

Institutional Design of Philippine Competition Law

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Abstract

After twenty-five years in the legislative mill, the Philippine Competition Act (PCA) was enacted into law in 2015, which established a national competition authority. But whether this law will truly change the landscape of competition in the market is an ambitious antitrust vision that requires years of competition law enforcement. On top of that, it demands for consideration and balancing of several competing norms and values within a well-designed competition law institution.

This study looks into the institutional design of the PCA vis-à-vis the presence of the “structure and design” of the normative criteria or values, which are considered the institutional prerequisites for an effective competition law enforcement regime. The institutional evaluation of the design and structure of the Philippine competition enforcement regime suggests that the normative criteria of designing competition law institution are formally embedded in the provisions of the PCA. Independence, accountability, transparency, and confidentiality are expressly entrenched in the language of the law. Relevant expertise in the discipline of competition law is considered in the selection of the personnel of the Philippine Competition Commission (PCC). The normative criteria or values appear to be formally implanted in the PCC’s institutional design, an advantage of legal transplant that a new competition authority enjoys during its conceptualization and designing. Of course, the overall institutional design of the PCC is not without shortcomings, which require congressional amendments.

Key Words: Institutional design, Philippine, competition law, enforcement

I. Introduction

It took twenty-five years for the Congress of the Philippines to pass a national competition law regime, the Philippine Competition Act, or the Republic Act 10667 (hereinafter “PCA”).¹ Prior to the passage of the law, competition-related policy and law were scattered in various statutes, although the terms “competition law” and “antitrust” are still foreign to the Philippine jurisprudence. It is, in fact, a constitutional policy.² However, the enforcement regime had not fully developed. In the matter of the Philippine economy, these laws did not help competition to be fully established in all sectors of the economy, nor were existing competition in other sectors of the market enhanced.³

There are various factors suggested by scholars why competition law regime in the Philippines did not develop. Among the factors are *regulatory conflicts, regulatory capture, lack of coherent enforcement and comprehensive competition law, and lack of jurisprudence*.⁴

The passage of the PCA is believed to be a gamechanger.⁵ This is not, however, an easy task for the newly-established competition authority given the above-mentioned factors that have affected the development of competition law regimes in the Philippines. It is worthy to add that competition law is new to the bar and the bench, notwithstanding that the concept of the Sherman Act⁶ was long implanted in the Philippine legal system.⁷ It was only recently that the idea of incorporating competition law in the curriculum of law schools began to surface as part of the advocacy

1) President Benigno S. Aquino III signed the law on July 21, 2015.

2) See CONST. (1987), art. XII (Phil.).

3) ANTHONY AMUNATEGUI ABAD, RECOMMENDATION FOR PHILIPPINE ANTI-TRUST POLICY AND REGULATION (2005) (paper presented during the conference entitled “Policies to Strengthen Productivity in the Philippines,” sponsored by the Asia-Europe Meeting (ASEM) Trust Fund, Asian Institute of Management Policy Center, Foreign Investment Advisory Service, Philippines Institute of Development Studies and the World Bank, June 27-28, 2005), <https://xa.yimg.com/kq/groups/14704596/1781335377/name/Abad-word.pdf>.

4) See generally Erlinda M. Medalla, *Government Policies and Regulations: Interface with Competition Policy*, in TOWARD A NATIONAL COMPETITION POLICY FOR THE PHILIPPINES 307 (Erlinda M. Medalla ed., 2002), <http://dirp4.pids.gov.ph/ris/books/pidsbk02-competition.pdf>.

5) Chris Schnabel, *Aquino Signs PH Competition Act, Amended Cabotage Law*, RAPPLER (published July 21, 2015, 11:03 AM, updated July 26, 2015, 1:26 PM), <http://www.rappler.com/business/economy-watch/99954-philippine-competition-act-shipping-law-aquino>.

6) Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2018).

7) See An Act to Prohibit Monopolies and Combinations in Restraint of Trade, Act No. 3247, (Dec. 1, 1925) (Phil.), <http://www.chanrobles.com/acts/actsno3247.html>.

program of the Philippine Competition Commission (hereinafter “PCC”) and was also included in the 2018 Bar examination coverage, which now makes it a mandatory subject to be covered.⁸ And with lack of experience in competition law enforcement, the PCC is constrained, as expected, to “cut and paste” antitrust rules and principles from developed economies into its enforcement framework. This is generally helpful as new competition law institutions have much to learn from the experiences of others, serving as a laboratory.⁹

Recognizing the ramifications of the above problems underpins the need to look into the institutional design of the new competition law authority because it is as important as the substance of competition law. Hence, this paper will evaluate the institutional design and structure of the new Philippine competition law regime through the lenses of normative criteria or values and best practices norms that are considered the *institutional prerequisites* for an effective competition law enforcement regime. Indeed, there is no perfect formula for an optimal enforcement mechanism but finding the existence of these norms in the competition law agency gives us an initial evaluation on the capacity and legitimacy of the agency in achieving its policy objectives of competition law enforcement and, perhaps, a window for policy reforms. Since the law was recently passed and the PCC is in its formative stage, this study will focus on the provisions of the PCA and the minutes of the deliberations of the Senate and the Bicameral Committee Conference of the House of Representatives and the Senate of the Philippines.

8) See *2018 Bar Examinations Mercantile Law*, SUP. CT. PHIL., <http://sc.judiciary.gov.ph/baradmission/2018/05%20Mercantile%20Law%20Syllabus%202018.pdf> (last visited Apr. 27, 2018). The PCC initiated a Call for Collaboration program together with the Philippine Association of Law Schools (PALS) for the crafting of syllabus for competition law. The first part of the Call for Collaboration was held on March 15 to 16, 2018. The author was one of the participants.

9) See Michal S. Gal, *When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce*, 41 LOY. U. CHI. L.J. 417, 419 (2010).

II. Philippine Competition Laws: Then and Now

A. The First Regime: The Revised Penal Code

The first legal provisions enforced to deal with monopoly and combinations in restraint of trade can be found in Articles 543, 544, and 545 of the Spanish Penal Code during the Spanish occupation.¹⁰ After the Spaniards ceded the Philippine territories to the Americans under the Treaty of Paris, the Philippine Legislature passed on December 1, 1925, Act. No. 3247 (*An Act to Prohibit Monopolies and Combinations in Restraint of Trade*),¹¹ which was based on the Sherman Act of the United States, supplementing the provisions of the *old* Spanish Penal Code. Later, with the passage of the Revised Penal Code (Act. No. 3815) (hereinafter “RPC”),¹² Article 186 of the RPC superseded Act. No. 3247.¹³ Article 186 of the RPC punishes monopolies and combinations in restraint of trade when there is a: “(1) combination to prevent free market; (2) monopoly to restrain free competition in the market; and (3) manufacturer, producer, or processor or importer combining, conspiring or agreeing with any person to make transactions prejudicial to lawful commerce or to increase the market price of merchandise.”¹⁴ Despite its long passage, the only cited case law, which can be found in the widely-used criminal law textbook in the Philippines, is the 1905 case of *U.S. vs. Fulgueras*¹⁵ which “involv[es] spreading of false rumors to restrain free competition under the regime of the old Penal Code.”¹⁶ On monopoly, there were only two case laws:

10) See TRISTAN A. CATINDIG, THE ASEAN COMPETITION LAW PROJECT: THE PHILIPPINES REPORT (2001), http://www.jftc.go.jp/eacpf/02/philippines_r.pdf.

11) Act No. 3247.

12) The Code was passed on December 8, 1930 but took effect on January 1, 1932.

13) See generally RAMON C. AQUINO, THE REVISED PENAL CODE: ARTICLES 114-367, at 332-34 (1961) (Article 186 of the Revised Penal Code was taken from Articles 543-535 of the old Penal Code and Sections 1-7 of Act No. 3247).

14) REVISED PENAL CODE, art. 186, Act No. 3815, as amended (Phil.). See LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW 286-87 (2008) (The penalty imposable by law is *prision correccional* (six months and one day to six years) or a fine of PhP 200 to PhP 6,000 or both. If the offense affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of *prision mayor* (six years and one day to twelve years).).

15) *U.S. v. Fulgueras*, G.R. No. 2176, (S.C., Apr. 18, 1905) (Phil.), https://www.lawphil.net/judjuris/juri1905/apr1905/gr_2176_1905.html.

16) REYES, *supra* note 14 (before the PCA took effect into law, there were six pending cases for preliminary investigation at the Office for Competition of the Department of Justice).

*Gokongwei, Jr., vs Security and Exchange Commission, et al.*¹⁷ and *Tatad vs. Secretary of Department of Energy, et al.*¹⁸

The Civil Code of the Philippines has also a separate provision that gives rise to a cause of action in case of unfair competition.¹⁹ This is a separate cause of action. Article 28 of the New Civil Code provides,

Article 28. *Unfair competition* in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machinations or any other unjust, oppressive or highhanded method *shall give rise to a right of action* by the person who thereby suffers damage.²⁰

Despite the apparent weak, or lack of, enforcement of the statutory regime under Article 186 of the Revised Penal Code, the Framers of the 1973 Philippine Constitution deemed it necessary to make it a constitutional policy and the same was carried into the 1987 Philippine Constitution.²¹ Section 19 of Article XII explicitly states:

[T]he State shall *regulate or prohibit monopolies* when the public interests so requires. *No combinations in restraint of trade or unfair competition shall be allowed.*²²

Moreover, on top of the above-cited general laws, the Philippines has several special laws that deal with specific industries or sectors, such as

17) *Gokongwei v. Sec. & Exch. Comm'n*, G.R. No. L-45911, 89 S.C.R.A. 339 (Apr. 11, 1979) (Phil.).

18) *Tatad v. Dep't of Energy*, G.R. No. 14360 (S.C., Nov. 5, 1997) (Phil.), https://www.lawphil.net/judjuris/juri1997/nov1997/gr_124360_1997.html.

19) CIVIL CODE, art. 28, Rep. Act 386, as amended (Phil.) (“*Unfair competition* in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machinations or any other unjust, oppressive or highhanded method *shall give rise to a right of action* by the person who thereby suffers damage.”) (emphasis added), <http://www.gov.ph/downloads/1949/06jun/19490618-RA-0386-JPL.pdf>.

