

The Philippines and Competition Law: Key Questions to Address

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Introduction

- Competition laws gives effect to the public policy decision to apply market principles to the production and distribution of goods and services in economic sectors
- Competition laws constitute the main policy tool for securing, preserving and enhancing the benefits of a market economy
- Competition laws are of general application to all economic sectors

Introduction cont'd

- Over 100 jurisdictions have competition laws
 - all advanced industrialized countries in North America, Europe and Asia (Japan (1947), Korea (1980))
 - emerging countries, e.g. BRICS (Brazil (1994), Russia (2006), India (2002), China (2007) and South Africa (1998); Turkey (1994)
 - most developing countries in South America, Africa and Asia
 - of the 10 countries of the ASEAN: Thailand (1999), Indonesia (1999), Lao PDR (2004), Singapore (2004), Vietnam (2004), Malaysia (2010)
 - few competition laws are more than 25 years old, e.g., Canada (1889), United States (1890), European Union (1957); most have been enacted in the past decade, most recently, Hong Kong (2010)
- All of this is recognizing the importance of competition laws to securing the benefits of a market economy

Introduction cont'd

- Competition laws establish
 - norms of business conduct
 - process for investigation of alleged violations of the norms
 - process for deciding on whether the norms are violated
 - sanctions for violations
- Competition laws are intended to protect competition (competitive process) and not competitors

Philippines and Competition Laws

- The Philippines does not have a comprehensive competition law but has laws dealing with competition
 - the 1987 Constitution (Article XII, Section 19) prohibits anti-competitive conduct and unfair competition
 - in addition, some 30 legislative acts deal with competition and related areas
- The Philippines is committed to enacting competition laws in preparation for the establishment of the ASEAN Economic Community (AEC) in 2015
- numerous failed legislative proposals in the past decade to enact competition laws

Challenge

- The challenge for the Philippines is to adopt a competition law regime that fits the country
- This means the laws should have regard to the
 - legal system: extent of the rule of law, level of law enforcement, role of the courts
 - government structure and especially relation between government and 'regulatory' bodies
 - market structure characteristics of the economic sectors
 - business culture
 - market economy: importance of present or former state-owned enterprises; scope of sectoral regulation

Key Elements

- The key elements of a set of competition laws
 - norms relating to conduct
 - collaboration between competitors
 - vertical business relationships, e.g., between supplier and its customers
 - business transactions for mergers and acquisitions
 - choice of institutional structure
 - whether a single body or several bodies to investigate, to enforce and to decide on the merits
 - role of courts to review decisions on the merits
 - exclusions and exemptions
 - conduct of investigations of alleged violations
 - deciding on alleged violations and imposing sanctions
 - right of private action for alleged violations

Collaboration between Competitors

- Competitors are expected to make business decisions, independently of each other
- Anti-competitive harm caused by collaboration or coordination
 - increase in prices
 - reduction of output
 - allocation of customers or customer channels
 - reduction of choice
- Generally, competitors are prohibited from making business decisions in collaboration or in coordination with its competitors in the form of agreements, arrangements or understandings ('concerted practices')

Competitors cont'd

- Generally, competitors are prohibited from making business decisions in collaboration or in coordination with its competitors *except* where there are demonstrable benefits that outweigh any competitive harm, e.g.,
 - collaboration on a research project where no party has the resources to undertake the project alone and limited harm to competition
- This exception is rarely available where the collaboration or coordination relates to a key parameter of competition such as price, output, customer or customer channels, product choice

Vertical Relationships

- Norms about vertical relationships concerned with dealings between persons at different levels of the production and distribution chain, e.g. supplier and its customers
- Competitive concern is generally about the extent to which certain conduct under the vertical relationship in question
 - excludes or disciplines competitors in the supply of the good or service and thereby, harming competition among suppliers
 - excludes or disciplines competitors in the buying of the good or service and thereby, harming competition among customers

Verticals cont'd

- Conduct under vertical relationships generally does not raise competition concerns unless one of the party is 'dominant'
 - Prohibition against an abuse of a dominant position (Article 102 TFEU)
- Examples of EU cases on abuse (anti-competitive conduct)
 - offering rebates and other incentives to discourage customers from buying from a competitor (*Intel*, computer chips)
 - non-disclosure by Microsoft of operating protocols, leveraging monopoly in operating systems to server market (*Microsoft*, server market)
 - margin squeeze pricing in network industry by supplying services to customers who are also competitors of the supplier (*Deutsche Telecom*, telephony)

Verticals cont'd

- Vertical relationship not involving a dominant business may raise competition concerns if the vertical relationship facilitates collaboration or coordination among competitors, in which case the law against anti-competitive agreements, etc. are applied (e.g. Article 101 TFEU)
 - a non-dominant supplier imposes a resale price on its customers that restricts or eliminates competition among its customers

