documents found during the inspections. It was evident from the documents that the board of directors of Orange developed a project aimed at preventing competitors from gaining access to its networks. A fine of EUR 127,500,000 was imposed on Orange.[97]

Enforcement Procedure

The PCC has delegated its power to conduct inquiry and investigations involving violations of Sections 14 and 15 of the PCA and other competition laws to its Competition Enforcement Office. It may, *motu proprio*, or upon receipt of a verified complaint or a referral from a regulatory agency, initiate and conduct a preliminary inquiry.[98] The preliminary inquiry has to be completed within ninety (90) days.[99] At the termination of a preliminary inquiry, the CEO may either close the inquiry or proceed to a full administrative investigation (FAI), if there are reasonable grounds to do so. The FAI is a full-blown investigation which entails intensive fact-finding and evidence-gathering that may take years. Upon termination of the FAI, the CEO shall file a statement of objections with the Commission if there is sufficient basis.[100] Adjudication shall thereafter commence.

PCC's inspection powers may be exercised by the CEO at any time after commencement of the preliminary inquiry until before filing a statement of objections with the Commission.

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97 Case T-486/11, Orange Polska v. Comm'n, 2015 EUR-Lex CELEX LEXIS 62011TJ0486 (Dec. 17, 2015).

98 Rep. Act No. 10667 (2015), sec. 12(g), sec. 31; PCC Rules of Procedure (2017), Rule II, sec. 2.1.

99 PCC Rules of Procedure (2017), Rule II, sec. 2.4.

100 PCC Rules of Procedure (2017), Rule II, sec. 2.11.

For violations of Sections 14(a) or 14(b), a criminal complaint may be filed before the Department of Justice OFC at any time after the termination of the preliminary inquiry if the evidence so warrants.[101] Any private person or entity that has suffered a direct injury by reason of any violation of the PCA may institute a separate and independent civil action after the preliminary inquiry is completed.[102]

An entity found to be criminally liable for entering into an anti-competitive agreement covered by Sections 14(a) and 14(b) of the PCA shall, for each violation, be subject to imprisonment from two to seven years, and a fine of not less than PhP50 Million but not more than PhP250 Million. The penalty of imprisonment shall be imposed upon the responsible officers and directors of the entity.[103] If the violation involves the trade or movement of basic necessities and prime commodities as defined under the Price Act of 1992[104] as amended, the fine imposed shall be tripled.[105]

Section 16 et seq.: Anti-Competitive Mergers and Acquisitions

A merger occurs when two or more entities join to form a single entity or a new entity.[106] Acquisitions refer to the purchase by one firm of the securities or assets of another firm for the purpose of obtaining control.[107] Mergers and acquisitions are not prohibited by the PCA. They can result in economies of scale and scope, enable the transfer of technologies, broaden access to capital, and increase productivity, thus allowing businesses to operate more efficiently and bring prices down for consumers. What is prohibited by the PCA are mergers and acquisitions that are likely to result in SLC.[108] This may happen for instance in a highly concentrated market with only a handful of players and one of them acquires its competitor, reducing the number of competitors and the choices of consumers.

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101 PCC Rules of Procedure (2017), Rule II, sec. 2.18.

102 Rep. Act No. 10667 (2015), sec. 12(g).

103 Rep. Act No. 10667 (2015), sec. 30.

104 Rep. Act No. 7581 (1992).

105 Rep. Act No. 10667 (2015), sec. 41.

106 Rep. Act No. 10667 (2015), sec. 4(j).

107 Rep. Act No. 10667 (2015), sec. 4(a).

108 Rep. Act No. 10667 (2015), sec. 20.

The PCC thus reviews mergers and acquisitions in order to determine if these will significantly reduce competition in the market, leading to higher prices, fewer choices, and lower quality of goods and services. Merger review seeks to maintain competitive conditions so that incentives and opportunities for collusion, abuse of market dominance, and other infringements are prevented from arising as a result of the merger or acquisition. Such review involves rigorous economic analysis and investigation. Merger reviews are conducted *ex ante* in order to provide the opportunity to raise anti-competitive concerns in the market prior to the consummation of the transactions, prevent potential damage to consumers, and respond in a timely manner to changes in the market structure that might substantially lessen competition for an indefinite period of time.

