Chapter 4

Competition policy in the Philippines[1]

This chapter reviews the competitive landscape in many sectors in the Philippines and discusses the importance of the new Competition Act for providing greater contestability of markets. It suggests some areas to consider in the implementing regulations which will accompany the new Act.

Summary

The adoption of the Philippine *Competition Act* in July 2015 marks the end of over 20 years of legislative discussion over the law and signals the country's readiness to tackle the anti-competitive practices and regulatory barriers that dominate the business landscape. The Philippines now meets its ASEAN commitment to have a comprehensive competition law in place by the end of 2015. The competition law is expected to stand the country in better stead to attract inward investment, promote sustainable and inclusive growth, and facilitate access to global markets in future trade negotiations. These are high expectations for a new competition law in an economy characterised by private conglomerates with strong ties to the political elite and a weak competition culture. The effectiveness of the new law will come down to its implementation and the ability of the new Competition Commission to take-on the anti-competitive practices of incumbents that are considered the norm in the Philippines. The new competition regime will require on-going support from the administration and must be free from actual or perceived interference by politicians or vested interests.

The major economic challenge for the Philippines is to sustain its recent positive economic growth trajectory and reduce poverty and inequality. Trade and structural reforms since the 1980s introduced competition in some sectors, but not all sectors have been liberalised to the same extent. A number of key industries still have high levels of protection from foreign competition in the form of import restrictions, regulatory barriers and behavioural constraints.

An inadequate competition policy regime explains in part why the Philippine's oligopolistic market structure persists. Although a number of sector or industry-specific competition laws exist, as well as regulatory arrangements to regulate network industries, they do not consistently deal with the wide range of anti-competitive practices that have emerged or could emerge in different sectors.

Sectors that had previously been dominated by monopolies, such as telecommunications and air transport, have demonstrably benefited from past reform efforts that opened them up to competition. The push for competition law and introducing more competition into the economy has been to sustain economic growth and build on these previous reforms. It is now seen as a key part of a package of measures necessary to boost growth and FDI, and to improve the business climate.

An economy-wide competition law and policy is necessary to combat on-going and potential anti-competitive practices that are not sanctioned under the existing legal framework. In the short term, the government's

resolve to enhance competition by appointing the Office for Competition (OFC) before the enactment of the 2015 *Competition Act* was a step in the right direction. The OFC has done a remarkable job of putting competition on the map and pushing for a change in accepted business practices and regulatory restrictions, despite not having any effective sanctions under the existing legislation. But in the long-term the Philippines needed a comprehensive competition law and a strong and independent competition authority equipped with the necessary enforcement powers and tools to effectively identify and tackle anti-competitive practices.

Like some other countries in Asia, the Philippines suffered from a history of political instability and a political economy controlled by an oligarchic elite. Political and socio-economic power remains in the hands of a few well-connected families and a high concentration of ownership persists in the Philippines. This poses a challenge for effective competition and therefore for implementing and enforcing a comprehensive competition law along with other meaningful domestic economic reforms. This goes some way to explain the country's relative underperformance in economic development and poverty reduction compared to its neighbours. These political economy issues will present a challenge to the effective enforcement of the new competition law and to how competition will be introduced into the many monopolised and cartelised markets that are features of the Philippine economy.

The ASEAN commitment to economic integration and the adoption of an economy-wide competition law by 2015 has provided the necessary push to enact competition legislation. Support for the law has also come from domestic forces, despite the political constituencies and factions that contributed to holding it up over the last two decades. The administration has demonstrated that it is not afraid to tackle vested interests in areas that had previously been too sensitive to reform. The challenge will be to maintain this momentum and embed a deep-seated change in business practices.

The establishment of the OFC had the political backing of the President but was sometimes hampered by the lack of an enabling framework and sanctions. It therefore lacked the necessary enforcement tools and powers to promote effective deterrence and encourage compliance by business and government agencies, although it effectively helped to tackle collusion in recent high profile cases in the garlic and onion sectors. It has also managed to raise the profile of competition policy and the OFC's activities.

The new *Competition Act* should be assessed in the context of international best practice as well as the realities of the Philippine market economy. The text reflects the compromises made over the 20 years of

negotiations in Congress following pressures from different vested interests seeking to protect their positions. It also reflects additions and modifications inserted to address concerns about guarding against these vested interests and the politicisation of competition policy and enforcement. Many of these do not appear in the laws or guidelines of competition authorities in other jurisdictions, either in Asia or in more established competition jurisdictions. For example, the law includes a controversial exemption for predatory pricing where prices were established "in good faith", which may exonerate dominant companies resorting to predatory pricing. It also provides for a number of unusually broad and vague exemption powers for the new Competition Commission, including the power to exempt an entity from the *Competition Act* if the Commission determines that the exemption does not impede competition or enforcement of the Act, or that competition is not necessary to attain the competition policy behind the law. There is a high degree of discretion in the application of such an exemption, both to approve an exemption but also to withdraw it once granted. Moreover, it is surprising in an economy characterised by large conglomerates that the exemption applies to entities rather than a specific agreement or practice that meets particular statutory standards.

A significant challenge will be for the implementing rules and regulations to clarify the provisions, as well as the powers and functions of the new Commission as set out in the new law. They should be designed such that they facilitate implementation and clarify the remaining gaps and potential ambiguities in the new law.

Another concern is the interaction of the new competition law with the existing price control regime for basic commodities which is out of step with economic reforms to introduce more competition in the economy. No consideration has been given to removing or scaling back the regime as part of the package of economic reforms, although the OFC published a study in June 2015 that called for the review of the Suggested Retail Price mechanism because it distorts competition and recommended that price control be limited to emergencies or natural calamities.

The long-term outlook for the Philippines and the government's objectives of inclusive growth and poverty reduction depend fundamentally on the government's ability to implement policies that improve the business environment. The government needs to follow through on a programme of economic reforms underpinned by the new competition regime. This will provide the necessary policy support to continue liberalising key sectors of the Philippine economy and open up the economy to competition. More competition will raise productivity and create more jobs, while more contestable markets will spur investment from both domestic and foreign sources. The next step will be to operationalise the new competition law and

the new Competition Commission alongside the adoption of a whole-of-government policy on competition to support the review and reform of regulatory barriers to competition.

The impact of liberalisation reforms on product market competition

The Philippines began to undertake political and economic reforms in the late 1980s and early 1990s. It shifted from import substitution to export-oriented policies and introduced more liberal trade and investment policies. The Philippines made significant progress in opening up the economy to competition by removing tariff and non-tariff barriers in the manufacturing and agricultural sectors. Average nominal tariff rates were reduced from a range of 70 to 100% to within a 3 to 30% range. Effective protection rates declined from 53% in 1983 to around 3% by 1996. By 1998 most quantitative restrictions were removed, except for rice. These trade reforms were accompanied by privatisation and deregulation policies. Reforms were initiated in the financial sector as well as utilities, including telecommunications, power, water, air transport, and shipping. Investment liberalisation centred on allowing foreign investment in sectors that were not specified in the Foreign Investment Negative List. These reforms aimed at removing barriers to competition and promoting high and sustained economic growth and rapid poverty alleviation.

In some sectors, trade reforms beginning in the mid-1980s introduced greater competition and have limited the potential for abuse of market power. For example, the increase in competitive pressures in sectors such as agricultural machinery as well as metal and paper-based industries has had the dual effect of decreasing firm concentration and lowering domestic prices toward international levels. However, a number of industries remain protected from foreign competition. For example, in-quota and out-quota tariffs exist for selected agricultural products, such as sugar and rice. Import restrictions and other protective measures have also led to high market concentrations in many manufacturing industries, including cement, iron steel, glass and plastics.

Notwithstanding these trade reforms, a continued lack of competition in the manufacturing and agricultural sectors is a major reason for the Philippine's traditionally low growth rate. Regulatory barriers and price controls are prevalent in the agricultural sector. Even where import restrictions have been removed in parts of the manufacturing sector, many industries show signs of collusion, either due to structural barriers or behavioural constraints.

Box 4.1. **Impact of tariff and non-tariff barriers on competition: Sugar, glass and cement industries**

Sugar: The government established Sugar Regulatory Administration controls and regulates the sugar market. It also enforces a production sharing system between domestic planters and millers, which is a disincentive for producers to increase productivity and reduce costs. The industry is protected from imports through in-quota tariffs and is dominated by integrated sugar magnates who control milling, refining and marketing. The oligopolistic structure of the market has led the high cost of domestic sugar even when there has been a worldwide glut. This has also resulted in the reduced competitiveness of industries such as food processing that use large quantities of sugar for their products.

Glass: The glass industry has been heavily protected from imports through quotas and tariffs, and three dominant firms contribute 84% of the total industry value-added. The flat glass sub-sector, a capital and skill-intensive industry, has only one domestic producer.

Cement: The industry has historically been heavily cartelised, with firms colluding to set production quotas and prices and allocating geographic markets. With the introduction of more import-driven competition in the domestic market from 2000 to 2001, the industry succeeded in obtaining protection through safeguard measures, which eliminated import competition. However, even when these measures were withdrawn in 2004, the highly fragmented nature of the domestic cement market due to high inter-island transport costs made the industry susceptible to collusion.

Source: Aldaba (2008).

Reforms in the non-traded service sector promoted a number of liberalisations in key industries in the late 1980s and 1990s, opening sectors such as telecommunications and air transport to greater competition which helped to sustain growth over the next decade.

The telecommunications sector was liberalised in the 1990s, opening up an industry that had been dominated by a private monopoly for more than 50 years. Air transport was deregulated in the mid-1990s and restrictions on domestic routes and frequencies as well as government controls on rates and charges were eliminated. Generation in the power sector was opened up in 1987 and the *Electric Power Industry Reform Act* (EPIRA) was introduced in 2001, which restructured the industry by allowing competition in generation and supply and by regulating transmission and distribution. The water sector was privatised in 1990 through competitive bidding. The banking sector was liberalised in the 1980s and entry of foreign banks was allowed by the mid-1990s. A new law further liberalising foreign bank entry

was enacted in 2014, allowing 100% foreign ownership of banks. Deregulation of domestic shipping rates began in 1989 and by 2004 domestic shipping operators could establish their own rates, which improved market conditions, although rates remain relatively high. Further reforms in 2014 streamlined regulations to facilitate market entry.

Table 4.1. **Barriers to entry and competition in selected industries**

Sector	Source of barrier
Agriculture: Rice	Import licences or tariff quotas
Agriculture: Corn	Cartel behaviour by dominant producers
Agribusiness	Restrictions on foreign land ownership, restrictive land use policies
Downstream oil	Cartel behaviour by oligopolistic producers, large capital requirement
Pharmaceutical drugs	Licensing/registration restrictions, cartel behaviour by dominant firms
Cement	Cartel behaviour by oligopolistic producers, large capital requirement
Electricity distribution	Monopoly, limited regulatory capacity
Water	Local monopoly, multiple fragmented/overlapping administrations
Telecommunications	Congressional franchise, limited regulatory capacity
Ports	Monopoly, limited regulatory capacity
Shipping	Cabotage Law, cartel behaviour by local oligopolies
Air transport	Cabotage Law, congressional franchise, limited regulatory capacity

Sources: World Bank (2015) and Aldaba (2008).

The reforms deregulated and liberalised infrastructure utilities and opened these markets to competition, but they have not been sufficient to ensure efficient and competitive markets. Market structures in many of these sectors remain oligopolistic and entry barriers are prevalent, with Constitutional restrictions limiting foreign equity participation to 40%.

In the telecommunications sector, interconnection between the incumbent and new entrants remains a regulatory challenge, and the sector has reconsolidated back to a situation where competition is widely seen to be lacking. In the retail power sector, a lack of competition has led to high prices and supply constraints. In air transport, the domestic market is characterised by duopolists on major routes and monopolies on minor routes. And unlike the domestic sector, international air travel remains heavily regulated and the government has yet to implement a full open skies policy.

In ports, competition is limited due to the conflict of interests arising from Philippine Ports Authority's multiple roles as regulator, operator, and developer of the ports sector. In shipping, restrictions on cabotage that limited competition from foreign shipping companies and meant only a few

firms controlled most of the primary routes, have only just been lifted following the amendment to the *Cabotage Law* adopted in July 2015. The removal of the cabotage restrictions are expected to contribute to a reduction in inter-island shipping costs. These costs are high due to existing constraints in port infrastructure and the cabotage restrictions that prevented more efficient foreign ships from servicing domestic routes.

Notwithstanding the steady rise in the *Global Competitiveness Index* ranking between 2012 and 2015, the Philippines, in 47th place, still lags behind its neighbours. Singapore ranked 2nd, Malaysia 18th, Thailand 32nd and Indonesia 37th in the World Economic Forum's rankings. While the Philippines is slowly closing the gap on its ASEAN peers, it is ranked 5th in ASEAN. And while it has made great strides, ensuring healthy competition remains a significant challenge. According to the 2015 rankings, the Philippines ranks 56th on the intensity of local competition and among the worst in ASEAN for the extent of market dominance of companies (87th) and the effectiveness of anti-monopoly policy (74th).

Consequently, in spite of these market-opening reforms and liberalisation policies, competition and productivity growth in the Philippines remain weak. Informal workers and the poor, in particular, appear to have benefited least from the reforms as evidenced by the slow pace of poverty reduction in the decades following liberalisation. It is clear that liberalisation efforts do not automatically lead to a competitive domestic economy. Consequently, the absence of clear rules and appropriate regulatory frameworks as well as efficient regulators and infrastructure constraints, has limited effective competition in many sectors of the Philippine economy. Fundamentally, these markets reforms, though well-intentioned, lacked the necessary policy support measures, notably in the form of a comprehensive competition law, to support an enabling business environment to level the playing field between firms of all sizes and origins.

The competition provisions found in various legislative acts (prior to the 2015 *Competition Act*), including the Constitution, and the institutional arrangements to regulate natural monopolies, have proved inadequate in dealing with the wide range of anti-competitive practices and barriers prevalent in the country's oligopolistic markets and the strong ties between the economic and political elite. The absence of a comprehensive competition law has also held back infrastructure investment and FDI in the Philippines, while enabling rent seeking by incumbents. Poor infrastructure development, notably in roads, power stations, ports, airport capacity and schools, is a constraint on growth and investment. The lack of infrastructure and security of energy supplies is cited by business leaders as a major reason for the difference in the lower amount of FDI the Philippines receives compared to its ASEAN neighbours. Concerns have also been raised about

perceived corruption, bureaucracy, regulatory unpredictability and the lack of a level playing field given the many monopolised and cartelised markets that are features of the domestic economy.