Mergers and Acquisitions

- Most but not all jurisdictions with competition laws review mergers and acquisitions ('mergers')
 - some jurisdictions choose not to enact *general* provisions dealing with mergers and acquisitions, e.g. Malaysia (2010), Hong Kong (2012)
- With few exceptions jurisdictions that review mergers and acquisitions impose a notification requirement for mergers that meet certain criteria such as local nexus, turnover or value of assets of the parties or turnover or value of assets involved in the transaction
 - some jurisdictions review mergers but does not have a notification requirement: UK, Australia, New Zealand, Singapore

Mergers cont'd

- Generally, in a merger review, the question is whether the merger is likely to have an anti-competitive effect
 - test of significant impediment to effective competition (EU Merger Regulation) which is generally regarded to be similar to the more widely-used substantial lessening of competition test
- With the exception of U.S. and Canada (and non-compulsory merger review systems), the jurisdiction to review a merger arises only if the transaction in question is required to be notified
- This is the predominant system in the world: EU, virtually all Member States with merger review (25 of 26), most new competition regimes
 - may review non-notifiable mergers, e.g. Germany and China

Mergers cont'd

- Very few reviewed mergers raise competition concerns
- Those that raise competition concerns are rarely prohibited
- Typically 'problematic' mergers are cleared with conditions
- Typically conditions are negotiated

Institutional Structure

- Enforcing competition laws requires deciding on the institutional structure to investigate, to enforce (prosecute) and to decide
- There many different institutional models.
 - Generally, the investigative and enforcement functions reside in a single body or in a single body for most matters except the enforcement of provisions that are criminal
 - Many jurisdictions have an integrated body with responsibility for all three functions, e.g. European Union
 - Other jurisdictions combine investigation and enforcement in one body and have another body to make decisions such as a specialized tribunal or a court
- A key issue is how to ensure fairness in the enforcement process

Institutional Structure cont'd

- A related issue is the nature of the relationship between the competition body (or bodies) with the government
 - Is the investigative/enforcement body independent of the government?
 - Is the decision-making body independent of the government?
 - Can the government overrule the decision-making body?

Role of Courts

- All jurisdictions with competition laws provide that a decision on the merits is subject to review by a court (even where a decision on the merits is made by a court, albeit a different one from the reviewing court)
- A key issue is the standard of review
 - To what extent should the reviewing court defer to the expertise of the decision-making body below?
- Another issue is the powers of the reviewing court
 - quash the decision below?
 - make a decision in place of the decision below? remit the matter back to the body below?

Exclusions and Exemptions

- In designing a competition law system, intense pressure to exclude or exempt certain class of persons or certain type of conduct from competition laws ('we are special')
 - Some jurisdictions exclude all conduct by the State; others (e.g. EU) only non-economic activity of the State
 - Sometimes, all conduct in a certain sector is exempt where the conduct is regulated ('sectoral exclusion')
 - Sometimes, a specific activity or conduct that is required or expressly permitted by government or a regulator is exempt ('regulated conduct')
- Generally speaking, the effectiveness of a competition law system is undermined if there are too many exclusions and exemptions: 'everyone is special'

Conduct of Investigations

- Typically, an investigative/enforcement body is given investigative powers such as
 - to demand responses to written information requests and documents
 - to conduct search of business or private premises to seize documents and to access electronic storage of information
 - to examine a person under oath
- The use of these powers, given their intrusive nature, may require prior approval such as a court order for a search warrant or at least a formal order, in the case of an integrated body

Decisions and Sanctions

- Where a decision-making body makes a finding of a violation of a conduct norm or that a merger is anti-competitive, the decision with reasons is made public
- Requiring the publication of a reasoned decision is an important step in promoting understanding and in fostering respect for the competition law system
- Sanctions:
 - purpose: deterrence? punishment? restorative?
 - types: monetary penalties? conduct orders?

Private Right of Action

- Most jurisdictions provide for a private right of action for a breach of the conduct norms
- Some jurisdictions allow private actions regarding anti-competitive mergers
- Some jurisdictions, out of concern about the potential abuse of a private right of action, permit private actions only in respect of conduct for which there has been a public enforcement finding of a violation
- With the notable exception of the United States, typically a private plaintiff may claim only compensatory damages, sometimes also punitive or exemplary damages, and injunctive relief

Obstacles

- Among the greatest obstacles to embedding a culture of competition
 - lobbying by special interests groups
 - rivalry among government bodies to exempt certain sectors from competition laws
 - actions and attitudes about competition of government bodies such as departments/ministries and sectoral regulators

The End