20) *Id.*

21) *See CONST.* (1987), art. XIV, § 2 (Phil.). *See also id.* art. XII, §§ 1, 13, 19 (National Economy and Patrimony); *id.* art. XIII, §§ 1, 2, 11 (Social Justice and Human Rights).

22) *Id.* art. XII (emphasis added).

energy, transportation, and communications, which have competition law aspects.²³

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- 23) An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes, Rep. Act No. 9136 (June 8, 2001) (Phil.), <http://www.officialgazette.gov.ph/2001/06/08/republic-act-no-9136>; An Act Providing the Rules for the Imposition of an Anti-Dumping Duty, Amending for the Purpose Section 301, Part 2, Title II, Book 1 of the Tariff and Customs Code of the Philippines, as Amended by Republic Act No. 7843, and for Other Purposes, Rep. Act No. 8752 (Aug. 12, 1999) (Phil.), https://www.lawphil.net/statutes/repacts/ra1999/ra_8752_1999.html; An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes, Rep. Act No. 7042 (June 13, 1991) (Phil.), https://www.lawphil.net/statutes/repacts/ra1991/ra_7042_1991.html; The Consumer Act of the Philippines, Rep. Act No. 7394 (Apr. 13, 1992) (Phil.), https://www.lawphil.net/statutes/repacts/ra1992/ra_7394_1992.html; An Act Allowing the Long-Term Lease of Private Lands by Foreign Investors, Rep. Act No. 7652 (June 4, 1993) (Phil.), <http://www.officialgazette.gov.ph/1993/06/04/republic-act-no-7652>; An Act Liberalizing the Entity and Scope of Operations of Foreign Banks in the Philippines and for Other Purposes, Rep. Act No. 7721 (May 18, 1994) (Phil.), <http://www.bsp.gov.ph/downloads/laws/RA7721.pdf>; An Act Deregulating the Downstream Oil Industry, and for Other Purposes, Rep. Act No. 8479 (Feb. 10, 1998) (Phil.), <http://www.officialgazette.gov.ph/1998/02/10/republic-act-no-8479>; An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes, Rep. Act No. 8293 (June 6, 1997) (Phil.), https://www.lawphil.net/statutes/repacts/ra1997/ra_8293_1997.html; An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunications Services, Rep. Act No. 7925 (Mar. 1, 1995) (Phil.), https://www.lawphil.net/statutes/repacts/ra1995/ra_7925_1995.html; An Act Amending Sections 11, 14, 19, 51 and 53 of Batas Pambansa Blg. 68 or the Corporation Code of the Philippines, (2016), B.P.Blg. 68 (Phil.), http://www.congress.gov.ph/legisdocs/basic_17/HB01324.pdf; An Act Amending Republic Act No. 5980, as Amended, Otherwise Known as the Financing Company Act, Rep. Act No. 8556 (Feb. 26, 1998) (Phil.), <http://www.bsp.gov.ph/downloads/laws/RA8556.pdf>; THE SECURITIES REGULATION CODE, Rep. Act No. 8799 (July 19, 2000) (Phil.), http://www.sec.gov.ph/wp-content/uploads/2015/11/Securities_Regulation_Code_RA8799.pdf; An Act Amending Certain Provisions of Republic Act No. 7581, Entitled “An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions” and for Other Purposes, Rep. Act No. 10623 (Sept. 6, 2013) (Phil.), <http://www.officialgazette.gov.ph/2013/09/06/republic-act-no-10623>; An Act Providing for the Regulation of the Organization and Operations of Banks, Quasi-Banks, Trust Entities and for Other Purposes, Rep. Act No. 8791 (May 23, 2000) (Phil.), https://www.lawphil.net/statutes/repacts/ra2000/ra_8791_2000.html; An Act Protecting Local Industries by Providing Safeguard Measures to Be Undertaken in Response to Increased Imports and Providing Penalties for Violation Thereof, Rep. Act No. 8800 (July 19, 2000) (Phil.), <http://tariffcommission.gov.ph/ra-8800>; A Decree to Consolidate and Codify All the Insurance Laws of the Philippines, Pres. Dec. 1460 (June 11, 1978) (Phil.), https://www.lawphil.net/statutes/presdecs/pd1978/pd_1460_1978.html; An Act, to Recognize the Civil Aeronautics Board and the Civil Aeronautics Administration to Provide for the

III. The Institutional Design of the Philippine Competition Law

The number of national competition authorities has tremendously increased and this phenomenon has also led to the increasing diversification of institutional models,²⁴ which almost blurs the formal characterization of the basic

Regulation of Civil Aeronautics in the Philippines and Authorizing the Appropriation of Funds Therefor, Rep. Act No. 776 (June 20, 1952) (Phil.), <http://www.cab.gov.ph/mandates/category/republic-act-no-776-2>; An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Rep. Act No. 9184 (Jan. 10, 2003) (Phil.), https://www.lawphil.net/statutes/repacts/ra2003/ra_9184_2003.html; An Act Promoting the Development of Philippine Domestic Shipping, Shipbuilding, Ship Repair and Ship Breaking, Ordaining Reforms in Government Policies Towards Shipping in the Philippines and for Other Purposes, Rep. Act No. 9295 (May 3, 2004) (Phil.), https://www.lawphil.net/statutes/repacts/ra2004/ra_9295_2004.html; An Act Providing the Regulatory Framework for Securitization and Granting for the Purpose Exemptions from the Operation of Certain Laws, Rep. Act No. 9267 (Mar. 19, 2004) (Phil.), https://www.lawphil.net/statutes/repacts/ra2004/ra_9267_2004.html; An Act Providing for Cheaper and Quality Medicines, Amending for the Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6675 or the Generics Act of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes, Rep. Act No. 9502 (June 6, 2008) (Phil.), https://www.lawphil.net/statutes/repacts/ra2008/ra_9502_2008.html; An Act Amending the Cooperative Code of the Philippines to be Known as the “Philippine Cooperative Code of 2008”, Rep. Act No. 9520 (Feb. 17, 2009) (Phil.), <http://www.cda.gov.ph/resources/issuances/philippine-cooperative-code-of-2008/republic-act-9520>; An Act Regulating the Practice of Real Estate Service in the Philippines, Creating for the Purpose a Professional Regulatory Board of Real Estate Service, Appropriating Funds Therefor and for Other Purposes, Rep. Act No. 9646 (June 29, 2009) (Phil.), https://www.lawphil.net/statutes/repacts/ra2009/ra_9646_2009.html; An Act Establishing Reforms in the Regulation of Rent of Certain Residential Units, Providing the Mechanisms Therefor and for Other Purposes, Rep. Act No. 9653 (July 14, 2009) (Phil.), https://www.lawphil.net/statutes/repacts/ra2009/ra_9653_2009.html; An Act Strengthening and Rationalizing the Regulatory Capacity of the Bureau of Food and Drugs (BFAD) by Establishing Adequate Testing Laboratories and Field Offices, Upgrading Its Equipment, Augmenting Its Human Resource Complement, Giving Authority to Retain Its Income, Renaming It the Food and Drug Administration (FDA), Amending Certain Sections of Republic Act No. 3720, as Amended, and Appropriating Funds Thereof, Rep. Act No. 9711 (Aug. 18, 2009) (Phil.), https://www.lawphil.net/statutes/repacts/ra2009/ra_9711_2009.html; An Act Establishing the Pre-Need Code of the Philippines, Rep. Act No. 9829 (Dec. 3, 2009) (Phil.), https://www.lawphil.net/statutes/repacts/ra2009/ra_9829_2009.html.

24) The number of national competition law system in the world has tremendously increased. In 2014, the OECD reported a “600% increase in the number of jurisdictions with competition law enforcement since 1990, from fewer than 20 to about 120 today. *See* ORG. FOR ECON. CO-OPERATION & DEV., CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT (2014), <https://www.oecd.org/daf/competition/Challenges->

institutional models, leading to *hybridization*. Legal scholars identified three basic institutional models: “(1) the *bifurcated judicial model*, in which specialized investigative and enforcement authorities bring formal complaints before the court [US Antitrust Division of the Department of Justice]; (2) the *bifurcated agency model*, in which specialized investigative and enforcement agencies bring formal complaints before separate, specialized adjudicative agencies [*e.g.*, Canada, South Africa, and Chile]; and (3) the *integrated agency model*, in which specialized agency undertakes investigative, enforcement and adjudicative activities [*e.g.*, EU, Japan, US, and China].”²⁵ Some countries have also combined the elements of the basic models (*e.g.*, India, New Zealand and Australia).²⁶ At the outset, it bears noting that the formal distinction in institutional frameworks does not necessarily imply significant differences in functional outcomes²⁷ as the goals of competition policy and law have now become globally uniform.

Based on the three models, the structure and design of the Philippine competition law enforcement regime follow the “integrated agency model” on administrative matters and “bifurcated judicial model” for criminal enforcement and civil enforcement. The national competition law enforcement agency is the Philippine Competition Commission (hereinafter “PCC”). For criminal prosecution, the prosecution arm, the Office for Competition-Department of Justice (hereinafter “OFC-DOJ”), primarily handles the preliminary investigation and indictment.

Competition-Internat-Coop-2014.pdf. The number will continue to multiply as developing countries adopt national competition law. A recent example is the Competition Policy and Law (CPL) pursued within the framework of the Association of Southeast Asian Nations (ASEAN) as part of the blueprint in establishing a single market, the ASEAN Economic Community (AEC). In 2007, the ASEAN Economic Ministers established the ASEAN Experts Group on Competition Law (AEGC) as a regional forum to discuss and cooperate in CPL. It oversees the implementation of the competition policy-related tasks and activities, as specified in the AEC Blueprint. In 2010, AEGC completed the ASEAN Regional Guidelines on Competition Policy and the Handbook on Competition Policy and Law in ASEAN for Business. See ASSOC. OF SE. ASIAN NATIONS, GUIDELINES ON DEVELOPING CORE COMPETENCIES IN COMPETITION POLICY AND LAW FOR ASEAN (2012), https://asean-competition.org/file/post_image/Regional%20Core%20Competencies.pdf.

25) Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 WORLD COMPETITION 361 (2002).

26) See Eleanor M. Fox & Michael J. Trebilcock, *Introduction: The GAL Competition Project: The Global Convergence of Process Norms*, in THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES 1, 5 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

27) *Id.*

A. The Philippine Competition Act (Rep. Act No. 10667)

The PCA is a product of *Senate Bill No. 2282*²⁸ and *House Bill No. 5286*²⁹ (originally named as Fair Competition Act of 2015). The first attempt to have a national competition law was filed during the Eighth Congress in the 1980s and since then such bill had been in the legislative mill for about twenty-five years. Several versions of the same were filed in the two Houses of Congress. Eventually, the Sixteenth Congress, through the committee chairmanship and authorship of Senator Paolo Benigno “Bam” A. Aquino, succeeded in resurrecting from the legislative mill this long overdue legislative and economic reform, which became law on July 21, 2015. One of the strong forces that led to the full support of this legislation in both Houses was the ASEAN Economic Integration. The enactment of the PCA, which slumbered in the Congress for twenty-five years, is seen by the public and private sectors as a “game changer.”³⁰

In a nutshell, the PCA mandates the creation of the PCC, which shall “implement the national competition policy”³¹ of the government.³² As a

28) S.B. No. 2282, 16th Cong., 2d Reg. Sess. (2014) (Phil.).

29) H.B. No. 5286, 16th Cong., 2d Reg. Sess. (2015) (Phil.).

30) Schnabel, *supra* note 5 (During the ceremonial signing of the law, President Aquino III hinted that the law is an opportunity to maximize the benefits of his “bosses” and will change “the crooked ways of lack of competition in business which do not benefit the people.” On his part, Senate President Franklin Drilon said the new law[s] would help the country face the challenges and seize the opportunities that would arise from the Association of Southeast Asian Nations (ASEAN) market integration in December. The Speaker of the House Belmonte, on his part, said the new law would also encourage innovation and the production of more goods and services. “The Philippine Competition Act will usher in a new era of doing business in the country.”).

31) An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor, § 5, Rep. Act No. 10667 (July 21, 2015) (Phil.), <http://www.officialgazette.gov.ph/2015/07/21/rep-public-act-no-10667> [hereinafter Philippine Competition Act].

32) PCA Section 2 provides:

Sec. 2. Declaration of Policy. – The efficiency of market competition as a mechanism for allocating goods and services is a generally accepted precept. The State recognizes that past measures undertaken to liberalize key sectors in the economy need to be reinforced by measures that safeguard competitive conditions. The State also recognizes that the provision of equal opportunities to all promotes entrepreneurial spirit, encourages private investments, facilitates technology development and transfer and enhances resource productivity. Unencumbered market competition also serves the interest of consumers by allowing them to exercise their right of choice over goods and services offered in the market.

quasi-judicial body, it has “original and primary jurisdiction over the enforcement and implementation” of the PCA.³³ The law is enforced through the PCC for preliminary investigation and administrative sanctions, through the OFC-DOJ for criminal prosecution, and through private parties for civil actions. The law mainly covers three antitrust subjects, *viz*: anticompetitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions.

1. The PCC’s Enforcement Regime

a. Institutional Structure

Competition law enforcement is now lodged in a single independent quasi-judicial body, the PCC. It has original and primary jurisdiction over competition law matters. It is attached to the Office of the President.³⁴ The PCC is composed of a Chairperson and four Commissioners with the rank of cabinet secretary and undersecretaries, respectively, who must be experts in any of the following fields: *economics, law, finance, commerce or engineering*.³⁵ Section 7 of the PCA provides “[t]he term of office of the Chairperson and the Commissioners shall be seven (7) years without reappointment.”³⁶ The

Pursuant to the constitutional goals for the national economy to attain a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged and the constitutional mandate that the State shall regulate or prohibit monopolies when the public interest so requires and that no combinations in restraint of trade or unfair competition shall be allowed, the State shall:

- (a) Enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole;
- (b) Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and
- (c) Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.

Philippine Competition Act § 2.

33) *Id.* § 12.

34) *Id.* § 5.

35) *Id.* § 6.

36) *Id.* § 7.

original draft was to give the commissioners a term of fourteen years.³⁷

There are six main Offices under the Office of the Executive Director.³⁸ Of the six Offices, two are strictly organized for competition law enforcement, which are the Competition Enforcement Office and the Mergers and Acquisitions Office.³⁹ Data obtained from the Civil Service Commission shows that the initial personnel complement of the PCC shall have a total of 200 positions or employees, including members.⁴⁰

During their tenure, the Commissioners are strictly enjoined to avoid conflict of interest in the conduct of their office.⁴¹ In doing so, they are prohibited to hold any other office or employment and to practice, directly or indirectly, any profession except teaching capacity.⁴² They are also prohibited to have a business interest in any franchise or special privileges granted by the government.⁴³ The Chairperson, the Commissioners, officers, employees, and agents of the PCC enjoy immunity from suits in connection with any act committed or omitted by them in the performance of their office, except for those done in evident bad faith or gross negligence.⁴⁴

b. Powers and Functions

The powers and functions of the PCC can be generally classified into

37) Minutes of Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No. 5286 (June 8, 2015) [hereinafter Bicameral Conference Minutes] (on file with author).

38) *PCC Offices*, PHIL. COMPETITION COMMISSION, <http://phcc.gov.ph/about-us/offices> (last visited Apr. 27, 2018) (the six Offices are: *Competition Enforcement Office*, *Mergers and Acquisitions Office*, *Economics Office*, *Communications and Knowledge Management Office*, *Administrative and Legal Office*, and *Finance, Planning and Management Office*).

39) *Id.*

40) Letter from Arsenio M. Balisacan, Chairman, Phil. Competition Comm'n, to Alicia dela Rosa-Bala, Chairperson, Civil Serv. Comm'n (May 30, 2016) (on file with author) (The data also show the following positions and their corresponding numbers in the two main enforcement Offices: For the Competition Enforcement Office, under the *Monitoring and Investigation Division*, there are eight investigation agents with two legal assistants, while under its *Adjudication Division* are ten PCC attorneys and four legal assistants (this excludes two directors, one secretary, and one driver). For mergers and acquisitions under Merger and Acquisition Office, there are six attorneys, four economists, and two legal assistants, while its *Adjudication Division* is composed of ten attorneys and four legal assistants (this excludes two directors, one secretary, and one driver)).

41) Philippine Competition Act § 8.

42) *Id.*

43) *Id.*

44) *Id.* § 42 (Immunity from Suit).

quasi-legislative and *quasi-judicial*, but the nature of its primary powers and functions is more quasi-judicial.⁴⁵

In the exercise of its administrative power (quasi-judicial) to determine whether a conduct or an agreement is in violation of the PCA, or such merger or acquisition *substantially prevents, restricts, or lessens competition* (hereinafter “SLC”) in the relevant market, the PCC performs a tripartite role as investigator, prosecutor, and administrative judge.⁴⁶ Aside from hefty administrative fine that it can impose on conduct or agreement that results to SLC, the PCC may impose a *behavioral remedy*⁴⁷ and *structural remedy* (injunctions, divestment, or disgorgement).⁴⁸ However, the structural remedies of divestment or disgorgement can only be used if there is no equally effective behavioral remedy or the behavioral remedy is more burdensome.⁴⁹

There are also other powers of the PCC that are essential, if not indispensable in the exercise of its quasi-judicial function. These are the powers to punish for *contempt*, to issue subpoenas (*duces tecum* and *ad testificandum*), to summon witnesses and administer oaths, and to issue interim orders (show cause and cease and desist orders).⁵⁰ The PCC may also inspect the premises and the records of the entity subject of investigation, but this can only be done upon the order of the court.⁵¹

On the other hand, there are also rule-making powers of the PCC that are important to highlight. Aside from its power to promulgate the Implementing Rules and Regulations of the PCA, the PCC may adjust or determine the *thresholds* for notification and the requirements and procedures for notification. Just recently,

45) CARLO L. CRUZ, PHILIPPINE ADMINISTRATIVE LAW (2007) (The *quasi-legislative power* may be defined as the authority delegated by the law-making body to the administrative body to adopt rules and regulations intended to carry out the provisions of a law and implement legislative policy. The *quasi-judicial power* has been defined as the power of the administrative authorities to make determinations of facts in the performance of their official duties and to apply the law as they construe it to the facts so found.).

46) Philippine Competition Act § 12(a).

47) See PHIL. COMPETITION COMM’N, RULES OF PROCEDURE OF THE PHILIPPINE COMPETITION COMMISSION § 6.23 (2017) [hereinafter PCC RULES OF PROCEDURE], http://phcc.gov.ph/wp-content/uploads/2017/09/2017-PCC-RULES-OF-PROCEDURE_CKMO.pdf (“A *behavioral remedy* is a measure that obliges the Entity concerned to act in a specific way, or to cease or refrain from engaging in specific conduct.”) (emphasis added).

48) *Id.* § 6.24 (“Structural remedy – A structural remedy is a measure that effectively changes the structure of the market in order to maintain, enhance, or restore the competitive structure thereof.”).

49) *Id.* § 6.28 (this is copied from Council Regulation 1/2003, art. 7(4), 2002 O.J. (L 1) 1 (EC)).

50) Philippine Competition Act § 12.

51) *Id.* § 12(g).

the PCC issued Circular No. 18-001 increasing the initial threshold for compulsory notification under § 17 of the PCA from PhP one billion to PhP two billion for the value of transactions, and PhP five billion for the value of assets.⁵²

Prior to the enactment of the PCA, the OFC-DOJ, pursuant to Executive Order 45 of 2011,⁵³ exercised some of the major powers discussed above. In a nutshell, all controversies concerning the provisions of the PCA or the enforcement and regulation of all competition-related issues are primarily lodged with the PCC, even if the case involves either or both competition and non-competition issues. The concerned sector regulator shall, however, be consulted and afforded reasonable opportunity to render its own opinion and recommendation before the PCC makes a ruling.⁵⁴ Unfortunately, the repealing provision on the power of the Energy Regulatory Commission (hereinafter “ERC”),⁵⁵ the electricity sector regulator, is problematic. Unless amended or settled by the Supreme Court in a proper case, there is now an ambiguity regarding whether the power of the ERC to investigate and punish anti-competitive conducts and agreements in the electricity sector is transferred to the PCC.