There is widespread recognition that as the government follows through with its programme of deepening structural reforms, this must include a clear and effective competition policy for the Philippines. Reforms to strengthen competition in the economy have culminated in the introduction of a comprehensive competition law and the establishment of a central institution to enforce the law. The impetus for a competition law has been to sustain economic growth and build on previous reforms. Improved competition requires improved investment and business activity to absorb the growing labour force. It is seen as part of a package of measures necessary to boost competition and FDI.

The Philippine Development Plan 2011-16 (PDP) includes a unified competition law as a cross-cutting policy reform as part of its good governance measures. The law is cast as a measure to enhance "economic justice", necessary for inclusive growth. The PDP highlights the government's role in promoting competition and making it easy for firms, regardless of size, to do business in the country. It also notes the government's role in promoting a consistent and predictable policy environment to "level the playing field by strengthening the legal and institutional framework to prevent unfair and anti-competitive practices". The Plan envisages that strengthening the legal framework on promoting competition "will not only improve the country's competitiveness but also rationalise commodity prices". The competition law is also listed first of the priority policies and legislation aimed at fostering an enabling environment for infrastructure development.[2]

Development of competition law in the Philippines

The history of competition law in the Philippines can be traced back to the Old Penal Code enforced by the Spanish regime. Subsequently, under American rule the *Act to Prohibit Monopolies and Combinations in Restraint of Trade* (Act No. 3247), which was based on the 1890 *US Sherman Act*, was enacted in 1925. This was largely replaced by the restraint of trade provisions in the Revised Penal Code 1932, which until the 2015 *Competition Act*, constituted the main law addressing anti-competitive behaviour in the Philippines.

The Constitution of 1987 sets out basic competition policy with reference to the control of monopolies in Article XII (19). The New Civil Code 1949 provides for a right of action for any person suffering damages due to unfair competition. The *Price Act* prohibits cartelisation designed to

manipulate prices of basic necessities and prime commodities. The Republic Act 4152 of 1964 (Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice) tasks the Justice Secretary with legal and enforcement duties related to competition. Other legal provisions scattered in several statutes seek to prohibit certain anti-competitive practices, which are enforced by various government agencies and regulators, but until now there has been no single economy-wide competition law.

Pending the enactment of a fully-fledged competition law, President Aquino, designated the Department of Justice as the country's competition authority in June 2011 (EO 45) and established the Office for Competition (OFC). The OFC's mandate is to supervise markets in order to enforce existing competition laws and investigate and prosecute violations, as well as to prepare studies on competition to inform industry and consumers. The designation of the Department of Justice as the competition authority is in line with its general mandate to enforce laws and prosecute offenders and its function as the government's principal legal counsel and prosecution arm. The sector regulators continue to enforce the competition provisions in their respective sector regulations.

There have been successive attempts to introduce a competition law in the Philippines since the early 1990s. Numerous bills have been presented to both houses of Congress without ever being approved. Previous versions of the bills before earlier Congresses succumbed to lobbying by selected business interests keen to maintain the status quo and did not receive sufficient support. Political backing came when President Aquino assumed office in 2010. The President identified the passage of a comprehensive competition law as a policy priority in his first State of the Nation Address: "According to our Constitution, it is the government's duty to ensure that the market is fair for all. No monopolies, no cartels that kill competition. We need an Anti-Trust Law that will give life to these principles, to afford small- and medium-scale enterprises the opportunity to participate in the growth of our economy".

Another important driver for the competition law was ASEAN commitments. The ASEAN Economic Community is to be established by 2015, and the government is busy putting in place measures to prepare for regional economic integration. This includes commitments set out in the 2007 ASEAN Economic Community Blueprint – a roadmap for regional integration – that gave each ASEAN member a target date of the end of 2015 by which to establish a national competition policy. To date, eight of the ten ASEAN Member States (Indonesia, Lao PDR, Malaysia, Myanmar, Singapore, Thailand, Viet Nam and now the Philippines) have adopted a comprehensive competition law and policy.

Box 4.2. **Overview of competition-related laws and provisions prior to 2015**

- 1987 Constitution
- Act to Prohibit Monopolies and Combinations in Restraint of Trade 1925
- Revised Penal Code, as amended 1932
- Public Service Act, as amended 1936
- New Civil Code 1949
- Civil Aeronautics Act, as amended 1952
- Amending the Law Prescribing Duties and Qualifications of legal Staff in the Office of the Secretary of Justice 1964
- Insurance Code 1974
- Corporation Code 1980
- National Food Authority Act 1981
- Revised Securities Act 1982
- Consumer Act 1992
- Price Act, as amended1992
- New Central Bank Act 1993
- Public Telecommunications Policy Act 1995
- Intellectual Property Code 1997
- Downstream Oil Industry Deregulation Act 1998
- Anti-Dumping Act 1999
- Retail Trade Liberalisation Act 2000
- Deposit Insurance Law 2000
- Securities Regulation Code 2000
- Electric Power Industry Reform Act 2001
- Government Procurement Reform Act 2003
- Domestic Shipping Development Act 2004
- Universally Accessible Cheaper and Quality Medicines Act 2008
- Philippine Cooperative Code 2009
- Real Estate Service Act 2009
- Rent Control Act 2009
- Food and Drug Administration Act 2009
- Pre-Need Code 2009

Note: Some of these are at the periphery of competition law regimes, and others deal with civil remedies for parties affected by unlawful conduct.

Source: OFC Brochure Advancing Economic Justice for All.

The competition law also gained support from the academic community and the media, and more recently the business community. A number of business organisations in the Philippines publicly backed the introduction of the law, particularly since it gained political traction. The Joint Foreign Chambers of Commerce has been an active proponent of a competition law and other pro-competitive reforms, given their impact on market access for its foreign members.[3] The Philippines Chamber of Commerce, the largest business association, voiced its support for the law in a signed manifesto.[4] The export sector, particularly the Philippine Exporters Confederation, issued a statement supporting the passage of the law as a means of attracting investments and ensuring that businesses are able to operate on a level playing field, especially with the ASEAN Economic Community just around the corner.[5] The Makati Business Club, which consists of the country's biggest businesses, expressed cautious support for the law, noting concerns over proposals in some versions of the bills for retroactive application of the law and high penalties.[6] The academic community has provided considerable research on product market competition in the Philippines, highlighting the need for a competition law and further economic reforms to address market inefficiencies and eliminate anti-competitive practices. Vocal media commentators have kept the competition law debate active in the press with discussions on the timeliness of introducing competition law to counter entrenched interests and address inequalities, especially given that their dynamic ASEAN counterparts already have strong legal frameworks in place to promote competition.

The various bills over the years have differed on the scope of prohibited acts, the inclusion of a merger review regime and the institutional arrangements for the competition authority. Many of these different positions reflected the competing interests of the legislators and their stakeholders, which include both the public and private sectors. Deliberations in both Houses during the 15th and 16th Congress benefited from public hearings that sought input from national and foreign experts. This has facilitated comparison of draft provisions with international best practice and established competition principles, which it was hoped would bolster the final text and make it harder to support amendments to water down the provisions.

The 15th and 16th Congress made significant progress with enacting a competition statute, culminating in the adoption of the Competition Act on 21 July 2015. During the 16th Congress each house successfully consolidated the different competition bills before it, resulting in the approval by the Senate of draft bill SB 2282 on 14 December 2014, and the adoption of the House version of the draft bill HB 5286 on 19 May 2015. The two bills went into a bicameral committee process at the start of June

2015 with representatives of both Houses to harmonise them into one bill, where additional amendments were made. A consolidated version was agreed in the bicameral committee and was subsequently approved by both houses on 10 June 2015. The Act was signed by the President on 21 July 2015, before his last State of the Nation address later that month. The law came into force on 17 September 2015.

In the interim, the Department of Justice issued *Guidelines on the Enforcement of Competition Law*, which took effect on 15 May 2015. The Department Circular proscribes specific competition prohibitions and related acts that may constitute a breach in pursuance of the existing legal provisions set out in the statutes listed above. The Circular states that entities engaging in such conduct may be the subject of an OFC investigation. Departmental Circulars are designed to supplement provisions in the law or provide a means for carrying them out.[7] The issuance of this Circular indicated the OFC's determination to press ahead with its mandate to enforce the existing laws by detailing a regulatory framework for competition enforcement through which it would interpret the existing fragmented legal provisions. The introduction of the new law refers to the repeal of the Guidelines, which is unsurprising given the inconsistencies between the Guidelines and the new law. Nevertheless, the Guidelines have provided a clear and concise explanation of different types of anti-competitive practices during the interim period before the law takes effect and the new Commission is established. Aspects of the OFC's Guidelines and the process of developing them could usefully inform the development of the new law's implementing rules and regulations, which the new Commission will draft in consultation with the Department of Justice and Office for Competition.

The competition regime

This section will review the competition laws and institutions that existed prior to the adoption of the 2015 *Competition Act* (RA 10667), and will assess the provisions in the new competition law.

The competition law

Objectives and scope:

The Constitution sets out the basic Philippine policy on competition. Article XII (19) states: "The State shall regulate or prohibit monopolies when the public interest so requires. No combination in restraint of trade or unfair competition shall be allowed". The provisions of the existing *Revised Penal Code* 1932 apply to goods and services but are only applicable to

individuals, not economic entities. This and the other legislative acts under the previous regime covered combinations in restraints of trade as well as unilateral acts such as monopolisation, stockpiling and profiteering.

Competition policy objectives in the new *Competition Act* are set out in Chapter 1 (2a-c). Section 2(a) refers to enhancing economic efficiency and promoting free and fair competition in trade and all economic activities, and makes specific reference to the establishment of a National Competition Policy that is to apply across government agencies. The law also makes specific reference in Section 2(b) to the objective of preventing market concentration that controls production, distribution or trade that would unduly threaten to distort competition in the Philippines. Section 2(c) refers to the penalisation of anti-competitive practices and mergers with the objective of protecting of consumer welfare and advancing domestic and international trade and economic development.

The *Competition Act* applies to good and services and legal persons, individuals and economic entities. Under Chapter 1 (4), "entity" is defined to include those "owned or controlled by the government", engaging "directly or indirectly in any economic activity". State-owned enterprises therefore appear to fall within the scope of the Act. Its provisions apply to acts committed domestically or abroad that are likely to affect the trade, industry and commerce of the Philippines.

Exclusions and exemptions:

No sector of the economy is exempt from the new competition law, but the law provides the new Competition Commission with unusually broad exemption powers. Chapter 5 (28) enables the new Competition Commission to exempt an entity from the enforcement of the Act for a limited time if the Commission determines that enforcement is not necessary to attain the policy objectives of the law or that competition would not be impeded in the market where the entity operates or in related markets. While the exemption must be made public and may be conditional or subsequently withdrawn by the Commission, it provides for a high degree of discretion in its application without reference to standards or conditions and the timeframe is vague. The provision also gives wide discretion for the Commission to withdraw exemptions previously given, which is at odds with principles of procedural fairness. The fact that the exemption is designed for entities rather than a specific agreement or practice that meets particular statutory standards is surprising given that the economy is dominated by large conglomerates that operate across many different markets. It is understood that this provision was inserted in order to avoid legislative wrangling and business lobbying over exemptions for particular industries in the Congress, leaving it to the new Commission to assess and

determine potentially many requests from businesses looking to exempt themselves entirely from the provisions of the Act. At a minimum a general procedure should be established to help avoid non-transparent and ad hoc responses to pressure for special interest and protection, as well as more detailed clarification of the grounds for exemption.

Moreover, there is a broad public interest exemption in the new law. Chapter 5 Sec 26(d) stipulates that it is for the Commission to weigh up whether on balance enforcement is necessary or whether it would amount to "overzealous or undue intervention" that would undermine competition efficiency, productivity, innovation or the development of priority areas or industries. Consequently even if the balancing is in favour of a prohibition, the Commission must consider the impact of enforcement on these macro variables. The Act stipulates that the Commission should consider wider public policy and national champion considerations, including: the overriding need to make the goods/services available to consumers, the need for large infrastructure investments and the need of the Philippine economy to respond to international competition (Section 26(c)). The law also directs the Commission to consider whether the entity's alleged anti-competitive conduct was done with a "reasonable commercial purpose", which could include phasing out a product or closing a business or a "reasonable commercial response to the market entry or conduct of a competitor" (Section 26(e)).

OECD jurisdictions have shifted away from the use of public interest objectives as part of competition law analysis. Most competition authorities do not consider factors that extend beyond what appear to be the generally accepted "core" competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency. Public interest exemptions are more prevalent in developing and transition countries. Possible explanations for this include greater influence of vested business interests in these countries and a more pressing need to promote one or more public interest objectives given the stage of economic development. Even so, competition authorities and national courts generally do not authorise or exempt agreements, decisions or practices on public policy grounds if they directly oppose core competition principles. Traditionally, if public policy considerations must prevail, competition law experts have argued that such externalities should be addressed through legislation or regulation rather than through a restriction of the competition enforcement powers of competition authorities. Moreover, competition authorities are probably not best placed to pursue public objectives other than efficiency objectives, since they are technical and non-elected public bodies.[8]

Content of the competition law

Prior to the enactment of the *Competition Act*, the legal provisions in the Philippines on competition were fragmented across different statutes and sector-specific regulations. The main provisions addressing anti-competitive behaviour were found in the *Revised Penal Code*. Article 185 prohibits and criminalises bid rigging in public auctions while Article 186 prohibits and criminalises combinations in restraint of trade and unlawful monopolisation. Article 186 will be repealed by the new *Competition Act*. Bid-rigging is also covered by Section 65(b) of the *Government Procurement Reform Act* (RA 9184) which provides for higher penalties.

With the exception of bid rigging and cartelisation, specific anti-competitive agreements were not expressly prohibited in the Philippines. Abusive practices were not expressly prohibited, other than predatory pricing which was unlawful in limited industries such as the downstream oil industry. Other than the *Price Act* and provisions for treble damages through civil penalties, the relevant laws were criminal and required a burden of proof beyond reasonable doubt. There was no merger control regime provided for in the law, although a review process to assess the competitive effects of mergers was recently introduced to the merger approval.