As such, the PCA requires parties to a merger or acquisition to notify the PCC if the transaction value exceeds the thresholds and not consummate their agreement until the PCC has given its clearance.[109] The Implementing Rules and Regulations of the PCA ("IRR") lays down the method for calculating the transaction value, consisting of the size of party and the size of transaction.[110] Under PCC Memorandum Circular 19-001, the notification threshold has been adjusted to PhP 5.6 Billion for size of party, and PhP 2.2 Billion for size of transaction. Merger and acquisition transactions that exceed both thresholds are required to notify the PCC. Failure to comply with this requirement will render the merger or acquisition void and subject the parties to an administrative fine equivalent to 1% to 5% of the value of the transaction.[111]

Notification violations

There are three kinds of violations of the compulsory notification requirement under Section 17 of the PCA: (i) non-notification of a consummated merger; (ii) gun-jumping; and (iii) late notification.

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109 Case T-486/11, Orange Polska v. Comm'n, 2015 EUR-Lex CELEX LEXIS 62011TJ0486 (Dec. 17, 2015).

110 Rep. Act No. 10667 (2015), sec. 12(g), sec. 31; PCC Rules of Procedure (2017), Rule II, sec. 2.1.

111 PCC Rules of Procedure (2017), Rule II, sec. 2.4.

Non-notification of consummated merger occurs when a transaction that is notifiable was consummated without notifying the PCC.[112]

Gun-jumping occurs when a notified transaction is consummated prior to the end of the 30-day waiting period or clearance of the transaction. The parties shall be subject to a fine of 3% of the value of the transaction which may be increased or decreased on a case-to-case basis.[113]

Lastly, **late notification** occurs when the parties notified the PCC beyond the 30-day period from the signing of the definitive agreement but the parties have not consummated the transaction. The parties shall be subject to a fine equivalent to ½ of 1% to 1% of the value of the transaction but not to exceed PhP2 Million.[114]

Violations of the compulsory notification requirement are investigated *motu proprio* by MAO based on complaints or information obtained from its market monitoring.

Anti-competitive mergers and acquisitions

In order to determine if a merger or acquisition is anti-competitive, the transaction is subjected to substantive merger review. Overlaps in the businesses of the merging parties are assessed to see if the business combination will result in less competition in a specific market. As mentioned above, the relevant market is defined, *i.e.* the product market and geographic market of the product/services of the merging parties. An economic assessment is then made to determine whether the merger is likely to harm the market through potential increase of prices, lower quality, less incentive for innovation, and foreclosure of entry or expansion of competitors of the merging parties. To satisfy the test of SLC, a comparison of the pre- and post-merger competition conditions is made.

112 Rep. Act No. 10667 (2015), sec. 17.

113 PCC Rules on Merger Procedure (2017), Rule 16.5.

114 PCC Rules on Merger Procedure (2017), Rule 16.2.

Merger Review/Investigation Procedure

A merger review may be commenced upon notification by the parties as required under Section 17 or by the Commission *motu proprio*.[115] A *motu proprio* investigation may be opened if there are reasonable grounds to believe that the transaction is likely to prevent, restrict or lessen competition in the market.[116] Thus, a merger that does not exceed the thresholds may still be reviewed by the PCC.