2. Procedural Characteristics

a. Enforcement, Appeal and Execution

The three important adjudicative functions of the PCC are: the (1) power to determine anti-competitive agreement and conduct, (2) power of preliminary inquiry, and (3) power to review mergers and acquisitions. In the exercise of its rule-making power, the PCC promulgated separate rules for investigations, hearings and proceedings, and mergers and acquisitions reviews.⁵⁶

On the one hand, the procedural rule on anti-competitive agreement and

52) PHIL. COMPETITION COMM’N, PCC MEMORANDUM CIRCULAR NO. 18-001 (2018), <http://phcc.gov.ph/pcc-memorandum-circular-18-001-amendment-rule-4-section-3-implementing-rule-s-regulations-republic-act-no-10667-threshold-adjustment>.

53) Designating the Department of Justice as the Competition Authority, Exec. Ord. No. 45 (June 9, 2011) (Phil.), <http://www.officialgazette.gov.ph/2011/06/09/executive-order-no-45-s-2011>.

54) Philippine Competition Act § 32.

55) *Id.* § 55.

56) PCC RULES OF PROCEDURE, *supra* note 47; PHIL. COMPETITION COMM’N, PCC RULES ON MERGER PROCEDURE (2017), <http://phcc.gov.ph/mergerprocedurerules2017>.

conduct and preliminary inquiry as spelled out in the 2017 Rules of Procedure of the Philippine Competition Commission is patterned from the EU Competition Law, particularly Regulation 1/2003.⁵⁷ On the other hand, the rule on merger review is closer to the US merger regulations.

The power of the PCC in determining whether there is a violation of the PCA is divided into three stages: (1) preliminary inquiry, (2) full administrative investigation, and (3) adjudication. The preliminary inquiry (hereinafter “PI”) and full investigation are conducted by the Enforcement Office. The PI may be commenced by a verified complaint, referral by a regulatory body, or upon a *motu proprio* order of the PCC⁵⁸ and the inquiry is for the purpose of ascertaining whether there are reasonable grounds to conduct a full administrative investigation (hereinafter “FAI”).⁵⁹ The law does not require that the complainant be an injured party for him to be able to file a complaint.⁶⁰ It is submitted that a *consumer-standing* is enough to initiate a fact-finding and the law only requires *reasonable grounds*.⁶¹

After the conduct of PI which must be completed within ninety days, the Enforcement Office shall terminate the PI; if there are reasonable grounds, the Enforcement Office shall issue a resolution to proceed for a FAI.⁶²

The FAI is intended to determine the sufficiency to charge an entity for violation of the PCA.⁶³ If after terminating the FAI and there exists *sufficient basis*⁶⁴ to charge the entity, the Enforcement Office shall file a Statement of Objection with the PCC charging the entity for violation of the PCA.⁶⁵ For a criminal case, the PCC may file a complaint before the Department of Justice, if evidence warrants, at any time after the termination of the PI for preliminary investigation.⁶⁶

Upon the filing of the Statement of Objection with the PCC, the latter will summon the respondent-entity to file its *verified* answer. The standard of

57) Council Regulation 1/2003, *supra* note 49.

58) *See* PCC RULES OF PROCEDURE, *supra* note 47, §§ 2.1, 2.2.

59) *Id.* § 2.1.

60) Philippine Competition Act § 31 (merely mentions “interested” party).

61) *Id.*

62) PCC RULES OF PROCEDURE, *supra* note 47, § 2.5.

63) *Id.* § 2.8.

64) *Id.* § 2.11 (“Sufficient basis means the existence of such facts and circumstances that would endanger reasonable belief that there is a violation of the Act, its implementing rules, or other competition laws, and that the Entity subject of the [Statement of Objection] probably committed it.”).

65) *Id.*

66) *Id.* § 2.18.

proof required to justify administrative sanction or penalty is *substantial evidence*.⁶⁷ Technicality shall not be strictly applied and, as a general rule, all hearings shall be public.⁶⁸ To adopt any ruling or decision, the affirmative vote of three members is needed.⁶⁹

Decisions and final orders of the PCC shall be appealable to the Court of Appeals under Rule 43 of the Rules of Civil Procedure.⁷⁰ Unless ordered otherwise by the Court of Appeals, the filing of an appeal does not suspend the execution of the final decision or resolution of the PCC.⁷¹ However, § 40 of the PCA states that a writ of execution may be issued by the PCC to enforce its decision and the payment of the administrative fines *upon finality*.⁷² According to § 4.55, Rule IV of the PCC Rules of Procedure, there is finality in decisions and orders when there was no motion for reconsideration filed or the same was not appealed to the Court of Appeals.⁷³ This creates an ambiguity on the rule regarding whether an appeal automatically stays an order, ruling or decision sought to be reviewed.

The appeal under Rule 43 of the 1997 Rules of Civil Procedure⁷⁴ is broad enough that it may *reverse* or *modify* the award, judgment, final order or resolution of the PCC. The Court of Appeals can review both questions of fact and of law of the PCC. However, the findings of facts when supported by substantial evidence shall be binding on the Court of Appeals.⁷⁵

Aside from the appeal under Rule 43, parties may be available of the remedies of Special Civil Actions of *Certiorari*, *Prohibition* or *Mandamus*⁷⁶ if the PCC acted without or in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction.⁷⁷ In either case, the adverse party in the decision of the Court of Appeals may elevate the case to the Supreme Court for review.⁷⁸

As a general rule, only the Court of Appeals and the Supreme Court can

67) *Id.* § 4.2.

68) *Id.* §§ 4.4, 4.5.

69) *Id.* § 4.8.

70) *Id.* § 5.1; PHIL. R. CIV. P. 43 (1997).

71) PCC RULES OF PROCEDURE, *supra* note 47, § 7.2.

72) Philippine Competition Act § 40.

73) PCC RULES OF PROCEDURE, *supra* note 47, § 4.55.

74) PHIL. R. CIV. P. 43.

75) *Id.* 43, § 10.

76) *See id.* 65 (for the requirements and concept of special civil actions).

77) *See id.*

78) *Id.* 45, 65.

issue a temporary restraining order or an injunction, except when the matter is of extreme urgency involving a constitutional issue, such that the non-issuance of a temporary restraining order will result in grave injustice and irreparable injury to the public.⁷⁹

b. Mergers and Acquisitions Review

As a general rule, the PCC has the power to prohibit mergers or acquisitions that will result in a SLC.

i. Compulsory Regime

The parties to a merger or an acquisition that falls within the threshold⁸⁰ are required to notify the PCC through its Mergers and Acquisitions Office within waiting period of thirty days after a definitive agreement is reached.⁸¹ Within the waiting period, the parties are prohibited to consummate the M&A.⁸² An M&A consummated in violation of this compulsory regime shall be considered void and the parties shall be imposed an administrative fine of 1% to 5% of the value of the transaction.⁸³ The statutory waiting period of thirty days may be extended by the PCC for an additional sixty days.⁸⁴ The total period for the review of the PCC shall not exceed ninety days from the initial notification.⁸⁵

79) Philippine Competition Act § 46 (“Prohibition on the Issuance of Temporary Restraining Orders, Preliminary Injunctions and Preliminary Mandatory Injunctions”).

80) Initially, Section 17 of the PCA has set the transactional value to PhP one billion for mandatory notification. But just recently, in its Memorandum Circular No. 18-001, the PCC raised the new thresholds to PhP five billion for the Size of Person, and PhP two billion for the Size of Transaction as defined in the Implementing Rules and Regulations. This is the first time the PCC has adjusted the thresholds since the PCA was enacted with the PhP one billion default threshold. To date, the PCC has received 152 notifications (equivalent to 134 transactions) and approved 125 transactions worth a total of PhP 2.25 trillion, while others are in different stages of review. Majority of these came from the manufacturing, financial, electricity, real estate and transportation sectors. *See PCC Adjusts Thresholds for Compulsory M&A Notifications*, PHIL. COMPETITION COMMISSION (Mar. 5, 2018), <http://phcc.gov.ph/pcc-adjusts-thresholds-compulsory-ma-notifications> (press release).

81) Philippine Competition Act § 17.

82) *Id.*

83) *Id.*

84) *Id.*

85) *Id.* ¶ 3.

If the period expired and no decision has been promulgated for whatever reason, the merger or acquisition shall be deemed cleared for SLC.⁸⁶ The favorable recommendation from a governmental agency with a competition mandate offers is a *disputable presumption* that the proposed M&A is not anticompetitive.⁸⁷

ii. Phase of Review

There are two phases of the merger review. A *Phase 1* review takes for a maximum period of thirty days from complete notification and payment. This involves an assessment to determine if the notified merger raises any competition concerns that would warrant comprehensive review. If no competition concerns are found, the merger may be cleared within the period for Phase 1 review.⁸⁸

A *Phase 2* review is a more detailed and in-depth assessment of the merger and takes for a maximum period of sixty days.⁸⁹ Before the PCC renders a decision, the parties may propose commitments that would remedy, mitigate, or prevent SLC.

At the end of the Phase 1 or 2 review process, if the PCC finds out that the merger or acquisition *substantially prevent, restrict or lessen* competition in the relevant market or in the market for goods and is not deemed exempted under § 21 of the PCA,⁹⁰ the PCC may order to (1) prohibit the M&A, or (2)

86) *Id.* ¶ 4.

87) *Id.* ¶ 6.

88) PCC RULES ON MERGER PROCEDURE, *supra* note 56.