This legal framework for competition law complied with the minimum elements prescribed in the ASEAN Regional Guidelines on Competition Policy which provide a common framework for Member States introducing competition law in their respective national contexts. As a baseline, the guidelines suggest that the competition law should: (*i*) prohibit horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the Member State's territory, unless otherwise exempted – which would include hard core restrictions, such as price fixing, bid rigging, market sharing and limiting or controlling production or investment; (*ii*) prohibit the abuse of a dominant position; and (*iii*) prohibit anti-competitive mergers.[9]

The DOJ-OFC *Guidelines on the Enforcement of Competition Law* adopted on 15 May 2015 created basic prohibitions for anti-competitive agreements and abuse of a dominant position. It was not evident that these could be readily extrapolated from the existing laws at the time and therefore it was unclear to what extent a prosecution under the legal provisions could rely on the descriptions in the Guidelines of what constitute anti-competitive practices. In any event, given the criminal nature of these laws (other than the *Price Act* relating to cartelisation and monopolisation in commodities), the standard of proof required for the offences is beyond reasonable doubt, which would be difficult to prove under that legal regime. In addition the applicable sanctions were fixed by law.

The *Competition Act* contains the three major prohibitions identified in the ASEAN Regional Guidelines. It provides for mandatory criminal sanctions for both entities and individuals engaged in price fixing, bid rigging, market allocation and controlling output. Administrative fines can be applied for entities breaching the competition law. The law has no retroactive effect.

Restrictive agreements:

The distinction between horizontal and vertical agreements in the *Competition Act* is not as clear-cut as that provided in the OFC Guidelines which differentiated between horizontal and vertical agreements by providing examples. It is advisable for the implementing rules and regulations under the new law to do the same.

Article 186 of the Revised Penal Code 1932 (since repealed by the *Competition Act*) prohibited and criminalised the monopolies and combinations in restraint of trade, which comprised:

- A 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;
- Monopolising any merchandise or object or trade or commerce, or combining with any other person or persons to monopolise any merchandise or object, in order to alter the price thereof by spreading false rumours or making use of any other article to restrain free competition on the market;
- A combination, conspiracy or agreement between a manufacturer, producer, processor or importer and any other persons for the purpose of making transactions prejudicial to lawful commerce or of increasing the market price of any merchandise or object of commerce.

Various Supreme Court decisions have defined "combination in restraint of trade" and the acts that constitute a restraint of trade.[10] However no Supreme Court ruling has declared an entity to be involved in a combination in restraint of trade and no entity has been convicted under these provisions.

Anti-competitive agreements under Article 186 were illegal per se. Article 186 was a criminal provision and penalties were restricted to natural persons. The penalty provided for a prison sentence ranging from six months and one day to two years and four months, and a fine ranging from 200 to 6 000 pesos (approx. USD 4–134). The incredibly low fining range was set in 1932 and was never upgraded to reflect inflation. Compare this to fines in

more established jurisdictions, which are typically up to 10% of worldwide turnover.

The *Revised Penal Code* also prohibits bid rigging in public auctions as a *per se* offence. The Article 185 prohibition includes both attempted as well as actual collusion in public procurement. It carries the same criminal penalty of a prison sentence as Article 186 offences, along with a fine ranging from 10-50% of the value of whatever is auctioned. Bid rigging is also prohibited under the *Government Procurement Reform Act* (RA 9184), with a criminal sanction of 6-15 years' imprisonment for individuals, including public officials, who engage in bid rigging.

Section 5 of the *Price Act* 1992 prohibits cartels designed to manipulate the prices of basic necessities and prime commodities[11]. Its objective is to keep the prices of these goods at reasonable levels especially during times of "calamity" and "emergency". It provides for extensive price monitoring and price setting powers. The Act is enforced by various agencies, in respect of the particular goods that fall under their respective jurisdictions, although the Department of Trade and Industry (DTI) is the primary implementing agency. It can impose prison sentences of 5-15 years with fines of between 5 000 and 2 million pesos (approximately USD 110 – USD 45 000) and administrative fines of between 1000 – 1 million pesos (approximately USD 22 – USD 22 000) and other penalties (such as cease-and-desist orders and closure of establishments). The *Price Act* therefore provided a potentially important avenue to deal with price fixing across a range of commodities, although the cartel offence has never been enforced.

Section 11 of the *Downstream Oil Industry Deregulation Act* 1998 prohibits cartelisation in the downstream oil industry. The Act was a response to the power supply crisis in 1992 and was intended to liberalise the downstream oil importation, refining and distribution industry in order to attract new players and investment. The Act abolished the power of the government to set oil prices or regulate competition in the market, but it included provisions prohibiting collusion and predatory pricing to prevent anti-competitive distortions. Criminal sanctions apply for cartelisation under the Act of three months to one year imprisonment and a fine ranging from 50 000 – 300 000 pesos (approximately USD 1 120 – USD 6 700). Deregulation did not result in a more competitive market however, and additional measures are needed to encourage more investment and new entrants as well as investment in the alternative energy sources in the upstream market.[12]

The OFC 2015 Guidelines, distinguished between horizontal and vertical agreements. They provided a non-exhaustive list of different horizontal restrictions categorised as hard core cartels, including price fixing, output

restrictions, market allocation and bid rigging. They also contained a detailed but non-exhaustive list of vertical agreements that are considered anti-competitive (Chapter 2, Sec 2). The latter includes resale price maintenance, agreements to discriminate, tying, boycotts, exclusivity deals, restrictions on passive sales and certain forms of selective distribution. In most jurisdictions, boycotts and tying are associated with monopolisation or abuse of dominance, not vertical restrictions. Here, the Guidelines listed tying and refusal to deal also under exclusionary abuses in Chapter 2 Sec 3.

The first cartel case was filed in November 2011 against liquefied petroleum gas dealers for alleged price fixing in breach of Article 186 of the Revised Penal Code and the *Downstream Oil Industry Deregulation Act* of 1998. In 2014 the case was reported as under motion for reconsideration, but no further details are available. An investigation into alleged price fixing among power generation companies was opened following complaints received in December 2013. The on-going investigation is being separately undertaken by both the Energy Regulatory Commission and the OFC, with co-ordination between the two agencies.

The rule on anti-competitive agreements in Chapter 3 Section 14 of the new *Competition Act* is a mix of the *per se* and rule of reason approaches. This hybrid approach was a compromise to align the House version of the law, where all anti-competitive agreements were *per se* illegal, with the Senate version, which had a rule of reason approach. The Act prohibits three categories of agreements: (i) agreements between competitors concerning price fixing and bid manipulation are *per se* illegal (Chapter 3, Sec 14(a)); (ii) agreements that specifically relate to controlling production and market sharing that have as their object or effect the substantial prevention, restriction or lessening of competition (Chapter 3 Sec 14(b)); and (iii) all other agreements (regardless of subject matter) that have as their object or effect the substantial prevention, restriction or lessening of competition. In relation to this third category, there is an exemption similar to the EU system whereby the agreement may be exempted if efficiencies outweigh the anti-competitive effect by improving production or distribution of goods or services while allowing consumers a fair share of the benefits (Chapter 3 Sec 14(c)).

The Act therefore adopts the language and style of both US (*per se*) and EU (object or effect) concepts, but it is silent on whether the Commission, if it identifies "*per* se" infringements or infringements "by object", need only establish the existence of the prohibited agreement without having to analyse its effect on the market. The Act defines anti-competitive agreements as agreements between competitors. Therefore the prohibition in Chapter 3 Section 14 applies only to horizontal agreements and not to vertical agreements. Vertical agreements can still fall under the prohibition of abuse of dominance.

Box 4.3. **OFC cartel investigations and studies**

Garlic price increase (September 2014)

The DOJ-OFC was instructed by the President to investigate price hikes of garlic after prices in June 2014 rose to an all-time, increasing 74% within a one year period or more than 100% increase from average prices. The OFC's report noted that there was adequate supply and stocks of garlic. It found that the majority of import permits (imports represent 73% of supply) issued were granted to one group. The permits were ostensibly for the purpose of checking garlic quality but they enabled a group of four individuals to obtain most of the import permits, cartelise the market and charge higher prices. The OFC examined a similar case investigated by the Indonesian competition authority in the Indonesian garlic market. The DOJ-OFC report recommended a number of actions to be taken, including: abolishing a government-instituted action team that was deemed to contribute to the problem, investigating and prosecuting certain individuals, and establishing a fair and transparent system to allow for competition in the industry, including the removal of the current import permit system. The National Bureau of Investigation subsequently filed criminal charges under the Anti-Graft and Corrupt Practices Act against 119 individuals for cartel conduct in the garlic industry.

Onion report (January 2015)

Off the back of the garlic investigation, the DOJ-OFC examined data on the onion industry and found that the same practices identified in the garlic cartel were being used to manipulate onion supply and prices by the same group of alleged cartelists. The report recommended the abolition of the current import system as well as the government mandated task team. The OFC also proposed that the commodity sector should be prioritised for competition-related studies and prepared a draft Administrative Order for the President to direct all heads of departments, bureaus, commissions, agencies and offices engaged in sector regulation, particularly those involved in regulating basic necessities and prime commodities, to conduct sector studies to determine possible competition reforms.

ATM fees and charges (October 2013)

The OFC issued a statement cautioning banks on industry-wide adjustment ATM fees and charges. The statement pointed out the need to increase transparency in the imposition of interbank withdrawal charges to ensure that there is no coordinated action among banks, which is considered anti-competitive.

Criminal sanctions are reserved to price fixing and bid rigging as *per se* offences (Chapter 3 Section 14(a)), and for market allocation and controlling output as by object or by effect offences. Accordingly, the Commission can impose administrative fines on the entity but will have to refer criminal prosecution of entities and individuals to the DOJ-OFC. Consequently the standard of proof for civil cases on anti-competitive agreements will be different from criminal cases, which will require proof beyond reasonable doubt.

Abuse of dominance:

Article XII (19) of the Constitution provides that the State shall regulate or prohibit monopolies when the public interest so requires. Therefore it does not prohibit monopolies *per se* but requires a previous determination as to whether the public interest warrants a monopoly. This interpretation was confirmed by the Supreme Court.[13] Article 186(2) of the *Revised Penal Code* (repealed by the new *Competition Act*) sanctioned "any person who shall monopolise any merchandise or object of trade or commerce". It also prohibited monopolies without exceptions. The sanctions were the same as those listed in the section above for restrictive agreements. None of the applicable provisions refer to a dominant position.

A special regime exists for the energy sector. Under section 45 of the *Electric Power Industry Reform Act* 2001 the Energy Regulatory Commission (ERC) is tasked to enforce safeguards against anyone owning, operating or controlling more than 30% of the installed generating capacity of a grid, or 25% of the national installed generating capacity. It also prevents distribution utilities from sourcing from bilateral power contracts more than 50% of their total demand from an associated firm engaged in generation. The ERC is mandated to monitor and penalise any market power abuse or anti-competitive or discriminatory act or behaviour in the electric power industry.

The *Price Act* prohibits "hoarding or the undue accumulation of prime commodities beyond normal inventory levels"; and profiteering or selling "at a price grossly in excess of the good's true worth" (Section 5). These prevent abusive price increases of basic necessities and prime commodities. The applicable sanctions are the same as those for price collusion, detailed in the section above.

Box 4.4. **Philippine Supreme Court rulings on monopolies**

Agan vs. Philippine International Air Company, et al.: The Supreme Court defined monopolies as “a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of a particular commodity”.

(GR No. 155001 5 May 2003)

Gokongwei v Securities and Exchange Commission: The Supreme Court upheld the validity of a provision in the by-laws of a corporation that would disqualify any stockholder from being nominated to its board of directors when he is engaged in a competing business, citing the prohibition on monopolies contained in the Constitution and Article 186 of the Revised Penal Code. It further explained that “a common director of two or more competing corporations would have access to confidential sales, pricing and marketing information and would be in a position to coordinate policies or to aid one corporation at the expense of another, thereby stifling competition.”

(GR No.L-52129 29 April 1980)

The *Downstream Oil Industry Deregulation Act* prohibits predatory pricing, defined as “selling or offering to sell any oil product at a price below variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market” (Section 11(b)). Pricing below average variable cost in order to match the lower price of a competitor and not for the purpose of destroying competition is not deemed to be predatory pricing.

The DOJ-OFC 2015 Guidelines provide extensive detail in a non-exhaustive list of the elements that may be considered in determining dominance, in addition to market shares (Chapter 2 Sec 3(1)). The inclusion of a reference to entities that are dominant by virtue of exclusive rights to provide a service or supply for essential public services, specifically included incumbents in the regulated sectors within the OFC’s remit. The Guidelines also provide an extensive list of conducts that may be considered abusive, which are delineated into exploitative and exclusionary abuses. This list provides a brief description of each abuse, but does not go so far as to provide guidance on the analytical framework the OFC will use to assess conduct. Nevertheless, this may be a useful starting point in the development of the relevant implementing rules and regulations for the new Act.

The new *Competition Act* abuse of dominance prohibition in Chapter 3 Sec 15 broadly reflects the EU system. It prevents the abuse of a dominant position by one or more entities and sets out a list of potentially unlawful abusive conducts, although it is not clear whether or not the list is intended to be exhaustive. In assessing the relevant market, the Act adopts an approach that mirrors other regimes, focusing on substitutability.

A number of features of the law relating to abuse of dominance differ from international best practice. First, Chapter 5 Sec 27 establishes a rebuttable presumption of dominance if the market share of the entity in the relevant market is 50% or more. Although not unique in comparison with other jurisdictions, this is not in line with a growing acceptance that market shares are not necessarily a useful proxy for substantial market power. Even where jurisdictions have stipulated through guidance and case law that a particular market share may indicate dominance, it is clear that market shares are not the only element on which dominance is generally assessed. Although Chapter 5 Sec 27 provides additional elements for the Commission to consider when assessing dominance (including the existence of barriers to entry, the existence and power of its competitors, the power of its customers to switch to other goods or services and the recent conduct of the entity), it is not clear how this will interact with the market share threshold and whether the latter would suffice to establish dominance without robust evidence of durable market power. Second, the law also provides for the Commission to set market share thresholds for dominance for particular markets. Different threshold presumptions in different markets are likely to result in legal uncertainty and will undermine the benefit usually associated with a "rule of thumb" market share presumption for dominance.

The conducts listed in Chapter 3 Sec 15 as abusive practices broadly reflect those usually found in the laws of other jurisdictions: predatory pricing, imposing barriers to entry, tying, price discrimination, sales or purchasing conditions, exclusive dealing, limiting production and non-compete clauses, although again it is not clear if this is intended to be an exhaustive list. It also prohibits "unfair pricing" and prohibits the purchase of goods at unfairly low prices from marginalised agricultural producers, fishermen, MSMEs and other marginalised service providers and producers.