Merger review is divided into two phases. Phase 1 commences upon sufficiency of the notification and has to be completed within thirty days. If there are no concerns that the proposed transaction is likely to result in SLC, the review will be terminated and the Commission will clear the transaction.[117] However, if the Phase 1 review raises competition issues and requires more information or further investigation, the transaction will be subject to a Phase 2 review.[118] A Phase 2 review is a more detailed, in-depth assessment of the merger and must be completed within sixty days.[119]

At the end of either Phase 1 or Phase 2, the Commission may either prohibit the transaction, approve the transaction unconditionally, or approve the transaction with conditions. If a transaction is found likely to result in SLC, it will be prohibited. This means that the parties cannot proceed with the merger or acquisition. In some cases, the Commission may still approve the transaction but subject to conditions. If the PCC fails to act upon the expiration of the 30-day period for Phase 1 or the 60-day period for Phase 2, the transaction will be deemed approved.[120]

During Phase 1 and Phase 2 of the merger review, factual and economic evidence is gathered by PCC through interviews of market participants, market surveys, requests for information from third

115 PCC Rules on Merger Procedure (2017), Rule 13.

116 Rep. Act No. 10667 (2015), sec. 20.

117 PCC Rules on Merger Procedure (2017), Rule 2.7.

118 PCC Rules on Merger Procedure (2017), Rule 2.8.

119 PCC Rules on Merger Procedure (2017), Rule 2.9.

120 PCC Rules on Merger Procedure (2017), Rule 2.12.

parties, and the information submitted by the parties involved in the transaction. Economic evidence is studied together with other pieces of evidence, such as internal documents of the parties to the transaction.[121] Reliable conclusions regarding the potential effects of the proposed transaction to the competition in the relevant market can be formed when economic evidence is consistent with other types of evidence.[122] To properly assess a transaction, it is essential that the PCC has all the necessary and relevant information on the businesses of the merging parties, their competitors, customers, and other market participants.

In the course of a review or investigation of a transaction, the PCC may exercise its powers of inspection.[123] This can be done in either phase of merger review.

The use of inspection powers is especially important when conducting *motu proprio* merger investigations where the burden of obtaining relevant information falls heavily on PCC. Unlike in transactions where merger review is triggered by the parties' own notification to PCC, *motu proprio* review of mergers takes the form of an investigation so parties are less likely to cooperate and more susceptible to concealment or destruction of information. The same is true for investigations of notification violations.

Dawn raids in merger investigations

The Hungarian Competition Authority conducted its first dawn raid operation in relation to merger control in 2017. The merger concerned two of Hungary's leading telecommunication providers, DIGI and Invitel. The Hungarian merger notification rules require parties to submit all relevant documents related to the proposed acquisition. These documents include preparatory documents, as well as board presentations showing the motivations of the parties with respect to the transaction. The Hungarian Competition Authority

121 Organisation for Economic Co-operation and Development [OECD], *Policy Roundtables: Economic Evidence in Merger Analysis* at 11 (July 27, 2012).

122 *Id*.

123 PCC Rules on Merger Procedure (2017), Rule 2.13, par. (c).

("HCA") discovered that the notifying party failed to submit complete documents, even after repeated and express requests. Therefore, the competition authority conducted dawn raids on the premises of DIGI. The HCA initially cleared the transaction with commitments, but the said decision has been revoked in early 2019. The HCA concluded that the parties misled the competition authority by willfully omitting a significant fact, which is a ground for revocation of a decision clearing the transaction. Furthermore, the HCA imposed a fine equivalent to US$ 290,000.[124]

CONCLUSION

After decades of advocacy, debate and deliberation, the Philippines finally has a comprehensive competition law. This is as much a reflection of the government's commitment to fostering competition for consumers' benefit as it is the business community's acknowledgment of the fairness of a level playing field for all market players. It is a manifestation of a common goal shared by all nations—economic growth for everyone. Given this, there is simply no room for failure in enforcement and implementation of the Philippine Competition Act.

To the great credit of the legislators, the law has the essential ingredients for effective enforcement: it polices business conduct that is inimical to competition; it covers all types of entities including government owned and controlled corporations; it imposes hefty penalties; and it creates an implementing body imbued with powers and functions that give it teeth. All that is left really is to use these powers in order to give life to the law.