89) *See id.*

90) *See* § 21, which provides:

Exemptions from Prohibited. Mergers and Acquisitions. – Merger or acquisition agreement prohibited under Section 20 of this Chapter may, nonetheless, be exempt from prohibition by the Commission when the parties establish either of the following:

- (a) The concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement; or
- (b) A party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets:

Provided, That an entity shall not be prohibited from continuing to own and hold the stock or other share capital or assets of another corporation which it acquired prior to the approval of this Act or acquiring or maintaining its market share in a relevant market through such means without violating the provisions of this Act:

Provided, further, That the acquisition of the stock or other share capital of one or more corporations solely for investment and not used for voting or exercising

prohibit the M&A unless and until it is modified by changes specified by the PCC, or (3) prohibit the M&A unless and until the pertinent party or parties enter into legally enforceable agreements specified by the PCC.⁹¹

A party seeking exemption under § 21 of the PCA must demonstrate significant gains in the implementation of the agreement.⁹² As a default rule, favorable ruling clearing the M&A from SLC is final, except when there is fraud or false material information.⁹³

3. Private Enforcement

Violation of the PCA may be enforced through a private action by a person who suffers *direct* injury by reason of any violation of the provisions of the PCA. The action is separate and independent, which means that this action may be instituted simultaneously with the administrative case before the PCC and with the criminal case instituted by the OFC-DOJ. The law only requires that the *preliminary inquiry* of the PCC be completed.⁹⁴ Under Philippine Rules of Evidence, the quantum of proof required for a civil action is the *preponderance of evidence*.⁹⁵ “Preponderance of evidence is meant simply evidence which is of greater weight, or more convincing than that which is offered in opposition to it.”⁹⁶ This private action under § 45 is without prejudice an action for damages under Article 28 of the New Civil Code.

4. Criminal Action (Office for Competition)

Section 14 of the PCA criminalizes two types of anti-competitive agreements: those that are *per se* prohibited⁹⁷ and those that have object or effect of

control and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition in the relevant market shall not be prohibited.

Philippine Competition Act § 21.

91) *See id.* § 18.

92) *Id.* § 22.

93) *Id.* § 23.

94) *Id.* § 45.

95) PHIL. REVISED R. EVID. 133, § 1 (1989).

96) Rivera v. Court of Appeals, G.R. No. 115625, (S.C., Jan. 23, 1998) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/1998/jan1998/115625.htm>.

97) (a) The following agreements, between or among competitors, are *per se* prohibited:

(1) Restricting competition as to price, or components thereof, or other terms of trade;

substantially preventing, restricting or lessening competition.⁹⁸ The determination of whether a criminal action shall be instituted is lodged with the OFC-DOJ. The OFC-DOJ cannot, however, conduct a *preliminary investigation* until the PI under § 31 of the PCA is completed and the PCC has filed a criminal complaint before the OFC-DOJ.⁹⁹ If *probable cause* exists, the OFC-DOJ files a criminal information before the Regional Trial Court.¹⁰⁰ While the determination of probable cause to charge an entity is the sole function of the OFC-DOJ, the trial court may, in the protection of one's fundamental right to liberty, dismiss the case if, upon a personal assessment of the evidence, it finds that the evidence does not establish probable cause.¹⁰¹

IV. Institutional Design Analysis

The institutional design of a competition law regime is a prerequisite to effective enforcement. Understanding, therefore, the institutional design and structure of a competition law institution gives us valuable insights into how structure and operations of public institution has shaped policy outcomes.¹⁰² In comparing a competition law institution to a well-designed house, *Prof. Eleanor M. Fox* of the New York University School of Law wrote: “[g]ood

(2) Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation.

Philippine Competition Act § 45.

98) (b) The following agreements, between or among competitors which have the object or effect of substantially preventing, restricting or lessening competition shall be prohibited:

- (1) Setting, limiting, or controlling production, markets, technical development, or investment;
- (2) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means.

Id.

99) See Philippine Competition Act §§ 13, 31.

100) *Bautista v. Court of Appeals*, G.R. No. 143375 (July 6, 2001) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2001/jul2001/143375.htm> (probable cause has been defined as the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted).

101) *Mendoza v. People*, G.R. No. 197293 (Apr. 21, 2014) (Phil.), https://www.lawphil.net/judjuris/juri2014/apr2014/gr_197293_2014.html.

102) See William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019 (2012) (this is a review of DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011)).

institutional design is a critical component of good competition policy and competition law enforcement. The design of the institutions is like the design of a house: it must facilitate life within the house. Good institutional design takes account of the family's values and empowers life within walls."¹⁰³ To paraphrase Prof. Fox, institutional design is akin to the architectural design of a beautiful house. Such design must reflect the personality of the owner and serve a purpose.

In the case of a newly-created competition law enforcement agency, it is important to look into its institutional make-up. Any regulatory agency struggles with capacity building owing to the limits of its institutional endowments,¹⁰⁴ the economic, legal and political conditions of the jurisdiction, public perception, *anti-institutions*,¹⁰⁵ and the market structure of the jurisdiction. In the words of *Graham T. Allison* in his widely-quoted *Essence of Decision: Explaining the Cuban Missile Crisis*, "[i]f analysts and operators are to increase their ability to achieve the desired policy outcomes . . . we shall have to find ways of thinking harder about the problem of 'implementation,' that is, the path between the preferred solution and the actual performance of the government."¹⁰⁶

As there are no hard-and-fast rules or clear-cut methodology in institutional design and structure analysis, we shall be guided by well-accepted normative criteria and values in designing competition law institutions and the best practices for governance of regulators.¹⁰⁷

In evaluating competition law institutions, *Trebilcock* and *Iacobucci* enumerated ten normative criteria in a dyadic form, emphasizing the tradeoffs of these values which they termed "bipolar value tension."¹⁰⁸ These are independence, accountability, expertise, detachment, transparency, confidentiality, administrative efficiency, due process, predictability, and flexibility.¹⁰⁹ For them, this list is inherently uncontroversial.¹¹⁰

103) Eleanor M. Fox, *Antitrust and Institutions: Design and Change*, 41 LOY. U. CHI. L.J. 473, 487 (2010).

104) To read more on the effect of scarcity of institutional endowment, see Gal, *supra* note 9, for an exhaustive discussion.

105) Daniel A. Crane defines anti-institutions as those political and legal forces that arise to counter the directional pull of institutions. See Kovacic, *supra* note 102.

106) GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

107) See generally Trebilcock & Iacobucci, *supra* note 25.

108) See *id.*

109) *Id.*

110) There are two versions of the paper *Designing Competition Law Institutions* of Michael J. Trebilcock and Edward M. Iacobucci. The first longer version was published in 2002

On the other hand, the United Nations Conference on Trade and Development (UNCTAD) adopted a shorter list of normative criteria, which it considered as what characterized efficient public regulatory bodies. These are: “independence; transparency; accountability; assuring due process; being well funded in proportion to the mandate; being staffed by well-educated, well-trained and non-corrupt persons; and having an appellate process that itself is well structured and non-corrupt.”¹¹¹

In related works, like the draft proposal by the Due Process Task Force of the Competition Committee of the United States Council for International Business citing transparency, engagement, confidentiality, due process/fairness, non-discrimination, and accountability,¹¹² these norms are considered as a framework for best practices. According to the Task Force,

the foregoing best practices, if adopted, not only would ensure that companies are accorded procedural fairness, but also would more effectively promote the policies that underlie competition laws, promote greater respect for competition law and its enforcement and ensure more efficient utilization of the enforcement resources of competition authorities worldwide, without jeopardizing the legitimate enforcement interests of any jurisdiction.¹¹³

The Organization for Economic Co-operation and Development (OECD) has also formulated its Best Practice Principles on the Governance of Regulators,¹¹⁴ which applies to competition law institutions. For the OECD, the core seven principles of good governance are: “role clarity, preventing undue influence and maintaining trust, decision making and governing body structure for independent regulators, accountability and transparency, engagement,

World Competition by Kluwer Law International. *Id.* The subsequent shorter version appeared in the Spring 2010 issue of Loyola University Chicago Law Journal. Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI. L.J. 455 (2010).

111) U.N. Conference on Trade and Development, *Foundations of an Effective Competition Agency*, U.N. Doc. TD/B/C.I/CLP/8/Corr.1 (May 9, 2011) [hereinafter UNCTAD Foundations].

112) U.S. COUNCIL FOR INT’L BUS., RECOMMENDED FRAMEWORK FOR BEST PRACTICES IN INTERNATIONAL COMPETITION LAW ENFORCEMENT PROCEEDINGS (2009), https://www.uscib.org/docs/2009_11_04_antitrust.pdf.

113) *Id.*

114) *OECD Best Practice Principles on the Governance of Regulators*, OECD, <http://www.oecd.org/gov/regulatory-policy/governance-regulators.htm> (last visited Apr. 27, 2018) [hereinafter *OECD Principles*].

funding and performance evaluation.”¹¹⁵ These seven principles aim to develop a framework for achieving good regulatory governance.¹¹⁶ Moreover, the Global Administrative Law (GAL) Competition Project: The Global Convergence of Process Norms which did an institutional analysis of at least nine major competition authorities in the world also used the following institutional performance norms: decision-making (due process norm), expertise, predictability, transparency, and accountability.¹¹⁷

Based on the above surveys of related literature, it was observed that there is no uniform list of normative values, but the common and most important norms are *independence*, *transparency*, *predictability*, *accountability*, *confidentiality*, and *predictability*, which will be the focus of this study.

A. Independence

Independence of the PCC is statutorily guaranteed. Section 5 of the PCA provides,

SEC. 5. PHILIPPINE COMPETITION COMMISSION. To implement the national competition policy and attain the objectives and purposes of this Act, an *independent* quasi-judicial body is hereby created.¹¹⁸

The PCC is an attached agency of the Office of the President.¹¹⁹ The Chairman and Commissioners hold an equivalent rank of a cabinet secretary and under-secretaries, respectively. The fact that it is an *attached* agency to the Office of the President does not theoretically diminish its independence. Under the Philippine Administrative Law, the purpose of attaching one functionally interrelated government agency to another is to attain “policy and program coordination.”¹²⁰ Accordingly, “an attached agency has a larger measure of independence from the department to which it is attached than one which is under departmental supervision and control or administrative supervision. This is borne out by the ‘lateral relationship’ between the

115) *Id.*

116) *Id.*

117) Fox & Trebilcock, *supra* note 26.

118) Philippine Competition Act § 5 (emphasis added).

119) *Id.* § 5, ¶ 2.