The description of predatory pricing includes a controversial exemption for prices established "in good faith". It is understood that this exemption, which is not found in the competition laws of other jurisdictions, was removed from the House version of the Bill following debates over the potential for it to be used as an "escape clause" by dominant companies to resort to predatory pricing in the guise of "good faith".[14] The clause was reintroduced at the bicameral discussion stage, despite arguments that

selling below cost with the intention of driving out the competition is a prohibited act in itself and therefore, in bad faith.

Another feature of the Act's abuse of dominance provision is the inclusion of the potential for exemptions for price discrimination based on a list of permissible price differentials (Chapter 3 Sec 15 (d)). This includes "socialised pricing" for the poor, as well as reasons for different pricing structures, such as transport costs, but also responding to competitive prices or services of a competitor as well as changing market conditions. This level of detail would be more suited to a guidance document to fully explore what amounts to objective and proportionate reasons for price discrimination, based on efficiency grounds.

The Act makes specific reference that it will not be interpreted as prohibiting a dominant position or the acquisition of market share through "legitimate means" before the law was passed (Chapter 3 Sec 15(g)). Clearly the law should be about the abuse of a dominant position which should never be prohibited as such, so this point seems incongruous. Presumably the inclusion of the statement was to assuage any concerns that the law is anti-big business, given the continued resistance to introducing a competition law over the past 20 years.

As with the prohibition on anti-competitive agreements, conduct conferring an objective benefits, while allowing consumers a fair share of the resulting benefit, may be exempted from being considered an abuse of a dominant position (Chapter 3 Sec 15(i)).

Mergers

The old laws did not provide for a merger control regime. The Corporation Code 1980 (Sections 79 and 80) required mergers and consolidations of corporations to be approved by the Securities and Exchange Commission (SEC) but did not provide for the SEC to consider the anti-competitive effects or nature of the merger. Section 140 allowed the relevant agency to impose a maximum limit on stockholding in corporations whenever necessary to prevent illegal monopolies or combinations in restraint of trade. The SEC control mechanism was rudimentary and did not allow for the parties to amend the merger if in contravention of the competition provisions in different laws, and did not specifically refer to competition rules and objectives.

In the case of a merger or consolidation of entities subject to sector-specific regulations such as banks, insurance companies, public utilities and other corporations governed by special laws, approval had first to be obtained from the relevant government agency. For example the Energy Regulation Commission had the power to grant clearance to mergers under

the *Electric Power Industry Reform Act* (EPIRA) provided that they did not have the effect of substantially lessening competition in the market. It could also authorise mergers if they were likely to result in a benefit to the public that would outweigh any detriment caused by a lessening in competition. Such benefits were defined as improved reliability of service, lower prices and more choice for consumers, increased economic efficiency, more efficient resource allocation, growth in employment and improvements in the quality and safety.[15] Section 45 of EPIRA sets market share thresholds that ring fence the transmissions assets from parties in the generation, distribution and retail markets in order to prevent vertical integration.

To encourage compliance with competition law and to address the lack of merger review, the DOJ and SEC agreed in July 2014 to set up the country's merger control regime based on existing provisions of law pending the introduction of a comprehensive competition law. The agreement, which took effect in August 2014, stipulated that all applications for approvals and consolidations must be forwarded to the OFC for evaluation and determination of the existence of any anti-competitive effects. The OFC would submit its findings and recommendations to the SEC. According to the agreement a finding by the OFC that a proposed merger or consolidation would result in a violation of existing laws on competition, monopolies or restraint of trade may lead the SEC to either disapprove the application or require the applicant corporations to comply with specified conditions within a prescribed period. The agreement provided for a 30 day time period from receipt of a complete set of documents for the OFC to carry out its assessment. The agreement was an important step towards implementing merger control in the Philippines and also highlighted the OFC's determination to move forward with its mandate to support and enable competition prior to the enactment of the *Competition Act*.

The OFC was in the process of drafting merger guidelines that were to cover the specific processes, requirements and standards it would apply to its merger assessments, but the guidelines have not yet been issued. To date, the OFC reports that ten mergers have been cleared and seven applications from the SEC are pending since the beginning of 2015. It is unclear on what basis the OFC's assessments are currently made, although it is understood that the OFC was not at the stage of applying technical analysis to its merger assessments. Delays in completing the assessments have been a cause for concern for parties and the SEC. The 30 day period set out in the MOA is counted from the time the OFC receives a complete set of documents from the SEC. Without a clear merger notification process, it is understandably difficult for parties to know what information is required of them, although the SEC provides a checklist of requirements to merger applicants. And

while the final decision of the OFC was made available to the SEC and parties, it is good practice for competition agencies to publish decisions and assessments, redacted as necessary. This promotes transparency in the process and provides useful guidance to business on the agency's approach to merger review in practice.

The new *Competition Act* introduces a mandatory and suspensory merger control regime. The notification threshold is based on the value of the transaction, together with a requirement that control is acquired. This is in common with the majority of merger control regimes globally. Compulsory notification to the Commission is required for any merger or acquisition agreement with a transaction value exceeding one billion pesos (USD 21 million). Where this threshold is exceeded, parties are prohibited from completing their merger or acquisition until 30 days after submitting a notification. An agreement completed in violation of this requirement to notify shall be considered void and subject to an administrative fine of 1-5% of the value of the transaction. (Chapter 4 Sec 17).

The Act provides statutory deadlines for the merger review process. From the time it receives the notification the Commission has 30 days to review the transaction, which can be extended by a further 60 days, beginning on the day of the request, if the Commission requires additional information to make its assessment. The Act requires that the total period for the review of any case shall not exceed 90 days from the initial notification by the parties which is a much shorter timeline than a number of other regimes. The transaction is deemed approved if the Commission fails to make a decision within the above time periods. In the event of a clearance decision related to a merger in sectors covered by other sectoral laws, approval by the relevant government agency is required. The Act does not dispense with the favourable recommendation from specialised regulatory agencies (for example the Bangko Sentral ng Pilipinas) required by Section 79 of the Corporation Code.

Many elements of the merger system follow the EU model. The definition of control (Chapter 5 Sec 25) appears to be based upon the "decisive influence" criterion under the EU Merger Regulation. This definition will enable the Commission to target potentially problematic transactions more effectively, as it requires more case specific interpretation. The Act adopts the substantial lessening of competition test to assess mergers. Chapter 4 Sec 20 prohibits mergers "that will prevent or substantially lessen competition in the relevant market or in the market for substantially related goods or services". The enforcement model is therefore based on the EU administrative model. The relevant market is determined by a classical definition of product and geographic markets (Chapter 1 Sec 4(k)), and replicates the EU definition.

If the Commission finds that the merger will substantially lessen competition, it may: a) prohibit the agreement; b) require modification or amendments to the agreement; or c) require legally binding commitments (remedies) from the parties (Chapter 4 Section 21). The Commission may also approve a merger that would otherwise be prohibited for substantially lessening competition where it is likely to result in efficiencies that are greater than its anti-competitive effects or to avoid a failing firm exiting the market. In both cases the burden of proof rests with the parties (Chapter 4 Sec 21 and 22). Acquisitions of stock that do not carry voting rights or otherwise allow for the exercise of control are also explicitly exempted.

The Act appears to provide for administrative fines for a prohibited merger (Chapter 6 Sec 29(a)) which is at odds with standard practice around the world where penalties are limited to failure to comply with the notification requirement.

The detail of the merger regime will need to be set out in the Commission's implementing regulations. These should reflect that most mergers do not raise competition concerns and enable the Commission to deal with these swiftly and efficiently. At the same time, it needs to be capable of identifying potentially anti-competitive mergers, applying sophisticated analysis of markets and the effects of the transaction to determine whether the merger is anti-competitive or efficiency enhancing. Additional guidelines would provide advice and general information to companies and their advisers on the procedures used by the Commission. This should also include detailed information on the application of the substantive test that the Commission will use to assess mergers.

Unfair competition / consumer protection

References to unfair competition are made in the Constitution and the 1949 *Civil Code*. Article 28 of the *Civil Code* provides for civil damages to be sought by those that are subjected to unfair competition in certain industries: "agricultural, commercial, or industrial enterprises or labour". It does not define unfair competition but lists the means by which it can be committed: "force, intimidation, deceit, machination, or any other unjust, oppressive or highhanded method." Properly understood, the law of unfair competition is primarily comprised of torts – deceptive or wrongful practices – of a business that cause an economic injury to consumers or other businesses, as opposed to economic harms involving monopolies and anti-competitive practices.

The *Consumer Act* 1992 covers all consumer-related concerns. The DTI is empowered with rule-making and adjudicatory powers to ensure the effective protection of consumers.[16] It is mandated to enforce the provisions

of the Consumer Act on deceptive, unfair and unconscionable sales or practices, the regulation of practices relating to weights and measures, consumer products and service warranties, labelling and fair packaging, liability for products and services, advertising and sales promotions and regulation of service and repair firms. The Department for Health covers consumer-related matters for food, drugs, cosmetics, devices and substances. The Department of Agriculture covers agricultural products. The National Consumers Affairs Council is the formal co-operation mechanism between the three government departments, and also includes the Department of Education, Culture and Sports as well as representatives from national consumer organisations and business/industry sectors. The National Telecommunications Commission also has consumer protection powers under its law.

The DOJ's mandate under the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice 1964 provides it with the jurisdiction to take criminal prosecutions under the Articles 185 and 186 of the *Revised Penal Code*, cartelisation under the *Price Act* or under the *Cheaper Medicines Act* and deceptive or unfair trade practices under the *Consumer Act*. The OFC's mandate under EO 45 gave it the power to enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices. Consequently the OFC has been heavily involved in unfair competition cases in their broadest sense.

The OFC notes that it has prepared a draft study on the distinction between abuse of dominance, unilateral conduct and unfair trade practices which will form the basis of a Legal Opinion with a focus on key sectors such as telecommunications and air transport. It remains to be seen how such studies and opinions will influence the perspective of the new Commission in the application of the *Competition Act*.

To delineate jurisdiction between the OFC and the DTI, they agreed in July 2013 to implement a complaint handling system for violations of competition and consumer welfare laws. The DTI dealt with administrative cases involving individual consumer complaints, while the OFC dealt with business-to-business cases, as well as criminal and civil cases, although investigations are undertaken jointly with the DTI, where they are referred on. The majority of the OFC's actions to date are consumer-related cases involving unfair commercial practices. For example 22 of the 58 complaints the OFC has acted on have involved consumer complaints in the telecommunications sector. Most of these consisted of misleading advertising and unfair commercial practices and were referred to the DTI for action.

Box 4.5. OFC activities on unfair business practices

Statement on gift certificates – 13 December 2013

On the OFC's recommendation, the Secretary of Justice issued a statement that gift certificates including gift checks and gift cards are equivalent to cash and do not have an expiry date. This was intended to remind businesses and consumers of the relevant DTI's regulation prohibiting any supplier from issuing gift certificates/checks/cards that contain an expiry date.

Advisory on Airline ticket sales - 18 February 2013

This addressed misleading advertisements and promotional campaigns for air fares, which exclude material information from the advertisement. The DOJ-OFC reminded airline companies that they should refrain from misleading advertising and must include reasonable details to enable consumers to make informed decisions. The full price must be disclosed before the transaction is completed to avoid hidden or additional costs. Consumers are reminded to closely scrutinise deals and promotional offers.

Advisory on broadband and mobile internet services – 24 September 2014

This was issued following complaints from subscribers that they were not getting what they are paying for. The DOJ-OFC reminded Internet Service Providers (ISPs) that they must not use false, deceptive or misleading advertisements in promoting internet offers. ISPs must provide all the necessary details in their advertising including, service rates, minimum connection speed, and service reliability. It calls on relevant regulatory agencies to monitor, enforce and implement sanctions on erring telecom companies under the *Consumer Act* and the *Public Telecommunications Policy Act*. It also reminds the general public to be critical about advertisements and to be prudent when subscribing to contracts.

Advisory on "unlimited" internet offers – 9 December 2014

This was issued following a complaint to the OFC about a promotional offer by a telecom operator marketed as unlimited access to Facebook. The OFC found that telecoms companies were imposing fair usage policies on all their internet packages including unlimited internet promotions. The advisory warned the operators that restricting subscribers' internet usage upon reaching a certain volume of data bits could amount to misleading or deceptive advertising when the packages were sold as "unlimited". It encouraged ISPs to adopt network management schemes that advance optimal use of the internet rather than restricting it, and advised that ISPs should offer internet packages specific to data usage, subscription period and/or software applications. Consumers are encouraged to be responsible and limit large data usage during peak hours and switch off broadband devices when not in use to free up the network. The advisory calls on the Department of Trade and DTI and NTC to monitor and penalise non-compliant telecom operators.

The OFC took the step of producing advisory opinions on matters where it received significant or a large number of consumer complaints. Even if the cases were referred on to other government departments for investigation, the OFC used the advisory opinions to detail and raise awareness of the misleading or harmful practice, remind business of their obligations under the relevant laws and call on the relevant government agency or regulator to monitor the practices and take enforcement action as appropriate. The opinions were not legally binding but they have provided a useful advocacy tool for business, regulators and consumers.

Institutional arrangements

The Philippine Competition Commission established under the *Competition Act* will be the country's first full-fledged competition authority. Until its establishment, various laws empowered different agencies to enforce the competition provisions under their respective legislation and regulations.

Office for Competition

The establishment of the OFC as the competition authority in 2011 through EO 45 was a significant step in developing an economy-wide competition regime in the Philippines. The OFC has made remarkable progress in getting itself on the map domestically and internationally in a short space of time. It is even more impressive that it has done so without any new legislative tools and in the absence of effective enforcement powers. The OFC was set up in October 2011 and sits under the Office of the Secretary of Justice. Both the DOJ and the OFC are under the Executive branch, headed by the President. Neither the DOJ nor the OFC are structurally independent agencies; they are under the responsibility and oversight of the Secretary of Justice.