The power to conduct unannounced inspections is one of the powers explicitly granted by the PCA to the Philippine Competition Commission. It is a power vested in competition agencies around the world in recognition of its effectiveness as an investigation tool.

124 Anna Turi, *Hungarian Competition Authority revokes its decision clearing Digi's acquisition of Invitel and imposes a significant fine*, SCHØNHERR (Aug. 27, 2019), https://www.schoenherr.eu/publications/publication-detail/hungarian-competition-authority-revokes-its-decision-clearing-digis-acquisition-of-invitel-and-impo/.

There are quite a number of competition cases with successful outcome because of the use of inspections or dawn raids during investigation. Due to the nature of competition infringements, investigation of competition cases is doubly hard. Any direct evidence would most likely be in the possession or control of the entities involved. Thus, a tool like the dawn raid comes useful in cases where the evidence is in the hands of the entities and in danger of concealment or destruction.

Section 12(g) of the PCA allows PCC to conduct dawn raids but in the same breath also defines the scope and standards for the exercise of this power. Like the EU, the standard is "reasonable suspicion," which is appropriate for administrative searches. Further, Section 12(g) requires a court order authorizing conduct of an inspection. Pursuant to this, the Supreme Court promulgated the Rule on Administrative Search and Inspection under the PCA which took effect on November 16, 2019. As the rule sets forth the procedure for issuance of inspection orders, it protects the delicate balance between the necessities of due process and the strong public interest to enforce the country's competition law.

It can be said that both branches of government—the legislative and judiciary—have thus breathed life into the inspection powers of the PCC. The dawn raid is ready for use as a tool for investigation. May it aid PCC in fulfilling its noble mandate.

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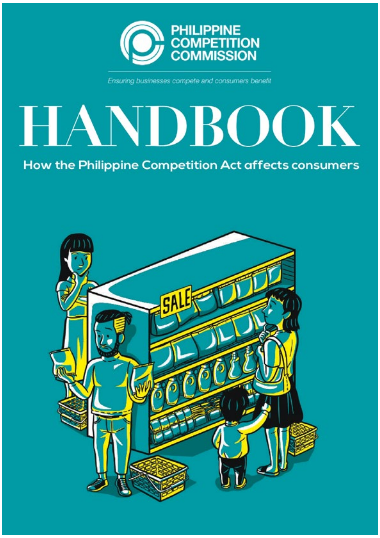

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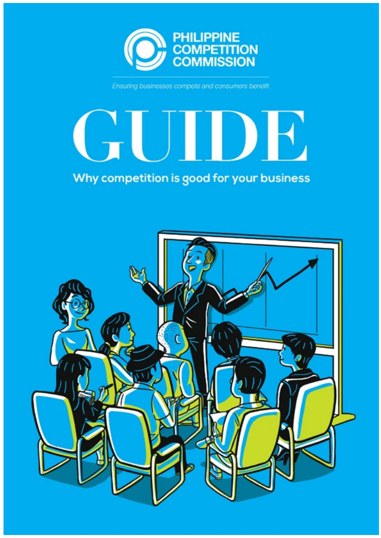

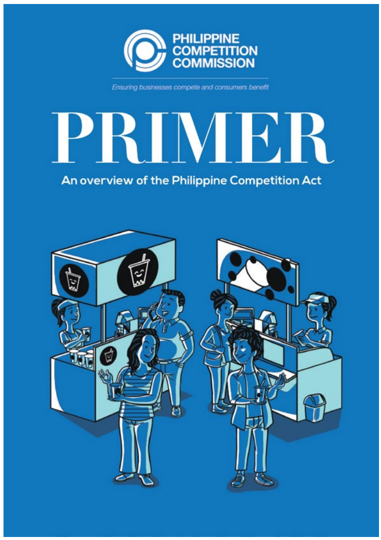

PHILIPPINE COMPETITION COMMISSION

Ensuring businesses compete and consumers benefit

Contact Us

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