120) CRUZ, *supra* note 45. See *Beja v. Court of Appeals*, G.R. No. 97149 (S.C., Mar. 31, 1992) (Phil.), https://www.lawphil.net/judjuris/juri1992/mar1992/gr_97149_1992.html.

department and the attached agency.”¹²¹ This concept of *attachment* under the Philippine Administrative Code of 1987 needs to be re-examined, in so far as ensuring the optimum independence of a national competition agency, in the light of the best practices for governance of regulators.¹²²

The independence of the PCC is also reinforced by other provisions in the PCA, such as the power to appoint,¹²³ security of tenure of the commissioners,¹²⁴ general prohibition on the issuance of temporary restraining order, preliminary injunctions and preliminary mandatory injunctions,¹²⁵ and immunity from suit of the commissioners, officers, employees and agents of the PCC.¹²⁶ The grant of immunity from suit is unique for the PCC.

It is, therefore, safe to say that the institutional design of the PCC has put in place frameworks that reinforces the indicators of formal or *de jure* independence. However, “enshrining independence within the institutional framework does not guarantee that the regulator’s behaviour and decisions will be independent.”¹²⁷ According to Maher, “[b]ut independence is not simply a matter of bureaucratic structure” as this depends on several variables which “most importantly status endowments, resource endowments, the nature of its regulatory powers, and the cultural and constitutional constraints under which it labour.”¹²⁸ Maher further argues that

[i]n thinking about the ‘independence’ of competition agencies, we have to be careful not to confuse formal or statutory independence (i.e., the ‘independent regulatory agency’ model as advanced by many international economic development agencies) with actual independence. Competition agencies can still be *de facto* independent even where they lack formal independence.¹²⁹

121) *Beja. vs. Court of Appeals*, G.R. No. 97149.

122) *See, e.g.*, UNCTAD Foundation, *supra* note 111; *OECD Principles*, *supra* note 114.

123) *See* Philippine Competition Act § 11.

124) *See id.* § 7.

125) *See id.* § 47.

126) *See id.* § 42.

127) Mark Thatcher, *Regulation After Delegation: Independent Regulatory Agencies in Europe*, 9 J. EUR. PUB. POL’Y 954 (2002).

128) Imelda Maher, *The Institutional Structure of Competition Law*, in *ASIAN CAPITALISM AND THE REGULATION OF COMPETITION: TOWARDS A REGULATORY GEOGRAPHY OF GLOBAL COMPETITION LAW* 55, 61-63 (Michael W. Dowdle, John Gillespie & Imelda Maher eds., 2013).

129) *Id.*

It is therefore essential that the regulator “must ensure a culture of independence, strong leadership and an appropriate working relationship with government and other stakeholders.”¹³⁰

It is also said that “the principle also encompasses independence from government and other public bodies to shy away from politicians who might use competition law for political ends or industrial goals unrelated to competition policy.”¹³¹ This is even more relevant to the PCC as entities within its regulatory jurisdiction include government-owned or controlled corporations.¹³²

Being an *attached* agency to the Office of the President, the PCC cannot be absolutely and practically insulated from politics. The Office of the President may request the Chairman and Commissioners to join the cabinet meetings. The PCC is transitioning to full implementation of the PCA at the same time that the Philippines is having a new political environment. Surely, it has to deal with an unconventional national figure, President Rodrigo Roa Duterte, who has captured both domestic and international media because of his tough-talking image.¹³³ This is not to say though that the President will influence how the PCC will act. Statutorily, the President cannot directly influence the decision making of the PCC as independent quasi-judicial agency; but politically, he can put pressure to the agency in several ways and means, such as asking his allies in Congress to conduct a congressional inquiry, asking the Department of Justice to file charges, etc.

As explained earlier, independence is not simply a matter of “bureaucratic structure” as this depends on several variables, which include human resource

130) *OECD Principles*, *supra* note 114.

131) Sofia Alves, Jeroen Capiau & Ailsa Sinclair, *Principles for the Independence of Competition Authorities*, 11 COMPETITION L. INT’L 13 (2015).

132) *See* Philippine Competition Act § 4(h).

133) Some of the controversial headlines of President Duterte: Virgil Lopez, *Duterte to UN Rapporteurs: ‘Go Home and Get Some Sleep’*, GMA NEWS (June 8, 2016, 3:52 PM), <http://www.gmanetwork.com/news/story/569215/news/nation/duterte-to-un-rapporteurs-go-home-and-get-some-sleep>; Lara Tan, *U.N. Chief Condemns Duterte’s ‘Apparent Endorsement’ of Killings*, CNN PHILIPPINES (June 11, 2016, 11:44 AM), <http://cnnphilippines.com/news/2016/06/10/Duterte-media-killings-extrajudicial-killings-UN.html>; Nestor P. Burgos Jr. & Victor Anthony V. Silva, *Duterte Dares US, Australia to Cut Ties*, INQUIRER.NET (Apr. 22, 2016, 12:38 AM), <http://newsinfo.inquirer.net/780825/duterte-dares-us-australia-to-cut-ties>; Rodrigo Duterte, *‘Trump’ of Philippines, Wins Presidential Election*, NBC NEWS (May 10, 2016, 5:35 AM), <http://www.nbcnews.com/news/world/rodrigo-duterte-trump-philippines-wins-presidential-election-n571021>.

endowments. It is one of the major determinants of whether an authority can act independently, as well as function effectively.¹³⁴

The law mandates that the PCC must have an *adequate* staff. What is adequate is a function of the size of the country or its economy.¹³⁵ Are the 200 personnel proportionately adequate to the size of the economy of the Philippines? As a quick briefer, the Philippines is now one of the fastest growing economies in the world, having an economic forecast growth of 6.9% in 2016 and 6.5% by 2017.¹³⁶ In the Philippine Securities and Exchange Commission's (SEC) Annual Report of 2014, the Philippine corporate sector was composed of 870,235 firms; 65.26% of which were active.¹³⁷ Among the active firms, 54.58% were stock corporations; 28.88% were non-stock corporations; and the rest were partnerships.¹³⁸ In evaluating the proportionality of the 200 positions, we must also consider the number of unique positions dedicated to strict competition law enforcement. Attracting well-educated and highly-trained staff is not a problem within the framework of the PCC because the law exempts it from the Salary Standardization Act.¹³⁹

Attracting the best and brightest, however, poses a great challenge. The PCC needs to break the culture of fraternity or exclusivity in the Philippines, especially so that fraternity is well-entrenched in the legal profession. To do this, it must ensure diversity in the recruitment of its key personnel (this may be too late, but the PCC might consider it when it expands its organizational make-up). Currently, all the commissioners are graduates of the University of the Philippines and the key officials, lawyers and economist are almost all from either the University of the Philippines or Ateneo de Manila University.¹⁴⁰ Some of them are also coming from the major corporate law firms in the Philippines. Arguably, law firms, in some way or the other, contribute to the process of regulatory capture (or corruption) through the partner's *networks* in

134) See Alves, Capiou & Sinclair, *supra* note 131; Maher, *supra* note 128.

135) Alves, Capiou & Sinclair, *supra* note 131.

136) *Philippines: Economy*, ASIAN DEV. BANK, www.adb.org/countries/philippines/economy (last visited Apr. 27, 2018).

137) SEC. & EXCH. COMM'N, 2014 ANNUAL REPORT (2015), <http://www.sec.gov.ph/wp-content/uploads/2015/10/2014-Fostering-Good-Corporate-Governance.pdf> (Phil.).

138) *Id.*

139) See *Careers*, PHIL. COMPETITION COMMISSION, <http://phcc.gov.ph/careers> (for example, the annual salary of a director is ranging from 1,470,000 to 2,031,600, exclusive of allowances, benefits and incentives).

140) The writer validated this by checking the LinkedIn accounts of the PCC employees.

the regulatory body. These networks could either be from fraternal affiliation, previous transactions or employment, or simply through alumni networks.

It is indubitable that the credentials of the PCC's commissioners and key officials are all impressive. However, the concentration (leadership perspective or leadership bias) may serve as barriers to diversity, like that of a monopolistic firm, which when abused, will foreclose competition and will result to the barrier to entry.

B. Accountability

Because of the severe problem of corruption in the bureaucracy, accountability in government institutions remains weak, notwithstanding the fact that the Philippines has tough laws on accountability. Accountability is essential because it balances independence;¹⁴¹ otherwise the latter will usher abuse and misuse of power. Accountability also leads to responsible regulatory enforcement it reinforces fairness.

The PCA has the typical accountability framework of a regulatory agency. *First*, the law mandates the creation of a Congressional Oversight Committee.¹⁴² *Second*, its decision is subject to judicial review.¹⁴³ While the law speaks only of appeal, this does not (should not) diminish the power of the courts to issue extraordinary writs, such as the special civil actions of *prohibition*, *mandamus*, and *certiorari* under the rules of Court. These special civil actions are essential accountability mechanisms to correct the grave

141) See UNCTAD Foundation, *supra* note 111.

142) Philippine Competition Act § 49 (“Sec. 49. *Congressional Oversight Committee*. – To oversee the implementation of this Act, there shall be created a Congressional Oversight Committee on Competition (COCC) to be composed of the Chairpersons of the Senate Committees on Trade and Commerce, Economic Affairs, and Finance, the Chairpersons of the House of Representatives Committees on Economic Affairs, Trade and Industry, and Appropriations and two (2) members each from the Senate and the House of Representatives who shall be designated by the Senate President and the Speaker of the House of Representatives: *Provided*, That one (1) of the two (2) Senators and one (1) of the two (2) House Members shall be nominated by the respective Minority Leaders of the Senate and the House of Representatives. The Congressional Oversight Committee shall be jointly chaired by the Chairpersons of the Senate Committee on Trade and Commerce and the House of Representatives Committee on Economic Affairs. The Vice Chairperson of the Congressional Oversight Committee shall be jointly held by the Chairpersons of the Senate Committee on Economic Affairs and the House of Representatives Committee on Trade and Industry. The Secretariat of the COCC shall be drawn from the existing personnel of the Senate and House of Representatives committees comprising the Congressional Oversight Committee.”).