The OFC is headed by an Assistant Secretary. At the outset, there were only two full time State Counsels and two technical assistants. The rest of the 20 staff were part time and continued with their pre-existing duties from the offices to which they were attached: the National Bureau of Investigation[17], DOJ Legal Staff, Office of the Solicitor General[18] and Office of the Government Corporate Counsel[19]. Initial needs-assessments conducted for the OFC highlighted the importance of a dedicated and trained staff.[20] More full time positions were appointed in 2012. In 2015 there were 22 full-time lawyers, economists, investigation agents and support staff as well as 20 assisting lawyers.[21]

Table 4.2. **Existing institutions with competition responsibilities**

Government agency	Competition remit
Department of Justice **Office for Competition**	• DOJ investigates and prosecutes crimes, including Article 185 and 186 of the Revised Penal Code; cartelisation under the Price Act and Cheaper Medicines Act. • DOJ designated the competition authority in 2011. • OFC created in 2011 to enforce competition policies and laws to supervise and promote competition in markets in order to protect consumers from abusive or harmful business practices. Tasked with investigating and prosecuting cases involving violations of competition laws. Promotes transparency and accountability in markets by conducting and disseminating sector studies, reports and other relevant issuances. Tasked with promoting international cooperation and strengthening trade relations with other countries. • Neither DOJ nor OFC can impose criminal or other fines and penalties – this is a matter for the regular courts. Nor are they authorised to issue cease and desist orders or injunctions against alleged violations of the existing competition laws
Department for Trade and Industry	• Primary implementing agency of the Price Act in relation to certain basic necessities and prime commodities: conduct investigations and impose administrative penalties and other penalties; may initiate civil actions and initiate criminal violations with the regular courts
Securities and Exchange Commission	• Approves mergers and consolidations of corporations; Memorandum of Agreement with OFC on competition assessment of mergers and acquisitions
Joint Task Force of DOJ and Department of Energy	• Oversees competition in the downstream oil sector: investigate complaints about cartelisation and predatory pricing and direct DOJ criminal prosecutors to initiate actions before the regional trial courts. It does not have the power to impose fines or penalties for violations of the Downstream Oil Deregulation Act
Energy Regulatory Commission	• Principal regulator for the electric power industry under the Electric Power Industry Reform Act. Responsible for issuing rules and regulations to promote competition, encourage market development and consumer choice; it has published competition rules relating to the identification and investigation of anti-competitive behaviour in the sector. Tasked with monitoring and penalising abuse of market power, cartelisation and any anti-competitive or discriminatory behaviour. It has the power to impose remedies to redress these violations *e.g.* price controls, injunctions, divestiture or disgorgement of excess profits, fines and penalties

The OFC's budget is allocated as a separate regular item in the *General Appropriations Act*. The OFC's operational budget in 2012 and 2013 was 7.525 million pesos (USD 168 000). This was increased to 10.144 million pesos (USD 226 600) and 11.86 million pesos (USD 265 000) in 2014 and 2015 respectively.

The current OFC structure provides for both lawyers and economists in dedicated divisions, as well as investigators in the enforcement division. It was recognised early on that in addition to full time personnel, there was a need for expert economists. This point will be equally relevant for the new Commission. The OFC plantilla has a balanced mix of lawyers with business, economics and political science backgrounds as well as economists assigned to different divisions – Legal, Enforcement, Market Assessment, and Economics Divisions. The OFC has National Bureau of Investigation staff detailed to it in a bid to build investigation capacity.

Training of staff by foreign experts has been key and continues. The OFC has taken advantage of training programmes through partnerships with development organisations and international organisations, as well as bilateral capacity building provided by established competition agencies. The OFC has extended these programmes to include officials from sector regulators, other government agencies, the judiciary, business and law students. This supports its efforts to raise awareness and understanding across a broad range of stakeholders.

The OFC made co-operation with sector regulators and other government agencies a priority from the outset. It set up the Sector Regulators Council, which provides a means of sharing information and experiences and as well as an advocacy channel for the OFC to educate other government agencies about competition law and policy and to encourage those agencies with competition enforcement powers to deploy them. The OFC has been effective in corralling other agencies into conducting joint investigations on matters under their remit.

The OFC also established four working groups with leads from key stakeholders. The working groups themselves were primarily a means of fostering a collaborative environment with those counterparts.[22] They have been credited with smoothing the way for the adoption of the OFC's 2013 and 2014 Policy Paper discussing the respective roles and functions of sector regulators and competition agencies.[23] These made the case for concentrating competition powers in the competition authority rather than sector regulators, arguing that a competition authority is less prone to regulatory capture and is therefore better able to embed principles of principles independence, transparency, and accountability.[24] The new law

reflects this position but does not detail how the new Commission and the regulators will interact in practice.

Good governance and integrity have been a strategic focus for the OFC. Developing and embedding a series of core values was particularly important for the OFC as a new agency, given the levels of perceived corruption and inequality in the Philippines. Accountability is important in this context and a systematic approach to making information publically available and readily assessable would support this effort. This should include publishing all studies and reasoned decisions on its website, as well as draft consultations and guidelines to raise awareness, improve dissemination and encourage more open consultations. These principles and good practices will be equally relevant for the new Competition Commission. Transparency provisions are embedded in the Act (Chapter 9 Sec 52) which requires the Commission to publish its final decisions, orders and rulings on its website, subject to confidentiality provisions (Chapter 7, Sec 34).

Before the *Competition Act* was approved, the OFC set out an ambitious set of priorities for the next two years. The OFC flagged the energy, transport and telecommunications sectors as priority areas where competition policy should play an important role in further regulatory reforms, and it anticipated studies for each. Additional policy papers were envisaged on emerging enforcement issues as well as study on the different roles of civil, administrative and criminal systems, and a framework for competition advocacy. The OFC had planned to conduct competition assessments and prepare reports in collaboration with the sector regulators and to continue to prepare advisory opinions on consumer protection concerns. A key priority was recruiting additional permanent staff.

Most of the functions of the OFC will transfer to the new Competition Commission leaving the OFC with a mandate focused on conducting preliminary investigations and prosecution of all criminal offences under the *Competition Act* and other competition-related laws. Nevertheless, the priorities that the OFC identified are likely to inform the new Commission's priorities. A mechanism is required to capture the knowledge, experience and methodologies that the OFC has developed to avoid re-inventing the wheel. It would also make sense to enable staff to easily transfer to the new authority, where they could play a key role in disseminating learning and institutional capacity building.

Although the OFC will no longer be the competition agency, it will continue to have the authority to investigate and prosecute criminal offences under the *Competition Act* and other competition laws (Chapter 2 Sec 13). However, the OFC in this new format will not be able to file a criminal case

unless there has been an inquiry conducted and it has been endorsed to the DOJ (via the OFC) by the new Commission (Chapter 7 Sec 31). The Act provides for the OFC to grant leniency or immunity in the course of its preliminary criminal investigations in accordance with the leniency programme that will be developed by the new Commission. This will require close co-ordination between the OFC and the Commission to avoid confusion in a programme that relies on predictability in order to be effective in encouraging whistle-blowers to come forward.

Even though the Act does not prescribe a wider role for the OFC, for example to conduct advocacy or studies, there is a willingness on the part of the OFC to make use of its expertise to continue to promote the role of competition law in the national economic agenda. It would rely on the wider mandate of the DOJ as the government's law agency to advocate for legal and regulatory reforms in this area.[25]

Philippine Competition Commission

The Competition Commission is described in the *Competition Act* as an independent quasi-judicial agency (Chapter 2 Sec 5). It will be attached to the Office of the President for the purposes of budget (under the *General Appropriations Act*) and policy co-ordination. Over the years the bills have varied significantly on the institutional arrangements for the new Commission. Some draft versions of the law proposed an office under the Department of Justice, much like the current structure but with legal powers. The Act provides for a structure akin to the US model, with an independent Commission and an office under the Executive responsible for criminal enforcement under the new law and other related competition laws.

The Commission will consist of a Chairman and four commissioners who will be appointed by the President and rank as Secretary and Under Secretaries. They will have security of tenure and cannot be removed without just cause, which will support the independence of the Commission. They will hold office for one seven year term (non-renewable). One of the Chairman or the four Commissioners must be a member of the Philippines Bar, while another must be an economist. The others must have backgrounds in economics, law, finance, commerce or engineering from the public, private or academic sectors. The Executive Director of the Commission will be appointed by the Commission.

The Commission will report to a Congressional Oversight Committee on Competition to oversee the implementation of the law, jointly chaired by, the chairmen of the relevant Senate and House Committees, and composed of two senators and two representatives nominated by the Senate President and the Speaker of the House of Representatives, one of each of these

nominations must be made by the Minority Leaders of the House and Senate.

The Commission will receive an initial budget outlay of 300 million pesos (USD 6.7 million) (Chapter 9, Sec 50). This is a significant budget increase from the draft versions of the law. In line with the majority of competition authorities around the world, the fines imposed by the Commission will not form part of the Commission's budget, but will be remitted to the Treasury. This is a welcome step and avoids the potential for regulators to be incentivised by collecting fines rather than seeking to promote effective competition, which would undermine confidence in the fairness and equity of the system. A robust funding model and institutional independence will stand the new Commission in good stead in terms of perception of independence from political interference.

The Commission will have primary jurisdiction over competition matters (Chapter 7 Sec 32). It will have jurisdiction over matters that involve both competition and non-competition issues, although the Act states that the relevant sector regulator will be consulted. The decisions, rulings and orders of the Commission will be appealable to the Court of Appeals (Chapter 7 Sec 39).

The Commission is to be established with 60 days of the Act coming into effect on 17 September 2015. The Commission is therefore expected to be in place by 16 November 2015. The implementing rules and regulations are due to come into force within 180 days of the law coming into effect – *i.e.* 15 March 2016. These are ambitious timeframes to set up a new agency, select and appoint a Chair, Commissioners and Executive Director, as well as draft the detailed implementing regulations envisaged throughout the Act.

The Act provides for a two year transition period before the prohibitions come into force once the law comes into effect (Chapter 9, Sec 53). This addresses concerns that business should have a reasonable timeframe to adapt to their new legal responsibilities under the Act. During this period the government is tasked with undertaking advocacy to inform the general public about the Act (Chapter 9, Sec 53).

Enforcement process and investigation powers

Under the previous competition regime, the OFC could begin an investigation in three circumstances: on its own initiative; as the result of a complaint; or pursuant to a request from a government agency. The National Prosecution Service of the DOJ conducts investigations of criminal violations under the Revised Penal Code and other laws with criminal penalties. The sector regulators, in exercise of their administrative powers

generally conducted their investigations as the result of a complaint or on their own initiative.

The procedures for the OFC's investigations were set out in a Departmental Circular issued in March 2013.[26] The OFC issued a user-friendly version of the Guidelines for the public, including a flow-chart of the process, on 22 May 2015.[27]

Accordingly, the OFC conducted a preliminary assessment of all complaints received or own cases initiated to determine jurisdiction and the necessity of further investigation. The OFC could reject a complaint or close an investigation at this stage if there was no valid cause for action, or could refer the case to the appropriate sector regulator. No timeframe was set for the preliminary investigation stage. This "triage" stage would have benefitted from prompt handling of these matters to help move cases along more quickly. This is a useful read-across for the new Commission when it determines its case handling processes.

An investigation could be opened on the approval of the OFC Head and, according to the Guidelines, the OFC "shall conduct investigation within 90 days of the approval by the Head". The new Case-Handling Procedures, on the other hand suggests that the case was to get underway within 90 days of approval being granted. The OFC could request information and the Guidelines provided a ten day deadline for respondents to reply to a request for information, which could be extended by an additional ten days. It could conduct searches of premises subject to securing a search warrant from the courts. The Guidelines set out a template for the investigation report. The report could recommend three courses of action: (*i*) filing the case with the appropriate agency (administrative cases go to the relevant government agency; civil cases filed with the court with competent jurisdiction; criminal cases are filed with the National Prosecution Service of the DOJ for preliminary investigation); (*ii*) requiring the complainant to provide additional information; (*iii*) dismissing the case.

Once an investigation was completed, the report was approved by the Head of the OFC and submitted to the Secretary of Justice within 30 days of the end of the investigation. The Secretary of Justice could approve, modify or reject the OFC's recommendations and/or order a re-investigation. If the Secretary recommended the filing of administrative, civil and/or criminal charges the OFC had 15 days to prepare and file the complaint.

Individual investigations vary in complexity and length of time, and most competition authorities enjoy significant discretion as regards procedural timelines for enforcement. That said, some competition agencies have introduced statutory deadlines for different parts of the competition process, while many agencies have made commitments to speed up the

process. According to the OFC, of the 58 cases docketed since 2012, 13 are pending preliminary assessment or at the investigation stage. In light of the timeframes set out above, this suggests that the OFC's investigation process has taken longer than envisaged, which is a point for the new Commission to consider when setting internal and/or external timeframes for its investigations.

This underscores broader points of relevance for both the OFC in its new role to conduct all criminal investigations and for the new Commission. There is a need for appropriate staffing levels to deal with caseload, and there is scope to prioritise case work to concentrate resources on high-impact or high-significance cases and projects, notably potentially harmful conducts, precedent-setting cases, significant market studies and advocacy projects on critical concerns. Many OECD countries' competition authorities have prioritisation principles, which help the authorities to better focus their resources and actions.

The new Competition Commission will have a broad range of powers and functions, which are detailed in Chapter 2 Sect 12 of the Act. The Commission will conduct inquiries, investigate, and hear and decide on cases involving any violation of the *Competition Act* and other existing competition laws. It can do so on its own volition, as a result of a complaint from an interested party or on referral from a regulatory agency. It can then begin the appropriate civil or criminal proceedings.

The Commission has also been given an advisory function. It can issue advisory opinions and guidelines on competition matters; submit annual and special reports to Congress, including proposed legislation for the regulation of commerce, trade or industry. The Commission will also monitor competition in the Philippine economy, implement and oversee measures to promote transparency and accountability, and ensure compliance with prohibitions and requirements of competition laws.

The Act sets a 90 day time limit on preliminary investigations after which the Commission must either terminate the investigation with a resolution stating that there has not been any violation or infringement, or issue a resolution to proceed to a full investigation. (Chapter 7 Sec 31). No deadline is stipulated for the full investigation. The Commission also has the power to issue a temporary cease and desist order during the course of its preliminary investigation. The Commission can file a criminal complaint before the DOJ-OFC, and its preliminary investigation will be conducted in accordance with the Revised Rules of Criminal Procedure.

It will be able to issue subpoenas for documents and testimony of persons and summon witnesses (Chapter 2 Sec 12(f)). The wilful failure to comply with a subpoena without just cause, as well as, for example, refusing

to answer questions or furnish information when legally required to do so will be deemed contempt which may be summarily punished by the Commission by imprisonment for no more than 30 days or a fine, or both (Chapter 7 Sec 38). The Commission will have the power to conduct inspections subject to a court order (Chapter 2 Sec 12(g)). Many jurisdictions require a warrant from a court to conduct an unannounced inspection.

In common with most jurisdictions, the Act provides for a leniency programme to be developed by the Commission, which will grant an entity immunity from suit or a reduction in fine in exchange for the voluntary disclosure of information regarding cartels (Chapter 7 Sec 35). Complete immunity will be granted if the entity reports, in full, the illegal anti-competitive activity before the Commission initiates an investigation, and continues to co-operate throughout the investigation. It must not be the ringleader of the cartel, and it must have taken prompt action to terminate the illegal activities as soon as it identified them. The applicant may be granted leniency if the investigation has already started, if the entity co-operates fully and it is the first one to come forward for leniency, and if the Commission does not have sufficient evidence to convict the entity. The Commission must also decide that the granting of leniency would not be unfair to others. As mentioned above, the OFC will also be able to grant leniency in its preliminary investigations of criminal violations, and it will be necessary to ensure consistency in how leniency is applied across the two agencies. Details about possible reductions in fines for leniency applicants are not contained in the Act, and presumably this will be specified in follow-on implementing rules and regulations.

Sanctions and remedies

The *Competition Act* contains a set of wide-ranging, non-adjudicatory administrative remedies that the Commission may deploy; a number of which are atypical in light of international practices. Chapter 7 Sec 37(a) provides for a request for a binding ruling, akin to the US business review request for parties concerned about the legality under the competition laws of proposed business conduct. An entity will have 90 days to abide by the ruling in the event of an adverse ruling by the Commission. The provision for a "show cause order" in Chapter 7 Sec 37(b) suggests that the Commission can send a type of request for information to the entity about alleged anti-competitive behaviour and order that it rebut a finding of infringement, but it is unclear what evidence the Commission will provide to the entity. The entity can either propose to modify or restructure its acts to make them compliant with the law or it may provide justification as to why it should not be made to cease and desist from its conduct. Alternatively the

entity may pay the administrative fine. Section 37(c) on consent judgements appears to provide for the Commission to enter into settlement agreements with the party, but the provision does not require admission of guilt, which suggests it may instead be a commitment decision process. The use of settlements typically applies to cartel investigations; they establish a violation and require an admission of guilt from the parties. A commitment decision does not establish a violation and does not require any admission by the parties; they are appropriate for all antitrust cases except for cartels. Therefore it is unclear whether this provision intends to introduce a settlement process or enable commitment decisions.

The text of the Act removed a provision from an earlier draft that included a consultation process for the parties prior to a binding rulings or consent orders. This would have embedded procedural fairness principles into the Commission's procedures. The inclusion of a monitoring function in Section 37(d) is unusual outside of merger control. Generally the competition authority only ensures that the fine is paid. This monitoring requirement risks being resource intensive and potentially detracting the Commission from enforcement activities and priorities.

A number of sanctions and remedies are envisaged for a violation of the prohibitions on anti-competitive agreements and abuse of a dominant position. They include imposing injunctions and orders for the disgorgement of excess profits. The Act also provides for structural remedies such as adjustment and divestiture orders, provided that there is no equally effective behavioural remedy or where such a remedy would be more burdensome for the entity concerned. It would be unusual to require structural and behavioural remedies to anti-competitive agreements. Structural remedies in abuse of dominance cases may involve significant up-front administrative costs and the risk of impairing the efficiency of the divested operations, as well as being interventionist with a remedy that attacks the dominant position rather than necessarily remedying the abuse.

The new Commission will also be empowered to impose certain administrative fines and penalties for violations of the proposed law (Chapter 6). The fines range from 100 million pesos (USD 2 million) for the first offence, to up to 250 million pesos (USD 5.4 million) for the second offence. This is a marked increase from the previous administrative penalties, such as the 1 million peso (approximately USD 22 430) maximum fine that the DTI may impose under the Price Act for cartelisation. It is generally accepted that high fines are a crucial element of deterrence. The amount of fines imposed for antitrust infringements, and for hard core cartel violations in particular, has significantly increased over the last decade. Many jurisdictions have statutory thresholds based on a percentage of the firm's turnover rather than pegging fines to an absolute amount. The

Competition Act instead provides for the Commission to increase the schedule of fines in the Act every five years to take inflation into account.

Like other administrative agencies, the Commission will not have the power to adjudicate or impose criminal liability, which may be determined only by the Regional Trial Court. Criminal violations of the proposed law would be punishable by imprisonment from two to seven years, and a fine ranging from 50 million pesos to 250 million pesos (approximately USD 1 million to USD 5.4 million). This is a substantial increase from the criminal fines under Article 186 of the Revised Penal Code (a 6 000 peso maximum fine) and the *Price Act* (a 2 million peso maximum fine). If the violation involves the trade or movement of prime commodities the *Competition Act* provides that the fine imposed by the Commission or the courts shall be tripled automatically (Chapter 7 Sec 41).

The prison term in the *Competition Act* is on par with the *Revised Penal Code* (from 6 to 10 years imprisonment for offences involving prime commodities) but lower than the possible 5 to 15 year prison term under the *Price Act*. The *Competition Act* provides that when the entity involved is a company, prison terms shall be imposed on its officers, directors, or employees in managerial positions, if they were knowingly and wilfully responsible for the violation.

The Act allows a right of follow-on private actions for damages from violations of the proposed law (Chapter 7 Sec 15). Arguably this is unlikely to become a major source of private enforcement or compensation due to its follow-on nature and the lack of awareness of the law generally, certainly at the outset.

Challenges to competition policy and competition law enforcement

Regulatory barriers to competition

Regulatory barriers and government restrictions account for a lack of competition in key sectors of the Philippine economy, compounding the previous absence of a comprehensive competition law and a suitably equipped competition authority to enforce it. And even though the *Competition Act* is to be commended for not exempting specific sectors or public bodies from the competition law, it does not address the fact that many competition problems stem from the anti-competitive impact of government actions on the market. This requires wider pro-competitive regulatory reform. Two examples are provided below of the effects of restrictions on key areas of the economy.

Domestic shipping industry

Competition in domestic shipping is limited, contributing to large-scale inefficiencies and higher prices of many goods, especially food. Logistics costs account for 24%-53% of wholesale price in the Philippines compared to less than 20% in other countries in the region. Shipping and ports are estimated to account for about 3%-30% of wholesale prices depending on the goods and routes.[28] It is more expensive to transport goods between two domestic points than between two domestic points via an international point. According to data compiled by a World Bank study, transporting a 40-foot container from Manila to Cagayan de Oro in Northern Mindanao costs some USD 1 860 but transporting from Manila to Cagayan de Oro via Kaohsiung would reduce the tariff by USD 716 to USD 1 144.[29]

Existing laws make it difficult for new shipping companies to enter the market. They also raise costs artificially by requiring that certain services (for example dry docking and repair) be done within the Philippines when cheaper options are available elsewhere. Until July 2015, Philippine laws also provided for so-called "cabotage" restrictions – these restrict foreign shipping companies from serving domestic routes even if they can provide better service. Removing competition constraints and enhancing the competitiveness of shipping companies would lead to greater efficiency, increased capacity, better quality ships, lower operating costs, and lower freight rates. This will have a positive impact on lowering food and input prices, improving producers' access to markets, and raising the incomes of farmers in less developed regions.

Reform of the shipping industry was recently made a priority. In his July 2013 State of the Nation Address, President Aquino identified cabotage liberalisation as a priority reform and asked Congress to amend the 50 year old cabotage provisions "in order to foster greater competition and to lower the cost of transportation for agricultural sector and other industries." Recent reforms include regulations adopted by the Maritime Industry Authority in 2014 that streamlined the procedural requirements for applications for a Certificate of Public Convenience (required to operate a commercial domestic shipping service in the Philippines) and limited the ability of incumbent firms to delay their issuance by eliminating the requirement that incumbents be informed of new market entry. Complementary reforms to liberalise cabotage and improve port efficiency are also required otherwise inter-island shipping costs are likely to remain high.

The amendment to the cabotage rules was enacted on 21 July 2015 at the same time as the new competition law. The *Foreign Ships Co-Loading Act* will permit foreign ships to serve local routes for import and export cargo. Specifically it will allow for the transport and co-loading of foreign

cargos within Philippine waters by foreign vessels. Ships coming into the country will be able to transport container cargo to a destination port within the Philippines once they have cleared a port of entry. The co-loading provision allows for foreign vessels to transport container cargo of another foreign vessel bound for the same port. The reform is expected to improve competition in the sector and improve the country's attractiveness as an investment destination.

Price control

Price control exists for basic necessities and prime commodities under the *Price Act*, especially during periods of calamity, emergency or widespread price manipulation. The justification is to ensure the provision of commodities at a reasonable price at all times. Basic necessities and prime commodities are defined under the Act, and additional products may be included within the coverage of the law. The system is administered by the various government agencies with mandates under the Act, notably the DTI, the Department of Health, the Department of Agriculture, and the Department of Environment and Natural Resources. It is co-ordinated by the National Price Co-ordination Council, which includes the above government departments as well as representatives of manufacturers and retailers. The Council publishes suggested retail prices of commodities every three months, and suggested retail prices for seasonal items. The DTI and other government agencies monitor nationwide prices of the listed commodities, and if prices are found to be outside an allowable range then an order is issued to the relevant business requiring them to justify their costs. The list itself is determined by the DTI and is updated as necessary. A recent update of the list included bottled water, liquefied petroleum gas and noodles. There are regular warnings from the DTI and politicians on ensuring that products stay within their price caps.

Price controls are intended to protect consumers, particularly for food products or fuel. In December 2014, the DTI produced an amended list of suggested retail prices of basic commodities to reflect the 30% decline in the price of petroleum products. It declared that as a result, prices of basic commodities should come down by 3% at a minimum, but evidence suggests that even if price controls buffer the local economy from upward spikes in international commodity prices, these regulated prices do not mirror downward trends of commodity prices in international markets. This results in an effect opposite to the intended policy since consumers do not benefit from lower international prices. In addition, price controls increase business risks and discourage entry of new players that could generate competitive pressure.

In general, while price controls are not unusual in many jurisdictions, it is mostly accepted that price control should only be necessary in very particular circumstances, such as infrastructure markets where there are natural monopolies. And overall, price control should be unnecessary in markets free from structural constraints and which allow for effective market entry. The operation of competitive markets will drive prices down, allowing for new entrants to increase production when needed. Such a widespread and systematic price control system is therefore out of step with the economic reforms to introduce more competition in the economy. Consideration should be given to scaling back and eventually removing price controls, except in limited and time-bound circumstances to address market failures arising from exceptional circumstances.

An OFC report (June 2015) on the government's suggested retail price (SRP) mechanism highlighted a lack of rules and guidelines on the imposition of the SRP, which acts as a price ceiling and removes incentives to compete on price. The enforcement procedures for non-compliance along with the requirement for the retailer to have planned price increases approved, negates the recommendatory nature of the SRP. The report notes that the SRP did not prevent or detect the price hikes in the rice, garlic and onion sectors that the DOJ is prosecuting. It proposes amending the terminology to better reflect that it is a recommended rather than government imposed price. It also suggests that price controls be imposed only during calamities and disasters and only for basic and prime commodities.

Sectoral overlap

A number of sectoral laws give the sector regulators jurisdiction over competition matters as well as economic regulation in their respective industries. Even with the establishment of the OFC in 2011 the sector regulators continued to enforce the competition provisions in their respective sectors, where they exist. Consequently, the OFC made establishing relations with the sector regulators and asserting its role as the competition authority under EO 45 a priority. The OFC's first Policy Paper from 2013 dealt with the respective roles and functions of competition authorities and sector regulators and proposed a set of co-operation guidelines to determine OFC participation in competition investigations.[30] The OFC also entered into agreements with the Philippines Port Authority and the Energy Regulatory Commission where they are co-ordinating over the respective investigating a case of alleged collusion in the power industry.

The Act provides for the new Competition Commission to have primacy over competition matters. It will also have jurisdiction over any issue that involves both competition and non-competition matters, although it will

have to consult the relevant sector regulator. It will have the authority to intervene and participate in the administrative and regulatory proceedings of other government agencies, which require a consideration of the Act, such as those before the Energy Regulatory Commission, the SEC and the National Telecommunications Commission (Chapter 2 Sec 2(n)). This is to ensure that the competition laws are interpreted and properly enforced. This may lead to conflicts with the sector regulators and it is expected that the Commission would build on the OFC's established relations with the regulators and enter into agreements with them to smooth the application of its intervention powers.

Ports

The Philippines Port Authority (PPA) is a government-owned corporation attached to the Department of Transportation and Communications, established in 1974 as the main developer, operator and regulator of ports. Most ports, especially the larger ones are under the control of the PPA. It supervises 119 self-owned ports and regulates over 500 ports, issues permits to construct and operate ports,and sets and collects port charges. It also approves increases in cargo handling rates and receives 10% of domestic cargo handling rates and 20% of foreign cargo handing rates. Port ownership and administration across the Philippines is highly centralised.[31]

The PPA's multiple roles as developer, operator and regulator lead to a conflict of interest and functions. It has little incentive to promote competition and has used its regulatory powers to protect its ports from competition delaying or not issuing permits to construct and operate private ports. This has disadvantaged private port operators. The PPA has also limited competition in cargo handling services by restricting cargo handlers in its ports to operating on specific piers and for specific shipping lines. This is compounded by a lack of transparent and competitive bidding processes for granting or extending cargo handling contracts. In addition, given that the PPA approves rate increases for charges and cargo handling in both PPA-owned and private ports, it is able to generate revenue increases for itself.

Competition in the ports sector has been weak and investments inadequate as a result of this regulatory and institutional framework. The sector would benefit from regulatory reforms to promote competition, notably through separating the PPA's regulatory responsibilities from its development and operations role.

Telecommunications

The telecommunications sector, which was dominated by a private monopoly, the Philippine Long Distance Company (PLDT), for more than half a century was liberalised in the late 1980s. Before that, waiting time for a telephone line could take up to ten tears and service quality was low. This liberalisation process was accelerated in the early 1990s. Cellular mobile services were liberalised in 1992 and in 1993 EO 59 mandated the interconnection of all carriers, while EO 109 opened up the basic telephone service to new entrants.