143) *Id.* § 39.

abuse of jurisdiction. *Third*, the act of the PCC is subject to injunctions by the Court of Appeals and the Supreme Court and in exceptional cases by the court of general jurisdiction (Regional Trial Court).¹⁴⁴ *Fourth*, the PCC is an attached agency to the Office of the President. *Fifth*, the law mandates the PCC to publish its final decision, orders and rulings on its official website.¹⁴⁵ *Finally*, the President approves the salary classification of the entire personnel of the PCC, including the Chairman and Commissioners.

As this formal framework of public accountability is common to all regulatory agencies in the Philippines, it remains to be seen in the future how this mechanism will work in antitrust enforcement, especially in promoting fairness.

The unique grant of immunity from suit¹⁴⁶ may have, however, diluted the value of ensuring accountability. While the immunity provision should not be interpreted to grant an absolute immunity from suit, it has added additional elements to crimes usually committed by public officers under its exception clause making it very difficult to make employees of the PCC accountable for their malfeasance and misfeasance. This provision also suffers two fundamental constitutional infirmities, *viz*: (1) it violates the equal protection clause of the 1987 Constitution of the Philippines for being a class legislation,¹⁴⁷

144) *See id.* § 47.

145) *See id.* § 52 (Transparency Clause).

146) *Id.* § 42 (“Sec. 42. *Immunity from Suit.* – The Chairperson, the Commissioners, officers, employees and agents of the Commission shall not be subject to *any action*, claim or demand in connection with any act done or omitted by them in the performance of their duties and exercise of their powers *except for those actions and omissions done in evident bad faith or gross negligence.*”) (emphasis added). The legislative intent of the immunity provision is revealed in the following Q&A of *Sen. Paolo Benigno “Bam” Aquino IV* and *Sen. Aquilino “Koko” Pimentel III* during the Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No. 5286 (Fair Competition Act) on June 8, 2015:

SEN. PIMENTEL. Are we sure you want to grant immunity from suit?

The Vice President does not have immunity.

THE CHAIRMAN (SEN AQUINO). We should –

SEN. PIMENTEL. Do you want to grant members to the commission?

THE CHAIRMAN (SEN AQUINO). I think we should, Mr. Senator, because their work is **highly sensitive, very contentious**— ...

THE CHAIRMAN (SEN AQUINO). My **fear** here is that we will not have anyone who will want to be commissioner or chairman.

Bicameral Conference Minutes, *supra* note 37 (emphasis added).

147) CONST. (1987) art. III, § 1 (Phil.) (“No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied of equal protection of the law.”).

and (2) it limits or encroaches upon the constitutional mandate of the Office of the Ombudsman.¹⁴⁸

Corollary to *immunity from suit* provision is the *indemnity* provision under § 43, which grants indemnifications to the Chairperson, Commissioners, officers, employees and agents of the PCC for any and all liabilities, losses, claims, demands, damages, deficiencies, costs and expenses of whatsoever kind and nature arising from a litigation filed against them.¹⁴⁹ This also appears to be in collusion with the equal protection clause. On the one hand, whether the grant of immunity from suit and the indemnity provisions is constitutional is one thing. On the other hand, whether they promote optimum enforcement or independence is another thing. For sure, the immunity and indemnity provisions achieved two things: they strengthened the independence of the PCC and made working at the PCC very attractive.

C. Transparency

Transparency complements the institutional value of accountability. “Comprehensive framework of accountability and transparency actively supports good behaviour and performance by the regulator, as they allow the regulator’s performance to be evaluated by the legislature or responsible other authority,”¹⁵⁰ or even by the public, in general. They are also considered the “other side of the coin of independence.”¹⁵¹

The PCA has strongly laid down the foundation of transparency.¹⁵² This made the PCC have, by far, the best institutional framework on transparency in all quasi-judicial agencies in the Philippines. The minutes of the proceedings of the Bicameral Committee Conference of both Houses of Congress of the Philippines shows that this clause was not originally part of Senate Bill No. 2282 and House Bill 5286, the bills creating the PCC.¹⁵³ The clause was introduced by *Congressman Antonio L. Tinio* during the last remaining sessions of the Bicameral Committee Conference. Originally, the two bills only contained a

148) *Id.* art. XI, § 13.

149) Philippine Competition Act § 43.

150) *OECD Principles*, *supra* note 114.

151) *Id.*

152) Philippine Competition Act § 52 (“Sec. 52. *Transparency Clause*. — Final decisions, orders and rulings of the Commission shall be *published on the official website* subject to Section 34 of this Act. Records of public proceedings shall be made available to the public subject to Section 34 of this Act.”) (emphasis added).

153) *See* Bicameral Conference Minutes, *supra* note 37, at 147-61.

general provision in the enumerated powers of the PCC under the proposed § 16(t) of the bills. Section 16 became § 12 of the law and subsection (t) is no longer in there.

D. Confidentiality

Section 34 of the PCA enjoins confidentiality.¹⁵⁴ A violation of the confidentiality provision shall subject the “violator” to a huge administrative fine, ranging from PhP one million to PhP five million.¹⁵⁵ Who is the possible “violator” referred to in the law and who determines confidentiality? Under Rule XI of the PCC Rules of Procedure, the Enforcement Office initially determines the confidentiality of a business information.¹⁵⁶ Does this mean that the violator referred to in the law is a third person? But the deliberation of the Bicameral Conference Committee reveals that the sanction under § 34 of the PCA is purposely intended for the employees of the PCC.¹⁵⁷ This is logical because the PCC, other than the entity, is the repository of the confidential information and the entity must be protected from possible mishandling or abuse of confidential business information.

Thus, giving the Enforcement Office that determinative function collides with the very intent of § 34.

154) Philippine Competition Act § 34 (“Sec. 34. *Confidentiality of Information*. – Confidential business information submitted by entities, relevant to any inquiry or investigation being conducted pursuant to this Act as well as any deliberation in relation thereto, shall not, in any manner, be directly or indirectly disclosed, published, transferred, copied, or disseminated. Likewise, the Commission shall, to the extent possible, subject such information to the confidentiality rule provided under this section when it issues notices, bulletins, rulings and other documents: *Provided*, That the confidentiality rule shall not apply if the notifying entity consents to the disclosure, or the document or information is mandatorily required to be disclosed by law or by a valid order of a court of competent jurisdiction or of a government or regulatory agency, including an exchange. The identity of the persons who provide information to the Commission under condition of anonymity, shall remain confidential, unless such confidentiality is expressly waived by these persons. Any violation of this provision shall be imposed a fine of not less than one million pesos (P1,000,000.00) but not more than five million pesos (P5,000,000.00).”).

155) Bicameral Conference Minutes, *supra* note 37, at 17 (the PCC was authorized to increase the range of impossible fines in the original draft bills).

156) PCC RULES OF PROCEDURE, *supra* note 47, Rule XI.

157) Bicameral Conference Minutes, *supra* note 37, at 16-18 (“**THE CHAIRMAN (SEN. AQUINO)**. I have a question. Who are the **possible violators** of this provision? The Commission, right? **REP. GUTIERREZ**. And employees of the Commission.”)

E. Predictability

In a legal system based on the rule of law, significant value is placed on the predictability and consistency with which laws are applied.¹⁵⁸ In the field of administrative law, the norm of predictability is further qualified by proper exercise of delegated power by the administrative agency exercising quasi-legislative power or rule-making power. Under the Philippine jurisprudence, to be valid, administrative regulation must comply with the following requisites: “(1) Its promulgation must be authorized by the legislature; (2) It must be within the scope of the authority given by the legislature; (3) It must be promulgated in accordance with the prescribed procedure; (4) It must be reasonable.”¹⁵⁹

The importance of predictability was underscored in the controversy that engulfed the sale of San Miguel Corporation’s (hereinafter “SMC”) telco assets to Philippine Long Distance Telephone Company (hereinafter “PLDT”) and Globe Telecommunications (hereinafter “Globe”), the two major telco players in the Philippines. The case is still pending before the Supreme Court. The case sprung from the consummation of the acquisition, which technically violated the waiting period under § 17 of the PCA. But such violation could not be pursued because of the *transitory rule*¹⁶⁰ issued by the PCC in its first year, which technically suspended the mandatory waiting period. Below is a comparison of the transitory rule and the provision of the PCA.

¶¶ 4-6, MC 16-002	§ 17, REP. ACT NO. 10667
4. Covered transactions notified through paragraphs 1 and 2 above shall be deemed approved.	SEC. 17. COMPULSORY NOTIFICATION. – Parties to the merger or acquisition agreement referred to in the preceding section wherein the value of the transaction exceeds one billion pesos (P1,000,000,000.00) are prohibited from consummating their agreement until thirty (30) days after providing notification to the Commission in the form and containing the information specified in the regulations issued by the Commission: <i>Provided, That the</i>
5. Covered transactions that are deemed approved under this Memorandum Circular shall benefit from Section 23 of Rep. Act No. 10667 and may not be challenged under this law, except when the notification required under	

158) See Fox & Trebilcock, *supra* note 26, at 24.

159) See, e.g., Exec. Sec’y v. Southwing Heavy Indus., Inc., G.R. No. 164171 (S.C., Mar. 1, 2006) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2006/feb2006/G.R.%20No.%20164171.htm>.

160) PHIL. COMPETITION COMM’N, MEMORANDUM CIRCULAR NO. 16-002 (2016), <http://www.officialgazette.gov.ph/downloads/2016/02feb/20160216-MC-16-002.pdf>.

<p>paragraph 2 above contains false material information.</p> <p>6. Covered transactions which are not notified to the Commission in accordance with this Memorandum Circular are subject to the provisions of Section 17 of Rep. Act No. 10667.¹⁶¹</p>	<p>Commission shall promulgate other criteria, such as increased market share in the relevant market in excess of minimum thresholds, that may be applied specifically to a sector, or across some or all sectors, in determining whether parties to a merger or acquisition shall notify the Commission under this Chapter.¹⁶²</p>
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The problem, or (to say the least) ambiguity, in the Circular is the apparent removal or absence of the mandatory waiting period. In effect, the *transitory rule* suspended the thirty-day waiting period. Under MC-16-002, before the effectivity of the implementing rules and regulations, the parties to an M&A, which falls under “covered transaction,” must notify the PCC through a letter addressed to the PCC.¹⁶³ The transitory rule states that “covered transactions” notified in accordance with MC-16-002 shall be *deemed approved*.¹⁶⁴ This is what the parties did.