Regulation was separated from operations in the telecommunications sector under the 1995 *Public Telecommunication Policy Act*. It established the National Telecommunications Commission (NTC), as a state agency attached to the Department of Transportation and Communications, responsible for administering the provisions of the Act. This includes: ensuring telecommunications services are provided in underserved areas; granting Certificates of Public Convenience and Necessity (CPCN); establishing rates and tariffs in circumstances where competition is not feasible; resolving interconnection disputes; and allocating radio-frequency spectrum.

Companies wishing to provide public telecoms services (*i.e.* those involving the establishment of a fixed network) need to obtain a Congressional franchise, which requires the approval of both Houses of Congress. The maximum period for which a franchise may be granted is 50 years. Upon expiry, the franchisee must go back to Congress to get an extension. In practice, franchises have generally been granted for 25 years. Franchised public telecoms companies must then obtain a CPCN from the NTC in order to provide the relevant service. The CPCN specifies geographical area, type or classification of activities, regulations for providing the services and, in some cases, the rates chargeable.

As a result of the reforms, several players, including international investors, entered the telecoms market. By 2001, the industry had seven players and revenues grew 11-fold from about PHP 20 billion in 1993 to PHP 230 billion in 2008. The industry's contribution to value-added increased at a similar pace. The original monopoly that was the initial target of the liberalisation reforms, the PLDT, emerged as the biggest beneficiary of the reform, earning much higher revenues from a much bigger market.[32]

The telecoms sector remains highly concentrated, however, and has even reconsolidated. The wireless communications sector is dominated by PLDT, which extended its market share to over 65% following the controversial 2012 NCT approved merger with Sun Cellular – the ailing, smallest and most recent entrant in the cellular market. The third major

competitor, Globe Telecom, has a market share of about 30%. The absence of a comprehensive competition law raises the potential for this merger to stifle competition.[33] The low penetration and the high cost of broadband internet stem partially from the lack of competition in the broadband sector, where PLDT controls 60% of the market. And since acquiring Digitel in 2011, PLDT has dominated the fixed-line sector, with as much as an 80% market share.[34]

The combination of a weak regulatory authority, a dominant carrier in fixed line and mobile services, significant market barriers such as foreign equity restrictions and the need for a Congressional franchise to provide telecom services, alongside unclear interconnection and access rules and pricing, has limited the impact of liberalisation efforts and restricted competition in the telecommunications sector.

Electricity

The power generation sector was opened up in 1987, allowing the private sector to invest and participate in augmenting the sector's generation base capacity. This was followed by the *Electric Power Industry Reform Act* (EPIRA) 2001 which prescribed the restructuring of the sector by separating the natural monopolies from the potentially competitive parts. Generation and supply would be competitive and open while transmission and distribution segments would be regulated.

As the principal regulatory body for the Philippine electric power industry, the Energy Regulatory Commission is tasked with ensuring 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 45 EPIRA). 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 anti-competitive agreements, misuse of market power, and mergers and acquisitions and consolidation.

One of the weaknesses in the competition-related provision of the EPIRA is that the Act provides for safeguards against anyone owning, operating or controlling more than 30% of the installed generating capacity of a grid, or 25% of the national installed generating capacity but allows for cross-ownership under these thresholds. This might lead to access problems and a conflict of interest as it allows a distribution company to enter into supply contracts with its generation subsidiaries.

In addition, the absence of clear rules and an appropriate regulatory framework in the early stage of deregulation led to discretionary decision-making, which resulted in high long-term costs and concerns over affordability. Alongside power shortages, these dominate the headlines. In 2014 Manila Electric Co (Meralco -the Philippine's largest utility) had its bid for a 75% short-term tariff suspended as the Supreme Court extended indefinitely a freeze on the firm's rate hike petition, citing the need to protect consumers. Access rules for transmission and distribution as well as pricing system changes that would allow consumers to share in efficiency gains have not yet been fully addressed.[35] As a result, the structure of the electricity sector is still a monopoly with National Power Corporation in generation, Transco in transmission, and Meralco in distribution.

In 2006, under its competition remit, the ERC launched an investigation into alleged price manipulation in the wholesale electricity market by the National Power Corporation and Power Sector Assets and Liabilities Management Corporation. The ERC did not find sufficient evidence to support a case but did note that the electricity market was not really competitive and was therefore prone to market abuse.[36] Since then, no other major investigation into any alleged restrictive practices in the energy sector was initiated until December 2013 when complaints were filed over alleged price fixing by power generation companies. It is currently under investigation by the ERC as well as the OFC.

Competition advocacy

Competition advocacy involves efforts directed both towards specific government entities and towards generating support for competitive markets and the building of what is often referred to as a "competition culture" in society. The first, intra-governmental advocacy, involves advising government on how public policies and institutions interact with markets and on how to minimise the impact of government interventions on competition. Competition culture advocacy on the other hand aims to increase the understanding within the wider society about competition and its benefits, including among consumers, civil society, academia and the business community. The objective is to increase understanding and support for competitive markets and compliance with competition law. Competition authorities generally engage in both forms of advocacy.

Intra-governmental advocacy

There was no explicit competition advocacy role for any of the government departments prior to the enactment of the *Competition Act.* However, one of the tasks assigned to the OFC by EO 45 was to prepare, publish and disseminate studies and reports on competition to inform and

guide the industry and consumers. Although this did not expressly include intra-governmental advocacy, the OFC has directed much of its advocacy activities towards government stakeholders. It has used Policy Papers to set out its position for vesting competition powers in the competition authority rather than across sector regulators and the relative governance strengths of a competition authority in this regard.[37] It has also provided input and support to the legislative efforts to pass a competition law through co-ordination and consultation with the Senate and House of Representatives on the draft Bills.

The OFC has completed three sector studies, one on the reform of the Customs, Immigration and Quarantine officers' overtime charges, a second on liberalising the harbour pilots industry and a third on competition and regulation in the tug assistance service (Box 4.6). It has arguably not tackled the most significant regulatory barriers head on, but has tested the water with more modest proposals for reform in the first instance. This strategy is perhaps well conceived given the OFC's lack of enforcement powers and its reliance on the co-operation of other government agencies to progress its recommendations.

Box. 4.6. **OFC sector studies to date**

The case of Customs, Immigration and Quarantine (CIQ) Charges (July 2013)

In support of policy measures to improve the competitiveness of the transport industry and reports that business executives found customs procedures inefficient, the OFC launched a study to review the impact of overtime pay to Customs, Immigration and Quarantine (CIQ) officers and demonstrate the OFC's support for the economic reform introduced by the Aquino administration. The OFC reviewed the charges paid to CIQ agencies, which supervise a significant proportion of the transport industry, and noted that they significantly increase the cost of operating in the Philippines and highlighted that the practice of multiple billing by CIQ agencies is contrary to good governance. The OFC's study also outlined the main arguments put forward by supporters of reform, notably that the charges amounted to double taxation and the need for a modernised CIQ system. On the basis of this review the OFC endorsed its support for the reform which removed the CIQ overtime charges and introduced 24/7 operations, as a means of improving competitiveness in the transport industry. The study noted that the reform was estimated to have generated more than 400 million pesos (approximately USD 8 970 900) in annual savings to the air transport industry.

Box. 4.6. **OFC sector studies to date** (cont.)

Liberalising the Harbour Pilots Industry (October 2014)

This study was completed under the umbrella of the OFC-Philippine Ports Authority (PPA) Memorandum of Agreement signed in June 2013. The study identified the following competition restraints: (i) monopolisation of pilotage services due to exclusive privilege granted by an administrative order; (ii) conflict of interest in the determination of vacancies in pilotage as well as in the appointment of harbour pilots; (iii) lack of transparency in harbour pilots' transactions; and (iv) non-compliance of harbour pilots with the prescribed rates and services. The PPA and the OFC recommended liberalisation of the industry and the study provides a proposed Executive Order, for approval by the President to accomplish this. The policy proposes that harbour pilots would no longer be required to be members of a harbour pilots association and could charge competitive rates. The policy would also remove the limit on the number of harbour pilots per pilotage district. The aim of the proposal is not only to liberalise the pilotage industry and increase the competitiveness of Philippine ports but also to address the harbour pilots' conflict of interest in determining vacancies in pilotage and appointment of pilots. The policy would also require all harbour pilots to submit their financial records to the PPA. The proposed Executive Order is undergoing consultations with the PPA prior to finalising the draft for wider consideration by policy makers.

Addressing Competition and Regulatory Issues in the Tug Assistance Service (June 2015)

This study was also conducted under the OFC-Philippine Ports Authority (PPA) co-operation agreement. The study identified a number of competition and regulatory concerns. These included (i) a lack of competition in the provision of tug services; (ii) the use of exclusive contracts between tug assistance providers and port operators; (iii) potential cartel behaviour and opaqueness in tug rates; (iv) unfair advantage of harbour pilots as tug operators; and (v) non-registration of tug owners. The OFC made several recommendations for reforms. These would (i) remove unnecessarily high barriers to entry and exclusive contracts; (ii) make information on pricing/agreed-on rates more readily available; (iii) develop rules and regulations on unfair business practices; and (iv) sanctions for non-compliance by tug operators.

The OFC has also taken advantage of other opportunities to make recommendations on anti-competitive regulations. It took part in consultations on amendments to the National Internal Revenue Code to grant income tax exemptions to international air and shipping carriers that are expected to result in international carriers opening or adding flights to the country, and reducing fares.

Building a competition culture

The Philippines lacks a strong consumer base to support competition. Continued advocacy efforts will be necessary to increase stakeholder support. Consideration should be given to creating a more interactive and user-friendly website to complement these efforts. This might include simple explanations of the purpose of competition law and policy and examples of how it benefits consumers and business.

The *Competition Act* includes a specific advocacy mandate for the new Competition Commission. Chapter 2 Sec 8(m) provides that the Commission will have a general role of issuing advisory opinions and guidelines to support the effective enforcement of (and presumably compliance with) the Act. It can submit reports and proposals to Congress to propose legislation for the regulation of commerce, trade and industry. A function akin to a market study is envisaged with the Commission mandated to monitor and analyse the practice of competition in markets that affect the Philippine economy. The Commission will also have a general role of promoting a competition culture by publishing reports and studies on anti-competitive conduct and agreements to raise awareness and guide business and consumers.

The Act also provides for a "National Competition Policy" which is to be developed by the National Economic and Development Agency, in consultation with the Competition Commission and sector regulators. It is not clear what this policy's objectives are. Will it develop proposals for a programme of micro-economic reform like the Australian model from the 1990s, or is it more generally about raising awareness of competition and across government? The *Competition Act* also provides that the government is to conduct an advocacy programme to inform the general public about the Act during the two year transition period.

International aspects

Regional integration and trade agreements

The 2015 target for implementing the ASEAN Economic Community was a clear driver for the Philippines to implement the *Competition Act* to meet its ASEAN commitments. But beyond this specific commitment, the free trade agreement itself gives rise to pressure for effective competition legislation. The free trade area generates a focus on competition in non-traded goods and services, as exporters and importers become concerned at the impact on their competiveness of any lack of competition in relation to the businesses that supply them. In addition, if imports face domestic anti-competitive obstacles to reaching consumers there is likely to be pressure

from exporters in other countries and from import agencies and businesses in the importing country for the removal of any domestic "behind the border" obstacles to the realisation of the benefits of free trade.

Economic integration therefore forces the Philippines to open up its markets further. In addition to existing free-trade agreements with major regional trading partners such as China, Korea, Australia and India, the Philippines is also conducting free trade negotiations with the European Union and the United States. Membership of the Regional Comprehensive Economic Partnership with ASEAN dialogue partners[38] and participation in the Trans-Pacific Partnership dialogue would expand opportunities for the Philippines.[39] Participation in these agreements and negotiations will require further economic reforms to improve the investment climate and promote competition in the Philippines.

International engagement

The OFC is currently recognised across the international community as the central agency responsible for the existing competition laws and policy within the Philippines. It has been proactive in the international arena and its dynamic approach to regional and international organisations as well as bilateral relations with other competition authorities has fostered significant international co-operation and assistance. The new Commission will take on the role of official representative of the Philippines government in international competition matters. It will benefit from the in-roads that the OFC has made regionally and internationally, which have galvanised support for capacity building and assistance from international donors.

Within ASEAN, the OFC has assumed an active role in the ASEAN Experts Group on Competition, a body established in 2007 under the ASEAN Economic Community as a forum for discussion and co-ordination of competition policies. The OFC chaired the Group in 2013-14 and introduced a number of ambitious projects designed to accelerate the pre-integration process. These include: a proposal for a regional co-operation framework to lay the groundwork for co-operation in enforcement, information sharing and technical assistance; developing and implementing sector studies in the region; categorising the Group's documents to assist with knowledge management system and a proposal to measure the effectiveness of ASEAN Member States individually and collectively through a series of major indicators. The OFC's willingness to assume a high profile role provides it with an excellent opportunity to highlight the expectations on ASEAN Member States to implement a comprehensive competition law, and how the Philippines fares against the ASEAN Regional Guidelines on Competition Policy. It is also an opportunity to assess the effectiveness of neighbours' experiences with implementing their

respective competition laws and relevant lessons that the Philippines can derive from this.[40]

The OFC has been an active participant in the activities of international organisations. It completed a peer review by UNCTAD in 2014 and is a regular participant in International Competition Network meetings, the annual OECD Global Forum, and the OECD-Korea Policy Centre Competition Programme. The OFC also hosts a number of regional meetings, including the East Asia Conference on Competition Policy and the East Asia Top Officials Meeting. An agreement with the World Bank in 2013 provides for a four-year project to identify and address competition barriers in domestic trade and logistics sectors. This includes a study on product market regulation using the OECD's PMR indicators methodology to assess the economy-wide and industry- specific regulatory structures and policies that restrict competition in upstream markets such as electricity, energy, telecommunications and transport.

The OFC and other stakeholders also benefit from targeted capacity building activities. Under the EU's Trade Related Technical Assistance 3 project, which aims to support the Philippine's integration into the international and regional trading and investment system, the OFC is the implementing agency for the component on competition policy development. This supports capacity building as well as sector studies in priority sectors identified by the OFC, notably energy, telecoms and the transport sector. The Australian Competition and Consumer Commission is providing assistance, for example in the preparation of an investigation manual for the OFC. Likewise the US Federal Trade Commission and the Department of Justice have held capacity building workshops. Several donor agencies and other groups have long-standing technical assistance programmes that support the OFC and other stakeholders in areas of competition policy and regulatory reform.[41] A memorandum of understanding signed with the Japan Fair Trade Commission in 2013 and with the Australian Competition and Consumer Commission in 2014 provide for improved co-operation and capacity building. The OFC expected to sign three more MOUs by end of 2015.