Notwithstanding the clear language of the *contentious* transitory rule, the PCC took the stand to conduct a review of the transaction. PLDT sought the Court of Appeals for injunctions and the writ was granted. On October 18, 2017, the Court of Appeals affirmed the PLDT and Globe’s Php seventy-billion buyout deal of the telco assets of SMC.¹⁶⁵ In its 54-page-decision, the Court of Appeals ruled that the acquisition is considered deemed approved by operation of law and should be recognized by the PCC. The Court said,

With the subject notice being compliant with the requirements of MC (Memorandum Circular) 16-002 and there being no false material statement therein, the subject acquisition is deemed approve[d] by operation of law and may no longer be challenged under the PCA (Philippine Competition Act).¹⁶⁶

161) *Id.* (emphasis added).

162) Philippine Competition Act §17 (emphasis added).

163) MEMORANDUM CIRCULAR 16-002, *supra* note 160.

164) *Id.*

165) See Tetch Torres-Tupas, *CA Affirms PLDT, Globe Buyout Deal of SMC’s Telco Assets*, INQUIRER.NET (Oct. 23, 2017, 3:42 PM), <http://business.inquirer.net/239099/ca-affirms-pldt-globe-buyout-deal-of-smcs-telco-assets#ixzz58HX3ovrH>.

166) *Id.* (quoting the Court of Appeals).

The PCC interprets the phrase “deemed approved” otherwise. According to the PCC, “Memoranda Circulars 16-001 and 16-002 are transitory in nature and do not dilute the authority of the PCC to conduct a substantive review under the PCA, especially where national interest and public policy require it.”¹⁶⁷ Surely, there is no question about the authority of the PCC to conduct the substantive review as that is statutorily granted.

Obviously, the issue is brought about by the vague Circular. The PCC should not have used the phrase “deemed approved.” This lack of predictability has contributed to the weakened overall compliance.¹⁶⁸ But is the PCC allowed to issue a transitory rule that suspends the application of the statutory waiting period? The answer to the question is straightforward. The PCC cannot issue a transitory rule that would suspend a mandatory provision of the law because it would be an invalid exercise of subordinate legislation. The power of the PCC to promulgate rules and regulations in the implementation of a statute is necessarily limited only to carrying into effect what is provided in the legislative enactment.¹⁶⁹ Administrative issuances, like the PCC’s memorandum circulars, must not override but must remain consistent and in harmony with the law they seek to apply and implement.¹⁷⁰ Thus, in case of a conflict, the law necessarily prevails.¹⁷¹ Assuming the validity of the transitory rule is put in issue and it is declared invalid based on the principles articulated, the acquisition would still be valid under the *operative fact doctrine*.

Aside from the earlier discussion about the ambiguity in the provision of confidentiality, there is another provision in the PCA that affects predictability. This is the issue of the jurisdiction of the Energy Regulatory Commission (ERC) under Rep. Act No. 9136, a sector regulator, vis-à-vis the primary jurisdiction of the PCC under Rep. Act No. 10667. Perhaps by honest mistake, the

167) *Telco Deal Not Deemed Approved, PCC to Do Comprehensive Review*, PHIL. COMPETITION COMMISSION (June 17, 2016), <http://phcc.gov.ph/telco-deal-not-deemed-approved-pcc-comprehensive-review>.

168) *See* Maher, *supra* note 128.

169) *Miners Ass’n of Phil. v. Factoran*, G.R. No. 98332, 240 S.C.R.A. 100 (Jan. 16, 1995) (Phil.); *Melendres v. COMELEC*, G.R. No. 129958, 319 S.C.R.A. 481 (Nov. 25, 1999) (Phil.).

170) *Comm’r v. Court of Appeals*, G.R. No. 108358, 240 S.C.R.A. 368 (Jan. 20, 1995) (Phil.).

171) *Kilusang Mayo Uno Labor Ctr. v. Garcia*, G.R. No. 115381, 239 S.C.R.A. 386 (Dec. 23, 1994) (Phil.).

Repealing Clause¹⁷² repealed or amended an entirely irrelevant provision of Rep. Act No. 9136. This must be corrected by the Congress as it resulted in a jurisdictional clash between ERC and the PCC.

V. Conclusion

The normative criteria and best practices required in designing a competition law institution are expressly provided in the formal framework of the PCA. The law formally grants independence to the PCC. It provides a framework to promote transparency and accountability. And while the SMC-PLDT-Globe transaction was unfortunate because of a wrong transitory rule, the same should not be taken as a setback in antitrust enforcement in the Philippines. On a positive note, it serves as the first lesson to the PCC. For a young competition authority, the PCC is in a more advantageous and privileged position by having to learn from and through the experiences of advanced competition law regimes, and adopting the well-established best practices in global competition law enforcement.

While the provisions identified to have constitutional objections are not a serious defect that would affect the optimum enforcement of the PCA, the ambiguity in the jurisdiction of the PCC *vis-à-vis* the jurisdiction of the ERC must be *cured* by Congress to avoid a tug of war. The trade-offs of values that we also identified are but natural occurrence in regulatory governance that have to be addressed and balanced on a case-by-case basis.

The lessons from other jurisdictions with matured enforcement evince that creating an effective competition regime is a long and winding journey.¹⁷³ But caution is necessary for the PCC not to hastily adopt foreign rules simply because they appear to be the better. Benchmarking is good practice, but

172) Philippines Competition Act § 55 (“Sec. 55. *Repealing Clause*. – The following laws, and all other laws, decrees, executive orders and regulations, or part or parts thereof inconsistent with any provision of this Act, are hereby repealed, amended or otherwise modified accordingly: . . . (c) Section 43(u) on Functions of the ERC of Republic Act No. 9136, entitled ‘An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes’, otherwise known as the ‘Electric Power Industry Reform Act of 2001’, insofar as the provision thereof is inconsistent with this Act; . . .”).

173) See also Simon Vande Walle, *Private Enforcement of Antitrust Law in Japan: An Empirical Analysis*, 8 COMPETITION L. REV. 7, 8 (2011).

contextualization of foreign rules to the local environment before they are transplanted is indispensable.

In a survey of International Competition Network conducted in 2006, the following were identified as special challenges for young competition agencies: (1) Legislation was inadequate in terms of not properly addressing the anticompetitive conduct actually engaged in in (sic) the domestic economy, and in terms of not allowing effective enforcement by the agency; (2) cooperation and coordination with particular government ministries and other regulatory bodies were not sufficient; (3) budget was not large enough for the agency to operate effectively; (4) there were too few skilled professionals; they were either not present in the country or were not attracted to the agency given the civil service salary structures; (5) judiciary was unfamiliar with competition law and its economics; and (6) a “competition culture” among the business community, government, media and general public had not developed.¹⁷⁴

In the case of the Philippines, the greatest challenges in the Philippine competition enforcement are lack of skilled professionals in competition law, the unfamiliarity of the judiciary with competition law and economics, and the lack of completion culture. As these challenges should be at the frontline of the agenda of the PCC, advocacy must take primacy during the formative years of the PCC.¹⁷⁵ This does not, however, mean that enforcement activities against anticompetitive conduct and agreement should take a backseat. Those under the *per se* liability rule must, of course, be enforced without delay. Given the above challenges, the importance of advocacy is a necessary tool to avoid a scenario that competition enforcement, because of the complexity in competition law analysis, might only hurt the economic gains of the Philippine economy. Derek Bok, an antitrust scholar and former president of Harvard University, once lamented that “merger enforcement was so complex that ‘consideration of all relevant factors may actually detract from the

174) See UNCTAD Foundations, *supra* note 111.

175) Drawn from his long experience in competition law enforcement, Prof. William Kovacic articulated these tasks that a young competition authority, the PCC in this instance, should undertake in its first decade, *viz*: “(1) *establish credibility and presence* (advocacy, publicity, and good process); (2) *obtain and sustain good leaders and staff*; (3) *control expectations and demands*; (4) *attain autonomy in prosecution*; (5) *persuade the courts*; (6) *build links to other public and non-government institutions*; and (7) *create business and social awareness of competition law*.” WILLIAM E. KOVACIC, THE FIRST DECADE: CHALLENGES FACING NEW COMPETITION AGENCIES (2010), https://www.ftc.gov/sites/default/files/documents/public_statements/first-decade-challenges-facing-new-competition-agencies/100626belgradecompeition.pdf.

accuracy' of the court's decision."¹⁷⁶ To borrow the language of Hovenkamp, "if antitrust rule is complex that it cannot reliably produce correct results, then we are better off with no antitrust rule at all, which is the same thing as nonliability."¹⁷⁷ Corruption also remains a major problem in the Philippines. The World Economic Forum's 2016-2017 Global Competitive Report placed corruption as among the most problematic factors for doing business in the Philippines.¹⁷⁸ In the Corruption Perception Index 2017, Philippines is also ranked among the worst performing countries.¹⁷⁹ And because of the high severe problem, accountability in government institutions remains weak.

From an institutional perspective, accountability is essential in combatting corruption and regulatory capture. However, looking at the PCC's institutional design, the *immunity from suit* clause may, however, result in a counterintuitive effect in the long run.

In conclusion, it may be fitting to reflect on the observation of Prof. David J. Gerber. He wrote,

Competition has been both God and devil in Western civilization. It has promised and provided wealth, undermined communities and challenged moral codes. Over the course of European history laws have frequently been used to control the enormous potential power of the process, but near the end of the last century the idea of establishing a general law to *protect* the process of competition from restraint and distortion developed and gained force, gradually becoming a central part of the legal and economic order in much Europe and the United States.¹⁸⁰

176) HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 45 (2005).

177) *Id.*

178) WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2015-2016, at 296-97, <http://www3.weforum.org/docs/gcr/2015-2016/PHL.pdf>.

179) *Corruption Perceptions Index 2017*, TRANSPARENCY INT'L (Feb. 21, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

180) DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998).

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