Policy recommendations

In the short- to medium-term the priority must be to operationalise the *Competition Act* and the new Competition Commission.

Main implementation challenges:

- Certain provisions of the *Competition Act* are likely to impede effective enforcement of the underlying objectives of the Act. It contains a number of provisions that are not commonly found in the laws or enforcement practices of other jurisdictions. These should be clarified and mitigated as far as possible through the implementing rules and regulations to avoid legal uncertainty and the risk of politicising the implementation of the law.
- The 180 day timeframe to complete all of the implementing rules and regulations envisaged in the law is very tight given (a) the number of details the Act leaves to the implementing rules, and (b) the need to clarify how some of the provisions will be interpreted and applied in practice. The development of these secondary regulations could be staggered to give more time to the process. This would also allow for more consultation of interested parties and for their feedback to be given due consideration, which will enhance buy-in.
- Raising awareness of the Act and changing attitudes to established business practices in the Philippines will be a considerable challenge.

Key implementation factors for success:

- ***Clear and robust implementing rules and regulations.*** Clear implementing rules and regulations are needed to articulate the new Competition Commission's interpretation of the law and avoid the potential negative effects of provisions that are at odds with established best practice. These should address the following provisions:
  - Exemptions and exclusions:
    - Limit the broad exemption powers which allow the Competition Commission to determine whether enforcement is warranted on general public interest grounds (Chapter 5 Sec 26) and which enable it to exempt individual entities from the Act (Chapter 5 Sec 28). Develop transparent principles to assess requests for exemptions from the competition law to limit their number, as well criteria for when they will be revoked. Establish clear criteria for exemptions on public interest grounds.

- Abuse of dominance:
  - Clarify that market shares are not the only element on which dominance will be assessed (Chapter 5 Sec 27)
  - Limit the Commission's power to set market share thresholds for dominance in particular sectors as this will create legal uncertainty (Chapter 5 Sec 27)
  - Limit the "in good faith" exemption for predatory pricing, which has the potential to be used to exonerate anti-competitive below cost selling.
- *Mergers:* Clarify that administrative fines for a prohibited merger would, in practice, not be applied (Chapter 6 Sec 29(a)). Instead penalties for failure to comply with a notification requirement should be applied.
- Sanctions and remedies:
  - Limit the Commission's monitoring function for non-adjudicatory administrative remedies (Chapter 7 Sec 37(d)), as this generally only applies in merger control, and it is likely to be resource intensive.
  - Limit the use of structural remedies from the Commission's non-merger/market investigation functions given their intrusiveness and potential chilling effect on competition.

The development of Implementing Rules and Regulations should also clarify legal criteria and tackle the following:

- ***Clarify the status of the OFC's enforcement and merger guidelines.*** The OFC Guidelines may inform the development of the Implementing Rules and Regulations as well as internal working documents for the new Commission. However there are inconsistencies with the new Law. The Act should be the starting point to define specific prohibitions and avoid inconsistencies between their respective descriptions of types of anti-competitive agreements, abuses and merger review procedures in the transition period. The status of the OFC's Guidelines and whether and how they will be used by the new Commission should be clarified to provide certainty and continuity to business during the transition period.
- Publish guidelines on the manner in which the Commission intends to enforce the *Competition Act* after the Commission has acquired some

enforcement experience. Publishing external guidance for a competition authority with little or no enforcement experience is premature. It can be difficult to amend previously published guidance, and to do so would create legal uncertainty. Instead, the new Competition Commission should adopt working internal guidelines to ensure a principled approach to enforcement and consistency in its approach. At the appropriate time, external guidelines may be published to reflect enforcement experience, and practice in taking enforcement decisions on cases. This would also take account of the direction and guidance from court decisions.

- ***Adopt policies and procedures to embed transparency, integrity and accountability into the new Competition Commission.*** Accountability is necessary to maintain independence in the longer term. Stakeholders, including politicians, the media, the public and the business community should know who is responsible for a decision, and the reasoning behind it. Interested parties should be able to provide relevant input to decisions through consultation processes. Furthermore, they should be able to obtain redress easily and quickly if the competition authority has acted arbitrarily or incompetently. Communication and transparency are key for accountability. It is therefore common practice for competition authorities to make their final decisions readily available to stakeholders, usually through their websites and the press. The new Commission should publish annual reports and financial accounts in line with national reporting requirements, as well as reasoned case decisions. It should systematically make information on its laws and regulations, activities and case decisions readily available through its website. It should also implement public consultations to seek views on proposed activities/priorities and the development of normative standards and guidelines. It would also be good practice to seek feedback from stakeholders about the quality of the Commission's work through annual surveys.

- ***Develop prioritisation principles for enforcement and advocacy activities***. Most competition agencies have a set of different criteria to help them set and guide their enforcement priorities. The process of prioritisation enables a competition agency to concentrate its limited resources in specific areas identified as being of greatest importance. Prioritisation can take into account a wide range of immediate or strategic criteria but should mainly be determined on the basis of the expected direct and indirect effects of any action. The process is intended to make it possible to concentrate resources on high-impact sectors or significant cases and projects, usually this means focusing on the most potentially harmful conducts, precedent-setting cases that

clarify the law, significant market studies, and advocacy projects on critical concerns. The adoption of prioritisation principles would signal to business, consumers and commenters what the Commission's key concerns are within the existing legal framework.

- Implement a mechanism to facilitate knowledge transfer from the OFC and build institutional capacity at the new Competition Commission. The experience, knowledge and processes developed by the OFC should be captured and transferred to the new Commission in so far as they relate to the functions that will transfer to the Commission. Where feasible, OFC staff should be able to transfer over to the new Commission to provide continuity and assist in building the Commission's institutional capacity. The new Commission should develop a training needs assessment and establish on-going capacity building programmes with regional and international providers.

- ***Provide additional funding to cover the resource implications of the new law for the DOJ's prosecution regime.*** Criminal offences under the Act will be prosecuted by the DOJ, with the OFC investigating and collecting evidence, the National Bureau of Investigation also assisting and collecting evidence and the National Prosecution Service conducting a preliminary investigation if a decision is taken to proceed to court. This will involve additional demands on all agencies, which must be adequately resourced.

- Develop an advocacy strategy targeted at government officials to educate them about competition and introduce competition assessment. The Commission should build on the OFC's advocacy work and inform public policymakers about how the choices that they make, at the government level, can have negative effects on competition. The Commission should also adopt a competition assessment methodology, such as the OECD's Competition Assessment Toolkit, to identify anti-competitive policies and regulations and propose less restrictive alternatives. Competition assessment provides competition authorities with an invaluable tool in structuring their intra-governmental advocacy efforts. This would complement the use of market studies to identify competition problems in markets and provide an evidence-base to advocate for pro-competitive reforms. The Commission's intra-governmental advocacy work should be linked to a strong communication plan and build on the OFC's efforts to develop a competition culture in the Philippines with business, the judiciary, consumers and academia.

- ***Measure and communicate the harmful effects of anti-competitive practices to encourage support for competition policy.*** The Commission and other stakeholders should identify topics that resonate with the public. Policy-makers understand the importance of competition enforcement better when the negative effects of anti-competitive practices on citizens and business are measured. Communicating the harmful costs of anti-competitive practices and articulating the benefits of more competition among firms in specific cases also helps build credibility and advocate for overall competition reforms in other markets.

Factors necessary for the success of the new competition regime

- ***Ensure the independence of the new Competition Commission***. Most competition authorities are independent from political interference and this is considered critical to effectively implement their mandates. An independent authority with a specific mandate and predictable decision-making that remains constant through a change of government will be better able to limit the extent that business groups can lobby government agencies for favourable treatment; and it provides business with greater regulatory certainty. Budgetary autonomy can support independence, for example a multi-year budget cycle, if feasible, could enhance the independence of the Competition Commission. The new Commission should promote its independence by adopting a statement setting out its commitment to transparent principles and implementing operational guidelines to this effect.

- ***Identify a government champion to support competition law and policy.*** A completely autonomous competition authority can become isolated from policy decisions and initiatives. In some instances this may weaken advocacy efforts due to the difficulty in conveying messages to policy makers during the elaboration of new policy initiatives. Too great a disconnect from the government system can also disadvantage the authority in terms of timely and comprehensive information on reform proposals. The new competition law will need strong political support and backing. Moreover, it will require a strong commitment on the part of the legislature and the executive to change the business climate as part of a package of economic reforms. It must not be seen in isolation as a law entrusted to, and the sole responsibility of a competition authority. It must be adopted as a whole-of-government policy if it is to be effective. While the new Commission will report to a Congressional Oversight Committee, consideration should be given to a more formal "line Ministry" type responsibility under a significant

government body in order to "champion" the Commission's role to other government departments. Otherwise the Commission risks having a relatively low level of influence on the policy-making process, despite having a broad advocacy mandate.

- ***Address major regulatory barriers to competition.*** Priority should be given to enhancing competition in key sectors of the economy where there is potential to reduce poverty and spur growth. Notably:

- ***Promote the development of pro-competitive regulatory policies in regulated sectors.*** Use the Commission's primacy over competition laws to foster competition in the regulated sectors, such as assuring non-discriminatory access to essential networks and tackling behavioural barriers to entry.

    – Guarantee the interconnection between the incumbent and new entrants for effective competition in the telecommunications sector. Clear rules are needed on interconnection and terms of access along with effective implementation of competition law and regulation.

    – Ensure adequate and affordable power supply in the electricity sector. This requires more focused implementation of competition law in the power retail market and lowering the threshold for open access so that the market becomes more contestable.

  – ***Reduce and eventually remove price regulation for basic commodities.*** This systematic price control system is contrary to the principle of introducing more competition in the economy. Price control should be unnecessary where no structural barriers exist and the market is contestable. The operation of competitive markets will drive prices down, allowing for new entrants to increase production when needed. The price control system for basic commodities should be scaled back and eventually repealed, except to address market failures in limited and clearly defined circumstances.

  – ***Review the mandate of the Philippines Port Authority (PPA) and divest its ports operations function.*** Competition in the ports sector is weak and investments are inadequate. Divest the PPA of its conflicting roles of regulator, developer and operator of ports, to avoid it using its regulatory powers to protect its own ports from competition. In addition, remove the link between PPA revenue and cargo handling charges to reduce a conflict of interest. This will reduce the price of goods and improve access to markets.

Notes

1. The information in this report is based on information provided and publically available information as of 11 September 2015.
2. NEDA (2014)
3. Joint Foreign Chambers of the Philippines Statement on Competition Legislation, 2011.
4. Philippines Chamber of Commerce 2014, *Manifesto of Support for the Adoption of a Competition Policy and Competition Law in the Philippines.*
5. Remo, A.R. "Exporter Cheer passage of Competition Law", *Philippine Daily Inquirer*, 22 December 2014.
6. Makati Business Club 2014.
7. Chapter 11, Section 50(1) Executive Order No. 292 Series 1987 Instituting the Administrative Code 1987.
8. OECD (2015).
9. ASEAN (2010).
10. Tatad vs Secretary of Department of Energy, GR No. 127867 5 November 1997.
11. Prime commodities are defined as goods other than basic necessities that are essential to consumers in times of crisis or calamity.
12. See, for example, Mumar (2010).
13. Tatad vs Secretary of Department of Energy, GR No. 127867 5 November 1997.
14. Romero P.S. "House leaders say anti-trust bill to be passed next week", *The Philippine Star*, 7 March 2015.
15. Energy Regulatory Commission: Rule 9, Sec 4 Competition Rules and Complaints Procedures.
16. Executive order 913.
17. National Bureau of Investigation (NIB): responsible for criminal investigation; completes criminal investigations it considers display "probable cause to warrant prosecution" and sends them to the National Prosecution Service which in turn independently determines whether there is probable cause to lodge criminal charges; if it establishes a *prima facie* case the matter is filed in court.

18. Represents a number of regulators before the appellate and supreme courts.
19. Provides legal advice and representation to some regulators and government-owned corporations.
20. American Bar Association-Rule of Law Initiative (2012).
21. These figures represent the core manpower complement that handles core functions and do not include support staff for administrative, finance, recruitment, liaison, utility, security, procurement and other related tasks or operational requirements of the OFC. These are undertaken by another 20 staff.
22. UNCTAD (2014), p.26.
23. OFC-DOJ (2013).
24. OFC-DOJ (2014).
25. Sy (2015), p.8.
26. DOJ Circular No. 11 *Guidelines Governing the Implementation of Executive Order No. 45, series of 2011, Designating the Department of Justice as the Competition Authority*, 1 Match 2013
27. OFC Case-Handling Procedure, 22 May 2015
28. World Bank (2015), p. 63.
29. World Bank (2014), pp 115-116.
30. OFC-DOJ (2013).
31. Llanto et al. (2005).
32. World Bank (2013), pp 128-129.
33. Aldaba (2011).
34. BTI 2014, *Philippines Country Report.*
35. Aldaba (2008,) p 44.
36. ERC case No. 2007-421 MC.
37 OFC-DOJ (2013) and OFC-DOJ (2014).
38. Australia, China, India, Japan, New Zealand and Korea.
39. Approximately half of the current Philippines' exports and one-third of its exports are accounted for by the current TPP countries and about a quarter of its FDI comes from these countries.

40. In line with these initiatives, the OFC accomplished several activities and outputs: (1) paper on existing best practices on regional cooperation and a related three-day workshop attended by ASEAN competition authorities on 3-5 November 2015 in partnership with the ASEAN-Australia-New Zealand Free Trade Agreement Competition Committee, Australian Competition and Consumer Commission (ACCC) and ASEAN Secretariat, as preliminary steps for a more formal regional cooperation arrangement; and (2) AEGC Kick-off Workshop on Sector Studies on 11-12 March 2014 with support from the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). The OFC continues to render assistance in the ongoing development of a web portal as part of the AEGC's knowledge management efforts and the identification of indicators to measure the effectiveness of competition agencies.

41. The Japan International Cooperation Agency (JICA), Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), United States Agency for International Development (USAID), Asia-Pacific Economic Cooperation (APEC) and Consumer Unity and Trust Society (CUTS) International.

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